IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-3644

CHRISTOPHER HEDGES,
DANIEL ELLSBERG, JENNIFER BOLEN,
NOAM CHOMSKY; ALEXA O'BRIEN,
US DAY OF RAGE; KAI WARGALLA,
HON. BRIGITTA JONSDOTTIR M.P.,

Plaintiffs,

v.

BARACK OBAMA, individually and as
representative of the UNITED STATES
OF AMERICA; LEON PANETTA,
individually and in his capacity as the
executive and representative of the
DEPARTMENT OF DEFENSE,
JOHN McCAIN, JOHN BOEHNER,
HARRY REID, NANCY PELOSI,
MITCH McCONNELL, ERIC CANTOR
as representatives of the UNITED STATES
OF AMERICA

Defendants.

PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR AN IMMEDIATE STAY DURING THE CONSIDERATION OF THIS MOTION

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ARGUMENT

The government seeks an emergency stay of the permanent injunction entered on September 12, 2012 pending appeal, arguing that the district court's order is an "unprecedented" intrusion into the President's powers under the 2001 Authorization for the Use of Military Force (AUMF). In reality, Judge Forrest's decision trods no new ground and relies on well-established precedent as to the President's delineated constitutional powers barring military jurisdiction over civilians, a power that has long been denied to the Executive. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521-522 (2004), citing *Ex Parte Milligan*, 4 Wall., at 125, 71 U.S. 2, 18 L. Ed. 281 (1866). Judge Forrest's decision is directly in line with this Court's holding in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), where the Court held that Congress intended the AUMF to be a limited conveyance of authority, particularly as to detention measures.

Similarly, in *Hamdi* the Supreme Court took pains to note the limited range of detention authority available to the government under the AUMF and that such authority was limited to the "narrow circumstances" of preventing "a *combatant's* return to the field of battle." 542 U.S. at 519, 521 [emphasis added]. Thus, Judge Forrest's comments as to the scope of the AUMF are not "unprecedented" but are directly in line with this Court's interpretation of the AUMF in *Padilla* and the Supreme Court's holding in *Hamdi* recognizing the limited nature of the AUMF and with the Supreme Court's repeated holding, *Hamdi* citing *Milligan*, supra, that the Executive has no authority to detain civilians or hold them in military jurisdiction.

Paradoxically, the scope of the permanent injunction is identical in all material respects to the preliminary injunction entered four months *earlier* on May 14, 2012, yet,

as to the preliminary injunction, the government raised no complaint and sought no stay of any kind - interim, temporary or administrative. The government's basis for *now* distinguishing between the preliminary and permanent injunctions is not the actual scope of the permanent injunction – it prohibits enforcement of only a single provision of the NDAA, §10212(b)(2), as did the preliminary injunction, and leaves untouched §1022 that that permits the president broad detention powers *outside* of the U.S. Rather, the government seeks to stay the permanent injunction, not because of what it enjoins but because of the district court's opinion as to the scope of the AUMF that the government fears will serve as persuasive authority for future challenges to the government's existing detention practices at Guantanamo or elsewhere.

Such fear of future judicial holdings is not a basis on which to stay an injunction of an unconstitutional enactment and the government offers no authority to support such proposition, particularly where case law makes it clear that the government has no power to detain U.S. civilians in military custody, powers that the Supreme Court has held repeatedly are not within the President's constitutional powers. *Hamdi*, supra, citing *Milligan; Reid v. Covert,* 354 U.S. 1, 22 (1957) (U.S. citizens abroad entitled to the protection of the Bill or Rights and cannot be made subject to military jurisdiction).

Ultimately, Judge Forrest *did* conclude that the AUMF did *not* authorize detention of any individuals based on the "substantially supported" standard now set forth in §1021(b) the NDAA. Her conclusion is well-supported by extensive case law in this circuit and in *Hamdi*, as well as numerous decisions of the D.C. Circuit, none of which ever applied the "substantially supporting" standard to *any* AUMF case and several of which rejected outright such standard. Indeed, in the long litany of litigation under the

AUMF not a single decision ever applied such detention standard and the government has identified none. Judge Forrest's detailed analysis of the absence of such precedent in itself undermines the government's claims to a stay. See Order at 32-45.

Judge Forrest did not gratuitously enter her opinion on the scope of the AUMF but was forced to do so by the nature of the government's defense. In the trial court, the government's primary defense was the claim that plaintiffs lacked standing to challenge §1021(b)(2) because the AUMF had *always* permitted detention based on the "substantially supporting" standard that now appears in §1021(b) and that since plaintiffs had never been detained during the 11 years in which the AUMF has been in force they had no basis to objectively fear detention under this new provision of the NDAA. On this basis, the government reasoned, plaintiffs had no standing to challenge §1021(b)(2). But by resting its defense primarily on the theory that the NDAA merely re-codified what had been the Executive's long-standing detention power under the AUMF, the government forced Judge Forrest to opine on the actual scope of detention power under the AUMF, the very holding the government now claims threatens the Executive's war functions. Jude Forrest noted the issue was put into play by the government's characterization of the AUMF:

> "[T]he Government argues…plaintiffs cannot have standing since § 1021 is simply a reaffirmation of the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF")--and since plaintiffs were never detained under the AUMF in the ten years since its passage, they cannot have a reasonable fear that they will be detained under § 1021(b)(2) now. The Court rejects that argument."

Order at 9.

Judge Forrest was forced to address the ultimate scope of the AUMF detention power - not because she gratuitously impressed her views on the scope of the AUMF – but because the nature of the government's defense forced her to determine whether the

AUMF had always included such detention authority, which she concluded it did not based upon a well established chain of decisions.[1] It is fundamentally unreasonable for the government to vigorously press a defense based upon the alleged scope of the AUMF detention authority and then demand that the resulting adverse decision be stayed because it may interfere with the President's executive function.

Case law is clear that the Executive has no constitutional power to either place civilians in the U.S. in military custody, *Hamdi* citing *Milligan*, or to extend military jurisdiction over civilians, as §1021(b) would now allow. *Reid v. Covert*, supra. By seeking leave, even on a interim administrative stay basis to detain civilians in military custody within the U.S., the President is asking this Court to authorize extra-constitutional forms of detention that the Supreme Court has repeatedly held are not within the President's constitutional powers, *Hamdi*, supra, a result this Court cannot sanction. In sum, since the President has no constitutional power to detain civilians in the military as §1021(b) would permit, he cannot be "irreparably harmed" by a district court order that bars him from doing that which the Constitution forbids and the stay should not be granted.[2]

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[1] In support of this argument, the government grievously miscasts the nature of section 1021(b)(2), contending that section 1021 was passed to "confirm the authority of the President as Commander in Chief under the Authorization for Use of Military Force". Def's Bf. at 3. While section 1021(a) does contain a provision that "Congress affirms" the authority of the President under the AUMF, this is neither the gravaman of the law nor is it an essential element of the NDAA. To the contrary, the AUMF itself has no sunset clause and section 1021 was not needed to "re-affirm" a statute - the AUMF – that has no terminal date.

[2] Plaintiffs do agree that the nature of the government's concern and the interests of U.S. citizens and domestic civilians to be free of military incarceration is sufficiently weighty that the matter should be heard on its merits on an expedited basis but a stay of the district court order pending appeal would permit the government to detain Americans in

I. THE DISTRICT COURT'S SEPTEMBER 12, 2012 ORDER DOES NOT IMPERMISSIBLY INTRUDE UPON THE PRESIDENT'S DETENTION POWERS UNDER THE AUMF.

A. Judge Forrest Correctly Held That The President Has No Power Under the AUMF to Detain Civilians in the U.S. or citizens outside of the U.S. under the "substantially supporting" standard.

AUMF detention authority has *never* included the "substantially supporting" detention standard that now appears in the NDAA and no court has ever applied such standard either to persons within the U.S. or to persons taken into custody abroad. While the government asserts that "this interpretation has been *utilized* by the Executive Branch in the habeas litigation brought by the Guantanamo detainees", Gov't Bf. at 6, it is telling that in *none* of the cases cited by the U.S. has any court ever actually *applied* such standard. In the very court where the government first raised the "substantially supporting" standard in its March 2009 briefing, *Hamlily v. Obama*, 616 F.Supp 2d 63, 75 (D.D.C. 2009), the court rejected wholesale the "substantially supported" detention theory and the government itself later abandoned such standard in the D.C. Circuit. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010). The March 2009 briefing where such theory was first raised, *see* Gov't Bf. at 6, has thus had a very short half-life.

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military custody, a power that has long been denied to the Executive branch. The government also argues incorrectly that injunctions should never be put into force until the matter reaches the Supreme Court. There is no authority for such limit on the court's powers and repeated instances of injunctions of unconstitutional numerous statutes show that such doctrine is incorrect. District courts frequently enjoin unconstitutional enactments that would interfere with protected liberties and do not lift such stays pending appeal as that would enable the government to engage in the very conduct that the court has found to be outside of its powers. In contrast, courts have stayed injunctive relief only where the injunction would enable the status quo to be altered pending appeal, such as the orders permitting publication of the Pentagon Papers that were stayed until the appeal process was completed. Here, however, the proposed stay would give the government the power to detain Americans in military custody in violation of long-established precedent, disrupting, not preserving, the status quo pending appeal.

As the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), recognized, the AUMF is remarkable for its limitations. *Hamdi* construed the AUMF to be limited in scope and tightly cabined to the arrest and detention of "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,' or who "harbored" such persons. *Hamdi* described the AUMF as being limited to the "narrow circumstances" of preventing "a *combatant's* return to the field of battle." 542 U.S. at 519, 521 [emphasis added].

Hamdi thus rejects the government's broad interpretation of the AUMF that would apply such detention to civilians in the United States. Under *Hamdi* the President's detention authority under the AUMF is limited to persons taken *in combat*, not the broader class of civilians who may be deemed to give "substantial support" to such groups who are now made subject to §1021(b)(2) of the NDAA. Judge Forrest correctly recognized that §1021(b) expands the government's detention authority well beyond the limited contours of the AUMF as construed in *Hamdi*.[3] Similarly, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court held the AUMF to be so limited in scope, despite its military cast, that it did not even authorize the President to establish what turned out to be the first incarnation of AUMF military commissions.

The "substantially supported" standard first emerged in a government brief submitted to the District Court for the District of Columbia in March 2009 in *Hamlily v.*

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[3] While *Hamdi* recognized that a citizen *combatant* could be held as a prisoner of war, *Hamdi*, 542 U.S. at 519, the facts of *Hamdi* concerned a detainee captured *in a combat theatre* and held by the U.S. military, *not* a non-combatant *civilian* as is now targeted by the broad language of the NDAA. *Hamdi* plainly cast the President's detention power under the AUMF in the traditional context of evaluating the status of a prisoner of war, *Hamdi*, 542 U.S. at 518-519, not a non-combatant civilian as the District Court found would be within the scope of the NDAA

Obama, 616 F.Supp 2d 63, 75 (D.D.C. 2009), where the government contended that under the AUMF it could detain persons taken abroad under the "substantially supporting" standard, a lesser detention standard than the requirement that a detainee be a "part of" al-Queda, the Taliban or their associated forces.

Hamlily famously rejected this theory. In *Hamlily*, the government argued – as it did below and does here - that a detainee could be held under the AUMF even if he was not a "part of" such groups as long as he gave "substantial support" to such groups. *Hamlily* directly rejected this premise holding that the AUMF did *not* provide for the detention of civilians under the "substantially supported" standard. *Hamlily* stated:

> Detaining an individual who "substantially supports" such an organization, but is not part of it, is simply not authorized by the AUMF itself or by the law of war. *Hence, the government's reliance on "substantial support" as a basis for detention independent of membership in the Taliban, al Qaeda or an associated force is rejected*.

616 F. Supp. 2d at 75-76 [emphasis added].

What *Hamlily* rejected is the very essence of what the government argues here: that detention authority under AUMF *or* the "law of war" always and necessarily included detention of one who "*substantially supports* such an organization". *Id.* The government claims on this motion that since the AUMF and the "law of war" *always* included the "substantially supported" detention authority, to now bar the enforcement of §1021 intrudes upon a "long-standing" executive power under the AUMF. If this were true it might bear some weight, but as shown above, *Hamlily*, the *only* court where the government directly presented this issue, squarely and unequivocally rejected this contention, holding that the AUMF *never* conveyed detention authority to the President under the "substantially supported" standard.

In *Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C. 2009), the same court pointedly refused to apply the "substantially supported" standard to persons coming under the protection of the U.S. Constitution, a second judicial rejection of the position the government now asserts, i.e., that the AUMF allowed such broader detention power as to U.S. civilians as now appears in the NDAA. See *Gherebi*, 609 F. Supp.2d at 55 n.7.[4]

Indeed, no court in the long history of litigation under the AUMF has ever applied the "substantially supported" standard under the AUMF to authorize detention of *any* individual and, subsequent to *Hamlily,* the government itself abandoned such claims before the D.C. Circuit. See, infra, *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010).

In *Bensayah* the government abandoned the "support" standard as a basis for detention under the AUMF. In *Bensayah*, the government had persuaded the District Court that an Algerian national arrested in Bosnia for conspiring to bomb the U.S. embassy could be detained under the AUMF based on the fact that he "provided *support*" for al-Qaeda or the Taliban. On appeal, the Government abandoned this claim, acknowledging instead that detention authority under the AUMF "extends to the detention of individuals who are functionally *part of* al Qaeda." 610 F.3d at 720 [emphasis added]. The Court of Appeals in *Bensayah* expressly found that the "the Government abandoned its theory that Bensayah's detention is lawful because he rendered *support* to al Qaeda." 610 F.3d at 722 [emphasis added].

[4] Other decisions relied on by the Government in the District Court, such as *Mohammedou Ould Salahi v. Obama,* 625 F.3d 745 (D.C. Cir. 2010), and *Salahi v. Obama*, 625 F.3d at 752, make it clear that these courts were construing the limited question of membership in al-Qaeda as the basis for detention authority under the AUMF.

Bensayah is dispositive of the fact that the AUMF did not convey detention authority under the "substantially supporting" standard. To show that a detainee is "supporting" a terrorist group obviously requires a lower burden of proof than to prove they are a "a part of" such an organization and the government in *Bensayah* would not have abandoned this easier "support" standard if it believed it was cognizable under the AUMF.

Other cases in the D.C. circuit have applied only the "a part of" standard under the AUMF. *Baroumi v. Obama*, 609 F.3d 416, 431 (D.C. Cir. 2010), found that Baroumi was " '*part of* an al-Qaida-associated force and therefore properly detained pursuant to the AUMF.' " [emphasis added]. The court in *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D. D.C. 2010), noted the Government's claim that it was entitled to a "substantially supporting" standard under the AUMF but the court had no opportunity to construe such claim as each plaintiff in the class action was a former Guantanamo detainee taken in a *combat* theater abroad, not a non-combatant civilian in the U.S. as would be covered by the broader "substantially supporting" standard contained in §1021(b).

Through these many years of litigation over the scope of AUMF detention authority, the D.C. Circuit has distanced itself from any endorsement of the government's "substantially supported" standard as a basis for AUMF detention.

In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), though the court acknowledged the Government's claim to the "substantially supporting" standard, it did so in the limited context of an Arab militia member arrested in Afghanistan who, the court found, ""purposefully and *materially* supported" the Taliban by serving as a food

vendor to Taliban camps, a vastly different definitional provision.[5] 590 F.3d at 873. Thus, the "substantially supporting" standard was not construed by the *Al-Bihani* court that instead applied the long-standing "*material* support" standard.[6]

It was following *Al-Bihani* that the Government in *Bensayah* abandoned the "substantially supporting" framework. 610 F.3d at 720. No decision since *Bensayah* has relied upon or applied the "substantially supporting" theory of AUMF detention. Accord *Alsabri v. Obama*, 2012 U.S. App. LEXIS 9006 (D.C. Cir. 2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1073-1074, citing Al-Bihani ("We have held that the authority conferred by the AUMF covers at least 'those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.' "); see also *Almerfedi v. Obama*, 654 F.3d 1, n.2 (D.C. Cir. 2011); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. cir. 2011) (recognizing that *Al-Bihani* extended to those who "materially supported" the designated terror groups); *Uthman v. Obama*, 637 F.3d 400, n.2 (D.C. Cir. 2011) (same); *Esmail v. Obama*, 639 F.3d 1075, 1076 (D.C. cir. 2011) (same). Each of these decisions substantiate the

[5] *Al-Bihani* also construed the standard in the context of "purposely" providing support, 590 F.3d at 873, implicating an intent requirement that is absent from the NDAA, one of the circumstances that led the District Court to find that the NDAA detention authority to be unconstitutional.

[6] The D.C. Circuit has since made clear that its holding in *Al-Bihani* was limited to a finding that the detainee was a "part of" the Taliban or "associated forces". *Khan v. Obama*, 655 F.3d 20 23 (D.C. Cir. 2010), citing Al-Bihani ("We have held that the AUMF grants the President authority (inter alia) to detain individuals who are "*part of* forces associated with Al Qaeda or the Taliban.") [emphasis added].

claim to detention under the AUMF on the "*materially* supported" standard, not the repudiated "substantially supported" standard.[7]

This Court itself has rejected the claim of the government to detain citizens in military custody in the U.S. In *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), the Second Circuit held that the AUMF did *not* contain the "specific Congressional authorization" required to overcome the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the detention of American citizens on American soil.

In so holding, *Padilla* rejected directly the claim by the United States that the AUMF conveyed to the President the power to detain persons on U.S. soil who were non-combatants. In terms that make it clear that the AUMF conveyed no such authority this Court stated:

> "The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) [the non-detention act] and the "clear," "unmistakable" language required by *Endo*."[8]

352 F.3d at 723.

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[7] In its brief seeking a stay, the government contends that the D.C. circuit and the district court in the District of Columbia have "defined with sufficient clarity" the "scope of [the government's] military detention authority". Gov't Bf. at 10. As a review of the cases in the D.C. circuit shows, neither the D.C. Circuit or the district court for the District of Columbia ever construed or defined the "scope of" the "substantially supported" detention standard, but in each case they courts applied only the "a part of" standard or the "material support" standard. Thus, the government's claim that Judge Forrest erred in finding the provision to be vague is incorrect since no other case law provides definition to the "substantially supported" detention standard of §1021(b) and the statute is silent on the meaning of this term.

[8] *Ex parte Mitsuye Endo*, 323 U.S. 283, 298-300 (1944)

Padilla further noted that the AUMF conveyed *no* implied power to the President to detain individuals on U.S. soil who are taken in the U.S. and not engaged against U.S. forces:

> While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not "arrayed against our troops" in the field of battle. *Hamdi III,* 316 F.3d at 467.

Id.

In holding that the AUMF does *not* authorize military detention of civilians on U.S. soil, this Court in *Padilla* relied on the record of Congressional debates in which even Congressional proponents of the AUMF complained that the AUMF was too limited in scope and did not authorize the President to "attack, apprehend, and punish terrorists *whenever* it is in the best interests of America to do so". *Padilla v. Rumsfeld*, 352 F.3d at 723, n.31 [emphasis added]. "The debates [on the AUMF]", this Court noted in *Padilla*, are "at best equivocal on the President's powers *and never mention the issue of detention*…they do not suggest that Congress authorized the detention of United States citizens captured on United States soil." *Id.* [emphasis added].[9] *Padilla* thus concluded that the very argument raised here by the government (and below before Judge Forrest) that the AUMF had all along provided for the type of broad-based civilian detention contained in §1021(b) is not only incorrect under the actual text of the AUMF but unsupported even by its legislative history of the AUMF. *Id*.

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[9] Although *Padilla* was reversed on the ground that the plaintiff had sought habeas relief in the wrong judicial district, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court left undisturbed this Court's interpretation of the absence of domestic military detention authority in the AUMF.

Notably, the only actual authority the government cites for the claim that the AUMF has always included the "Substantially supporting" standard is the government's own March 2009 brief in *Hamily,* that was squarely rejected by that court. See Gov't Br. at 22-23. As her detailed analysis shows, Order at 32-45, Judge Forrest stands on solid precedental ground in holding that the AUMF never included such detention authority and that §1021 contains new substantive provisions not previously included in the AUMF. Order at 9-11. That precedental authority, including this Court's holding in Padilla, and the Supreme Court's holding in Hamdi are the dispositive holdings, not the Executive's expansive "interpretation" of the AUMF that forms the sole basis of the government's support. Gov't Bf. at 28-29. Contrary to the government's argument, the district court had no right or authority to "defer to the Executive's interpretation", Gov't Bf. at 29, where its "interpretation" has never been implemented by the courts and is contrary to the legislative history of the AUMF as discerned by this Court in *Padilla*.[10]

[10] Out of the long litany of cases concerning the AUMF, the government refers to two decisions for the proposition that the "substantially supported" theory of detention has been upheld by the courts. Neither support the government's premise that §1021(b) merely imports a long-recognized detention authority from the AUMF. The first, *Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008), mentioned the government's March 2009 briefing in passing in a case concerning a Chinese national who was detained in Pakistan after having fled from a Urghur camp in Afghanistan and was found to be "an enemy combatant". 532 F.3d at 838. The second decision, *Al-Bihani v. Obama*, 590 F.3d 866, found that the detainee had "engaged in hostilities against a U.S. Coalition partner", 590 F. 3d at 873, and did "materially support such forces". *Id.* Neither *Parhat* nor *Al-Binhani*, nor any other decision cited by the government, has ever applied a "substantially supporting" standard of detention. Judge Forrest noted that it was unlikely that such a standard had ever had any widespread acceptance since the government, 11 years after the "substantially supporting" standard supposedly came into force, was unable at trial to offer any definition of the material terms of §1021(b). See Order at 10-11 ("one would reasonably assume that if the AUMF was interpreted consistently with the language of § 1021(b)(2), by 2012 the Government would be able to clearly define its terms and scope. It cannot.")

B. Judge Forrest Did Not Fail to Give Proper Deference to the Executive Branch In Construing Detention Authority as to U.S. Citizens or On U.S. Soil.

On the same day it reversed Padilla on jurisdictional grounds, see n. 5 below, the Supreme Court decided *Hamdi v. Rumsfeld*, in which it rejected outright any claim that the courts must defer to the executive branch in matters concerning detention by the military. *Hamdi* recognized the highly limited nature of the President's powers under the AUMF and rejected the government's contention that the courts were limited to a "deferential" standard in evaluating detention cases. In reaching this conclusion, *Hamdi*, citing *Ex Parte Milligan*, 4 Wall., at 125, 71 U.S. 2, 18 L. Ed. 281 (1866), held that "an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 530. *Hamdi* denies a "circumscribed" role for the courts even where the claimed power is incidental or derived from the war-making authority:

> *"[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances*. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. *We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens*. Youngstown Sheet & Tube, 343 U.S., at 587, 96 L. Ed. 1153, 72 S. Ct. 863. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions *a role for all three branches when individual liberties are at stake*.

542 U.S. at 535-536 [emphasis added].

Two years later in *Hamdan v. Rumsfeld*, the Supreme Court, citing *Ex parte Quirin*, recognized that "*Quirin* provides compelling historical precedent for the power

of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 548 U.S. 557, 588-589 (2006). In *Hamdan*, the Court held that the military commission process was necessarily subject to judicial review because Hamdan was not a member of the armed forces and the military commission process established by the government provided no means of appeal to any civil court. In essence, where the military purports to impose jurisdiction over a civilian, judicial review is inherent and the "obligations of comity" provide no basis for the court to abstain. *Hamdan*, 548 U.S. at 587-590.

Hamdan rejected a comparison with *Johnson v. Eisentrager*, 339 U.S. 763, 789, n.14 (1950), where the Court had suggested that claims arising under the Geneva Convention were outside of the purview of the judiciary. See *Hamdan* at 626 citing *Eisentrager,* 339 U.S. at 789 n. 14. To the contrary, *Hamdan* held that because the plaintiff's claims arose under domestic law, namely the law of war as imported into the Uniform Code of Military Justice, *Hamdan* concerned issues arising under the Constitution as to which conventional judicial review was properly applied, regardless of the relationship to the President's war making powers. *Hamdan* concluded that regardless of its military cast, the President's detention authority under the AUMF *was* subject to judicial review.

Hamdan rejected the primary argument advanced here, i.e., that §1021 falls within the President's war making powers and is thus beyond judicial review. *Hamdan*, 339 U.S. at 789. As in *Hamdan*, the NDAA too is a creature of domestic law and is subject under *Hamdan* to ordinary judicial review. Hamdan was, in fact, concerned with a similar claim by the government that judicial review of §1005(e)(1) of the Detainee

Treatment Act of 2005 (DTA) must be barred because it would interfere with the President's power as Commander-in-Chief to wage war. Just as DTA §1005(e)(1) was subject to judicial review as to actual combatant detainees, NDAA §1021(b)(2) must be ever more subject to judicial inquiry as it is drawn in terms that are not limited to combatants but apply to civilians, including citizens within the U.S. Judge Forrest broke no new ground in so holding.[11]

Thus, the Supreme Court has *twice* rejected the argument that the courts must play a highly deferential role where detention issues out of the President's powers as Commander-in-Chief. Moreover, President Obama in signing into law this very enactment stated that the authority to interpret Executive power rests with the Article III courts. In his signing statement for the NDAA, he stated that "it is not for the President to both expand the power of the Executive and to interpret that power. *That power is reserved* solely for *Article III judges*." See Presidential Signing Statement, National Defense Appropriate Act of 2011 [emphasis added].

This is hardly a new doctrine. In *Eisentrager*, 339 U.S. at 790, the Supreme Court recognized that the judicial power is fully operative as to detention of "persons both residing and detained within the United States", *id.,* where jurisdiction of the federal courts is "unquestioned".[12]

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[11] *Hamdan's* majority holding rejected claims by the dissenters (echoed by the government on its instant motion for a stay) that judicial rejection of DTA §1005(e)(1) would "sorely hamper the President's ability to confront and defeat a new and deadly enemy", *Hamdan v. Rumsfeld*, 548 U.S. at 705 (Thomas, J. dissenting). It is essentially this same argument advanced by the government here, repeated in endless incarnations anytime a question touching upon national security is raised, that the courts must refrain from acting even in the face of blatantly unconstitutional enactments.

[12] In *Eisentrager*, the Court distinguished such instances from the case then before it that involved German soldiers who continued combatancy in China after the surrender of

Eisentrager relied for this doctrine on *Ahrens v. Clark,* 335 U.S. 188 (1948) and *Ex parte Endo*, 323 U.S. 283 (1944). *Ahrens* concerned German enemy aliens living in the U.S. during the second world war who were subject to deportation under the Enemy Alien Act. In *Ahrens* the Supreme Court dismissed the aliens' habeas petition because the plaintiffs sought relief in the wrong judicial district but never questioned their right to seek federal judicial relief despite the fact that their detention was in consequence of the President's war powers. *Eisentrager* later endorsed this holding. *Eisentrager*, 339 U.S. at 790.

In *Endo*, the Supreme Court denied the Executive Branch's detention authority over a U.S. citizen of Japanese extraction who the Court found to be loyal. Significantly, the plaintiff in *Endo* had been detained under military internment orders that had been ratified by Congress (similar to the claim that the government makes here that the NDAA is a Congressional endorsement of the President's war powers) but the Court in *Endo* still asserted direct jurisdiction over the application, adjudicating it on the merits and ordering that the plaintiff be released as a loyal citizen.[13]

Germany and were arrested in China and subject to trial for war crimes violations in that jurisdiction. *Eisentrager* held that in such circumstances the individual can be lawfully tried by a military commission and was not entitled to access to the U.S. courts as their actions and detention were abroad in a country in which the U.S. was permitted by convention and diplomatic agreement to operate militarily. *Eisentrager* distinguished such circumstances from detention of "persons both residing and detained within the United States", *id.,* where jurisdiction of the federal courts is "unquestioned". *Eisentrager*, 339 U.S. at 790.

[13] Significantly, the detention authority construed in *Ex parte Endo* was administered by a civil agency and Congress, in the Act of March 1942 ratifying the military orders had expressly reserved recourse to the citizen detainee to the civil courts to challenge detention, a procedural and constitutional protection that Congress has omitted from §1021(b).

As this case law shows, the Supreme Court has repeatedly re-affirmed the role of the Article III courts in construing the constitutionality and legality of detention legislation. The government's contention on this stay application that the federal judiciary must, in essence, abstain from construing a statute that, by its broad terms, would subject U.S. civilians, including citizens, to indefinite military detention is contrary to decades of Supreme Court jurisprudence and would neuter and emasculate the judiciary of its substantive powers.[14]

C. Judge Forrest's Order is Consistent with Well-Established Precedent that The President Has No Power to Detain Civilians in Military Custody and the President Cannot Be Irreparably Harmed by An Order Barring Him From Doing that Which He is Prohibited From Undertaking

Contrary to the government's argument that the injunction intrudes upon a "long-standing" detention power of the President, it is actually §1021(b) that intrudes upon a long-standing and venerable rule that the Executive may *not* hold civilians in military custody in the U.S. where the civil courts are open and functioning. *Four times* the

[14] The government mischaracterizes those decisions at p. 19 of its brief that it claims stand for the proposition that no injunction over a statute should issue until the matter is resolved by the Supreme Court. Citing *Turner Broad. Sys. v. FCC*, 507 U.S. 1301 (1993) the government omits to mention that *Turner* was not a decision of the full Court but a refusal by the Chief Justice, acting alone as Circuit Justice, to enjoin enforcement of a statute that the lower court had found *was* constitutional. 507 U.S. at 1302. Nowhere in *Turner* did Justice Rehnquist make the extraordinary ruling that a statute found to be unconstitutional by the trial court should continue in force until the Supreme Court hears the case. Similarly, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), Justice Black, also sitting as Circuit Justice, refused to enjoin the statute after the district court had upheld the civil rights law. Unlike both *Heart of Atlanta* and *Turner*, here the statute has already been declared to be unconstitutional, a material distinction from the single-Justice decisions cited by the U.S. at p. 16 of its brief. In fact, every decision cited by the government for the proposition that no injunction may remain in force until after the Supreme Court has heard the matter involved, not decisions of the full Court, but decisions by a single Justice sitting as Circuit Justice. None of these decisions supports the extraordinary proposition that no injunction of an unconstitutional statute may lie until the high court hears the matter. Gov't Bf. at 16.

Supreme Court has rejected presidential claims that civilians in the U.S. may be held in military custody. Even in the Japanese internment cases during wartime when the country had been invaded and attack, *Endo*, supra, the detainees were subject only to civil detention, not military custody. *Endo*, 323 U.S. 283.

In *Hamdi* the Supreme Court iterated yet again the long-standing principle that the Executive has *no* military detention power over civilians. For this proposition, *Hamdi* cited *Ex parte Milligan*, 71 U.S. 2 (1866), where the Supreme Court reversed a civilian's detention precisely because the citizen - Milligan - was a civilian living in civilian life at the time of his arrest and was not in a theatre of combat, even though other parts of the U.S. were then engaged in actual warfare. *Hamdi* makes it clear that under *Milligan* the Executive has no power, *even in wartime*, to detain a civilian in military custody where the civil courts are open and functioning. Interpreting *Milligan*, *Hamdi* stated:

> In that case [*Milligan*], the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. [citation omitted] *That fact was central to its conclusion*. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Hamdi, 542 U.S. at 522.

In unmistakeable, plain language *Hamdi* recognizes that no civilian, except on a field of battle where engaged in conflict against the armed forces of the United States, can be placed in military jurisdiction. Such power is denied the President. While it may be argued that *Milligan* concerned an earlier, outmoded era of combat, *Hamdi* adopted *Milligan* in the context of the existing conflict against Al-Queda under the AUMF.

Having thus interpreted *Milligan* in a contemporary setting under the AUMF, the decision in *Hamdi* must be seen – and this Court must accept it as such – as an endorsement of *Milligan* in the context of the modern, contemporary conflict with terrorists. As *Milligan* itself held, civilians arrested outside the theatre of combat cannot be tried or detained by the military courts "when the courts were open and ready to try them." *Ex Parte Milligan*, 71 U.S. 2, 127 (1866).[15] *Hamdi* adopts this holding unequivocally. *Hamdi*, 542 U.S. at 522. In so holding, Judge Forrest merely followed mandatory Supreme Court jurisprudence.

Hamdi is not the only modern invocation of the *Milligan* doctrine. Even where war directly touches the U.S. domestic territory – as it did in Hawaii in World War II - the Court has struck down a Presidential attempt to declare martial law. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Supreme Court held that no authority existed under which either Congress or the Executive could impose military jurisdiction over civilians except in the limited circumstance where the U.S. gains jurisdiction over "recently occupied enemy territory". *Kahanmoku* decisively held that military jurisdiction over civilians is inconsistent with civil government:

> Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.
>
> Military tribunals have no such standing. For as this Court has said before: ". . . the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the

[15] *Milligan* went on to note:

> "*All other persons*, citizens of states where the courts are open, if charged with crime, *are guaranteed the inestimable privilege of trial by jury*."

[emphasis added]; accord *Reid v. Covert*, 354 U.S. 1 (1957)

> contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson*, 100 U.S. 158, 169…."civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan*, 4 Wall. 2, 124-125.

Kahanamoku at 322-323.

Milligan and *Kahanamoku* arose in circumstances where war had actually touched the nation within its domestic borders. In *Milligan*, the nation was in active warfare in the South and the border regions of Pennsylvania, Kentucky, Maryland and Tennessee at the time Milligan was arrested, while in *Kahanamoku* the then-territory of Hawaii, where martial law was declared, had been subject to actual attack if not invasion. Yet in both instances, in decisions straddling nearly one hundred years, the Court still held that the President had *no* authority to impose military jurisdiction over civilians. *Hamdi*, a 2004 decision, recognizes and endorses these teachings in the modern conflict with terrorists.

Hamdi itself makes no new law in this regard, resting on the earlier reasoning in *Reid v. Covert*, 354 U.S. 1 (1957), where the Court also held that Congress lacks the power to extend military jurisdiction to civilians:

> "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights the Necessary and Proper Clause cannot extend the scope of Clause 14.

Reid, 354 U.S. at 21. As *Reid* holds, Congress cannot use Art. I, §8, Cl. 14 as a basis on which to extend military jurisdiction over civilians. Of special significance is *Reid's* recognition that the power to impose military jurisdiction belongs to Congress under its legislative functions in Article I and that such power is subordinate to the Bill or Rights, as Judge Forrest concluded. In other words, Congress in effecting its power under Clause

14 to "make rules for the Government and Regulation of the land and naval Forces", Const., Art. I, §8 Cl. 14, must not extend such authority over civilians in derogation of their right to trial by jury and before the civil courts.

Reid is definitive in holding that civilians cannot be made subject to military jurisdiction:

> Not only does Clause 14, by its terms, limit military jurisdiction to members of the "land and naval Forces," but Art. III, § 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions -- safeguards which cannot be given in a military trial. In the light of these as well as other constitutional provisions, and the historical background in which they were formed, *military trial of civilians is inconsistent with both the "letter and spirit of the constitution*."

354 U.S. at 22 [emphasis added].

As this case law makes clear, §1021(b) in violation of "the deeply rooted and ancient opposition in this country to the extension of military control over civilians". *Reid* at 33.[16]

In *Hamdan v. Rumsfeld*, the Supreme Court held that even "exigencies of war" without textual support from the Constitution will not substantiate the imposition of military jurisdiction over non-combatant civilians:

> Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 121, 18 L. Ed. 281 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]"); *Ex parte Vallandigham,* 68 U.S. 243, 1 Wall. 243, 251, 17 L. Ed. 589 (1864); see also *Quirin*, 317 U.S., at 25, 63 S. Ct. 2, 87 L. Ed. 3 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers

[16] Accord, *Duncan* v. *Kahanamoku*, 327 U.S. 304, United States ex re. Toth v. Quarles, 350 U.S. 11 ,cited in Reid v. Covert, 354 U.S. at 31-32.

> granted jointly to the President and Congress in time of war. See *id.*, at 26-29, 63 S. Ct. 2, 87 L. Ed. 3; *In re Yamashita*, 327 U.S. 1, 11, 66 S. Ct. 340, 90 L. Ed. 499 (1946).

548 U.S. at 591. Citing *Milligan, Hamden* went on to note, that the historical justification for the imposition of military commissions has always arisen only where "the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war prevails, there is a necessity to furnish a substitute for the civil authority,…" *Hamden* at n.25 citing *Milligan* [emphasis added].

It is undisputed that the NDAA, §1021(b) imposes military jurisdiction over civilians, including U.S. citizens, detained in the U.S. and U.S. citizens outside the U.S. As case law makes clear, however, the sole and singular constitutional basis for the imposition of military jurisdiction over civilians arises only in those circumstances where the civilian is arrested in a theatre of combat and where the courts are "actually closed, and it is *impossible* to administer criminal justice according to law…" *Hamden* at n.25 citing *Milligan*. Judge Forrest correctly held §1021(b)(2) to be unconstitutional in that it makes none of these conditions predicates for the imposition of military jurisdiction.

Finally, since neither the President nor Congress have the constitutional authority to impose either marital law or military jurisdiction over civilians absent circumstances where the courts are "actually closed" - even under the AUMF as both *Hamdi* and *Hamdan* make clear - the President, at least within the domestic territory of the United States, has *never* had the authority conveyed under section 1021(b) and he cannot be

irreparably harmed by an injunction prohibiting him from doing what the Constitution forbids and what the Supreme Court has four times rejected.[17]

Judge Forrest's order is neither unprecedented since it follows well-trod ground does not "irreparably harm" the President in his authority as Commander-in-Chief since he never had the authority to detain civilians in military custody that Judge Forrest's order enjoins.[18]

D. Law of War Detention Cannot Be Extended to Civilians Outside of a Theatre of Combat

To sustain §1021(b), the government has focused heavily on the concept that the "Law of War" enables broad based detention authority by the Executive Branch but the government has ignored the governing jurisprudence that restricts the application of Law of War detention to combatants and does not extend it to civilians. In *Hamdan*, the Court recognized that law of war applies *only* to persons who are either engaged in combat or are members of a combatant force. Citing the leading authority on Law of War detention,

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[17] President Obama himself – a former professor of constitutional law - seemed to accept the moral force of such case law when he declared his discomfort as to the implications of the NDAA. In a statement released by the Executive Office of the President, on November 17, 2011, he issued a statement on the NDAA, stating:

> "applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets."

Accord, Alexander Hamilton, "Federalist No. 8," in The Federalist Papers, ed. Clinton Rossiter (New York: New American Library, 1961), p 69 ("The laws are not accustomed to relaxation in favor of military exigencies;")

[18] Even Justice Thomas in his dissent in *Hamdan* conceded that the purpose of the AUMF was to enable the President through the military to try "enemy belligerents", *Hamden*, supra, (Thomas, J. dissenting at n.5), not civilians.

Colonel William Winthrop whom the Court has called the "Blackstone of Military Law", *Hamdi* at 598, citing *Reid v. Covert*, 354 U.S. 1, 19, n. 38, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), described the "preconditions" necessary "for exercise of jurisdiction by a tribunal of the type convened to try Hamdan."

Hamdan noted that a detainee can be tried under Law of War by a military commission only for "offences committed within [a] theatre of war". *Hamdan* held further that in the absence of either martial law or occupation, a military commission may only try "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" *Id.*, at 838. Neither of these pre-conditions are included in §1021(b)'s invocation of the law of war. *Hamdan* concluded that that "a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Hamdan* supra citing *Reid* at 839.

In a significant footnote, *Hamdan* held that under the traditional common law of war, such a proceeding cannot take place where the civil courts are open and functioning:

> "the trial must be had within the theatre of war…;…if held elsewhere, and *where the civil courts are open and available*, the proceedings and sentence will be coram non judice." *Hamden* at n. 29.

Hamdan thus reiterates the essential formula of *Milligan* that civilians may not be kept in military jurisdiction where the civil courts are open and functioning and that military adjudications in such conditions will be void, "corum non judice". *Id.* This formulation is crystal clear: no military jurisdiction exists over U.S. civilians "where the civil courts

are open and available", *Hamden,* supra, and any such military adjudication will be void, i.e., "corum non judice".

Hamden was interpreting the President's war powers under the AUMF, the very instrument at issue on this stay application. Hence, since the Supreme Court itself has held that military detention and adjudication are available only over a combatant who has violated the law of war, *Hamdan*, supra, §1021 plainly violated long-established precedent that civilians cannot be made subject to military jurisdiction "where the civil courts are open and available", the same formula used by the Supreme Court 140 years earlier in *Milligan* and adopted again in *Hamdan*.

Judge Forrest's ruling is thus correct for the additional reason that §1021 does not contain the required predicates of *Hamdan* that the detainee must have committed an offense in a theatre of combat *and* in violation of the law of war before being made subject to military jurisdiction, as required under *Hamdan*.

By failing to predicate its military detention authority on a violation of the law of war for an offense committed in a combat theatre, see *Hamdan*, supra, §1021(b) purports to do precisely what *Hamdan* said it cannot, placing civilians into military jurisdiction without a prior violation of the law or war of the commission of a war crime. Viewed from the vantage of this clear and extensive precedent, it is not Judge Forrest's opinion that is "unprecedented" but rather the imposition of military power over the civilian that Congress has expressed through §1021(b) that breaks with traditional constitutional norms.

II. THE ORDER DOES NOT INTERFERE WITH THE PRESIDENT'S MANAGEMENT OF "ACTIVE HOSTILITIES" NOR WAS SUCH THE RELIEF THAT PLAINTIFFS SOUGHT IN THE TRIAL COURT

Among its reasons for seeking the stay of the order the government contends that the order will interfere the "conduct of military operations abroad during an active armed conflict". Gov't Bf. at 3. This argument is manifestly incorrect. The permanent injunction is directed only to §1021(b) that would permit detention with*in* the United States. The trial court was careful to leave unimpaired §1022 that governs detentions *outside* the U.S., as well as the AUMF.

The government's argument itself identifies that the only statute that has been enjoined is §1021(b). The government cites to two particular lines of Judge Forrest's order that highlight the limited nature of the injunction:

> "If, following issuance of this permanent injunctive relief, the Government detains individuals under theories of 'substantially or directly supporting' associated forces, *as set forth in § 1021(b)(2),* and a contempt action is brought before this Court, the Government will bear a heavy burden indeed"); Order at 112
>
> and
>
> ("[m]ilitary detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF and is enjoined by this Order *regarding § 1021(b)(2)").*

See Gov't Bf. at 16.

As the highlighted sections indicate, Judge Forrest's order is clearly limited to §1021(b)2) and no other provision. The district court order does not implicate the government's detention authority under the AUMF or under §1022, both of which enable detention on the battlefield or as to persons taken in the course of hostilities. To the contrary, Judge Forrest explicitly stated the AUMF remains in force:

> "When the AUMF is read according to its plain terms and criminal statutes considered, it reasonably appears that the Government has the tools it needs to detain those engaged in terrorist activities and that have not been found to run afoul of constitutional protections."

Order at 45. By this language, Judge Forrest expressly recognized the continued vitality of the AUMF as an Executive branch tool. Similarly, she acknowledged the Executive's power to enforce anti-terrorism laws:

> "Congress has provided the executive branch with ample authority to criminally prosecute those engaged in a wide swath of terroristic or war-making behavior;"

Order at 52.

Judge Forrest also noted the enormous range of statutory tools available to the government beyond the AUMF:

> "18 U.S.C. §§ 2339A-2339B has been used to charge more than 150 persons. Holder, 130 S. Ct. at 2717. For example, on May 24, 2012, Minh Quang Pham was indicted under 18 U.S.C. § 2339A(b)(1) for providing material support to a foreign terrorist organization. The specific overt act charged against Pham is working with a U.S. citizen to create online propaganda for al-Qaeda, in furtherance of the conspiracy. Sealed Indictment ¶ 3(c), United States v. Pham, No. 12 Cr. 423 (AJN) (S.D.N.Y. May 24, 2012).25
>
> In addition to 18 U.S.C. § 2339A-2339B, there are numerous criminal statutes available to prosecute and bring to justice those who commit illegal acts furthering war or acts of terrorism against the United States or its interests, including 18 U.S.C. § 2381 (the modern treason statute); 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2382 (misprision of treason); 18 U.S.C. § 2383 (rebellion or insurrection); 18 U.S.C. § 2384 (seditious conspiracy); 18 U.S.C. § 2390 (enlistment to serve in armed hostility against the United States); and 50 U.S.C. § 1705(c) (prohibiting making or receiving of any contribution of goods or services to terrorists)."

Order at 48.

Faced with this extensive recognition of the terror-fighting tools available to the U.S. and her explicit acknowledgment of the continued enforceability of the AUMF,

and her leaving intact §1022 that enables combatant detentions, by no means can Judge Forrest's order be said to impermissibly limit or intrude upon the Executive's ability to fight terrorism. And, as noted in Point III, infra, since the power to provide for military detention is a power delegated to Congress, *not* the Executive, see *Reid v. Covert*, 354 U.S. 1, 21 (1957), the injunction, by barring such detention over U.S. civilians and U.S. citizens, does not intrude upon any delegated Executive branch power.

III. THE PRESIDENT HAS NOT BEEN ENJOINED IMPROPERLY FROM CARRYING OUT AN UNCONSTITUTIONAL ENACTMENT AND HE IS NOT IMMUNE FROM CONSTITUTIONAL REVIEW

In its stay application the government, without citing any authority, makes the curious and extraordinary argument that neither the President nor the Secretary of Defense can be enjoined from carrying out an unconstitutional detention law. See Gov't Bf. at 12-14. Relying entirely on two inapposite cases, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Mississippi v. Johnson*, 4 Wall. 475, 4980499 (1867), the government suggests that no federal court can ever place the president or his cabinet member under an injunction barring enforcement of a statute. No case law sustains this extraordinary proposition.

Franklin v. Massachusetts does not support the government's position. *Franklin* concerned whether the President was subject to the Administrative Procedure Act (APA), a statutory structure that enables judicial review of arbitrary and capricious agency acts. Holding that the President was not an "agency" for purposes of the APA, the Court held that his decision on reapportionment of Congressional seats was not subject to the arbitrary and capricious standard under the APA. Franklin never made the blunderbuss

ruling urged here by the government that the President is never subject to injunctive relief.

To the contrary, the majority in *Franklin* expressly stated that the reapportionment determination *is* subject to "constitutional review" by the court and acknowledged that injunctive relief *is* available against the President but determined it to be unnecessary since "declaratory relief" as to the Secretary of Commerce would be sufficient for purposes of redressibility. The Court stated:

> "[W]e need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."

Franklin v. Massachusetts, 505 U.S. at 803. Thus, far from supporting the government's position, *Franklin* confirms that injunctive relief is available against the President *and his cabinet* where it is necessary for purposes of redressibility.[19]

Similarly, in the district court holding in *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D. N.Y. 2002), the court noted that injunctive relief against the President would not be appropriate to compel a change in Padilla's detention classification because an order directed *against the Secretary of Defense* could afford redressibility:

> "In this case, as in *Franklin*, the necessary relief, if any, may be secured by an order to the Secretary alone, and the President can be dismissed as a party."

Padilla v. Rumsfeld, 233 F. Supp 2d at 583.

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[19] Relying upon Justice Scalia's comment that "no court has ever issued an injunction against the President himself", Gov't Bf. at 13, the government fails to point out to the Court that the majority in *Franklin* did not adopt such dictum and it appears only in Justice Scalia's concurrence. 505 U.S. at 827.

Clearly then, even if the President is, arguendo, improperly joined to the injunction, the Secretary of Defense *is* a proper party. As the Court in *Franklin* made clear any barrier to injunctive relief against the President does not extend to his cabinet secretaries and the injunction here should remain in force as to the Secretary of Defense against whom a ban on implementing §1021(b)'s mandate to incarcerate civilians in military detention would be redressible.[20]

In *Nixon v. Fitzgerald*, 457 U.S. 731, 754 the Supreme Court agreed that the President cannot be enjoined "in the performance of his official duties." But made it clear that the President is subject to judicial restraint against unconstitutional acts. Id. *Fitzgerald* accepted the doctrine that the President is subject to injunctive relief but noted the court will look to "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. *Mississippi v. Johnson*, 4 Wall. at 501.

But the court cannot "balance the constitutional weight" of the claim against "the dangers of intrusion on the authority and functions of the Executive Branch", *id.,* where

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[20] *Mississippi v. Johnson* is contorted by the government to seemingly bar relief where no such rule was intended. *Mississippi* concerned an attempt by a state to bar President Johnson's carrying out of the Reconstruction Acts but no judicial holding had been made that the Act was unconstitutional and the Court's refusal to issue the injunction must be seen as a refusal to interfere with the President's carrying out of a statute that was in force, i.e., his "official duties". As the Court later explained in *Rogers v. Lodge*, 458 U.S. 613 (1982), *Mississippi* concerned an attempt to bar the President from affirmatively performing his official duties: "The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion." *Rogers v. Lodge*, 458 U.S. at 634, n. 5; accord *Colegrove v. Green*, 328 U.S. 549, 556 (1946), explaining that the rule of Mississippi applies where the issue is the "political" question of compelling the President to implement a public policy. In contrast, Judge Forrest's order prohibits the President from implementing a specific statutory mandate that the Constitution bars, a vastly different legal animal from seeking to force the President to carry out a statutory policy as was at issue in *Mississippi* and *Colegrove* that is generally beyond the power of the courts to compel.

the President is silent at trial as to any such "dangers" and refuses to offer any testimony or evidence as to the intrusion into executive "authority and functions". *Id.* See Order at 28-29, 112 ("The Government did not present any witnesses or seek to admit any documents"; The Government did not put forward any evidence at trial that it needed the statute for law enforcement efforts;") In determining such balance "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing *its constitutionally assigned functions*." *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 443 ( ), citing *United States v. Nixon*, 418 U.S. 683, 711-712 ( ).

But the President has no "constitutionally assigned functions," *Nixon v. Adm'r of General Servs.*, 433 U.S. at 443, to place civilians in military custody in the United States, as a host of decisions have made clear. As *Milligan* and *Hamdi* both hold, the President's war powers, while extensive, are not consonant with the imposition of military jurisdiction over civilians in the United States and any injunction barring the execution of such power does not intrude unduly into his "constitutionally assigned functions" since he has no constitutional power to place civilians in military custody.

Moreover, the power to wage war is not a personal power of the President. As Justice Douglass held in his concurrence in *New York Times Co. v. United States*, 403 U.S. 713 (1971),

> [T]he war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "to declare War." *Nowhere are presidential wars authorized.*

403 U.S. at 722, Douglas, J. (concurring) [emphasis added]. Consistent with Justice Douglass's concurrence, the Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957), has held that imposition of military jurisdiction over any person is a factor, *not* of the

President's personal powers, but of Congress's war power under Art. I., §8. In *Reid* the Court held that such jurisdiction is both "very limited and extraordinary" and is "derived from the cryptic language in Art. I, §8…" *Reid*, 354 U.S. at 21.

Art. I, §8 is a delegation of power to Congress, not the President and, as *Reid* held, the power to impose military jurisdiction is, therefore, a power that derives from the Legislative Branch, not the Executive. Looked at from this perspective, Judge Forrest's order does not intrude with the President's power as Commander-in-Chief because the power to detain a person in military custody derives from the legislative power in Article I, is a power of Congress, *Reid,* supra, not the Executive.

The government's argument against a "worldwide injunction" is also belied by the holding in *Reid v. Covert* in which the Court held that U.S. citizens abroad, even when associated with the military, are not deprived of the protection of the Constitution or of the Bill or Rights. *Reid* reject outright the suggestion that "constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him. As we have said before, such a view of the Constitution is erroneous." *Reid*, 354 U.S. at 33. In *Reid* the Court declared unconstitutional the president's assertion of military jurisdiction over persons who "accompanied" U.S. forces abroad.

Thus, a injunction of an unconstitutional detention statute *outside* the U.S. is presumptively valid and proper as to U.S. citizens. Here again, Judge Forrest broke no new ground in barring detention of citizens outside the U.S. under §1021(b).

As to the government's burden of proof on this stay motion, the district court set out an extensive holding as to why and how §1021(b) implicates speech concerns. Order at 82-86. Weighed against this on the motion for a stay is the government's single-

sentence bald statement that §1021(b) is "a grant of general war powers" and "does not even mention any form of expression…". Gov't Bf. at 32-33. Indeed, the court concluded that while §1021(b) has a legitimate anti-terror purpose "its breadth also captures a substantial amount of protected speech and associational activities." Order at 84. Judge Forrest compared §1021(b) to 18 U.S.C. §§ 2339A/B, the Anti-Terrorism and Effective Death Penalty Act that contains a specific provision protecting First Amendment activity that is wholly absent in §1021. If §1021 is not intended to impact speech concerns, the district court wrote, "'why not have a 'saving clause' as in 18 U.S.C. §§ 2339A/B? Why not have said plainly, 'No First Amendment activities are captured within § 1021?'" Id.

Judge Forrest noted the government's repeated reluctance to give any true assurance that plaintiffs First Amendment activities would not invoke §1021 detention. Order at 29-30, 84-85. Similarly, the government offers no credible basis to dispute the district court's finding that the plaintiffs are chilled in their exercise of their first amendment rights because of fear of the untrammeled impact opf §1021 on their extensive journalistic and advocacy activities. As the findings of fact demonstrate, Order at 15-28, the plaintiffs are engaged in extensive conduct that may reasonably be said to be within the unbridled and undefined scope of §1021(b). Whatever arguments the government may raise on the merits on this appeal, on this stay motion they have simply failed to demonstrate that Judge Forrest's detailed discussion of standing is without substantive support. See Order at 15-28, 52-65.

Plainly, the district judge gave extensive thought to this question following five rounds of briefing and two hearings below. Weighed against this, the government's single-sentence disavowal of any speech content is insufficient to stay the injunction.

IV. THE MOTION FOR STAY IS NOT PROPERLY BEFORE THIS COURT UNDER F. R.A.P. 8.

This Court should not grant a stay pending appeal because the government's motion does not comply with Rule 8 of the Federal Rules of Appellate Procedure (F.R.A.P.) and the rules clearly contemplate that this Court can only entertain an application for a stay after the District Court has ruled on the stay motion. F.R.A.P. 8(a)(2)(A)(ii) requires that any motion "state that, a motion having been made, the district court denied the motion…"

The district court below never ruled on the government's motion for a stay pending appeal because the Government insisted to the District Court judge that if the judge did not grant an interim stay, it would immediately seek an interim or administrative stay from the Second Circuit Court of Appeals. This demand was made by letter on Friday, September 14, 2012 after Judge Forrest granted a permanent injunction on Wednesday February 12, 2012.

Though Judge Forrest denied the government's request for what the government originally in its papers described as an "interim" stay (now characterized as an "administrative" stay) of the injunction, Judge Forrest issued an order by email on Friday, September 14th informing the government and all parties that she would decide the government's motion for a stay pending appeal on Wednesday, September 19, 2012 and setting a briefing schedule for all parties. The government neglected to inform this Court of that fact. Judge Forrest's email order follows:

> *In light of the holiday, the Court will issue an order on the motion for a stay on Wednesday [September 19, 2012]*
>
> *If plaintiffs plan to respond to the motion they should do so no later than*

> *3pm Tuesday.[September 18, 2012] The Court is aware of the holiday (obviously) and that some of plaintiffs counsel may be observing it, but the Court still requests a response by 3pm Tuesday.*

After neglecting to inform this Court of that development, the government sought both an administrative stay and a stay pending appeal from this Court and this Court granted an interim stay on September 17, 2012. Because of the government's action and this Court's decision, Judge Forrest concluded that she could not rule on a stay pending appeal. Because it was never ruled on below, it should not be ruled on at this time by the Second Circuit.

V. THE GOVERNMENT HAS PRODUCED NO EVIDENCE, AS REQUIRED BY F. R.A.P. 8 (A) TO EITHER THIS COURT OR THE COURT BELOW AND THEREFORE A STAY MUST BE DENIED.

Rule 8 of the Federal Rules of Appellate Procedure requires that in an application for a stay, affidavits must be filed setting forth the basis of the requested relief. The rule presumes that evidence under oath or declaration will be submitted by the movant.

No affidavits were filed in the District Court by the government either on the merits or as to the stay application and Judge Forrest's denial of the interim stay must be seen in light of the absence of any evidence offered by the defendants as to the factual basis of the claim of irreparable harm that they failed to buttress either at trial or on the stay application. Since affidavits or declarations are required to support any such motion, and since none were filed with the District Court, it is not even clear that the government has properly exhausted its remedy to seek a stay with the originating trial court. This litigation has been ongoing for nine months but at no point in time has the government entered any affidavits into evidence, called any witnesses or offered any evidence as to

why "irreparable" harm would befall the Executive Branch. See Order at 28-29, 111. On the other hand, the record below is replete with evidence as to how substantive First Amendment rights are risk from the NDAA; the District Court judge ruled this substantial body of testimony and evidence "credible" and ruled that absent an injunction, plaintiff's and the public's First Amendment and Due Process rights could not be adequately protected. The government has made no showing to justify setting aside this "credible" body of evidence.

VI. EVEN ASSUMING THE GOVERNMENT'S BALD ALLEGATIONS IN THEIR BRIEF ARE TRUE – UNSUPPORTED BY ANY EVIDENCE OFFERED EITHER TO THE DISTRICT COURT OR THIS COURT -- THE GOVERNMENT STILL HAS NOT MET THE STANDARD FOR A STAY.

Even taking the government at its word, the government has not met the standards for a stay in the Second Circuit. If anything, the full record shows that a stay of the injunction would continue the substantial chill of plaintiff's constitutional rights to freedom of speech, association and due process, and that the public interest lies in protecting same.

A. The Standard For A Stay Pending Appeal In The Second Circuit.

SEC v. Citigroup Global Markets, 673 F.3d. 158 (2d Cir. 2012) sets forth the criteria for a stay pending appeal in the Second Circuit:

1. Whether the stay applicant has made a strong showing that he is likely to succeed on the merits.
2. Whether the applicant will be irreparably injured absent a stay.
3. Whether issuance of the stay will substantially injure the other parties in the case.
4. Where the public interest lies.

The Court in *Nken v. Holder,* 556 U.S. 418, 434 (2009) cautions that a right to a stay does not exist simply because a movant is irreparably harmed; and further, that the burden is on the movant at all times to establish that a stay is warranted given an individualized balance of the factors according to the particular case. *Id,* at 1760-61 (citing *Virginian R. Co v. United States.,* 272 U.S. 672, 673; *Hilton v. Braunskill,* 481 U.S. 770, 777("[T]he traditional stay factors contemplate individualized judgments in each case"); *See*, *e.g., Clinton v. Jones,* 520 U.S. 681, 708 (1997); *Landis v. North American Co.,* 299 U.S. 248 (1936)).

The required degree of likelihood of success on the merits varies according to the assessment of the other three factors. *Hilton,* at 101. Where there is lower quantum of irreparable injury to the movant if a stay is denied, then a higher showing of likelihood on the merits is required. *See id*. The inverse is also true. *See id*.

The Supreme Court finds particularly important the first two factors: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; and (2) whether the applicant will be irreparably injured absent a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). ("It is not enough that the chance of success on the merits be better than negligible."(citing *Sofinet v. INS,* 188 F.3d 703, 707 (C.A.7 1999). "By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor", (citing *Abbassi v. INS,* 143 F.3d 513, 514 (C.A.9 1998)). In weighing these first two factors, Justice Kennedy, writing for the concurrence in *Nken*, opines that courts are restrained from "…dispens[ing] with the required showing of one simply

because there is a strong likelihood of the other. *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Justice Kennedy, with whom Justice Scalia joins, concurring).

There is a "heavy burden" on the movant because the court will not even consider likelihood of success on the merits if he has not first met his burden for establishing irreparable harm. *See id (*citing *Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315, 1317(1983) (Blackmun, J., in chambers) ("[L]ikelihood of success on the merits need not be considered ... if the applicant fails to show irreparable injury from the denial of the stay")). As set forth herein, the government is not irreparably harmed by the injunction because the President has never had the power to detain civilians in military custody.

B. Movants Have Admitted They Cannot Show A Likelihood Of Irreparable Harm

The stay of a district court's injunction pending appellate disposition is one of the most extraordinary remedies that an appellate court may issue. *See* John Y. Gotanda, *The Emerging Standards For Issuing Appellate Stays,* 45 Baylor L. Rev. 809, 809 (1993). A stay is imposed without a full hearing on the merits, yet it has the effect of suspending the action that preceded it. *Id.* It is especially extraordinary when absent the injunction, the non-movants constitutional rights to free speech and association are at stake.

The preliminary injunction was first issued by the District Court on May 16, 2012, four months ago. The permanent injunction issued Wednesday, September 12, 2012 is identical in all material respects to the preliminary injunction that has been in force since May. Yet, at no point during the preceding four months did the government argue to District Judge Forrest that the President was "irreparably harmed" by the

injunction even though it has been in force continuously since May 16, 2012. There is no basis for an "interim" or "administrative" stay over the next three days (until Judge Forrest decides the government's motion) if the government had made no claim of irreparable harm over the preceding four months.

The Government has failed to show a likelihood of irreparable harm absent the stay because, as it concedes, it finds § 1021(b) to be superfluous. The requirement that the movant will likely suffer some irreparable injury absent the issuance of a stay probably is the most difficult factor for the movant to satisfy, and as noted *supra*, the most devastating if not met. John Y. Gotanda, *The Emerging Standards For Issuing Appellate Stays,* 45 Baylor L. Rev. 809, 814 (1993). It also is the most misunderstood requirement. *Id.* This is because "the concept of irreparable injury does not readily lend itself to definition". *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Courts find that irreparable harm is the type of harm which cannot be fully rectified by a final decision on the merits in favor of the movant. *See Doe v. Gonzales,* 386 F. Supp. 2d 66, 72 (D. Conn. 2005)(gag order was irreparable harm where movant's timely opinion in newspaper article would be valuable contribution to public discourse on Patriot Act, given his role); *see Roland Mach. Co. v. Dressler Industries, Inc.,* 749 F.2d 380, 382 (absent stay, movant would be put out of business during pendency of appeal is irreparable harm); *but see Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n,* 259 F.2d 921, 925 (D.C. Cir. 1958)(complaining that if case is remanded to commission, it's possible they may not provide adequate hearing is not irreparable harm); *see also Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205 (2d Cir. 1970). Here, in the government's case, it has not put forth any argument that if the injunction of § 1021(b) is

not stayed, the harm caused, if any, cannot be fully rectified by a judgment in its favor adjudicating the legal rights that the government claims are at risk.

When the court finds harm as being irreparable it almost always involves a constitutional right; the government asserts no such right and in fact it is the plaintiffs would be irreparably harmed by staying the injunction. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976)("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Indeed, as shown above case law is clear that the government has no power to detain civilians in military custody so no designiated constitutional function of the President is subverted by the district court order.

The government contends that unspecified national security and institutional interests are affected by the injunction. *See* Government Stay Motion, 19. It cites to *Holder v Humanitarian Law Project,* 130 S. Ct. 2705 (2010) for the proposition that the court lacks competence to enjoin a law that touches on national security. In essence, the government argues the court should simply defer to the other branches of government where national security matters are concerned. But, where is the limit to that? Indeed, as in the case at present, the Court in *Holder* says the limit is when constitutional issues are at stake. *Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2727 (2010) (the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals").

Next, the government complains of § 1021(b) being enjoined in any manner, as to any person because it places a burden on the military during an active conflict which would cause harm. *See* Government Stay Motion, 15. However, this cry of foul is belied by the fact that the government does not know when or if it uses §1021(b), and what is more, the President himself has said §1021(b) is "unnecessary and breaks no new ground." *See* President Signing Statement, NDAA; *Hedges, et al. v. Obama, et al,* Trial Hearing Transcript, August 7, 2012. (Attach as exhibit) A court should not issue a stay of the injunction where the movant does not intend to use the statute being enjoined, nor has no record of using the statute simply to "allay" the movants unspecific anxieties. *See Standard Brands, Inc. v. Zumpe*, 264 F.Supp. 254, 267-68 (E.D.La.1967).

Next, the government argues it has suffered a *form* of irreparable harm because laws passed by Congress are presumed constitutional, and as such, cites to *Turner Broadcast System, Inc v. F.C.C,* 507 U.S. 1301(1993) for the proposition that §1021(b) should remain in effect pending a final decision by the highest court. However, the proposition held in that decision appears to come into play only when the stay at issue will not affect the party opposing the stay, and that there are no inequities weighing against the stay. *Marshall v. Barlow's, Inc*., 429 U.S. 1347, 1348 (1977)("The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. *In such a situation*, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court*"*. (emphasis added)). That

presumption is plainly not true in this case, and therefore *Turner Broadcast System, Inc.* is inapposite here.

C. Plaintiff Will Continue To Suffer Substantial And Irreparable Harm If Stay Is Ordered; Findings of Fact Presumed True Unless Abuse Of Discretion

Fed. R. Civ. P. 8 requires the movant of a motion for stay to make an application to the district court whom ordered the injunction. If the district court has denied the stay, and no new issues have been presented since that denial, the Court of Appeals should give the District Judge's action appropriate deference. *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986). Indeed, Courts of Appeals, when deciding motion to stay district court's injunctions, are "not reviewing the district judge's grant of the injunction, and [are] therefore not bound to defer to his [or her] judgment." But ,"… are, however, bound to accept the district court's factual findings unless [they] find them to be 'clearly erroneous." *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991); Fed.R.Civ.P. 52(a).

Judge Forrest explicitly states that the factual record establishes substantial and irreparable harm to Plaintiffs first amendment rights. *See* J. Forrest Op. and Order, 109, September 12, 2012. Further, the Supreme Court has held that injury upon first amendment rights is per se irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373(1976); *Salinger v. Colting*, 607 F.3d 68, 81-82 (2010); *Bronx Household of Faith v. Bd. of Educ. of New York,* 331 F.3d 342, 349 (2d Cir.2003)(where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be

presumed). Therefore, the government has a mighty burden indeed to overcome that presumption.

Showing contempt to Judge Forrest's detailed findings of fact, the government writes off the Plaintiff's harm as "speculative". Instead, the government states plainly that a stay will not harm plaintiffs because the government says plaintiff's haven't done anything yet to warrant detention under §1021(b), and as such, is a superficial reading of the numerous briefs filed by Plaintiffs.

D. Public Interest Is Unaffected By Injunction Pending Disposition Where The Government Has Admitted Sec. 1021 Is Unnecessary For National Security

The government has the burden of persuading the court that the public interest lies in having an injunction of §1021(b) stayed pending a judgment on the merits. It has put forth a woefully inadequate showing of that proof. It does not cite to any authority that the public interest has traditionally lied in the government's favor when constitutional issues are at stake. Rather, it cites to *Virginian Ry. Co. v. Sys. Fed'n No. 40* for the proposition that when the military relies on a statute enacted by Congress for wartime activities, the courts should give deference to the other branches because the policy of Congress is to be presumed in the public interest. *Virginian Ry. Co* 300 U.S. 515, 552(1937). ("military's reliance on a statutory authorization of detention as an aspect of the use of military force harms these democratic interests, because the policy of Congress is in itself a declaration of the public interest.) *See* Government Stay Motion, 20 (internal quotations omitted). However true that may be, the proposition is not applicable here because the government has not established in the trial record that the military has relied on §1021(b). Similarly, the government's claims that Judge Forrest's injunction causes

irreparable harm to the public interest because it creates "dangerous confusion into the area of military operations abroad during an active armed conflict" should be dismissed outright. If the government does not know whether the statute has been used in the nine months since its enactment, as it said at the trial hearing, and the government is aware of the fact that a final judgment by the district court held the statute unconstitutional, then the only dangerously confused party is the government.

E. Staying The Injunction Is Against The Public's Interest In Free Speech And Association

When contemplating a motion for stay of injunction, Courts of Appeals in numerous circuits considering the fourth factor 'where the public interest lies', have held "it is always in the public interest to protect constitutional rights." *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted)(reversing the District Court, Court of Appeals held that public interest factor weighed against state statute prohibiting the picketing of military funerals); *Kirkeby v. Furness,* 52 F.3d 775(1995)(reversing District Court, Court of Appeals held that public interest factor weighed against city ordinance prohibiting protesting abortion clinics) citing *Frisby v. Schultz,* 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)).

CONCLUSION

The motion for a stay pending appeal should be denied.

Respectfully submitted,

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