IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTOPHER HEDGES, et al., Plaintiffs, v. BARACK OBAMA, et al., Defendants.	No. 12-3644

DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

We explained in our motion for a stay that the district court improperly struck down as facially unconstitutional a duly-enacted Act of Congress, Section 1021(b)(2) of the National Defense Authorization Act of 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011), and erroneously entered a sweeping permanent injunction against its application. Order at 112 (September 12, 2012). Section 1021(b)(2) explicitly affirms the President's detention authority under the earlier Authorization for Use of Military Force (AUMF), 115 Stat. 224 (2001), which is the central legislative authority for the ongoing military operations against al-Qaeda, the Taliban, and associated forces. Plaintiffs' opposition to the stay motion fails to provide any basis for allowing that sweeping injunction to go into

force pending appeal, notwithstanding the unprecedented scope and inadequate legal foundation of the underlying ruling. Indeed, plaintiffs' motion focuses almost entirely on war powers with respect to U.S. Citizens and individuals apprehended in the United States, but as we explained repeatedly, Section 1021(b)(2) has absolutely no impact on that issue, *see* NDAA Section 1021(e), and the President has made clear that he "will not authorize the indefinite military detention without trial of American citizens." Statement by Pres. Obama, 2011 U.S.C.C.A.N. at S12.

As we explained, the district court's injunctive order causes harm in several ways. First, the court rejects the Executive Branch's long-standing interpretation of the AUMF – with respect to the concepts of "substantial support" and "associated forces" – that has been endorsed by two Presidents, by the D.C. Circuit in habeas litigation brought by Guantanamo detainees, and by the Congress in Section 1021(b)(2). And the court invites actions for contempt sanctions if the military exercises detention authority in a manner inconsistent with this deeply flawed understanding. *See* Order at 14. This invitation encompasses detention practices in areas of active hostilities. In doing so, the order threatens irreparable harm to national security and the public interest by injecting added burdens and dangerous confusion into the conduct of military operations abroad during an active armed conflict.

Second, the worldwide injunction exceeded the court's authority. It was

improperly entered against the President as Commander-in-Chief in his conduct of ongoing military operations. The injunction thereby intrudes upon military operations in the ongoing armed conflict against al-Qaeda, the Taliban, and associated forces, an area where courts should stay their hand. It was also issued as a worldwide injunction that limited the President's conduct with respect to anyone in the world, in a case that is not a class action, itself a reversible error even in cases that have no connection to national security and the conduct of armed conflict abroad.

Third, the court has enjoined wholesale an Act of Congress, but it is well established that Acts of Congress are presumed constitutional; enjoining them causes institutional harm; and they should remain in effect pending a final decision on the merits by the Supreme Court. This must be true especially in law that governs military operations abroad.

Finally, as we explained, a stay will cause no harm to plaintiffs because none of them face any threat of military detention under Section 1021 of the NDAA (or the AUMF for that matter) based on their stated activities. Even if it plaintiffs' claim otherwise had merit, which it does not, the court had no authority to enter a worldwide injunction extending beyond the particular plaintiffs in this case.

ARGUMENT

Given the fact that plaintiffs have filed their opposition to the government's

stay at midnight, just hours before the submission of the motion to this Court, we do not here attempt to address plaintiffs' opposition in detail. Instead, we address just two points in plaintiffs' filing that we did not specifically discuss in our stay motion.

First, plaintiffs are mistaken in arguing that government did not first seek relief in the district court under Federal Rule of Appellate Procedure 8(a)(1). See Opposition at 36. After the court entered its injunction, the government promptly sought a stay in district court, filing a stay motion on the morning of September 14, 2012 that requested both a stay pending appeal and an administrative stay to give the court time to resolve the issue of the stay pending appeal. *See* Motion, Docket Entry 64 (filed September 14, 2012). The district court immediately denied the government's request for an immediate administrative stay, as plaintiffs acknowledge. *See* Order, Docket Entry 68 (entered September 14, 2012) ("IT IS HEREBY ORDERED that the Government's request for an immediate interim stay is DENIED"). That denial meant the government lacked any timely relief from the district court for harm that was immediate, thereby requiring the government to seek relief in this court immediately. Further, that denial of the request for an administrative stay was in itself sufficient to satisfy the obligations of Rule 8 in these circumstances. *See* Fed. R. App. P. 8(a)(2)(ii) (in appellate stay motion, the movant must "state that, the motion having been made, the district court denied the motion or *failed to afford the relief requested*") (emphasis added). Here, the district court

"failed to afford the relief requested" by denying the government's administrative stay request. Fed. R. App. P. 8(a)(2)(ii). That necessitated the immediate filing of a motion for relief in this Court.

Further, the district court's subsequent actions have made clear that there is no remaining question concerning Rule 8. Once the government had filed its motion in this Court and this Court had granted an administrative stay, the district court determined that it would not act on the government's motion to stay pending appeal. *See* Chambers Email (Sept. 18, 2012) (attached as Exhibit 1) ("All issues, including the stay, are now before the Second Circuit. Nothing further should be filed in this Court until further notice"). Thus, the district court has effectively denied the government's request for a stay pending appeal by first denying the interim stay, and then determining that it would not rule on the government's request for a stay pending appeal. Finally, contrary to plaintiffs' assertion that the government "neglected to inform this Court" about the pace of district court proceedings (Opposition at 36), the government advised this Court that the district court "indicated informally that it would not resolve the stay motion until at least September 19." Mot. at 10. The government, however, needed immediate relief from the district court injunction. The requirement under Rule 8 that the government first seek relief from the district court has therefore been satisfied.

Second, plaintiffs are mistaken that the government's stay motion required a

supporting factual affidavit in these circumstances. Rule 8 provides that a stay motion "must . . . include . . . originals or copies of affidavits or other sworn statements supporting facts subject to dispute." Fed. R. App. P. 8(a)(2)(B)(ii). This rule provides for affidavits to assist the court in resolving factual disputes, but does not require them. As this Court has explained, a declaration is needed "'if the facts are subject to dispute.'" *Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1103 (2d Cir. 1987) (quoting version of Fed. R. App. P. 8(a) then in effect). And this Court has granted a stay pending appeal in the past where an act of Congress has been invalidated, without requiring an affidavit. *See*, *e.g.*, *Acorn v. United States*, 618 F. 3d 125, 133 (2d Cir. 2010); *Acorn*, Motion for Stay Pending Appeal, No. 10-992 (2d Cir. Filed March 31, 2010). Here, the dispute over the impact of the district court's order is legal, not factual. The institutional harm to the President and Congress is well-established, as we explained in our motion (pp. 13-14, 19-20). The confusion that the court's order will cause for military commanders in the field and detention practices in areas of active hostilities is a result of the district court's ambiguous legal ruling that suggests a threat of contempt for following the government's long-established interpretation of the AUMF. This harm is self-evident and not seriously disputed by plaintiffs as a factual matter. Instead, plaintiffs have argued that the court order has a lesser impact and is not ambiguous. *See* Opposition at 3 ("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"). We have explained, however, why the district court's order addressing the scope of the AUMF, combined with its threat of contempt should the military utilize that AUMF authority, is harmful. The prospective impact is simple to understand as a matter of law: if military forces in the field confront an individual who poses a threat to them, but cannot immediately determine that person is "part of" al-Qaida or the Taliban, the injunction and accompanying order rejecting authority under the AUMF and inviting efforts to challenge it in contempt proceedings threatens to significantly complicate the response by U.S. forces to that threat. Thus, this is not a case where affidavits are needed for this Court to conclude that a stay is warranted.

CONCLUSION

For the foregoing reasons and for the reasons explained in our stay motion, the Court should stay the district court's permanent injunction entered on September 12, 2012, pending final resolution of the government's appeal.

Respectfully submitted,

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SEPTEMBER 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 28the day of September 2012, I caused this reply to be filed with the Court electronically by CM/ECF. I certify that the following counsel in this case who is a registered CM/ECF user will be served by the appellate CM/ECF system:

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10 Braeburn Drive
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/s/ August E. Flentje
August E. Flentje
Attorney for Defendants-Appellants

Exhibit 1

Email from Chambers, September 18, 2012:

From: ForrestNYSDChambers
<ForrestNYSDChambers@nysd.uscourts.gov>
To: bruceafran <bruceafran@aol.com>
Sent: Tue, Sep 18, 2012 11:06 am
Subject: Re: Hedges v. Obama, 12 Civ. 331: motion for stay

Good Morning,

All issues, including the stay, are now before the Second Circuit. Nothing further should be filed in this Court until further notice.

Thank you.