12-3176, 12-3644

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTOPHER HEDGES, ET AL.
Plaintiffs-Appellees,

v.

BARACK OBAMA, ET AL.
Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT IN SUPPORT OF NEITHER PARTY AND IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether section 1021 of the National Defense Authorization Act of 2012 authorizes military detention of individuals arrested in the United States.

INTEREST OF THE AMICI CURIAE[1]

The Center for National Security Studies (the "Center") is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., founded in 1974 to ensure that civil liberties and human rights are not eroded in the name of national security. The Center works to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government. The Center has long worked to secure due process and fair trial protections. After the attacks of September 11, 2001, the Center brought a lawsuit challenging the secret arrests of hundreds of individuals in the United States. It also filed amicus briefs in the case brought by Jose Padilla challenging his military detention without charge, including in this Court in 2003, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), and in the Supreme Court in 2004, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). At the same time, the Center recognizes the legitimacy of law of war detention for individuals, including citizens, seized overseas fighting U.S. forces or allies, as described in *Hamdi v.*

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici and their counsel made any monetary contribution toward the preparation or submission of this brief. A motion for leave to file this brief is submitted herewith.

Rumsfeld, 542 U.S. 507 (2004), providing that adequate due process protections exist to ensure that such individuals are, in fact, enemy combatants.

The Center has also worked on congressional initiatives concerning military detention, including giving testimony before the Senate Judiciary Committee in November 2001 and July 2008. Since the passage of the National Defense Authorization Act of 2012, Pub. L. No. 112-181, 125 Stat. 1298 (Dec. 31, 2011) (the "NDAA"), the Center has worked to educate the public about the limits of the detention authority set forth in that Act. *See*, *e.g.*, Kate Martin, *A Peculiar and Pernicious Myth: Domestic Military Detentions*, THE HUFFINGTON POST (Jan. 1, 2012) (visited Nov. 12, 2012) < http://www.huffingtonpost.com/kate-martin /defense-authorization-act_b_1201668.html>; Kate Martin, Letter to the Editor, THE NEW YORK TIMES BOOK REVIEW (Apr. 28, 2012) (visited Nov. 12, 2012) < http://www.nytimes.com/2012/04/29/books/review/military-detention.html>.

The Constitution Project ("TCP") is a constitutional watchdog that creates coalitions of respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. TCP's Liberty and Security Committee—a bipartisan, blue-ribbon group of prominent Americans— was formed in the aftermath of the 9/11 attacks, and works to promote both national security and civil liberties. In July 2004, this committee issued a *Report on Post-9/11 Detentions* in which its signatories urged that "[a]ny detention of a citizen or

non-citizen in the United States must be expressly authorized by congressional statute or by the law of war," and that "[t]he courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law." Liberty & Security Initiative, The Constitution Project, Report on Post-9/11 Detentions 20 (2004) <http://www.constitutionproject.org/pdf /report_on_post_9_11_detentions.pdf>. In addition, TCP's bipartisan War Powers Committee's released *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, a report analyzing the respective powers of all three branches of government during wartime. TCP's report is available online at <http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf>.

TCP has appeared regularly before federal courts in cases raising important constitutional questions. *See, e.g.*, *United States v. Jones,* 132 S. Ct. 945 (2012); *Boumediene* v. *Bush*, 553 U.S. 723 (2008). In particular, TCP has participated as *amicus curiae* in a variety of cases addressing the scope of the United States' detention authority, including at several stages of the litigation in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Padilla v. Hanft*, 547 U.S. 1062 (2006); and *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff journalists and activists allege that they are subject to the threat of military detention under section 1021 of the NDAA, which provides that Congress affirms that the authority of the President to use all "necessary and appropriate force" under the Authorization for Use of Military Force of September 2001, Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2011) ("AUMF"), the statutory authority for the ongoing war in Afghanistan, includes the authority for the armed forces to detain persons pending disposition under the law of war. Section 1021(e) expressly states that section 1021 shall not be construed "to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." NDAA § 1021(e).

Nevertheless, the district court found that plaintiffs were subject to the threat of military detention under the NDAA and that such military detention would be unconstitutional, and the court entered a wide-ranging injunction. As the government's brief makes clear, Plaintiffs' First Amendment protected activities that form the basis for their suit cannot be the basis for military detention pursuant to the law of war under either the NDAA or the AUMF. Amici file this brief to make the additional point that neither the NDAA nor the AUMF authorizes military detention of individuals seized in the United States. As required by

canons of statutory construction, this Court should construe the statutes to avoid constitutional conflict and to protect individual rights, and it should also recognize the history of executive branch practice under these statutes. The lack of statutory authority for military detention of individuals seized in the United States is an additional basis for resolving this case.

I. Neither the NDAA nor the AUMF Authorizes Military Detention of Individuals Seized in the United States.

The District Court's expansive reading of section 1021 and the underlying AUMF violates two related principles of statutory construction. First, in all cases, federal courts must seek to avoid interpreting statutes in a way that will raise difficult constitutional questions. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932). Second, in cases involving deprivations of liberty by the executive branch that are allegedly authorized by Congress, courts require a clear statement from Congress that it intended to authorize these deprivations before finding the existence of such authority. *See, e.g., Greene v. McElroy*, 360 U.S. 474, 507 (1959). Neither section 1021 nor the AUMF contains any statement, much less a clear statement, authorizing the military detention of individuals seized in the United States.

A. The District Court's Expansive Reading of Section 1021 and the AUMF Violates Basic Principles of Statutory Construction.

There can be no doubt that the district court's interpretation of section 1021 raises a difficult constitutional question. Although the Supreme Court has not ruled on whether the AUMF provides authority for the military detention of individuals seized in the United States, five Justices have expressed skepticism that such authority would be constitutional. *See infra* at 12. Amici contended in *Padilla* that the Executive lacks such power for military detention of individuals arrested within the United States. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (finding no congressional authorization for military trial of alleged conspirator in Illinois despite the fact that military force had been authorized by Congress and habeas corpus had been suspended for prisoners of war); *but see Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. den.*, 547 U.S. 1062 (2006); *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated*, 555 U.S. 1220 (2009). But the crucial point here is that the district court had an obligation to avoid deciding this constitutional question if possible by reading section 1021 as not authorizing plaintiffs' detention. *See, e.g., Crowell*, 285 U.S. at 62 ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *Skilling v. United States*, 130 S. Ct. 2896, 2929-2930

(2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction"). Nothing in section 1021 or the AUMF compels a reading authorizing military detention of individuals arrested in the United States. For this reason alone, the district court should not have construed section 1021 and the AUMF to authorize military detention of such individuals.

The district court also should have applied the clear statement requirement when considering whether statutory authority exists to deprive individuals of their liberty, especially when the deprivation ignores the requirements of the Fifth and Sixth Amendments and substitutes military authority for civil power in the United States. Such authority cannot be inferred without a clear statement. *See, e.g., Greene*, 360 U.S. at 507.

> Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.

Id. (internal citations omitted).

This principle holds especially true in cases where Congress has authorized military force. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1945), for example, the Supreme Court rejected the government's argument that a federal statute

authorizing the Governor of Hawaii to place Hawaii under martial law necessarily included the power to subject civilians to trial before military tribunals. Although the power to impose martial law "authorize[d] the military to act vigorously for the maintenance of an orderly civil government …," the Court declined to read the statute as authorizing "the supplanting of courts." *Duncan*, 327 U.S. at 324; *see also id.* at 330 (Murphy, J., concurring) ("The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed [even] through a reasonable fear of military assault"). As the Supreme Court said in *Ex parte Endo*:

> In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [civil] liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Ex parte Endo, 323 U.S. 283, 300 (1944); *see also Coleman v. Tennessee*, 97 U.S. 509, 514 (1879) ("With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect").

B. Congress Has Not Authorized the President to Use the Military to Detain Without Charge or Trial Persons Who Are Seized in the United States.

Neither the AUMF nor the NDAA contains any statement, much less a clear one, that Congress has authorized military detention of individuals seized in the United States, bypassing civilian courts. Indeed section 1021(e) of the NDAA specifically provides that it does not affect any detention authority over individuals in the United States. The legislative history of section 1021(e) confirms that it was intended to clarify that section 1021 does not expand military detention authority over U.S. citizens and others arrested in the United States. The subparagraph was added in an amendment proposed by Senator Dianne Feinstein in response to public outcry concerning uncertainty as to the application of section 1021 to people arrested in the United States. As Senator Carl Levin, Chair of the Senate Armed Services Committee, stated in a floor debate: "Those who say we have written into law a new authority to detain American citizens until the end of hostilities are wrong. Neither the Senate bill nor the conference report establishes new authority to detain American citizens - or anybody else." 157 Cong. Rec. S8632, S8633 (Dec. 15, 2011).

And no such authority is contained in the AUMF. The AUMF, enacted as an immediate response to the September 11th terrorist attacks on the United States, provided the President with the authority only

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a). The AUMF is thus a general authorization for the use of military force, and it does not explicitly authorize the President militarily to detain persons captured in the United States without charge or trial.

The AUMF fails to satisfy the clear statement mandate because nothing in the text comes close to authorizing the President to subject persons seized in the United States to military detention. As this Court held in *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004):

> The plain language of the [AUMF] contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by [18 U.S.C. § 4001(a)] and the "clear," "unmistakable" language required by *Endo*. While it may be possible to infer a power of detention from the [AUMF] in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the [AUMF] 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.

For the reasons already recognized by this Court in *Padilla*, the Supreme Court's plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the AUMF implicitly authorizes certain military detentions, should be read only to apply to

military detention of persons taken prisoner on a foreign battlefield, inside a zone of active conflict. *Hamdi* does not extend to the military detention of individuals seized in the United States, far from any foreign battlefield.

II. The Executive Branch History with Respect to Military Detentions of Individuals Arrested in the U.S. Shows that Such Detentions Are Not "Necessary and Appropriate."

In reaching its decision, the district court failed to apply the principles of statutory construction addressed above, and it also failed to address whether detentions of individuals in Plaintiffs' position could be "necessary and appropriate" under the AUMF. The history of post 9/11 arrests and detention of suspected al-Qaeda members seized in the United States shows that military detention of individuals arrested in the United States is neither necessary nor appropriate, and is therefore not authorized under the AUMF.

In 2002, the Bush Administration placed Jose Padilla, a U.S. citizen, into military detention. In 2003, it also placed Ali al-Marri, a legal non-permanent resident, into military detention. In the succeeding nine years, the Executive Branch has not placed any other person arrested in the United States in military detention. Not even the "underwear bomber," from al-Qaeda in the Arabian Peninsula, whose only contact with the United States was a failed attempt in December 2009 to blow up an airplane that eventually landed in Detroit airport, was placed in military detention. *See* Department of Justice, Office of Public

Affairs, Press Release, "Umar Farouk Abdulmutallab Sentenced to Life in Prison for Attempted Bombing of Flight 253 on Christmas Day 2009" (Feb. 16, 2012) (visited Nov. 12, 2012) < http://www.justice.gov/opa/pr/2012/February/12-ag-227.html>.

When confronted with habeas challenges brought by Padilla and al-Marri, the Bush Administration argued in court that it had the authority to militarily detain persons seized in the United States. It claimed such power under both the AUMF and the President's constitutional authority under Article II. The Supreme Court never ruled on the merits of Padilla's case, but a majority of the Justices expressed skepticism that an individual in his position could be subject to military detention without criminal trial. *Padilla*, 542 U.S. at 465 n.8 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) ("I believe that … the [AUMF] does not authorize – the protracted, incommunicado detention of American citizens arrested in the United States"); *Hamdi*, 542 U.S. at 572 (Scalia, J., joined by Stevens, J., dissenting) ("I do not think [the AUMF] even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns"). The Fourth Circuit upheld Padilla's detention (*see Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005)), but when he petitioned for certiorari in the Supreme Court, the government transferred him out of military detention for criminal trial in federal court. *See Hanft v.*

Padilla, 546 U.S. 1084 (2006) (granting government's motion to transfer Padilla to civilian custody). When Padilla continued to seek Supreme Court review of the legality of his military detention, the government successfully avoided such review, contending that his challenge to his military detention was moot. *See Padilla v. Hanft*, 547 U.S. 1062 (2006) (Kennedy, J., concurring in the denial of certiorari).

When President Obama took office, al-Marri's habeas petition was pending before the Supreme Court. On the second day of his administration, President Obama issued an executive memorandum ordering review of the case. Memorandum for the Attorney General, Subject: Review of the Detention of Ali Saleh Kahlah al-Marri (Jan. 22, 2009) (visited Nov. 12, 2012) < http://www.whitehouse.gov/the-press-office/ReviewoftheDetentionofAliSalehKahlah>. Before the new administration had to file a brief in the Supreme Court, the government announced that al-Marri, like Padilla, would be moved to civilian criminal court. *See al-Marri v. Spagone*, 555 U.S. 1220 (2009). The Supreme Court dismissed al-Marri's petition as moot and vacated the Fourth Circuit's decision upholding his military detention. *Id.*

John Bellinger, who was Legal Advisor to the State Department and counsel to the National Security Council in the Bush Administration, subsequently stated that the military detentions of Padilla and al-Marri were a "failed experiment." *See*

Jane Mayer, *The Hard Cases: Will Obama Institute a New Kind of Preventive Detention for Terrorist Suspects?*, THE NEW YORKER (Feb. 23, 2009). Since al-Marri's transfer out of military detention, senior administration officials have repeatedly stated that the government will prosecute all suspected terrorists seized in the United States in criminal court.

> Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. As they should be. The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country. Nor should it.

John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the New York University School of Law Brennan Center Symposium: Intelligence Collection and Law Enforcement: New Roles, New Challenges (Mar. 18, 2011) (visited Nov. 12, 2012) < http://www.brennancenter.org/content/resource/remarks_by_john_brennan_at_brennan_center_symposium/>.

> Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our American heritage – reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a *posse comitatus* unless expressly authorized by Congress or the Constitution.

Jeh C. Johnson, "National Security Law, Lawyers and Lawyering in the Obama Administration," Dean's Lecture at the Yale Law School (Feb. 22, 2012) (visited Nov. 12, 2012) < http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf>.

While the government eschewed military detention of persons arrested in the U.S. after 2003, the civilian court system has proven capable of handling the prosecution of dozens of individuals arrested in the U.S. for terrorism related offenses. The President has affirmed that the security of the United States has been protected through this approach that relies upon criminal prosecutions:

> Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear.

Remarks by the President on National Security, White House Press Release (May 21, 2009) (visited Nov. 13, 2012) < http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

In light of this history, there was no basis for the district court's determination that plaintiffs could be subjected to military detention. The AUMF authorizes the use of military force, of which military detention is a component, only as "necessary and appropriate." The record of Executive branch practice since enactment of the AUMF – military detention abandoned as a "failed experiment," followed by universal and effective use of civilian criminal court

proceedings to prosecute al-Qaeda suspects found within the United States -- demonstrates that the use of military detention of persons arrested in the United States is neither necessary nor appropriate.

CONCLUSION

This Court should construe section 1021 and the AUMF so as to avoid unnecessary constitutional issues and in accordance with the clear statement rule. Neither section 1021 nor the AUMF authorizes military detention of individuals arrested in the United States. Moreover, the government's short-lived foray into the area of domestic military detention has proven to be a "failed experiment," and cannot be regarded as a "necessary and appropriate" use of force under the AUMF. In short, section 1021 and the AUMF do not subject journalists and political activists in the United States to the risk of military detention.

Dated: November 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that I will cause 6 paper copies of this brief to be filed with the Court.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,614 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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