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THE CONTINUING GROWTH OF EXECUTIVE POWER:

THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2012

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The National Defense Authorization Act (NDAA) of 2012 has become one of the Obama presidency's most controversial pieces of legislation. Nominally nothing more than an annual budgetary expenditure to fund the United States' armed forces, the bill also contains a section on counterterrorism (Subtitle D) that includes two sections (1021 and 1022) authorizing the indefinite military detention of terror suspects. These provisions were initially "the obscure province of a small group of national security law nerds,"[1] but have since become the subject of a very public national debate. Critics call the bill "truly pernicious legislation,"[2] "one of the greatest rollbacks of civil liberties in the history of our country,"[3] "a frightening grant of immense and unconstitutional power to the executive branch,"[4] and "tyranny for the sake of tyranny."[5] But others argue that "nobody who is not subject to detention today will become so when the NDAA goes into effect"[6] and "the NDAA 2012 is not the constitution-destroying bill that many fear."[7]

I argue here that the relevant provisions do not create expansive new powers for the government, but only because the presidency has already effectively claimed those powers. Yet they are indeed pernicious not only because of their specific effects, but also because they demonstrate congressional complicity in the ongoing unbalancing of the American system of checks and balances. The provisions 1) provide a clear congressional authorization for the indefinite military detention of American citizens while expanding the scope of persons who may be detained, and 2) transfer the authority and responsibility for responding to domestic crimes of terrorism from the civilian authorities to the military. In the bigger picture, the bill fails to address and reign in presidential claims to have the inherent authority to detain terror suspects in military prisons without the benefit of trial or legal counsel. This further shifts unchecked authority to the executive branch.

THE INDEFINITE DETENTION OF AMERICAN CITIZENS

The debate over the indefinite detention of American citizens began when the Bush administration detained Yaser Hamdi, who was captured in Afghanistan and initially imprisoned at Guantanamo Bay. After determining that he was an American citizen, he was moved to a military prison inside the United States. When Hamdi challenged his detention in the civilian courts, the Bush administration made two distinct legal justifications for its authority to detain citizens. The first claim was that the grant of executive power in Article II of the Constitution gives the president the inherent authority to detain citizens. Worried that the Court would not accept that argument, the administration also claimed that Congress had authorized the indefinite detention of enemy combatants through the post-9/11 Authorization

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to Use Military Force (AUMF) joint resolution. Although this document makes no mention of indefinite detention, it does authorize the president to use all "necessary and appropriate force" against those who had participated in or aided the 9/11 attacks.[8]

Whether indefinite military detention is "necessary and appropriate" is questionable, given that Congress did not explicitly suspend the right of *habeas corpus*, as the Constitution allows. But Congress did not challenge the administration's claim, and the Supreme Court accepted it. Since the latter agreed that Congress had implicitly authorized indefinite detention with the AUMF's "all necessary and proper force" clause, it did not need to consider the administration's first claim. It thus left this particular assertion unresolved and unrebutted.

Given this background, the NDAA is both much *less* a new extension of power than its critics claim, and *more* of one than its supporters claim. Given that the Supreme Court has already determined that Congress can authorize the president to indefinitely detain citizens who are terrorism suspects, the NDAA's authorization of indefinite detention does not extend executive authority. It does, however, codify an authority that formerly depended upon the interpretation of a much broader statutory language, a codification that strengthens the executive's claim to that power. The legislation also expands the range of persons who are subject to military detention (with no clear limits on who may be held) and *mandates* the detention of suspects who are non-citizen legal residents. Most frightening of all, the NDAA's legislative history signals the intent of many Congressmembers to eliminate *all* civilian due process protections for terror suspects and make them wholly subject to military authority, even if they are American citizens operating inside the United States.

The Detention of Citizens

There is no doubt that the NDAA authorizes the indefinite military detention of American citizens regardless of where they are found. Subtitle D, Section 1021, subsection (a) reads:

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force…includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

Subsection (b) defines covered persons as:

> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners,

> *including any person who has committed a belligerent act or has directly supported such hostilities in the aid of such enemy forces.*" (emphasis added)

There is no exemption for American citizens, as we can see by contrasting this section with Section 1022, which mandates military detention for all persons "captured in the course of hostilities authorized by" the AUMF. Subsection (b) (1), however, does contain an explicit exception for citizens:

> The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

A standard principle of legal interpretation is that the *presence* of a specific exception in one section of a law means that its *absence* in another section is evidence that Congress intended there to be no exception there. By including an exception for American citizens in Section 1022, Congress demonstrated its awareness of the potential to exclude them. Therefore, the failure to include a similar exception in Section 1021 means that they purposely chose not to make such an exception. American citizens, then, while not subject to the *mandatory* detention required for foreign terror suspects, are subject to indefinite detention at the *discretion* of the executive branch.

On a more serious note, it also means there are no definitive limits on who is subject to detention.

Both supporters and opponents of the NDAA agree that it applies to American citizens. In a *Chicago Tribune* op-ed, NDAA opponents Abner Mikva, William S. Sessions, and John Gibbons (two former federal judges and a former FBI director) stated that the NDAA would make indefinite detention "applicable to virtually anyone picked up in anti-terrorism efforts—including U.S. citizens."[9] Senator Lindsey Graham (R-SC), one of NDAA's most vocal congressional supporters, agreed that "the statement of authority to detain, does apply to American citizens."[10] Furthermore, when President Obama signed the NDAA into law, he issued a signing statement in which he declared that he would "not authorize the indefinite military detention without trial of American citizens."[11] This clearly indicates that he believes he does have the authority, but is choosing not to exercise it.

The Expansion of Covered Persons

Despite the claim that "nobody who is not subject to detention today will become so when the NDAA goes into effect,"[12] the language of Section 1021 sub-section (b), paragraph (2) (as shown above) does subtly expand the range of persons who can be detained. Paragraph (2) covers not only members of al-Qaeda and the Taliban, but anyone who "substantially supported" either of those groups or some "associated forces." The vagueness of the term "substantially supported" reflects the impossibility of trying to name every group that might engage in hostile action against the United States. On a more serious note, it also means there are no definitive limits on who is subject to detention.

Law professor Jonathan Hafetz, who has represented military detainees in court, explained the dangers of this vague language in an interview with political commentator Glenn Greenwald. Hafetz notes that the term "associated forces" would justify the ongoing detention of five Uighurs at Guantanamo Bay[13] for their alleged membership in a Uighur independence organization—whose only interest is seeking independence from China—that received training assistance sponsored by al-Qaeda or the Taliban.[14] He also remarks upon the potential for innocent people to be swept up under this broad language.

> Could the military arrest and detain a person arrested at his home in say Cleveland, Ohio, for writing a $20,000 check to a group that supported AQ? Or

> a doctor in New Jersey who sent medical supplies to an organization in Ethiopia, for example, that provided humanitarian aid to a group in that country that was deemed to be affiliated with AQ? The answer is probably yes, under the most aggressive views of the [NDAA].[15]

Under the Supreme Court's ruling in the *Hamdi* case, any detained person can challenge his/her detention in the civilian courts. But given the very broad definition of "covered persons," it may be impossible for a suspect to demonstrate that he/she falls outside the scope of this term.

The one likely exception to this rule is the purely domestic terrorist who has no connection with foreign terrorist groups; for example a person like Timothy McVeigh. Section 1021, subsection (b), paragraph (2) specifies that covered persons are those who were members or substantial supporters of "al-Qaeda, the Taliban, or associated forces that are engaged in hostile activities against the United States" or who "directly supported such hostilities in aid of *such enemy forces*" (emphasis added). While expansive readings of the law are not unknown, it would be too much of a stretch to claim that NDAA authorizes the military to capture and indefinitely detain, for example, militia groups associated with the Christian Patriot movement.

REPLACING CIVILIAN JUDICIAL AUTHORITY WITH MILITARY AUTHORITY

Hafetz's example of a humanitarian-minded doctor in New Jersey being arrested demonstrates that these provisions are designed to operate against American citizens on American soil. In the words of legal scholar Joanna Mariner, the NDAA's detention provisions "dramatically restrict reliance on civilian justice options, and ensure that terrorism cases are handled by the military."[16] This is not an unintended side effect, for the clearly expressed intent of those who support these provisions is to eliminate the role of the civilian justice system and replace it with military-controlled operations on American soil against American citizens. According to Senator Graham, "the homeland is part of the battlefield"[17] and "homegrown terrorists are becoming the threat of the 21st century."[18] Senator John McCain (R-AZ) agreed, saying that "the war on terror extends to us at home."[19] Supporters went so far as to propose an amendment that would have required *all* terror suspects to be held in military custody, thereby ending the currently common practice of turning them over to civilian courts.

While it is true that the terrorists' actions do not stop at the country's border, the question remains as to whether militarizing domestic anti-terrorism efforts is either appropriate or necessary. Some supporters think so, such as Senator Kelly Ayotte (R-NH), who argued against bringing suspected terrorists into the criminal justice system because of the importance of interrogating them for purposes of gathering intelligence. According to her, the Fifth Amendment right against self-incrimination (commonly called the Miranda right) could hinder that purpose.

> Common sense will tell you [that] telling a terrorist they have the right to remain silent is counter to what we need to do to protect Americans. We do not want them to remain silent, we want them to tell us everything they know.[20]

Graham was even more explicit about this concern.

> I wish to make sure we understand the difference between fighting a war and fighting a crime. When it comes to al-Qaida operatives, whether they are captured in the United States or overseas, the first thing we should be doing as a nation is trying to find out what that person knows about the attack

> in question or future attacks. When we capture an enemy prisoner, the first thing our military does is turn the person over to the military intelligence community for questioning.[21]

But this argument fails on two grounds. First, the value of interrogation is not unique to terrorism but is equally relevant to criminal law cases, particularly when a suspect may have accomplices or may have information about other crimes he/she has committed. This is particularly true when the person is a serial murder or rapist. Senator Ayotte's argument, however, implies that these types of crimes are critically different from, and less serious than, terrorist acts.

Second, we have had ample evidence since 9/11 and even before that the criminal justice system is very effective at handling terrorism suspects. Domestic terrorists Timothy McVeigh and Eric Rudolph were both convicted in the civilian criminal justice system, as were al-Qaeda affiliated terrorists Richard Reid and Umar Farouk Abdulmutallab. According to the Department of Justice, civilian courts have obtained over 300 convictions for terrorism and terrorism-related crimes since 2001.[22] Additionally, the military has frequently transferred suspected terrorists (e.g., Jose Padilla, Ali Saleh Kahlah al-Marri, and Khalid Sheikh Mohammed) from military control to the civilian justice system. There simply is no evidence that the criminal justice system fails to deal appropriately with terrorists who commit actions that—significantly—have been defined as crimes by the same Congress that now proposes to replace civilian justice with military authority.

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Beyond the militarization of justice being unnecessary, the Obama administration—which initially threatened to veto the bill because of these provisions—has consistently argued that this trend would actually be counterproductive. The Office of Management and Budget released a statement opposing the NDAA's militarizing effect on the grounds that it would hinder effective efforts to combat terrorism.

> Specifically, the provision would limit the flexibility of our national security professionals to choose, based on the evidence and the facts and circumstances of each case, which tool for incapacitating dangerous terrorists best serves our national security interests.[23]

Likewise, FBI Director Robert Mueller sent a letter to Senate Armed Services Committee Chair Carl Levin arguing that the provision could "inhibit our ability to convince covered arrestees to cooperate immediately, and provide critical intelligence."[24]

Although Obama ultimately dropped his veto threat, this unnecessary militarization remains such a significant part of the legislation that he has chosen to address it twice. In his signing statement, he "reject[s] any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat."[25] He also issued a policy directive outlining procedures for implementing the mandatory military detention provision that takes advantage of Section 1022 (a) (4)'s "waiver for national security" provision to reject the "inflexible requirement" of mandatory military detention for non-citizens.[26] Unfortunately, his implementation directives do not constrain future presidents from militarizing what should properly be a civilian law enforcement function. This poses a considerable threat to our civil liberties.

CONGRESSIONAL COMPLICITY IN EXPANDING EXECUTIVE POWER

The oddest paragraph in the detention provisions is Section 1021, subsection (e), which reads:

> Nothing in this section shall 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.

It is uncommon for Congress to write laws that provide specific authorization for certain activities and then add the disclaimer that it should not be interpreted as changing the law in any way. This unusual paragraph, the consequence of a legislative compromise, refers discretely to the question raised by President Bush in the *Hamdi* case: Does the president have the inherent executive power to militarily detain American citizens without the benefit of trial? The Supreme Court has neither rebutted nor confirmed this claim. In drafting the NDAA, Congress had the opportunity to challenge it but chose not to do so. Instead, it adopted this odd language and thereby implicitly acquiesced to the executive's dubious claim.

The President's Claim of Inherent Executive Authority to Militarily Detain American Citizens

The background to this is the case of Yaser Hamdi, an American citizen captured in Afghanistan who was alleged to have been fighting with the Taliban against the United States. When he challenged his detention, the Bush administration not only claimed its inherent executive authority to detain him, but also claimed the authority to do so under the AUMF's all "necessary and appropriate force" language. This approach invoked a structure for interpreting the legality of executive action devised in the 1952 Supreme Court case of *Youngstown Sheet and Tube Company v. Sawyer*, more commonly known as the "Steel Seizures Case." The case challenged President Truman's temporary nationalization of the steel industry in order to prevent a strike that would have hindered production during the Korean War. In a concurring opinion, Justice Jackson defined three different situations in which a president might exercise authority.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate….
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain….
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter….[27]

In claiming the inherent executive authority to order detention, Bush was operating in that "zone of twilight"; however, because he relied on the AUMF he succeeded in moving his authority to "its maximum." Since the Supreme Court accepted the claim of a congressional grant of authority, it did not need to examine the less certain claim of inherent executive power, the "lowest ebb" claim.

Having the congressionally granted and judicially approved authority in hand, neither Bush nor his successor Barack Obama needed to reiterate the claim of inherent authority. Consequently, this claim remains unsettled because it has been neither confirmed nor rejected. It is not surprising that Bush, as its originator and a supporter of the Unitary Executive theory, never renounced it. But Obama, who criticized it as a candidate, has also not clearly rejected it as president. While publicly stating that he *does* base his detention authority on the AUMF, he has not taken the further step of stating that the president *must* rely on a congressional grant of authority.

Congress' failure to address this claim represents a failure of the American system of checks and balances. As explained by James Madison in "Federalist 51," competition between the branches of government for power was to be "the means of keeping each other in their proper places."[28] Madison would have expected Congress to clearly reject the president's claim of unilateral authority to order the military detention of American citizens to preserve its own authority. While Congress cannot make the authoritative decision as to whether that unilateral authority exists or not, it could have placed the president's claim at its "lowest ebb," in case of a future challenge before the Supreme Court. But Congress has carefully avoided doing so.

In fact, the detention provisions' legislative history can fairly be read to indicate implied Congressional acquiescence to the claim. The House never attempted to address the question of inherent executive authority, and the Senate, upon being asked, promptly refused to do so as well. Senator Dianne Feinstein (D-CA) offered amendment 1126, which would have denied the executive the authority to indefinitely detain citizens. In its entirety, the amendment reads:

> On page 360, between lines 21 and 22, insert the following:
> (e) Applicability to Citizens. The authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of the hostilities.[29]

Nominally, the amendment's purpose was to clarify the meaning of the AUMF with regard to the detention of citizens captured within the United States, as explained by Feinstein:

> The disagreement arises from different interpretations of what the current law is. The sponsors of the bill believe that current law authorizes the detention of U.S. citizens arrested within the United States…
> Others of us believe that current law, including the Non-Detention Act that was enacted in 1971, does not authorize such indefinite detention of U.S. citizens arrested domestically. The sponsors believe that the Supreme Court's Hamdi case supports their position, while others of us believe that Hamdi, by the plurality opinion's express terms, was limited to the circumstance of U.S. citizens arrested on the battlefield in Afghanistan, and does not extend to U.S. citizens arrested domestically. And our concern was that section 1031 of the bill as originally drafted could be interpreted as endorsing the broader interpretation of Hamdi and other authorities.[30]

But beneath this simple effort of clarification, the amendment challenged the presidential claim of inherent authority to detain regardless of citizenship. Had it been adopted, presidents could not have claimed that Congress authorized the detention of American citizens, and the claim to have the authority to do so would thus have rested solely on their claim of inherent executive authority.

But given this opportunity to both protect the civil liberties of American citizens and challenge the presidential claim to have inherent detention authority independent of Congress, the Senate rejected the amendment and instead adopted the language stating that "nothing in this section shall be construed to affect existing law… relating to the detention of United States citizens [or] lawful resident aliens of the U.S." This compromise effectively reinforces the presidential claim to have inherent and unilateral authority to militarily detain American citizens. Feinstein, the sponsor of the compromise language, was explicit about this purpose.

> So our purpose in the second amendment, number 1456, is essentially to declare a

> truce, to provide that…this bill does not change existing law, whichever side's view is the correct one. So the sponsors can read Hamdi and author authorities one broadly, and opponents can read it more narrowly, and this bill does not endorse either side's interpretation, but leaves it to the courts to decide.[31]

By saying nothing of substance, the compromise has two levels of meaning. At the most visible level, it enables each side in the AUMF debate to hold on to its understanding of whether this joint resolution authorizes indefinite military detention of American citizens captured within the United States. But at a deeper level, the statutory language that would have challenged the presidential claim of being able to militarily detain any terror suspect anywhere, even American citizens on American soil, was rejected. This created an implicit congressional statement that the Congress does not object to the president's claim of independent power. As political commentator Glenn Greenwald argues:

> Even if…this bill changes nothing when compared to how the Executive Branch has been interpreting and exercising the powers of the old AUMF, there are serious dangers and harms from having Congress—with bipartisan sponsors, a Democratic Senate, and a GOP House—put its institutional, statutory weight behind powers previously claimed and seized by the President alone.[32]

The False Reassurance of Obama's Rejection of Military Detention for Citizens

The executive power provided by this legislation is an ongoing danger to Americans' civil liberty. First, although Obama has publicly declared that he will not use the power to detain American citizens, he insisted that the authority to do so be included in the NDAA. Second, the policies of one president have no authority over subsequent presidents, whereas any powers successfully claimed by them become precedents for future presidents.

Publicly, Obama has appeared to reject the military detention of both citizens and legal residents. In the statement issued when he signed the NDAA, he explicitly stated that he would "not authorize the indefinite military detention of Americans [because] doing so would break with our most important traditions and values as a Nation."[33] An earlier statement from the Office of Management and Budget, one that expressed concern about the language in the detention provisions, argued that "applying this military custody requirement to individuals inside the United States…would be inconsistent with the fundamental American principle that our military does not patrol our streets."[34] Finally, in his policy directive implementing Section 1022's detention provisions, Obama has taken advantage of sub-section (a) paragraph (4)'s national security waiver exception in order to waive the requirement of mandatory military detention for members of al-Qaeda and associated forces.

The executive power provided by this legislation is an ongoing danger to Americans' civil liberty.

But this appearance of concern for civil liberties is deceptive. In reality, his core concern appears to be less with the rights of Americans than with maintaining executive discretion, as demonstrated in that same OMB statement, which called the military custody provision a "restriction of the President's authority."[35] Senator Carl Levin (D-MI), Democratic Chair of the Senate Judiciary Committee, stated in the Senate debate that it was Obama himself who insisted that citizens be covered by the NDAA's detention provisions.

> I wonder whether the Senator is familiar with the fact that the language which precluded the application…to American

> citizens was in the bill we originally approved in the Armed Services Committee, and the administration asked us to remove the language which says that U.S. citizens and lawful residents would not be subject to this section. Is the Senator familiar with the fact that it was the administration which asked us to remove this very passage…and that we removed it at the request of the administration…?[36]

If Obama was sincere about not detaining citizens, as opposed to seeking maximum discretion for the executive branch, he could easily have supported, rather than opposed, the original language that would have protected them from being subject to indefinite detention.

Ultimately, however, Obama's executive branch policies matter less than the duly enacted laws. One president's signing statements have no authority over future presidents, and his successor can easily rewrite his administration's implementation procedures. There simply is no way for a current president to constrain future holders of the office *except* by rejecting legislation that grants unwise and unnecessary power. Ultimately, this is the one strategy Obama chose not to employ. Given the steady and unchecked growth of executive power over the past century, and the common belief that the war on terror is "a war without end,"[37] there is no reasonable basis for optimism that future presidents will confine themselves to less power than Congress is willing to grant them.

Perhaps it is fitting to reserve the last word for Alexander Hamilton, the first advocate of a strong executive. Even though he firmly believed that such leadership was crucial, he recognized the dangers of tyranny and particularly the risk that national security concerns posed to liberty. Today we would do well to remember his prescient warning.

> Safety from external danger is the most powerful director of national conduct. Even the ardent lover of liberty will, after a time, give way to its dictates. The ….continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.[38]

THE WAY FORWARD

All three branches of the federal government are complicit in this undermining of our constitutional rights: the executive branch for demanding the power of indefinite detention, the legislative branch for accommodating the executive's demands, and the judicial branch for not making a more definitive statement against indefinite detention in the Hamdi case. President Obama's role in adding indefinite detention of American citizens to the NDAA has already been made clear. And in a January 16, 2012 Republican presidential debate, Mitt Romney emphasized his support for indefinite detention, when asked whether he would have signed the NDAA into law:

> Yes, I would have … [P]eople who join al Qaeda are not entitled to rights of due process under our normal legal code. They are entitled instead to be treated as enemy combatants.[39]

Congress has the power in their hands to undo this encroachment on our rights, but they will respond only if the American public clearly demonstrates its opposition to the law. Continued vocal opposition cannot be silenced and is difficult to ignore. Fortunately there is bipartisan opposition to the NDAA's detention provisions. What we need now is for opposition groups from across the political spectrum to work in coordination with each other to demonstrate visibly that this is neither a partisan nor an ideological issue, but one on which the citizenry is united.

Finally, although "a cooperative judiciary is usually

ready to oblige if presidents need legal or constitutional warrant to achieve their policy objectives,"[40] the federal courts remain a crucial hope. On September 12 of this year, the U.S. District Court for Southern New York issued a permanent injunction against section 1021 (b) (2) of the NDAA. The challenge to the law came from a group of journalists and activists including such notable figures as Daniel Ellsberg, Noam Chomsky and Pulitzer prize-winning journalist Chris Hedges, who argued that the vagueness of the law's "substantially support" language meant it could be used to detain them in consequence of their professional activities. Hedges, for example, has interviewed al-Qaeda members for his articles and books, and as the Court's opinion rhetorically asks, "Where is the line between what the Government would consider 'journalistic reporting' and 'propaganda'?"[41]

The Obama administration, in direct contradiction to its publicly stated opposition to the detention provisions, but perfectly in keeping with its legislative support for them, has filed an appeal to the Court's ruling. It is impossible to say what the higher courts (next the 2nd Circuit Court of Appeals, and then inevitably the U.S. Supreme Court) will say. But now is the time for the legal arm of political organizations, conservative, liberal and libertarian, to file amicus curiae (friend of the court) briefs urging the federal judges who next hear the case to uphold the District Court's ruling. The value of amicus briefs is hard to overstate, and receiving agreeing briefs from diverse parties can make a particularly strong impression on judges' decision-making.

American citizens must demonstrate to the government that Hamilton's warning is not applicable to us, that as "ardent lovers of liberty," we are not so cowed by external danger that we are willing to sacrifice our freedom. Although we are not offered a choice between presidential candidates who will reject the authority to detain citizens indefinitely, we can still demand of our legislators that they amend the NDAA to eliminate these provisions, and we can support, both verbally and materially, those organizations that are fighting the legal battle against the executive branch assault on our constitutional rights.

APPENDIX: RELEVANT TEXT OF NDAA SUBTITLE D[42]

Section 1021 "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force,"

(a) In General.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force…includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

(b) Covered Persons.—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in the aid of such enemy forces."

(c) Disposition Under Law of War.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of hostilities authorized by the Authorization for Use of Military Force.

(2) [Trial by military commission.]

(3) [Trial by civilian courts.]

(4) [Transfer to the suspect's home country or any other foreign country or entitry.]

…

(e) Authorities.—Nothing in this section shall 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.

…

Section 1022, "Military Custody for Foreign Al-Qaeda Terrorists."

(a) Custody Pending Disposition Under Law of War.—

(1) In General.—Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force…in military custody pending disposition under the law of war.

(2) Covered Persons.—The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined—

(a) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

(b) to have participated in the course of planning or carrying

out an attack or attempted attack against the United States or its coalition partners.

…

(4) WAIVER FOR NATIONAL SECURITY—The President may waive the requirement of paragraph (1) if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

(b) APPLICABILITY TO UNITED STATES CITIZENS AND LAWFUL RESIDENT ALIENS.—

(1) UNITED STATES CITIZENS.—The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

(2) LAWFUL RESIDENT ALIENS.—The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.

ENDNOTES

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