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#### The NDAA imposes a chilling effect, forcing persons to risk indefinite detainment for offering their constitutionally protected dissenting opinions

Afran & Mayer, 12 (Bruce, Carl, MAYER LAW GROUP LLC, Attorneys for Plantiffs in Hedges v. Obama, PLAINTIFFS’ BRIEF IN SUPPORT OF APPLICATION FOR RESTRAINTS ON THE OPERATION OF THE HOMELAND BATTLEFIELD BILL PROVISIONS OF THE NATIONAL DEFENSE AUTHORIZATION ACT (2011), <http://www.lawfareblog.com/wp-content/uploads/2012/04/Brief_Final_1-12-cv-331KBF.pdf>, SSM)

Hamdi requires that civilians must be “engaged in armed conflict with the United States” to be subject to military jurisdiction. Hamdi, 542 U.S. at 526. In contrast, the Act makes subject to military imprisonment and trial any person who “substantially supported” al-Qaeda, the Taliban or “their associated forces”, a term that is left undefined and without the limiting condition in Hamdi that civilians subject to military detention must be actually “engaged in armed conflict with the United States” to be subject to military jurisdiction. Hamdi, supra. While §1031(b)(2) does contain a secondary clause “including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces,” see Homeland Battlefield Act, §1031(b)(2), such additional language not only fails to contain the more stringent requirement under Hamdi that covered persons must be “engaged in armed conflict with the United States”, but it is a mere exemplar - not a limitation - of the covered conduct. See e.g. Akins v. Penobscot Nation, 130 F.3d 482, 486 (1st Cir. 1997) (“Because the wording used is "including," the specific categories are exemplars and not exclusive. The examples provide limited guidance.”) The absence of limiting language in the Act, such as a reference to the fact that a covered person “shall be” or “is” one who has “committed a belligerent act” or “shall be” or “is” one who has “directly supported such hostilities in aid of such enemy forces”, renders the government free under §1031 to detain a citizen whose conduct is limited to the first clause of §1031(b)(2), namely one who has “substantially supported” the delineated organizations and their “associated forces”, an overbroad mandate that renders subject to arrest and military detention civilians engaged in protected Constitutional conduct. See e.g., Carrington Co. v. United States, 70 Cust. Ct. 105, 111 (1973) (recognizing that statutory exemplars are at best “directory only with the remaining language of the statute being determinative of its outer limits”). And since the undefined term “substantially supported” can be contoured to a virtually endless array of acts, the text plainly fails to give reasonable notice as to what conduct will render one a “covered person”. Such vague construction would allow the Government to bring within its scope persons such as plaintiffs whose writings, journalistic and advocacy acts may well be deemed to “substantially support” such organizations or “their associated forces” but are otherwise protected First Amendment activities. Even if the Court were to interpret the general phrase “substantially supported” in the context of the somewhat more specific phrase “in aid of such enemy forces” that follows, cf., Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 600-601 (1963) (“general words” in a statute should not be given a meaning “totally unrelated to the more specific terms of a statute”), the term “in aid of enemy forces” is still far removed from the mandate of Hamdi that a U.S. citizen may be placed in military detention only where “engaged in armed conflict with the United States”. 542 U.S. at 526. Indeed, it is difficult to see how plaintiffs, whose writings are often highly sympathetic or directly endorsing of such entities, can avoid being drawn into the undefined contours of the Act by the imprecision of its drafting. In sum, no definitional provision explains the meaning of “substantially supported” or “directly supported”, language capable of application to nearly any form of ideological support for such entities and the statute is without sufficient direction to provide notice and is inherently overbroad. The phrase “or associated forces” is similarly left undefined and can apply to nearly any group that lends ideological or other support for al-Qaeda or the Taliban, including groups such as Hamas and Hezbollah that are de facto state actors and whose leadership is a normal subject for journalists and commentators such as plaintiffs Christopher Hedges and Noam Chomsky. Indeed, Iran has been labeled a terror state by the United States, a designation that would almost certainly render it and its leadership as “associated forces” under the Act rendering journalists and writers who cover Iran favorably, meet with its leaders and expound upon their ideas as likely “covered persons”. As in Amnesty Int’l v. Clapper, supra, here the threatened harm is not derived from plaintiffs “purely subjective fear”, 638 F.3d at 131, but from the actual text of the statute. Clapper at 138. As the Second Circuit noted in Clapper, the threatened harm here also derives from the highest expression of governmental policy, a Congressional enactment: It is significant that the injury that the plaintiffs fear results from conduct that is authorized by statute. This case is not like Lyons, where the plaintiff feared injury from officers who would have been acting outside the law, making the injury less likely to occur. Here, the fact that the government has authorized the potentially harmful conduct means that the plaintiffs can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance. 638 F.3d at 138. Indeed, the threatened harm is far more concrete here than in Clapper where the plaintiffs feared that their First Amendment activities would be chilled because the government would access their conversations in the course of seeking to monitor the plaintiffs’ foreign contacts. In contrast, here the plaintiffs, including plaintiff Hedges who was also a plaintiff in Clapper, are themselves subject as “covered persons” under the Act whereas in Clapper the expected monitoring of the plaintiffs’ communications was incidental to the government’s targeting of third parties. Just as the Court found in Clapper, the plaintiffs’ activities place them directly within the government’s objectives: Furthermore, the plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct. The plaintiffs testify that in order to carry out their jobs they must regularly communicate by telephone and e-mail with precisely the sorts of individuals that the government will most likely seek to monitor — i.e., individuals "the U.S. government believes or believed to be associated with terrorist organizations," "political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government," and "people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts." The plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable, and the government has not disputed that assertion. On these facts, it is reasonably likely that the plaintiffs' communications will be monitored under the FAA. The instant plaintiffs' fears of surveillance are by no means based on "mere conjecture," delusional fantasy, or unfounded speculation. Baur, 352 F.3d at 636 (to establish standing, a plaintiff "must allege that he faces a direct risk of harm which rises above mere conjecture"). Their fears are fairly traceable to the FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world. Clapper at 138-139. Nothing in the Act precludes plaintiffs’ “reasonable interpretation of the challenged statute. Clapper, supra. As in Clapper, the plaintiffs’ contacts with the terror organizations and their leadership and the plaintiffs’ promotion of the terror groups’ ideology through favorable news coverage or commentary of such entities can reasonably be deemed “substantial support” to the covered entities and their “associated forces” under the Act, making plaintiffs and others engaged in similar endeavors “covered persons” and subject to indefinite military incarceration without trial or judicial access. This is not “mere conjecture, delusional fantasy, or unfounded speculation”, Clapper, supra, but a “reasonable interpretation, Clapper, supra, of the very statutory text. In sum, the unrestrained breadth of language in the Act renders a “covered person” subject to unlimited military detention under §1031(b)(2) any person, including plaintiffs, who has “substantially supported” any group “associated” with al-Qaeda or the Taliban, a coverage realm that is virtually undefined by any contour that would limit its applicability to persons engaged in protected First Amendment conduct. Indeed, it is that very conduct that will render them subject to the Act’s provisions. The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," Broadrick v. Oklahoma, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." Id., at 613, 37 L Ed 2d 830, 93 S Ct 2908. See also Virginia v. Black, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003); New York v. Ferber, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982); Dombrowski v. Pfister, 380 U.S. 479, 491, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965). Overbreadth doctrine eliminates the deterrence of legitimate speech caused by statutory text that intrudes upon protected First Amendment activities. The remedy has arisen out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes criminal sanctions. See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980); Bates v. State Bar of Ariz., 433 U.S. 350, 380, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977); NAACP v. Button, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963). Plaintiffs like many persons, rather than undertake the considerable burden of vindicating their rights through case-by-case litigation, may be forced to simply to abstain from protected speech, Dombrowski, supra, at 486-487, 14 L Ed 2d 22, 85 S Ct 1116--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Cf., Viginia v. Hicks, 539 U.S. 113, 119 (2003). As the case law makes clear, plaintiffs, facing the threat of indefinite detention, military trial and possible rendition to foreign jurisdictions by the sheer sweep of language of the Act, face the choice between speech with such risk and diminishing their speech or remaining silent. The very existence of this decided threat to their First Amendment activity in itself gives rise to irreparable harm. Elrod v. Burns, supra. Finally, since the Act provides that such persons can be immediately taken into military custody without access to the civil courts, they will have little or no opportunity to seek early or expeditious release based upon a defense that they were engaging in constitutionally protected conduct. Indeed, while the government may argue that the matter is not ripe and plaintiffs lack standing until actually incarcerated by the military, such “remedy” effectively allows for the very deprivation of liberty under the Act that the instant action seeks to forgo.5

#### **The unending War on Terror creates an environment of stress that disincentivizes rational decision making, and suppresses all dissenting opinions**

Bloom 5 (Sandra, MD, Associate Professor at Drexel University, THE IMPORTANCE OF DISSENT: A MEDITATION ON THE DANGERS OF DANGER, http://www.sanctuaryweb.com/PDFs\_new/Bloom The Importance of Dissent.pdf, May 14, 2005, SSM)

Liberty and the right to protest. Civil rights and freedom of speech. The right to dissent is a fundamental requirement of democracy. Our willingness to express a differing opinion appears to be inextricably bound up with our most cherished values. But why is this so? When dissent is suppressed we focus on this suppression as a violation of rights as it certainly is. But why is dissent so important to the functioning of any group, from one as small as a family to one as large as a nation? And why do we willingly silence dissent, even when we so cherish the right to free expression? The key to understanding the conflict between freedom of expression and the silencing of dissent can be found in an analysis of the role of stress – particularly extreme stress - in individual and group life. For groups, as for individuals, a little stress is good for us. Stress stimulates growth, development and innovation. But too much stress – including stress that lasts too long - is toxic. Overwhelming stress in individuals leads to physical, emotional, and social adjustment problems that have become well documented. Although there is an extensive body of information about the effects of stress on individuals, less study has been devoted to the impact of stress on groups. Families, workplaces, organizations, and even countries are more than the sum of the individuals involved, and systems such as these respond to severe stress in certain characteristic ways that may serve short term survival of the group but which can have long-term negative consequences for the wellbeing and healthy functioning of the organization and of all the individuals that comprise the group. What causes organizational stress? Anything that compromises safety and security for the system. Organizational safety has at least four components: physical safety – which extends to include financial security; psychological safety – the safety of individual expression within the organization and organizational “self-esteem; social safety – the safety of group functioning; and moral safety – the organizational ethics and integrity in pursuing its mission. Like individuals, organizations must manage emotional expression since too much emotion in any environment can create confusion and an interference with function while too little emotion can become demoralizing and can stifle creativity. Within organizations it is the decisionmaking, problem solving and conflict resolution methods that help a system routinely manage emotions that can become destructive if not properly channeled but which can greatly assist organizational functioning when they are directed to constructive purpose and the achievement of organizational goals. Organizations experience losses – of leaders, of funding, of work partners, of members – and must grieve for those losses. And if they are to be successful, all organizations must develop a vision that propels them into an imagined future. This vision is usually embodied within the organizational mission and goals. Groups may also experience conditions of extreme stress. The events of September 11, 2001 produced extreme stress in the United States captured in the frequently spoken expression, “America will never be the same again”. Families experience the death of members, domestic violence, divorce, job loss, house fires and other traumatic events. All of these are examples of situations of extreme stress that may have large and often unrecognized impacts on organizational as well as individual function. When confronted with extreme stress, individual function changes rapidly in order to accommodate to the situation with responses that are more likely to promote survival. The fight-flight characteristics of the human stress response prepare us to survive under emergency conditions that are the exception to the rules of normal functioning. We enter a state of high arousal and hyper-vigilance with attention directed at whatever is the source of the danger. Complex – but time consuming thought patterns are replaced by a more rapid form of information processing characterized by the reduction of multiple options to only dichotomized either-or-choices. Emotional expression may be sealed off, a condition commonly called “shock” which is the acute form of dissociation, because emotional arousal can so easily interfere with cognitive functioning and an action response. Attention is directed at the source of the threat and other environmental information is ignored as extraneous and irrelevant to the immediate danger. An urgent need to take action compels us to fight or to flee. Aggression increases dramatically and therefore violent action is far more likely while impulse control plummets since it interferes with rapid response. But the human stress response is not a totally individual response. Human beings are social animals and responding to danger with a unified group response accounts for much of our ability to survive as a species. When we are under threat, we experience an increased attachment behavior directed at those individuals and groups to which we have already formed an attachment. Threatened families tend to pull together under stress as do threatened workgroups and threatened nations. Group cohesion and unified action is achieved through a series of steps that is part of the human stress response. In stressed groups, a leader is likely to arise and in an emergency we are likely to follow the leader who most convincingly asserts superior knowledge about how to survive the emergency. Human beings love to engage in conflict – a movie, a book, a television show, or a play without conflict are recognized as boring – but under stress, group conflict is dangerous because it interferes with the rapid mobilization of a coherent group response. As a result human groups tend to strongly silence dissent and externalize the conflict by projecting the conflict onto an external enemy and the more strongly the convincing leader urges a group to resolve its conflicts by these methods, the more strongly the group becomes bonded to the leader. Since the increased group aggression must be projected outward, overt violence against the perceived enemy is more likely to occur. As long as the danger to the individuals and the group can be removed through these methods, the results can enhance group survival. However, two conditions interfere and may even sabotage these efforts so that they become ineffectual and even disastrous: when the complexity of the threat requires a more complex response than the individual or group can summon under the impact of stress; or when the threat itself become chronic and repetitive. When danger becomes chronic or repetitive, the biology of individual changes and the effects of these individual changes, compounded by escalating group responses turns a evolutionary survival mechanism into an evolutionary time bomb. Chronic exposure to danger creates chronic hyperarousal in overly stressed individuals. In this state, people respond to even minor threats as if they were major threats and are likely to react accordingly. Extremist thinking becomes chronic leading to further difficulties with problem-solving and flawed decision-making. The tendency to act – and act violently – escalates dramatically. The numbing of emotions simultaneously reduces concerns about one’s own well-being and reduces the capacity for empathy with others. Other vital, but apparently less immediately stressful concerns, are ignored as attention to threat becomes chronic. The employment of aggressive responses becomes chronic leading to a state of chronic conflict and the need to seek out perpetual enemies. As the need to justify previous actions and defend faulty judgments expands, explanations become increasingly bizarre. The leaders who have made these faulty judgments become both bullying and deceptive, needing to lie not only to their constituents but to themselves. Dissent must be suppressed using ever more coercive and forceful means because surfacing the previous and present conflicts now is seen by flawed leaders as more dangerous and destabilizing than ever before. In this way, individuals and groups under stress can become incapable of comprehending or dealing with situations of great complexity. Complex problems require complex solutions and complex solutions are never the product of a single mind. Complex solutions require the participants in any problem-solving venture to start from some basic shared and the means by which they are going to get there. For complex solutions to emerge in any situation, there must be sufficient safety for the individuals within a group to voice divergent opinions and challenge the existing status quo. Individuals and groups must grieve for whatever has been lost in the struggle for survival and be willing to recognize their present resistance to change. There must be sufficient calm and mutual respect for human cognitive function to work at peak efficiency and sophistication – conditions impossible under the impact of chronic stress. To reduce the externalization of aggression, group conflicts must be withdrawn from the enemy and reabsorbed by the group. To counteract the effects of stress a leader must seek out and welcome dissent and guide a group toward the integration of multiple points of view. The dissenting voice in any group contains the necessary seeds for the solutions of complex problems because the dissenters contain in embryonic form, ideas that are new or previously discarded by the group faced with a problem that will not budge. Without recognizing the dissenting voice, a group is quite likely to follow a leader, like lemmings, over a cliff. For all these reasons, democracy is a necessity, not a luxury. Democracy is the best method yet that human beings have evolved for managing complex problems with a minimum of violence. The more democratic principles are compromised, the greater the likelihood of poor decisions, faulty judgments, escalating levels of conflict, and ultimately violence. Dissent – and the engagement in creative conflict – is the cornerstone of democratic processes and in an ever more complex world, silencing the dissenting voice imperils human survival.

#### **Dissent is critical to create change and learn from the viewpoints of others**

Atkins, 11 (Linda, Representative to Ward 2 on the Eureka City Council. Eureka, CA, [Democracy and dissent go together, http://www.times-standard.com/guest\_opinion/ci\_18584956](file:///C%3A%5CUsers%5CTEMP%5CDownloads%5CDemocracy%20and%20dissent%20go%20together%2C%20http%3A%5Cwww.times-standard.com%5Cguest_opinion%5Cci_18584956), 7/30/2011, SSM)

Throughout the history of our country, dissent has been important to bringing change to our government. Without dissent and protest, we would still be English citizens, people would still own other people as slaves, women would not have the vote. Promoting a world view that doesn't allow citizens to protest the actions of their government is to take on the philosophy of all of the despots and dictators who kept their citizens silenced and afraid of retribution. Democracy is a living form of government that embraces the right of its citizens to protest decisions that they disagree with. A governing body taking a vote is sometimes just the beginning of the process. As an elected official, I have the duty to listen to and encourage the people of Eureka to speak out when their representatives act in ways that the public disagrees with. I consider those people who show up to speak to our council week after week as involved and caring citizens who want to be a part of shaping our community. Others have dismissed these citizens' concerns because they continue to come to our meetings and voice their ideas. I don't understand that reasoning. Somehow, their very involvement at our meetings bothers some who would prefer that the community just shut up and let them do whatever they want, without the complaint from the citizenry. I agree that participating in a democracy means that we continue to work with the people with whom we disagree in order to come to future compromises that benefit our community. I would never refuse to work with, or treat badly, council members or staff with whom I've had disagreements. I expect the people I work with to have the same resilience. Politics is often a rough-and-tumble exercise. Dissent and protest stretch our ability to take criticism and should lead us to examine what it is that people are upset about, not simply dismiss their complaints as unimportant. Unlike some past council members, I don't have the capacity to know what the people who are not communicating with me are thinking. During the protest of the city's recent action, I received overwhelming input against the action the city had taken. I responded to that input by encouraging the citizens to express themselves. Talking to fellow citizens and circulating petitions are time-honored ways for people to express their concerns. I will continue to support the people of Eureka actively participating in their government. I think that increased participation is the key to solving many of the issues that face our city today. Innovative ideas about how to address problems often come from outside of a bureaucracy, because it sometimes takes a different perspective to come up with alternative solutions. The stifling of citizen involvement cuts us off from others' viewpoints and leaves us with no new information with which to make our decisions. I want to encourage the people of Eureka to continue to give input to their elected officials about decisions that are important to our community. Don't be discouraged by the disregard of your concerns from some in the community; you know you were heard because of the nature of their response to your vocal protest in their July 22 My Word. It sometimes takes sustained communication to convince some elected officials that the public should not be ignored. I don't believe that, as a public official, I somehow know better than my fellow citizens what the correct direction is to move our city forward. I rely on all of you to help steer my decisions in a way that will help to bring positive changes and open communication between all people in our city. I challenge my fellow council members to join me in becoming aware of our use of the divisive language that has become so popular in our country today. It's easy to slip into this destructive habit of dismissing the people we disagree with. Dissent and protest represent the health of our democracy, while dismissal and divisiveness represent its deterioration. I will continue to speak up when I think something is wrong or when I disagree with a decision. I will continue to encourage others to do so, too. The framers of our democracy were very wise to include the right to dissent and protest in our governing documents. These rights allow our democracy to remain a strong and vibrant form of government.

#### **Dissent is key to flipping the balance of power for the oppressed – without it, change is impossible**

Zinn 10 (WAJAHAT, a writer, journalist, blogger and attorney, An Interview with Howard Zinn, Political Scientist, author of *A People's History of the United States,* Counter Punch, Dissent as Democracy, <http://www.counterpunch.org/2010/01/29/dissent-as-democracy/>, 1/29/10, SSM)

ALI: You said the democratic spirit of the American people is best represented when people are picketing and voicing their opinion outside the White House. How does this nature of dissent and protest serve as the crux of a democracy and a healthy, functioning civic society? Many would argue this is divisive, no? ZINN: Yes, dissent and protest are divisive, but in a good way, because they represent accurately the real divisions in society. Those divisions exist – the rich, the poor – whether there is dissent or not, but when there is no dissent, there is no change. The dissent has the possibility not of ending the division in society, but of changing the reality of the division. Changing the balance of power on behalf of the poor and the oppressed. ALI: The People’s History of The United States is now considered a seminal work taught in high schools and universities across the country. Why do you think the work has had such lasting, influential impact? ZINN: Because it fills a need, because there is a huge emptiness of truth in the traditional history texts. And because people who gain some understanding on their own that there are things wrong in society, they look for their new consciousness; their new feelings to be represented by a more honest history. ALI: Minority voters, like Hispanic Catholics, voted solidly for Bush in 2002, and some sons of immigrants have virulent anger and disdain against “illegal” immigrants. It seems many marginalized voices have forgotten their history and now side with those actively intent on keeping them either on the sidelines or in some form “oppressed.” How do we explain this discrepancy? ZINN: It is to the interest of the people in power to divide the rest of the population in order to rule them. To set poor against middle class, White against Black, Native born against immigrants, Christians against other religions. It serves the interest of the establishment to keep people ignorant of their own history, ALI: Most say that corporations now own American media. What is the proper outlet for democratic discourse and dissemination of information if indeed there is a biased monopoly over media? ZINN: Because of the control of the media by corporate wealth, the discovery of truth depends on an alternative media, such as small radio stations, networks like Pacifica Radio, programs like Amy Goodman’s Democracy Now. Also, alternative newspapers, which exist all over the country. Also, cable TV programs, which are not dependent on commercial advertising. Also, the internet, which can reach millions of people by-passing the conventional media.

#### **Suppressing dissent only advances more techniques of control**

Ivie, 8 (Robert, Professor of Communication and Culture at Indiana University in Bloomington, Toward a Humanizing Style of Democratic Dissent, Rhetoric & Public Affairs, Volume 11, Number 3, Fall 2008, pp. 454-458, <http://muse.jhu.edu/journals/rap/summary/v011/11.3.ivie.html>, SSM)

Democracy is, or at least involves, a politics of contestation. It is an agonistic affair of pluralistic politics, if we take our cue from the likes of Chantal Mouffe, not a protocol of dialogue or a practice of deliberation aimed at deriving a universal rational consensus.1 As Mouffe contends: Instead of trying to design the institutions which, through supposedly “impartial” procedures, would reconcile all conflicting interests and values, the task for democratic theorists and politicians should be to envisage the creation of a vibrant “agnostic” public sphere of contestation where different hegemonic political projects can be confronted. This is, in my view, the sine qua non for an effective exercise of democracy.2 As an agonistic affair, democracy puts differences into play on an uneven political field where hegemony, as a product of articulation, becomes subject in some measure to contestation and possibly even a modicum of reformulation. Thus skewed to hierarchy, the democratic contestation of a healthy pluralistic polity must somehow bridge divisive differences without eliding identities, that is, by means of partial and transitory transfigurations of underlying divisions. One of the prime challenges in an imperfect world of democratic give and take is to prevent where possible, and repair as necessary, agonistic exchanges that degenerate into antagonistic relations of social disaffection, cultural alienation, and political estrangement. When politics reduces to hostility and contestation degenerates into warfare against an evil or otherwise dehumanized and despised internal and/or external enemy, democracy is lost, at least for the moment, however long that moment may last. Or, perhaps expressed somewhat more realistically, when politics produces agonistic exchanges without creating enemies, democracy is achieved momentarily, however fleeting that moment proves to be. Yet, the burden of resisting dehumanizing discourses, I want to suggest, falls squarely on the many who are ruled by political elites rather than onto the elites who govern in place of and over the citizenry, thus necessitating the practice of a humanizing style of democratic dissent under the shadow of the modern warfare state. Any thorough conception of a democratic style for a pluralistic polity must therefore take into account the challenge of advancing a politically unconventional position without demonizing adversaries (or making oneself a demonized subject). With the rhetorical burden falling on those who contest conventional wisdom, standing policies, or other hegemonic formations, there may be no more quintessentially democratic discourse than that of dissent. Dissenters especially must learn to critique society in a humanizing instead of demonizing idiom because circumventing the enemy-making rituals of ruling regimes is a key to democracy’s momentary escape from tyrannizing hegemonies. Along with Gerard Hauser, I consider the challenge of negotiating the tricky, treacherous, reticulated terrain of pluralistic public spheres, “in which strangers develop and express public opinions by engaging one another,” to entail the operation of a vernacular rhetoric.3 Unlike Hauser, though, I want to emphasize the strategic and tactical nature of a vernacular rhetoric of resistance instead of how vernacular rhetoric might contribute to a “genuine dialogue,” discussion, or deliberation that “induces cooperation,” articulates an “informed opinion,” and yields a collective expression of “shared sentiments” between and among specific public spheres within an overall public sphere.4 Hauser’s emphasis on rhetoric as a political means “to produce cooperation within conditions of difference and interdependence”—conditions, he observes, that do not allow for “rational consensus” and that typically are marked by “ideological distortion”—shifts attention away from vernacular discourses of resistance and toward agonistic practices and relationships out of which “publics emerge and in which societies produce themselves.”5 At least tacitly, a telos of recovering the whole and of effecting collective self-governance through a productive interface of the state and civil society seems to inform Hauser’s sense of the vernacular as a democratic style in which publics form opinions “to guide governmental actions.”6 My emphasis on the vernacular intersects with Hauser’s concern for privileging citizen voices and advancing participatory democracy where political elites and official discourses otherwise enjoy a ruling presence. This emphasis on quotidian-everyday-colloquial discourses distinguishes a decidedly democratic style from related political idioms such as Robert Hariman’s conception of the republican style—a style that Hariman believes to be a crucial component of democratic governance, especially in political campaigns and parliamentary deliberations, but also one that ultimately is at odds with a democratic ethos. As modeled by Cicero, the rhetorical skills and sensibility of the republican style play out in “a public theater designed for broad effects.”7 Oratory is the principal vehicle of deliberation; the orator embodies the republic; consensus is valorized as both the means and the end of governance for the common good. As Hariman succinctly puts the matter, “In the republican mind, persuasion is the essence of politics, rhetorical virtuosity is the surest sign of political acumen, and public speaking is the master art.”8 Civic republicanism eschews secrecy, which is taken as a sign of subversion, and insists on speaking openly in a public discourse that constitutes the republic through an aesthetic of cohesion. Decorum, civility, dramatic gesture, and a proclivity for heroic leadership—all of this inclines the republican style toward elitism and against “the egalitarian ethos of democratic societies.”9 If a thoroughly democratic style is distinctly egalitarian and basically vernacular, it speaks in the voices of the citizenry from within the demos, not for the citizenry from above the demos. Eugene Debs, defying the Espionage Act of 1917—which proclaimed any wartime criticism of the government to be a treacherous act of sedition punishable (as it turned out in his case) by a ten-year prison sentence—articulated this very democratic sensibility in his socialist stand against capitalism by locating himself within the ranks of the working masses rather than posing as a leader or representative of the people. In his words: I am willing to be charged with almost anything, rather than to be charged with being a leader. I am suspicious of leaders, and especially of the intellectual variety. Give me the rank and file every day in the week. If you go to the city of Washington, and you examine the pages of the Congressional Directory, you will find that almost all of those corporation lawyers and cowardly politicians, members of Congress, and misrepresentatives of the masses—you will find that almost all of them claim, in glowing terms, that they have risen from the ranks to places of eminence and distinction. I am very glad I cannot make that claim for myself. I would be ashamed to admit that I had risen from the ranks. When I rise it will be with the ranks, and not from the ranks.10 One need not speak as a socialist to assume the persona of a common citizen, but any iteration of a patently democratic style positions speakers and audiences on a more or less equal footing with one another. As a leveling rather than leadership style, a democratic rhetoric is quintessentially a discourse of dissent rather than a discourse of governance. Invoking democracy as a mode of political rule, especially in the American context of liberal institutions and corporate power, Sheldon Wolin observes, is a mythic act that “legitimates the very formations of power which have enfeebled it.”11 Democracy, with its egalitarian commitment to participation, cooperation, inclusion, and community, fails to meet standards of efficiency and stability applied to systems of governance in a plural polity. Democracy should be regarded, then, as “beleaguered and permanently in opposition to structures it cannot command.”12 Rather than governing in a traditional sense, democracy exists in the “fugitive” status of a practice of resistance. It is an ephemeral phenomenon of the many dispersed across a multiplicity of sites. It “protests actualities and reveals possibilities” by relying on “the ingenuity of ordinary people . . . inventing temporary forms to meet their needs,” and thus, Wolin argues, it is an experience of “ongoing opposition” to elitist regimes that constitute the superpower of a corporate state dedicated to the containment of democracy.13 Given that “governing means manning and accommodating to bureaucratized institutions that, ipso facto, are hierarchical in structure and elitist, permanent rather than fugitive—in short, anti-democratic,” democracy cannot become a stable form of political rule without negating itself.14 Accordingly, and consistent with the perspective of Michel de Certeau, the basic challenge of democratic dissent is to develop a quotidian art of tactics that enable nonconforming speech to avoid being captured and contained within the ruling paradigms of governing regimes.15 Such tactics, at least in the case of peace-building dissent from the enemy-making discourses of a warfare state, involve recurring enunciations of humanizing themes and imagery that break the cycle of ritualized recrimination.16 Nothing could be more crucial to preserving the possibility of enhancing egalitarian relations across the human divide than vernacular rhetorics—voices of the demos—that cultivate a humanizing style of democratic dissent. Indeed, as Thomas Docherty argues, the “most fundamental form of democracy that we might have” will come through an experience that enables subjects to “know themselves always to be conditioned” by an alterity that is opened to them through aesthetic “encounter[s] with otherness.” By means of such aesthetic encounters we might hope to alter the collective self enough to move beyond the strictures of radical individualism and the diversion of sheer consumerism so that whatever is mine can never be simply “mine alone.”17 Otherwise, as is evident in the current and pervasive war on terror (a war that has no foreseeable end or spatial limit), the failure to cultivate a democratizing style of peace-building dissent with which to resist demonizing propaganda will only serve to increase the likelihood of succumbing further to advancing techniques of governance, surveillance, containment, and control. In Julian Reid’s view, this prospect increases the likelihood of reducing the citizenry to “states of docility, plasticity and logistical order,” that is: a life lived under the duress of the command to be efficient, to communicate one’s purposes transparently in relation to others, to be positioned where one is required, to use time economically, to be able to move when and where one is told to, and crucially, to be able to extol these capacities as the values which one would willingly, if called upon, kill and die for.18 In futile pursuit of a sustainable peace through recurring warfare against those at home and abroad who have been rendered alien, savage, and hostile to freedom, the project of liberal modernity sans a strengthened capacity for democratic dissent threatens to produce an unprecedented power “over the political constitution of life itself,” including the constraints it may place on what counts as human life and what we might imagine a life of agonistic relations with others could become.19 Thus, Reid warns that when a liberal regime attempts to convince its citizenry that nothing short of the survival of civilization and of life itself is wagered “in a conflict against an enemy stripped of all ordinary attributes of humanity,” it becomes necessary to question “as rigorously as possible the relations between life, war, and liberal modernity.”20 Only the vernacular voices of a dissenting demos speaking in a humanizing idiom about those who have been designated enemies of the state offer some possibility of escaping the regression from lively politics to deadly passivity.

#### **Restrictions on personal liberties is the pivotal first step in breaking a democracy into a totalitarian state – Nazi Germany proves**

Chossudovsky 12 (Michel, Economist, Professor – University of Ottawa, Global Research, The Inauguration of Police State USA 2012: Obama Signs the “National Defense Authorization Act“, <http://www.globalresearch.ca/the-inauguration-of-police-state-usa-2012-obama-signs-the-national-defense-authorization-act/28441>, January 1, 2012, SSM)

With minimal media debate, at a time when Americans were celebrating the New Year with their loved ones, the “National Defense Authorization Act ” H.R. 1540 was signed into law by President Barack Obama. The actual signing took place in Hawaii on the 31st of December. According to Obama’s “signing statement”, the threat of Al Qaeda to the Security of the Homeland constitutes a justification for repealing fundamental rights and freedoms, with a stroke of the pen. The relevant provisions pertaining to civil rights were carefully esconded in a short section of a 500+ page document. The controversial signing statement (see transcript below) is a smokescreen. Obama says he disagrees with the NDAA but he signs it into law. “[I have] serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.” Obama implements “Police State USA”, while acknowledging that certain provisions of the NDAA (contained in Subtitle D–Counterterrorism) are unacceptable. If such is the case, he could have either vetoed the NDAA (H.R. 1540) or sent it back to Congress with his objections. The fact of the matter is that both the Executive and the US Congress are complicit in the drafting of Subtitle D. In this regard, Senator Carl Levin (D-Mich.) revealed that it was the White House which had asked the Senate Armed Services Committee “to remove language from the bill that would have prohibited U.S. citizens’ military detention without due process” Obama justifies the signing of the NDAA as a means to combating terrorism, as part of a “counter-terrorism” agenda. But in substance, any American opposed to the policies of the US government can –under the provisions of the NDAA– be labelled a “suspected terrorist” and arrested under military detention. Already in 2004, Homeland Security defined several categories of potential “conspirators” or “suspected terrorists” including “foreign [Islamic] terrorists”, “domestic radical groups”, [antiwar and civil rights groups], “disgruntled employees” [labor and union activists] and “state sponsored adversaries” ["rogue states", "unstable nations"]. The unspoken objective in an era of war and social crisis is to repress all forms of domestic protest and dissent. The “National Defense Authorization Act ” (H.R. 1540) is Obama’s New Year’s “Gift” to the American People: “Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.” (emphasis added) Barack Obama is a lawyer (a graduate from Harvard Law School). He knows fair well that his signing statement –which parrots his commitment to democracy– is purely cosmetic. It has no force of law. His administration “will not authorize” what? The implementation of a Law endorsed by the Executive and signed by the President of the United States? Section 1021 is crystal clear. The Executive cannot refuse to implement it. The signing statement does not in any way invalidate or modify the actual signing by President Obama of NDAA (H.R. 1540) into law. It does not have any bearing on the implementation/ enforcement of the Law. “Democratic Dictatorship” in America The “National Defense Authorization Act ” (H.R. 1540) repeals the US Constitution. While the facade of democracy prevails, supported by media propaganda, the American republic is fractured. The tendency is towards the establishment of a totalitarian State, a military government dressed in civilian clothes. The passage of NDAA is intimately related to Washington’s global military agenda. The military pursuit of Worldwide hegemony also requires the “Militarization of the Homeland”, namely the demise of the American Republic. In substance, the signing statement is intended to mislead Americans and provide a “democratic face” to the President as well as to the unfolding post-911 Military Police State apparatus. The “most important traditions and values” in derogation of The Bill of Rights and the US Constitution have indeed been repealed, effective on New Year’s Day, January 1st 2012. The NDAA authorises the arbitrary and indefinite military detention of American citizens. The Lessons of History This New Year’s Eve December 31, 2011 signing of the NDAA will indelibly go down as a landmark in American history. Barack Obama will go down in history as “the president who killed Constitutional democracy” in the United States. If we are to put this in a comparative historical context, the relevant provisions of the NDAA HR 1540 are, in many regards, comparable to those contained in the “Decree of the Reich President for the Protection of People and State” , commonly known as the “Reichstag Fire Decree” (Reichstagsbrandverordnung) enacted in Germany under the Weimar Republic on 27 February 1933 by President (Field Marshal) Paul von Hindenburg. Implemented in the immediate wake of the Reichstag Fire (which served as a pretext), this February 1933 decree was used to repeal civil liberties including the right of Habeas Corpus. Article 1 of the February 1933 “Decree of the Reich President for the Protection of People and State” suspended civil liberties under the pretext of “protecting” democracy: “Thus, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of association and assembly, and violations of the privacy of postal, telegraphic, and telephonic communications, and warrants for house-searches, orders for confiscations, as well as restrictions on property rights are permissible beyond the legal limits otherwise prescribed.” (Art. 1, emphasis added) Constitutional democracy was nullified in Germany through the signing of a presidential decree. The Reichstag Fire decree was followed in March 1933 by “The Enabling Act” ( Ermächtigungsgesetz) which allowed (or enabled) the Nazi government of Chancellor Adolf Hitler to invoke de facto dictatorial powers. These two decrees enabled the Nazi regime to introduce legislation which was in overt contradiction with the 1919 Weimar Constitution. The following year, upon the death of president Hindenburg in 1934, Hitler “declared the office of President vacant” and took over as Fuerer, the combined function’s of Chancellor and Head of State. The Reichstag Fire, Berlin, February 1933 Germany’s President (Field Marshal) Paul von Hindenburg Obama’s New Year’s Gift to the American People To say that January 1st 2012 is “A Sad Day for America” is a gross understatement. The signing of NDAA (HR 1540) into law is tantamount to the militarization of law enforcement, the repeal of the Posse Comitatus Act and the Inauguration in 2012 of Police State USA. As in Weimar Germany, fundamental rights and freedoms are repealed under the pretext that democracy is threatened and must be protected. The NDAA is “Obama’s New Year’s Gift” to the American People. …

#### **The NDAA creates a totalitarian state – allowing it to stand crushes the legal system that created it**

Hedges 12 (Chris, Pulitizer Prize winner, author, reporter, Truth Dig, Chris Hedges | Totalitarian Systems Always Begin by Rewriting the Law, [http://truth-out.org/opinion/item/8095-chris-hedges-|-totalitarian-systems-always-begin-by-rewriting-the-law](http://truth-out.org/opinion/item/8095-chris-hedges-%7C-totalitarian-systems-always-begin-by-rewriting-the-law), 3/26/12)

I spent four hours in a third-floor conference room at 86 Chambers St. in Manhattan on Friday as I underwent a government deposition. Benjamin H. Torrance, an assistant U.S. attorney, carried out the questioning as part of the government's effort to decide whether it will challenge my standing as a plaintiff in the lawsuit I have brought with others against President Barack Obama and Secretary of Defense Leon Panetta over the [National Defense Authorization Act](http://en.wikipedia.org/wiki/National_Defense_Authorization_Act_for_Fiscal_Year_2012) (NDAA), also known as the Homeland Battlefield Bill. The NDAA implodes our most cherished constitutional protections. It permits the military to function on U.S. soil as a civilian law enforcement agency. It authorizes the executive branch to order the military to selectively suspend due process and habeas corpus for citizens. The law can be used to detain people deemed threats to national security, including dissidents whose rights were once protected under the First Amendment, and hold them until what is termed "the end of the hostilities." Even the name itself—the Homeland Battlefield Bill—suggests the totalitarian concept that endless war has to be waged within "the homeland" against internal enemies as well as foreign enemies. Judge Katherine B. Forrest, in a session starting at 9 a.m. Thursday in the U.S. District Court for the Southern District of New York, will determine if I have standing and if the case can go forward. The attorneys handling my case, Bruce Afran and Carl Mayer, will ask, if I am granted standing, for a temporary injunction against the Homeland Battlefield Bill. An injunction would, in effect, nullify the law and set into motion a fierce duel between two very unequal adversaries—on the one hand, the U.S. government and, on the other, myself, Noam Chomsky, Daniel Ellsberg, the Icelandic parliamentarian Birgitta Jónsdóttir and three other activists and journalists. All have joined me as plaintiffs and begun to mobilize resistance to the law through groups such as [Stop NDAA](https://www.stopndaa.org/). The deposition was, as these things go, conducted civilly. Afran and Mayer, the attorneys bringing the suit on my behalf, were present. I was asked detailed questions by Torrance about my interpretation of Section 1021 and Section 1022 of the NDAA. I was asked about my relationships and contacts with groups on the U.S. State Department terrorism list. I was asked about my specific conflicts with the U.S. government when I was a foreign correspondent, a period in which I reported from El Salvador, Nicaragua, the Middle East, the Balkans and other places. And I was asked how the NDAA law had impeded my work. It is in conference rooms like this one, where attorneys speak in the arcane and formal language of legal statutes, that we lose or save our civil liberties. The 2001 Authorization to Use Military Force Act, the employment of the Espionage Act by the Obama White House against six suspected whistle-blowers and leakers, and the Homeland Battlefield Bill have crippled the work of investigative reporters in every major newsroom in the country. Government sources that once provided information to counter official narratives and lies have largely severed contact with the press. They are acutely aware that there is no longer any legal protection for those who dissent or who expose the crimes of state. The NDAA threw in a new and dangerous component that permits the government not only to silence journalists but imprison them and deny them due process because they "substantially supported" terrorist groups or "associated forces." Those of us who reach out to groups opposed to the U.S. in order to explain them to the American public will not be differentiated from terrorists under this law. I know how vicious the government can be when it feels challenged by the press. I covered the wars in El Salvador and Nicaragua from 1983 to 1988. Press members who reported on the massacres and atrocities committed by the Salvadoran military, as well as atrocities committed by the U.S.-backed Contra forces in Nicaragua, were repeatedly denounced by senior officials in the Reagan administration as fellow travelers and supporters of El Salvador's Farabundo Marti National Liberation (FMLN) rebels or the leftist Sandinista government in Managua, Nicaragua. The Reagan White House, in one example, set up an internal program to distort information and intimidate and attack those of us in the region who wrote articles that countered the official narrative. The program was called "public diplomacy." [Walter Raymond Jr.](http://www.spartacus.schoolnet.co.uk/JFKraymondW.htm), a veteran CIA propagandist, ran it. The goal of the program was to manage "perceptions" about the wars in Central America among the public. That management included aggressive efforts to destroy the careers of reporters who were not compliant by branding them as communists or communist sympathizers. If the power to lock us up indefinitely without legal representation had been in the hands of [Elliott Abrams](http://www.sourcewatch.org/index.php?title=Elliott_Abrams) or [Oliver North](http://www.biography.com/people/oliver-north-9425102) or Raymond, he surely would have used it. Little has changed. On returning not long after 9/11 from a speaking engagement in Italy I was refused entry into the United States by customs officials at the Newark, N.J., airport. I was escorted to a room filled with foreign nationals. I was told to wait. A supervisor came into the room an hour later. He leaned over the shoulder of the official seated at a computer in front of me. He said to this official: "He is on a watch. Tell him he can go." When I asked for further information I was told no one was authorized to speak to me. I was handed my passport and told to leave the airport. [Glenn Greenwald](http://www.truthdig.com/report/item/truthdigger_of_the_week_glenn_greenwald_20120323/), the columnist and constitutional lawyer, has done the most detailed analysis of the NDAA bill. He has pointed out that the crucial phrases are "substantially supported" and "associated forces." These two phrases, he writes, allow the government to expand the definition of terrorism to include groups that were not involved in the 9/11 attacks and may not have existed when those attacks took place. It is worth reading Sections 1021 and 1022 of the bill. Section 1021 of the NDAA "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 like this: "(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 a part of or substantially supported Al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the U.S. or its coalition partners." Section 1022, Subsection C, goes on to declare that covered persons are subject to: "(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." And Section 1022, Subsection A, Item 4, allows the president to waive the requirement of legal evidence in order to condemn a person as an enemy of the state if that is believed to be in the "national security interests of the United States." The law can be used to detain individuals who are not members of terrorist organizations but have provided, in the words of the bill, substantial support even to "associated forces." But what constitutes substantial? What constitutes support? What are these "associated forces"? What is defined under this law as an act of terror? What are the specific activities of those purportedly "engaged in hostilities against the United States"? None of this is answered. And this is why, especially as acts of civil disobedience proliferate, the NDAA law is so terrifying. It can be used by the military to seize and detain citizens and deny legal recourse to anyone who defies the corporate state. Torrance's questions to me about incidents that occurred during my reporting were typified by this back and forth, which I recorded: Torrance: In paragraph eight of your declaration you refer to the type of journalism we have just been discussing, which conveyed opinions, programs and ideas as being brought within the scope of Section 1021's provision defining a covered people as one who has substantially supported or directly supported the acts and activities of such individuals or organizations and allies of associated forces. Why do you believe journalistic activity could be brought within that statute? Hedges: Because anytime a journalist writes and reports in a way that challenges the official government narrative they come under fierce attack. Torrance: What kind of attack do they come under? Hedges: It is a range. First of all, the propaganda attempts to discredit the reporting. It would be an attempt to discredit the individual reporter. It would be a refusal to intercede when allied governments physically detain and expel the reporter because of reporting that both that allied government and the United States did not want. And any foreign correspondent that is any good through their whole career has endured all of this. Torrance: Remind me, the phrase you used that you believed would trigger that was "coverage disfavorable to the United States"? Hedges: I didn't say that. Torrance: Remind me of the phrase. Hedges: I said it was coverage that challenged the official narrative. Torrance: Have you ever been detained by the United States government? Hedges: Yes. Torrance: When and where? Hedges: The First Gulf War. Torrance: What were the circumstances of that? Hedges: I was reporting outside of the pool system. Torrance: How did that come about that you were detained? Hedges: I was discovered by military police without an escort. Torrance: And they took you into custody? Hedges: Yes. Torrance: For how long? Hedges: Not a long time. They seized my press credentials and they called Dhahran, which is where the sort of central operations were, and I was told that within a specified time—and I don't remember what that time was—I had to report to the authorities in Dhahran. Torrance: Where is Dhahran? Hedges: Saudi Arabia. Torrance: And that was a U.S. military headquarters of some sort? Hedges: Well, it was the press operations run by the U.S. Army. Torrance: And what was the asserted basis for detaining you? Hedges: That I had been reporting without an escort. Torrance: And was that a violation of some law or regulation that you know of? Afran: Note, object to form. Laws and regulations are two different things. Hedges: Not in my view. ... Torrance: Did the people who detained you specify any law or regulation that in their view you violated? Hedges: Let me preface that by saying that as a foreign correspondent with a valid journalistic visa, which I had, in a country like Saudi Arabia, the United States does not have the authority to detain me or tell me what I can report on. They attempted to do that, but neither I [nor] The New York Times [my employer at the time] recognized their authority. Torrance: When you obtained that journalistic visa did you agree to any conditions on what you would do or where you would be permitted to go? Hedges: From the Saudis? Torrance: The visa was issued by the Saudi government? Hedges: Of course, I need a visa from the Saudi government to get into Saudi. Torrance: Did you agree to any such conditions? Hedges: No. Not with the Saudis. Torrance: Were there any other journalists of which you were aware who [were] reporting outside of the pool system? Hedges: Yes. Torrance: Were they also detained, to your knowledge? Hedges: Yes. The politeness of the exchanges, the small courtesies extended when we needed a break, the idle asides that took place during the brief recesses, masked the deadly seriousness of the proceeding. If there is no rolling back of the NDAA law we cease to be a constitutional democracy. Totalitarian systems always begin by rewriting the law. They make legal what was once illegal. Crimes become patriotic acts. The defense of freedom and truth becomes a crime. Foreign and domestic subjugation merges into the same brutal mechanism. Citizens are colonized. And it is always done in the name of national security. We obey the new laws as we obeyed the old laws, as if there was no difference. And we spend our energy and our lives appealing to a dead system.

#### **Plan: The United States Supreme Court should rule that sections 1021 and 1022 of the National Defense Authorization Act violate the First Amendment.**

#### Sections 1021 and 1022 of the NDAA are overly broad, and should be rejected as unconstitutional

Harfenist et al 12 (Steven J, Herbert W. Titus, William J. Olson, John S. Miles, Jeremiah L. Morgan, Robert J. Olson, WILLIAM J. OLSON, and Gary G. Kreep, FRIEDMAN HARFENIST KRAUT & PERLSTEIN LLP and U.S. JUSTICE FOUNDATION, Amicus Curiae Brief is support of the plantiffs in Hedges v. Obama, <http://www.lawandfreedom.com/site/constitutional/Hedges_Amicus.pdf>, 4/16/12, SSM)

A. Section 1021(b)(2) is Designedly Indeterminate. At the March 30, 2012 hearing, Government counsel was asked by the Court to clarify two key terms — “substantially support”4 and “associated forces”5– appearing in section 1021(b)(2). At each opportunity, Government counsel declined. When asked for “an example” of “substantial support,” Government counsel replied: “I’m not in a position to give specific examples.”6 When asked for one example of a statutory “boundary” around “associated forces,” Government counsel responded with an example of an “armed group” that a court had “found to be an associated force.”7 In response, the Court asked: “[A]re we to have to wait until courts ... decide on a fact scenario who the associated forces are? Is that the only way we can figure this out?”8 To which question Government counsel had already given the answer: “it will be ... on a case-by-case determination of what precisely may be permissible” on consideration of “habeas applications being made by detainees.”9 This is not the first time that Government lawyers have taken this position. In its January 11, 2012 report to Congress, Congressional Research Service attorneys reported that: In its 2009 brief, the government declined to clarify these aspects of its detention authority: “It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support,’ or the precise characteristics of ‘associated forces,’ that are or would be sufficient to bring persons and organizations within the foregoing framework.” [CRS Detainee Report, p. 7 (emphasis added).] Instead, it is Government policy that: Section 1021 does not attempt to clarify the circumstances in which a U.S. citizen ... captured within the United States may be held as an enemy belligerent in the conflict with Al Qaeda. Consequently, if the executive branch decides to hold such a person under the detention authority affirmed in Section 1021, it is left to the courts to decide whether Congress meant to authorize such detention when it enacted the AUMF in 2001. [Id. at 16 (emphasis added).] After a survey of the relevant cases, the CRS report concludes that, “regardless of their citizenship, the circumstances in which persons captured in the United States may be subject to preventive military detention have not been definitively adjudicated.” Id. (emphasis added). Because of the lack of definitive judicial resolution as to whether U.S. citizens could be preventively detained under AUMF, attempts were made in Congress to adopt an amendment to NDAA that “would have expressly barred U.S. citizens from long-term military detention on account of enemy belligerent status....” Id. at 15. The amendment was considered and rejected. Id. Thus, the CRS report concludes that the legality and constitutionality of the preventive detention of U.S. citizens, even those captured on American soil, is left unsettled by section 1021. Id. at 10. Actually, the definitional standard by which a court is to make the decision whether a person is subject to preventive detention under NDAA section 1021 is not only unsettled, it is deliberately “indeterminate.” For example, the CRS report states that “the inclusion of ‘associated forces’” in the definition of covered persons is “a category of indeterminate breadth,” as is the “‘substantial support’ prong of the executive’s description of its detention authority....” CRS Report, p. 7 (emphasis added). The definition of covered persons subject to preventive detention was deliberately left unsettled and fluid, in order to maximize presidential discretion. Indeed, since 9/11, Congress has given the President carte blanche power to determine how and against whom he would take the nation to war. That very process — policy by presidential initiative and congressional acquiescence — does not yield the rule of law. Rather, it bows down to executive prerogative. Instead of Congress setting the rules to govern the President’s actions, Congress delegates the rule making power to the President and, then, acquiesces to those rules. That is exactly what happened in the formulation of NDAA section 1021(b)(2). As pointed out, supra, the definition of “covered person” in section 1021(b)(2) appeared initially in a U.S. Department of Justice brief filed in the case known as In re Guantanamo Bay Detainee Litigation. CRS Detainee Report, p. 7, n.18. Instead of exercising its independent judgment to fashion a rule to govern the exercise of presidential discretion, Congress has simply conformed section 1021(b)(2) to accommodate executive experience and practice. This is not the process by which law is to be made under the United States Constitution. Paraphrasing Justice Hugo Black’s keen observation in Youngstown Sheet & Tube v. Sawyer: section 1021(b)(2) does not direct that a congressional policy be executed in a manner prescribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President. See id., 343 U.S. 579, 588 (1952). B. Section 1021(b)(2) is Unconstitutionally Vague. A legislature has a constitutional duty to “define the conduct it chooses to make criminal” in order to preserve “the rule of law.”10 Otherwise, courts will be left with little guidance to assess whether a particular person is entitled to constitutional and legal criminal procedural protections, or whether he is subject to indefinite detention or trial by military commission. A vague statute gives excessive discretion to the President permitting discriminatory treatment, resulting in a breakdown of the rule of law. See Gans Facial Challenges at 1359-61.11 The liberty interest of the individual is even more paramount in times of war, for at stake is whether the person may be held indefinitely without trial (or trial by military commission), or whether that person entitled to the procedural safeguards of the Bill of Rights. 1. The Definition of “Covered Person” in Section 1021(b)(2) is Vague. NDAA section 1021(b)(2)’s definition of “covered person” is permeated with vagueness. First, section 1021 contains absolutely no mens rea requirement.12 A person may be found to have “substantially supported” al-Qaeda or the Taliban without any intent, knowledge, recklessness, or even negligence, or to have given such support to “associated forces” without any intent, knowledge, recklessness or negligence as to whether those forces were “engaged in hostilities” with the United States or its partners. A person could also be found to have “committed a belligerent act ... in aid of ... enemy forces” without any proof of intent, knowledge, or breach of any standard of care. Finally, a person could be found to have “directly supported ... hostilities” against the United States or its partners “in aid of ... enemy forces” without having any idea that such an act was being committed. Having dispensed with any mens rea requirement whatsoever, section 1021(b)(2) fails “to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits [and] may authorize and even encourage arbitrary and discriminatory enforcement.” See City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (emphasis added). Indeed, it appears from the legislative history that the section 1021(b)(2) definition of “covered person” was left deliberately indeterminate in order to maximize presidential discretion, at the price of abandoning the rule of law. 2. The Reach of Section 1021(b)(2) is Vague. While President Obama has attempted to reassure American citizens in his December 2011 signing statement, such assurance, like section 1021(b)(2), is vague. The President has stated that he “want[ed] to clarify that [his] administration will not authorize the indefinite military detention without trial of American citizens,” but when asked by this Court to clarify whether “without trial” meant a military or civilian trial, Government counsel stated that he “would have to look at the signing statement again.”13 Later, Government counsel asserted emphatically that, if a person is an American citizen, “the President’s signing statement would make his fear of indefinite detention under this provision unreasonable.”14 But a presidential signing statement is not binding law on President Obama’s successor in office; indeed, the statement does not even estop the president who wrote it. Some claim that NDAA section 1022(b)(1) exempts U.S. Citizens from detention, but that exemption is only from mandatory detention, not detention at the discretion of the president.15 Additionally, some claim that NDAA section 1021(e) exempts U.S. citizens from preventive detention: Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens ... who are captured or arrested in the United States. [Emphasis added.] And, as detailed above, the “executive’s existing authority to detain U.S. Citizens” is left to the courts to decide case by case. CRS Detainee Report, p. 16. C. Section 1021(b)(2) is Unconstitutionally Overbroad. NDAA section 1021(b)(2)’s unconstitutional vagueness also imposes a “chilling effect” upon the exercise of the First Amendment freedoms of speech, press, and assembly. As the Supreme Court stated in Keyishian v. Board of Regents, 385 U.S. 589 (1967), “‘precision of regulation must be the touchstone in an area so closely touching our most precious freedoms’... ‘for standards of permissible statutory vagueness are strict in the area of free expression...’” Id. at 603. There is no doubt that the plain language of section 1021(b)(2) could reach journalists, Internet bloggers, political activists, and others engaged in First Amendment activities. Any publication of views contrary to the official government policy concerning the war on terror could be construed as “substantially supporting” not only al-Qaeda and the Taliban, but also “associated forces.” And certainly membership in an “associated force” could well be construed to constitute “substantial support” of al-Qaeda or the Taliban. Under questioning by the Court at the March 30 hearing whether section 1021(b)(2)’s “associated forces” would reach political advocacy activities, Government counsel replied “that for ten years this authority has been in existence and the government has never taken the position that any kind of independent advocacy or expression [like that engaged in by Plaintiff Hedges] could put someone within that authority”16 and “that ‘associated forces’ cannot extend to groups that are not armed at all.”17 Remarkably, in making these and like statements, Government counsel did not base them upon any construction or interpretation of the language of section 1021(b)(2). Rather, counsel relied solely upon the claim that the Government has chosen not to extend its preventive detention so far, noting that during that entire time the Government had the “same authority” as it does now under section 1021 and the plaintiffs “have been engaging in the same activities that they claim fear and nothing has happened to them.”18 But, as the Supreme Court recently ruled, “the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige.” United States v. Stevens, 559 U.S., 130 S.Ct. 1577, 1591 (2010). As Chief Justice Roberts observed: “The Government’s assurance that it will apply [a statutory provision] more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.” Id. The U.S. Supreme Court ruled long ago that making it unlawful to join, or otherwise to support, an organization “without knowledge of [its] unlawful purposes and specific intent to further its unlawful aims” would “run afoul of the Constitution.” Keyishian, 385 U.S. at 606-07. As noted above, section 1021(b)(2)’s definition of covered person contains no mens rea requirement whatsoever, much less the “specific intent” requirement commanded by the First Amendment. Thus, section 1021 is overly broad, violating the rights of American citizens to the freedoms of speech, of the press, and of association. See Elfbrandt v. Russell, 384 U.S. 11 (1966).

#### It is incumbent on the judiciary to rule, there is no constitutional basis for the act

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It is generally assumed that the “law of war” is temporary, and that the powers conferred by AUMF and NDAA section 1021 will cease when the war effort against those responsible for the attacks against the nation on 9/11. But AUMF authorizes the President not only to “use all necessary and appropriate force against those nations, organizations, or persons he determines” were responsible for 9/11, but also “to prevent any future acts of international terrorism.” (Emphasis added.) So the end of hostilities will not occur until the war on international terrorism comes to an end. Thus, the “law of war” invoked by AUMF, and continued under NDAA section 1021, will continue so long as the President determines that the threat of future acts of terrorism, whatever their source, continues. The Supreme Court has ruled that, “the war power does not necessarily end with the cessation of hostilities.” Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948). In that light, the Court warned that, because “the effects of war under modern conditions may be felt in the economy for years and years,” the war power “may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well.” Id. at 143-44. Rather than assume the end of hostilities, and thus the cessation of the law of war, it would be wise to heed these words of wisdom penned by Robert Jackson, a former attorney general, then sitting as an associate justice of the U.S. Supreme Court: [T]he arguments that have been addressed to us lead me to utter more explicit misgivings about war powers than the Court has done. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable “war power.” No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It is usually invoked in haste and excitement, when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. [Id., at 146 (Jackson, J., concurring).] While Justice Jackson recognized that even the judiciary could be caught up in the emotions of war, it is incumbent on the third branch of government to exercise its independent judgment.23