UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HEDGES et al., Plaintiffs, v. BARACK OBAMA et al., Defendants.	12 Civ. 331 (KBF)

Government's Memorandum of Law in Support of Its Motion for Reconsideration of the May 16, 2012, Opinion and Order

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, New York 10007
Telephone: 212.637.2703, .2728
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov
christopher.harwood@usdoj.gov

BENJAMIN H. TORRANCE
CHRISTOPHER B. HARWOOD
Assistant United States Attorneys

– Of Counsel –

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Preliminary Statement

Defendants in the above-captioned action (the "government") respectfully submit this memorandum of law in support of their motion for reconsideration of this Court's Opinion and Order dated May 16, 2012 (the "Order"), pursuant to Fed. R. Civ. P. 54(b), 59(e), and 60(b), and Local Civil Rule 6.3.

This Court's Order enjoins the government from enforcing section 1021(b)(2) of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011), against the plaintiffs in this action,[1] but expressly notes that the government's detention authority under the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF") is unaffected.[2] Although the

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[1] The government construes this Court's Order as applying only as to the named plaintiffs in this suit. Although the Order fails to comply with Fed. R. Civ. P. 58, and the concluding paragraph of the Order is not, on its face, clear as to whom the injunction benefits, the government reads it in light of the well-established principle that courts "neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-78 (1995), a principle applicable also to facial challenges, *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 390, 392-94 (4th Cir. 2001); *accord Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (claimants who "do not represent a class . . . [can]not seek to enjoin . . . an order on the ground that it might cause harm to other parties"); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994). As a rule, "injunctive relief should be narrowly tailored to fit specific legal violations," *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Furthermore, while the Order enjoined "enforcement of § 1021," Order 68, the government interprets this to apply only to section 1021(b)(2), as the Court did not discuss —and plaintiffs expressly did not challenge, Tr. 27-28, 34, 276, 290—any other portion of the statute. Within section 1021(b)(2), plaintiffs also did not challenge, Tr. 282, and the Court did not discuss, the language that deems those who are "part of . . . al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners" to be "covered persons"; accordingly, the government views the Court's injunction as leaving that language intact as well.

[2] The Court clearly stated that the government's detention authority under the

(continued...)

government respectfully disagrees with the Order on a number of grounds that the government may raise should it choose to appeal, this motion for reconsideration is limited to one aspect of the Court's reasoning. As explained below, the Court should revisit its decision regarding plaintiffs' standing in light of the fact that the conduct alleged by plaintiffs is not, as a matter of law, within the scope of the detention authority affirmed by section 1021, and that it would in any event be improper to shift the burden of proof on this issue to the government. Reconsideration of the injunction is also supported by the Constitution's separation of powers. Issuing an injunction regarding the President himself, or restraining future military operations (including military detention) under the President's constitutional authority as Commander-in-Chief during a time of war would be extraordinary. Even assuming an order restraining future military operations could ever be appropriate, it is plainly unwarranted here given the absence of any imminent or credible threat of harm to plaintiffs.

Argument

A. Standard for Reconsideration

Reconsideration is appropriate where the moving party points to matters the court did not take into account "'that might reasonably be expected to alter the conclusion reached by the court.'" *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 187 (2d Cir. 2001) (quoting *Shrader v. CSX Trans., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

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[2] (...continued)
AUMF "is still in force and effect." Order at 65; *id.* at 66 ("other statutes . . . can be utilized to detain . . . including the AUMF"; injunction "does not divest the Government of its many other tools").

B. Plaintiffs Lack Standing, as Section 1021 Does Not Apply to Them

As explained in the government's briefs, section 1021 reaffirms the government's authority to detain enemy forces engaged in armed conflict with the United States, defined to include those who (1) are part of al-Qaeda, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners,[3] or (2) provide substantial support[4] to al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners. Gov't Initial Mem. 3-9. The statute affirms the military authority to detain such "covered persons" pending "disposition under the laws of war." § 1021(a). Potential dispositions under the laws of war include detention "under the law of war" until the end of the hostilities authorized by the AUMF. § 1021(c)(1).

The government argued in its briefs that the plaintiffs cannot reasonably believe that section 1021 would extend to their conduct, in light of law of war principles, First Amendment limitations, and the absence of a single example of the government detaining an individual for engaging in conduct even remotely similar to what is alleged here. *See* Gov't Initial Mem. 12-13. But at argument the government did not agree to provide specific assurance as to each plaintiff, a request that the government considers problematic. As a result, this Court deemed the government's position to be unclear regarding whether section 1021 could apply to the conduct alleged by plaintiffs in this case. To eliminate any

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[3] An "associated force" has two characteristics: (1) it is an organized, armed group that has entered the fight alongside al-Qaeda and/or Taliban forces, and (2) it is a co-belligerent with al-Qaeda and/or Taliban forces in hostilities against the United States or its coalition partners. Gov't Initial Mem. 5-6, 23-24; Gov't Supp. Mem. 7, 12.

[4] As we have explained, as a matter of law, "substantial support" does not authorize law of war detention of those who provide "unwitting or insignificant" support to al-Qaeda, the Taliban, or associated forces. Gov't Initial Mem. 5 n.5; Gov't Supp. Mem. 7.

doubt, the government wants to be as clear as possible on that matter. As a matter of law, individuals who engage in the independent journalistic activities or independent public advocacy described in plaintiffs' affidavits and testimony, without more, are not subject to law of war detention as affirmed by section 1021(a)-(c), solely on the basis of such independent journalistic activities or independent public advocacy.[5] Put simply, plaintiffs' descriptions in this litigation of their activities, if accurate, do not implicate the military detention authority affirmed in section 1021.

As we have explained, this construction of section 1021 is consistent with the detention authority granted by the AUMF, which is informed by the law of war. Of course, as Congress expressly stated, "[n]othing in [section 1021] is intended to . . . expand the authority of the President or the scope of the [AUMF]." § 1021(d). Notably, plaintiffs have not argued that detention under the law of war would extend to the types of independent journalistic activities or public advocacy they have alleged. Moreover, for ten years the Executive Branch has been applying its military detention authority under the AUMF, and it has never taken the position that a person could be made subject to its military detention authority merely for engaging in the independent journalistic activities or independent public advocacy at issue here. Gov't Initial Mem. 13-14, 17-19, 22; Gov't Supp. Mem. 15-16. In adopting section 1021, with the express intent of affirming and codifying the Executive's

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[5] This case does not involve the kind of independent expressive activity that could support detention in light of law of war principles and the First Amendment. In contrast, for example, a person's advocacy, in a theater of active military operations, of military attacks on the United States or the intentional disclosure of troop movements or military plans to the enemy, or similar conduct that presents an imperative security threat in the context of an armed conflict or occupation, could be relevant in appropriate circumstances. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 5, 41-43, 78. As discussed further below, it is not appropriate to expect the government to make categorical statements about the scope of its detention authority in hypothetical scenarios that could arise in an armed conflict, in part, because that authority is so context-dependent.

existing authority under the AUMF, "Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government." *National Lead Co. v. United States*, 252 U.S. 140, 146-47 (1920); *accord Saxbe v. Bustos*, 419 U.S. 65, 73-75 (1974) (statutory construction "reflects the administrative practice"); *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835) (statute should "be construed with reference to [Executive's] usage"); *United States v. Wilson*, 290 F.3d 347, 356-47 (D.C. Cir. 2002) (the "relevant practices of the Executive Branch" and "the Executive Branch's interpretation of the law through its implementation" form "background understandings" that "Congress is presumed to preserve, not abrogate"); Gov't Supp. Mem. 1-7.

Thus, the claimed fear of detention here based solely on the independent journalistic activities or independent public advocacy alleged by plaintiffs is without any factual or legal foundation.

As the government explained, the claims are flawed in a second material respect in that there is no substantial nexus alleged to a covered group. Section 1021 has no application to unarmed groups like WikiLeaks or Occupy; nor could a group like Hamas qualify as an "associated force" under the statute solely for committing acts of terrorism. Gov't Initial Mem. 23-24 & n.13; Gov't Supp. Mem. 13. Plaintiffs themselves acknowledged that other groups alleged to be at issue in this action, such as WL Central, US Day of Rage, and Revolution Truth, are not armed, much less associated with al-Qaeda or the Taliban in armed conflict with the United States. Gov't Supp. Mem. 12-13. Because two of the plaintiffs alleged that their activities related solely to such unarmed, non-covered groups, the government did in fact expressly state that "neither Wargalla nor Jonsdottir could possibly be deemed to fall within the scope of section 1021." Gov't Supp. Mem. 12. And, as the government further stated, neither of the other two testifying plaintiffs, O'Brien or

Hedges, alleged any connection to al-Qaeda, the Taliban, or an associated force beyond the extremely attenuated link of reporting on them for journalistic outlets that are independent of al-Qaeda and the Taliban. Gov't Supp. Mem. 13. Thus section 1021 has no application to plaintiffs' alleged activities.

The Court's ruling to the contrary depended largely on its conclusion that the government did not offer specific assurances to the individual plaintiffs that they would not be subject to section 1021. Order 31-33, 37, 46, 56, 62, 65. No case requires the government to provide such "assurances" or "comfort," Tr. 237, 272, or any other type of advice to any person simply because he brings a lawsuit, Gov't Supp. Mem. 16-17. Indeed, the government cannot be expected to make assurances regarding individuals who file a suit in a context such as this, based solely upon their allegations and without knowledge of other facts that might be relevant to determining whether the individuals fall within the scope of the detention authority affirmed by section 1021. But consistent with law-of-war principles, constitutional limitations, and the government's unambiguous past practice, we can reiterate that the detention authority provided in the AUMF and affirmed by section 1021 does not encompass the independent journalistic activities or independent public advocacy identified here standing alone.

Moreover, it is improper to shift to defendants the burden of disproving the possibility of harm. Gov't Initial Mem. 13, 28; Gov't Supp. Mem. 8 & n.5; *Cacchillo v. Insmed, Inc.*, 638 F.3d 401 (2d Cir. 2011) (plaintiff bears the burden of establishing standing). In granting the Order here, this Court relied upon *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 131 (2d Cir. 2011). This Court stated that under *Clapper*, where "plaintiffs allege a prospective injury to First Amendment rights, they must only show an actual and well-founded fear." Order 37. The government reiterates its disagreement with the *Clapper*

decision and notes that, since this Court's Order, the Supreme Court has granted review in *Clapper*. No. 11-1025, 2012 WL 526046 (U.S. May 21, 2012). But even under *Clapper,* plaintiffs must show a sufficiently threatened "future injury" with an "objectively reasonable likelihood." 638 F. 3d at 134. It is plaintiffs' burden to demonstrate an objectively credible threat of enforcement and injury, and they have wholly failed to meet that burden. The Court's Order improperly shifts that burden—pointing to no evidence that supports the conclusion that plaintiffs met their burden by demonstrating an objectively reasonable threat of enforcement, but only to the perceived lack of "assurances." In doing so, the Court's Order contravened well-established law.

In the context of this case, it is particularly inappropriate to shift the burden to the government to disprove a plaintiff's speculative fear of future harm. To require the government to evaluate and declare whether or not a statute affirming the authorization of the use of force—here, in the form of detention—during an armed conflict would apply to specific individuals for specific conduct would place the government in an untenable position: the government would be inundated with copycat suits and be forced to give what would be advisory opinions to countless individuals regardless of whether they have shown a reasonable fear of enforcement. Tr. 268-69. The government cannot be required to define the boundaries of its authority by giving *ex ante* assurances to individuals in this manner, especially to individuals who lack a sufficient "personal stake in the outcome of the controversy . . . to justify exercise of the court's remedial powers on [their] behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

Moreover, in this case, which involves the Constitution's separation of powers in the context of national defense and security, it is particularly inappropriate to issue an injunction, especially where there is an inadequate showing of standing and irreparable

injury by the plaintiffs. Gov't Supp. Mem. 4, 17-18. Even in an ordinary case that does not involve war powers during an active armed conflict, the power to issue an injunction is always discretionary, and requires careful consideration of the public consequences of an injunction. *See EBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). In national security and military matters, courts are properly reluctant to exercise that equitable discretion in those fields. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (reluctance due, in part, to the "lack of competence on the part of the courts" in regard to matters of national security (quotation marks omitted)). And constitutional concerns become particularly acute where, as here, the injunction would entail "judicial intrusion into the Executive's ability to conduct military operations abroad." *Munaf v. Geren*, 553 U.S. 674, 700 (2008). Indeed, "it would be an abuse of . . . discretion to provide discretionary relief" regarding military operations approved by "the President [and] the Secretary of Defense." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.).[6]

Indeed, based on separation-of-powers principles, more generally, the courts have recognized that an injunction running against the President would be extraordinary, and have questioned whether such an order would ever be appropriate regarding the President's "performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866); *accord Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality) (the "grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows," and generally courts lack jurisdiction to enjoin President); *id.* at 825-29 (Scalia, J., concurring and concurring in judgment) (discussing "unbroken

[6] For the same reasons, the declaratory relief sought by plaintiffs should be denied.

historical tradition . . . implicit in separation of powers" against enjoining President). The reasons for denying injunctive relief against the President are all the more compelling where, as here, a plaintiff seeks relief against the President as Commander-in-Chief under the Constitution. Injunctive relief is also inappropriate against the Secretary of Defense in this case, where Executive Branch officers assist the President in carrying out powers and responsibilities vested in the President by the Constitution, as is true of the Commander-in-Chief power, and "their acts are his acts." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *see also* 10 U.S.C. § 113(b) (Secretary is "principal assistant to the President" in defense matters, whose authority is "[s]ubject to the direction of the President"); *id.* § 162(b) ("Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs—(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command."). While in other contexts an injunction might run against an Executive Branch officer responsible for assistance of the President, *see Franklin*, 505 U.S. at 803, no such injunction is appropriate with respect to future military operations, including detention—especially given plaintiffs' failure to establish any objectively reasonable basis for concluding that they face imminent harm.

In this case, an injunction relating to the Executive's military detention authority is unwarranted, especially given the government's clarification of its position regarding the purported threat of military detention: as noted above, assuming for current purposes that the plaintiffs' descriptions in this litigation of their activities are true and complete, those activities would not, as a matter of law, make any of the plaintiffs subject to section 1021. Under this Court's rationale, that statement "eliminat[es]" the plaintiffs' standing, Order 33, 46, and thus requires denial of their motion for a preliminary injunction.

Conclusion

The Court should reconsider its Order, and deny the motion for a preliminary injunction.

Dated: New York, New York
May 25, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ Benjamin H. Torrance
BENJAMIN H. TORRANCE
CHRISTOPHER B. HARWOOD
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: 212.637.2703, .2728
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov
christopher.harwood@usdoj.gov