



Written by [Joe Wolverton, II, J.D.](#) on August 9, 2012

Obama Admin. Files Appeal of NDAA Injunction

On Monday lawyers representing the Obama administration [filed an appeal challenging an injunction](#) issued by a federal judge in May barring the enforcement of the indefinite detention provision of the National Defense Authorization Act (NDAA).



This was likely a premature response to a ruling expected on a hearing held Tuesday to make the temporary injunction permanent.

Oral arguments on a request filed by plaintiffs to permanently enjoin the federal government from enforcing the indefinite detention provisions of the NDAA were heard Tuesday during four hours of questions and answers, but at press time the court had issued no ruling.

Curiously, not a single outlet of the mainstream media reported this important event.

On May 16 Judge Katherine Forrest (left photo, above) of the [U.S. District Court for the Southern District of New York](#) [issued a preliminary injunction](#) preventing the Obama administration from exercising the indefinite detention authority granted the President by Section 1021 of the NDAA.

In [the 68-page opinion](#) accompanying the temporary injunction order, Judge Forrest disagreed with the federal government's argument that the relevant provisions of the NDAA merely restate existing law. She wrote: "Section 1021 is not merely an 'affirmation' of the AUMF [Authorization for the Use of Military Force]."

Pointing out that were Section 1021 and the AUMF identical then the former would be redundant, Judge Forrest held:

Section 1021 lacks what are standard definitional aspects of similar legislation that define scope with specificity. It also lacks the critical component of requiring that one found to be in violation of its provisions must have acted with some amount of scienter — i.e., that an alleged violator's conduct must have been, in some fashion, "knowing." Section 1021 tries to do too much with too little — it lacks the minimal requirements of definition and scienter that could easily have been added, or could be added, to allow it to pass Constitutional muster.

[Scienter is defined as](#) "a state of mind often required to hold a person legally accountable for his or her acts." In other words, the indefinite detention provisions of the NDAA are too vague and aren't specific enough to permit a person to know whether he or she has violated the law.

While admitting that preventing the federal government from enforcing a congressional act is a sober matter that must be attended to with caution, Judge Forrest writes that "it is the responsibility of our judicial system to protect the public from acts of Congress which infringe upon constitutional rights."

In its appeal, the federal government argues that in cases dealing with "militants" and those offering



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“substantial support” to them, indefinite detention without due process is appropriate.

The notice of appeal was filed with the 2nd Circuit Court of Appeals by the Manhattan office of the U.S. Attorney’s Office, the branch of the Justice Department handling the case in which President Barack Obama and Defense Secretary Leon Panetta are named defendants.

As readers will recall, Pulitzer Prize-winning journalist Chris Hedges (right photo, above) is joined as a plaintiff in the suit by a coterie of other prominent writers and commentators. Noam Chomsky, Daniel Ellsberg, and Icelandic politician Birgitta Jonsdottir all signed on to add their witness to that of Hedges that the fear of indefinite detention lurked within the shadows of vagueness of key terms of the NDAA.

The principal allegation made by the plaintiffs against the NDAA was that the vagueness of critical terms in the NDAA could be interpreted by the federal government in a way that authorizes them to label journalists and political activists who interview or support outspoken critics of the Obama administration’s policies as “covered persons,” meaning that they have given “substantial support” to terrorists or other “associated groups.”

According to the text of [Section 1021 of the NDAA](#), the president may authorize the armed forces to indefinitely detain:

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

Fearing that this section could be applied to journalists and that the specter of such a scenario would have a chilling effect on free speech and freedom of the press (Naomi Wolf writes in her affidavit that she has refused to conduct many investigative interviews for fear that she could be detained under the auspices of applicable sections of the NDAA) in violation of the First Amendment, Hedges filed his lawsuit on January 12 in the U.S. District Court for the Southern District of New York.

Hedges’ complaint claims that his extensive work overseas, particularly in the Middle East covering terrorist (or suspected terrorist) organizations, could cause him to be categorized as a “covered person” who, by way of such writings, interviews and/or communications, “substantially supported” or “directly supported” “al-Qaeda, the Taliban or associated forces that are engaged in hostilities against the United States or its coalition partners,... under §1031(b)(2) and the AUMF [Authorization for Use of Military Force].”

Specifically, Hedges alleges in his complaint that it is precisely the existence of these “nebulous terms” — terms that are critical to the interpretation and execution of the immense authority granted to the president by the NDAA — that could allow him or someone in a substantially similar situation to be classified as an enemy combatant and sent away indefinitely to a military detainment center without access to an attorney or habeas corpus relief.

During Tuesday’s hearing, Carl Mayer, an attorney representing some of the plaintiffs, repeated his argument that the phrase “associated forces” was written by the Congress so as to be purposely ambiguous, and that it could reasonably be expected that agents of the federal government could



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interpret articles and statements made by journalists and activists as attempts to support armed conflict against the United States and as the offering of “substantial support” to terror organizations.

David Remes, one of the plaintiff’s other lawyers, echoed that point, saying, “The danger posed by the sword of Damocles is not that it falls, but that it can fall.”

Judge Katherine Forrest then asked Benjamin Torrance, the lawyer representing the government, whether he was confident in the government’s ability to narrowly define terms and if so, why they had not done so in this statute, specifically as regards the crucial terms “covered person,” “substantial support,” and “associated forces.” The judge followed up by asking Torrance how he could expect ordinary citizens to properly define key terms in the law if the Congress was unable to do so.

Torrance responded by reiterating the Obama administration’s position that the NDAA does not apply to U.S. citizens residing inside the United States and that the purpose of the law was not to restrict the right of anyone to exercise his or her First Amendment right to speak or publish, including articles and speeches condemning government actions.

[According to one report of the proceedings](#), in response to this point, Judge Forrest quoted Chief Justice John Roberts’s ruling in a 2010 case: “The First Amendment protects against the government,” Roberts wrote. “It does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the government promised to use it reasonably.”

Torrance then answered that detainees would not be completely cut off from all judicial remedies as they would still be permitted to file a writ for habeas corpus.

“How long does a petition take?” Judge Forrest asked.

Torrance demurred, responding that he didn’t know the answer to that question off the top of his head.

“Several years, right?” Forrest demanded.

Torrance then admitted that that might be true, but added that since 9/11, during hearings on petitions for habeas corpus relief, most courts have found the detentions to be lawful.

At the conclusion of the hearing, Judge Forrest said that she had not yet reached a decision. Hedges and the other plaintiffs were hopeful for a favorable outcome in light of the tone of the questioning and Judge Forrest’s previous injunction. In fact, Mayer reportedly said later that “he and his colleagues were considering bringing contempt of court charges over what he called an apparent disregard for the court injunction.”



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