Written by **Joe Wolverton, II, J.D.** on September 19, 2012

Appeals Court Judge Reinstates Indefinite Detention — for Now

On Monday, September 17, on the 225th anniversary of the signing of the final draft of the Constitution, with a one-page order a lone appeals court judge effectively repealed many of that document's fundamental protections of individual liberties.

Issued late Monday night, the order written by Judge Raymond Lohier of the Second Circuit Court of Appeals temporarily set aside a lower court's injunction blocking indefinite detention provisions of the National Defense Authorization Act (NDAA). The practical effect of Judge Lohier's stay is the immediate reinstatement of the president's authority to send the military to apprehend and indefinitely imprison a person suspected of colluding with a terrorist organization to threaten U.S. national security.

In the order, Judge Lohier offered no explanation for his decision, preferring to postpone publishing any opinion until the matter is thoroughly reviewed by the Second Circuit.

The injunction permanently (pending an appellate court's review) preventing the president from exercising the extraordinary and extraordinarily unconstitutional powers granted him in the NDAA was issued on September 12 by Judge Katherine Forrest of the U.S. District Court for the Southern District of New York.

The Obama administration filed an immediate appeal.

In the opinion supporting the permanent injunction, Judge Forrest wrote,

> The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention — potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity — and that specificity is absent from § 1021(b)(2).

This is similar to the language she used in the 68-page opinion accompanying the temporary injunction order. In that 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 wrote that "it is the responsibility of our judicial system to protect the public from acts of Congress which infringe upon constitutional rights."

As readers will recall, Pulitzer Prize-winning journalist Chris Hedges is joined as a plaintiff in a lawsuit challenging the NDAA 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 in violation of the First Amendment, Hedges filed his lawsuit on January 12, 2012. (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.)

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.

Despite the Second Circuit judge's late-night defense of indefinite detention, Hedges is optimistic. In an article by Hedges published at truth-out.org, he remains cautiously optimistic for a favorable outcome given the repeated failures of the government's lawyers to defend the indefensible. "The government has now lost four times in a litigation that has gone on almost nine months. It lost the preliminary injunction in May. It lost a motion for reconsideration shortly thereafter. It lost the permanent injunction. It lost its request last week for a stay," Hedges writes.

In Hedges' article, co-lead counsel in the Hedges case, Bruce Afran, says the Obama administration's dogged determination to restore the president's NDAA authority raises a "disturbing question." Speaking of the riots related to the *Innocence of Muslims* YouTube video that purportedly set off the anti-American violence in the Middle East, Afran said,

> A Department of Homeland Security bulletin was issued Friday claiming that the riots [in the Middle East] are likely to come to the U.S. and saying that DHS is looking for the Islamic leaders of these likely riots. It is my view that this is why the government wants to reopen the NDAA — so it has a tool to round up would-be Islamic protesters before they can launch any protest, violent or otherwise. Right now there are no legal tools to arrest would-be protesters. The NDAA would give the government such power. Since the request to vacate the injunction only comes about on the day of the riots, and following the DHS bulletin, it seems to me that the two are connected. The government wants to reopen the NDAA injunction so that they can use it to block protests.

A hearing before a three-judge panel of the Second Circuit Court of Appeals is scheduled for September 28.

Photo: AP Images