



Written by [Joe Wolverton, II, J.D.](#) on September 13, 2012

## Federal Judge Permanently Blocks Indefinite Detention Under NDAA

On September 12 [a federal district court judge made permanent an earlier order](#) temporarily blocking enforcement of provisions of the National Defense Authorization Act (NDAA) purporting to empower the president to deploy the U.S. military to apprehend and indefinitely detain people suspected of “substantially supporting” al-Qaeda, the Taliban, or “associated forces.”



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

The temporary block has now been made permanent. In [the opinion handing down the injunction issued yesterday](#), 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 writes that “it is the responsibility of our judicial system to protect the public from acts of Congress which infringe upon constitutional rights.”



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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 (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.

In her order permanently preventing the Obama administration from enforcing the sections of the NDAA challenged by Hedges and his co-plaintiffs, Judge Forrest wrote regarding the court's role in protecting timeless principles such as habeas corpus and due process:

Courts must safeguard core constitutional rights. A long line of Supreme Court precedent adheres to that fundamental principle in unequivocal language. Although it is true that there are scattered cases — primarily decided during World War II — in which the Supreme Court sanctioned undue deference to the executive and legislative branches on constitutional questions, those cases are generally now considered an embarrassment (e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans based on wartime security concerns)), or referred to by current members of the Supreme Court (for instance, Justice Scalia) as "wrong"



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(e.g., *Ex parte Quirin*, 317 U.S. 1 (1942) (allowing for the military detention and execution of an American citizen detained on U.S. soil)). Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside.

Farther down in the order, Judge Forrest cites the Supreme Court's decision in *Ex Parte Milligan* in support of her own ruling:

A few years later, in *Milligan*, the Supreme Court held: "Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus." 71 U.S. at 4. The Court stated, "No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open." *Id.* at 73.

In an [interview with the Village Voice](#), Hedges praised Judge Forrest's brave decision: "I'm elated," he said. "This judge is amazing. She had the courage to do the right thing in an age when most judges write long opinions about why they can't do the right thing."

As the article in the *Voice* rightly notes, there is reason to be cautious in such rejoicing. The government will appeal this decision and it is likely that a decision as uniquely constitutional as Judge Forrest's will be torn apart by an appeals court.

"That's all right," Hedges told the *Village Voice*. "If they appeal, we'll fight them, and we'll keep fighting them, and we'll fight them until we win."

According to one of the plaintiffs in the case, Tangerine Bolen, the Obama administration has filed a notice of its intent to appeal Judge Forrest's decision.

Photo: U.S. military guards walk within Camp Delta military-run prison, at the Guantanamo Bay U.S. Naval Base, Cuba: AP Images



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