



Written by [Joe Wolverton, II, J.D.](#) on April 1, 2012

Lawsuit: Journalists Fear First Amendment Infringed by NDAA

The purpose of [Thursday's hearing held in a Manhattan federal courtroom](#) was to decide if those who have joined in the lawsuit questioning the constitutionality of the NDAA have legal standing to initiate a proceeding against the federal government.

In order to clear the "[standing](#)" hurdle, plaintiffs must provide evidence sufficient to demonstrate a "reasonable fear" of being denied their First Amendment rights and of being detained by the government of the United States for the exercise thereof.

If the plaintiffs can satisfy this first threshold legal requirement, then the suit may proceed.



The suit, [filed by Pulitzer Prize-winning reporter Chris Hedges](#), counts several other prominent writers and commentators as co-plaintiffs — Noam Chomsky, Daniel Ellsberg, and Icelandic politician Birgitta Jonsdottir. Renowned author and journalist Naomi Wolf has joined the legal battle as well, indicating in [an article published in the Guardian](#) that she has filed an affidavit in support of Hedges and the suit against the NDAA.

The principal allegation made by the plaintiffs against the NDAA is that the vagueness of critical terms in the NDAA could be interpreted by the federal government in a way that authorizes it 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."

Fearing that even the probability 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.

Naming both President Barack Obama and Defense Secretary Leon Panetta as defendants, the complaint of Hedges avers 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]."

The complaint continues,



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The Homeland Battlefield Bill [NDAA] is sufficiently broad as to include within its scope Plaintiff's writings and journalistic endeavors that have the effect of conveying, promoting or disseminating the ideas, philosophy and program of organizations, persons and entities in a state of hostility with the United States since September 11, 2001 or with organizations, persons and entities allied or associated with persons in a state of hostilities as defined under the AUMF and the Homeland Battlefield Bill.

Accordingly, Plaintiff as a result of his journalistic endeavor and profession, is in jeopardy of detention under the Homeland Battlefield Bill because he produces material, an example of which is set forth, supra, that may be deemed within the scope of "substantially" or "directly" supporting persons, organizations, entities and their associates, allies and colleagues, who are in a state of hostility with the United States.

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 support of this point, Carl Mayer, an attorney representing some of the plaintiffs, argued at the hearing on Thursday 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 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.

At this point, Judge Katherine Forrest 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 with regard to 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 citizens of the United States 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.

Singling out the Occupy Wall Street movement and WikiLeaks, Torrance said that such groups are not the target of the law, but instead it was enacted in order to aid the United States in its fight against global terrorism perpetrated by al-Qaeda, the Taliban, and other "associated forces" who are currently engaged in armed conflict against America.

During testimony presented at Thursday's hearing, Chris Hedges recounted a few of his personal experiences while serving as a journalist covering the conflict in the Middle East, as well as his dealings with terrorist groups based in Central America. Hedges expressed his fear that these interactions could be classified under the NDAA as aid to the enemy and how others might curb their efforts to cover these types of organization based on similar fears. This would have a textbook chilling effect on the freedoms of speech and the press protected by the First Amendment.

"Under the NDAA, as I see it, if you're writing about something that goes against the official narrative, there is no difference between you and the people you are covering," Hedges testified.



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In the [Guardian article](#), Naomi Wolf bears unfortunate witness to the truth of Hedge's predictions.

In November 2011, I declined, in writing, a proposed meeting with Vaughan Smith and Julian Assange, because of statements made by high-level United States officials regarding their belief that Assange is a terrorist, as well as the ongoing Department of Justice investigation, which, as I understand it, could lead to terrorism and/or espionage charges against him. I have declined to meet directly with members of Occupy Wall Street, because that group is being threatened with being named as terrorists in Miami. As a result, I have ceased conducting one-on-one interviews with them.

Thus the Homeland Battlefield Bill has already a chilling effect upon my ability to investigate and document matters of national controversy that would ordinarily be subject to my professional inquiry. It has therefore prevented my readers from receiving the full spectrum of truthful reporting which, in a functioning democracy, they have a right to expect.

Speaking of his own experience with wiretaps and alleged placement on government "watch lists," Hedges stated, "There is a possibility that people looking at my activity from the outside would not differentiate between myself and someone endorsing that activity." This situation, it seems, would be an implication of the vagueness of the term "associated forces" as used in section 1021 of the NDAA and under the authority of which a person could be indefinitely detained, denied habeas corpus and due process, and left in a secret government prison until the "end of hostilities."

Other testimony was presented in furtherance of the plaintiffs' complaint against the federal government. Later in the hearing, Naomi Wolf read the written testimony of Birgitta Jonsdottir. Jonsdottir assisted WikiLeaks in producing a video of an airstrike on Baghdad in which 11 civilians were reportedly killed that was carried out by the U.S. military. The video went viral and brought attention to Jonsdottir — attention she now fears could place her in danger of being captured and indefinitely incarcerated by agents of the U.S. government.

In the sworn statement read by Wolf, Jonsdottir explained that she did not testify in person because she was afraid of being detained under the authority of the NDAA if she traveled to New York.

The remaining roster of plaintiffs — including Pentagon Papers source Daniel Ellsberg, Massachusetts Institute of Technology Professor Noam Chomsky, and Revolution Truth founder Jennifer Bolen — did not enter testimony at Thursday's hearing.

Although the evidence was certainly compelling in showing that the NDAA is inimical to the fundamental principles of freedom and the rule of law upon which the Constitution is built, District Court Judge Forrest wasn't completely persuaded. She admitted that she was "extremely skeptical" that the plaintiffs would be able to provide sufficient evidence that the NDAA interfered with their First Amendment rights.

Later, Judge Forrest indicated that as she read the NDAA, the restraint on free speech is not "the heart of the statute." She did, however, state that she did believe that Section 1021 of the NDAA may have been written so as to include speech under its umbrella.

Finally, Judge Forrest admitted that she would have a hard time "finding [the statute] unconstitutional." She pointed to the Supreme Court's decision in [Holder v. Humanitarian Law Project](#) wherein judges were instructed to "tread carefully" when interpreting laws that touch and concern matters of national



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security.

Pleadings from both sides must be submitted by early April. After considering these arguments, Judge Forrest will decide if the case may go forward.



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