



Written by [Bob Adelman](#) on May 1, 2014

Supreme Court Refuses to Hear Case Against NDAA Unlawful Detention

Within days of Congress reauthorizing the National Defense Authorization Act (NDAA) in January 2012, Brian Trautman [summarized it perfectly](#):

This pernicious law poses one of the greatest threats to civil liberties in our nation's history. Under Section 1021 of the NDAA, foreign nationals who are alleged to have committed or merely "suspected" of sympathizing with or providing any level of support to groups the U.S. designates as terrorist organization or an affiliate or associated force may be imprisoned without charge or trial "until the end of hostilities."



The law affirms the executive branch's authority granted under the 2001 Authorization for Use of Military Force (AUMF) and broadens the definition and scope of "covered persons."

But because the "war on terror" is a war on a tactic, not on a state, it has no parameters or timetable. Consequently, this law can be used by authorities to detain (forever) anyone the government considers a threat to national security and stability — potentially even demonstrators and protesters exercising their First Amendment rights.

One of those felt threatened was Christopher Hedges, Pulitzer Prize winner and former *New York Times* reporter, who sued President Obama (and others in his cabinet along with members of Congress) claiming that his rights not only as a citizen but as a journalist were threatened. U.S. District Court Judge Katherine M. Forrest agreed, issuing a preliminary injunction against the most pernicious piece of the NDAA — Section 1021(b)(2) — on constitutional grounds, and then made her ruling permanent four months later.

The administration appealed her decision and the injunction was lifted until a full appeal could be heard. The U.S. Second Circuit Court of Appeals overturned Forrest's ruling in July 2013. From there it was just a matter of time before the case came to the Supreme Court for review. On April 28 the Supreme Court [let the Second Circuit Court's ruling stand](#), without comment.

The specific language contested allows the president to use United States armed forces to detain indefinitely

[Any] person who was a part of or substantially supports 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.

Indefinite detention means no protection under the Fifth Amendment ("No person shall be ... deprived



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of life, liberty, or property, without due process of law”), the Sixth Amendment (“the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation”), or the Fourteenth Amendment (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

In addition the ruling greatly dampens and discourages freedoms guaranteed under the First Amendment (“Congress shall make no law ... abridging the freedom of speech, or of the press.”)

In other words, under instructions from the president, an American citizen may be arrested, incarcerated and deprived not only of his right to an attorney but access to trial in a court of law for as long as such alleged hostilities last (i.e., forever).

Hedges, along with other plaintiffs including whistleblower Daniel Ellsberg, claimed that such a broad reading of undefined terms as “covered persons” providing “substantial support” to terrorists or other “associated groups” could easily enfold him in its trap in his role as an investigative journalist. He called the terms “nebulous,” recognizing that they could be expanded to include him as an “enemy combatant” merely for having conversations with sources linked to terrorist groups. The “enemy combatant” designation could then be used to put him away indefinitely in a military detention center with no access to an attorney.

In her ruling, Forrest claimed that the poisonous section of the NDAA did in fact violate the U.S. Constitution, that Section 2012(b)(2) of the NDAA was

Constitutionally infirm, violating both their free speech and associational rights guaranteed by the First Amendment as well as due process rights guaranteed by the Fifth Amendment of the United States Constitution....

There is a strong public interest in protecting rights guaranteed by the First Amendment ... [as well as] a strong public interest in ensuring that due process rights guaranteed by the Fifth Amendment are protected.

Her final comments should have ended the matter:

The court is mindful of the extraordinary importance of the government’s efforts to safeguard the country from terrorism. In light of the high stakes of those efforts as well as the executive branch’s expertise, courts undoubtedly owe the political branches a great deal of deference in the area of national security....

Nevertheless, the Constitution places affirmative limits on the power of the Executive to act, and these limits apply in times of peace as well as times of war. Heedlessly to refuse to hear constitutional challenges to the Executive’s conduct in the name of deference would be to abdicate this court’s responsibility to safeguard the rights it has sworn to uphold.

But upon appeal, the Second Circuit held that the plaintiffs had no standing to bring the suit as they could not prove that they had been damaged, and reversed the earlier decision. Besides, said that court, the language the plaintiffs had objected to doesn’t mention American citizens specifically, and by definition, it therefore must not refer to them. Here’s how the court beat up the English language in coming to that decision:



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Section 1021(e) provides that Section 1021 just does not speak — one way or the other — to the government’s authority to detain citizens, lawful resident aliens or any other persons captured or arrested in the United States....

We thus conclude, consistent with the text and buttressed in part by the legislative history, that Section 1021 means this: With respect to individuals who are not citizens, are not lawful resident aliens and are not captured or arrested within the United States, the President’s AUMF [Authorization for Use of Military Force Against Terrorists, passed after 9/11] authority includes the authority to detain those responsible for 9/11 as well as those who were 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 — a detention authority that Section 1021 concludes was granted by the original AUMF.

But with respect to [American] citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.

Therefore, in the convoluted language and twisted logic of the appeals court, since the language says nothing about American citizens, it must mean nothing to American citizens.

The silence from the Supreme Court is deafening. The Rutherford Institute, which supports Hedges, issued a statement following the Supreme Court’s announcement that it would let the appeals court’s ruling stand:

In refusing to hear a legal challenge to the indefinite detention provision of the National Defense Authorization Act of 2012 (NDAA), the United States Supreme Court has affirmed that the President and the U.S. military can arrest and indefinitely detain individuals, including American citizens. By denying without comment a petition for review in *Hedges v. Obama*, the high court ... let stand a lower court ruling empowering the President to use “all necessary and appropriate force” to indefinitely detain persons associated with or “suspected” of aiding terrorist organizations.

John Whitehead, head of Rutherford, added:

What the NDAA does is open the door for the government to detain as a threat to national security anyone viewed as a troublemaker.

According to government guidelines for identifying domestic extremists — a word used interchangeably with terrorists — [the law] applies to anyone exercising their First Amendment rights in order to criticize the government.

Hedges himself, while unavailable for comment following the Supreme Court’s announcement, said earlier that

If Section 1021 stands it will mean, as [Judge] Forrest pointed out in her 112-page opinion, that whole categories of Americans — and here you can assume dissidents and activists — will be subject to seizure by the military and indefinite and secret detention.

By failing to take *Hedges v. Obama* under consideration, the Supreme Court appears to have allowed precisely that.

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