



Written by [Joe Wolverton, II, J.D.](#) on May 17, 2012

Federal Judge Blocks Enforcement of NDAA's Indefinite Detention Provisions

Judge Katherine Forrest of the U.S. District Court for the Southern District of New York [issued a preliminary injunction](#) on Wednesday preventing the Obama administration from exercising the indefinite detention authority ostensibly granted the President by Section 1021 of the National Defense Authorization Act for 2011.

In [the 68-page opinion](#), 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."

When asked about his response to the judge's ruling, plaintiff and Pulitzer Prize-winning journalist Chris Hedges called the ruling "courageous" but added that Judge Forrest "did what she was supposed to do" in light of the fact that "the law is so clearly unconstitutional."

As readers will recall, Hedges was 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 specter of indefinite detention loomed within the shadows of vagueness cast by 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



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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, Hedges' complaint averred 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 support of this point, Carl Mayer, an attorney representing some of the plaintiffs, argued at the hearing in March 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 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.

Singling out the Occupy Wall Street movement and WikiLeaks, Torrance said that such groups are not the target of the law, but that 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 the hearing in March, 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



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types of organizations based on similar fears. This would have a textbook chilling effect on the freedoms of speech and the press protected by the First Amendment.

Moreover, Hedges argued, “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 carried out by the U.S. military on Baghdad in which 11 civilians were reportedly killed. 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.

Despite the power of this testimony, originally Judge Forrest indicated that as she read the NDAA, the restraint on free speech was not “the heart of the statute.” She stated, however, that she did believe that Section 1021 of the NDAA may have been written so as to include speech under its umbrella.

Apparently, the judge saw the light regarding the NDAA’s potential impact on the First Amendment and decided to do her part to shrink the federal umbrella, because in her order she wrote that “the chilling impact on First Amendment rights [is] reasonable — and real.”

When contacted by *The New American* for comment on the judge’s adverse ruling, the lawyers at the U.S. Attorney’s office in Manhattan who represented the federal government in the case refused comment.

Although this favorable ruling is reason to celebrate, constitutionalists must not be lulled into a false sense of security, relying on one branch of the federal government to check another. The surest solution to unconstitutional acts of Congress or edicts of the executive is to apply the principles of nullification.

Remember that, as Alexander Hamilton [wrote in the *Federalist Papers*](#), “There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid.”

Joe Wolverton, as a journalist and lawyer, is uniquely qualified to both write and participate in the constitutional challenge filed by Chris Hedges against the enforcement of the indefinite detention provisions of the NDAA. To that end, Joe has exposed the constitutional violations of the NDAA from the beginning and he recently joined the team of journalists, activists, and lawyers who successfully blocked the enforcement of the provisions of the NDAA that could have categorized journalists as enemy combatants and permitted their indefinite imprisonment.



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