Written by **Joe Wolverton, II, J.D.** on June 9, 2012

Federal Judge Reaffirms Her Order Blocking Indefinite Detention by Obama Administration

Lest there was any lingering doubt, the federal judge who enjoined enforcement of the indefinite detention provisions of the National Defense Authorization Act (NDAA) told the Obama Administration that it may not legally detain an American indefinitely based on a suspicion of support of terrorism unless the government can demonstrate a connection to the attacks of September 11, 2001.

In a memorandum clarifying her ruling from May 16, Judge Katherine B. Forrest (pictured) of the Southern District of New York reaffirmed her earlier opinion stating plainly that her earlier order stands and that the objections raised by the government in its request for a reconsideration were not valid.

In its Motion for Reconsideration of the judge's injunction, the White House argued that, in its opinion, the judge's prohibition on the application of Section 1021 of the NDAA applied only to the plaintiffs named in the original lawsuit.

Judge Forrest, while agreeing that her ruling concerned only Section 1021, informed the lawyers for the government that the injunction applied to anyone who might reasonably fear that his constitutionally protected freedom of expression would be affected by the specter of criminal punishment.

"The injunction in this action is intentionally expansive because 'persons whose expression is constitutionally protected (and not party to the instant litigation) may well refrain from exercising their rights for fear of criminal sanctions by a statute of susceptible of application to protected expression,'" Judge Forrest explained.

As readers will recall, Pulitzer Prize-winning journalist Chris 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 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 label journalists and political activists who interview or support outspoken critics of the Obama Administration's policies could be branded 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 her order issued in May, 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.

Simply put, scienter is "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 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."

For the benefit of readers, the full text of Section 1021 is provided here:

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in sub-section (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) 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.

The President has declared that to indefinitely detain American citizens without a trial on the charges laid against them "would break with our most important traditions and values as a nation."

Ironically, the signing statement in which President Obama gave these assurances is itself violative of the Constitution, the separation of powers established therein, and only demonstrates his proclivity for

ignoring constitutional restraints on the exercise of power once those powers have been placed (albeit illegally) by a complicit Congress at his disposal.

This (undoubtedly) illusory promise to preserve the most fundamental of American civil liberties reminds one of a statement made by the author of the Declaration of Independence, Thomas Jefferson:

> Free government is founded in jealousy, not confidence. It is jealousy and not confidence which prescribes limited constitutions, to bind those we are obliged to trust with power…. In questions of power, then, let no more be heard of confidence in men, but bind him down from mischief by the chains of the Constitution.

In a small measure, at least, Judge Katherine Forrest's May 16 order and the clarification of it provided this week, tighten the "chains of the Constitution" designed to restrain the government.

Knowing that the Obama administration may still try to find a loophole through which to pass its own version of due process, Judge Forrest spelled out the intended import of her opinion in very plain language:

"Put more bluntly, the May 16 order enjoined enforcement of Section 1021(b)(2) against anyone until further action by this, or a higher, court — or by Congress," she wrote. "This order should eliminate any doubt as to the May 16 order's scope."

When contacted by *The New American* for its reaction to the judge's memorandum, a spokeswoman for the U.S. attorney's office in the Southern District of New York refused to comment.