Written by **Michael Tennant** on May 18, 2012

NDAA: No Detaining Americans Allowed, Says Federal Judge

President Barack Obama must surely rue the day he appointed Katherine Forrest (left) to the federal bench. On Wednesday, U.S. District Judge Forrest issued a preliminary injunction against Section 1021 of the National Defense Authorization Act (NDAA), the section that gives the President "the absolute power to arrest and detain citizens of the United States [and of other countries] without their being informed of any criminal charges, without a trial on the merits of those charges, and without a scintilla of the due process safeguards protected by the Constitution of the United States," in the words of *The New American*'s Joe Wolverton, II. Wolverton should know: He was a member of the legal team representing the plaintiffs.

In what columnist Glenn Greenwald hailed as "an extraordinary and encouraging decision," Forrest, appointed to the U.S. District Court in Manhattan by Obama just last year, accepted the arguments of the plaintiffs — various journalists and activists including former *New York Times* reporter Christopher Hedges, Daniel Ellsberg, and Noam Chomsky — and rejected those of the Obama administration, which was defending the law.

Of note is the fact that while four of the plaintiffs provided either oral or written testimony along with substantial supporting evidence, the government apparently felt no need to introduce any witnesses or evidence to bolster its contentions, relying instead on the old standby argument that the plaintiffs had no standing to sue because the law had not been, nor was it about to be, enforced on them. In addition, the administration claimed that the whole lawsuit was much ado about nothing because the indefinite detention provisions of the NDAA merely reiterated those of the 2001 Authorization for Use of Military Force (AUMF), which courts have upheld.

Forrest, however, found that the plaintiffs did indeed have standing to challenge the law. "Each of the four plaintiffs who testified," she wrote, "has shown an actual fear that their expressive and associational activities are covered by Section 1021; and each of them has put forward uncontroverted evidence of concrete — non-hypothetical — ways in which the presence of the legislation has already impacted those expressive and associational activities." Specifically, the plaintiffs testified that they had altered speeches they had delivered, withheld articles from publication, and declined to invite certain individuals to panel discussions for fear of running afoul of the NDAA. Hedges also expressed concern that his past associations with terrorist organizations, made in the course of reporting on their activities, could subject him to indefinite detention. Brigitta Jonsdottir, a member of the Icelandic parliament who was involved in producing a film that included footage of an American attack on Iraqi

civilians posted by WikiLeaks, testified in writing that she has been forced to decline invitations to speaking engagements in the United States because she believes she could be arrested under the NDAA.

The court offered the government multiple opportunities to demonstrate that the plaintiffs did not have standing, but the government refused to do so despite having been informed in advance of the nature of the plaintiffs' testimony. Asked repeatedly if the plaintiffs' fears of being detained under the NDAA were well founded, the government's attorney refused to answer, saying he was "not authorized to make specific recommendations regarding specific people." Noted Forrest:

> It must be said that it would have been a rather simple matter for the Government to have stated that as to these plaintiffs and the conduct as to which they would testify, that Section 1021 did not and would not apply, if indeed it did or would not. That could have eliminated the standing of these plaintiffs and their claims of irreparable harm. Failure to be able to make such a representation given the prior notice of the activities at issue requires this Court to assume that, in fact, the Government takes the position that a wide swath of expressive and associational conduct is in fact encompassed by Section 1021.

As a result, Forrest found that "plaintiffs have stated a more than plausible claim that the statute inappropriately encroaches on their rights under the First Amendment."

She also found that the plaintiffs' challenge to the law on the basis that it violates their Fifth Amendment right to due process was likely to succeed. Due process, she observed, "requires that individuals be able to understand what conduct might cause him or her to run afoul of" the law. "Unfortunately," she continued, "there are a number of terms [in Section 1021] that are sufficiently vague that no ordinary citizen can reliably define such conduct." For instance, who is a "covered person" under the statute? What does the term "associated forces" mean? And what does the law mean when it threatens those who "substantially" or "directly" "support" these "associated forces" or al-Qaeda or the Taliban?

Again the court gave the government every opportunity to advance specific arguments to counter the plaintiffs' claims, and again the government failed to do so. "The Government was unable to define precisely what 'direct' or 'substantial' 'support' means," observed Forrest. "Thus," she concluded, "an individual could run the risk of substantially supporting or directly supporting an associated force without even being aware that he or she was doing so."

The law's vagueness also led Forrest to reject the Obama administration's argument that it was a mere restatement of the detention powers already granted under the AUMF. The 2001 law, she pointed out, was quite specific as to what individuals and activities it covered and what its terms mean, while the NDAA is much broader in scope and so vague in its definitions that even the government can't explain exactly which persons or activities it covers. Wrote Forrest: "Since this Court is not convinced that Section 1021 is simply a 'reaffirmation' of the AUMF, and since the Government has authorized detention for violations of Section 1021, plaintiffs here can reasonably assume that Government officials will actually undertake the detention authorized by the statute," adding weight to their claims of standing to sue.

Moreover, she remarked, "if the Government's argument is to be credited in terms of its belief as to the impact of the legislation — which is nil — then the issuance of an injunction should have absolutely no impact on any Governmental activities at all." That the administration fought the lawsuit, therefore,

ought to be proof positive that the NDAA goes far beyond the AUMF.

Further proof may be found in Obama's NDAA signing statement, in which he stated that his "Administration will not authorize the indefinite military detention without trial of American citizens," which makes it clear that such detention is permitted by the law and may be authorized by future administrations. The administration argued that the statement rendered the plaintiffs' case moot, but Forrest averred in a footnote: "The Signing Statement does not eliminate the reasonable fear of future government harm that is likely to occur — i.e., the irreparable injury at issue here."

Wolverton, via email, said he "was not surprised by the government's lassitude" in defending the law. Rather than presenting evidence or answering Forrest's requests for specificity, the government chose to rely on the deference to which it has become accustomed in recent decades when any law that can be tied, however tenuously, to "national security" has been challenged. As a result, wrote Wolverton, "its lawyers were caught a bit flat footed" when a judge had the temerity to demand an actual defense of the law.

The administration will almost certainly appeal Forrest's ruling, and a higher court may well reverse it — especially since, Wolverton said, "it is unlikely that the government would be so unprepared if given another chance to remove an impediment to indefinite detention."

But for now, observes Greenwald, "this is a rare and significant limit placed on the U.S. Government's ability to seize ever-greater powers of detention-without-charges, and it is grounded in exactly the right constitutional principles: ones that federal courts and the Executive Branch have been willfully ignoring for the past decade." Constitutionalists must hope that it is upheld.