



Written by [Joe Wolverton, II, J.D.](#) on February 12, 2013

Obama Administration Defends Detention Power in Appeals Court Hearing

Inside a federal courtroom packed to beyond capacity, lawyers for President Obama [argued that their boss has the right to deploy the U.S. armed forces to apprehend and indefinitely detain American citizens](#) that he alone suspects of somehow supporting groups threatening national security.



Last Wednesday, judges of the Second Circuit Court of Appeals heard the government's arguments in their appeal of an earlier ruling blocking the enforcement of this controversial provision of the National Defense Authorization Act for 2012.

Judge Katherine Forrest issued the now-stayed permanent injunction on September 12, 2012.

The Obama administration filed an immediate appeal and the case was kicked upstairs to the Second Circuit.

In [the opinion supporting the permanent injunction](#), Judge Forrest wrote:

The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention — potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity — and that specificity is absent from § 1021(b)(2).

This is similar to the language she used in [the 68-page opinion](#) accompanying the temporary injunction order. In that order 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.

Addressing the court, Justice Department attorney Robert Loeb attacked Judge Forrest's reasoning, describing it as a "fundamentally flawed reading of the law." He reassured plaintiffs in the case that



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there was nothing to fear because the indefinite detention provisions “simply doesn’t apply to them.”

Lead plaintiff, Pulitzer Prize-winning journalist Chris Hedges, is joined by a coterie of other prominent writers and commentators in his complaint challenging the NDAA. Noam Chomsky, Daniel Ellsberg, and Icelandic politician Birgitta Jonsdottir all signed on to add their witness to that of Hedges that the fear of indefinite detention lurked within the shadows of vagueness of key terms of 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 as “covered persons,” meaning that they have given “substantial support” to terrorists or other “associated groups.”

According to the text of [Section 1021 of the NDAA](#), the president may authorize the armed forces to indefinitely detain:

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.

Fearing that this section could be applied to journalists and that the specter of such a scenario would have a chilling effect on free speech and freedom of the press in violation of the First Amendment, Hedges filed his lawsuit on January 12, 2012.

Hedges’ complaint claims 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 his defense of the NDAA’s indefinite detention powers, Loeb argued that the Authorization for the Use of Military Force (the foundation upon which the NDAA’s indefinite provision is built) “expressly exempts our citizens.” He’s wrong and Second Circuit Judge Raymond Lohier (who issued the original stay of the district court’s stay of the provision) called him on it.

Lohier reminded Loeb that the section of the AUMF he referenced “doesn’t exempt anything.”

In fairness, Lohier lowered the boom on plaintiffs, as well, warning them that he was inclined to dismiss cases based on nothing more than “ambiguous inferences” from relevant sections of the NDAA and the AUMF.

Loeb added that it was “quite telling” that no journalist had been detained for reporting in the nearly 12 years since the attacks of September, 11, 2001.

Hedges understands, however, that just because something hasn’t been done (that we know of) doesn’t



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mean it would never be done. The best way to prevent it from ever being done, moreover, is to dislodge from the president the power to apprehend citizens of the United States and hold them indefinitely without charge, hearing, or access to an attorney.

As part of the record of the case, lawyers representing congressional war hawks Senators Kelly Ayotte (N.H.), Lindsey Graham (S.C.), and John McCain (Ariz.) requested and received permission to address the court. The Republican trio's counsel spoke in support of protecting President Obama's immense unconstitutional power to detain citizens, [arguing in their brief](#) that Section 1021 of the NDAA 2012 was a "unquestionably a legitimate exercise" of congressional war powers.

Curiously, Congress has never declared war on Afghanistan, Iraq, Yemen, Somalia, or any of the growing number of theaters in the "War on Terror."

Carl Mayer, one of the lead attorneys for Hedges and his co-plaintiffs, accurately and chillingly restated what is at stake in this case. "What the NDAA is trying to impose is a system of military justice that allows the military to police the streets of America to detain U.S. citizens, to detain residents in the United States in military prisons. Probably the most frightening aspect of the NDAA is that it allows for detention until 'the end of hostilities,'" he said.

[Writing about the case on truthdig.com](#), Hedges explains why this issue cuts across partisan lines and concerns all Americans.

If we lose in *Hedges v. Obama* — and it seems certain that no matter the outcome of the appeal this case will reach the Supreme Court — electoral politics and our rights as citizens will be as empty as those of Nero's Rome. If we lose, the power of the military to detain citizens, strip them of due process and hold them indefinitely in military prisons will become a terrifying reality. Democrat or Republican. Occupy activist or libertarian. Socialist or tea party stalwart. It does not matter. This is not a partisan fight. Once the state seizes this unchecked power, it will inevitably create a secret, lawless world of indiscriminate violence, terror and gulags. I lived under several military dictatorships during the two decades I was a foreign correspondent. I know the beast.

No date was set for the issuing of a ruling in the case, but Hedges and his co-plaintiffs intend to appeal to the Supreme Court if necessary.

Photo of cell block at Guantanamo: AP Images

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