

Judge strikes down indefinite detention provision

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A federal district court judge in New York City issued a preliminary injunction Wednesday barring enforcement of a section of the National Defense Authorization Act that permits the US president to order indefinite military detention of any individual he designates as associated with terrorism.

Judge Katherine B. Forrest, an Obama appointee, found that a group of plaintiffs, headed by former *New York Times* reporter Christopher Hedges, were likely to prevail in their legal challenge to Section 1021 of the NDAA, which comprises a single paragraph of a 565-page law. The overall law would continue in effect even if Forrest's ruling is upheld on appeal.

Hedges filed a lawsuit January 13 against enforcement of the NDAA, two weeks after Obama signed it into law. He challenged the constitutionality of Section 1021, which allows the president to order indefinite military detention of any person on "suspicion of providing substantial support" to people engaged in hostilities against the U.S., such as al-Qaeda, the Taliban or "associated forces".

The lawsuit was joined by other plaintiffs, including Daniel Ellsberg, who leaked the Pentagon Papers to the media in 1971; liberal MIT professor Noam Chomsky; Icelandic parliamentarian Birgitta Jonsdottir, a spokeswoman for WikiLeaks; Kai Wargalla, of Occupy London; and Alexa O'Brien, of the New York-based group US Day of Rage.

President Obama issued a statement at the time he signed the NDAA into law declaring he had no intention of exercising the powers of Section 1021 and even claiming to oppose the provision on principle. But the Department of Justice nonetheless went into court to defend Section 1021 against the legal challenge, claiming, among other things, that the plaintiffs lacked standing to sue.

This has been the legal tactic employed under both the Bush and Obama administrations to defend police-state measures of all kinds, from wiretapping to detention to torture. The federal government claims that those filing lawsuits lack standing because they cannot prove they have been the targets of such practices.

Since the practices are secret, the plaintiffs usually cannot produce evidence that they have been targeted. In the exceptional cases where such evidence does exist, the government has invoked the "state secrets" privilege to bar admission in court of the proof of its own crimes.

In the legal challenge to Section 1021, Hedges and his fellow plaintiffs sought to establish standing by claiming that they had already altered their own behavior—in Hedges' case, by the journalist refusing to conduct interviews with individuals potentially associated with the Taliban or Al Qaeda, on the grounds that this might make him a target for indefinite military detention.

Jonsdottir submitted a written statement declaring she would not visit the United States following passage of the NDAA, for fear that her activities in support of WikiLeaks would lead to her indefinite detention. A US Army private, Bradley Manning, faces capital charges of espionage for allegedly leaking evidence of US war crimes in Iraq and Afghanistan to the whistleblower web site, while WikiLeaks founder Julian Assange is reportedly the target of a secret grand jury indictment under the Espionage Act.

Several other plaintiffs cited actions they had taken or not taken as proof of the "chilling effect" of the NDAA on the exercise of constitutionally protected freedom of speech, freedom of the press and freedom of association.

While the judge initially appeared skeptical, she cites

the government response at a hearing March 21 as evidence of the validity of such claims. She repeatedly asked government attorneys to indicate that the plaintiffs' expressed fears were groundless, and that they would not be targeted for things they said or wrote.

"Can Hedges and others be detained for contacting al Qaeda or the Taliban as reporters?" Forrest asked. The government attorneys refused to give any assurances such activities would not be punished by indefinite detention.

One exchange from the transcript of that hearing gives the Orwellian flavor of the hearing:

JUDGE: Assume you were just an American citizen and you're reading the statute and you wanted to make sure you do not run afoul of it because you are a diligent U.S. citizen wanting to stay on the right side of [the law], and you read the phrase "directly supported." What does that mean to you?

GOVERNMENT: Again it has to be taken in the context of armed conflict informed by the laws of war.

JUDGE: That's fine. Tell me what that means?

GOVERNMENT: I cannot offer a specific example. I don't have a specific example.

Asked specifically about one of the plaintiff's activities as a journalist, a government attorney replied, "I don't know what she has been up to."

In her ruling, Forrest cited the unwillingness of the government attorneys to declare any activity constitutionally protected from the NDAA. "Failure to be able to make such a representation," she wrote, "requires the 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 1021."

She added, "Here, the uncontradicted testimony at the evidentiary hearing was that the plaintiffs have in fact lost certain First Amendment freedoms as a result of the enactment of section 1021."

She continued: "In addition, it is certainly the case that if plaintiffs were detained as a result of their conduct, they could be detained until the cessation of hostilities -- i.e., an indeterminate period of time. Being subjected to the risk of such detention ... must constitute a threat of irreparable harm."

Forrest wrote that the NDAA gives the government authority to proceed not just against those actually

affiliated with Al Qaeda, but against individuals engaged in political speech that "may be extreme and unpopular as measured against views of an average individual. That, however, is precisely what the First Amendment protects."

The Obama administration has 60 days to decide whether to appeal the district court ruling.

In his signing statement, Obama claimed to have "serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists." He added: "I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation."

However, in responding to the lawsuit challenging section 1021, the Obama administration argued the reverse—that the law added nothing to the powers of the federal government and merely constituted "an affirmation" of the resolution on the use of force against those who perpetrated the September 11, 2001 terrorist attacks.

Whatever the outcome of the court challenge, the position adopted by the Obama administration demonstrates its visceral hostility to democratic and constitutional rights, as well as the utter hypocrisy of the present occupant of the White House.



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