

# Obama moves to overturn court ruling invalidating indefinite detention law

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Obama administration lawyers have appealed last week's court ruling invalidating the indefinite detention provision of the National Defense Authorization Act (NDAA), passed by Congress and signed by Obama last New Year's Eve.

Section 1021, a single paragraph buried within the 565-page NDAA, gives the president express authority "to detain covered persons... under the laws of war."

"Covered persons" are defined in Section 1021(b)(2) of the NDAA as those who "substantially supported al-Qaeda, the Taliban, or associated forces," and include "any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

In plain English, the law authorizes the military to abduct and imprison people anywhere in the world without charge or trial—including US citizens within the United States—if they are deemed to be "supporting" Al Qaeda, the Taliban or "associated forces."

The law provides no mechanism to challenge the military's decision other than a protracted court battle for a writ of habeas corpus—if a lawyer can be found to penetrate the military prison system and represent the inmate. It deprives detainees of protection under the most important provisions of the Bill of Rights.

Two weeks after Obama signed the bill, a lawsuit challenging its constitutionality was filed in the United States District Court in New York City. Former *New York Times* reporter and Pulitzer Prize winner Christopher Hedges is the lead plaintiff. Having interviewed, dined with and even visited the homes of members of 17 organizations deemed "terrorist" by the US State Department, Hedges claims that the potential sweep of phrases such as "associated forces," "substantially support," and "directly support" subjects him to the threat of indefinite detention for publishing articles deemed critical of the US military's operations.

Hedges is joined in the lawsuit by five others, including Daniel Ellsberg, who leaked the Pentagon Papers on Viet Nam; liberal professor Noam Chomsky; Birgitta Jonsdottir, a member of the Iceland parliament who supports WikiLeaks; Kai Wargalla of Occupy London; and Alexa O'Brien of the US Day of Rage. All have provided sworn testimony that they fear their activities and publications may result in their seizure by

the military and indefinite detention without trial.

Last May, US District Judge Katherine Forrest, an Obama appointee who assumed office just last year, issued a preliminary injunction temporarily halting the use of Section 1021(b)(2)'s indefinite detention provision after government lawyers refused to state that the plaintiffs' activities were outside the law's scope. She invited Congress to amend the law, and government lawyers to come forward with a more narrow interpretation. Neither happened.

After further legal arguments, on September 12 Judge Forrest issued a thorough 112-page decision invalidating the law. The injunction means that anyone detained under the authority of Section 1021(b)(2) can bring a motion for contempt of court against the involved government officials.

Judge Forrest made clear that the "key question throughout these proceedings" is "what and whose activities" the law "is meant to cover."

"That is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual's core liberties," she 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 Section 1021(b)(2)."

After listing the various criminal statutes already on the books to prosecute people who "materially support" terrorist organizations—such prosecutions trigger due process rights including counsel, bail, motions to suppress illegally obtained evidence, public trials by jury and appeals—Judge Forrest wrote: "This Court rejects the Government's suggestion that American citizens can be placed in military detention indefinitely, for acts they could not predict might subject them to detention, and have as their sole remedy a habeas [corpus] petition adjudicated by a single decision-maker (a judge versus a jury), by a 'preponderance of the evidence' standard [rather than proof beyond a reasonable doubt]. That scenario dispenses with a number of guaranteed rights."

Judge Forrest sided with the plaintiffs' claims that the threat of summary, indefinite military imprisonment "chilled" their free speech rights. She lambasted the government lawyers for their reliance on *Ex parte Quirin* (1942), a World War II case which upheld the military detention and summary execution of saboteurs transported from Germany to Long Island on a submarine.

"*Quirin* is not a case in which an American, not in uniform, carrying arms, or reporting to a foreign government, was taken from his home in the United States, and detained by the military, for writing or having written works speaking favorably about enemy forces, or for raising questions regarding the legitimacy of American military actions," Judge Forrest wrote. "It is those activities which Section 1021(b)(2) captures (so far as one can decipher from the Government's position)."

Judge Forrest continued, "The Government is wrong to ground a wide-sweeping ability of the executive branch to subject anyone at all to military detention in *Quirin*. That argument eliminates Constitutional guarantees (under many provisions of the Constitution) in one fell swoop; it ignores as irrelevant all of the language, past and present, regarding limits on executive authority to arrest and—as applied to First Amendment activities—would privilege such detention ability above the prohibition that 'Congress shall pass no law... abridging the freedom of speech.' The Government's reading of *Quirin* is therefore both wrong and dangerous and this Court rejects it."

The extreme holding of the *Quirin* case was seized on by Bush administration lawyers to support their assertion of virtual police-state powers in the aftermath of September 11. Now the same ruling is embraced by the Obama administration to justify even broader unchecked executive powers.

On September 17, US Department of Justice lawyers acting expressly on behalf of "Barack Obama" as the principal appellant filed an emergency motion for a stay of Judge Forrest's ruling in the United States Court of Appeals for the Second Circuit.

After contemptuously dismissing the plaintiffs' claims of constitutional injury, the Obama administration lawyers argued that the new indefinite detention law simply "affirms the President's detention authority under the earlier Authorization for Use of Military Force." The AUMF, however, is limited by its terms to those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." It does not extend to people who "substantially" or "directly" supported Al Qaeda, the Taliban, or "associated forces."

Moreover, in the case involving Yaser Esam Hamdi, the Supreme Court construed the AUMF to allow the detention only of "enemy combatants" actually "engaged in armed conflict against the United States." In comparison, as explained by Judge Forrest, Section 1021(b)(2) authorizes "indefinite

military detention of US citizens for conduct that could occur in their own home in New York City, Washington, DC, Toledo, Los Angeles—anywhere in this land."

Obama's lawyers do not explain why, if the "detention authority" affirmed in Section 1021(b)(2) was already provided by the AUMF, Congress even bothered to enact the new law. More tellingly, if Section 1021(b)(2) gives Obama no more power to summarily imprison people than he already had, there is no reason for his appeal, as Judge Forrest did not enjoin detentions under the AUMF.

Obama's lawyers sought to pass over the stripping of constitutional rights from the imprisoned. "The district court misunderstood the fundamental purpose of Section 1021(b)(2) and the AUMF," they argued, declaring that, "they are war authorizations conferred upon the President, not penal statutes intended to regulate and punish conduct."

When he signed the law, Obama claimed to have done so with "serious reservations" about the possibility of "indefinite military detention without trial of US citizens" which would "break with our most important traditions and values as a nation."

Having authorized the appeal of Judge Forrest's ruling, however, Obama's New Year's statement is shown to be as worthless as his campaign pledge of four years ago to close the Guantanamo Bay concentration camp.

Instead of rolling back Bush administration attacks on democratic rights, Obama is intensifying them—including the compilation of assassination lists and ordering of murders, including those of the New Mexico-born Islamic cleric Anwar al-Awlaki and his 16-year-old son, both American citizens.

In a one-page order, Second Circuit Judge Raymond J. Lohier this week granted an interim stay of Judge Forrest's injunction until September 28, when a three-judge panel is scheduled to hold a hearing on a stay until the Obama administration appeal is decided, likely sometime next year.



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