

## Federal Court Overrules NDAA Provision

by Glenn Greenwald via stan - Salon *Thursday, May 17 2012, 11:10pm*

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### The LAW works if vigorously applied!

A federal district judge today, the newly-appointed Katherine Forrest of the Southern District of New York, issued a ruling: one which preliminarily enjoins enforcement of the highly controversial indefinite provisions of the National Defense Authorization Act, enacted by Congress and signed into law by [puppet] President Obama last December. This afternoon's ruling came as part of a lawsuit brought by seven dissident plaintiffs — including Chris Hedges, Dan Ellsberg, Noam Chomsky, and Birgitta Jonsdottir — alleging that the NDAA violates “both their free speech and associational rights guaranteed by the First Amendment as well as due process rights guaranteed by the Fifth Amendment of the United States Constitution.”

The ruling was a sweeping victory for the plaintiffs, as it rejected each of the Obama DOJ's three arguments: (1) because none of the plaintiffs has yet been indefinitely detained, they lack “standing” to challenge the statute; (2) even if they have standing, the lack of imminent enforcement against them renders injunctive relief unnecessary; and (3) the NDAA creates no new detention powers beyond what the 2001 AUMF already provides.

As for the DOJ's first argument — lack of standing — the court found that the plaintiffs are already suffering substantial injury from the reasonable fear that they could be indefinitely detained under section 1021 of the NDAA as a result of their constitutionally protected activities. As the court explained (h/t Charles Michael):

In support of their motion, Plaintiffs assert that § 1021 already has impacted their associational and expressive activities—and would continue to impact them, and that § 1021 is vague to such an extent that it provokes fear that certain of their associational and expressive activities could subject them to indefinite or prolonged military detention.

The court found that the plaintiffs have “shown an actual fear that their expressive and associational activities” could subject them to indefinite detention under the law, 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” (as but one example, Hedges presented evidence that his “prior journalistic activities relating to certain organizations such as al-Qaeda and the Taliban” proves “he has a realistic fear that those activities will subject him to detention under § 1021”). Thus, concluded the court, these plaintiffs have the right to challenge the constitutionality of the statute notwithstanding the fact that they have not yet been detained under it; that's because its broad, menacing detention powers are already harming them and the exercise of their constitutional rights.

Significantly, the court here repeatedly told the DOJ that it could preclude standing for the plaintiffs if they were willing to state clearly that none of the journalistic and free speech conduct that the plaintiffs engage in could subject them to indefinite detention. But the Government refused to make any such representation. Thus, concluded the court, “plaintiffs have stated a more than plausible

claim that the statute inappropriately encroaches on their rights under the First Amendment.”

Independently, the court found that plaintiffs are likely to succeed on their claim that the NDAA violates their Fifth Amendment due process rights because the statute is so vague that it is virtually impossible to know what conduct could subject one to indefinite detention. Specifically, the court focused on the NDAA’s authorization to indefinitely detain not only Al Qaeda members, but also members of so-called “associated forces” and/or anyone who “substantially supports” such forces, and noted:

Plaintiffs have shown a likelihood of success on their vagueness challenge. The terms upon which they focused at the hearing relate to who is a “covered person.” In that regard, plaintiffs took issue with the lack of definition and clarity regarding who constitutes an “associated forces,” and what it means to “substantially” or “directly” “support” such forces or, al-Qaeda or the Taliban. . .

The Government was unable to define precisely what “direct” or “substantial” “support” means. . . . Thus, 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.

Perhaps most importantly, the court categorically rejected the central defense of this odious bill from the Obama administration and its defenders: namely, that it did nothing more than the 2001 AUMF already did and thus did not really expand the Government’s power of indefinite detention. The court cited three reasons why the NDAA clearly expands the Government’s detention power over the 2001 AUMF (all of which I previously cited when denouncing this bill).

First, “by its terms, the AUMF is tied directly and only to those involved in the events of 9/11,” whereas the NDAA “has a non-specific definition of ‘covered person’ that reaches beyond those involved in the 9/11 attacks by its very terms.” Second, “the individuals or groups at issue in the AUMF are also more specific than those at issue in § 1021” of the NDAA; that’s because the AUMF covered those “directly involved in the 9/11 attacks while those in § 1021 [of the NDAA] are specific groups and ‘associated forces.’” Moreover, “the Government has not provided a concrete, cognizable set of organizations or individuals that constitute ‘associated forces,’ lending further indefiniteness to § 1021.” Third, the AUMF is much more specific about how one is guilty of “supporting” the covered Terrorist groups, while the NDAA is incredibly broad and un-specific in that regard, thus leading the court to believe that even legitimate activities could subject a person to indefinite detention.

The court also decisively rejected the argument that President Obama’s signing statement – expressing limits on how he intends to exercise the NDAA’s detention powers — solves any of these problems. That’s because, said the court, the signing statement “does not state that § 1021 of the NDAA will not be applied to otherwise-protected First Amendment speech nor does it give concrete definitions to the vague terms used in the statute.”

The court concluded by taking note of what is indeed the extraordinary nature of her ruling, but explained it this way:

This Court is acutely aware that preliminarily enjoining an act of Congress must be done with great caution. However, it is the responsibility of our judicial system to protect the public from acts of Congress which infringe upon constitutional rights.

I’ve been very hard on the federal judiciary in the past year due to its shameful, craven deference in the post-9/11 world to executive power and, especially, attempts to prosecute Muslims on Terrorism

charges. But this is definitely an exception to that trend. This is an extraordinary and encouraging decision. All the usual caveats apply: this is only a preliminary injunction (though the court made it clear that she believes plaintiffs will ultimately prevail). It will certainly be appealed and can be reversed. There are still other authorities (including the AUMF) which the DOJ can use to assert the power of indefinite detention. Nonetheless, 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.

UPDATE: I really should mention the rest of the plaintiffs who brought this lawsuit beyond the four well-known ones I named above, because each deserves immense credit for doing this. Alexa O'Brien is an independent journalist who writes for WL Central, regarding WikiLeaks, Guantanamo and other issues, and founded a website to work on America's corrupted elections, U.S. Day of Rage. Kai Wargalla is a British activist who founded Occupy London and has done extensive work in advocating for WikiLeaks. Jennifer Bolen, who along with Hedges spearheaded the organization of this lawsuit, is an activist with Revolution Truth who did substantial work to defeat the NDAA.

Though I knew a fair amount about it as it proceeded, I hadn't written about this lawsuit before, largely because I did not expect it to succeed; I anticipated that it would be dismissed on "standing" grounds, the favored tactic (along with the State Secrets privilege) for both the Bush and Obama DOJ's to persuade federal courts not to even adjudicate constitutional challenges to the War on Terror powers. Serious kudos to all of the plaintiffs and lawyers here who persevered in what I'm certain they knew would be an uphill battle.

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