THE GOVERNMENT CAN'T MAKE UP ITS MIND WHETHER WIKILEAKS AMOUNTS TO AIDING AL QAEDA OR NOT

The government's arguments in Hedges v. Obama are getting more and more inconsistent.

This is the case, recall, where Chris Hedges, Birgitta Jonsdottir, and several other people challenged the section of the NDAA that affirmed the President's authority to militarily detain or deport (among other things) "covered persons." Because the government repeatedly refused to say that the plaintiffs were not covered by the section, Judge Katherine Forrest not only found they had standing to sue, but she enjoined enforcement of the law.

Now the government is trying to unfuck the fuckup they made at oral arguments by offering caveated assurances that none of the plaintiffs would be covered by the law. (h/t Ben Wittes) But look carefully at what they say:

> The government argued in its briefs that the plaintiffs cannot reasonably believe that section 1021 would extend to their conduct, in light of law of war principles, First Amendment limitations, and the absence of a single example of the government detaining an individual for engaging in conduct even remotely similar to what is alleged here. See Gov't Initial Mem. 12-13. **But at argument the government did not agree to provide specific assurance as to each plaintiff, a request that the government considers problematic**. As a result, this Court deemed the government's position to be unclear regarding whether section

> 1021 could apply to the conduct alleged by plaintiffs in this case. To eliminate any doubt, **the government wants to be as clear as possible on that matter.** As a matter of law, individuals who engage in the independent journalistic activities or independent public advocacy described in plaintiffs' affidavits and testimony, without more, are not subject to law of war detention as affirmed by section 1021(a)-(c), solely on the basis of such independent journalistic activities or independent public advocacy.5 **Put simply, plaintiffs' descriptions in this litigation of their activities, if accurate, do not implicate the military detention authority affirmed in section 1021**.
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> 5 This case does not involve the kind of independent expressive activity that could support detention in light of law of war principles and the First Amendment. In contrast, for example, a person's advocacy, **in a theater of active military operations**, of military attacks on the United States or **the intentional disclosure of troop movements or military plans to the enemy**, or similar conduct that presents an imperative security threat in the context of an armed conflict or occupation, **could be relevant in appropriate circumstances**. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 5, 41-43, 78. As discussed further below, it is not appropriate to expect the government to make categorical statements about the scope of its detention authority in hypothetical scenarios that could arise in an armed conflict, in part, because that authority is so context-dependent.

The government is not being at all clear here!

It is reaffirming it stance that it would be problematic to offer assurances about the plaintiffs. It is saying it "wants to be as clear as possible" on this issue, but then says only **if plaintiffs' descriptions of their activities are accurate**, then they don't implicate military detention authority.

Let me spoil the surprise. The government doesn't believe all the plaintiffs' descriptions are accurate.

For a hint of why, look at the footnote. First, you've gotta love their caveat that "in a theater of active military operations." The government has repeatedly said the entire world, including the US, is the battlefield in this war on terror. So they really mean "anywhere."

But note they include "intentional disclosure of troop movements or military plans" to the enemy. That passage gets at their problem here.

That's because, in spite of the fact that they say, "Section 1021 has no application to unarmed groups like WikiLeaks," and remind they've offered assurances that Jonsdottir "could [not] possibly be deemed to fall within the scope of section 1021," the government's actions against WikiLeaks belie those claims.

That's true, first of all, because DOJ specifically excludes entities like WikiLeaks from their definition of protected journalistic activities. (Indeed, I've deemed this passage from the DIOG the "WikiLeaks exception.")

> As the term is used in the DIOG, "news media" is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

Reassurances from DOJ that "journalistic activities" would not make Jonsdottir a covered person for her WikiLeaks work are worthless since DOJ doesn't consider WikiLeaks' activities journalistic activities.

More importantly, the government has already made it clear that they believe WikiLeaks amounts to aiding al Qaeda in DOD's case against Bradley Manning. In fact, they base their Aiding the Enemy charge against Manning on the claim that by leaking materials to WikiLeaks, he knowingly made it available to al Qaeda.

> In deliberations over a defense motion to dismiss the "aiding the enemy" charge, the government argued that the "enemy" had gone regularly to a "specific website and Pfc. Bradley Manning knew the "enemy" would do this when he allegedly provided information to the website.
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> The deliberations occurred in the second day of a pre-trial motion hearing at Fort Meade in Maryland. Manning, who is accused of releasing classified information to WikiLeaks, is charged with "aiding the enemy," an Article 104 offense under the uniform code of military justice (UCMJ). It is a federal offense that could carry the death penalty (although the government has indicated it will not press for that in sentencing).
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> Judge Col. Denise Lind asked military prosecutor Capt. Joe Morrow if "the government intends to show that there is a particular website that this information was sent to and the accused was aware the enemy used that website." Morrow said yes.
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> What this means is that the government is essentially arguing that "the enemy"—which the government has said is al Qaeda or any terror groups

> related—frequently accessed WikiLeaks and any "intelligence" provided. Manning knew that by handing over information to website he would provide assistance to "the enemy."

And Judge Lind bought off on this argument, at least in theory.

So long as the government sustains this bogus Aiding the Enemy charge against Bradley Manning, then they implicitly are also arguing that Jonsdottir, by actually publishing the information allegedly provided by Manning, also intentionally provided intelligence to al Qaeda.

It seems, after being embarrassed by their past obstinance, the government is willing to say anything to avoid individuals from getting standing to challenge their counterterrorism abuses. Are they worried enough to drop that Aiding the Enemy charge yet?