DEFENSE DEPARTMENT IGNORES SIGAR, ORDERS RUSSIAN HELICOPTERS IN END-RUN AROUND NDAA

An Mi-17 undergoing maintenance. Most maintenance within SMW is carried out by contractors because SMW lacks the expertise. (SIGAR photo).

The Special Inspector General for Afghanistan Reconstruction, (SIGAR) issued a report (pdf) yesterday that serves as microcosm of the bumbling ineptitude and denial of reality that has characterized the entire US military's misadventure in Afghanistan. Subtexts running through this scandal run the gamut from US think tanks cooking up unworkable plans to the vast network of international arms dealing (replete with counterfeit parts), Russia supplying arms to Syria, possible blow-back from the arrest of Viktor Bout, the US Congress remarkably trying to exert a bit of power and finally DoD declaring that they will continue with their schedule for claiming Afghanistan can provide its own defense operations despite overwhelming evidence to the contrary.

At issue here primarily is a contract for 30 Russian Mi-17 helicopters. Despite the fact that

the US has been at war in Afghanistan continuously for almost twelve years now, and despite the spectacular failure of US helicopters under haboob (dust storm) conditions in the failed April, 1980 Iran hostage rescue attempt, it appears that Russian helicopters are more reliable in desert conditions and easier to maintain in flying order with a less sophisticated ground crew than US helicopters

The route by which we got to this contract is remarkable. The helicopters are to be supplied to the Special Mission Wing, which is the air support group for Afghanistan's Special Operations forces. But how this group came into existence is very important to the current scandal. From the report (footnotes removed in this and all subsequent quotes):

> At a December 2011 Special Operations Summit, ISAF senior leadership identified the development of air support capacity as a priority for improving Afghan military capabilities for counterterrorism and other special operations missions. To respond to this need, NTM-A [NATO Training Mission – Afghanistan] sponsored a RAND study to assess requirements and provide recommendations. The study's recommendations discussed different scenarios for the planned size—in terms of both personnel and aircraft—of air support, the command structure, and scope of operations.
>
> NTM-A determined that the Afghan Ministry of Interior's (MOI) existing Air Interdiction Unit, a counternarcotics-focused unit, would provide the best foundation to develop an Afghan counterterrorism and special operations aviation capability, while maintaining critical counternarcotics efforts. On May 12, 2012, NTM-A issued a military order identifying its concept for the establishment of the SMW. On

> July 18, 2012, the ANA commissioned the SMW, which replaced the Air Interdiction Unit.

That's all fine and dandy, except that the geniuses at RAND didn't allow for the fact that they created a destructive turf war inside the Afghan government. The new SMW is to be housed within Afghanistan's Ministry of Defense (MOD) since that is where Afghan Special Operations resides. The turf war over moving the existing unit has not yet been resolved:

> Ongoing tensions between the MOI and MOD over administrative control of the SMW also impacts recruitment. The NTM-A concept calls for the transfer of SMW from joint MOI/MOD to strictly MOD command and control. The ETT [Embedded Training Team] Commander pushed the Afghan government to make the transition by January 2013—although it did not happen—because he believes the transition will allow the SMW to leverage the recruiting efforts and resources of the Afghan Air Force. The Afghan government has generated a draft memorandum of understanding between MOI and MOD to transfer the command authority of the SMW to the MOD. The memorandum states that, effective upon publication, the ministries agree the SMW will fall under the command authority of the MOD and be assigned to the ANA Special Operations Command. Nevertheless, the memorandum is still in draft form and remains unsigned by the ministries due largely to MOI resistance to surrendering authority over the SMW.
>
> Further, according to the ETT Commander, the MOD is unwilling to allow SMW recruitment from its ranks without assurances that the pilots, once trained, will remain under its control. The ETT Commander stated that he expects recruitment to improve when the two

> ministries agree on the planned memorandum of understanding that completes the SMW's transition tothe MOD.

The impact on recruitment? It's huge, and is the primary reason SIGAR advocated for suspending the planned purchase of aircraft (emphasis added):

> The SMW lacks the capacity—both in personnel numbers and expertise—to operate and maintain its current and planned fleets, and NTM-A and DOD do not have personnel or performance milestones requiring the SMW to develop the necessary capacity before DOD acquires and delivers the full complement of aircraft for the SMW at a cost of $771.8 million for 30 new Mi-17s and 18 PC-12s. The NTM-A concept of operations calls for an SMW comprising 806 personnel at full strength, and DOD officials call for the SMW to have full operational capability by July 2015. However, as of January 23, 2013, the ETT Commander confirmed that the **SMW had just 180 personnel—less than one quarter of the personnel necessary to meet full operational capacity**.

The whole concept of purchasing Russian-made helicopters is quite controversial now, especially since the very supplier under discussion here, Rosoboronexport, has been accused of supplying arms to Syria (see, for example, this GAO report-pdf). In fact, the SIGAR report states:

> Specifically, under the fiscal year 2013 National Defense Authorization Act, Congress prohibited contracting with Rosoboronexport.

On June 3, SIGAR provided a draft version of the report to the Defense Department, recommending

that the purchase of aircraft for SMW be suspended until staffing and training reached a point that the aircraft could be used in missions and properly maintained. Despite that recommendation, and despite the NDAA ban on purchases from Rosoboronexport, the Defense Department entered into the final contract with Rosoboronexport on June 16.

The end-run around NDAA is especially enraging. The sentence above about the 2013 NDAA prohibiting contracting with Rosoboronexport in the report is followed by this one:

> However, by using fiscal year 2012 funds for the award, DOD concluded that it was legally able to proceed with this purchase.

What a wonderful, upstanding operation our Defense Department is.

Postscript: If the follies above aren't enough to set your blood boiling, consider that the contract for maintenance, logistics and spare parts for the aircraft assigned to SMW is split in an unbelievable way between two huge defense contractors:

> Our audit focuses on these two large task orders that provide ongoing aircraft maintenance and logistical support services. Specifically, the U.S. Army Space & Missile Defense Command awarded:
>
> • Task order 20 on September 26, 2008, to Northrop Grumman to provide maintenance and logistics support services for Afghan MOI and MOD air assets, as well as training for Afghan pilots, flight engineers, and mechanics. As of April 4, 2013, the amount obligated was approximately $364.6 million, with approximately $50.7 million supporting the SMW since its inception in July 2012.

> • Task order 32 on September 30, 2009, to Lockheed Martin Integrated Systems, Inc. for procurement of materiel and spare parts in support of MOI and MOD air maintenance and repair options. As of February 21, 2013, the total obligated amount on task order 32 was approximately $407.1 million, with approximately $71.2 million supporting the SMW since its inception.
>
> Coordination between the two contractors is necessary to maintain efficiency since one contractor maintains the aircraft and identifies parts requirements, and the other contractor actually orders the parts. Contractors perform their maintenance and logistics functions at the Kabul International Airport and store spare parts and supplies at a warehouse there (see photo 2). Task orders 20 and 32 each provide services for both the MOI and the MOD; however, each task order lists the services for each ministry separately and the contractors have separate teams supporting each ministry. Services to support the SMW fall under the MOI task order line items.

What could possibly go wrong?

THE FOLKS WHO BROUGHT YOU MILITARY DETENTION IN THE NDAA ARE REWRITING

THE AUMF

Yesterday, the Senate Armed Services Committee announced a hearing to revisit the 2001 Authorization to Use Military Force. In addition to a bunch of DOD figures (but not the recently departed Jeh Johnson, the DOD-connected person who said the most interesting things about the AUMF), it'll have (I've linked their most salient comments on the AUMF):

> Rosa Brooks, Professor of Law, Georgetown University Law Center
>
> Geoffrey Corn, Professor of Law, South Texas College of Law
>
> Jack Goldsmith, Professor of Law, Harvard Law School
>
> Kenneth Roth, Executive Director, Human Rights Watch
>
> Charles Stimson, Manager, National Security Law Program, The Heritage Foundation

Curiously, John Bellinger who (as far as I understand) started the discussion of a new AUMF is not slated to testify. Also note that the Deputy Director of Special Operations for Counterterrorism will testify, but no one from CIA is scheduled to; while JSOC can operate under the President's inherent authority, it likely prefers the legal cover of an AUMF (and therefore may be one of the entities pushing for an AUMF that matches reality on the ground).

Politico reports that this hearing is more than speculative: Levin and no-longer-SASC-Ranking-Member-but-he-might-as-well-be John McCain are planning to rewrite the AUMF, with help from Bob Corker, Dick Durbin, and Lindsey "all detainees must be military" Graham.

And if the inclusion of Graham in that group doesn't scare you, remember that this crowd is substantively the same one that enshrined

military detention in 2012's NDAA. While that effort might be regarded as "reasonable" Carl Levin and John McCain's attempt to present something more reasonable than House Armed Services Committee Buck McKeon was pushing for, and while the NDAA originally included exceptions for US citizens, in the event, the White House pushed Carl Levin to effectively rubber stamp its claims to unlimited authority, including detaining (or killing) US citizens.

And if that doesn't have you worried enough about this effort, consider this quote, which mocks the contributions Rand Paul or Ted Cruz might make to this debate.

> "Can you imagine what Paul or Cruz would do with this?" said one top Democratic aide. "It could be a disaster. And it would be worse in the House."

As a threshold matter, a top aide who can't distinguish between Paul's more heartfelt libertarianism from Cruz' authoritarianism pretending to be libertarianism is a concern. But to call the influence of both as "a disaster" is troubling.

Ultimately, though, what is likely to happen with this debate is that all players will be unwilling to discuss openly what we've actually been doing in the name of war against al Qaeda, up to and including waging war in the "homeland." That's one thing the 2001 AUMF was written to exclude. And I can almost guarantee you, it's an authority the President — and the top Democratic aides who mock Rand Paul — will want to preserve.

DEPARTMENT OF PRE-

CRIME, PART 4: THE NDAA CONGRESS IS NOT ABOUT TO LEGISLATE TARGETED KILLING

In three earlier posts, I have discussed the problem with turning the FISA Court into the Drone and/or Targeted Killing Court: As I noted, the existing FISA Court no longer fulfills the already problematic role it was set up to have, ensuring that the government have particularized probable cause before it wiretap someone. On the contrary, the FISA Court now serves as a veil of secrecy behind which the government can invent new legal theories with little check.

In addition, before the FISA Court started rubberstamping Drone Strikes and/or Targeted Killings of Americans, presumably it would need an actual law to guide it. (Though Carrie Cordero, who is opposed to the Drone and/or Targeted Killing FISA Court idea because it might actually restrain the Executive, seems to envision the Court just using the standards the Executive has itself invented.) And there's a problem with that.

The same Congress that hasn't been successful passing legislation on detention in the 2012 NDAA is certainly not up to the task of drafting a law describing when targeted killing is okay.

As a reminder, here's what happened with the NDAA sections on military detention. The effort started with an attempt to restate whom we are at war with, so as to mandate that those we're at war with be subject to law of war detention. The language attempting to restate whom we're at war with ended up saying:

> (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50

> U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) 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.

Compare that language with what the actual AUMF says:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Part of the difference arises from the shift to focusing exclusively on persons (you can't detain a nation, after all, though Palestine might disagree).

Part of the difference comes from the effort —

clause 2 above — to extend the AUMF to those associated forces. This was meant to cover groups like AQAP and al-Shabaab, but as we'll see, it's one source of the problem with the law.

But part of the problem is that the NDAA language smartly took out the "he determines" and "in order to prevent any future acts of international terrorism" language. The former has long been a giant loophole, allowing the President to define in secret whom we're at war against. And I increasingly suspect the Administration has been using the latter language to expand the concept of imminent threat.

In other words, in an effort to parrot back its understanding of whom we're at war against, Congress both introduced some new fuzzy language — associated forces — and took out existing loopholes — the "he determines" and "prevent any future acts."

This already made the White House squirrelly and veto-threaty, which is why, as I understand it, this language was inserted.

> (d) CONSTRUCTION.—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

If the Administration ever has to assert its authority goes beyond what Congress laid out in the NDAA, it will point to this clause and argue it guarantees the President can still do what he was already doing, deciding who presents an imminent threat in secret. Note, too, that this clause affirms not just what he was already doing under the AUMF, but "the authority of the President," Article II power.

Along the way, the Senate Armed Services Committee (which was striving for something that looked balanced as compared to the House Armed Services Committee), tried to restrict the use

of military detention with US citizens based on activities they undertook in the US. But when the Administration asked, they withdrew that language.

> The initial bill reported by the committee included language expressly precluding "the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States." **The Administration asked that this language be removed from the bill**. [my emphasis]

Carl Levin and Dianne Feinstein (who of course would still be the lead players in any FISA Drone and/or Targeted Killing legislation) actually had a remarkably heated squabble about this. When DiFi and others tried to provide further protections for Americans as part of the amendment process, this is the best they could come up with:

> (e) AUTHORITIES.—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

As with clause (d), if anyone ever challenges the Administration's authority under this law, they'll point to clause (e), argue they already had the authority (based perhaps on the Jose Padilla or the Anwar al-Awlaki precedent) and therefore they can keep doing whatever they were doing.

So they passed this law, which basically inserted loopholes in just about every place where the law might impose real limits on the fairly unlimited authority the Bush and Obama

Administrations have claimed under the 2001 AUMF.

Then, in his signing statement, Obama created one more loophole to make sure Section 1024 — which would have required the Administration provide meaningful reviews to detainees held in Bagram — really didn't impose any new requirements there, either.

> Going forward, consistent with congressional intent as detailed in the Conference Report,my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.

And when, 4 months later, DOD got around to exercising that discretion, they basically picked a date so far in the future (3 years) as to make Congress' requirement DOD give detainees meaningful review meaningless. (Along the way Obama also gutted his own plan to offer periodic reviews at Gitmo.)

In short, even in an effort to reaffirm and slightly expand the AUMF, Congress and the President ended up recreating or replacing the loopholes that two Administrations have used to claim the AUMF offers fairly unlimited authority. As a threshold matter, this is the kind of law that would result of any effort to rein in targeted killing.

Hilarity ensued as soon as this law hit the courts. When Judge Katherine Forrest asked the Administration's lawyers to define what an "associated force" (one of the new loopholes inserted into the law) was, they refused to go on the record at all.

> The Court then asked: Give me an example. Tell me what it means to substantially support associated forces.

> Government: I'm not in a position to give specific examples.
>
> Court: Give me one.
>
> Government: I'm not in a position to give one specific example.

Judge Forrest concluded what we should assume would be a starting place for the arguments that would take place in the secrecy of the FISA Drone and/or Targeted Killing Court.

> It must be said that it would have been a rather simple matter for the Government to have stated that as to these plaintiffs and the conduct as to which they would testify, that § 1021 did not and would not apply, if indeed it did or would not. That could have eliminated the standing of these plaintiffs and their claims of irreparable harm. Failure to be able to make such a representation given the prior notice of the activities at issue requires this 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.

Mind you, the government has since tried to put this genie back in the bottle, by arguing that the specific plaintiffs in the Hedges suit won't be indefinitely detained, but the underlying point is clear: the Administration does not believe the "associated forces" has any clear bounds.

All that, of course, is driven by law.

But there's one more problem with the notion that Congress — this Congress!!! — would be able to write law adequate to making a FISA Drone and/or Targeted Killing review meaningful.

Back when the NDAA was coming to a close, Jay Carney made this comment, which was striking

then but is even more so given the claims we've seen made public in the interim.

> MR. CARNEY: Well, let me make clear that this was not the preferred approach of this administration, and **we made clear that any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the nation would prompt the President's senior advisors to recommend a veto**.
> After intensive engagement by senior administration officials, the administration has succeeded in prompting the authors of the detainee provisions to make several important changes, including the removal of problematic provisions. [my emphasis]

Carney couched this language in objections — which were clearly held and definitely part of the problem — to limits on FBI interrogation and detention of detainees. But the "protect the nation" language is familiar from the white paper on targeted killing. It's that half of the argument that grounds targeted killing authority not in the AUMF, but in Article II authority. An anonymous official saying precisely the same things Brennan would later say on the record went even further, pointing to Anwar al-Awlaki's killing as the example that the Administration can and should have unlimited flexibility in Counterterrorism operations. CIA's General Counsel and others have made clear: Obama is conducting covert operations — including targeted killing and almost certainly the targeted killing of Awlaki — under his Article II authority; the AUMF is just gravy to that.

The NDAA debacle makes clear: Congress is so unwilling to even impose real constraints on the AUMF, there is no chance any law they might pass would accidentally impose new constraints on covert operations conducted under Article II authority.

Which is why I said what I said at the start: the calls for a FISA Drone and/or Targeted Killing Court are just Congress' (DiFi's especially) effort to punt this to a place where it won't embarrass Congress for their refusal to rein in the Executive Branch anymore. The push to give FISA review over this authority is just an attempt to stick this all someplace we can't see it anymore, not to impose any meaningful review of the Executive.

LATIF, THE NDAA, AND MITT'S MOOCHERS

Amy Goodman is doing a 100 city tour to support public outlets that carry Democracy Now. She also gave a talk about the importance of independent media at Grand Rapids Community Media Center.

And, she had me—live!—on her show.

Man I've got a lot of hair!

HEDGES NDAA INDEFINITE DETENTION DECISION STAYED BY 2ND CIRCUIT

As much as I, and most who care about Constitutional protections and Article III courts still having a function in balance of power determinations, the recent 112 page ruling by Judge Katherine Forrest in SDNY (see here and, more importantly, here) had fundamental

issues that made review certain, and reversal all but so.

The first step was to seek a stay in the SDNY trial court, which Judge Forrest predictably refused; but then the matter would go to the Second Circuit, and the stay application was formally filed today.

Well, that didn't take long. From Josh Gerstein at Politico, just filed:

> A single federal appeals court judge put a temporary hold Monday night on a district court judge's ruling blocking enforcement of indefinite detention provisions in a defense bill passed by Congress and signed into law last year by President Barack Obama.
>
> U.S. Court of Appeals for the 2nd Circuit Judge Raymond Lohier issued a one-page order staying the district court judge's injunction until a three-judge panel of the court can take up the issue on September 28.
>
> Lohier offered no explanation or rationale for the temporary stay.

Here is the actual order both granting the temporary stay and scheduling the September 28 motions panel consideration.

This is effectively an administrative stay until the full three judge motions panel can consider the matter properly on September 28th. But I would be shocked if the full panel does anything but continue the stay for the pendency of the appeal.

CHRIS HEDGES ET. AL WIN ANOTHER ROUND ON THE NDAA

You may remember back in mid May Chris Hedges, Dan Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, Kai Wargalla, Birgetta Jonsdottir and the US Day of Rage won a surprising, nee stunning, ruling from Judge Katherine Forrest in the Southern District of New York. Many of us who litigate felt the plaintiffs would never even be given standing, much less prevail on the merits. But, in a ruling dated May 16, 2012, Forrest gave the plaintiffs not only standing, but the affirmative win by issuing a preliminary injunction.

Late yesterday came even better news for Hedges and friends, the issuance of a permanent injunction. I will say this about Judge Forrest, she is not brief as the first ruling was 68 pages, and todays consumes a whopping 112 pages. Here is the setup, as laid out by Forrest (p. 3-4):

> Plaintiffs are a group of writers, journalists, and activists whose work regularly requires them to engage in writing, speech, and associational activities protected by the First Amendment. They have testified credibly to having an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2).

> At the March hearing, the Government was unable to provide this Court with any assurance that plaintiffs' activities (about which the Government had known—and indeed about which the Government had previously deposed those individuals) would not in fact subject plaintiffs to military detention pursuant to § 1021(b)(2). Following the March hearing (and the Court's May 16 Opinion on the preliminary injunction), the Government fundamentally changed its position.
>
> In its May 25, 2012, motion for reconsideration, the Government put forth the qualified position that plaintiffs' particular activities, as described at the hearing, if described accurately, if they were independent, and without more, would not subject plaintiffs to military detention under § 1021. The Government did not—and does not—generally agree or anywhere argue that activities protected by the First Amendment could not subject an individual to indefinite military detention under § 1021(b)(2). The First Amendment of the U.S. Constitution provides for greater protection: it prohibits Congress from passing any law abridging speech and associational rights. To the extent that § 1021(b)(2) purports to encompass protected First Amendment activities, it is unconstitutionally overbroad.
>
> A key question throughout these proceedings has been, however, precisely what the statute means—what and whose activities it 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. 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).

Those were the stakes in the litigation and Katherine Forrest did not undersell them in the least. Now, truth be told, there is not really a lot of new ground covered in the new decision that was not touched on in the earlier ruling, but it is even more fleshed out and also formalizes a declination of the government's motion for reconsideration filed in June as well as argument on the additional grounds necessary for a permanent injunction over the preliminary injunction initially entered. As Charlie Savage pointed out, it is a nice little gift coming on the same day the House voted 301-118 to re-up the dastardly FISA Amendments Act.

And Forrest really did go out of her way to slap back the government's bleating that courts should stay out of such concerns and leave them to the Executive and Legislative Branches, an altogether far too common and grating refrain in DOJ arguments in national security cases (p 11-12):

> The Court is mindful of the extraordinary importance of the Government's efforts to safeguard the country from terrorism. In light of the high stakes of those efforts as well as the executive branch's expertise, courts undoubtedly owe the political branches a great deal of deference in the area of national security. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2711 (2010). Moreover, these same considerations counsel particular attention to the Court's obligation to

> avoid unnecessary constitutional questions in this context. Cf. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nevertheless, the Constitution places affirmative limits on the power of the Executive to act, and these limits apply in times of peace as well as times of war. See, e.g., Ex parte Milligan, 72 U.S. (4 Wall.) 2, 125-26 (1866). Heedlessly to refuse to hear constitutional challenges to the Executive's conduct in the name of deference would be to abdicate this Court's responsibility to safeguard the rights it has sworn to uphold.
>
> And this Court gives appropriate and due deference to the executive and legislative branches—and understands the limits of its own (and their) role(s). But due deference does not eliminate the judicial obligation to rule on properly presented constitutional questions. Courts must safeguard core constitutional rights. A long line of Supreme Court precedent adheres to that fundamental principle in unequivocal language. Although it is true that there are scattered cases—primarily decided during World War II—in which the Supreme Court sanctioned undue deference to the executive and legislative branches on constitutional questions, those cases are generally now considered an embarrassment (e.g., Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans based on wartime security concerns)), or referred to by current members of the Supreme Court (for instance, Justice Scalia) as "wrong" (e.g., Ex parte

> Quirin, 317 U.S. 1 (1942) (allowing for the military detention and execution of an American citizen detained on U.S. soil)). Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside.

If you relish such things, especially the rare ones where the good guys win, the whole decision is at the link. If you would like to read more, but not the entire 112 pages, the summary portion is contained in pages 3-14. For those longtime readers of Emptywheel, note the citation to *Ex Parte Milligan* on pages 12, 37, 51 and 79. Our old friend Mary would have been overjoyed by such liberal use of *Milligan*, especially this passage by Judge Forrest on pages 79-80:

> A few years later, in *Milligan*, the Supreme Court held:
> "Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus." 71 U.S. at 4. The Court stated, "No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open." Id. at 73.

Indeed. Keep this is mind, because the concept of military tribunals not being appropriate to try citizens "at a place where the courts are open" is a critical one. Although the language invokes "citizens", the larger concept of functioning courts being preferable will be coming front and center as the Guantanamo Military Tribunals move through trial and into the appellate stages, and will also be in play should Julian Assange ever really be extradited for trial in the United States (a big if, but one constantly discussed).

So, all in all, yesterday's decision by Judge Forrest has far ranging significance, and is a remarkably refreshing and admirable one that should be widely celebrated. That said, a note of caution is in order: Enjoy it while you can, because if you are the betting type, I would not lay much of the family farm on Forrest's decision holding up on appeal.

There was talk on Twitter that the Supreme Court would reverse, but I am not sure it even gets that far. In fact, unless Chris Hedges et. al get a very favorable draw on the composition of their appellate panel in the 2nd Circuit, I am dubious it goes further than that. And one thing is sure, the government is going to appeal.

JUDGE ENJOINS NDAA SECTION 1021 BECAUSE GOVERNMENT IMPLIES SPEECH MAY EQUAL TERRORISM

> The Court then asked: Give me an example. Tell me what it means to substantially support associated forces.
>
> Government: I'm not in a position to give specific examples.
>
> Court: Give me one.
>
> Government: I'm not in a position to give one specific example.

When Judge Katherine Forrest asked the government, repeatedly, for both generalized clarification and descriptions specific to plaintiffs like Chris Hedges and Brigitta Jonsdottir explaining the scope of Section 1021

of the NDAA, the government refused to give it. Not only was the government unwilling to reassure that even a Pulitzer Prize winning journalist like Hedges would not be indefinitely detained as "a person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces" if he reported on any number of terrorist groups, but it also refused to explain the meaning of the section generally.

Which is the core reason why Forrest not only ruled that the plaintiffs have standing and the case should go forward, but also enjoined any enforcement of Section 1021. In explaining this, she noted that she was forced by the government's refusal to give clarification to assume that the government believes First Amendment speech is included in the orbit of "substantially supported" that might be indefinitely held under 1021.

> It must be said that it would have been a rather simple matter for the Government to have stated that as to these plaintiffs and the conduct as to which they would testify, that § 1021 did not and would not apply, if indeed it did or would not. That could have eliminated the standing of these plaintiffs and their claims of irreparable harm. **Failure to be able to make such a representation given the prior notice of the activities at issue requires this 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**.
>
> [snip]
>
> This Court is left then, with the following conundrum: plaintiffs have put forward evidence that § 1021 has in fact chilled their expressive and associational activities; the Government will not represent that such activities are not covered by § 1021; plaintiffs'

> activities are constitutionally protected. Given that record and the protections afforded by the First Amendment, this Court finds that plaintiffs have shown a likelihood of succeeding on the merits of a facial challenge to § 1021.

I spent much of the day explaining to people why Obama's Yemen EO is so troubling. I've had to describe all the things that have transpired that have criminalized speech since Obama issued a similar EO in 2010—the decision in Holder v. Humanitarian Law Project, the conviction of Tarek Mehanna, and the charging of Bradley Manning with aiding the enemy.

Now I can point to Forrest's opinion to show that the proposition that journalists might be prosecuted for material support of terrorism for their First Amendment speech—to the extent it's an extreme proposition—it is the government's extreme proposition.

Forrest used the government's stubbornness against it in one other way, too—to get past the rather high bar on whether to issue a preliminary injunction or not. The decision on whether to issue an injunction or not depends on a lot of things. But ultimately, it requires a balancing test between the hardships imposed on the plaintiff and the defense. And since—Forrest explained—the government repeatedly insisted that Section 1021 does no more or less than what the AUMF already does, then enjoining the enforcement of 1021 would not harm the government at all.

> In considering whether to issue a preliminary injunction, the Court must consider, as noted above, "the balance of the hardships between the plaintiff and defendant and issue the injunction only if the balance of the hardships tips in the plaintiff's favor." Salinger, 607 F.3d at 80.

> The Government's primary argument in opposition to this motion is that § 1021 is simply an affirmation of the AUMF; that it goes no further, it does nothing more. As is clear from this Opinion, this Court disagrees that that is the effect of § 1021 as currently drafted. However, if the Government's argument is to be credited in terms of its belief as to the impact of the legislation—which is nil—then the issuance of an injunction should have absolutely no impact on any Governmental activities at all. The AUMF does not have a "sunset" provision: it is still in force and effect. Thus, to the extent the Government believes that the two provisions are co-extensive, enjoining any action under § 1021 should not have any impact on the Government.

While most of Forrest's ruling involved hoisting the government on its own obstinate petard, she also left a goodie in her ruling for the higher courts that will surely review her decision after the government surely appeals (unless Congress passes a fix to the NDAA tomorrow, as they might). Forrest established the importance of speech by pointing to … Anthony Kennedy's opinion in Citizens United.

> In Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), Justice Kennedy wrote that "[s]peech is an essential mechanism of democracy, for it is the means that hold officials accountable to the people . . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government." Id. at 899. Laws that burden political speech are therefore subject to strict scrutiny. Id. at 898. "The First Amendment protects speech and speaker, and the ideas that flow from each." Id.

> at 899.

If corporations can avail themselves of unlimited campaign speech, then mere journalists and activists ought to be able to engage in political speech without being indefinitely detained.

And yet, it took a judge to make that argument to the government.

THE OTHER ASSAULT ON THE FOURTH AMENDMENT IN THE NDAA? DRONES AT YOUR AIRPORT?

Figure 2: Planned DoD 2015 UAS Locations

Steven Aftergood notes that the Army just issued new directives for the use of drones in civilian airspace. The new directives include nothing earth shattering (my favorite part is the enclosure from 2009 explaining what to do when you lose contact with one of your drones, on PDF 18—but really, what could go wrong?). But it does, as Aftergood notes, reflect a real enthusiasm for using more drones in civilian airspace.

Which brings me to a part of the NDAA debate

that has remained largely undiscussed.

Days after the NDAA past, Chuck Schumer started boasting about how the NDAA would bring jobs to Syracuse, NY because the city's airport might be one of 6 sites approved as test sites for drones flying in civilian airspace.

> The National Defense Authorization Act signed into law last week by President Barack Obama allows for the establishment of six national test sites where drones could fly through civil air space.
>
> Schumer, D-N.Y., said Tuesday he pushed for the establishment of six spots, instead of the planned four, to improve the chances that Hancock Field would be included.
>
> [snip]
>
> Schumer said Hancock already meets FAA requirements for unmanned aerial vehicles because about 7,000 square miles surrounding the airport is designated as "special use" airspace.
>
> He said that "making Hancock a test site for this technology would be a boon for Central New York, creating jobs and bringing new investments to our defense contractors that provide thousands of good paying jobs."

Curiously, the language addressing drones in civilian airspace in the NDAA, as passed, doesn't actually say this.

> SEC. 1074. REPORT ON INTEGRATION OF UNMANNED AERIAL SYSTEMS INTO THE NATIONAL AIRSPACE SYSTEM.
>
> (a) REPORT REQUIRED.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall, in consultation with the Administrator of the Federal Aviation

> Administration and on behalf of the UAS Executive Committee, submit to the appropriate committees of Congress a report setting forth the following:
>
> (1) A description and assessment of the rate of progress in integrating unmanned aircraft systems into the national airspace system.
>
> (2) An assessment of the potential for one or more pilot program or programs on such integration at certain test ranges to increase that rate of progress.

Rather, it seems to require Secretary Panetta to tell Congress whether "one or more" test ranges would "help" us get drones into civilian airspace more quickly. Perhaps the new Army guidelines are part of DOD's preparation for the report to Congress.

That said, there is evidence that the legislative intent behind the NDAA is to push those 6 sites forward. Here's what the managers' statement said about this section (note, the numbering changed as sections got squished together into a bill).

> **Unmanned aerial systems and national airspace (sec. 1097)**
>
> The House bill contained a provision (sec. 1098) that would require the Administrator of the Federal Aviation Administration to establish a program to integrate unmanned aircraft systems into the national airspace system at six test ranges.
>
> The Senate amendment contained no similar provision.
>
> The Senate recedes with an amendment that would require that, for any project established by the Administrator under this authority, the Administrator ensures that the project is operational not later than 180 days after the date

> on which the project is established.

That would seem to say that the Congressional intent, if not the letter of the law, adopted the language from the House bill, which says this:

> SEC. 1098. UNMANNED AERIAL SYSTEMS AND NATIONAL AIRSPACE.
>
> (a) Establishment- Not later than 180 days after the date of the enactment of this Act, the Administrator of the Federal Aviation Administration shall establish a program to integrate unmanned aircraft systems into the national airspace system at six test ranges.
>
> (b) Program Requirements- In establishing the program under subsection (a), the Administrator shall—
>
> (1) safely designate nonexclusionary airspace for integrated manned and unmanned flight operations in the national airspace system;
>
> (2) develop certification standards and air traffic requirements for unmanned flight operations at test ranges;
>
> (3) coordinate with and leverage the resources of the Department of Defense and the National Aeronautics and Space Administration;
>
> (4) address both civil and public unmanned aircraft systems;
>
> (5) ensure that the program is coordinated with the Next Generation Air Transportation System; and
>
> (6) provide for verification of the safety of unmanned aircraft systems and related navigation procedures before integration into the national

> airspace system.
>
> (c) Locations- In determining the location of a test range for the program under subsection (a), the Administrator shall—
>
> (1) take into consideration geographic and climatic diversity;
>
> (2) take into consideration the location of ground infrastructure and research needs; and
>
> (3) consult with the Department of Defense and the National Aeronautics and Space Administration.

Similar language appeared in the FAA authorization that got hung up in Congress last fall.

> SEC. 326. UNMANNED AIRCRAFT SYSTEMS TEST RANGES.
>
> (a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator of the Federal Aviation Administration shall establish a program to integrate unmanned aircraft systems into the national airspace system at not fewer than 4 test ranges.
>
> (b) PROGRAM REQUIREMENTS.—In establishing the program under subsection (a), the Administrator shall—
>
> (1) safely designate nonexclusionary airspace for integrated manned and unmanned flight operations in the national airspace system;
>
> (2) develop certification standards and air traffic requirements for unmanned flight operations at test ranges;
>
> (3) coordinate with and leverage the resources of the National Aeronautics and Space Administration and the Department of Defense;

> 4) address both civil and public unmanned aircraft systems;
>
> (5) ensure that the program is coordinated with the Next Generation Air Transportation System; and
>
> (6) provide for verification of the safety of umanned aircraft systems and related navigation procedures before integration into the national airspace system.

So in addition to the Army releasing new guidelines for drones (remember, btw, that Army Secretary John McHugh, who signed the new guidelines, used to represent Fort Drum in northern NY, which has ties to the efforts to bring drones to Syracuse and already conducts drone surveillance of the black bears in the Adirondacks) it's clear that Congress is pushing to have drones regularly operating in civilian airspace in 4-6 locations around the country. And as the map above makes clear—taken from this 2010 report—DOD plans to have drones all over the country by 2015.

I'm not entirely certain what the status of those 6 test sites are. But it's fairly clear that Congress has decided, without any discernible debate, that we're going to have drones there and elsewhere in the near future.

EARLY EFFECTS OF NDAA IRAN SANCTIONS BEING FELT: EU AGREES ON OIL EMBARGO,

CHINA CUTS OIL CONTRACTS BY HALF

Among the many controversial provisions in the NDAA which President Obama signed into law on New Years Eve are provisions aimed at disrupting Iran's ability to export oil by punishing countries that do business with Iran's central bank. Although the harshest sanctions on Iran's bank don't take full effect for another six months (and Obama says in his signing statement that he will regard the measures as nonbinding if they affect his "constitutional authority to conduct foreign relations"), Iran's largest oil customers are planning to cut back dramatically on Iranian imports. The European Union has agreed in principal to a complete embargo on Iranian oil and China has already cut their imports from Iran for January and February to half their previous amount.

The moves by the EU and China will hit Iran very hard. As seen in the table above, China is Iran's largest oil importer, buying 22% of Iran's exports (but this only accounts for 11% of China's overall imports), so cutting their order for the next two months in half will have a major impact on Iran's overall oil revenues if replacement orders are not found quickly. The EU follows closely behind China, buying 18% of Iran's oil exports. Note that these purchases are not spread evenly among EU nations, as Italy and Spain combine to account for over 75% of total EU imports of Iranian oil. Should the EU embargo actually take place, and even if China does not further reduce its purchasing, Iran is looking at a loss of about 30% of its oil export volume.

The Wall Street Journal describes some of the details of how the Iran oil sanctions are designed to take effect:

> The bill specifically targets anyone doing business with Iran's central bank, an attempt to force other countries to

> choose between buying oil from Iran or being blocked from any dealings with the U.S. economy.
>
> Certain sanctions would begin to take effect in 60 days, including purchases not related to petroleum and the sale of petroleum products to Iran through private banks. The toughest measures won't take effect for at least six months, including transactions from governments purchasing Iranian oil and selling petroleum products.

Reuters provides details on the status of the EU embargo:

> European governments have agreed in principle to ban imports of Iranian oil, EU diplomats said on Wednesday, dealing a blow to Tehran that crowns new Western sanctions months before an Iranian election.
>
> /snip/
>
> Diplomats said EU envoys held talks on Iran in the last days of December, and that any objections to an oil embargo had been dropped – notably from crisis-hit Greece which gets a third of its oil from Iran, relying on Tehran's lenient financing. Spain and Italy are also big buyers.
>
> "A lot of progress has been made," one EU diplomat said, speaking on condition of anonymity. "The principle of an oil embargo is agreed. It is not being debated any more."

China is cutting its orders and is driving hard bargains on payments for the oil it is purchasing:

> China, which buys around 10 percent of Iran's crude exports, cut its January purchases by about 285,000 barrels per

> day, just over half of the total average daily amount it imported in 2011.
>
> “February would be the same as January, with the same cut,” said a Beijing-based senior crude trader who deals with Iranian oil.
>
> The sticking point in talks is over the credit period. Top Chinese refiner Sinopec Corp, which processes around nine-tenths of China’s Iranian oil imports, is insisting on 90 days to pay for imports, while Iran wants payment in 60 days.

And, of course, no matter how “surgically” the sanctions are designed to affect only the Iranian government, the effects already are beginning to hit Iranian citizens very hard. Going back to the Reuters article about the EU embargo:

> Tougher sanctions appear to be having an impact already on Iran’s streets, where prices for foodstuffs are soaring. The rial currency has lost 40 percent of its value against the dollar over the past month.
>
> Currency exchanges have shut in Tehran and Iranians have queued to withdraw their savings from banks and buy dollars.
>
> That economic hardship is being felt by the public two months before a parliamentary election, Iran’s first since a disputed 2009 presidential vote that led to massive street demonstrations, put down violently by Iran’s rulers.

The timing of the announcement of the sanctions in relation to the upcoming parliamentary elections in Iran can’t be a coincidence. It would appear that the US government has decided

that inflicting damage on Iranian voters is a desirable route to getting them to vote against the current government. That is a very dangerous gamble to make, since the government should now be in a position to make the argument that the current hardships are not the fault of Iran's government but are instead due to US meddling.

And meddling it is. The US can't harm Iran by stopping its own importation of Iranian oil because it has been more than 20 years since the US imported any Iranian oil. In fact, 1987 is the only year since the 1979 hostage crisis in which the US imported more than 50,000 barrels of Iranian oil a day and no Iranian oil at all has been imported since 1991. So, just as Iran's threat to close the Strait of Hormuz was taking the attitude that if Iran couldn't export oil, no Persian Gulf countries could export oil, the US, in implementing these sanctions, is saying that since the US uses no Iranian oil, no country should use Iranian oil.

UPDATE ON THE SIGNING OF THE NDAA

Many people have been wondering what happened regarding the signing of the 2012 NDAA containing the critical, and much criticized, detention provisions. The House of Representatives passed the conference report of the bill on December 14th, with the Senate approving it by a 86 to 13 margin the following day, December 15th. Interest then turned to whether the President would veto it (he won't) and when he will sign the legislation.

Most seemed to think that meant the bill must be

signed by yesterday, which would have been the tenth day, excluding Sundays, after passage pursuant to Article I, Section 7 of the Constitution, which provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules

> and Limitations prescribed in the Case of a Bill.

But Obama has not yet signed the NDAA, so what gives? Presentment. A bill coming out of Congress must be formally presented to the President for signature. Sometimes, if the subject matter is deemed urgent, the presentment process is accelerated remarkably and happens on an emergency basis quite quickly. But, normally, it is a time honored deliberate process also governed by statute. 1 USC 106 and 107 require an enrolled bill passed by both chambers of Congress be printed on parchment or paper "of suitable quality" and "sent" to the President; this is the "presentment" process. 1 USC 106 does allow for alternate accelerated means for a bill emanating during the last six days of a session, and the OLC, in a little known opinion from May 2011, has decreed that electronic transmission is even acceptable (basically, the thing can be emailed).

In the case of the critical 2012 NDAA, however, Congress (one would assume with the blessing of the White House) apparently made no attempt to accelerate the schedule as often occurs for end of session matters, and the NDAA was not formally presented to President Obama until December 21st. So, excluding intervening Sundays, the tenth day is, in fact, Monday January 2, 2012.

Why, then, is the White House and President stringing out the signing of the NDAA? Well, we know AG Eric Holder has indicated Obama would be attaching a signing statement to the executed NDAA. Although unconfirmed officially, the word I am hearing from DOJ, who was working with the White House on the signing statement, was that they were done late last week.

So, it is not clear why Obama has still not yet signed the NDAA. Maybe he and the White House optics shop realized what a sour pill it would be to sign such a perceived toxic hit on civil liberties right before Christmas? The better

question might be whether they are planning on slipping this little gem in the end of the week pre New Years trash dump.