DOJ FILES APPEAL: FURTHER THOUGHTS ON HEDGES AND THE LAWFARE/WITTES ANALYSIS

Last night (well for me, early morning by the blog clock) I did a post on the decision in the SDNY case of *Hedges et. al v. Obama*. It was, save for some extended quotations, a relatively short post that touched perhaps too much on the positive and not enough on the inherent problems that lead me to conclude at the end of the post that the decision's odds on appeal are dire.

I also noted that it was certain the DOJ would appeal Judge Forrest's decision. Well, that didn't take long, it has already occurred. This afternoon, the DOJ filed their Notice of Appeal.

As nearly all initial notices of appeal are, it is a perfunctory two page document. But the intent and resolve of DOJ is crystal clear. Let's talk about why the DOJ is being so immediately aggressive and what their chances are.

I woke up this morning and saw the, albeit it not specifically targeted, counterpoint to my initial rosy take offered by Ben Wittes at Lawfare, and I realized there was a duty to do a better job of discussing the problems with Forrest's decision as well. Wittes' post is worth a read so that the flip side of the joy those of us on the left currently feel is

tempered a bit by the stark realities of where Katherine Forrest's handiwork is truly headed.

Wittes makes three main critiques. The first:

> So put simply, Judge Forrest's entire opinion hinges on the idea that the NDAA expanded the AUMF detention authority, yet she never once states honestly the D.C. Circuit law extant at the time of its passage—law which unambiguously supports the government's contention that the NDAA affected little or no substantive change in the AUMF detention power.

Secondly:

> Second, Judge Forrest is also deeply confused about the applicability of the laws of war to detention authority under U.S. domestic law. She does actually does spend a great deal of time talking about Al-Bihani, just not about the part of it that really matters to the NDAA. She fixates instead on the panel majority's determination that the laws of war do not govern detentions because they are not part of U.S. domestic law. Why exactly she thinks this point is relevant I'm not quite sure. She seems to think that the laws of war are vaguer and more permissive than the AUMF—precisely the opposite of the Al-Bihani panel's assumption that the laws of war would impose additional constraints. But never mind. Someone needs to tell Judge Forrest that the D.C. Circuit, in its famous non-en-banc en-banc repudiated that aspect of the panel decision denying the applicability of the laws of war and has since assumed that the laws of war do inform detention authority under the AUMF. In other words, Judge Forrest ignores—indeed misrepresents—Al-Bihani on the key matter to which it is surpassingly

> relevant, and she fixates on an aspect of the opinion that is far less relevant and that, in any case, is no longer good law.

Lastly, Ben feels the scope of the permanent injunction prescribed by Forrest is overbroad:

> Judge Forrest is surely not the first district court judge to try to enjoin the government with respect to those not party to a litigation and engaged in conduct not resembling the conduct the parties allege in their complaint. But her decision represents an extreme kind of case of this behavior. After all, "in any manner and as to any person" would seem by its terms to cover U.S. detention operations in Afghanistan.

First off, although I did not quote that portion of Ben's analysis, but I think we both agree that Judge Forrest pens overly long and loosely constructed opinions, if the two in Hedges are any guide. This is what I often refer to as "rambling", and it is that.

Secondly, I note, significantly, Ben does not mention, much less meaningfully challenge, Forrest's discussion on, and finding of, standing for the Hedges Plaintiffs. He should, it is every bit as big of an appellate concern as the three areas he does list. Forrest, in effect, used the disdain the Obama DOJ displayed to the court in not affirmatively presenting evidence and otherwise engaging in the initial March hearing on the merits of the plaintiffs' situation as her basis for finding standing under *Lujan v. Defenders of Wildlife*.

Forrest does an admirable job laying out a foundation for her finding of standing, but the 2nd will take some issue and it is almost certain the Roberts Court who, are ideologically led by Scalia in their ever more restrictive view of standing, will reverse Forrest. If I am

writing the inevitable DOJ appeal, that is where I start. And if an appellate court, as I suspect, starts there and disagrees with Forrest, the inquiry may end right there without getting into further merits. I would not bet against just that happening.

Standing issue aside, Ben Wittes' demurrers to the Hedges opinion are also salient. Initially, I was going to deconstruct the heart of Ben's take via some older material from another Lawfare protagonist I very much respect, Steve Vladeck. Due to other duties interrupting the writing of the instant post, Steve has come along and done that for me in a post at Lawfare:

> Indeed, I'm not perplexed by the theory behind Judge Forrest's analysis, but by its application to these facts. Consider section 1021(e) of the NDAA, a.k.a. the "Feinstein Amendment":
>
> > 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 Marty and I explained in this post, the entire point of the Feinstein Amendment was to quell concerns that the NDAA might covertly authorize the detention of U.S. citizens or other individuals within the United States. It did so by emphasizing that it merely preserved the (entirely ambiguous) status quo in such cases. This proviso didn't resolve the scope of the government's authority to detain such individuals; it merely provided that the NDAA didn't change that question in any meaningful way.

> As such, the Feinstein Amendment appears to necessarily foreclose the argument that what's "new" in the NDAA could encompass any power to detain individuals covered by section 1021(e), i.e., "United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." Such individuals might still be subject to detention under the AUMF, but thanks to the Feinstein Amendment, only under the AUMF. And so, to the extent that Judge Forrest's analysis turns on the conclusion that the NDAA confers detention authority not provided by the AUMF, one would think she'd have to explain why the Feinstein Amendment doesn't limit the "newness" of the NDAA exactly to those individuals with less clearly established constitutional rights, e.g., non-citizens arrested and detained outside the territorial United States.

You may say to yourself, well what is there particularly positive about Vladecks' take? And it is a decent question. The answer is, admittedly, nuanced and somewhat thin. But it starts with the fact Steve is willing to consider Forrest's "central premise". And, indeed, contra Ben Wittes, I think it is more than possible to envision the Katherine Forrest framing in a world that is capable of distinguishing between *Ex Parte Milligan* and *Ex Parte Quirin* in a more liberal Founding Fathers view as opposed to the militaristic "War On Terror" view such as is the single minded view of the Bush/Cheney to Obama Executive Branch unitary theory.

Secondly, and as Wittes appropriately notes, Judge Forrest is in no way bound by the hideous precedent that has been laid down by the DC Circuit. No, Forrest operates in the 2nd Circuit and is not bound by the crazed opinions of

Janice Rogers Brown and the War On Terror Stockholm Syndrome infected DC Circuit that seems to have lost all perspective of that from whence we came. Give Katherine Forrest credit, I think she understands the slippery and craven hill she is heroically trying to climb, and that is why she engages in such rambling attempts to buck up her position.

As to Ben's last beef, the overbreadth of the permanent injunction, well, yeah, that is the nature of the beast, no? Seriously, when any federal court is interpreting a statutory decree of Congress on a "facial", as opposed to "as applied" basis, especially one as far reaching and contra to Founding principles as Section 1021(b) of the NDAA, the injunction has to really be that broad to engage the "face" of the statute. So, that one is not really the crux of the consideration in this case.

In conclusion, I have to, regrettably, agree with my friend Ben Wittes, the shelf life of the joy from Katherine Forrest's decision in *Hedges et. al v. Obama* is remarkably short. That does not mean it does not have immense value though. Doomed as it may be, it is a significant and principled pushback at the treachery engaged in by the DC Circuit in the "Detainee Cases". It almost certainly will not hold up, but I have not in recent times (maybe not since Vaughn Walker) had more respect for what a federal judge has tried to do to protect the Constitution and principles this country was built on.