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.
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> Government: I'm not in a position to give specific examples.
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> Court: Give me one.
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> 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**.
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> [snip]
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> 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.
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> 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.