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.
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> 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.
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> 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.
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> 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.