

## UNITED STATES DISTRICT JUDGE KATHERINE B. FORREST, SOUTHERN DISTRICT OF NEW YORK

HEDGES v BARACK OBAMA, DATE FILED: May 16, 2012

... the Government argues that as an "affirmation" of the <u>AUMF</u>, § 1021 of the <u>NDAA</u> does nothing new; ... this Court finds that § 1021 is not merely an "affirmation" of the AUMF. To so hold would be contrary to basic principles of legislative interpretation that require Congressional enactments to be given independent meaning. To find that § 1021 is merely an "affirmation" of the AUMF would Page 3

require this Court to find that § 1021 is a mere redundancy--that is, that it has no independent meaning and adds absolutely nothing to the Government's enforcement powers. Page 4

**The Court asked** "when we are talking about cases which have used the phrase 'substantially supported' and said that that is a valid criterion under the AUMF or of the legislation, that's not the same thing as saying that . . . any court has found, one way or the other, that 'substantially supported' has an understandable meaning to an **ordinary citizen**?"

The Government responded, "It's true that the courts have not expressly ruled that, that's right."

**The Court then asked**: Give me an example. Tell me what it means to substantially support associated forces. Page 31

**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.

The Court then asked: What does 'directly supported' mean?

**Government**: We have not said anything about that in our brief.

Court: What do you think it means?

**Government**: . . . Your Honor, we had focused so much on the phrase that was challenged by the plaintiffs, 'substantial support' that I have not thought through exactly and we have not come to a position on what 'direct support' and what that means.

The Court then asked: "Assume you were just an American citizen and you're reading the statute and you wanted to make sure you do not run afoul of it because you are a diligent U.S. citizen wanting to stay on the right side of §1021, and you read the phrase 'directly supported'. What does that mean to you?"

**Government**: Again it has to be taken in the context of armed conflict informed by the laws of war.

Court: That's fine. Tell me what that means?

The Government then returned to the Laws of War and finally stated, "I cannot offer a specific example. I don't have a specific example."

The Court then asked the Government specific questions regarding plaintiffs' present and intended activities at issue Page 32 here and whether those activities would fall within the scope of § 1021.

**The Government responded**, "I can't make specific representations as to particular plaintiffs. I can't give particular people a promise of anything." Page 33

**Court**: These people [plaintiffs] have real things they are saying. These are not speculative or hypotheticals. These are people who have actually written articles that we have here. [The Court then held up the articles written by O'Brien and marked as Court Ex. 3.] We are trying to figure out, are these articles going to subject Ms. O'Brien to risk under § 1021? . . . .

**Government**: Again, I'm not authorized to make specific representations regarding specific people. I'm saying that 'associated forces' cannot extend to groups that are not armed groups at all.

Court: So we don't know about the articles, it depends?

**Government**: Maybe they are an armed group.

PATRIOT COALITION NOTE: The evasiveness of the Executive Branch as illustrated above has been going on for at least the last eight years.

(2004) <u>HAMDI vs. RUMSFELD</u> (U.S. Supreme Court Justice O'Conner, writing for the majority)

"...The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such."

With regard to Hedges the Court asked, Is it possible, in your view, that Mr. Hedges, any of his activities as he has described them, should they occur in the future, [and also as to his past Page 34 activities], can you say that he would not be subject to military detention without trial under § 1021?

**Government**: I'm not prepared to address that question here today, but I would answer that by saying that his concerns that he has raised are addressed by what I have said and he has the burden of showing that his fear as articulated is a reasonable fear. Page 35

...since this Court is not convinced that § 1021 is simply a "reaffirmation" of the AUMF, and since the Government has authorized detention for violations of § 1021, plaintiffs here can reasonably assume that Government officials will actually undertake the detention authorized by the statute. Page 38

...An individual detained under § 1021 could be subject to military detention until the cessation of hostilities--and in the context of the war on terrorism, that is an uncertain period of time to be sure. Page 43

Before anyone should be subjected to the possibility of indefinite military detention, the Due Process Clause of the Fifth Amendment requires that individuals be able to understand what conduct might cause him or her to run afoul of § 1021. Unfortunately, there are a number of terms that are sufficiently vague that no ordinary citizen can reliably define such conduct. Page 54

The Court finds that importing its interpretation of principles from the AUMF into § 1021 would ignore the differences between those two statutes that this Court is required to assume are intentional. p. 60

...there are obvious differences between the AUMF and § 1021. Section 1021 is certainly far from a verbatim reprise of the AUMF. This Court assumes, as it must, that Congress acted intentionally when crafting the differences as between the two statutes. Page 62

First, by its terms, the AUMF is tied directly and only to those involved in the events of 9/11. Section 1021, in contrast, has a non-specific definition of "covered person" that reaches beyond those involved in the 9/11 attacks by its very term.

...§ 1021 speaks in terms of "engaged in hostilities," id.; that is the present progressive tense, not the past tense relating to 9/11.

At issue in the AUMF are those who were directly involved in the 9/11 attacks while those in § 1021 are specific groups and "associated forces." ... But the Government has not provided a concrete, cognizable set of organizations or individuals that constitute "associated forces," lending further indefiniteness to § 1021. Page 63

Further, any question of "support" is specifically defined by the verbs in the statute--i.e., "planned," "authorized," "committed," or "aided" in relation to the 9/11 attacks themselves or "harbored" in relation to the organizations or persons who engaged in the just-discussed acts. Such clarity is not provided in § 1021 with respect to what acts--and what mental state related to those acts--falls within the broad, general phrase of "substantial support."

Thus, the indefinite--indeed, vague--nature of § 1021, coupled with the Government's inability to provide assurances that the specific conduct at issue here (of which the Government had ample notice) would not subject plaintiffs to prosecution and detention for their acts <u>lays the foundation for plaintiffs' reasonable fear of irreparable harm</u>. Page 64

<u>CONCLUSION</u>: For the aforementioned reasons, plaintiffs' motion for preliminary injunction is GRANTED; enforcement of § 1021 of the NDAA is preliminarily enjoined pending further order of this Court or amendments to the statute rendering this Opinion & Order moot.