

JUDGE FORREST'S INVITATION TO CONGRESS: PASS THE SMITH-AMASH AMENDMENT

As I noted yesterday, Judge Katherine Forrest stopped the government from enforcing Section 1021 of last year's NDAA, because it is having a chilling effect on the First Amendment protected activities of plaintiff's including Chris Hedges.

There's an aspect of her ruling that was rather auspiciously timed. Because in addition to enjoining 1021, she invited Congress to fix it.

Accordingly, this Court preliminarily enjoins enforcement of §1021 pending further proceedings in this Court or remedial action by Congress mooting the need for such further proceedings.

As luck would have it, the House is poised to vote today on the Smith-Amash amendment to next year's NDAA. Their amendment would largely—though perhaps not entirely—“moot the need” for any further proceedings in the Hedges case, because it would eliminate indefinite military detention for those captured in the US.

Reps. Adam Smith (D-Wash.) and Justin Amash [my Rep] are planning to offer an amendment to this year's defense authorization bill that would guarantee that no one—citizen or otherwise—could be denied a fair trial if captured in the United States. Smith, who is the ranking member of the House Armed Services Committee, will introduce the bill during a hearing Wednesday. Amash has agreed to support it once the defense bill comes to the floor next

week, possibly bringing along enough Republican support to ensure its passage in the House.

“The amendment is drafted to prevent the president from indefinitely detaining persons captured on US soil without charge or trial,” said Will Adams, a spokesperson for Amash.

I spoke to Adams last night, and the Amendment is within striking distance of having enough votes to pass—though the House leadership is trying a bunch of stunts to avoid that outcome.

I said passing this Amendment would mostly moot further proceedings. That’s because Forrest issued her injunction covering all the plaintiffs, including people like Brigitta Jonsdottir, who is an Icelandic citizen and has sworn off from traveling to the US because of the NDAA and other Wikileaks related prosecution. Whereas the Smith-Amash amendment would apply to Jonsdottir only if she were in the US; it doesn’t offer any protection to non-citizens outside of the US.

Which means, with her ruling, Forrest has made the Smith-Amash amendment the sensible middle ground (really, it ought to be considered the bare minimum, but even still, before last night it didn’t stand a chance in hell of passing the Senate). That is, it does what most Americans seem to want done to the NDAA, to limit it so it doesn’t apply to them.

In her ruling, Forrest made it clear she tried to offer the government an easy way to help her avoid enjoining this section.

The Court’s attempt to avoid having to deal with the Constitutional aspects of the challenge was by providing the Government with prompt notice in the form of declarations and depositions of the precise conduct in which plaintiffs are involved and which they claim places them in fear of military detention. To

put it bluntly, eliminating these plaintiffs' standing simply by representing that their conduct does not fall within the scope of § 1021 would have been simple. The Government chose not to do so—thereby ensuring standing and requiring this Court to reach the merits of the instant motion.

She also made it clear she'd welcome Congress fixing the problem. Let's see if they do so today.