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## Unending imprisonment

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On September 12 — with little fanfare or national publicity — U.S. District Judge Katherine Forrest of the Southern District of New York permanently enjoined enforcement of certain provisions of the National Defense Authorization Act for Fiscal Year 2012.

Among other things, the act authorizes the president to detain American citizens, indefinitely, without trial. The controversial provision purports to authorize future detentions and ratify those already accomplished under the Authorization for the Use of Military Force (AUMF), which was passed just days following the September 11 attacks. Unlike the AUMF, however, this statute expressly authorizes the executive and the military to detain any person who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks."

Detention is authorized until "the end of hostilities" under the AUMF and "the law of war," a phrase which itself is not subject to concrete definition. Simply stated, the statute permits the president (or his military agents) to pick up any individual, including an American citizen located in the United States, on who knows what evidence, and hold him or her without trial, until conclusion of the "War on Terror," or the conflict resulting from the September 11 attacks, if indeed there is ever an end.

Although a judge of the U.S. Court of Appeals for the Second Circuit has stayed the injunction pending an expeditious appeal, the statute and the case raise several significant issues. First, many commentators and scholars were surprised at Forrest's ruling, not because they questioned the constitutionality of the law, but because the judge found that the plaintiffs, a group of controversial writers and journalists, including such long-time activists as Daniel Ellsberg and Noam Chomsky, had standing to challenge the law.

None of them had been detained or threatened with detention under the statute. Federal courts are very scrupulous about making sure that the parties challenging the constitutionality of a law are actually harmed by the statute, and, although all alleged they were in fear of being detained in light of the breadth of the law, the government represented to the court that the plaintiffs' expression was not covered by the statute. Thus, it is highly possible that the case will be overturned on appeal because the parties are not the proper ones to bring the case.

All that means is that inevitable adjudication on the merits will await another day. But deferred litigation does not detract from the fact that Congress passed, and the president signed, what many constitutional scholars agree are unconstitutional portions of a federal law. President Obama says he signed it because the controversial provision was attached to a necessary defense spending law. And, in a flourish reminiscent of the much maligned George W. Bush, he issued a signing statement expressing his concern whether the statute was enforceable as to citizens, and affirming his personal intent not to use it in that manner (even though it will operate well beyond his term of office).

What's more, Obama's position does not answer the question of why members of Congress, who take an oath to uphold the Constitution, should knowingly enact provisions of a statute that are almost certainly unconstitutional. During the Bush administration, the U.S. Supreme Court repeatedly held that some sort of due process for American citizens is required when they are detained and, unless Congress suspends the writ of habeas corpus in accordance with the Constitution (which this law could not and did not do), prompt access to some tribunal is necessary.

Further, the court held that even aliens located on United States soil (read Guantánamo Bay, Cuba) have a right to some procedures to test the legality of the detention. The court has made it abundantly clear that detention without timely resort to some tribunal to test its legality is unconstitutional. Thus, it is highly likely that indefinite detention of citizens or aliens "without trial" would also be unconstitutional.

Moreover, although the Supreme Court has not been called upon to test the constitutionality of indefinite detention even with some adjudicatory intervention, the justices have noted that unending imprisonment incidental to military action is of dubious constitutional validity, and is not justified by the law of war.

Whether or not Congress believes it needs such legislation to effectuate the War on Terror, a legislature and a president have the duty to know what the Supreme Court says is constitutional and what is not, and a duty not to enact and sign legislation that assuredly contravenes the Constitution. As citizens of a democracy, we have a right to insist that Congress and the president abide by their oaths.

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