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SWEET LAND OF LIBERTY: True constitutionalists for Supreme Court

By: Nat Hentoff
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On Monday, April 28, the Supreme Court unanimously refused to hear Hedges v. Obama, a case that includes the most broadly dangerous attacks on citizens' individual constitutional liberties in our history. Not a single justice was sufficiently shocked to sign a dissent against this grim silence, and the media have been largely indifferent.

The plaintiffs brought the lawsuit in protest of sections of the National Defense Authorization Act (NDAA) that were signed into law by President Barack Obama in December 2011. Read this part of Section 1021 of the NDAA and judge for yourself if I am exaggerating the far-ranging unconstitutionality of this law:

The Armed Forces of the United States, at the behest of the president, has the power to indefinitely "detain" without trial "a person" (including any American citizen) "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

Take note: The word "detain" is Obama's euphemism for "imprison."

John Whitehead's Rutherford Institute filed an amicus brief in a lower court on behalf of the plaintiffs in Hedges v. Obama. The brief explained how the Supreme Court abandoned our First Amendment and other constitutional rights:

"Nobody — including the Government arguing in favor of this provision — can define the terms 'belligerent act,' 'substantial support' and 'associated groups' with any precision ...

"Unlike the definition of 'material support' in the Antiterrorism and Effective Death Penalty Act, which lists specific forms of prohibited assistance such as giving money, arms, or training to terrorist groups, the broad term 'substantial support' in the NDAA could be read to encompass an enormous range — not only of conduct but of political speech and journalism.

"For example, would a journalist interviewing an al-Qaeda member be 'substantially supporting' al-Qaeda by giving that terrorist a media voice? What if the journalist were to ask a question or

to make a comment that the Government deemed sympathetic to the interviewee? The terms of the statute could be read to penalize such press activities with indefinite detention without trial."

In fact, as this Rutherford Institute amicus brief indicated, the term "substantial support" could apply to this journalist: "Could someone protesting the detention of a terrorist held without trial, or even assisting in the legal defense effort of such a detainee, be herself (or himself) detained as providing 'substantial support' to the enemy? The terms of the statute do not answer such questions."

And what are the "associated forces" any of us are forbidden from supporting? Not that "supporting" is defined. There is no definition of it in the NDAA — or of "belligerent."

Now dig this: During the New York district court proceedings that eventually led Hedges v. Obama to the blank wall at the Supreme Court, the judge asked the U.S. attorney representing the government which potential defendants could be subject to indefinite detention on the basis of organizations they supported. The attorney's answer was the official government position:

"I can't make specific representations as to particular plaintiffs. I can't give particular people a promise of anything."

Huh? Where in the Constitution can the government deny American citizens any knowledge of specific organizational connections, even in the course of their regular work, that could get them imprisoned indefinitely by the military and the president?

Here, then, is the path of this Chinese-style law to the Supreme Court: On Sept. 12, 2012, responding to Hedges v. Obama — brought by, among other plaintiffs, former New York Times Pulitzer Prize-winning reporter Christopher Hedges — Judge Katherine Forrest of the Southern District Court of New York ruled that "the Constitution requires specificity — and that specificity is absent from (Section) 1021(b)(2)."

Forrest wrote in her ruling that this part of Section 1021 "impermissibly impinges on guaranteed First Amendment rights and lacks sufficient definitional structure and protections to meet the requirements of due process."

But President Obama, of course, appealed this district court's abolition of indefinite imprisonments without trial and other due process to the Second Circuit Court of Appeals, which sided with him in its ruling last summer. The court agreed that these journalists and other plaintiffs had no standing to challenge the indefinite imprisonments, ignoring the reasons already shown in this column and in the briefs to the Supreme Court, which then nonetheless decided the free speech and due process claims were not worthy of its attention.

I return to Judge Forrest, whose initial ruling speaks for all of us, now that we have been abandoned by the Supreme Court:

"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" that now include

“indefinite military detention — potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever.”

I ask you readers: Whom will you vote for in the 2016 presidential and congressional elections who will return such of our individual constitutional liberties to us as the First and Fifth Amendments?

As James Madison and Thomas Jefferson warned us, it’s up to We The People to remain free — of both Barack Obama and the Supreme Court.

(Nat Hentoff is a nationally renowned authority on the First Amendment and the Bill of Rights. He is a member of the Reporters Committee for Freedom of the Press, and the Cato Institute, where he is a senior fellow.)