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Published on Aspen Daily News Online (http://www.aspendailynews.com)
Supreme Court in contempt of First Amendment

Writer:
Nat Hentoff
Byline:
Aspen Daily News Columnist

I have read scores of Supreme Court decisions, but rarely has there been so broadly vague and amateurishly twisted a rationale as in Chief Justice John Roberts majority decision (Jan. 21) on "Holder, Attorney General, Et al. vs. Humanitarian Law Project." With only three justices dissenting, this dangerous judicial activism disables the free-speech anchor of the First Amendment.

National Public Radio's Nina Totenberg, to whom I first turn for analysis of High Court rulings, says it plain: "The U.S. Supreme Court has upheld a federal law (in the grievously misnamed Patriot Act) that makes it a crime to provide any support to a (State Department-named) terrorist organization — even when that support is specifically to promote resolving disputes peacefully."

Does that make sense? She quotes the lawyer who argued before the Court on behalf of the Humanitarian Law Project, Georgetown Law School professor David Cole, a longtime leading advocate for the Bill of Rights in our courts. "The bottom line," says Cole, "is that the Court has now said that the First Amendment permits Congress to make human-rights advocacy and peacemaking into a terrorist crime."

Unbelievable? Read on. The Chief dissenter, Justice Stephen Breyer, was so outraged by the ruling that he read it aloud from the bench. He first cited verbatim the Patriot Act statute that punishes "knowingly provid(ing) material support or resources to a foreign terrorist organization," including "expert advice or assistance" that "threatens the security of the United States or its nationals ... with intent to endanger directly or indirectly, the safety of one or more individuals."

Who are these terrorists at the Humanitarian Law Project who are allegedly so intent on endangering us?

Founded in 1985, the nonprofit Humanitarian Law Project (HLP) describes itself — pay attention, Attorney General Holder — as "dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law." An NGO (non-governmental organization), it has consultative status at the United Nations.

Illustrative of its "terrorist" work, President Obama is its persistent concern through the years about the genocide in Darfur because, as board member David Lynn, emphasizes: "To do nothing concerning the crisis in Darfur and Eastern Chad makes us all accomplices." The HLP advocated, uselessly, peaceful U.S. and U.N. intervention.

Nonetheless, the Humanitarian Law Project is targeted by the Obama administration for providing "material support" to terrorists; and after the lower federal courts held that such clauses in the

Patriot Act section as providing “expert advice or assistance” to terrorists are unconstitutionally vague, President Barack Obama commanded Attorney General Holder to get the Supreme Court to review the lower courts’ findings.

But what are these crimes it committed? In his crystal-clear dissent, Justice Breyer tells us. After the Secretary of State designated the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as “foreign terrorist organizations,” Holder charges the Humanitarian Law Project nonetheless provided “material support” to these terrorists.

Justice Breyer shows exactly how the HLP did not, in any way, support terrorism. “The plaintiffs, all United States citizens or associations,” declare “they can (1) ‘train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes’” (2) “engage in political advocacy on behalf of Kurds who live in Turkey; (3) teach PKK members how to petition various representative bodies such as the United Nations for relief; and (4) engage in political advocacy on behalf of Tamils who live in Sri Lanka.”

Is this supporting terrorism? Educating his colleagues and the president, Breyer repeatedly reminds them that “speech and association for political purposes” is the very core of the First Amendment, adding that not “’even the war power ... removes constitutional limitations safeguarding essential liberties.’ (United States v. Robel).”

The ACLU also reminds us all that the penalty for providing “material support” to terrorists is 15 years in prison. (“Supreme Court Rules ‘Material Support’ Law Can Stand,” June 21). And Ahilan Arulanantham, an ACLU attorney from Southern California, explains another brutal dimension of this law: “A humanitarian organization may send medicine to perform dialysis, but risks prosecution if it also seeks to send either the doctor or the equipment needed to perform the dialysis itself.” (acslaws.org, Nov. 17, 2009)

“This is a very dark day in the history of the human rights struggle to assist groups overseas that are being oppressed,” said Ralph Fertig, president of the Humanitarian Law Project, as he read the Roberts Court decision. His group will continue peaceful advocacy, “but we do so with great fear.” (Tony Mauro, New York Law Journal, June 22). There was adequate press coverage of this disemboweling of the First Amendment, but the tumultuous firing of Gen. Stanley McChrystal instantly removed this dark day of our constitutional history from the news. But not from history.

Actually, on the day the decision came down, how many Americans were disturbed by it, or even took note of this “victory” for President Obama, the former teacher of constitutional law at the University of Chicago?

“Find out,” warned Frederick Douglass, “just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed on them.” There’s more wrong to come from this Supreme Court with Elena Kagan’s dim view of the First Amendment and the separation of powers very likely to be added.

There is a steadily increasing number of reasons to vote in the midterm elections.

Nat Hentoff is a member of the Cato Institute, where he is a senior fellow.

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