GlobalResearch
Center for Research on Globalization

The Creeping Hand of Fascism in America. Indefinite Military Detention and the NDAA

By Dr. Binoy Kampmark
Global Research, May 08, 2014

Region: USA
Theme: Law and Justice, Police State & Civil Rights

In declining to hear the case of Hedges v Obama and declining to review the NDAA, the Supreme Court has turned its back on precedent dating back to the Civil War era that holds that the military cannot police the streets of America. Carl Mayer, Attorney for Chris Hedges, May 2014

President Barack Obama's administration has that curious quality that marks it as authoritarian even as it embraces principles of liberty; an enemy of freedoms even as it claims to be promoting them in bookish fashion. The tendency is part schizophrenic, part conscious bloody mindedness when it is found out. Obama has shown a particular liking for various draconian laws which he hopes will sail past judicial and congressional scrutiny. The National Defense Authorization Act of 2014, signed by the President last December, was devil spawn, engendered by a security atmosphere that has the executive and law makers enthral.

The indefinite detention clause – section 1021, more specifically 1021(b)(2) – allows for the "indefinite detention of American citizens without due process at the discretion of the President." It actually made its ignominious debut in the NDAA Act of 2012. The wording is astonishingly bruising to civil liberties, and has received considerable criticism from a range of sources. Public polling by OpenCongress.com showed a 98 per cent disapproval rating. The ACLU considered the statute "particularly dangerous because it has no temporal or geographic limitations, and can be used by this and future presidents to militarily detain people captured far from any battlefield." It can, in fact, be argued that the provision makes the entire domestic and global space of US policy a potential battlefield, governed by executive fiat.

The subsequent bill of 2013 contained amendments made by Congress attempted, in part, to limit the reach of the indefinite detention clause. Sections 1031 to 1033 ostensibly attained those goals, affirming the right to due process for American citizens and the right of habeas corpus. But the legislative Frankenstein would not go away – indefinite detention was simply something too good to let go.

On the legal front, a constitutional challenge was mounted by Christopher Hedges, Carl Mayer and Bruce Afran, and joined by Noam Chomsky, Daniel Ellsberg, Alexa O'Brien, Tangerine Bolen of RevolutionTruth, Birgitta Jonsdottir and Occupy London activist Kai Wargella. They were to be rudely disappointed.

Things began promisingly enough. In 2012, US District Judge Katherine B. Forrest was sufficiently troubled by the offending section to rule it unconstitutional and grant a

permanent injunction. “Here, the stakes get no higher: indefinite military detention – potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity – and that specificity is absent.” She also repelled suggestions by lawyers for the Obama government that the section be re-instated as they appealed the decision.

The US Court of Appeal for the 2nd circuit did two things. It reinstated the law, swallowing the argument that it was needed for national security purposes. The claimants immediately got suspicious[1] – was it already being used to detain US citizens “in black sites, most likely dual citizens with roots in such countries as Pakistan, Afghanistan, Somalia and Yemen”? The national security premise seemed too pressing.

Second, the court decided to make a spurious legal exit in refusing to rule on the constitutionality of s. 1021(b)(2), citing the old issue of standing which was similarly used in the Supreme Court case of *Clapper v Amnesty International USA* (2013)[2] In other words, those challenging the law could not show that the provision had any bearing on the government’s authority to indefinitely detain US citizens. Those plaintiffs who were not US citizens could not show “a sufficient threat that the government will detain them” in the course of their conduct. Similarly, in *Clapper*, the plaintiffs, of which Hedges was also one, could not show to the court’s satisfaction that secret wiretapping of US citizens under the FISA Amendments Act of 2008 was genuine in inflicting “real, unavoidable injury”. The effects on such organizations as Amnesty International by wiretapping was “speculation”.

The refusal to hear the case of Hedges v Obama[3] by the Supreme Court on April 28, effectively affirming the appeals decision, threw the police state manual right back at the appellants. A disgusted Hedges[4] showed justifiable frustration, calling it a “dirty game of judicial avoidance on two egregious violations of the Constitution.”

The rather contorted form of reasoning on the subject of proof and injury in surveillance and detention laws suggests that a patently authoritarian provision can’t be deemed unconstitutional unless it is proven to be directly exercised against the plaintiffs. If this can’t be shown, such reprehensible provisions will be allowed to remain on the books. If the proof be in the national security pudding, the judges were not interested in seeing, let alone tasting it.

As Daya Gamage[5], US national correspondent for the *Asian Tribune* suggested, “The United States set a precedent for other nations that face terrorist threats, internally or externally, letting the government indefinitely detain people – under military custody – it deems to have ‘substantially supported’ al Qaeda, the Taliban or ‘associated forces.’”

The hallmark of any tyranny is arbitrariness exercised without limits, without guardians, without those controls that soften the blows of authority. Hedges argues that the United States has “entered a post-constitutional era.” He sees courts compliant, subject to a corporate ideal that is propelling his country into a legal wilderness; where citizens are marginalised from legal redress against the abuses of state power; where the seemingly invisible hand of fascism is becoming more discernible. But that era was well and truly marked by the Bush administration, whose legacy is being bolstered, rather than modified, by his duplicitous successor. So much, it seems, for constitutional protections.

Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: bkampmark@gmail.com

Notes.

[1] http://www.truth-out.org/opinion/item/23486-chris-hedges-capitalism-not-government-is-the-problem

[2] http://www2.bloomberglaw.com/public/desktop/document/Clapper_v_Amnesty_Intl_USA_133_S_Ct_1138_2013_ILRC_1311_41_Med_L_

[3] http://www.constitutioncampaign.org/blog/?p=16973#.U2mWtTAyZ8F

[4] http://www.truth-out.org/opinion/item/23486-chris-hedges-capitalism-not-government-is-the-problem

[5] http://www.asiantribune.com/node/79394

Articles by: Dr. Binoy Kampmark