

**MSBA member-proposed Resolution addressing the need to defend civil liberties . . .**

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

A resolution affirming the Minnesota State Bar Association's commitment to the civil freedoms guaranteed under the Constitutions of the U.S. and Minnesota.

WHEREAS, the Minnesota State Bar Association has a distinguished history of protecting the civil liberties of Minnesotans; and

WHEREAS, the Federal Government has enacted laws, executive orders, military orders and justice department directives in response to terrorism, including the USA PATRIOT Act and the Homeland Security Act; and

WHEREAS, the Minnesota State Bar Association believes that some liberties guaranteed under the Constitutions of the United States and Minnesota are now directly threatened by some provisions these federal laws, executive orders, military orders and justice department directives.

NOW, THEREFORE, BE IT RESOLVED, that the Minnesota State Bar Association

1. Declares and affirms that laws, executive orders, military orders and justice department directives contain provisions that weaken judicial review risk infringement upon the civil liberties established in the Constitution of the United States of America;
2. Affirms that the United States Constitution, including the Bill of Rights, is the ultimate legal authority when it conflicts with laws, executive orders, military orders and justice department directives;
3. Urges Congress and appropriate officials in the federal government to repeal or sunset the provisions of the laws, executive orders, military orders and justice department directives that violate civil liberties under the U.S. Constitution and Bill of Rights; and
4. Transmit a copy of this resolution to the
  - a) U.S. President,
  - b) U.S. Attorney General,
  - c) U.S. Homeland Security Department Secretary,
  - d) Presiding Officers of the Minnesota Senate and House of Representatives,
  - e) Minnesota Attorney General,
  - f) Minnesota Governor, and
  - g) Minnesota Congressional Delegation.

## Report

pursuant to Section 6(d) of the MSBA Bylaws

regarding a resolution to affirm civil liberties

### **Section 6(d)(1): Reasons for the resolution**

Consistent with attorneys' obligations as guardians of liberty (see attached article "Guardians of Liberty" by Edward Cleary appearing in the November 2001 Bench and Bar), this resolution affirms the Minnesota State Bar Association's commitment to constitutional civil freedoms in the face of laws, executive orders, military orders and justice department directives enacted by the federal government in response to terrorism.

The Minnesota State Bar Association is properly concerned that these federal laws, executive orders, military orders and justice department directives weaken judicial review and risk infringement upon constitutionally protected civil liberties. See expression of this concern on the President's Page, April 2005 Bench and Bar, "Needing Protection From the Protectors". Copy attached. The resolution affirms that the federal and state constitutions are the ultimate legal authorities when they conflict with laws, executive orders, military orders and justice department directives.

The resolution urges Congress and appropriate officials in the federal government to repeal or sunset the provisions of the laws, executive orders, military orders and justice department directives that violate civil liberties. Additionally, the resolution is consistent with Minnesota's policy on racial profiling as codified by Minnesota Statute Section 626.8471, because while carrying out the important task of enforcing laws against terrorist activity some enforcement officers may inappropriately use the new laws to investigate, stop, search or arrest non-terrorist members of Arab, Hispanic and African ethnic groups.

Because this resolution is a tool to inform the public and government about the concerns of the Minnesota State Bar Association a copy of this resolution will be transmitted to the following officials: U.S. President, U.S. Attorney General, U.S. Homeland Security Department Secretary, Presiding Officers of the Minnesota Senate and House of Representatives, Minnesota Attorney General, Minnesota Governor, and Minnesota Congressional Delegation.

### **Section 6(d)(2) --- No commitment beyond the resolution**

The report contains no language committing the MSBA to policy not set forth in the resolution.

### **Section 6(d)(3) --- Expenditures**

The resolution calls for no action that may result in expenditures.

### **Section 6(d)(4) --- Designated Spokesperson**

Gena Berglund, 1507 Osceola Avenue, St. Paul, MN 66105; 651-699-3718;  
[genab61@mindspring.com](mailto:genab61@mindspring.com)



# PROFESSIONAL RESPONSIBILITY

## GUARDIANS OF LIBERTY

BY EDWARD J. CLEARY

*Those who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. . . . They recognized the risks to which all human institutions are subject . . . they knew that . . . fear breeds repression; that repression breeds hate; that hate menaces stable government . . . they did not exalt order at the cost of liberty.*

JUSTICE LOUIS BRANDEIS.<sup>1</sup>

**T**he lives of all Americans changed irrevocably the morning of September 11, 2001. Most of us alternated between feelings of horror, shock, and rage. As human beings, we suffered and mourned. Planning by our government for a military response began immediately. It is as lawyers that our response should now be measured and circumspect, as we react to new laws proposed in the wake of the national tragedy.

In the aftermath of the first significant attack on our civilian population by foreign enemies in our nation's history, a great deal of legislation aimed at the threat of terrorism was proposed and, in a number of instances, signed into law. Some civil libertarians found fault in most, if not all, of the new measures. Others, fearful of further terrorist attacks and not worried about privacy concerns or a dramatic increase in police power, seemed to want a national "lock-down," as though we must concede permanent change in our daily lives and governing institutions. Though changes in our daily lives were perhaps inevitable, permanent changes in our government and in the rights of our citizens would be an additional national tragedy. As lawyers we have a responsibility and a role to play.

This is the beginning of the oath each of us took upon being sworn in as a lawyer after passing the bar examination. Few give it much thought, few remember the exact wording, but all of us swore this oath. Only a small minority of attorneys ever find themselves in the position of challenging the constitutionality of a law in the courts. All of us, however, have a duty as practitioners, legislators, public

**"How many lawyers have challenged unconstitutional but popular laws at great personal and professional cost?"**

officials and judicial officers to withstand public criticism and to prevent the enactment and enforcement of unconstitutional laws.

### LAWYERS, COURTS, AND THE BILL OF RIGHTS

Justice Brandeis' observations from the period between the two World Wars remind us of what "those who won our independence" intended. Lawyers were crucial to the drafting of the Declaration of Independence, the Constitution, and the Bill of Rights. In the over two centuries that have passed since American lawyers contributed perhaps their finest moment in creating the constitutional framework, other American lawyers have provided a bulwark of protection against the erosion of individual freedom and personal liberties encapsulated in our nation's founding documents. It is in times of crisis that the need for reasoned, dissenting voices is most acute. How many lawyers have challenged unconstitutional but popular laws at great personal and professional cost? How much pride do we, as Americans, take in our freedoms: to speak freely, to dissent, to be free of intrusive state action?

*A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive.*

JUSTICE LOUIS BRANDEIS.<sup>1</sup>

We all want protection from those who would do us harm. We also want freedom

from intrusion on our privacy. Locally, the Minnesota Supreme Court made it clear several years ago that state residents have a right of privacy.<sup>4</sup> Addressing overreaching by law enforcement agencies, the United States Supreme Court drew the line last term in finding that the use of infrared technology to discover what is inside of a private residence violated the 4th Amendment and represented the threat of "the power of technology to shrink the realm of guaranteed privacy."<sup>5</sup> That, however, was last term. The world has changed. While virtually all those who fly understand and approve of increased security at our nation's airports (though some may find soldiers with automatic weapons more disconcerting than reassuring), other proposed measures are much more far-reaching.

*They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.*

BENJAMIN FRANKLIN.<sup>6</sup>

Whether we are corporate lawyers or lawyers for a civil liberties organization; government lawyers or criminal defense attorneys; whether we come from big firms or solo practices, the constitutional oath we took is the same. As lawyers we have an obligation to be heard, whether directly challenging a law we believe to be unconstitutional, or in voicing our concerns to those who propose or advocate legislation of dubious constitutionality.

Legislation discussed, and in some instances proposed in the wake of the September 11 attack, included the requiring of a national identity card with the probable creation of a national data-

**EDWARD J. CLEARY is director of the Office of Lawyers' Professional Responsibility. He has practiced both privately**



**and as a public defender for 20 years and is past president of the Ramsey County Bar Association. His book, Beyond the Burning Cross, won a national award in 1996.**

## PROFESSIONAL RESPONSIBILITY

base on citizens; allowing law enforcement to search a home or business without telling the targets of the search until later; allowing U.S. prosecutors to use evidence illegally obtained by foreign governments; efforts to expand a 1978 anti-espionage law to loosen restrictions on wiretaps and surveillance; and a proposal for the indefinite detention of immigrant suspects.<sup>7</sup>

As lawyer-legislators and as opinion-makers, members of our profession will not only set the parameters of the debate but may be forced to stand up in the face of public opinion and attack popular legislation. This is not a "political" issue; one has only to study the debates in Congress to see that members across the political spectrum have worried in recent months that, as Laurence Tribe has said, "the laws we enact today, in response to yesterday's terrorist attack, move the baseline of privacy expectations against which the tools proposed to deal with tomorrow's terrorist attack are assessed."<sup>8</sup> Of even greater significance to some observers, was the attack on dissenting opinions that occurred after September 11 in a "zeal to protect Americans from disturbing thoughts," to the point that a White House official warned a television personality to "watch' what he said." This in a nation "where the right to express an opinion, especially one critical of the government, is at the core of what it means to be an American."<sup>9</sup>

Why don't lawyers just leave it to the judiciary? For the simple reason that "salvation by judiciary" is not always the best method of sustaining the democratic state . . . . Lower courts often fail to properly enforce the high court's decisions, perhaps out of the same fear felt by elected officials, "who do not want 'to be found on the wrong side of an emotionally charged issue which partisans have framed as a matter of good versus evil."<sup>10</sup> Indeed, as an editorial in the *Washington Post* noted, the Attorney General of the United States continually warned of further terrorist activity with "the implication that if it occurs it will be partly the fault of those who insist on modifying" the legislation.<sup>11</sup> Imagine the assigning of fault to those who strike down the legislation. Finally, "passing the buck to judges nurtures the undemocratic myth that courts are the sole custodians of constitutional truth."<sup>12</sup> In any case, it will take strong-willed lawyers to fight to the point that the judiciary has an opportunity to strike down unconstitutional legislation.

### CONCLUSION

As our thoughts go with the men and women of our armed forces who are engaged in a military response and as we hope that civilians both here and abroad escape harm, members of the legal profession may be engaged in a fight of an entirely different nature — a fight to protect our constitutional legacy.

That fight is left to the lawyers and judges who, regardless of their political beliefs, will once again defend the Bill of Rights, directly or indirectly. They will do this not out of an ethical obligation, though ethical it most certainly is, but because, unlike those untrained in the law, members of our profession, both lawyers and judges, have been taught a unique reverence for the Constitution and for the Bill of Rights. Lawyers and judges are the guardians of liberty. The stakes are enormous and the final outcome unclear, much like the war on terrorism itself. As U.S. Supreme Court Justice Sandra Day O'Connor said at a groundbreaking ceremony for a new law school in New York, shortly after she viewed the ruins of the World Trade Center, in "an indirect reference to the Court's possible role in reviewing the new Bush administration's counter-terrorism proposals, ' . . . we wish we could set the clock back. But to preserve liberty, we must preserve the rule of law."<sup>13</sup> □

### NOTES

1. *Whitney v. California*, 274 U.S. 357, 375-77 (1927).
2. *Minn. Stat.* § 358.07.
3. *Whitney at* 274 U.S. 377.
4. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).
5. *Kyllo v. United States*, 121 S.Ct. 2038 (2001).
6. Tom Brazaitis, "Watch what we say?" St. Paul Pioneer Press, 10/2/01, p. 11A.
7. Ted Bridis & Gary Fields, "U.S. Tries to Decide What It Must Give Up To Be Free of Terror," *The Wall Street Journal*, 9/26/01, p. A.1; William M. Bukeley, "Hijacker Passports Highlight Issue of Rampant Fake IDs in U.S.," p. A.6.
8. Laurence H. Tribe, "We Can Strike a Balance on Civil Liberties," *The Wall Street Journal*, 9/26/01, p. A.14.
9. Brazaitis, *op. cit.*
10. Edward J. Cleary, *Beyond the Burning Cross* (New York: Random House, 1994), 146.
11. "An Improving Anti-Terror Bill," *The Washington Post*, 10/3/01, p. A.30.
12. Tribe, *op. cit.*
13. Charles Lane, "For Supreme Court, a Special Moment," *The Washington Post*, 10/2/01, p. A.03.



# NEEDING PROTECTION FROM THE PROTECTORS

BY DAVID STOWMAN

Since September 11, 2001, the tension between individual liberties and presidential powers has heightened and the battle continues in the courts.

On that fateful day, hijacked jetliners hit the World Trade Center in New York and the Pentagon outside Washington. A fourth airplane crashed into a field in Pennsylvania. In the name of  *jihad*  or holy war, the perpetrators committed heinous acts for what they believed to be a noble cause. It was the Crusades in reverse.

The first response of most Americans was shock, followed by disbelief and fear of additional attacks. Those emotions were replaced by anger, and a reflexive inclination to retaliate. The impulse was to bomb them back to the Stone Age, but whom would we attack? Suspects included "the evil empire," "the axis of evil" and just plain "evildoers." In striving to define the enemy, American policy makers blurred the line between who had attacked our country and who might do so. Saddam Hussein, who had previously without provocation invaded Kuwait, had been seen as a potential threat to American interests ever since. Scrutiny of his regime intensified.

Preemptive warfare became the new policy and millions of tons of munitions were dropped in a campaign of "shock and awe." The number of Iraqis killed has been estimated to be in the hundreds of thousands. Granted, there were some missteps in analyzing intelligence about weapons of mass destruction (WMD), but our country did rid the world of a tyrant whose policies also resulted in the death of a lot of Iraqi citizens.

It is a short slide on a slippery slope to go from preemptive invasion of a sovereign nation to depriving American citizens of their liberty, if the justification for both is to prevent attacks on our homeland. This brings us to the case of Jose Padilla, who has been imprisoned for nearly three years without being charged.

This natural-born U.S. citizen was no choir boy. By the time he was in his early teens, he was running with the Latin Kings — a notorious Chicago street gang, had spent time in juvenile detention facilities, and as an adult served the better part of a year behind bars. About 1992, he convert-

ed to Islam and had no further criminal records until his arrest on May 8, 2002. Federal authorities allege that in the late 1990s he attended an  *al Qaeda*  training camp in Afghanistan; later learned about bomb making, and hatched a plot to attack the United States with a "dirty bomb." On his return to the United States he was arrested on a warrant as a material witness in Chicago. From there, he was taken to New York and a public defender was appointed, but before any action was taken on his behalf, the rules of the game changed dramatically. The arrest warrant was vacated and he was turned over to Defense Department officials, then incarcerated at a military brig in South Carolina. The president declared him an enemy combatant and, with that, Padilla was deprived of the right to counsel and other protections ordinarily guaranteed to citizens under the Constitution.

The government argues that under the 6th Amendment, the right to counsel does not apply until charges are filed; granted, the government has not charged Padilla. Ordinarily, U.S. citizens cannot be detained without charge, but the administration has striven to distinguish Padilla an "enemy combatant," then proclaimed that the court may not second-guess this designation.

By way of a circuitous route through the courts, the case came before Henry F. Floyd, a federal judge in South Carolina and a 2003 Bush appointee, who ordered the administration to release the prisoner within 45 days or bring charges against him. The Justice Department is appealing.

Padilla may be guilty of treason or other crimes, but that is not the point. He has been incarcerated for about 35 months with no charges, no indictment, no trial, no due process of law and, for the most part, no right to counsel. That's the way things were done in Chile under General Pinochet and in the Soviet Union under Stalin. Padilla and all Americans deserve better.

One must step back and ask what we are fighting for. America focuses on the fight against terrorism, but she is fighting for freedoms guaranteed by the Constitution.

The principle advanced by the administration amounts to an assertion

that the executive branch can serve as judge, jury, and jailer in cases involving terrorist suspects. However, that power cannot be found in the Constitution. The Bill of Rights does not come with an asterisk reading "Unenforceable during a war on terrorism."

Granted, Congress can suspend the writ of  *habeas corpus*  under very narrow circumstances, but that has not happened. Instead, the president has unilaterally stripped Padilla of his rights, holding him without even the semblance of due process.

The threat of terrorism represents a danger, but unchecked presidential power also represents a great danger to the rights of American people. If the power to arrest Americans for terrorism and punish them without federal court interference is upheld by the courts, the lives of our citizens will be changed forever in ways unimaginable. No one will be safe from arrest, including government critics, lawyers, dissidents, and those found to be unpatriotic or thought to be evil. Any person deemed to be an "enemy combatant" and taken into military custody will have no recourse but to depend on the "good faith" of the administration.

Americans need protection from the protectors. An impartial judge, not the president, should make the ultimate decision as to whether the arrest and imprisonment comport with the Constitution.

James Madison, in  *Federalist No. 47* , put it succinctly:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." □

**DAVID STOWMAN of Detroit Lakes is president of the MSBA, a certified civil trial specialist, and a top 100**

**SuperLawyer. He concentrates his practice in products liability and personal injury law and related litigation.**

