GUARDIANS OF LIBERTY

BY EDWARD J. CLEARY

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

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 extort order at the cost of liberty.

JUSTICE LOUIS BRANDEIS.

The 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 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.

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.6 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." 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.

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...

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PROFESSIONAL RESPONSIBILITY

base on citizens; allowing law enforce-
ment to search a home or business with-
out 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 pro-
posal for the indefinite detention of
immigrant suspects.7

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 legis-
lation. 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 pri-
vacy expectations against which the tools
proposed to deal with tomorrow's terrorist
attack are assessed." Of even greater sig-
nificance 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 person-
ality 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."9

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 deci-
sions, 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 parti-
sans have framed as a matter of good
versus evil."10 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."11 Imagine the
assigning of fault to those who strike
down the legislation. Finally, "passing
the buck to judges nurtures the undemo-
cratic myth that courts are the sole cus-
todians of constitutional truth."12 In any
case, it will take strong-willed lawyers
to fight to the point that the judiciary has
an opportunity to strike down unconsti-
tutional 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 profes-
sion may be engaged in a fight of an
entirely different nature — a fight to pro-
tect 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 profes-
sion, 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 lib-
erty. The stakes are enormous and the final
outcome unclear, much like the war on ter-
rorism itself. As U.S. Supreme Court Justice
Sandra Day O'Connor said at a ground-
breaking 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.' "13

NOTES

1. Whitney v. California, 274 U.S. 357,
375-77 (1927).
4. Lake v. Wal-Mart Stores, Inc., 582
N.W.2d 231 (Minn. 1998).
5. Yick To v. United States, 121 S.Ct. 2038
6. Tom Brazaitis, "Watch what we say!" St.
Paul Pioneer Press, 10/2/01, p. 11A.
7. Ted Bids & 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. A11; William M. Bukeley, "Hijacker
Passports Highlight Issue of Rampant Fake
8. Laurence H. Tribe, "We Can Strike a
Balance on Civil Liberties," The Wall Street
10. Edward J. Cleary, Beyond the Burning
Cross (New York: Random House, 1994),
146.
11. "An Improving Anti-Terror Bill," The
12. Tribe, op. cit.
13. Charles Lane, "For Supreme Court, a
Special Moment," The Washington Post,
10/2/01, p. A.03.

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