



P R O F E S S I O N A L R E S P O N S I B I L I T Y

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.¹

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

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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.³

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.⁴ 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."⁵ 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.

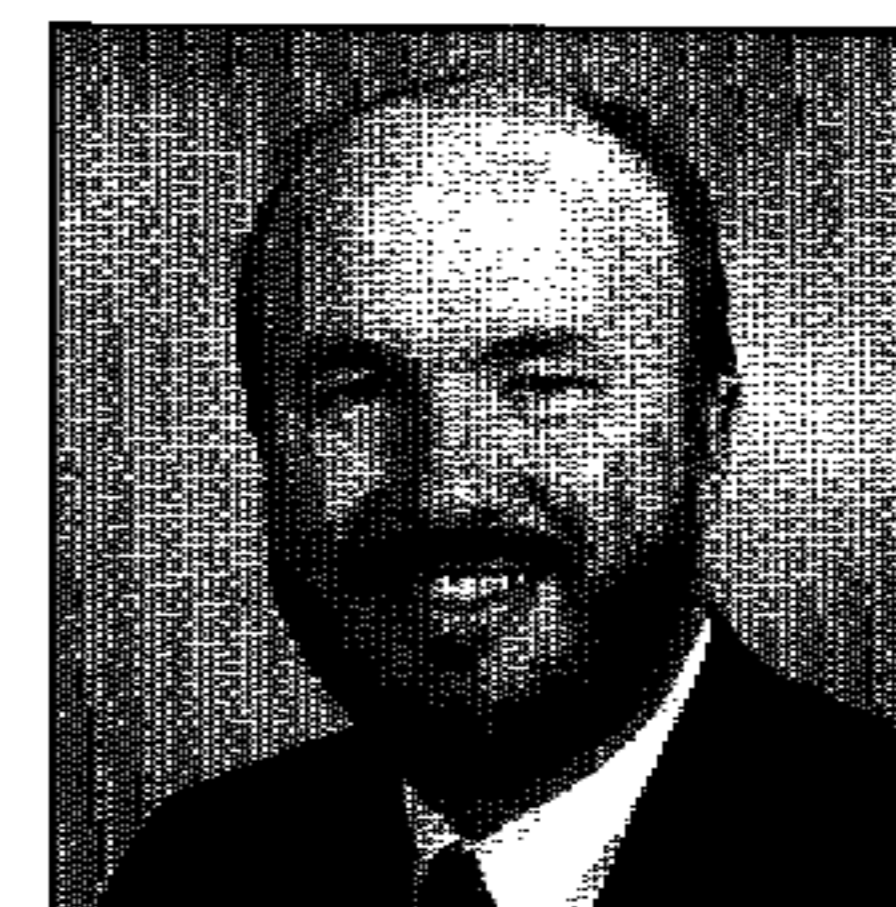
They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

BENJAMIN FRANKLIN.⁶

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 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.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 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."⁸ 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."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 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."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 undemocratic myth that courts are the sole custodians 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 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.'"¹³ □

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.