

Worrying About Civil Liberties

By *Naseem Stecker*

Last Easter, Detroit lawyer Kenneth Essad and his family took a vacation to New York City and did what many tourists do in New York—marvel at the famous skyline, visit places like St. Patrick's Cathedral, and enjoy the Broadway shows. The Essads also took the opportunity to visit Liberty and Ellis Islands, where the names of their grandparents are forever etched on the walls, marking the spot where they first stepped foot on American soil at the turn of the century.

They were also thrilled to discover the names of other Arabic friends and relatives engraved on the walls of Ellis Island. "We are all grateful that our relatives decided to come to the greatest country on earth to give us freedom and the best opportunities life has to offer," said Essad, who is the president of the Arab American Bar Association in Detroit.

The sense of pride that the Essads and many others of Arab ancestry feel in being American has been deeply shaken and scrutinized since the terrorist attacks on New York and Washington on September 11 last year. Despite the outstanding efforts of the Bush administration to enlighten the country about the difference between the terrorists actions and the actual teachings of the Muslim faith, Essad says that Arab Americans "have to deal with the anxiety of being seen and portrayed by the rest of America as somehow different from other Americans because the terrorists were Arabic and they committed horrible crimes in the name of the Islamic religion. . . . Just as the rest of America did not and does not wish to be associated with the terrorist Timothy McVey simply because he happened to be an American, neither do Americans of the Muslim faith or Arab Americans wish to be associated with terrorists of any kind."

An estimated 300,000 Arabs live in the metropolitan Detroit area. The diverse peo-

ple who inhabit the area include Palestinian Christians, Iraqi Chaldeans, Yemenis, Syrians, and the Lebanese Muslims who dominate Dearborn—a town southwest of Detroit that has the largest concentration of Middle Eastern people outside the Middle East. In these communities, grief and sadness over the terrorist attacks mingles with outrage over the Israeli occupation, sanctions against Iraq, and ethnic profiling.

Since the events of September 11, the ACLU in Michigan has been evaluating claims of harassment in the community. They are also investigating several cases involving the firing of Arab employees solely because of their religion or ethnicity. Kary Moss, Executive Director of the ACLU of Michigan said that complaints are also being received by the Michigan Department of Civil Rights and the Arab American Anti-Discrimination Committee. "There have been some reports of violence, but it has not been predominant," Moss said.

Media reports suggest that nationwide 1,200 people have been arrested since September 11. Detroit lawyer William Swor is defending some of the detainees. "The circumstances surrounding the reported arrests and detentions are of great concern to the Arab-American community in Michigan," he said. "Although the arrests have been for violations of the law, it is clear that in many of the cases, the attention given to the cases [is] far out of proportion to the offenses alleged. Further, it is clear that the individuals chosen for this extraordinary treatment all have one of two common characteristics: they are of Arabic or Muslim background. They have a third common characteristic, none of them has yet been charged with being a terrorist or hav-

ing any involvement in the mass murders of September 11."

"In several cases, the presumption of innocence and the right to a reasonable bond, two of our most cherished rights, have been suspended and individuals have been held without bond on relatively minor offenses. The rationale for all these actions is the fear that the insanity of September 11 is not over. The government argues that it needs to be sure that it does not happen again, so it will take no chances, even at the risk of detaining people that it knows are innocent. The problem is the actions taken to 'protect' us against a repeat of September 11 are not focussed to dis-

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cern the conduct first and the ethnicity later. Rather, the first focus, in too many cases, has been the ethnicity, which defined the perception of the conduct," Swor added.

The stark realities after September 11 bring into sharp focus an issue close to the hearts of many lawyers—civil liberties. In the interests of safety, should Americans expect to see gradual erosion of our constitutional freedoms? Kary Moss thinks, "it would be a tragic mistake to assume that increasing safety must come at the expense of taking away important freedoms. As Ben Franklin once said: 'they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.' We hear the media tell us that our friends and relatives are willing to give up liberty for the sake of

security. What does that mean? Which liberties? Will those liberties guarantee security? If those questions can't be answered, it is too soon to let fear drive us to give up the freedoms that we cherish."

Rather, Moss advocates assessing the reasons why the intelligence community was unable to anticipate the attacks of September 11. "There have been calls for increased wiretapping powers and, in fact, two bills have been introduced in the state house that would create new wiretapping authority in Michigan, but there has been absolutely no showing that the intelligence community failed because of insufficient wiretapping powers. To the contrary, there have been numerous reports that the federal intelligence community had a significant amount of information that they never evaluated because it was in Arabic or because it just was not a priority. How could it happen that the terrorists were able to buy \$14,000 in one-way tickets in cash on the day of their flight without that triggering scrutiny by airport security?"

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Moss asserts that it is tempting at such times "to act quickly and think that more police power will make the difference. But history has shown the mistake of this strategy: the Palmer Raids, the internment of Japanese Americans, the McCarthy red scare. All of these measures were taken in times of national crises and were measures that we ultimately regretted in hindsight. Many current suggestions like the greater use of facial recognition technology or national identity cards are fraught with problems of inaccuracy or promising much more than they can ultimately deliver. It is up to our leadership to think out of the box and focus on measures that will truly improve security without costing us the very foundation upon which our democracy rests."

William Swor is of the view that the anti-terrorism laws are evidence that our civil liberties are under attack. "These laws will allow the government to monitor who we speak with and what we say. They allow the government to enter our homes secretly and not tell us. They allow indefinite detention without trial. Although the laws only speak about controlling activities, the laws are so vaguely written that there is no real definition of terrorist in them, inviting potential abuse against unpopular individuals or groups. We're told not to worry because the laws have "sunset" provisions, but who believes that the government will voluntarily give up any power once it has it?"

United States congressman Mike Rogers, a Republican who represents Michigan's 8th Congressional District, said that the anti-terrorism legislation passed by Congress and signed into law does not infringe on our Fourth Amendment protections. "Strict due process requirements remain in the measure, safeguarding the civil liberties set out in the U.S. Constitution. The new law replaces a law based on 1970s technology with a law that deals with 21st century technology. The alarming success of the September 11 attack proves the need for modernizing our ability to protect not only our freedoms, but the American way of life."

Balancing security and civil liberties is a delicate act—one that must be struck, according to Congressman Rogers. Still, he believes that in some instances concerns about civil liberties trump security. "As a former member of the law enforcement community, I take the issue of racial profiling very seriously. In fact, my first-hand experience tells me the practice has absolutely no place in proper law enforcement procedures, especially in a society that values personal freedoms like America. Additionally, the arbitrary nature of racial profiling has the consequence of leading minority groups to distrust law enforcement officers, which does nothing to increase the safety and security of our communities. The second example is secret evidence. Constitutional due process should ensure that all persons—including immigrants—have the right to face their accuser and have the ability to see, hear, and re-

spond to the evidence against them. I believe the so-called 'secret evidence' is un-American and has no place within our system of justice, even though proponents of its use claim it as necessary to enhance 'security.'"

The change in our legal landscape, especially the great expansion of executive power in the legal fight against terrorism, has often been described as "unprecedented." Sweeping new measures have been announced fast and furiously—secret military tribunals to try foreigners suspected of terrorism, eavesdropping rules that allow the government to listen to the conversations of lawyers and their clients in federal custody, and interviewing men of Middle Eastern heritage who entered the country legally in the past two years. These are just some of the new rules that have generated debate and concern among Michigan lawyers.

Bruce Neckers, the president of the State Bar of Michigan, who travels regularly all over the state to address bar associations, observes that lawyers are conflicted. "It is in times like this that lawyers and others begin to realize the tremendous benefit of the Bill of Rights. It is for every generation to discover their importance and lawyers are now talking about these issues like we have never done in my memory," Neckers said.

On whether the government is justified in doing what it wants to do to wage war on terrorism, Neckers said there's not enough information at this point to address that. "But we have enough information to be concerned and to monitor the actions of our government and at this difficult time to make sure they are not sacrificing the rule of law. As this unfolds, the government may prove that its actions are entirely reasonable, and they may not."

He adds that lawyers must continue to call upon the government and our citizens to honor the proven worth of our Constitution and the Bill of Rights. "In other times we have had to learn the value of our freedoms, and this is one of those times. We lawyers always call for the rule of law above all else. Sacrificing the Bill of Rights has almost always eventually caused great concern, and history has not treated those who have done so kindly."

Professor Richard Primus, constitutional law expert at the University of Michigan in

Ann Arbor, stressed that “lawyers must be willing to assert constitutional liberties in the face of the law and where appropriate to challenge the law to figure out what its constitutional boundaries are.” He advised against “frivolous challenges just for the sake of challenging it, because there are some legitimate things the law is trying to accomplish—but also not to be intimidated by the law. Continue to make clear that people have a right to express their opinion without being subject to legal sanction.”

Kary Moss thinks the focus should be on enforcing “our state’s human right laws to remedy any acts of discrimination against Arab Americans based on race or ethnicity.... We must not let the mob mentality take hold,” she warned. To William Swor, without the Constitution, its limits on government, and its demand for respect of the individual, “the American flag that so many people fervently wave these days, is nothing more than an empty battle banner of red, white, and blue.”

He asserts that constitutional law is a uniquely American “religion.” “The consti-

tution is our Bible. Everyone runs to court to solve their problems. Everyone expects the law to protect them. Everyone, even criminals, believes in our constitutional promise of fairness based on rules that treat all persons in this country as friends, until they have been shown to have done something that makes them enemies.”

“Lawyers are the priests of the new American religion. Just as rabbis, priests, ministers, and imams are expected to lead by example and point the way to the answers to the great moral dilemmas of our time. We as lawyers are expected by our families, friends, and neighbors to help them understand what is at stake during this time of crisis. We must show them that we believe that the rule of law based upon individual deeds, not individual ethnic or religious identity, is what must govern our lives. If we don’t clearly demonstrate our belief in the rule of law, then how can we be shocked when someone close to us engages in some hateful activity?”

William Swor said his own decision to become a criminal lawyer was shaped by tes-

timony he read that was given by a witness at the end of World War II. He quotes it from memory:

*First, they came for the Communists,
but I wasn't a Communist
So I didn't say anything;
Then they came for the trade unionists,
but I wasn't a trade unionist,
So I didn't say anything;
Then, they came for the Jews, but I wasn't
a Jew
So I didn't say anything;
Then they came for the Catholics, but I wasn't
a Catholic
So, I didn't say anything;
Then, they came for me,
And there was no one left to say anything.*

“As lawyers, we have the power to make sure that no one in America ever has to say this. [People] make jokes about [lawyers]. They even hate us. But they always expect us to do our job and be there when they need us. They expect us to lead them. That’s the difference lawyers can make,” Swor added. ♦

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