Ten Years with the ACLU

What I have learned from the outstanding, collegial, and supportive bench and bar of this state

BY AARON H. CAPLAN

June 1, 2008, marked my 10-year anniversary as staff attorney at the American Civil Liberties Union of Washington. It was also one of my last days on the job. I am making a transition — I have accepted a position teaching constitutional law at Loyola Law School in Los Angeles. When *Bar News* invited me to offer some thoughts on the occasion, I was delighted, as I have learned much from the outstanding, collegial, and supportive bench and bar of this state.

When I left private practice in 1998 to begin with the ACLU, I knew that the position would allow me to work on some interesting and important cases. I did not predict that I would be, in the words of that aphorism that is part blessing and part curse, practicing civil liberties law in "interesting times." I had a front-row seat when the city of Seattle overreacted to anti-WTO demonstrations in 1999 by declaring most of downtown a "No Protest Zone." New computer technologies turned me, somewhat by accident, into an authority on the rights of public school students who get suspended for using the Internet to say things their school principals don't like. Most important, I did not predict that much of the ACLU's work in the years since the terrorist attacks of September 11 would be devoted to defending the concept of the rule of law itself, which has been assailed by the pernicious argument that it is somehow an unaffordable luxury for the government to follow the rules that protected our nation's freedoms for two centuries.

Here are a few lessons that I learned during my time working at the ACLU in these interesting times.

Abstract Rules Have Real Effects on Real People

Quick: Does a seizure of assets pursuant to Treasury Department blocking notice issued by the authority of an executive order under the International Emergency Economic Powers Act fall within an exception to the warrant requirement of the Fourth Amendment? "A nice topic for a law review article," I can hear you say, "but not one I would ever want to read."

Admittedly, it is pretty dry stuff — unless you happened to be our clients who saw the entire inventory of their corner grocery hauled away in semi trucks because of a piece of paper faxed from the Treasury Department. Federal agents confiscated the cash register, emptied all the meat out of the freezer, and stripped the shelves of every last box of cereal and every last roll of toilet paper. Why? Because the grocery on Seattle's Rainier Avenue shared an address with the local franchise of an international money-transfer service that was under suspicion, and the faxed order said nothing more than that the assets at the address were to be "blocked."

Blocking notices are ordinarily instructions sent to banks, directing them to freeze the account of a foreign government or foreign national. In our case, the Office of Foreign Assets Control had determined, based on virtually no evidence, that the headquarters of an international money-transfer service based in Somalia had been infiltrated by al Qaeda. (As later acknowledged by the 9/11 Commission, this was not so. The entire series of choreographed and highly publicized raids on Somali-owned businesses in cities across America was largely a publicity stunt that added nothing to national security.) So the government decided that "blocking" would mean confiscating everything owned by the local branch of the transfer service, down to the chairs and the pencils. This opened the door to confiscating everything owned by the grocery store that sublet to the transfer service.

If the Treasury Department had followed the Fourth Amendment, it would have obtained a warrant from a neutral

judge. The judge would have required evidence that the action was justified, and the articles to be seized would have been described with particularity. Obtaining warrants is not difficult — it happens thousands of times every day — but it avoids problems like ours. The administration's unwillingness to follow the rules led to a tragedy for a small business and the refugee families that depended on its income.

My grandfather ran a corner grocery when he immigrated to this country, so the case resonated strongly with me. With the help of volunteer attorneys and accountants, we were able to negotiate a $100,000 settlement to cover some of our clients' losses, although it took two years to do it. Our clients learned the hard way that the difference between a constitutionally adequate warrant and a fax backed up only by an agency's say-so is far from academic.

(Left to right) Aaron Caplan, ACLU Board President Jesse Wing (who was Habeeb's main ACLU attorney), and Iraqi refugee and artist/calligrapher Abdulameer Habeeb. The ACLU brought on a suit on Habeeb's behalf for wrongful arrest and detention. The U.S. Department of Justice later issued an apology to Habeeb.

The Facts Matter

Just as legal rules have enormous impact on the stories of individuals, under our common law system the stories of individuals have enormous impact on the law. You can talk until you are blue in the face about why a blocking order is not a warrant, but it will not resonate until you connect the legal concept back to the immigrant grocers losing their livelihood.

Our post-WTO litigation demonstrated this principle in many different ways. Seattle's infamous "No Protest Zone" was inaugurated with a televised press conference where the mayor and police announced: "We're going to adopt a policy [to] prohibit any demonstration within that core area for the remainder of the week. Our position is that anyone who goes into that area to protest will be arrested." Amazingly, the City argued in court later that same day that the policy was not to prohibit protest downtown, but only to restrict the area to people who lived or worked there — and that those people allowed into the area could demonstrate if they liked.

In later proceedings, we attacked this assertion with a barrage of facts. We had clients who did not live or work downtown but were allowed in so long as they took their political buttons off their coats. (Another bit of pointless theater in which freedoms were suppressed in exchange for absolutely no gain in security.) We also were able to test the City's theory with the help of an attorney whose office was in the affected area. If it was really true that persons working within the Zone were allowed to protest, then they should be able to carry signs on the street outside their offices. Our tester gathered a team from his firm who carried signs saying "Protect Free Speech!"; "Say No to WTO"; and my personal favorite, "Downtown Workers Against the WTO." Sure enough, these people were ordered to put down their signs, on pain of arrest.

We obtained early settlements for three of our seven clients, but four of them remained in the case through an appeal. In another demonstration of the importance of the facts, the two clients who ultimately prevailed were the ones who had videotaped evidence showing exactly what had happened to them. On remand, we negotiated settlements of $62,500 for a credentialed conference observer who was wrongly arrested and $12,500 for a demonstrator whose sign was confiscated on videotape. Putting a face to the legal violation — in this case, making the face visible literally — matters enormously.

Read Your History

Although every modern constitutional question has its novel elements, it will usually have more than a passing resemblance to events from the past. For example, the ACLU's work opposing current attempts to inculcate religious doctrines in public school science classes under the name "Intelligent Design" traces directly back to the attempts to do the same thing in the 1980s under the name "Creation Science," and ultimately back to the Scopes Trial of 1925 (one of the ACLU's first cases). The clampdown on immigrants after September 11 is eerily similar to the Palmer Raids of 1919–21, when federal agents arrested and deported political dissidents and even some lawful immigrants in response to the panic caused by a terrorist attacks (this time by anarchists).

Recognizing historical parallels can help you frame a successful argument. We were contacted by students who were threatened with suspension from school not because of anything they had written on the Internet, but because they had created a bulletin board for open discussion on which other anonymous students had said punishable things. In many important respects, the case resembled the famous sedition trial against John Peter Zenger in 1735.

Zenger was an early publisher of newspapers, which at the time were a new and unfamiliar technology that allowed people to express their ideas to a wider audience at an unprecedentedly low cost. Zenger got into trouble not for his own writings, but for creating a platform where other anonymous speakers criticized the British bureaucrat then running the New York colony. The jury refused to convict Zenger, and his story motivated the framers of the Constitution to include strong protections for freedom of speech and press.

The analogy between our modern high-school students and John Peter

Zenger proved to be a very fruitful source of legal ideas, authorities, and, of course, inspiration. We were ultimately successful in persuading the school board to reverse the punishment. We went on to obtain precedent-setting rulings protecting the rights of students in cyberspace.

Constitutional Lawyering Is Lawyering

One nice feature of ACLU litigation is that we choose cases that allow us to talk (both in and out of court) about important philosophical, political, or historical principles. But the mechanics of the litigation are not rarefied. We use the same tools as other lawyers.

For example, I initially found the least familiar and most intimidating area of the ACLU's caseload to be our work around prison and jail conditions. In 1999 we had a two-week trial about the substandard medical care at the Washington Corrections Center for Women at Purdy. Our clients were found guilty of felonies, but they had been sentenced to a term of imprisonment, not to death or disfigurement from easily preventable ailments. Coming from a commercial litigation practice, I first thought this was a completely different universe.

But one can research this case law just like any other. It quickly became apparent that a claim for cruel and unusual punishment under the Eighth Amendment had well-defined elements just like any other cause of action. One element is that prison officials had "deliberate indifference" towards the consequences of their health-care practices. How could we prove this element? The same way a lawyer would prove any claim. We talked to our clients. We exchanged written discovery. We took depositions.

Our clients told us that the prison dentist had earned the nickname "Dr. Yank" in honor of his preference for pulling teeth that other dentists would try to salvage. At deposition, I decided to confirm another rumor the prisoners told me. "Does your car have vanity plates?" I asked. "Yes," he said. "What do they say?" I asked. "DR YANK," he responded. We made sure to emphasize this in our post-trial brief and explain why it supported the element of deliberate indifference. The case ultimately settled, with agreements to improve conditions and a fund for further enforcement.

Another way in which constitutional lawyering resembles ordinary lawyering is the magical effect of well-prepared correspondence to resolve cases before they erupt into litigation. In addition to the typical demand letter, this can also take the form of a public-records request. One of our clients was a beer importer who was denied the ability to sell a fancy Belgian ale in the state of Washington because the label (featuring an artistic nude from a well-known Flemish painter) allegedly violated an outdated regulation banning alcohol labels that Liquor Control Board (LCB) deemed to be "immodest, undignified, or in bad taste."

We sent a request asking the LCB to provide records showing all instances in which labels had been rejected in the past three years. A few days later, I got a call from an LCB commissioner saying that they would certainly respond to the records request — but in the meantime, could I please just tell him which rules the ACLU thought needed changing. One letter later (explaining how government cannot restrict speech based on vague or subjective terms), the unconstitutional rule was eliminated.

You'll Never Walk Alone

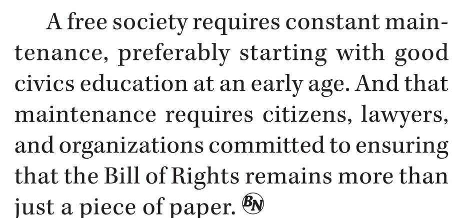
Of course, a letter on ACLU letterhead signals that the writer is not just another lover of good beer and immodest bottles. The letterhead represents our tens of thousands of current members and our history of effective and principled advocacy stretching back to 1920. Because our letterhead was doing some of the work for me, I have always felt an obligation to make sure my own work was at the same high standard, so that other ACLU lawyers could continue to benefit from our good reputation.

This is one of many ways in which the work we do as lawyers is always a team effort. The ACLU is blessed with an extensive roster of volunteer attorneys who never fail to rise to the occasion. Our volunteers handle cases for us on a pro bono basis; provide valuable advice and consultation on cases where they are not listed as counsel; and assist with research, public speaking, and advocacy. Washingtonians are fortunate that our bar instills a strong ethic of volunteerism for the public good.

Eternal Vigilance Really Is the Price of Freedom

Roger Baldwin, the founder of the ACLU, once wrote that "[n]o battle for civil liberties ever stays won." He meant, of course, that no battle for civil liberties stays won without concerted effort. In our office, it is virtually a guarantee that every year we will receive four or five complaints from families with a student who was punished for declining to recite the Pledge of Allegiance, even though the U.S. Supreme Court established students' freedom to abstain back in 1943. After we contact the schools and explain the law, the principals typically apologize and reverse the punishment. But the problem recurs, because school administrators either forgot or were never told that the Constitution protects a student's right against compelled oaths. The battle would not stay won without this continual re-education effort.

A free society requires constant maintenance, preferably starting with good civics education at an early age. And that maintenance requires citizens, lawyers, and organizations committed to ensuring that the Bill of Rights remains more than just a piece of paper. BN



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