

**The following text may be printed, copy/pasted, or downloaded and emailed.**

## **Robed heroes of liberty**

By ROBYN E. BLUMNER

St. Petersburg Times Perspective Columnist

Published October 10, 2004

Ever wonder where are today's James Madisons and Thomas Jeffersons - Americans who can express an idea of liberty with such conviction that it rings through the ages? They are out there, sitting on the federal bench. We may think of the military as producing the heroes that protect our way of life, but those accolades are just as deserved by the nation's crop of judges.

In these times, when the president thinks nothing of bulldozing the girders of our constitutional democracy in the name of national security, it has been the nation's federal judges - far more than Congress - who have acted as a collective bulwark against George Bush's wrecking crew of John Ashcroft and Donald Rumsfeld.

The latest example is a decision on Sept. 29 by U.S. District Judge Victor Marrero of the Southern District of New York. In a 120-page ruling, Marrero struck down a section of the USA Patriot Act that gave the FBI wide-ranging surveillance authority without having to get a judge's approval.

Under the Patriot Act, the Justice Department was given expanded authority to issue what are known as "National Security Letters."

This allowed the FBI, without court review, to demand all sorts of sensitive customer records held by businesses, including information from Internet service providers about the communications of whole groups of people. No evidence of individual wrongdoing had to be established before the FBI could snoop. All the government was required to claim was that the information sought was "relevant" to a terrorism or counterintelligence investigation.

On top of that, anyone who received one of these letters was gagged by the law from disclosing it. This meant that the FBI could act with virtual impunity since the victims of any privacy violations would have no way of discovering that the government was digging through their lives.

Marrero recognized the danger: "It is precisely times like these that demand heightened vigilance, especially by the judiciary, to ensure that, as a people and as a nation, we steer a principled course faithful and true to our still-honored founding values."

He wrote of the gag order: "(A)n unlimited government warrant to conceal . . . has no place in our open society. . . . Under the mantle of secrecy, the self-preservation that ordinarily impels our government to censorship and secrecy may potentially be turned on ourselves as a weapon of self-destruction."

The same themes were echoed by Judge Damon Keith, a federal appeals court judge in Cincinnati. Keith authored the 6th Circuit Court of Appeals 2002 opinion striking down the blanket use of secret hearings in hundreds of deportation cases involving post-Sept. 11 detainees.

"Democracies die behind closed doors," Keith famously declared. "When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."

I'm usually no fan of U.S. Supreme Court Justice Sandra Day O'Connor, but I will grant her a nice turn of phrase in last term's case of Hamdi vs. Rumsfeld. In that case, she, along with seven fellow justices, rejected the contention by the Bush administration that Yaser Esam Hamdi, an

American citizen, could simply be declared an "enemy combatant" and held without charge or a lawyer.

"A state of war is not a blank check for the president when it comes to the rights of the nation's citizens," O'Connor wrote. The Bush administration's assertions "would turn our system of checks and balances on its head," she said.

Following the court's ruling, a deal was struck with Hamdi to release him to his home in Saudi Arabia as long as he renounced his U.S. citizenship. (Though Saudi Arabia hasn't agreed as yet to take him in.) It was an unbelievable turnaround. Here was a man touted by the administration as so dangerous that he had to be held in violation of all constitutional norms, but once the government was told to prove the allegations against him, the decision was made to set him free.

It makes you wonder what, if any, proof the administration has against the hundreds of other "enemy combatants" it is holding. A deputy commander at Guantanamo just told the Financial Times that most of the 550 prisoners there have been of little intelligence value. "Most of these guys weren't fighting," Brig. Gen. Martin Lucenti said. "They were running."

Of all the branches of government, only the nation's judiciary is keeping its eye on the real prize: the retention of our constitutional liberty. With fervent prose, a number of judges have cited this ideal as the basis for ruling against the excesses of the administration's "war on terrorism."

But Bush is fighting back by trying to transform the federal judiciary - determinedly picking judges who share his disdain for individual rights. So far, 201 of Bush's nominees to the district and appellate courts have been confirmed. Once the federal judiciary is firmly under Bush's control there will be no countervailing force standing for transparency, due process and personal freedom. Then we will really have reason to wonder where all the Madisons and Jeffersons have gone.