Written by **Thomas R. Eddlem** on May 16, 2011

Indiana Supreme Court Says Citizens Can't Resist Rogue Police

Justice Steven David wrote for the court in the decision that "this Court is faced for the first time with the question of whether Indiana should recognize the common-law right to reasonably resist unlawful entry by police officers. We conclude that public policy disfavors any such right."

Justice David acknowledged that he was overturning many centuries of common law precedent in favor of his "public policy" decision, admitting that "The English common-law right to resist unlawful police action existed for over three hundred years, and some scholars trace its origin to the Magna Carta in 1215."

Fellow Indiana Supreme Court Justice Robert D. Rucker issued a blistering dissent, claiming:

> The common law rule supporting a citizen's right to resist unlawful entry into her home rests on a very different ground, namely, the Fourth Amendment to the United States Constitution. Indeed, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585 (1980). In my view it is breathtaking that the majority deems it appropriate or even necessary to erode this constitutional protection based on a rationale addressing much different policy considerations. There is simply no reason to abrogate the common law right of a citizen to resist the unlawful police entry into his or her home.

Rucker added that the "majority sweeps with far too broad a brush by essentially telling Indiana citizens that government agents may now enter their homes illegally — that is, without the necessity of a warrant, consent, or exigent circumstances. And that their sole remedy is to seek refuge in the civil arena."

The consequences of the *Barnes* decision, if citizens indeed have "no right to reasonably resist unlawful entry by police officers," are indeed frightening. If a policeman enters a man's house to rob him or rape his wife or daughter, under this decision, a citizen cannot legally resist him. Indeed, even shouting at the police officer to stop could be considered a crime of interfering with a police officer. The court ruled in the *Barnes* decision that protesting illegal police conduct verbally — without any physical resistance — constituted a crime according to a majority of the judges in the decision: "Barnes's speech in the present case is that of a person of interest refusing to cooperate with a police investigation and is not within the contours of political speech."

Perhaps the egregious part of the *Barnes* decision is that it was made without any pretense of legislative or constitutional justification. To the contrary, every law and constitutional citation made by Justice Steven David reasserted the citizen's right to resist unlawful entry, and the court justified its

decision on "public policy" considerations and a few activist court decisions. "In the 1920s," Justice David wrote, "legal scholarship began criticizing the right as valuing individual liberty over physical security of the officers." What Justice David means by "legal scholarship" is activist judges who blatantly overturn long-held laws and centuries-old common law legal tradition without either constitutional or statutory authority from the legislature. Indeed, "public policy" considerations are an exclusively legislative responsibility, and are prohibited to the judicial bodies.

Justice David concluded: "We believe however that a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence. Nowadays, an aggrieved arrestee has means unavailable at common law for redress against unlawful police action." Specifically, Justice David found not that anyone had amended the Fourth Amendment to the U.S. Constitution or that the legislature had passed any new laws, but rather that Americans are the beneficiaries of "modern developments" that include: "(1) bail, (2) prompt arraignment and determination of probable cause, (3) the exclusionary rule, (4) police department internal review and disciplinary procedure, and (5) civil remedies."

But, of course, the 21st century has seen numerous examples of government denying bail, indefinite detention without a *habeas corpus* hearing, and use of secret evidence in "military commissions" courts that the federal government created during the Bush administration and are now being created under the Obama administration. David's argument that modern remedies are available fails not only because these "modern" remedies are not universal, but more importantly because they are not based upon changes in the constitutions or laws of the land.