

Protecting the Rule of Law

Several weeks ago, upon being awarded an honorary Doctor of Laws in my hometown, I remarked that I could not think of any area of activity more in need of a new doctor than the law.

For this has been a tough time for the rule of law, both internationally and domestically. Internationally, savage, suicidal terrorism, which knows no law, continues on the move, adopted now by sectarian militias in Lebanon, and in Iraq, where a vacuum of legal authority facilitates the slaughter of innocents. Domestically, this country's most cherished legal document, the Constitution of the United States, has been subjected to more challenge and pressure than at any time in our modern history. Justice Brandeis said it best three quarters of a century ago:

“For good or ill, government teaches the whole people by its example. If government becomes a law-breaker, it breeds contempt of law. It invites every man to become a law unto himself. It invites anarchy.”

If Brandeis said it best, Tom Paine said it first in the pamphlets of common sense that fueled the American Revolution 230 years ago:

“Where,” he wrote, “you may ask, is our king? In monarchies, the king is law. In our democracy, the law is king.”

Yes, here the law is king, long live the king! Under our Constitution, we have no king, and the separation of powers holds our chief executive accountable. But the separation of powers in recent times has been bypassed by an abuse of so-called signing statements and by the abuse of recess appointments. The Bill of Rights has been breached by government-sponsored wire-tapping without warrants. The wall between church and state has been eroded. The practice of cruel and unusual punishment has been renewed. Objectionable persons, including some American citizens, have been indefinitely detained without full and unimpeded access to either court or counsel.

For generations, the literature of injustice defined or illustrated arbitrary procedures by using analogies or historical reference points such classically notorious incidents as the Salem Witch Trials, or the Spanish Inquisition, or with references to Kafka, or to Orwell, or to Alice in Wonderland – and every reader in the world knew what was meant. In the future, I predict, writers will need only to mention a single word: “Guantanamo.”

Some concerned citizens have asked: “But surely the Bill of Rights did not design Due Process to protect terrorists?” True, it was not designed to protect terrorists, or murderers,

or rapists. Due Process was designed to protect our country and everyone in it. Due Process is for finding out whether a person is a terrorist, a murderer or a rapist -- we call that "liberty and justice for all."

Senator John McCain of Arizona summed up this Due Process for terrorists debate not long ago, saying: "It's not about their values – it's about ours."

As the great defense attorney Clarence Darrow said to a jury in 1920: "You can only protect your liberties by protecting the other man's freedom. You can only be free if I am free." Martin Luther King, Jr., in his 1963 "Letter from Birmingham Jail," said:

"Injustice anywhere is a threat to justice everywhere. We are all tied in a single garment of destiny – whatever affects one directly, affects all indirectly."

But, if the Constitution is being violated so frequently, some say, perhaps we need to change the Constitution. Indeed, that basic charter of our law and liberty, which has been changed only seventeen times in the last 200 years, is now under siege by the proposal of dozens of ideologically, politically or frivolously motivated amendments -- not amendments to expand our liberties as has almost always been true of past amendments, but proposed amendments to restrict our liberties, to curb one practice or another which offers no threat to our security or our way of life. Rather than change our charter, I prefer to refer to a statement made by Senator John Sherman, some 150 years ago, when James Buchanan was fumbling in the White House: "Our Constitution," Senator Sherman said, "already provides for every contingency, except for a vacancy in the mind of the President."

A year ago, President Mike Greco of the American Bar Association, established the "Commission on the Renaissance of Idealism in the Legal Profession." I had the privilege to serve as its honorary co-chairman. Surely there could have been no better time for a renewal of idealism in the legal profession, a reminder to all members of the Bar of their obligations to do justice, to uphold the law, to defend the Constitution, and to insist that our country observe international law in concert with other law-abiding nations around the globe. That's what lawyers do. As I told the New York City Fellows of the ABA Foundation regarding lawyers: "It's easy to make a buck – it's harder to make a difference." Winston Churchill, as always, said the same thing better: "We make a living by what we get – we make a life by what we give."

But the real "difference" this year was made not by the good work of our little Commission on Idealism but by the leadership of the American Bar Association itself. Too many American lawyers seem to have remained silent while our Constitution was being violated, while the rule of law was being flouted. Silent. But as Martin Luther King also said: "There comes a time when silence means betrayal." Unwilling to betray the ideals of our profession and the principles of our Constitution, the American Bar Association this year did not remain silent.

-- Too many American lawyers did not notice that the U.S. Legal Services Corporation – established to fund legal assistance for those whose lack of resources deny them fair and equal access to our system of justice -- was no longer receiving enough

appropriations to meet its responsibilities. But the American Bar Association did notice – and spoke up.

-- Too many American lawyers ignored the extraordinary number of statements, made by our President, when signing bills passed by both Houses of Congress, that he felt free to forget or defy any portion of those new laws he wished. But the American Bar Association noticed – and spoke up.

-- Too many American lawyers ignored the revelation that the federal government, without judicial or Congressional approval, had expanded its warrantless surveillance, eavesdropping, program to tap into telephone conversations in the United States, without proof that the U.S. citizens participating within those private conversations were terrorists. But the American Bar Association noticed – and spoke up, and insisted that the government “achieve the proper balance in protecting both the nation’s security and the American people’s constitutional rights.”

-- Too many American lawyers ignored the revelation that detainees in Guantanamo, when called before military commissions of dubious legal standing, often had their privileged conversations with defense counsel monitored or otherwise interfered with. But the American Bar Association noticed – and spoke up.

The rule of law in this country has not always suffered like this. For those of you too young to remember a time when America was truly a nation of laws and not of men, too young to remember when the United States was a leader in the creation and enforcement of international law, please recall with me that morning almost 44 years ago when the President of the United States called me into the Oval Office to inform me first, that CIA overflight photography had just revealed the sudden, secret installation of Soviet nuclear long-range missiles on the island of Cuba 90 miles from our shores, clearly with the intent of using them for the nuclear obliteration or nuclear blackmail of our country; second, that he was determined upon the removal of those missiles; and third, that he was calling a meeting that morning of his principal advisers to consider all of his options. After a review of all those options, he ultimately chose not to launch a unilateral preemptive strike, but to invoke international law, the United Nations Charter and the Rio Treaty, and then formulated, in accordance with those legal standards, a swift, sure-handed restrained response that carefully balanced deterrence with diplomacy, and defense with dialogue, and obtained within 13 days the complete withdrawal of those missiles under United Nations inspection, without the United States firing a single shot and with the loss of only one life. During those 13 days, which historians now call “the most dangerous 13 days in the history of humankind,” the President did not order the suppression of debate or dissent in this country, or the indefinite detention of all suspected Communists, or the invasion of their privacy through warrantless wiretaps.

Less than eight months after that Cuban Missile Crisis, I flew from Washington to this island, where President Kennedy was addressing the nation's mayors, asking their help on guaranteeing to all Americans, black as well as white, their full constitutional rights. The purpose of my long journey here was to work with him, during the overnight return trip to Washington, on his commencement speech to be delivered the next day, June 10, 1963, at American University in Washington, the speech in which he memorably called for "a new effort to achieve world law... resolving disputes on the basis of law." If we and the Soviets "cannot now end our differences," he said, "at least we can help make the world safe for diversity. For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal." Little more than 5 months later, he was gone.

Even before he became President, John F. Kennedy would often interrupt his speeches – as I am tempted to interrupt this one – to challenge his audience with a single Cold War question: "Are we up to the test?" Can a free society meet the single-minded advance of those who would destroy us? Can we meet this test of survival, and still maintain our traditions of liberty, our freedom of speech and press? It is the enduring faith of the American tradition," he added, "that there is no real conflict between freedom and security, that freedom is the handmaiden of security, that the Bill of Rights is the guardian of our security as well as our liberty. If we ever abandon basic American traditions to defeat our global enemy," he concluded, "what will it profit us to win the whole world if we lose our own soul?"

About that same time, 50 years ago this year, he brought forth a book entitled "Profiles in Courage," compiling the profiles of 8 United States senators brave enough to defy powerful interests, public opinion and popular sentiment in order to do what was right for our country, for the whole people. Who among you hearing or reading my words today will be a profile in courage who holds accountable, as the Constitution provides, those who – in Shakespeare's words – "traduce the state?"

One final question. Two months ago today, a senior citizen named Louis D. Sohn died. He was the American Bar Association's and the legal profession's strongest champion of international law, the United Nations and the goal of achieving world peace through world law – as a Harvard professor, an ABA Journal columnist, a United Nations observer, an international judge, and a member of one international body after another. He played a unique role in the American legal profession. Now that he is gone, who among you will take his place? Think about it. Think about Robert Kennedy's speech as Attorney General in 1962 at the University of San Francisco Law School: "Courage is the most important attribute of a lawyer," he said, "more important than competence or vision. It can never be dated or outworn. It should pervade the heart, the halls of justice and the chambers of the mind." Courage.