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# These Are Times That Should Try Lawyer's Souls

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# These Are Times That Should Try Lawyers' Souls

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Each year, lawyers in America commemorate Law Day, which celebrates the rule of law and the indispensable role of lawyers and judges in preserving it. As Justice Sandra Day O'Connor has said with respect to the constitutional principle of judicial independence, broad acceptance of the notion that a nation is governed by the rule of law is something that has been achieved only with long and steadfast effort over generations, but that acceptance is always fragile and, once lost, may be almost impossible to be revived.

Everyone who attends law school comes to appreciate how remarkable the concept of the rule of law is. Law students are exposed to example after example of constitutional crises that were resolved with a judicial ruling subjecting government officials and private citizens alike to rulings declaring that they cannot do what they proposed to do because they are subservient to the rule of law, and the law prohibits their desired course of conduct.

The Supreme Court told President Truman that he could not seize the nation's steel mills, even though he believed it important to do so for the nation's best interest in a time of war. The Supreme Court told the nation that purposeful segregation by race in the public schools would not be tolerated, even though many school boards around the country thought integration would harm the general welfare. The Supreme Court told the Tennessee General Assembly that it had to reapportion itself, even though it was disinclined to do so. The Supreme Court told the State of Florida that it could not convict Clarence Earl Gideon of a crime risking incarceration without providing him with effective assistance of counsel at the state's expense, even though Florida officials didn't think it had to do that and didn't know how it would afford to do so in all criminal cases involving indigent defendants. The Supreme Court told President Nixon that he was required to produce the White House tapes, even though he believed doing so would erode executive privilege and the functioning of the nation's chief executive officer. The U. S. Supreme Court told the Virginia Supreme Court and supreme courts all around the country that they could not prohibit truthful, non-misleading advertising by lawyers, even though these states courts believed that this would be harmful to the public and the profession. The Supreme Court told Virginia Military Institute that it must admit women, even though adminis-

trators of that venerable institution feared doing so would adversely change the value of a VMI education. The Supreme Court told Al Gore he could not take office as president, even though he believed he had won the election of 2000. Federal courts and state appellate courts on occasion reverse convictions that the state has obtained through elaborate criminal trials.

In each of these cases and countless others, decided by federal and state courts, the order of the court was obeyed. The rule of law acted as a constraint on government action, and government officials acceded to the rulings.

By the time this essay is published, the United States Congress may have passed two bills that purport to make lawful (1) the indefinite detention of persons labeled "enemy combatants" and (2) domestic surveillance of United States citizens without a warrant. The bills would deprive the judiciary of jurisdiction to review government decisions with respect to these areas of activity. No court could say that a government official made a mistake, or worse, abused the authority granted by the legislation.

The proposed Military Commissions Act eliminates the right that since the 13<sup>th</sup> Century has embodied the essence of the rule of law: the right of habeas corpus, incorporated in Article I, Section 9 of the Constitution since 1789. Under the proposed statute, persons could be detained, perhaps erroneously, essentially forever with no opportunity to challenge the correctness or the conditions of their incarceration. We know that there have been scores of wrongful convictions in capital cases that have been prosecuted with all of the benefits of the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendments. What are the chances that there are persons who have been or will be wrongfully detained at Guantanamo?

The proposed National Security Surveillance Act would strip courts of jurisdiction over pending cases challenging the legality of the administration's domestic spying program and transfer these cases to a secret court that issues secret decisions.

The congressional "compromise" that resulted in these bills did introduce some rights that the administration reluctantly accepted. But the bills also incorporate a palpable distrust of the judiciary. They represent an effort of the federal government's legislative branch to insulate the executive branch from any possibility of effective judicial review of the most drastic sorts of executive acts imaginable, acts that are fraught with opportunities for mistake and abuse. They would eviscerate the delicate system of checks and balances built into our

constitutional system under the principle of separation of powers. If passed, they would implement a significant suspension of the rule of law in the United States of America.

Throughout our nation's history, lawyers have worked painstakingly to create and preserve the rule of law. A responsibility to safeguard the rule of law is embedded deep within lawyers' professional souls. The Preamble to the Rules of Professional Conduct, promulgated by supreme courts of almost every state, contains two observations that explain why many lawyers are extremely concerned about an agreement that has been forged by two branches of the federal government in an attempt to eliminate the capacity of the third branch to play its constitutional role. "[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."

An earlier column in this space recalled how, during the 20<sup>th</sup> Century, the legal profession in some countries either stood by or was co-opted as the rule of law was destroyed in their nations. American lawyers have, so far, the luxury of independence from government control. They should be the first ones to recognize when the system of checks and balances is threatened to be thrown out of whack, and they should be the first ones to protest measures that may usher in the unraveling of the very rule of law that we all have pledged ourselves to defend.

Toward this end, dozens of law school deans and professors, Dean Robert Butkin of the University of Tulsa and me, signed a letter voicing strong opposition to the "compromise" legislation discussed here. The letter was read by Senator Patrick Leahy, a lawyer, on the floor of the Senate on Sept. 27, 2006. By a vote of 51 to 48, the Senate rejected Senator Leahy's effort to preserve a role for the judiciary in the two areas addressed by the bills discussed here.

This essay is based on the content of the deans' letter, circulated by Harold Kongju Koh of Yale Law School. It can be read at [http://www.law.yale.edu/documents/pdf/Deans\\_Office/MCA\\_FISA\\_4.pdf](http://www.law.yale.edu/documents/pdf/Deans_Office/MCA_FISA_4.pdf). An ABA statement with respect to an earlier version of one of the bills can be viewed at [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=22](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=22).



Lawrence K. Hellman

## EVENTS & SEMINARS

### OCBA EVENTS

**Dec. 7, 2006**

*Holiday Reception*, 5-7 p.m.,  
Robinson Renaissance  
Food Court

**Feb. 10-16, 2007**

*Aspen Ski Seminar*  
Aspen, Colorado

**April 13 & 14, 2007**

*Bench & Bar Conference*  
Quartz Mountain Resort

**May 1, 2007**

*Annual Law Day Luncheon*  
12 Noon, Sheraton Hotel

**June 15, 2007**

*Annual Awards Luncheon*  
12 Noon, OKC Marriot Northwest

### OCBA CLE SEMINARS

**Nov. 14, 2006**

*Drug Court*, Judge James  
Paddleford, 7:30 a.m., Bar Office  
*Recent Developments in Family  
Law*, Prof. Robert Spector,  
12 Noon, Bar Office  
*Handling Digital Evidence*, Calvin  
Weeks, 5:30 p.m., Bar Office

**Dec. 5, 2006**

*The Six Worst Things To Do In  
Court*, Judge Stephen P. Friot,  
7:30 a.m., Bar Office  
*Above Guidelines Child Support:  
A Study of the Case Law*, 5:30  
p.m., Bar Office

**Dec. 12, 2006**

*BAPCPA - Hits & Misses of  
Bankruptcy's All-New Ballgame*,  
Judge Niles Jackson, 7:30 a.m.,  
Bar Office  
*How to Handle Allegations of  
Sexual Abuse*, 5:30 p.m., Bar Office

### ALI/ABA SEMINARS

**Oct. 23, 2006**

*Ethics 2006*, 4 p.m., Bar Office

**Oct. 30, 2006**

*Advanced Writing and Editing for  
Lawyers*, 4 p.m., Bar Office

**Nov. 20, 2006**

*Fall Employee Benefits Law &  
Practice Update*, 4 p.m., Bar Office

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