These Are Times That Should Try Lawyer's Souls

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By Lawrence K. Hellman

Court told Virginia Military Institute that it public and the profession. The Supreme Court believed that this would be harmful to the state of Virginia, even though these states courts around the country thought integration 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 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, 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 the 13th 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 4th, 5th, and 6th Amendments. What are the chances that there are persons who have been or will be wrongfully detained at Guantánamo?

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 threat to the judiciary. They represent an effort of the federal government, by law, to co-opt as the rule of law was being 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 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 our selves to defend.”

An earlier column in this space recalled how, during the 20th 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 Konju Koh of Yale Law School. It can be read at http://www.law.yale.edu/documents/pdf/De ans_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.