

LIBERTY UNDER THE LAW: SEPARATE BRANCHES – SHARED POWER

Law Day is a national day set aside to celebrate the rule of law. Law Day underscores how the law and the legal process have contributed to the freedoms of all Americans.

The first Law Day was established in 1957 by the American Bar Association. In 1958, President Dwight D. Eisenhower established Law Day to strengthen our great heritage of liberty, justice and equality under the law. In 1961, by a joint resolution of Congress, May 1st became the official date celebrating Law Day. While May 1st is the official date, Law Day has historically been celebrated any time during May.

Law Day programs are designed to help people understand how law keeps us free and how our legal system strives to achieve justice. Law Day is celebrated in schools across the country and also in programs designed to reach the adult public. Thousands of such programs are conducted every year.

The Law Day activities are great for the public relations of our Bar Association and for the public perception of lawyers. Many things happen during Law Day that help tell the public about the law and how important it

is to our society. The Alabama State Bar, along with the Mobile County Bar Association, have many different outreach programs, including outreach to the media, schools and the general public. The essay contest that you've heard about is excellent. The Law Help Line, The Liberty Bell Award, and the Montgomery Bus trip are all wonderful programs. All of these things help teach the public about the law and what lawyers do. As we all know, it is important to teach our children and adults about the law and what it does for us. All of this educational outreach helps with lawyer public relations and with out public perception.

In July 2005, the American Bar Association commissioned a nationwide survey to measure the public understanding of the separation of powers and related constitutional concepts. The results show a dangerous lack of basic knowledge and misunderstanding by too many people.

Only 48% of the respondents correctly identified the meaning of "separation of powers". Only 56% correctly identified the three branches of our government. Yet, only 60% showed an accurate understanding of the role of the judiciary. Clearly, Americans need a refresher course in the separation of powers. Perhaps some lawyers do too.

As a result of the survey, The American Bar Association decided to set the theme for Law Day 2006 as "Liberty Under Law: Separate Branches,

Balanced Powers”. This reflects the fundamental importance of the separation of powers to our democratic form of government and to our liberty. It is at the heart of the U.S. Constitution and inspires emerging democracies worldwide. It is also a timely theme, given the current debate about the appropriate roles and responsibilities of the executive, legislative, and judicial branch of government.

By fusing Law Day with the theme of Separation of Powers, we have chosen a matter of overwhelming significance for all Americans. We have long understood the rule of law provides many protections that are part of our national endowment. But we seldom reflect upon the critical importance of the separation of powers and the rule of law.

In fact, democracy will not long survive without a knowledgeable public that zealously protects the separation of powers. We now must educate the public and build support for the constitutional principals that have protected our rights and liberties for over two centuries.

It is important that all Americans understand what the founders intended and accomplished in creating a government of separate powers. The branches represent separate powers that together form a dynamic system that works for the common good.

At the time the Constitution was drafted, we were forming a new country and had just left England. One of the main reasons we left England was because the King had too much power and was abusing this power. In fact, in the Declaration of Independence, we stated a long list of abuses by the King. It is with this in mind that the framers of the Constitution met in 1787 and formed a blueprint for a new government.

This blueprint was specifically designed to protect individual liberties by keeping one person from having too much power. In fact, the preamble of the Constitution states that one of the most important points the Constitution was to “establish justice and secure the blessings of liberty to ourselves and our posterity.”

We had just experienced that absolute power in the hands of the King of England was not the way to go. In fact, the British historian Lord Acton taught us that “absolute power corrupts absolutely”. Unfortunately, history shows many tragic examples of absolute power resulting in tyranny. In this new nation called America, we chose not to have all power in one person but instead to distribute power among three branches of government.

One former U.S. Supreme Court justice stated: “The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrarive power.” In fact, the

separation of powers system of government with its checks and balances is not very efficient. In many cases, it takes time and effort to perform a single task that one person with all the power might perform much more quickly. Whatever we lose in efficiency, we gain much more by not having too much power in the hands of too few. It is certainly well worth the tradeoff.

James Madison even stated that we can have no liberty where the legislative and executive functions are united in the same person. He declared, “the accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny”. Our founders seem to be united on the point that absolute power corrupts absolutely. Stated simply, we did not want one person to have too much power.

Today, most people agree that the Constitution is sheer genius and has served us well for over 200 years. The delicate balance of authority, the system of checks and balances and separation of power has served as the foundation for our liberties. It provides for the flexibility needed to accommodate two centuries of change and growth while also inspiring people around the world to strive for liberty.

The Constitution is based on the simple notion that checks and balances require that all important government actions require concurrence of at least two branches of government. Enacting a law generally requires action by both the President and the Congress. Searching or arresting a person requires a request by the executive branch and approval by the judiciary. Imprisoning a person requires an executive prosecution and a judicial conviction. Signing a treaty or going to war require that both the president and Congress agree.

The Constitution is designed as Chief Justice John Marshall observed, “to endure for ages to come”. We have had many times in our history where the different branches of government have tried to take too much power. Some were never challenged in the courts and were thus allowed. Others were challenged in our courts and the rule of law prevailed. Chief Justice Marshall stated that our national charter has been threatened many times by reckless disregard for its wisdom. Unfortunately, there will always be those well-meaning people who act with reckless disregard for the wisdom of our Constitution.

Some historical examples of separation of powers issues during war time are good for our discussion.

Executive orders have been used to direct foreign policy since the presidency of George Washington. In 1793 he issued a proclamation stating that the United States would be “friendly and impartial toward the belligerent powers” of Britain and France. In this “Neutrality Proclamation,” Washington justified his power to issue such a statement based on the “law of nations.” James Madison, among others, criticized Washington’s proclamation as an overextension of executive authority and an infringement on Congress’ authority to decide issues of war and peace. This early episode demonstrates that the President and Congress may have overlapping responsibilities, and in such situations, the scope of the President’s power to act unilaterally is sometimes unclear.

Similarly, President Abraham Lincoln used presidential directives to run the early months of the Civil War, presenting Congress with the decision either to adopt his practices as legislation or to cut off support for the Union army. Within his first two months in office, on April 15, 1861, Lincoln issued a proclamation activating troops to defeat the Southern rebellion and for Congress to convene on July 4. He also issued proclamations to procure warships and to expand the size of the military; in both cases, the proclamations provided for payment to be advanced from the Treasury without congressional approval. These latter actions were probably

unconstitutional, but Congress acquiesced in the face of wartime contingencies, and the matters were never challenged in court.

President Franklin Roosevelt greatly expanded the use of executive orders, partly in response to the growth of government and partly in response to the demands placed on him as Commander in Chief during World War II. Unfortunately, FDR also showed a tendency to abuse his executive order authority and claim powers that were not conferred on him in the Constitution or by statute, like the internment of Japanese-Americans in prison camps during WWII.

Harry Truman followed this same pattern of governing by executive order. Some of President Truman's executive orders were to his credit, such as the integration of the armed forces. However, some were to his shame, such as the attempted seizure of the steel industry during the Korean conflict.

None of the above actions by the Executive branch were ever decided by the courts. However, it is easy to see that a mini constitutional crisis might have ensued if it had gone to the courts.

Today, as in other times in American history, our President states that we are at war and seeks to act in a way that may violate the separation of powers.

The case of Jose Padilla is a case in point. He was an American citizen apprehended at Chicago's O'Hare Airport for allegedly planning to build and detonate a "dirty bomb" in the United States. He was held without charges for over three and a half years. The Government claimed he was an "enemy combatant" and therefore could be held indefinitely without charges or trial, even though he is an American citizen who was arrested in this country for a crime in this country.

The Government claimed it had the power to suspend the Fourth Amendment, which requires warrants before arrest; the Fifth Amendment which requires grand jury indictments before detention, and the Sixth Amendment, which requires trial by jury and proof beyond a reasonable doubt before imprisonment.

Under this line of reasoning, literally anyone could be imprisoned forever without judicial review if the Government labeled them "an enemy combatant". The Constitution's commitment to having two branches of government involved before arrest and imprisonment would be simply abandoned.

Although the Supreme Court did not reach the merits of the underlying claim, at least five Justices clearly signaled that they would rule in favor of Padilla and hold that the government has no authority to detain an

American citizen arrested in the United States as an enemy combatant.

Hence, the rule of law would prevail.

In two other similar cases, the Supreme Court emphatically upheld the rule of law and the right of those being detained as a part of the war on terrorism to have access to the courts. In these cases, the court held that those being detained at Guantanamo Bay, Cuba, are entitled to have a habeas corpus petition heard in Federal Court and that an American citizen apprehended in a foreign country and held as an enemy combatant must be accorded due process, including a meaningful, factual hearing on his status.

In each case, the Government took the position that it had unreviewable authority to hold individuals as enemy combatants as part of the war on terrorism. In its briefs and oral arguments to the Supreme Court, the Government inherent authority to detain individuals as enemy combatants and that the courts have no power to review such detentions.

The U.S. Court of Appeals for the District of Columbia Circuit had earlier ruled that no court had jurisdiction to hear habeas petitions brought by those held in Guantanamo, and the U.S. Court of Appeals for the Fourth Circuit had decided in one case that a person could be held as an enemy combatant and was not entitled to due process.

The Supreme Court emphatically rejected this position and held that the courts can review detentions, even if those who are being held are part of the war on terrorism.

From the Supreme Court's perspective, the Government's actions in detaining individuals as enemy combatants violates the separation of powers because it prevents the judiciary from carrying out its essential function of hearing the claims of individuals who contend they are being wrongfully detained. These claims go to the very heart of judicial role as it was defined in *Marbury v. Madison* more than 200 years ago. In *Marbury*, the Supreme Court stressed that we are a nation of laws and no one and not one branch of government, is above the law. The very essence of liberty is the right of every individual to claim the protection of the laws, whenever he or she receives an injury.

Presidents from George Washington to present have dealt with separation of power during wartime. Each time these issues were litigated, the rule of law prevailed.

Separation of power issues are not just involved during wartime. In 1983, the U.S. Supreme Court wrote to a dispute involving immigration. Pursuant to earlier legislation, the President had the authority to allow certain immigrants to stay in the country even though they were illegal

aliens. During this particular time, Congress disagreed with individuals the President was allowing to stay in the country, because they believed he was doing it to curry favor with certain groups. So, Congress passed a law that said that either house of Congress could veto a President's choice on an illegal immigrant by passing a resolution.

The Supreme Court ruled this unconstitutional because Congress was trying to exercise an improper legislative veto. Any veto of a presidential action requires 2/3 of both houses, not a majority of just one house.

There are many times that the separation of powers becomes an issue. In fact any courtroom is a perfect example of separation of powers. The judicial branch is involved through the judge, the executive branch is involved through the prosecutor and the legislative branch is involved through making laws that are followed in the courtroom. Likewise, any time Congress issues a subpoena to the Executive asking for documents, there are separation of powers issues.

The important thing is that the rule of law, when litigated, has always prevailed. We as lawyers must continue to educate the public about separation of powers, our liberties and the rule of law. Safeguarding our system is the only way that our liberties will be around for another 200 years. (OR - *that the liberties we cherish today will be handed down intact*

to the next generation of Americans.) So, as Law Day comes to a close all throughout this country in May 2006, it is my hope that the rule of law as established by our Founders in the Constitution will continue to prevail.