
University of Oregon School of Law
<http://www.law.uoregon.edu/news/printer/542>

May 23rd 2008

Elden Rosenthal Addresses the Class of 2008

Portland attorney Elden Rosenthal, who successfully challenged the USA PATRIOT Act in federal court, addressed Oregon Law's Class of 2008 at its commencement ceremony on May 18, 2008. Following is the text of his remarks.

Well, here we all are. Graduation day. Capped and gowned. Ready to become lawyers. Just get through this commencement speech, take the bar exam, bingo, done.

I haven't been at a graduation ceremony in quite a while. About ten years ago I attended my older daughter's undergraduate commencement at Stanford. The graduating seniors there played a game called commencement bingo. You do that here? Let me explain. My daughter and her friends made up bingo cards. Instead of numbers and letters like B-6 and O-74, they filled in their cards with words they expected to hear from the speaker; you know, like "future," "success," and so forth. Justice Breyer gave the talk that day, and every once in a while he would be interrupted by some graduating senior yelling out "Bingo." I'm not sure he ever figured out what was going on.

Anyway - just to clear the air and take care of my solemn duties, here goes: future, bright, loved ones, trust, new era, love, mercy, compassion, forward, safekeeping, moral, ethical, hard work, Elvis, success, marriage, family, achievements, proud, hope, better world, congratulations.

There, got that out of the way.

As I look around I see parents and spouses and lovers and siblings are all here, excited and expecting big things out of you.

But there are others here too, lurking in the corners. I know, for example, there is a lot of debt sitting in this room, so there are a slew of bankers over in the corner nervously betting on your future. You can't see them, but they are here.

There are insurance salesmen in the back of the room too, waiting to sell you life insurance, disability insurance, malpractice insurance.

And there are Westlaw sales people, web site managers, CPAs, realtors, magazine publishers, and even some car salesmen nervously awaiting your entry into the practice of law. There are political candidates in need of funds, and committees to reelect judges just waiting for you out there in the real world. And NGOs of every type, including alumni fundraisers. Seems to me I got my first letter soliciting funds from my law school just a few months after graduation.

What am I saying? I guess what I'm saying to you is this: "Welcome to the business of law." Make no mistake about it my new colleagues, law is now a big business, with millions of dollars due to go through your hands and office accounts and pockets during the course of your careers.

But there is more to our profession than this. Much more. In fact, as though to emphasize the importance of becoming a lawyer, today marks one of the most important legal anniversaries in our nation's history. Fifty-four years ago, on May 17th, 1954, a unanimous U.S. Supreme Court issued *Brown v. Board of Education*. It was that case, argued in the Supreme Court by a black man who eventually became our first African-American Supreme Court Justice - Thurgood Marshall - that in a real sense launched the civil rights movement that swept through our country in the late 50s and early 60s. Without *Brown v. Board of Education* there would be no Martin Luther King holiday, no Civil Rights Acts, there would be no Condoleeza Rice or Barack Obama. Because that case, the result of years of litigating and strategizing by brilliant and hard working trial lawyers, established that all citizens have the right to the same opportunity to learn, the right to real - not fictional - equality. That case established that America could no longer say one thing about equality and do something else. That case went a long way toward establishing that our Nation is truly governed by the Constitution, not by Jim Crow, not by ethnic or religious zealots, not by a sordid and embarrassing history.

I talk to you about *Brown v. Board of Education* because *Brown* is not about the business of law, but rather about the hope and promise found in the law, about how the law can save a nation from itself, about how lawyers can use the rule of law to change a nation.

I want to talk to you this afternoon about the rule of law, about the tremendous responsibility that you are perhaps unknowingly undertaking. And I want to talk to you about the ominous threat that confronts you as you start your careers.

I believe that the rule of law, and the role of lawyers and judges in our society, is what defines our nation. It is the basis of our history of enjoying a stable government, it is the basis of our economy, and is the bedrock that underpins our collective belief that our aspirations as a people are achievable. It is the rule of law that protects us from ourselves, and from government misconduct.

We are a nation and a society premised on the rule of law. The acceptance of the rule of law is so pervasive, so integral to American life, that it is for the most part taken for granted. While some societies are based upon shared religious beliefs, and some societies are based upon shared ethnicity, the American experience is based upon a shared reverence for the rule of law, and the idea that the fundamental liberties that protect the individual from government excesses are best protected by strict adherence to the rule of law.

The rule of law contains at least three ideas.

First, that courts are corruption free and accessible and reasonably prompt.

As a second principle, the rule of law embodies the concept that courts, in a measured and predictable way, interpret constitutions and statutes and follow precedent.

And, finally, the rule of law embraces the idea that change in the basic rules that govern society *can* occur - without violence - when the rationale underpinning the status quo becomes outmoded and dysfunctional.

I know that few of you will make a career of civil rights or criminal law, but it is important for all lawyers to appreciate how the rule of law provides basic structure to our society. Consider, for example, that by providing for stability and certainty in economic dealings, the rule of law in America created the basis to allow the United States to develop the first totally modern economy, an economy based upon binding and enforceable contracts and obligations. One only needs to travel to areas in the Caribbean to see what happens to commerce where there is no adherence to the rule of law. In the Dominican Republic, for example, armed men are hired to enforce ownership of real estate, muscle supplants legal writs. Violence and force supplant lawyers and courts as the method of enforcing economic obligations.

And the rule of law - the system that provides for private parties to enforce through civil damages actions the responsibility to act carefully and safely - has made America a leader in product and drug safety, in traffic safety, in corporate accountability. So much of what we take for granted in our everyday lives can be directly traced to consumers and their lawyers who bring damages actions to compel, for example, guards to be placed on industrial machinery as well as on home products such as lawn mowers, damages actions to compel the safe placement of gas tanks on pick-up trucks and passenger vehicles, damages actions to compel the use of oxygen monitors for anesthetized patients undergoing surgery, damages actions to compel safe playgrounds for our children, and safe nursing homes for our elderly.

And the rule of law as applied to government has, by and large protected us from the excesses and abuses inherent in government. Those societies that do not exalt the rule of law have experienced the awful consequences. The danger of a dysfunctional legal system allowing for chaos and mayhem is obvious in third world countries. But even the governments of so-called advanced nations will in times of stress turn on the people. Witness the gulag in the former Soviet Union, the horror in Europe only 65 years ago, the disappearances in Chile while Pinochet was in power, the dirty war in Argentina less than 30 years ago. The Soviet Union, Germany, Italy, Chile and Argentina were not backward third world nations when these obscenities occurred. They were nations where power could accumulate in the hands of a small elite, a small elite that were above the law.

But if you travel to these countries, and meet the folks who live there, they are not different from us. Russians, Germans, Italians, Chileans and Argentinians are just like us. And if they can turn on their own people, so can we.

We are all the same. We have all murdered and abused the "others" that occupied our lands. We are all capable of graft, corruption, bigotry, hatred and violence.

In America, it is the rule of law that protects us from our neighbors, and protects us from our government.

Being invited to speak at your commencement, being granted the honor of being your final law school instructor, I can think of no more important lesson to stress than this lesson. It is what has motivated me to work evenings and weekends for over 35 years; it is what has

motivated me to represent folks who have been wronged by those with economic or political power. It is what still gives me hope and pride in America. Because respect for the rule of law has allowed our country to be a place where society strives to ensure fairness and equality, a society that strives to place all persons on equal footing.

So now, as you accept membership into the legal profession, reflect on what it really means to be a member of the bar. *You are now privileged. You now take possession of the keys to the courthouse. You now have the right and the responsibility to enforce the rule of law. And if you don't accept this responsibility, no one else will.*

It is the lawyers of our country that make the entire economic and governmental system work. The lawyers who represent clients, the lawyers who write demand letters, the lawyers who file lawsuits and try cases, *it is we who breathe life and meaning into the rule of law.*

You are about to be entrusted with a legal system that allows any citizen to file a lawsuit, a legal system that empowers every lawyer, on behalf of a client, to compel the richest and most powerful men and women in our society to sit across a table from you and answer questions, a legal system that authorizes you, as lawyers, to insist that others obey the law.

It is you - the lawyers of the next 35 years - who by your actions will choose to enforce the rule of law in America, who will decide whether disputes are settled in courtrooms, or in the streets.

It is you - the lawyers of the next 35 years - who by your actions will control the local police department, the local housing authority, the mayor, the governor, the FBI, and even the President of the United States.

It is you - the lawyers of the next 35 years - who by your actions will decide whether contracts are enforced, whether consumers can be cheated, whether debts will be paid.

It is you - the lawyers of the next 35 years - who by your actions will determine whether child support will be paid, whether foster children will be safe, whether criminals will be punished, whether the innocent will be freed.

It is you - the lawyers of the next 35 years - who by your actions will determine whether the ideals of Jefferson will be realized, whether the dreams of Martin Luther King will come to fruition, whether America will remain a nation of freedom and liberty. It may sound corny, but it is true. The America of your adult lives will only be as wonderful as the rule of law allows it to be, and you and only you are the ones who are ultimately responsible to maintain the rule of law.

There are few outside our profession who understand or appreciate that fundamental reality. *But we lawyers do understand.*

My father grew up in a small town in Germany, a town near Frankfurt. His family had been German for as far back as anyone can determine, at least 2 centuries. My father's father was a medic in the German Army during World War I; I have a medal he was awarded by the Kaiser for his service in the so-called Great War. But when Hitler came to power and began his war against the Jewish people, civil society and the court system failed my family,

and failed the German people, and the bigotry and hatred of Nazi philosophy became the law of the Third Reich. This happened, in part, because the lawyers and judges of Germany went along.

My father and his parents were fortunate to escape. As I grew up and learned about Europe, and about America, I came to realize that what happened in Europe could happen here, but for the courts, but for the lawyers and judges, and but for what I now know to call the rule of law.

Unfortunately, a reminder that what happened in Europe can, indeed, happen here has been made abundantly clear recently as the current administration attempts to make its case that it is acting within the Constitution as it fights what it calls the War on Terror.

First we learned that government lawyers advised the President that "The Geneva Conventions do not apply to Guantanamo." Then, as the NSA telephone wiretapping scandal unfolded we discovered that the administration's view is that "The Fourth Amendment does not apply to the executive branch during wartime." And then, just last month we learned that an Assistant Attorney General advised the administration that "Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President "

In short, the current administration contends that persons who are enemies of the United States, and persons suspected of being enemies of the United States, have no right to claim the benefit of the rule of law. Those persons, those others, can be secretly imprisoned, the imprisonments can last indefinitely, and these prisoners can be tortured.

*Do you realize that right now agents of the federal government can walk into this ceremony, arrest any one of us, take us to a secret location and hold us indefinitely without charging us with a crime? And that it would be perfectly legal so long as the President declared the arrested person to be an enemy combatant. And at this moment under our law there is be no way for that person to see a lawyer, to file a habeas corpus petition? No way to protest the President's decision and action. That there is *no courtroom in America that would have the right or the power to hear your cry of innocence?**

*Don't look at me and think to yourself - that would never happen here. It has happened. And don't think that if it happens again tonight or tomorrow that it would not affect every one of us. Because once our government successfully claims that right, the right to remove an American, any American, from the protection of the Constitution and the legal system, America is altered. **America becomes just another one of those countries that protects itself but not its citizens.***

Do you realize that right now, this afternoon, agents of the federal government can go to a secret court in Washington, D.C., represent that one of us is an agent of a foreign power, and that the secret court in Washington, D.C. can authorize wiretapping, surreptitious searches of our homes or offices, secret reviews of our computers? And that you will never be told of the wiretapping, never be told of the searches? And that the government can never be questioned on what it did or why it suspected you? That, my friends, is what our government calls - with no shame - the Patriot Act.

The Patriot Act? Thomas Jefferson would be ashamed. Benjamin Franklin would take off his spectacles and look you in the eye and spit out the word "Blasphemy."

This administration believes that it can arrest people anywhere in the world, U.S. citizens and non-citizens, take these unfortunate souls to secret prisons, and torture them. And if one of these persons turns out to be innocent of any crimes, is wrongly suspected of being in league with our enemies, if this person seeks compensation in a U.S. court for being taken to a secret prison and tortured - our government's position is that the case must be dismissed, must be thrown out of court because a public trial would compromise our nation's secrets.

The government successfully used this tactic recently in the case of a German citizen who was mistakenly kidnapped and tortured by US agents.

I ask you, "What secrets is the government protecting?" The location of our secret prisons? The orders from the White House? The methods of torture being used in the name of democracy? The German government, our ally, has issued arrest warrants for thirteen CIA agents involved in the kidnapping and torture of this German citizen. But our government stands silent.

Our country, our beloved democracy, has a president and top ranking executive officers who believe that torture in the name of national security is morally justified, and constitutionally permissible.

A couple months ago I spoke to a group of Japanese Americans who were commemorating their experience in the World War II internment camps. What would have happened, I asked them, if this administration had been in power during World War II? Would Japanese-Americans suspected of disloyalty been water-boarded in secret prisons? Would they have been removed to a location off American soil, been tortured and murdered in the name of national security? I shudder at the thought of answering this question.

The legal community in America must save us from this frightening flight from the rule of law.

The international legal community is watching what happens here with concern and foreboding. The Honorable Mary Robinson, a barrister, former President of Ireland, former UN High commissioner on Human Rights, recently commented that the movement away from the rule of law in the United States has a profound effect upon "so many other countries that don't have similar checks and balances."

The International Commission of Jurists recently issued a Declaration on Upholding Human Rights and the Rule of Law warning that "the odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights."

The legal community - both the academic legal community and the practicing bench and bar - must fight these legal obscenities in order to protect what is important about America. *Because if we do not meet these challenges head on and defeat them, if the rule of law is subverted, your America in 35 years - your America when you are my age - will be a*

different America. It will be a place where the government controls the people. It will be a government of the select and elite few. It will no longer be a government of the people and for the people. *Don't think for a minute that our country is immune to what happens everywhere else, immune to what happened in Argentina and Chile, to what happened in Germany and Italy.* It can happen here, and only lawyers protecting the rule of law will stop it from happening.

The late Justice William Douglas, who loved the mountains and the forests of the Northwest, and who loved freedom and loved America, when speaking about a prior crisis in our experiment in freedom, put it this way.

"As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such a twilight that we all must be most aware of change in the air - however slight - lest we become unwitting victims of the darkness."

We lawyers understand that ours is not a Christian nation, ours is not a sports nation, ours is not a consumer nation. We are a nation of laws, a nation built upon the promises of fairness and equality. And we are each obligated by membership in our profession to ensure that our children, and our children's children, will have the same benefits we inherited. *We are each obligated to ensure that our nation continues to be a nation of laws and rights, and that no war, no disaster, no special interest political movement and no President turns our nation away from the rule of law.*

So I conclude this final lecture of your law school careers, by charging you with the responsibility of upholding the rule of law. In a few years my generation of lawyers will be retired. My generation grew up during the Civil Rights Movement, endured the government abuses that occurred during the Vietnam War. Your generation is facing the gravest threat to the rule of law since that time.

And so, as we all congratulate you, as we all wish you good fortune, we are also, and most importantly, counting on you.