Preserving the Rule of Law: Attacks on the court undermine our way of life

BY W. MICHAEL RYAN

For the past 17 years, I have enjoyed a wonderfully challenging, immensely stimulating and deeply satisfying career as a District Court judge in Massachusetts. At times, though, I have been frustrated by the passive nature of the job and necessary restraint on my expression of views and opinions.

The role requires judges to quietly absorb information, carefully evaluate it for credence, relevance and probative value, dispassionately synthesize it with legal precedent and conscientiously craft the decision mandated by that merger of facts and law, even when we don't like or don't agree with the outcome. We are not permitted to use our decision-making function as a mode of self expression. We are oath-bound, duty-bound and law-bound to suppress and ignore our personal opinions in our work and there are few forums that permit us to openly and publicly speak our minds. But this is one; thank you for the opportunity.

Given this opportunity, to express personal views, this is what I wish to say: America, as a community of states and a community of kindred people, is splitting apart and it is up to us - lawyers and judges - to save it. Not since the Civil War, at least not since the end of Reconstruction, has this country been so little united. The middle - the political middle, the economic middle, the philosophical middle - has virtually dissolved, leaving, in each case, two contentious, hostile, angry, hate-filled, distrustful, and disgusted extremes bent on annihilating the other.

Neither side is willing to afford the other a spirit of good will, a sense of respect, or an opportunity to express views contrary to its own catechism. We need a common ground, and the only ground we Americans share is Rule of Law.

From the beginning of the Republic, Rule of Law has been the glue that holds America together and makes us one indivisible nation. As a nation of immigrants, we are not descended from a single tribe or ethnic group. We have no common history, heritage, traditions, customs, culture, religion or language. We have no distinctive dress to identify us as Americans, and no holidays which we all observe in the same manner for the same purpose. We cannot even agree on a national sport.

Rule of Law is what defines us. Not capitalism, not Christianity, not democracy. Russia has adopted capitalism; China is on the road to a slow conversion to a market economy but neither is anything like America. We are often called a Christian country with good reasons and much supporting evidence, but so are scores of other countries ruled by monarchs, autocrats and despots of one form or another. It is a wonderful mission to spread democracy and support democratic governments all over the world, but letting people choose their own leaders will not make them our allies or our friends.

Germany was the foremost democratic country in Europe when the Nazi party rose to power. In competitive democratic elections, Venezuela elected a president who hates us, and the Palestinians elected an entire government dedicated to the mass destruction of both Israel and ourselves. It is not our electoral system that distinguishes us but our court system - our methods of challenging government action, regulating citizen behavior, restricting police conduct, interpreting public laws and resolving private disputes.

All that unites us, defines us and distinguishes us is Rule of Law - a common adherence to a philosophy of government whose four minimal components are access to courts, equality before courts, procedural justice in courts and supremacy of courts. We who have studied and been trained in the law know how vital Rule of Law is and it's entrusted to us to invigorate, energize and rejuvenate public awareness, appreciation and protection of its basic components. It is up to us, by our advocacy and our example, to
hold our communities and our country together.

The most serious attack on our way of life, the central strife that is destroying the fabric of our society, is not being launched by Arab extremists or South American socialists. It is the efforts by some of our own, some of our strongest and brightest, to remove the underpinnings of civic health by abandoning and subverting the four essential components of Rule of Law. We, as citizens, lawyers, judges and community leaders, must stop them.

If we look today at those areas of the world drenched in civic unrest, civil war, ethnic cleansing, tribal warfare and violent government suppression of opposition, we find a single common denominator. The aggrieved have no recourse to law, the abused have no entree to justice, the oppressed have no hope of reprieve, the deprived have no means of relief, the imprisoned have no chance of liberation - succinctly and simply, the people have no access to courts. Rule of Law is our safety net, our pressure valve, our fail-safe system, and it would be foolhardy and perilous to tamper with the mechanism that assures our domestic tranquility.

The first component of Rule of Law is access to courts. The right of habeas corpus - the Great Writ, the prime jewel of the Magna Carta - is the foundation of western civilization. It guarantees access to courts; it's the first defense against tyranny and the first target of tyrants. If a government is allowed to hold suspects in secret prisons without formal charges in public courts, it forfeits all claims of being a free society. Twin sister to the right of habeas corpus is the right to be free on bail while awaiting trial. These two rights prevent the government from punishing accused and suspected persons unless and until convicted of wrongdoing. To advocate holding suspects without charges or the accused on excessive bails strikes at the heart of Rule of Law. It is not just un-American; it's anti-American, and it makes no differences whether the venom spews from the self-appointed border guards in Texas, the halls of Congress or the police station in Holyoke. Those who denounce, disparage and demonize judges for their allegiance to Constitutional principles and their support of Constitutional rights are not attacking individual judges; they are attacking the soul of American freedom.

The second component is equality before courts. All praise this principle in the abstract, but many shrink from endorsing the consequential realities. It means that courts may not defer to the government in the War on Terror or the War on Drugs or the War on Domestic Violence; that constitutional rights protect all of us, even the potential terrorist, the suspected drug dealer and the accused spouse beater; that once the courts accept a terrorist exception to due process, a drug exception to the Fourth Amendment, or a spousal abuse exception to the right of confrontation, equality before the courts becomes conditional, elastic and status dependent.

Equality before the courts also means that the poor and indigent are entitled to representation at public expense. It stands to reason that lawyers who earn their livelihood by representing the neediest in our society deserve and are dependent upon fair remuneration and prompt payment for their services. Yet as I speak, Massachusetts Bar Advocates are paid half a poor lawyer's hourly rate for such services and made to wait months for remittance. Delaying timely payments of Bar Advocate bills is not a simple political dispute; it is an insidious and invidious but effectual way of discouraging, denying and undermining equality before the courts for poor, disabled, deprived, sick, shunned and luckless defendants.

The third component required by Rule of Law is procedural justice in every case. That is not to say that every case will have a just result. If the police conduct a warrantless search of a pickup truck and no exception applies, the evidence seized, be it counterfeit money, drugs, guns or betting slips, will be suppressed, and the felon will escape punishment. That may not be a just result but procedurally justice has not been insulted. On the other hand, if an innocent defendant is afforded due process and all her constitutional rights duly honored, and she is nonetheless convicted, procedural justice has been satisfied.
Judges may not enjoy releasing the former or imprisoning the latter, but to attempt in either case to substitute personal judgment for the results produced by rigorous adherence to procedural requirements would substitute Rule of Person for Rule of Law. If every judge attempted to be just in every case, chaos would reign, law would have no predictability, hence no deterrent effect, and community order and stability would dissolve. Justice without law is anarchy; law without justice is tyranny.

The final and most difficult component of Rule of Law to acquire and maintain is supremacy of the courts. Court rulings must be accepted, court decisions must be respected, and court orders must be obeyed if we are to be ruled by law and not by individual and independent sovereigns. Historically, this has been difficult for presidents. Thomas Jefferson considered hanging Aaron Burr even though the jury acquitted him of treason. More recently, Richard Nixon refused the Supreme Court's order to turn over his secret tapes to Congress until persuaded that impeachment would be a certain consequence of continued resistance.

Throughout history, court decisions have also been resisted by substantial portions of our population. The 1954 decision in Brown v. The Board of Education, which ordered the integration of schools "with all deliberate speed," was violently resisted from Montgomery, Alabama, to Boston, Massachusetts. Considerable segments of the populace have also resisted, sometimes by unlawful and even violent means, court decisions extending or recognizing rights of women, immigrants and gays and lesbians. This is not to disparage legitimate movements to pass new laws or change old laws or amend state or federal constitutions. We are a democratic society and human laws are not etched in granite tablets. Still, we cannot entertain mass impeachment of Justices for abhorrence of a particular decision nor evisceration of our Constitution because it protects unpopular minorities, unsavory characters, or suspicious foreigners. Rule of Law requires a respectful deference while advancing opposing views.

The supremacy of the courts exists, if it exists at all, only in the hearts and minds of its citizens. Surveys and studies show that support for our courts is strongest among those who know most about our courts, and that is where we, we men and women of law, we lawyers and judges and court and law enforcement personnel, must labor diligently and strive earnestly to mend the rifts in our local, state and national communities by educating the public about our mission and responsibilities.

No pit-bull can be calmed by petting, and the enemies of Rule of Law will not be silenced by one guest speaker's after-dinner remarks, but it is my fervent hope to help shift the focus from the denunciations of courts by the demagogues and wrath mongers to the preservation and protection of Rule of Law.