

Morton H. Halperin
Remarks
at
Constitution Project Gala
September 18, 2017

Thank you, Wade, for that wonderful introduction which brings back fond memories of our days together at the ACLU. I am also touched by the presence here of many of our colleagues from that time and of colleagues from other periods of my life including the State Department policy planning staff and the Open Society Foundations where I now work.

When Ginny called to give me the exciting news that I would receive this award, she told me that I would be sharing it with my good friend, Mickey Edwards -- only adding to my pleasure.

Mickey and I both started life as Republicans. We no longer belong to the same political party, but both of us have sustained our devotion to the American constitution.

Thus, it was not surprising that we both eagerly accepted invitations to join the board of the organization devoted to protecting and defending the constitution.

As you all know, the Constitution Project was started twenty years ago. What you might not remember is that the principal threat to the Constitution at that time was a plethora of proposed constitutional amendments.

The project's first major undertaking was to craft standards for when it is appropriate to amend the Constitution. Surprisingly, there was little, if any, serious scholarship on this subject. The effort to develop criteria

and to make them relevant in the political process, in which I enthusiastically joined, was one of the most intellectually challenging and consequential endeavors of my career.

The Project's report, *Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change* helped to defeat all of the pending proposals to amend the Constitution, and remains a key resource for those seeking guidance on when a constitutional amendment is needed and when resisting an amendment is the right way to show adherence to constitutional values.

Since then the Constitutional Project has explored a wide range of issues at the federal level and in the states always asking the question: what policy is most faithful to the constitution?

Under the outstanding leadership of Ginny Sloan, it has earned a reputation for preparing meticulously reasoned and non-partisan reports (including an enormously important one on torture), legal briefs, and advocacy statements which have had a significant impact on public debate, not only on specific issues but on the need to adhere to the principles of the Constitution.

I am proud to have played a part in creating the Constitution Project and to have served for many years on its board.

As everyone here is all too aware, our nation faces a new and deep challenge to its constitutional values. I want to focus in my remaining moments on how I think we need to approach this danger.

Drawing on my heritage, I want to suggest that we need to "build a fence" around the Constitution, just as Judaism teaches adherents to build a fence around the Torah, forbidding actions which might bring us closer to violating the literal commandments of the Bible.

So how do we build a fence around the Constitution? The most important thing we can do is enact legislation that constrains Presidents, so they are neither tempted nor able to violate the Constitution.

We also need to restrain ourselves—that is, we must resist the temptation to enhance presidential power when the incumbent is the person for whom we voted. We must never forget that any expansion of power can and will be used by presidents who may not share our own devotion the Constitution.

Let me give some examples of when we have strayed from this understanding of how to protect the Constitution.

War powers is perhaps the single most important example of this failure and one on which, I am proud to say, the Constitution Project has led in defending the Constitution. As it has argued, the Constitution is very clear. Only the congress can commit the nation to war. Any yet the American people and its Congress have permitted Presidents, time and again, to take us to war without appropriate congressional authorization. We have let the War Powers Act, a timid if important step toward restoring Congress to the central role, be ignored.

If we worry now, as we should, that the Executive Branch will take us to war with North Korea or Iran, or expand the war against ISIS, without congressional approval, we need to understand the blame is not with our constitution but with our failure to build a fence around that provision of the Constitution.

It is not too late to do so.

Emoluments is another example. Until recently, if any of us gave the Emoluments Clause of the Constitution any thought, we likely assumed it could be enforced against the President to prevent him from personally benefiting financially from payments by foreign governments. We now know that we need a fence around that constitutional provision, which

covers conflicts of interests and nepotism as well as well as foreign payments and which is effectively binds Presidents.

Not only have we failed to put in place effective constraints on Presidential power, we have often supported and even urged expansions of that power and supported reductions in the ability of the other branches to resist, when “our” President is in office.

Let me give some recent examples of this.

Limits placed on the right of Senators to filibuster, adopted in the Senate in the early days of the Obama Administration, is one of the most egregious examples of how easily we lose sight of the need to preserve checks on power, even if loosening them may be seen as necessary to advance the policy agenda of the day.

We are paying a heavy price now for removing the right in the Senate to filibuster executive branch, and, now, all judicial appointments. As a result, we have an Attorney General and a Supreme Court Justice who were confirmed with less than 60 votes in the Senate and whose adherence to constitutional values was not rigorously tested.

We can only be grateful that those with greater understanding of the importance of checks and balances, blocked efforts to eliminate the filibuster for legislation and continue to do so. That effort deserves the support of all who seek to preserve the constitution.

My last examples concern the toleration of acts that exceed the president’s constitutional powers, because we are unhappy with what Congress has done or failed to do. We have, for example, permitted Presidents of both parties to use the made-up power of a signing statement to exercise the non-existent right to veto parts of a bill passed by the Congress. We have supported presidential Orders which any fair reading of the constitution requires congressional approval.

Our Constitution is strong and I believe we will survive the current crisis with our liberties intact.

Whether we do is, however, already far too close a question.

As we confront these challenges together, I am more grateful than ever for the extraordinary leadership of Ginny Sloan and her entire team at the Constitution Project. That is why I am so honored to receive its award. And why I thank you all for being here and giving it your support.