



The Impeachinator

By HARVEY SILVERGLATE | November 24, 2008

This past summer, the daytime drivel of ABC's *The View* was briefly interrupted by some actual substance. Their guest was Speaker of the House Nancy Pelosi, and her appearance, on July 28, came just days after fellow Democratic representative Dennis Kucinich had introduced legislation to impeach President George W. Bush. Pelosi, whose ascendancy was based largely on anti-Bush sentiment, was asked why, for the past two years, she had consistently opposed impeachment. Her response: it simply would be too divisive for the country, but "[i]f somebody had a crime that the president had committed, that would be a different story."

While some moderate Democrats agreed with Pelosi, her centrist appeal incensed the party's left wing. It sparked more than just liberal ire, however. Former Reagan-administration lawyer and lifelong Republican Bruce Fein also took strenuous issue with Pelosi.

Fein has spent the past two years rallying citizens (and their representatives) to push Bush and Vice-President Dick Cheney out of office — a message he shared in an impassioned lecture to a gathering of ACLU of Massachusetts (ACLUM) members on November 12. When a self-described conservative speaks for 90 minutes — without a single note or teleprompter — and leaves a (mostly) liberal room spellbound, one can't help but pay attention.

Fein's arguments, which he's been making on Capitol Hill and around the country to whomever will listen, have been collected in a small but power-packed volume that has just hit the bookstores, *Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy* (Palgrave Macmillan).

Process, not personality

A Bush impeachment is now moot, of course, as a new president prepares to assume office in January. But impeachment was *never* to be, notes Fein, not because it lacked legal

underpinnings (they are clear and numerous, as methodically delineated in *Constitutional Peril*), but because the members of Congress needed, as he put it to his ACLUM audience, "a backbone implant."

Fein has been a particularly prickly thorn in Bush's side, precisely because of his impeccable conservative and Republican credentials and the widespread respect he is accorded on both sides of the aisle. He voted for Bush and Cheney twice, before the revelations of abuse of power began to leak out. He also supported the appointments of Chief Justice John Roberts and Associate Justice Samuel Alito to the Supreme Court, as well as the previous nominations of Justice Antonin Scalia and the late Chief Justice William Rehnquist. He loyally served Ronald Reagan in a variety of capacities, believes that the Supreme Court's opinions protecting abortion and homosexual sodomy "created wretched constitutional law," and opposes affirmative action, although he supported, in his words, "the color-blind civil-rights movement of the 1950s and 1960s."

The conservative values that cause Fein to oppose creative judicial expansions of constitutional rights, however, also cause him to oppose "unchecked power [that] invariably degenerates into despotism." And he hardly reserves his venom for the Bush gang. Theodore Roosevelt, another Republican, abused power and engaged in impeachable offenses by tricking the nation into engaging in war, Fein claims. And Franklin Roosevelt, a Democrat, unlawfully and unconstitutionally put American citizens of Japanese ancestry into "concentration camps" based on racist lies told to the Supreme Court. While seeing Richard Nixon resign office in disgrace was "one of the highpoints" of his life, Fein told the ACLUM audience he would have preferred an impeachment trial. Any national trauma suffered, he says, would have been worth the establishment of a clearer precedent (and deterrent) for future lawless presidents, including perjurer Bill Clinton.

Fein, above all, respects process — it is not Bush that he despises; rather, it is the way in which the president has so brazenly flouted the Constitution he was sworn to uphold. As such, Fein warned the ACLUM that citizen vigilance against unchecked executive authority cannot stop when Barack Obama moves into the Oval Office. Indeed, the über-popular president-elect will inherit an executive branch that has seen unprecedented increases in power over the past eight years, and, in reality, for many decades. It'll be up to the people to hold Obama accountable to his promises of increased transparency and respect for our nation's founding documents. Fein, true to his nature, is skeptical — the tolerance of executive over-reaching, he believes, has become too deeply engrained in our political and constitutional culture.

President, Emperor, King

Throughout his decades of public service, in which he had access to a considerable body of classified, as well as recently declassified, national state secrets, Fein says he never came across a leak or disclosure that actually harmed national security. The harm, he warns, is actually done by the classification system itself, which is so overly inclusive that it keeps the nation from discovering executive folly until it's too late.

Fein deems the Bush administration's excessive and obsessive secrecy as the most corrosive element of the past eight years. He compares Bush's secret orders in the "war on terror" to "the practice of Roman emperor Caligula of writing laws high on walls in miniscule print to deny citizens fair warning of what was required."

In his book, Fein shreds the "state-secrets doctrine" that allows the government to claim potential damage to national security as a legal basis to dismiss lawsuits brought against abusive government officials by aggrieved citizens. "The state-secrets doctrine," writes Fein, "is a tyrant's dream policy." And as for the covert practice of extraordinary rendition — whereby CIA officials ship a captive to a cooperating country known to engage in torture — Fein describes it as an "ends justify the means" evasion, the folly of thinking that "the enemy will be defeated by aping the enemy."

For all of the time and energy Fein spends trying to spur members of the legislature to action (he has remarkable access to congressional leaders, who seek his advice on a wide variety of subjects, from telecommunications and energy to civil liberties and international law), he doubts that Congress will oppose any modern president.

"No person with active cerebral faculties," writes Fein, "can be optimistic about the survival of a Republican form of government and checks and balances in the United States." When Fein testified before the House Judiciary Committee this past July to urge impeachment, he was shocked to learn that "all pejorative references to President Bush or Vice-President Cheney insinuating deceit or impeachable high crimes and misdemeanors were censored under a House rule derived from the British Parliament's prohibition on voicing 'irreverence' toward the king."

Footprints in the sand

Fein, despite all of his political differences, transfixed the largely liberal ACLUM audience with his moral and constitutional fervor. (ACLUM Executive Director Carol Rose has already invited Fein for a return engagement, to address an even larger audience.) His is a message yearning to be heard and heeded in an age when, as Fein notes at the end of his book, "the overwhelming

majority of Americans are vastly more thrilled by sporting events and creature comforts than they are by the moral challenges and burdens of self-government."

Given his pessimism, one wonders why Fein maintains such a back-breaking schedule of exposing and opposing unconstitutional usurpations of power and betrayal of duty? "Anything else would be dishonorable," writes Fein. And, besides, by speaking out "you might leave footprints in the sands of time to inspire someone yet to be born to champion freedom in more propitious circumstances."

Let us hope those circumstances are, as of today, just some two months away. But those with faith that the Obama administration will diverge sharply from the war on liberty waged by George W. Bush should recall Reagan's approach to then-Soviet Prime Minister Mikhail Gorbachev's promises of *glasnost*: "Trust, but verify."

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