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# Presidential Trashing of American Law and Diplomacy

REMARKS FROM AND INTERVIEW WITH  
THEODORE C. SORENSEN

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*Theodore C. Sorensen was special counsel and adviser to President John F. Kennedy and is a widely published author on the presidency and foreign affairs. He joined Kennedy in 1953, shortly after Kennedy's election to the U.S. Senate, and served as one of his closest advisors and his speechwriter in both the Senate and the White House. In the Kennedy administration, Mr. Sorensen served as special counsel (1961-1963), with responsibility for both domestic and foreign policy, and played a critical role in the resolution of the Cuban missile crisis.*

*After leaving the White House in 1964, Mr. Sorensen remained involved in Democratic politics and public affairs. He is the author of the international bestseller *Kennedy*, published in 1965, as well as seven other books on the presidency, politics, and foreign policy. He is currently of counsel at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, where he practiced international law for over 36 years.*

*On February 9, 2006, Mr. Sorensen delivered the Charles Francis Adams Lecture at The Fletcher School of Law and Diplomacy in Medford, Massachusetts. The Fletcher Forum is proud to be able to publish a shortened version of his speech below, as well as remarks Mr. Sorensen made in a subsequent interview with The Fletcher Forum's Garth Schofield and Jacob Hamstra. A video of his full speech at The Fletcher School can be found at <<http://media.web.tufts.edu/fletcher/sorensen/sorensen.mov>>.*

I'm going to talk about law and diplomacy, the two lodestars of my own career both as a public servant and as an international lawyer, and the two lodestars that have guided this country since its earliest days. These two lodestars are also essential now, in a globalized world where marketing, investment, trade, travel, transportation, and everything else requires both law and diplomacy if there's not to be chaos. And so I want to talk about the both of them because they are so important, and also because I'm afraid they are both, in this country, in peril.

Law and diplomacy are indispensable. They are also interconnected. If law is going well, that facilitates diplomacy going well. If diplomacy goes well, it strengthens law's ability to go well. They are inseparable. If we mess up diplomacy in an ugly world, the pressures and threats on this country may require us to bend the law a little bit to respond to those threats. That is happening today.

I want to illustrate the importance of both law and diplomacy. On October 16, 1962, the President of the United States called me into his office to tell me that Soviet nuclear missiles had been found on the island of Cuba, 90 miles from our shores, and he was calling a meeting—not in a few months, not even in a few days—he was calling a meeting that morning to see what could and should be done about it. From our viewpoint, the law was extremely important in shaping the answer. We decided not to move ahead with a preemptive air strike against those missiles for fear that it would precipitate mankind's final war, choosing instead a more restrained approach: a blockade.

A blockade could also be an act of war, and the President was well aware of what the United Nations Charter required and wanted to act in a manner consistent with it. He called the blockade a "quarantine"—not a blockade keeping out food and petroleum, oil and lubricants, but a quarantine against offensive weapons.

We also emphasized, in the President's report to the country and the world six days later, that this was a regional problem. The UN Charter provides for regional arrangements for peace and security and regional acts of self-defense. And he made it clear that we were going to apply to the Organization of American States (OAS) for the adoption and endorsement of this quarantine.

Moreover, if you take a look at the speech, you will find it was full of references to the Rio Pact and to the OAS Council of Ministers and to a variety of positions that they had taken. The President made it very clear on that evening of October 22 that the United States would put this matter before the UN Security Council and would show the evidence of these nuclear missiles, which had a range capable of reaching, he said, almost any part of the hemisphere. That's how important the law was to us.

So was diplomacy. The President personally called the prime minister of Great Britain, and he sent the highest possible envoys to brief the president of France, the chancellor of West Germany, and the NATO Council. To brief the somewhat imperious Charles de Gaulle, he selected our most senior statesman, former Secretary of State Dean Acheson. Mr. Acheson went into President de Gaulle's office and handed him a copy of President

Kennedy's speech from October 22, which laid out exactly what we were doing and the reasons for it. He then said: "out in your waiting room, Mr. President, is a United States Air Force Colonel, who has the pictures of these Soviet nuclear missiles—just to make clear that we are sharing the evidence of this threat to world peace and security." De Gaulle waved him off and said: "No, the word of the President of the United States is good enough for me." That was then.

This is now. Now the word of the President of the United States is not respected in most parts of the world. Now the United States has paid very little attention to either international law or domestic law. We bypassed the UN Security Council in launching a preemptive strike against Iraq, claiming the presence of weapons of mass destruction which posed, we were told, an imminent threat to the United States.

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We continued down that same course. We withdrew from the protocol of the world court, the International Court of Justice, even though it had been invaluable to us when our own hostages were taken by the Iranians at the end of the 1970s. We even said that the Geneva Conventions could be ignored because this was a different kind of war. The people now in power think that international law is optional, that it is political, that it is not binding. We can choose it when it is to our benefit; we can ignore it when it is not.

Domestically, our treatment of law has been very much the same. Hearings have been held this week about a system of massive tapping, without warrants, of telephones and emails of citizens of the United States. This is happening despite the fact that Congress, back in the late 1970s, enacted a statute, the Foreign Intelligence Surveillance Act, under which a special court was established so that law enforcement officials could no longer say, in times of international emergency, things like "it takes too long," "it's too cumbersome," or "it's too likely to leak to the public," as an excuse not to apply for warrants.

But the Foreign Intelligence Surveillance Act, and the special court established under it, have been bypassed because of claims that the President has inherent power in times of war—inherent power under the Constitution. They forget the history of the Constitution; the Constitution, which arranges the governing powers of the United States,

could not have been adopted without adding the first ten amendments—the Bill of Rights. The people insisted not only on knowing what the powers of government would be, but also what the rights of the citizens would be vis-à-vis those powers. Those rights included the Fourth Amendment, under which the people of the United States are safe in their homes from undue invasions by government.

To say that an executive order can bypass the Fourth Amendment to the Constitution is extraordinarily poor law. I read the highlights of the document that the Justice Department put out, the precedents and references and sources allegedly justifying this warrantless wiretapping by the computers at the National Security Agency in Maryland, under order of the President of the United States in his role as commander-in-chief. A new phrase has emerged—commander-in-chief of the country. The President is

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not commander-in-chief of the country. We don't have a commander-in-chief of the country. We don't have a king. He's commander-in-chief of the armed forces of the United States, which is a very different thing indeed.

Some smart politicians thought that a war president would get the people to rally around him for reelection, and some smart lawyer thought that a war president would have extra powers that would not otherwise be

available. But Justice O'Connor—and, God, we miss her already—said, “A state of war is not a blank check for the President when it comes to the rights of citizens.” That is absolutely correct. This Justice Department document, as a justification of how the President could bypass the Fourth Amendment and an explicit statute of Congress, in my humble opinion as a long-time lawyer, simply doesn't measure up.

It goes on. The International Criminal Court (ICC) could have been the court where Saddam Hussein was tried, at least for those offenses where the crime fit the ICC jurisdiction. We've not only backed away from it, we have done everything possible to undermine it and to intimidate smaller countries into backing away from it and granting immunity to the United States, should any United States soldier commit crimes against humanity.

President Clinton signed the ICC treaty. He didn't have quite the good sense or courage to send it to the Senate, where he knew it would be defeated, but at least he signed it. The current administration said it was

“unsigned” it. This may or may not be a word in the dictionary—it certainly has no precedent in international law—but the administration “unsigned” the ICC, just as it backed away from the Anti-Ballistic Missile Treaty, even though it was the foundation of whatever arms limitations we have in the nuclear age.

We’ve also begun this terrible practice called rendition, which sends prisoners, many of whom are already in Guantanamo or elsewhere, to a secret network of detention centers around the world without access to a judge, a lawyer, or any review of their guilt or innocence. There they can be tortured, sometimes by Americans who are violating the War Crimes Act passed by Congress, which specifically prohibits Americans from engaging in such acts. Or they’re turned over to other countries that have no such statute and are less likely to feel guilty about conducting acts of torture at the request of the United States.

How can this be? How can our country have changed so dramatically, so drastically, since those days when Kennedy was calling for a world of law, when he was resolving the Cuban missile crisis by negotiating with the enemy, by isolating the enemy? We didn’t kill a single Russian in order to obtain the removal of those missiles. That’s why I deplore the state we’re in.

Now, in a democracy, that kind of error is supposed to be self-correcting. The Constitution does provide two different provisions for removing a

President who has, to use Shakespeare’s phrase, “traded the state.” One is the people denying a second term, and that didn’t work a year and a half ago. The other is to determine whether the violations of all of these laws constitute high crimes and misdemeanors. This is a very divisive question, and it’s a political question, I realize. And it’s an academic question, so long as Congress, its committees, and the chairmanship of the two judiciary committees are in the hands of the President’s own party. A time when the

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courts, the Congress, and the executive branch are all under the control of one president and one party is not a good time for a democracy, or for holding government accountable.

I want to close with three statements from different eras of our country’s history, which I think make my point pretty well. This is from the pamphlet that fueled the revolution, *Common Sense*, by Tom Paine:

But where, say some, is the King of America? I'll tell you Friend, . . . let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.<sup>1</sup>

That was Tom Paine, 1776.

The next quote comes from one of the great justices of all time, Justice Brandeis, who practiced law in Boston, not far from here. At a time of another scare, 1928, he said in one of his opinions:

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>2</sup>

And then Justice Frankfurter, some years after that in 1947, picked up on that same theme and said:

There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process.<sup>3</sup>

I love this country. I do not want to see it descend into either chaos or tyranny, and therefore I'm speaking out, and I'm glad to be here today.

*Following his remarks at The Fletcher School, Mr. Sorensen spoke with The Fletcher Forum's Garth Schofield and Jacob Hamstra on March 16, 2006, from New York City. He discussed the role of law and the United Nations in American foreign policy and the process of restoring America's credibility in the world.*

**FORUM:** *You stated in your speech that America's credibility has been damaged by its disregard for diplomatic coalition building and international law in the run up to, and aftermath of, the invasion of Iraq. Do you believe it is possible to rebuild this credibility around the world? If so, what would it take to accomplish this?*

**SORENSEN:** Yes, it is possible, but it will take a long time, an entirely new kind of leadership, and better diplomacy. We must demonstrate by actions, not merely by words, that we embrace and accept international law, and that we are willing once again to be leaders in formulating international agreements and institutions, as we did following World War II.

**FORUM:** *Do you believe there will be instances in the future, as there have been in the past, when the United States will have to act unilaterally? What approach would you recommend for decision making in those circumstances?*

**SORENSEN:** The UN Charter is not intended to limit or deny a nation's inherent right to self-defense. This means you can act unilaterally, as long as you demonstrate that there is a real danger of imminent attack with weapons of mass destruction or other threats of that kind. The UN Charter also includes provisions for regional security and defensive arrangements. That's why, during the Cuban missile crisis, President Kennedy took steps to get the OAS to endorse and participate in the quarantine against the Soviet Union to prevent it from sending more offensive weapons to Cuba.

I do not think that a more multilateral, law-abiding America would be defenseless or more vulnerable than it is now, especially considering that our current actions antagonize the rest of the world and seem to be building more resentment and creating more enemies.

**FORUM:** *As an international lawyer, do you believe that regional organizations, such as the OAS or NATO, provide sufficient legal authorization for the use of force in the absence of UN Security Council authorization?*

**SORENSEN:** I agree with Secretary-General Kofi Annan when he says that international law hasn't yet caught up with international practice. The NATO campaign in Kosovo was one example of that. I haven't the slightest doubt that if we encourage the UN and international legal scholars and diplomats to proceed on these matters, in time, international law will catch up.

**FORUM:** *The Bush administration likes to say that the world changed on September 11 and has justified much of its willingness to depart from international law on the basis of the threat from nonstate actors. However, you seem to be saying that any threats we are facing now from al-Qaeda and other terrorist groups are just a new version of what has come before.*

**SORENSEN:** That's right. The administration very cleverly chose the phrase "war on terror." No one can think of any previous war being declared

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against a form of battle. It is like saying that, during World War II, instead of declaring war on Germany and Japan we should have declared war on blitzkrieg, which doesn't make any sense. But using the language of war has led to some political and legal—or allegedly legal—gains for the administration. The President managed to assert that he's a wartime president. The attorney general and legal counsel to the president were able to argue that

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the Geneva Conventions did not apply. These arguments are very dangerous. I agree with former Supreme Court Justice Sandra Day O'Connor, who has said that a condition of war does not give the President a blank check.

Moreover, the United States has in previous times been confronted with ideological movements. The Communists had state backing, but they did not always act in the form of organized, government-led armies. The Soviet "wars of

liberation," which tried to light fires throughout the Third World, represented a similar technique, and the United States prevailed. Ultimately, a country is protected both by its values and its vigilance, not by killing all the members of its adversary's team. We didn't kill all the Communists, but we prevailed in the Cold War through our superior values and vigilance.

**FORUM:** *Are there any elements of the Bush administration's foreign policy that you think are beneficial and that would be worth continuing in the next administration?*

**SORENSEN:** At one point, they did talk with a number of other countries about some specific steps to counter the proliferation of nuclear weapons by interdicting the sales of nuclear arms and missiles. This was the right approach. Unfortunately, they seem to have turned the other way now, by contributing to the decline of the nonproliferation regime through a new agreement with India that is going to facilitate India's admission to the nuclear club.

**FORUM:** *What do you think of this recent U.S.-India nuclear agreement? What kind of effect do you think it will have on the nonproliferation regime?*

**SORENSEN:** It will have a very adverse effect on the Nonproliferation Treaty. It will certainly set off a nuclear arms race on the Indian subcontinent, as Pakistan tries to ensure that India doesn't get too far ahead. It will also tell the North Koreans, the Iranians, and others that when the United



States denounces them and threatens them, we aren't too serious about nonproliferation.

*FORUM: Another aspect of the Bush administration's foreign policy is at least a verbal emphasis on democratization. Do you think that the promotion and support for democracy should play a role in U.S. foreign policy, and, if so, in what capacity?*

**SORENSEN:** I'm not opposed to democratization or to the United States promoting and protecting democracy. I am, however, opposed to the United States trying to impose democratization by force of arms. I think it is a contradiction in terms. Democracy, by definition, has to spontaneously arise from the people themselves. It also takes a lot of time. Countries that are accustomed to generations of tyranny and repression are not going to adopt democracy overnight, nor be able to manage it in a suitable, effective way just because the United States tells them to. Moreover, we all—including the administration—should remember that democracy is a lot more than elections. I used to say that one election is a start, but only a second free and fair election, and then a third, shows that democracy is taking hold. But in addition to that, you have to have opposition parties, a free press that is able to criticize the executive branch, and independent tribunals and other dispute resolution institutions. Those are all important parts of a democracy, and they are not quickly established or easily imposed from the outside.

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*I am opposed to the United States trying to impose democratization by force of arms. Democracy by definition has to spontaneously arise from the people themselves.*

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*FORUM: When you were serving in the Kennedy administration, promoting democracy in Latin America was a significant part of U.S. foreign policy. How was President Kennedy's focus on democracy in Latin America different from what the Bush administration has been doing?*

**SORENSEN:** The Alliance for Progress was all about Latin America working together with the United States to strengthen its political and economic institutions at the same time. We thought that Latin American governments who wanted more financial assistance from the United States should prove that they were interested in the development of democratic institutions at the same time that they were interested in strengthening their economic institutions. It was very much a collaborative effort.

President Kennedy did not send a single battalion to any Latin American country to impose democracy as part of the Alliance for Progress.

*FORUM: Mr. Sorensen, what do you think about the proposed reforms of the UN Human Rights Commission and the expansion of the Security Council?*

**SORENSEN:** I think that substantial change at the UN is necessary. I think that the new, proposed Human Rights Council is a very important reform. Yes, the wording of the new proposal is not perfect. John Bolton and his lawyers could find ways to improve it, but it is absurd for the United States to completely reject the proposal outright. As President Kennedy sometimes used to say, “The perfect is the enemy of the good.” Additional reforms were proposed, but Security Council reform is, frankly, unlikely to happen in my lifetime. After all, the five permanent members can veto any reform that might dilute their power.

*FORUM: In the past, you have stressed the importance of diplomacy, international law, and international institutions in guiding American foreign policy. How do you turn respect for these elements of international affairs into something that ordinary people will care about in future elections?*

**SORENSEN:** That’s a very good question. It takes leadership, statesmanship, and courage on the part of the opponents to this administration, and, in my opinion, they haven’t stood up for what’s right and necessary. But I don’t rule out the possibility that somebody will. After all, John F. Kennedy was a peace President because he had experienced the horrors of war and was able to educate and lead the American people in that direction, so that his policies, including the Nuclear Test Ban Treaty and a peaceful resolution of the Cuban missile crisis, were widely supported.

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At a recent conference on Vietnam at the Kennedy Library, a former U.S. serviceman and previous prisoner of war told us how thankful he was that American leaders were not at that time undermining the Geneva Conventions and that there had been no American guards in foreign prisons—like Abu Ghraib—torturing and mistreating detainees. He, in effect, said that if his jailors had heard about Americans abusing prisoners of war, he wouldn’t be here today—at least, not in one piece. That had a tremendous impact on me, and I’m sure it had a tremendous impact on everyone listening. We have to realize that what we do as a country has consequences, and those consequences can come back and

hurt us. It is in the interest of our own national security that the rule of law applies everywhere.

*FORUM: While you were at The Fletcher School, you said that the reason you want to speak out is that you do not want to see the United States descend into chaos or tyranny . . .*

**SORENSEN:** Yes. If the government becomes a lawbreaker, if one man can decide the law for himself, we pave the way for anarchy and tyranny. We've got to stop the breaking of the law by this president, by this administration. We've got to return to a rule of law that is uniformly applied. Laws against torture, warrantless wiretapping, and the indefinite detention of prisoners without access to lawyers or courts are all current practices that violate the law. We ought to start enforcing the law.

*FORUM: Mr. Sorensen, thank you so much for sharing your views with The Forum. ■*

#### **ENDNOTES**

1 Thomas Paine, *Common Sense* (Philadelphia: W. & T. Bradford, 1776), available at <[www.bartleby.com/133/](http://www.bartleby.com/133/)> (accessed April 11, 2006).

2 U.S. Supreme Court, *Olmstead v. United States*, 277 U.S. 438 (1928), at 485.

3 U.S. Supreme Court, *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), at 312.

