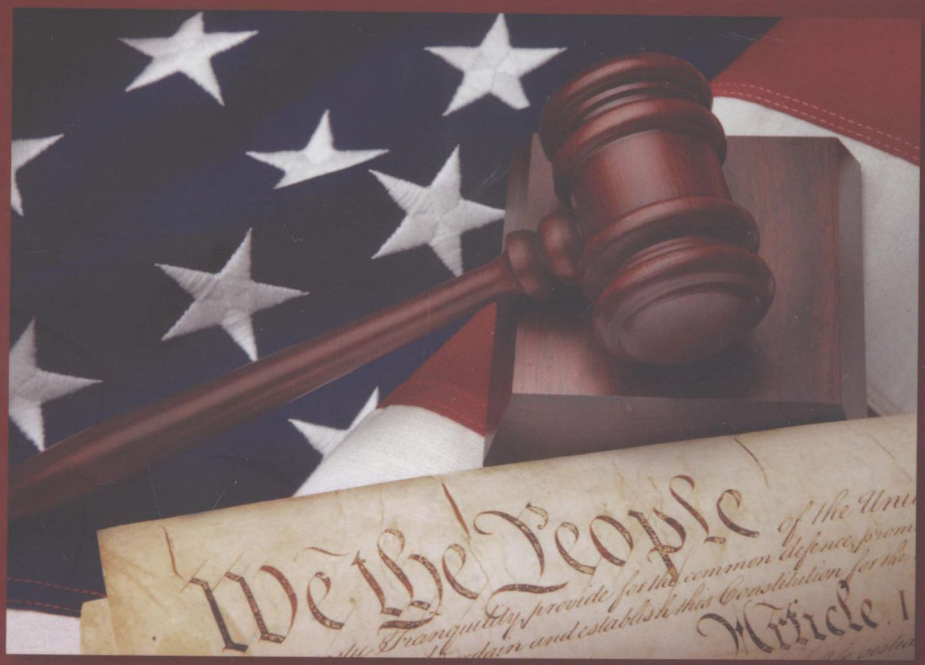
A NATION OF LAWS

America's Imperfect Pursuit of Justice



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PETER CHARLES HOFFER

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America's Imperfect Pursuit of Justice

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A Nation of Laws

For Stephen Botein, classmate and friend,
and Kermit Hall, mentor and patron.
They are greatly missed.

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sense, and decency. He is a super editor-in-chief. Assistant director Susan Schott wrote that she was "jazzed" by the prospect of marketing the book, and coming from flat out the best marketing director in the business that is just what any author wants to hear. My thanks to all of them, and to you for opening the book. Enjoy!

Introduction: A Nation of Laws

On May 21, 2009, President Barack Obama spoke to the American people about the continuing threat of terrorist activity. He promised that the government would remain vigilant, but he added,

> My own American journey was paved by generations of citizens who gave meaning to those simple words—"to form a more perfect union." I've studied the Constitution as a student, I've taught it as a teacher, I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as Commander-in-Chief, and as a citizen, I know that we must never, ever, turn our back on its enduring principles for expedience sake.

The president, a lawyer and the foremost law officer in the land, reminded his fellow Americans that "we are a nation of laws."[1]

The ideal that President Obama held aloft goes back to the founding fathers. They, too, extolled a nation of laws, for only a settled law, fairly enforced, could protect liberty and property in the new republic against corruption and tyranny. As John Adams in retirement recalled his response to British depreda-

tions on American liberties in the midst of the revolutionary crisis, "is this the conduct of a good judicial character in a free country, and under a government of laws"? The answer was as plain to him in 1816, when he penned his recollection, as in 1776, when he voted for independence. The ideal was "good laws, and such as were well calculated for the support of liberty."[2]

Adams's and Obama's professed faith that we are a nation of laws is reassuring in a world of lawless terrorism. Our leaders should adhere to this doctrine. But lest we adopt a self-satisfied or celebratory view of our legal history, we should return to the historical moments to which Adams and Obama referred. The controversies that led to the American Revolution were primarily legal, a bare-knuckled resistance to the imposition of parliamentary regulations in the colonies. Lawyers on both sides traded blows. Did Americans have a legal right to their property and persons or were these privileges that the crown could rescind at will? To vindicate those claims of rights, Adams and the other revolutionaries violated oaths of obedience to the crown and supported the violent overthrow of the home government.

When Obama spoke to the nation, he conceded the illegal means and methods his predecessors had adopted to counter suspected domestic terrorism. "Faced with an uncertain threat, our government made a series of hasty decisions." Obama admitted that those decisions violated our own and international law. They "failed to rely on our legal traditions and time-tested institutions." He promised that "my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law," but in fact he did not jettison all of the extra-constitutional expediencies of the former administration.[3]

It is true that the law in America has always been the foundation of a way of life. From the inception of the nation, through all its travails and triumphs, law has woven its way. Law is the mark and measure of American democratic republicanism. Its

lawgivers are not an elite aristocracy nor a divinely chosen few. Instead, they are the representatives of the people. Americans are legal actors on a scale unparalleled in history. Much of American law is made by the people themselves when they choose to litigate for their rights. The law belongs in a very personal way to all Americans.

It is also true that most of America's lawmakers are politicians, and they make and interpret law to suit partisan interests and ideologies. As a result, not all Americans have been equal under the law. In our past, some enjoyed all the benefits of citizenship. Some were excluded from many of those benefits. Some were never even accorded the status of persons under the law. The concept of a nation of laws is not self-actuating. It is a contested ideal.

Legal history teaches us that the course of the law in America has not been a linear progress from inequality, privilege, and narrowness of spirit upward toward liberty and dignity for all. Instead, the law has crawled crabwise over the landscape of our history, pulled and driven by competing notions of rights and duties. The result is not a single path of the law, but a multiplicity of paths, some deeply trodden, others ending abruptly, going nowhere. A clear view of our legal history reveals ambiguities and contradictions, quarrels and confrontations. These mirror the struggles within American history itself, for Americans turned to law to resolve conflict. When they did, they etched that conflict on the face of the law. But those controversies allowed many Americans to join or comment in the lawmaking process, reinforcing the central role of law in American life.

A Nation of Laws is a collection of interpretive topical essays on our legal history. It introduces the complexities of our laws, the diversity of our lawmakers, and the way in which our law informs events and ideas in our political, economic, and social history. It argues for the vitality of our legal institutions and tracks the failures of our law. Each essay stands on its own. Each

addresses the larger question of whether we are a nation of laws, and whether those laws apply to all of us fairly.

Four brief notes complete this introduction. First, this is not a work of jurisprudence. I offer no comprehensive theory of how law works or should work, but it may be useful to note in passing that one school of jurisprudents, called legal positivists, define law as the command of the state that one must obey or face consequences. For other philosophers of law, law is the will of the citizenry that the state embodies in its statutes and judicial decisions. Law that does not fit the values of the community will not be obeyed. The historian of law who finds merit in both of these definitions, as I do, will naturally see a law that sometimes wars with itself.

The second note concerns the boundary between legal history and constitutional history. By a convention lost in the mists of time, historians, political scientists, and jurists divide American legal history into constitutional history and legal history proper. The former focuses on the text of the federal Constitution and the decisions of the U.S. Supreme Court, the latter on the substantive and procedural law and to some extent the conduct of lawyers, legal education, and the legislatures. They are taught in distinct courses and books about them are wary of crossing over some sort of invisible border between them. I believe that constitutional history is a part of legal history. There is no bright line distinction between the two subjects. The High Court is wont to offer its opinion on matters well beyond the scope of the Constitution and the penumbras of the Constitution reach into the farthest corners of everyday legal activity. It is all of a piece and all of it belongs in any introduction to American legal history.

Third, I offer here a particular definition of nation. I do not mean the nation state of the political scientists or the historical geographers. My nation is less fixed in time and place. It is America, and I range in time from the Pilgrims to the present. I hope this somewhat impressionistic sense of nationhood is not

untoward. For in truth many of our laws, and surely our ideal of law, predate 1776 or 1787. Some of them came with the Pilgrims and some the Pilgrims found among the native peoples.

The fourth and final note: although terms and concepts of "black letter law" appear throughout this book, it is not a law book. I am interested in historical events and changing ideas of law more than hornbook (legal textbook) detail. But as in the previous sentence, I have tried to give short definitions for "terms of art," words whose meaning in law is not what it is in common parlance. For example, the execution of a writ is not the legally sanctioned murder of a writer, but the delivery of a court order by the appropriate official to the appropriate party to a lawsuit.

A Nation of Laws

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Prologue: Slavery and Race Law

This is the story we would like to tell about a nation of laws: We would like the great ideals of freedom and equality to be not just empty words but concepts anchored in law. We want to believe that "the Constitution and the Bill of Rights . . . stressed rights against the state and other powers. America began and continues as the most anti-statist, legalistic, and rights-oriented nation." As Chief Justice Earl Warren wrote in the companion to *Brown v. Board of Education, Bolling v. Sharpe* (1954), a decision striking down school segregation in the District of Columbia, "our American ideal of fairness" is embodied in concepts like "equal protection and due process" of law.[1]

But this is only half of the story, and it is important to know the rest. For if we are a nation of laws, that law seems to wear two faces. It promotes and it denies; it enables and it punishes; it protects some and not others.

The founders of the American nation believed that the fount of all law should be the sovereignty of "the people." They rejected the monarchical lawgiving of their former colonial masters and substituted for it constitutions based on voter ratification. As Thomas Paine wrote in "Common Sense" (1776), "A government of our own is our natural right." Virginia's Thomas Jefferson captured the spirit of this new legal regime of rights in the Declara-

tion of Independence. He wrote that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[2]

But everyone in the Continental Congress who voted for the Declaration of Independence knew that Jefferson owned slaves, and that slaves, along with women, Catholics, Jews, Indians, and a host of others could not give their consent to the new government because they could not vote. While Jefferson and his fellow committeemen drafted the Declaration, George Mason and other Virginia planters were writing slavery into the state's first constitution. Mason believed devoutly in the notion of human rights and would be one of the authors of the Bill of Rights. Privately Mason called slavery "that slow poison, which is daily contaminating the minds and morals of our people." But when he and his fellow revolutionaries reused the language of the Declaration as a preamble to the state constitution, they added to "all men" the phrase "when in a state of society." They thus consciously excluded slaves, who could not, because they were property, ever be in a state of society. For Jefferson and Mason, the law's two faces were inescapable.[3]

The highest law of the land, the federal Constitution, never mentioned the word "slavery," and that omission was made on purpose to avoid South Carolina and Georgia walking out of the convention, until the Thirteenth Amendment in 1865 made slavery unconstitutional. But slavery could not exist without the protection of law. Without laws friendly to slave owners, their treatment of men and women they enslaved would open them to criminal prosecution for kidnaping, false imprisonment, assault and battery, and perhaps even rape and murder. State law enabled slavery.

The framers of the federal Constitution conceded to the slave states a so-called Three-Fifths Compromise, allowing slave states to count three-fifths of their bondmen and women for the purpose of congressional apportionment, even though the slaves were property, not persons, under state law. The Rendition Clause of Article IV, section 2, "no person held to service or labor in one state, under the laws thereof, escaping to another, shall . . . be discharged from such service or labor, but shall be delivered up, on claim of the party to whom the labor or service is due," patently referred to runaway slaves. In 1793, Congress passed the first Fugitive Slave Act, stating that no state "shall entertain, or give countenance to, the enemies of the other, or protect, in their respective states, criminal fugitives, servants, or slaves, but the same to apprehend and secure, and deliver to the state or states, to which such enemies, criminals, servants, or slaves, respectively belong" providing the enforcement mechanism for the Rendition Clause. A nation of laws accommodated slavery.[4]

Antislavery thought was not a major impulse in America until the nineteenth century, but by the 1830s abolitionists were reading the federal Constitution in the light of the Declaration. Abolitionist legal theorist Lysander Spooner argued that the true and only foundation of law was moral right, a principle of "natural justice" that must mean slavery was illegal. The Constitution, rightly interpreted, in fact the only way that it could be interpreted, was in favor of freedom. "As a legal instrument, there is no trace of slavery in it." The absent word "slavery" could not be reintroduced by statute or judicial interpretation. In *Commonwealth v. Thomas Aves* (1836), Chief Justice Lemuel Shaw of the Massachusetts Superior Judicial Court determined that

> each sovereign state, governed by its own laws, although competent and well authorized to make such laws as it