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WHY DO WE DO IT?*

Larry S. Pozner**

The questions comes in many forms and many voices. Often with a tinge of anger, sometimes with a true sense of inquiry, rarely with a sense of admiration. What do you do? And then: Why did you pick that career? Or how can you defend those people?

We each have our public answer. We each have our personal reasons.

Sometimes I think the easiest answer is a question: What would happen to America if we did not exist?

In the absence of an American Criminal Defense Bar to challenge the rightness of government accusations, the power of the government would be absolute. Americans would seldom be angered by a “not guilty” verdict because few would ever occur. Other nations have adopted systems where the government’s accusation is equivalent to proof beyond a reasonable doubt. Other people have lived under the “protection” of such an infallible system. Those who govern may prefer such a system. But those who are governed do not.

The citizen left unprotected by a defense lawyer armed with the Bill of Rights must pray that their government is righteous, virtuous, perfect. Without guilt or malice, slow to anger, tolerant of dissent, racially and ethnically blind. Without guile or malice. The citizen without rights must pray that they or their loved ones are never accused, for without the protection of an adversary system and a presumption of innocence, an accusation equals a conviction.

The Founders of our nation did not believe that such an infallible government would ever exist. America’s history supports their view.

I. INTERNMENT OF JAPANESE-AMERICANS

We have learned how quickly good people can be frightened into destroying liberty on the pretext of preserving it. We still remember the Nisei and the Issei and what was done to them. Done to them by American citizens—our citizens—good citizens.

December 7, 1941. The bombing of Pearl Harbor. Immediately, without evidence, the Japanese-Americans living on the West Coast were suspected of disloyalty solely because they had Japanese ancestry. No witnesses, no charges, no trials. Just punishment which the government called “internment.”

January of 1942, the FBI began raiding the homes of Japanese-Americans, looking for signs of espionage. It didn’t matter that they found nothing suspicious.

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Soon, Japanese-Americans' homes and businesses were seized. Their families uprooted. Their careers, their dreams, their freedom destroyed. Only their dignity remained—but we cannot say the same for America. Everywhere the Japanese-Americans went, they were refused service. In restaurants, filling stations, grocery stores. The Governor of Kansas ordered police to stop the Japanese at the state line. The Nevada Bar Association stated, "if Japs are dangerous to Berkley, California, they are likewise dangerous to the State of Nevada."

On March 27, 1942, the remaining Japanese in California were given just 48 hours to dispose of their businesses and their homes.

The Japanese-Americans were first shipped off to "assembly centers." Each family was issued tags with a number to attach to their luggage and to themselves. In Washington State, Japanese-Americans were each allowed to take two suitcases. No one knew what to pack because no one knew where they were going.

The government called them "wartime communities." In these bleak camps behind barbed wire, 120,000 Japanese were forced to live under constant supervision. At night, search lamps continuously scanned the camps.

At Tanforan, California, many evacuees lived in old horse stalls. Manzanar, California, while it offered a beautiful view of mountains, was actually located in a desert, as were the other camps.

But it was legal. There was an Executive Order and a Supreme Court decision, and so off to the camps.

Why do we do it? Because we remember: The government can focus our fears on an undeserving target. Whether it is communism or sex or drugs, Americans will become the warriors in the cause, even if the cause is not just.

II. MCCARTHY ERA

Why do we defend "those people?" Those people who did "those things." Why do we do it?

Because the line is always shifting—the despised group, the ones who somehow are to be presumed guilty. Who are those people and what are those things that are too deplorable to be defended?

HUAC: the House Un-American Activities Committee was established by Congress in May 1938 to investigate "un-American groups." HUAC members looked at the American Nazi Party and the Ku Klux Klan, but it was communism that intrigued them most.

In 1951, Washington reporters ranked Wisconsin Senator Joseph McCarthy "the worst Senator." Judged rock bottom among his 95 colleagues, McCarthy needed an issue to get himself re-elected in 1952. He chose "The Red Menace." Five ugly years of "red baiting" followed.

It was a time of "guilt by association." McCarthy accused government employees of being communists, or tried to link them to left wing groups that had communist members or people who knew communists. At one point, he even wanted police to investigate the link between homosexuality and communism.

McCarthy went after “those people”—our citizens who mistakenly believed that the First Amendment protected their right to debate the merits of socialism.

And some in our government would not tolerate such a debate.

We were introduced to the politics of fear. We got a taste of a system based on “substantial cooperation.”

Why do we do it—why do we go to trial in behalf of even those who would challenge our own cherished system of government? Because we remember that time when no trials were necessary, only vague allegations:

“We have information.”

“Do you deny?”

“Are you now or have you ever been”

And the result? By the end of 1953, McCarthy had yet to find a single communist in the government.

And it was all done by over-zealous members of our government. Worse, all done in our house of government. All done by politicians who assured us the best way to preserve America’s freedom was to ignore our Constitution.

The politicians and prosecutors argued: If the First Amendment protects suspected communists—then do away with it. Now 40 years later, the politicians and prosecutors argue if the Fourth Amendment protects suspected drug dealers—do away with it.

Why do we do it? Because we didn’t believe the politicians and prosecutors then and we don’t believe them now.

And the politicians always reassure us: Our government will survive and only a bit of the Constitution will die.

Why do we do it? Because we fear: Freedoms can disappear one compromise at a time. Oppression can thrive one decision at a time. Justice can evaporate one injustice at a time. And because we too vividly recall when America was wholly divided by race.

III. MONTGOMERY, ALABAMA—DECEMBER 1955

Rosa Parks, tired after working all day, refused to give up her seat to a white man when she was asked to move to the back of the bus by the bus driver. She explained to the driver she wasn’t in the “white” section and she wasn’t going to move. The white driver told her “the white section is wherever I want it to be.” And Rosa Parks just happened to be sitting in it.

Rosa Parks was arrested, and fingerprinted, and thrown in jail. Her crime: violating the municipal segregation ordinance. The law. She was fined \$14.

As the years went by, more and more pictures showed up on the evening news, and even if we were too young to understand the politics, the images seeped through to our conscience. Fire hoses being turned on children. The force of the hose was so strong it knocked the bark off of the trees. A bus aflame. And we took note of the actors in the play. People with badges aimed the fire hoses. Law enforcement agents turning loose the German Shepherds. Our military holding guns on our own citizens. Citizens wearing signs saying “I am a man.”

I want to know, why did an American, in fact, why did any human being have to wear such a sign?

This country was birthed by a document that says—“All men were created equal.”

Why do we do it? Because we are waiting for America to live up to its words.

Eleven million blacks were deprived of the right to vote through poll taxes and trumped-up literacy tests.

Why do we do it? Because we remember Schwerner, and Chaney, and Goodman, the three young civil rights workers murdered in Mississippi in 1964.

We remember the ugliness of the majority and the oppression of the minority and it scares us.

We remember a time when the National Guard had to protect children trying to go to school.

Racial discrimination was not just the custom of the community. Legislatures put discrimination on the books, law enforcement agents brought charges. A government decreed “Whites Only” at the water fountain or public restrooms. A government made it illegal for blacks to eat at a restaurant. A government put its blessing on ethnically, racially and religiously restrictive covenants.

Why do we do it? For some it is because we remember the lessons:

Just because the majority favor it does not make it right.

Just because the act was forbidden it does not make it wrong.

Just because the law is upheld does not mean justice was done.

Why do we come to this profession? Why do we make such sacrifices? Why do we daily go to court to defend those our community detests?

Some of us remember Dr. King’s words in Birmingham: “I am here because I was invited here. I am here because I have organizational ties here. But more basically, I am in Birmingham because injustice is here.”

IV. ANTI-WAR MOVEMENT

The 1960s—Vietnam—the government spies on its own citizens. We always suspected as such. The FBI infiltrated lawful organizations of American citizens whose crime was that they dared to dissent. We were introduced once again to the government agent provocateur.

August 1968. Chicago. The Democratic National Convention. Yippies, hippies, anti-war demonstrators and McCarthy supporters all converged on Chicago to protest the Vietnam War. Armed with M-1 rifles, army carbines, shotguns and tear gas, 5600 National Guardsmen begin mobilizing and practicing mass attack and arrest tactics a week before the convention. For crowd control, there were 25 military jeeps equipped with razor-sharp barbed wire.

When the convention began, there were 1000 federal agents in Chicago. Half-way through the convention, it was estimated that one in six demonstrators was an undercover government agent.

What was the government so afraid of?

When American citizens demonstrated, the politicians and police reacted. The Chicago Police waded in with the nightsticks and tear gas as our generation

chanted: "The whole world is watching." And it was true—the world was watching and this is what it saw: The police rushing in, attacking everyone with clubs—kicking them—hitting them—protestors, reporters, delegates, innocent bystanders, medics.

On the night of Hubert Humphrey's nomination, 4000 demonstrators were in front of the Hilton. Some of them fell through the plate glass windows, and the police continued to beat them while they were laying there, bleeding. The TV cameras were on, and the crowd shouted, "The whole world is watching." It is estimated that 89 million people were watching the convention that night.

The police wore tape over their badge numbers so they could not be identified. When police reinforcements were called in that night—August 28, 1968—they rushed off their buses yelling: "Kill! Kill! Kill!"

Bobby Seale—A founder of the Black Panther party who had been invited by Tom Hayden to speak in Chicago, was later arrested for conspiring to cause a riot. He became part of the "Chicago 8."

At his trial in the fall of 1969, Bobby Seale was bound and gagged by Judge Hoffman after Seale called the judge a racist. Seale also stated that if his California attorney couldn't defend him, he wanted to defend himself. When Seale tried to speak with the gag on, the marshals then put adhesive tape across his mouth.

May 1970, Kent State. After a few days of turmoil on campus, which the Governor of Ohio links to a "communist element," he calls out the National Guard. We still remember the sad lyrics: "Four dead in Ohio."

And at Jackson State, Mississippi nine days later: Two students killed, 12 wounded, a college dorm riddled with bullets after 500 National Guardsmen, 80 state highway patrolmen and 125 city cops are called to campus.

June 13, 1971—*The New York Times* publishes the first article of what was to become known as "The Pentagon Papers"—documents leaked to the press by Daniel Ellsberg. Four months later Howard Hunt and Gordon Liddy orchestrate the burglary of Daniel Ellsberg's psychiatrist's office in an attempt to portray Ellsberg as mentally ill.

June 17, 1972. Another burglary. Watergate. Five men are caught while attempting to place bugging devices in Democratic Headquarters. The men are all linked to the Committee to Re-Elect the President (CREEP).

An investigation follows and America finds out that Nixon has committed a stunning array of illegal acts; authorizing the burglary of Ellsberg's office and the cover-up of the burglary at Watergate are only the tip of the iceberg.

The President of the United States used the IRS to harass political opponents. He kept an "Enemies List." He authorized phone tapping for political motives. He waged war in Cambodia without the knowledge of Congress.

And one by one, Nixon's aides resigned and were convicted. Hunt, Liddy, and McCord were convicted. The head of the FBI, William French Smith, resigned. Haldeman and Ehrlichman were convicted. So many others. Former Attorney General Richard Kleindienst was found guilty of a misdemeanor. Attorney General John Mitchell was convicted of a felony.

We saw it and we remember these lessons:

The same politicians that swear to uphold the Constitution may secretly be working to curtail its freedoms.

The same politicians that promise law and order are often willing to sacrifice law in exchange for order.

The same politicians that call for strong prosecution of crimes may well be committing those crimes themselves.

Why do we do it? Because we have learned that a government angered somehow finds a way to inflict punishment without benefit of trial.

Witness the Black Panthers. Started in California in 1966 by Bobby Seale and Huey Newton, their platform was for "blacks to determine their own destiny in their own communities."

Almost since their inception, the police had been waging an undeclared "war" on the Black Panthers. In 1969 the war escalated.

December 6, 1969. About 5:00 a.m. Fourteen Chicago police officers gun down Fred Hampton, a charismatic, intelligent, 21-year-old Black Panther, and fellow Panther, Mark Clark, 22, in their apartment. In all, police killed 28 Black Panthers in 1969.

Fast forward to May 14, 1985. Philadelphia. Another black militant organization. "MOVE." Police evacuate the neighborhood and then use water cannons on the house with MOVE members in it. The police are met with gunfire and they retreat. Finally, a helicopter flies over the MOVE house and drops an explosive charge on the rooftop. Fire erupts. When it was all over, 11 people were killed, four of them were children. Two city blocks of Philadelphia were nothing but charred ruins, 61 homes were destroyed by fire.

It's a hell of a way to execute an arrest warrant.

V. RUBY RIDGE—AUGUST 1992

On an outstanding warrant, U.S. Marshals approach Randy Weaver's Idaho cabin. An 11-day standoff occurs. Randy Weaver, his son Sammy, and one of Sammy's friends are in the cabin. Gunshots are fired. Fourteen-year-old Sammy is shot in the back. The FBI sends 50 agents along with armored cars and helicopters. Randy's wife Vicki, while holding her baby, is shot in the head by a sharpshooter.

VI. WACO—APRIL 1993

After four federal agents were killed in February, a 51-day stand-off ends with the Branch Davidian complex up in flames. At least 81 people were killed, 17 of them children.

Why do we do it? Because this is not old news.

- Thirty-three states now have the death penalty.
- America's death row has 3387 people.
- In Texas, 425 people await execution.
- In our name, America kills men, women and children.
- Seventy juveniles have been sentenced to death.

- America kills the mentally retarded. Thirty-three have been executed thus far.
- America kills the guilty and the innocent.
- Since 1900, 23 innocent people have been executed.
- Since 1970, 75 people have been released from death row when new evidence proved them innocent.

And so, we are accustomed to the question, “Why do we do it?” And truly, for each of us, there is a separate answer. A separate picture we remember. A separate injustice we witnessed. A separate oppression we suffered.

My own answer was provided by a German prisoner of war—Martin Neimoller, a Protestant minister. When he was asked why he—an intelligent, compassionate, religious man—did nothing in the face of growing governmental oppressions, he answered:

In Germany they came first for the communists.
And I didn't speak up because I wasn't a communist.
They came for the Jews,
and I didn't speak up because I wasn't a Jew.
Then they came for the trade unionists,
and I didn't speak up because I wasn't a trade unionist.
Then they came for the Catholics,
and I didn't speak up because I was a Protestant.

Then they came for me, and by that time no one was left to speak up.

*We are The National Association of Criminal Defense Lawyers.
We Will Speak Up.*

