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A Lawyer's Dissent

By Charles Rembar

The accused in a criminal prosecution has only lately gained the right to counsel. It is an honorable development in the law.

The case of Clarence Earl Gideon was decided only eleven years ago—the United States Supreme Court held that every poor defendant charged with a serious crime had an absolute right to free counsel—and until the 18th century the accused was not allowed to have a lawyer even if he could afford one.

Now the idea has gained acceptance that everyone, in a civil or criminal case, is entitled to a lawyer, and efforts are being made to insure that he will have one.

It would seem to be a corollary that a lawyer, called upon to act, should do so, or at least that he is always justified in rendering his services. No matter what he thinks of the client's character or his cause, it is said to be entirely proper for a lawyer to take a case, and he is obliged to do his best.

Thus, the celebrated John W. Davis, vastly admired and vastly successful practitioner and Democratic candidate for President in 1924, has in the last few weeks been quoted on the point.

In a review of a biography of him in The New York Times, it was noted that Mr. Davis had worked mainly for the rich and powerful.

His reputation as a constitutional lawyer was made in situations in which he attacked welfare legislation, whose constitutionality, in general, has since become the settled law.

District Judge Charles E. Wyzanski Jr., a respected member of the Federal judiciary, objected to the review:

"I wholly agree with Mr. Davis's eloquent letter to Theodore Huntley, dated March 4, 1924, that it is "the duty of the lawyer, just as it is the duty of the priest or the surgeon, to serve those who call on him unless, indeed, there is some insufferable obstacle in the way.' This high-minded attitude is the very cornerstone of the adversary system of Anglo-American law. It is one of the pillars of liberty."

This is the dogma. I question it.

Suppose a lawyer has doubts about the social consequences of what he is called upon to do. I am not speaking of the ordinary criminal case in which the structure of our adversary legal system dictates the defense even of those who are quite obviously guilty.

A lawyer should not assume the functions of judge and jury. If one thief or murderer escapes the law, the effect on society is negligible; adherence to the fundamentals of fair trial has considerably more importance.

Nor am I speaking of a situation in which the litigant, because he is unpopular or poor, can find no other lawyers.

I am speaking rather of a case itself momentous, whose outcome has immediate and huge effect upon the welfare of the nation. We have one currently: The case of Richard M. Nixon. Here James D. St. Clair stepped into the breach. He is a highly skilled and experienced litigator, best known to the public outside Boston by events of twenty years ago. He was assistant to Joseph N. Welch when Mr. Welch, some romantics thought, swept Senator Joseph R. McCarthy out of power.

I do not know Mr. St. Clair's private estimate of Mr. Nixon, but it is reasonable to surmise that a man of Mr. St. Clair's attainments, whatever his view of the legal issues he will argue, does not consider the perpetuation of Nixon Presidential conduct as a good thing for the country.

In any event, Mr. St. Clair will not enlighten us on his private views; instead, he has invoked the universal precept. He has explained that he took the case "because that is the appropriate thing for a lawyer to do" and that "it is a lawyer's business."

Is it really? Is the dogma in some instances no more than that hollow ugly rationale that is a favorite of our times: "It's my job," writing advertisements for rotten products, producing shoddy films of violence, giving bribes to get the building built.

This is not *ad hominem;* I am not asserting that the lawyers mentioned are not acting out of principle. I am questioning the principle, and asking what its limits are. It is not a matter of whether Mr. Nixon will go unrepresented.

About a quarter of the citizens, according to the polls, still think he is a good President, and there are many skillful lawyers in that quarter. Nor is it a matter of defending Mr. Nixon as a private citizen. Assuming he is removed from office and must then face criminal prosecution, the situation is the ordinary one, to which the principle easily applies. But that is later; at the moment the lawyer's task is not to keep him out of jail but to keep him in the White House.

Is this a task that should be undertaken by one who feels his client is unfit to occupy the White House?

I suggest the piety has limits, and, depending on the lawyer's personal view, its limits are found somewhere this side of representing Mr. Nixon. Principles have jagged edges. They encounter other principles.

Assume the client is Hitler, just before Hitler came to power, when things had gone far enough so that you had a good idea of what would happen if indeed he came to power. Assume that your rendering service to him will in some measure help him on his way. Should you take his case?

Mr. Nixon is of course not Hitler. But should a lawyer who believes that the President misuses the terrible power of his office devote energies and competence to keeping him in office?

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