



DON'T TRUST ME *(Except This One Time)*

By
Richard A. Epstein

The title of this talk is Don't Trust Me. The subtitle, is "Except this one time." This is obviously a paradoxical topic. I hope that the members of the graduating JD and LLM Class of 2007, and their families, will at least trust me on this point. I know that it has been a long, and sometimes frustrating slog for you to make it through this law school. But I am confident that for each and every one of you, your work and your sacrifices—and those of your families—will pay you large dividends throughout your personal and professional lives. The skills that you have learned in this law school, the friendships that you have forged, are not mere gossamer. They will set the course for your behavior long after you leave these halls. So for all your achievements today, you have my heartiest congratulations. And I know the faculty and staff, who have worked so hard to make your stay at the Law School so rewarding, join me in extending their good wishes.

On a sadder note, this year the Law School lost one of its great figures, a man who graced our institution for over 70 years. Bernie Meltzer, our master teacher of evidence and labor law, died this past January at the age of 92. He spoke at this ceremony only four years ago. His vision did not allow him to read. Still he was quite able to think. His brief talk reflected his deep wisdom and compassion. My self-appointed task is to build on on the admirable traits so personified in Bernie's life.

I take my cue from the moving remarks that his three children—Joan, Daniel and Susan—delivered at the memorial service held in Bernie's honor this past February 2nd. They characterized Bernie as a grand but amiable inquisitor, whose rigorous cross examination forced everyone to pause and reflect before acting.

Bernie, self-consciously, was not a big-picture man. He was suspicious of large generalizations and dangerous slogans. He feared that they could not provoke the kind of

zealotry that lead individuals and nations astray. Bernie was not so much the master builder. He was more the master balancer. He was acutely aware of the conflicting interests that had to be resolved before making hard choices.

Bernie's attitude supplies a powerful beacon on how to address the towering issues—like those Bernie tackled at Nuremberg—that now confront our nation and other nations around the globe.

That brings me back to the title of this speech. I start with this premise: perhaps the single most dangerous—subtly dangerous— words in the English language are “trust me.” Trust has to be earned. It cannot be demanded. Too often, those who demand our trust do so to quiet opposition or to stifle cross examination. But beware: those who ask for trust can betray trust. Unsupervised, they can act in their own self-interest, while mouthing pieties of the greater good they claim to serve. Harnessing, and constraining, self-interest poses a never-ending challenge to lawyers of all political stripes and persuasions. The poet Juvenal hit the nail on the head when he asked this question, *Quis custodiet custodiet?* Who guards the guardians? It is one of those great questions of human life that it is easy to pose, but very hard to answer.

Some 20 years ago, I spoke at the plenary session of the Annual Meeting of the American Association of Law Schools. Time was short. More than a thousand people



McKenzie High, Jessica Hertz, Katie Hill, Jenny Chang, Cory Hojka had to leave on time to make way for another scheduled event. The panel moderator impressed on us the importance of the time constraint: twelve minutes per person. (These are words that the Dean has uttered to me as well). His daughter would hold up cards to remind us that time was winding down. Sure enough, with a bit of grumbling, we

all obeyed his stern injunction. But when the moderator rose to speak, lo and behold, his daughter's cards were nowhere to be seen.

Countless small incidents like this remind us that it is imperative to develop a system of political arrangements that gives no one person the final say. Indeed, the one feature of the United States Constitution that most accounts for its success



(left to right) Christina Rieck Loukas, Robin Price and Mark Premo-Hopkins

is its commitment to the twin principle of separation of powers and checks and balances. Two examples: A court may strike down a piece of legislation as inconsistent with some structural or substantive provision of the Constitution. But it does not have the power to enact its own law. The President may veto particular legislative acts, but subject to Congressional override.

One conspicuous feature of the modern administrative state is to be dismissive of this system of separated powers. This position resonated strongly with the Progressives: Woodrow Wilson, regarded that principle as a “grievous mistake” that dampened the ability of the government to do good. And so it does—but by the same token it dampens its ability to create mischief.

On domestic matters, I take issue with Wilson's condemnation of the separation principle and the move to bigger government. It's not because I think that private parties are always trustworthy. Trust me, they're not. I do so because I think that the easiest way not to have to trust people is to have someone else to turn to in business.

It is for that reason that the hardest questions of domestic policy often turn on the regulation of legal or natural monopolies. In that setting, the option to go elsewhere comes at a very high price—doing without some essential service at all. But even here we divide powers: Congress or

the states can regulate rates to see that the monopoly does not exploit its customers. But, at their best, the courts step in to see that the Congress does not expropriate the invested capital of the regulated party: only for the cycle to begin anew if the initial rates are struck down.

But the question of trust and political power plays out more dramatically on matters of national security, domestic and foreign. Now the stakes are higher. Government is defined as a monopoly of force. There are no competitive solutions waiting in the wings. And this state monopolist does not just have the power to raise prices that reduce consumer welfare. This monopolist has direct control over the lives, liberty and fortunes of millions of individuals, citizens and aliens, within its power.

On this score, I am pleased that many Progressives who have extolled unitary government power on domestic issues have had a welcome change of heart. They have returned to our constitutional roots, by stressing the importance of checks and balances in all matters of national security.

I do not wish here to comment on basic foreign policy challenges. These leave much room for passionate



Matt Vogel

disagreement. But I would like to take this occasion to say how troubled I was at the ramshackle procedures that the President, with either the acquiescence or cooperation of Congress, have put into place to deal with surveillance of electronic communications. I am more distressed with the restrictions on the right of individuals in government custody to challenge their confinement by the writ of habeas corpus.

In both contexts, the response, "trust me in times of peril," should be rejected. I am therefore pleased to see, under pressure, that the Bush administration is backing off from asserting its unreviewable and independent power to wiretap. It now seems to acknowledge the procedures that Congress articulate in the Foreign Intelligence Surveillance Act of 1978. And I am equally pleased that, as I speak, new legislation is working its way through Congress to undo the damage to our nation that was wrought by the Military Commissions Act of 2006. Right now, Congress

has removed all semblance of independent review to persons confined in Guantanamo and elsewhere. With bipartisan support, this too might change.

I hope that the tradition of distrust that helped make this nation safe and free will renew itself in these and other areas. And I hope that all our graduates from this great law school will take this lesson from our recent history. Individual liberties and government power are in such constant tension.



It is the responsibility of us all to think hard and to act boldly on matters that impact so heavily on the common good. I trust that your education here has equipped you, in a way that would make Bernie Meltzer proud, to take on that critical task. For each of you in your own way will have to balance private gain with public service. My heartiest wishes to you in these critical endeavors. I am confident you will succeed. May your achievements be a beacon of light in anxious times.



Darah Smith, Adam Snyder