

## **Remarks of Thomas Sung for the Due Process Institute's Celebration of Constitution Day 2019**

We are living in a troublesome time of our history. I came to the US in 1952 at the age of 16. That was sixty-eight years ago. Socially and politically, I don't recall seeing as much division and conflict as we have today. It seems to me that our country has been pulled apart and gravitated to the two extremes and our politicians are using democracy as a means to divide the population to generate votes for their benefit rather than unite the population for the good of the country. It is a dangerous trend which may test the survival of our system. It is ever so important for an institution like yours to define and guide us through this difficult time.

1. Due Process Institute, what an important organization! Cicero, the Roman philosopher, and statesman stated in or about 60 B.C. that "Justice is rendering to every one his due." There can be no true justice without rendering everyone his/her due. Due process of law embodies this concept. It is about the protection of the fundamental rights of the people. These rights are ingrained in our democratic society. The Fifth Amendment of the US Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law ...". Again, the Fourteenth Amendment provides: "Nor shall any state deprive any person of life, liberty or property, without due process of law..."
2. There are two aspects of due process. One is procedural, and the other is substantive. Procedurally, any government action which affects the fundamental rights of any person must comply with due process of law. That procedural due process relates to the fairness of the legal proceeding such as the disclosure of evidence favorable to a defendant, or the initiation of a proceeding with fair and adequate notice before an impartial judge or jury, etc.
3. Substantively, due process of law requires the law itself to protect the fundamental rights of the people unless there is a compelling public interest. These fundamental rights can be found in the Constitution itself. They are deeply rooted in our society, such as non-discrimination, equal protection, the right to vote, the right to bear arms, the right to enter a lawful contract, property ownership, etc.
4. There is another substantive aspect of due process of law. That is the application of the law itself. Here, a violation of due process by the prosecutor or the government can be insidious. The discrimination can be implicit, and the denial of justice can be indirect, such as selective prosecution. The law itself may be legal and valid and applied procedurally correct. But, it is unfairly and discriminatorily applied to target a certain minority group; or refuse to prosecute

when the prosecution is required, leaving the injured to suffer without redress; or wrongfully apply the law, knowing the weak and the poor have no means of defending themselves.

5. It seems clear, therefore, that substantive due process is violated when a person is wrongfully or selectively prosecuted on account of his/her race, religion, sex or ethnic origin. Procedural due process is denied when a person is weak or poor and have no means to assert his/her innocence or is overwhelmed by government's use of excessive and unlimited resources and power. Procedural due process is also denied when the prosecutor calculates that the existence of an institution such as a financial institution will be terminated by an indictment without the trial.
6. Let me take you back to the year 2008, the year of major financial crises when several large financial institutions such as Bear Stern, Lehman Brothers, Countrywide and Washington Mutual collapsed. Other large institutions were all on the verge of default. In order to avert the collapse of the nation's economy itself, the Government pumped \$700 billion to shore up the capital of major banks and other financial institutions.
7. But, there was a tiny community bank ranked about 2500<sup>th</sup> in size and approximately one-tenth of one percent in assets of the largest bank. That little bank foresaw the risk of excessive speculation. Instead of loosening the credit standard, it actually tightened its credit two years before the 2008 Financial Crisis. In 2009 in the midst of the severest period of recession, not only it did not need government bailout funds, it lent out with pride over \$500 million in home mortgages which actually contributed to the recovery of the recession in a crucial time.
8. Then, there was also a prosecutor in Manhattan who, by reason of his location, had criminal jurisdiction over all foreign and domestic banks which had offices in Manhattan. During a 5-year period, beginning on or about January 2010, this prosecutor quietly accumulated over \$808 million in fines and settlements largely from big banks by threatening criminal prosecution, even though he was not a banking regulator and knew little about banking laws. The practice of extracting settlement and fines were so lucrative that he was said to have the largest white-collar investigative staff in the country. This prosecutor, therefore, knew well that no bank could survive or risk a criminal indictment because the bank's existence depends upon public trust. Whether it is to enhance his personal political agenda or his ability to collect more fines and settlements from large banks, he decided that that small community bank should be shut down and sacrificed. While large

institutions were too big to fail, that small institution was small enough to jail. So, on that fateful day of May 31, 2012, the prosecutor summoned that small bank along with 12 of its employees who had previously refused to enter cooperation agreement to testify against the Bank to appear for arraignment or indictment.

9. The prosecutor then handcuffed and chained these employees together and paraded them in a staged perp-walk before the national news media like a herd of slaves being led to the auction block. Nine of these employees were women, and three had already been arraigned 10 days before and were on bail. My daughter who worked in that prosecutor's office witnessed this scene, and it brought tears to her eyes. The raw display of power by the prosecutor betrayed the Country which provided refuge to those who sought liberty from the oppressors. The scene shocked the conscience of all who regarded this country to be the land of the free. The prosecutor then dramatically announced in front of the national media that that small bank was indicted for being responsible for causing the Financial Crisis of 2008. Such a mischaracterization of facts was beyond believed! The news of chain gang perp walk spread rapidly in the community served by that small Bank. It was like an ominously dark cloud that blanked the entire community. People were gripped with fear. Many businesses and their employees wondered who or themselves might be the next target of the prosecution, or perhaps the better word should be persecution.
10. Ladies and Gentlemen, that small bank was Abacus Federal Savings Bank and the prosecutor was the Manhattan District Attorney, Cyrus R. Vance., Jr. The case lasted five and half years with the Bank providing over 900 thousand pages of documents, emails, internal and external reports. The actual trial was 5 months and the jury deliberation 10 days. At the end, on June 5, 2015, the Bank and the two co-defendants were acquitted of all charges. The charges against the remaining 9 defendants waiting for trial were all dismissed on the shameful admission of the DA himself for lack of sufficient evidence to proceed.
11. In the end, however, the Bank was left financially depleted and the management responsible for the safety and soundness of the Bank, physically and mentally exhausted. The Bank's capacity to serve its community was materially diminished. The defendant employees who were wrongfully indicted were unable to find employment for at least 5 years. They were wrongfully discriminated, and their human rights, life, and liberty were irreparably harmed. Two of these employees' mothers were dying in Hong Kong desperately waiting to see their children for the last time. The passports of these two employees were impounded by the DA and they could not be at their dying mother's bedside.

12. The damage inflicted by this wrongful prosecution will always remind those who were personally involved that “Justice is how much one can afford” and more often than not, it is beyond the reach of the weak, poor and the small. The thought of possible wrongful conviction and the loss of life and liberty of so many prior innocent defendants left one anguishing over the horrors of a miscarriage of justice in the hands of the powerful and overzealous prosecutors whose overwhelming desire was for their selfish political advancement.
13. You, who are involved in this wonderful Due Process Institute, can be justly proud of your noble Mission, for Due Process of Law does not permit discrimination in any form against any race or ethnicity, the rich or the poor, the big or the small, the strong or the weak. Through the due process of law, the innocent can be protected, and the abuse of power, authority, and discretion by prosecutors and government officials can be curbed.
14. By promoting the due process of law, you promote the administration of justice based upon truth and fairness. So, carry on my friends, you are the beacon of life and liberty. You will ensure the survival of our democracy through equal justice for all.

Thank you for allowing me to speak today.