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I am Your Sword and Your Shield

Lawyers in defense of the Constitution

Marc Garfinkle, New Jersey Law Journal

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Last December, as recipient of NJ-ICLE's Distinguished Service Award, Middlesex County Assignment Judge Travis Francis offered an important acceptance speech. His Honor spoke about the unique role of lawyers in maintaining the stability of government and the integrity of systems. "Lawyers are the gatekeepers against tyranny," he proclaimed. He then reminded us of the butcher's declaration in *Henry VI*, that, "First thing we do, let's kill all the lawyers." That, you might know, was not a knock on lawyers; Shakespeare's butcher was an evil conspirator whose goal was anarchy—disruption and disintegration of the kingdom—and he knew there would be challenges from the lawyers. Let us hope there always will be.

Lawyers as the gatekeepers against tyranny? Having "majored" in history, I could think of scores of tyrants and all sorts of tyranny. But, really—lawyers at the gate, fighting off Attila's hordes or Hitler's Panzer divisions? Was this notion merely one judge's fanciful observation or is it a universal truth? If true, how did we get this job, what do we do here, and when can we go home? Besides, what is tyranny, what does it look like, and is it really at the gate?

Tyranny—rule by force—is as old as freedom, and the two cannot co-exist. Tyrannies are jingoistic, isolationist and atavistic. Their rulers restrict public access to information, generate disinformation, create false realities for its citizens, and favor a select few—usually family and loyalists—at the expense of many. Tyranny often tries to crash through freedom's door, via war or conquest or murder, but more often it sneaks in through a side door. It can begin with a popular vote or a hereditary title, a marriage, a treaty between sovereigns or a quiet conspiracy to assume emergency powers. It brings its own police and its own army, usually having first disarmed or outlawed the standing guard. It thrives wherever there is a fearful populace, especially one unable defend itself outside the aegis of a sovereign. It is drawn to democracies that are apathetic, misinformed or uninformed. It waits outside the gate.

Judge Francis was warning of battles to come, where lawyers will have to defend against assaults on our institutions. Lawyers, perhaps *only* lawyers—knowledgeable in law and procedure and trained as advocates—can meet the assailants and keep them at bay. America will need brigades of lawyers to withstand the impending onslaught. Whether we work alone, with a firm, for government, industry, an NGO, even if we aren't working at all, whether we voted Democrat or Republican or otherwise, we are responsible. We all understand the fundamentals of democracy and traditional notions of equal justice and fair play, and we have all taken an oath to uphold the Constitution. When democracy is threatened, the public can take the fight to the streets, but only lawyers can take tyranny to court to prevent its codification, outlaw its implementation and demonstrate its danger. If we don't do it, no one else will. No one else *can*.

When the President's ill-considered, ill-timed and ill-worded travel edicts created a host of legal problems for families and individuals affected by those measures, gatekeepers came by the thousand to help. The legal community rose in a groundswell of support for victims of the Executive's facially unconstitutional orders and its defiant disregard of protocol. Volunteer lawyers popped up everywhere, providing an array of necessary legal services at no cost and at high speed, honoring the best traditions of our profession, and giving the world insight into the great value of lawyers in society. This need continues and is likely to grow.

Dost thou see tyranny on the horizon, O ye Gatekeepers? Think not that it can't happen here. As Judge Francis was accepting his award, Donald Trump had not yet been inaugurated, President Obama hadn't given a farewell address focused on imminent threats to democracy, and Washington, D.C., was not yet in complete turmoil. There is now even greater reason for concern. The new President seems unable to internalize certain fundamental national values. He is averse to acquiring information that he disagrees with and he avoids discussion or debate (inherently democratic processes) or even reflection, on matters of Constitutional significance and sweeping impact. He strikes back at those who disagree with him, and threatens to destroy them. He speaks of nuclear retaliation as if it were of no moment. All this in a so-called leader who has revealed that he has acted on irrepressible impulses to grab women by the genitals, and that he has a visceral disgust of people with bad skin.

More dangerously, the new Chief Executive has contempt for the other branches and the free press. He offers alternate facts to explain the inexplicable, and fills the Executive branch with family and billionaires, all of whom agree to confidentiality and personal loyalty (the latter being an acceptable substitute for relevant experience). He scorns and threatens longtime friends that share our values, while seeking strange new bedfellows at home and abroad. He doesn't trust scientists or science, and he clings to notions that have long been discredited. He has an intolerant bullying style, admires a host of tyrants and denigrates our heroes. He is quick to criticize America, its actions and its institutions under the rubric of making us great again. All sorts of bigots are heartened by this administration, and, as either cause or effect, bigotry blooms anew on street corners everywhere, here and abroad. "Mein Kampf" is the number-one best seller in Germany, and graffiti swastikas are now a nightly occurrence here. Perhaps tyranny is not knocking at our door, but I'm thinking it is. In either case, this is not the time to lower our guard; it is time to call up the reserves.

But this column is not about politics, dear reader; it is about legal ethics. Today's has been about a lawyer's imperative to race into the breach to defend the Constitution. Now that I've burdened you with your sacred obligation to defend the Union from tyranny, perhaps it's time for me to share with you some additional quotations whose insights have stirred me as an American and as a lawyer, and have refreshed my sense of what both entail.

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country ... corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.

—Abraham Lincoln

America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves.

—Abraham Lincoln

We the people are the rightful masters of both Congress and the courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution.

—Abraham Lincoln

Yes, we did produce a near perfect Republic. But will they keep it, or will they, in the enjoyment of plenty, lose the memory of freedom? Material abundance without character is the surest way to destruction.

—Thomas Jefferson

I hope we shall crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.

—Thomas Jefferson

Liberty has never come from the government. Liberty has always come from the subjects of government. The history of liberty is the history of resistance. The history of liberty is a history of the limitation of governmental power, not the increase of it.

—Woodrow Wilson

The only thing necessary for the triumph of evil is for good men to do nothing.

—Edmund Burke

Those who profess to favor freedom, and yet deprecate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its waters. This struggle may be a moral one; or it may be a physical one; or it may be both moral and physical; but it must be a struggle! Power concedes nothing without a demand. It never did, and it never will. Find out just what people will submit to, and you have found out the exact amount of injustice and wrong which will be imposed upon them; and these will continue until they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.

—Frederick Douglass

We are charged with a grave responsibility, my colleagues: we lawyers must protect our freedom. We are sworn to defend the Constitution. We might not remember signing up for the job, and we don't get to make the schedule, but right now, this is *our* watch. Let's stay awake. •

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