

Democracy's Last Line of Defense

National Judicial College

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Throughout all of history, human beings have tried and experimented with just about every conceivable form of government imaginable in various attempts to discover how to live together for the long run in freedom and peace, as allegedly sophisticated primates.

It all began with the law of the jungle, or the state of nature, in the beginning, where the strongest prospered and the weak did not. Such was followed thereafter by experience with theocracies, tyrannies, oligarchies, monarchies, aristocracies, colonialism, socialism, communism and, of course, democracy.

After several millennia and the invention of the printing press, the debates about, and experiments with, various governing structures reached their zenith during the Age of Enlightenment in the 17th and 18th Centuries. Either by coincidence or providence, depending on one's perspective, the American colonies, having endured for 180 years "the rule by law" of an oppressive and distant monarch, along with their own temporary and failed governmental structures, set about to draft, in Philadelphia in 1787, what was advertised to be, only amendments to the Articles of Confederation.

But, by the end of a period of 114 days of thoughtful argument and deliberation, instead of amendments to the Articles, the delegates had instead, miraculously, constructed the Constitution of the United States of America. It was ratified by the required number of states only 10 months later, and has endured over these last 234 years, longer than any other continuously functioning democracy in recorded history.

Our Constitution was profoundly influenced by the writings and ideas of Baron de Montesquieu, the French political philosopher, who assigned an animating principle to each form of government he autopsied and contrasted, one with the other. The animating principle of a republic was, according to Montesquieu, based on “virtue.”

Montesquieu argued the “Rule of Law” does not refer to a specific design or architectural plan for a governmental structure; or a checklist of specific and essential component parts the sum total of which will inescapably and automatically produce an enduring and stable form of government.

It refers, instead, to a “cluster” of values and dreams of a sovereign people that inform their design and creation of a durable self-governing structure.

So, for example, if independence, freedom, durability and stability are highly prized values, how did the Rule of Law principle inform the framers of our constitution in their efforts to construct a government that reflects those values and virtues? Perhaps the most

memorable example, embodied in the Constitution, was Montesquieu's theory of the separation of powers.

He argued that the division of political authority into legislative, executive, and judicial powers, acting independently, through checks and balances, would most effectively and fairly promote the values and virtues of independence, freedom, durability and stability. The framers of the Constitution agreed, and they very purposely and knowingly embodied that "Rule of Law" into our Constitution, as did the states that followed thereafter with their individual constitutions.

Recall, if you will, the adjournment of the Constitutional Convention in the fall of 1787. Benjamin Franklin, as he exited Freedom Hall was asked: "Do we have a monarchy or a republic?" His response was prophetic: "You have a republic...if you can keep it." That remains, as it did in the beginning, the existential question of our time: Can we keep our republic? And can we keep it if the values and virtues of the Rule of Law, purposely infused into our constitutions, are not faithfully and consensually observed?

This Rule of Law design that we're talking about this evening is not, in reality, a singular or quantifiable rule at all. It's more precisely a metaphysical or intangible commitment to virtue, that becomes operable through the consent and discipline of the governed. And that virtue, though it does not come easily or instinctively to human beings, permeates every line and verse of the Constitution and provides the indispensable adhesive holding our union together.

We choose to believe in, and abide by, the Rule of Law simply by living in the United States of America, and we implicitly understand that it requires universal self-discipline and uninterrupted prioritization of public over private interest. Subscribing to the Rule of Law requires each of us to limit our personal ambition, and it calls out for and expects “greater service to our country” than to ourselves or to our political parties.

As you know, the social contract, upon which a constitution relies for efficacy and justice, is the agreement between a government and its citizens. It defines the rights of each party.

Recognizing that it is infused into every article of the Constitution, every elected official, and every “citizen,” agrees to a transcendent obligation to “faithfully” observe the Rule of Law. Without demonstrated and constant adherence to the Rule of Law, the union and our entire way of life that springs therefrom will not survive.

At this moment in time, it appears undeniable that there are ominous and unmistakable warning signs all around us that our constitutional government, our republic, is at risk.

A people who cannot talk to or listen to each other, who do not respect each another, who will not sincerely consider the thoughts of each other, who do not trust each other and who cannot reason with each other, cannot long live in freedom.

The most probable way for our republic to vanish is through a lack of honor and fidelity to the Rule of Law. Not surprisingly, a pledge of honor and fidelity is precisely the promise we make to each other as Americans. It is also the precise and indispensable pledge required by our constitutional oath of office: “I do solemnly swear or affirm that I will **support, protect and defend** the constitution...**AND THAT I WILL DISCHARGE THE DUTIES OF MY OFFICE WITH FIDELITY, SO HELP ME GOD.**

What did the framers of our constitution intend when they chose “fidelity” to be the virtue that provides guidance for appropriate behavior by every citizen and every officeholder who holds any office or public trust?

And what is this “fidelity” which we hear recited at every swearing-in ceremony, but, in all probability, have rarely stopped to thoughtfully and thoroughly consider? It is, in a word, “faithfulness.” Faithfulness to the preservation of our union, faithfulness to our fellow citizens; faithfulness to a cause; faithfulness to a shared set of values; and faithfulness to the law as well as to our constitutions . And that faithfulness is demonstrated by continuing and unequivocal loyalty and support of the Rule of Law, without interruption, without exception, without avoidance, without arrogance, without boastfulness, without deceit, without connivence and without obfuscation.

The fidelity referred to in our oath presumes not just faithfulness to the actual words of our constitutions, but faithfulness to its spirit as well. A spirit recognized and required by humility, respect of

others and the rights of others, decency, integrity, honor, self-discipline, selflessness, self-examination and common courtesy.

This fidelity of which we speak is synonymous with the Rule of Law and is the exact opposite of seeking power for its own sake, which history has revealed time and time again to be a fool's errand. As Winston Churchill once remarked, "Dictators ride to and fro upon tigers, which they dare not dismount for the tigers are getting hungry."

Many of us in this room grew up in an America as it used to be...one of the world's most stubbornly civil societies and cultures, where being a neighbor meant more than merely living next door to another family.

Throughout our growing-up years, and into adulthood and a new millennium, we shared a positive attitude about life, about neighbors, about families and about values.

We suspected the best of each other until proven wrong...a sort of presumption of innocence and good faith that was accorded from the beginning and instinctively one to another.

Contrast that with the awkward, thoughtless, poisonous, mean, and frequently inaccurate or false public communications of today, where 360,000 tweets a minutes are instantaneously dispatched and received every minute of every hour of every day.

That's how much of the country, and much of the world, talks to each other these days. It's dizzying, vacuous and perilous.

Chances for people with diverse views sitting across a table from one another and talking to each other about how to solve difficult and important problems have been substantially diminished. And, now, most of the time, eliminated, in favor of the new mindless electronic rituals that produce infinitely more confusion and anger than understanding.

It seems almost impossible to manage the noise, to control the flood of unverified and frequently inaccurate communications, conceived in rage and competition, and then once dispatched, regretted because all of that hateful piffle is now a matter of public record. How is it that we stop this runaway train as it picks up speed and leaves so much disaster and destruction along the way?

The internet is marvelous creation, in so many ways. But it has also strained and stunted our social existence, especially our political affairs, with irresponsible and baseless suggestions of the existence of circumstances and situations that have absolutely no basis in fact.

Perhaps the old adage is true, that inside every older person is a younger person asking "What Happened?"

We have to return to the deliberative processes that have served the republic so well for so long. If we don't, more and more important policy decisions will be made on the basis of inane drivel and precipitous rumor rather than on facts, which then produces exponentially growing friction, exhaustion and bitterness.

We have to bring more discipline, integrity and sensitivity to our communications and comments, individually and collectively, to fulfill the requirements of fidelity to one another, fidelity to the cause of freedom and fidelity to our shared belief in the future of our country and state.

It's not really a big ask. I'm not suggesting, **hopelessly**, a return to simpler times.

I'm calling, **hopefully**, for a return to the rule of law, to simple, timeless and enduring values: presuming the best of each other, listening in good faith before acting or responding, exuding generosity and grace, self-correcting our own mistakes, and being ambitious to accomplish something...not to be somebody.

I'm suggesting that much more can be accomplished practically—and politically—by shunning the tired old rhetorical games of yesterday, now magnified exponentially and given eternal life by the internet.

I'm suggesting that we focus on caring and listening to each other, seeing and hearing with our hearts, gathering the facts before we make up our minds and then actually fixing our society's

problems instead of being distracted by the flashing lights; engaging in the to and fro of never-ending, instantaneous, bitter and, all too often, mean and careless electronic communications that can sent at the speed of light with a silent click to every corner of the planet Earth and beyond at least 360,000 times a minute.

Democracy is a voluntary association of individuals. To paraphrase a famous movie producer, “If people don’t want to come, you can’t stop them.” It’s a dynamic institution, always changing. It can dynamically deteriorate and rot just as quickly as it can dynamically improve.

Sadly, we hear so much about our divisions. We are conditioned by the modern media to think that we have little in common—as a nation and as a people. But I believe the majority of the American people, the Great Middle of America, are tired of the intramural wars where all sides emphasize only their divisions with the hope of having them magnified and instantaneously scattered across the landscape courtesy of the internet and the propaganda incessantly purveyed by political hucksters for both political parties.

As one precocious Montanan told me at her eighth grade graduation, we are not different groups of people in America. We are, she said, one group of different Americans. One group of different Americans. It would serve us well to remember that.

We’ve got problems in this country and in our individual states. So, us let rediscover and restore the rule of law that metaphysically binds us together in freedom, independence and stability.

Let us quickly and completely abandon the solitary and destructive search for power and control, and get on about fixing our problems and taking care of one another—with fidelity, so help us God.