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A Law Day Meditation Upon the Duties of a Citizen, the Lawyer, and the Judge in a Government of Laws

Sam J. Ervin Jr.
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Remarks of U. S. Senator Sam J. Ervin, Jr. (D-NC) at
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A LAW DAY MEDITATION UPON THE DUTIES OF A CITIZEN,
THE LAWYER, AND THE JUDGE IN A GOVERNMENT OF LAWS

I am grateful to you for the privilege of being in your great
State, which is so ably represented in the Senate by my good friends,
Harry Byrd, Jr. and Bill Spong.

The Founding Fathers, who drew the Constitution of the United
States, entertained the abiding conviction that the freedom of the
individual is the supreme value of civilization. As positive testi-
mimony of this conviction, they stated in its preamble that they
drafted the Constitution to secure the blessings of liberty to
themselves and their posterity.

The Founding Fathers performed their task with complete con-
sciousness of the everlasting political truth subsequently embodied
by Daniel Webster in these words: "Whatever government is not a
government of laws is a despotism, let it be called what it may." As
a consequence, they were determined above all things to establish a
government of laws, i.e., a government in which certain and constant
laws rather than the uncertain and inconstant wills of men would
govern all the officers of government as well as all the people at
all times and under all circumstances.

Their purpose to establish a government of laws is disclosed
by the mode in which the Constitution was fashioned as well as by
its contents. The best description of how the Constitution actually came into being as a written document appears in the argument of one of the ablest advocates of all time, Jeremiah S. Black, Chief Counsel for the petitioner in *Ex Parte Milligan* (4 Wall. 2). He said:

"But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take away the protection of law from the rights of individuals. It was not thus that they meant to secure the blessings of liberty to themselves and their posterity. They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over Magna Carta, the Petition of Right, the Bill of Rights, and the rules of the common law, and whatever was found there to favor individual liberty they carefully inserted in their own system."

Law Day is customarily used as an occasion to extol the liberties secured by the government of laws which the Constitution establishes. It seems to me that it would be well for us to vary the theme for once, and meditate upon some of the obligations which a government of laws imposes. For this reason, I wish to talk to you about the duties of the citizen, the lawyer, and the Judge in a government of laws.
The Duty of the Citizen in a Government of Laws

The duty of the citizen in a government of laws is quite simple. It is to obey all laws without regard to whether he deems them just or unjust.

This statement seems to constitute absolute and incontrovertible truth. Nevertheless, its validity has been disputed by some clergymen and some civil rights agitators.

Their position was stated with eloquence by the report of the Committee on Christian Social Concerns, which was adopted by the General Conference of the Methodist Church at Pittsburgh, Pennsylvania, May 4, 1964. I quote from this report:

"There are certain circumstances when arbitrary authority is sought to be imposed under laws which are neither just nor valid as law. Even under such imposition the salutary principle of the rule of law requires that in all but the most extreme circumstances the individual confronting such authority must resort to legal processes for the redress of his grievances. However, Christians have long recognized that after exhausting every reasonable legal means for redress of his grievances, the individual is faced with the moral and legal dilemma of whether his peculiar circumstances require obedience to "God rather than to men." There are instances in the current struggle for racial justice when responsible Christians cannot avoid such a decision. Wherever legal recourse for the redress of grievances exists, the responsible Christian will obtain the best available legal and religious counsel for his
dilemma. In rare instances, where legal recourse is unavail-
able or inadequate for redress of grievances from laws or
their application that, on their face, are unjust or immoral,
the Christian conscience will obey God rather than man."

This report enables one to understand what the Angel Gabriel
meant when he spoke this line to the Lord in the play entitled "Green
Pastures":

"Everything what's nailed down is coming loose."

The Methodist Church has always been a bulwark of government
by law. For this reason, I have been deeply distressed by what this
report says. I cannot believe it reflects the minds and hearts of
the thousands of Methodists I have known and loved since my earliest
years.

When it is stripped of its surplus words, the report declares
that professing Christians have a God-given right to disobey laws
they deem unjust. This declaration cannot be reconciled with govern-
ment by law. It is, indeed, the stuff of which anarchy is made.

I do not believe, moreover, that this attempt to make God an
aider and abettor in crime finds support in the teachings of Chris-
tianity. I do not claim to be a theologian. I am merely a sinner
who looks to the King James version of the Bible for religious
guidance.

I find these plain words in I Peter, Chapter 2, verses 13-15:

"Submit yourselves to every ordinance of man for the Lord's
sake --- for so is the will of God."

The report asserts in substance that some groups have already
exhausted "every reasonable legal means for redress of grievances," and consequently are now entitled to engage in what the report calls civil disobedience. It is impatience rather than reason which makes this assertion in a land where laws are made by legislative bodies chosen by the people, and where the right to petition these bodies "for a redress of grievances" belongs to all men.

I make an affirmation which is subject to no exception or modification. The right of clergymen and civil rights agitators to disobey laws they deem unjust is exactly the same as the right of the arsonist, the burglar, the murderer, the rapist, and the thief to disobey the laws forbidding arson, burglary, murder, rape and theft.

The Duty of the Lawyer in a Government of Laws

The lawyer plays an indispensable part in a government of laws. He serves justice. Paradoxical as it may seem, he serves justice by serving his clients. In serving his clients, he may enact the role of the counselor or that of the advocate.

The counselor undertakes to guide his clients along legal pathways in their business and personal affairs.

The role of the advocate arises out of the dedication of our society to the principle that the surest way to truth and justice in legal controversies is an adversary proceeding before a judicial tribunal, which hears each litigant present his cause in its most favorable light and after hearing all judges the merits of the controversy according to rules of law. Since the litigant is not ordinarily skilled in law or advocacy, he presents his cause to the judicial tribunal through an advocate of his own choosing, who invokes
the rules of law and the testimony which tends to sustain his client's claim or to defeat that of his opponent.

These considerations reveal that the duty of the lawyer in a government of laws is three-fold in nature, regardless of whether he plays the part of the counselor or that of the advocate. He must know law, be loyal to his client, and maintain his own integrity.

If one is to know law, he must master it by earnest, protracted, and sacrificial study; for there is nothing truer than the trite saying that law "is a jealous mistress, and requires a long and constant courtship."

When I say the lawyer must know law, I do not mean to imply that he must carry in his cranium or on the tip of his tongue all laws and their interpretations. That is a manifest impossibility in a law-ridden country like ours.

I mean that the lawyer should know basic legal principles and do the legal research necessary to safeguard his clients' rights. To do this research, he must first acquaint himself with the facts on which those rights depend; for, as the ancient maxim proclaims, out of the facts the law arises. My father, who was an active practitioner at the North Carolina Bar for 65 years, gave me this sage advice on this point when I entered his law office many years ago: "Salt down the facts; the law will keep."

The lawyer should expand his study to fields outside the law, even though sufficient study of law will make him a good legal craftsman. This is so for the reason stated by Sir Walter Scott, a member of the Scottish Bar, in his novel *Guy Mannering*.
"A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

In discussing the loyalty the lawyer owes to his clients, I deem it not amiss to say something about the kind of clients the lawyer ought to have.

Sometimes wise men say silly things. Horace Mann, the great educator, gave a young lawyer this advice: "Never take a case unless you believe your client is right and his cause just."

I disagree most emphatically with Horace Mann. If he had merely said that a lawyer should never bring a civil case in behalf of a plaintiff when he is convinced after thorough investigation and research that the case is without warrant in fact and in law, I would agree with him.

But I reject the implication of his advice that a lawyer should refuse to accept as a client an accused in a criminal action or a defendant in a civil case merely because he believes the client to be in the wrong in respect to the event giving rise to the prosecution or the litigation.

As I have stated, our system of jurisprudence is based on the conviction that truth is most likely to be revealed and justice is most likely to be done in adversary judicial proceedings. It is of the very essence of the system that every man shall have his day in court and be represented by a lawyer learned in the law and trained in the art of advocacy.

If lawyers generally took Horace Mann's advice literally, they
would cast upon the judge the sole responsibility for safeguarding
the rights of the litigants they refused to represent, and would
thus make it impossible for our system of jurisprudence to function
effectively or justly.

Many questions arise in litigation in addition to whether the
accused in a criminal prosecution or the defendant in a civil action
was in the wrong in respect to the event which prompted the prose-
cution or the law suit. For example, a criminal prosecution may be
concerned with questions as to the intent of the accused, or the
degree of his offense, or the punishment he deserves; and a civil
case may involve questions as to the damages recoverable, or the
relief which ought to be granted.

Judge David Schenck, a North Carolina lawyer of a by-gone
generation, was once asked how he justified pleading for a guilty
client. His answer merits preservation. He said: "Someday I shall
stand before the Bar of Eternal Justice to answer for deeds done by
me in the flesh. I shall then have an advocate in the person of Our
Lord, who will certainly be pleading for a very guilty client."

Few relationships of life involve a higher confidence and trust
than that which exists between the lawyer and the client he accepts.
The client entrusts to the keeping of his lawyer his claim or his
property or his reputation or his liberty or his life, and the lawyer
pledges to his client the loyal use of his professional ability and
legal learning to secure for the client every right or defense afforded
by the applicable rules of law, properly applied.

What has been said makes it plain that there is no inconsistency
between the loyalty which the lawyer owes to his client and his obligation to maintain his own integrity. Apart from ethical and religious considerations, the integrity of the lawyer has important practical values in the administration of justice in a government of laws.

One of them arises out of the reality that integrity in those who participate in its administration is essential to the doing of justice according to law. Another originates in the truth that all people instinctively put their faith in a man of integrity. As a consequence, the integrity of the lawyer wins for him the confidence of clients, judges, jurors, other practitioners, witnesses, and the public generally, and thus constitutes his most potent professional attribute. No amount of intellectual brilliance or erudition can supply its lack.

When the French Philosopher, Alexis De Tocqueville, visited America and wrote his famous Democracy in America, he observed the American Bar and paid it this compliment:

"The profession of the law is the only aristocracy that can exist in a democracy without doing violence to its nature."

Hence, the lawyer who knows law, serves his clients loyally, and maintains his own integrity can justly claim to be a member of "the only aristocracy" which has a rightful place in a democracy.

The Duty of the Judge in a Government of Laws

The judge is the cornerstone of the temple of justice. Upon him rests the most serious responsibility imposed upon any public
officer in a government of laws. It is his duty to judge "his fellow travelers to the tomb" with absolute fairness according to rules of law prescribed by the lawmakers of the State.

If the judge is to perform this duty aright, he must put off all his relations except his relation to the law when he puts on his robes, try each case according to law with what Edmund Burke called the "cold neutrality of the impartial judge," and convince his hearers when he speaks that the law rather than an individual is speaking.

The burden of insuring a fair trial to every litigant rests upon the judge. If a litigant is to receive a fair trial, he must have his cause heard and determined according to rules of law by an impartial judge and an unbiased jury, if it be a jury matter, in an atmosphere of judicial calm and an open courtroom, where he is loyally represented by a lawyer possessing adequate knowledge of law and skill in advocacy.

It sometimes requires high courage and deep wisdom for the judge to insure a fair trial to a litigant. This is certainly true in cases where the government seeks to make the litigant a victim of political purpose, or an angry mob clamors for his blood.

Let me recount an event of a by-gone generation. William Alexander Hoke, who afterwards served as Chief Justice of the Supreme Court of North Carolina, was presiding over a one-week term of Superior Court in one of the State's counties.

A capital crime of an atrocious character had been committed on the eve of the convening of the court, and the passions of the community were much inflamed against an impoverished prisoner, who
had been arrested and charged with the offense.

After investigation, the lawyer, whom Judge Hoke had appointed to defend the prisoner, moved for a continuance and a change of venue, assigning as reasons that the prisoner had an alibi, but the witnesses necessary to prove it were at a distance and could not be procured during the existing term and that in any event trial of the case should not be had in a community whose passions were inflamed against the prisoner. The Solicitor, who headed the prosecution, strongly resisted both motions, upon the ground that the prisoner might be lynched by the mob if he were not immediately tried.

Judge Hoke made this response to the Solicitor's argument: "Mr. Solicitor, if this court has no choice other than to have the prisoner lynched by the mob or mobbed by the court, it prefers to let the mob deal with him. However, it believes there is a third choice. The trial is continued, and a change of venue is granted."

Since I am a lawyer in heart, I will cite a precedent, which defines in eloquent words the duty of the judge in a government of laws. It is Section 11-11 of the General Statutes of North Carolina, which sets out the oath that Superior Court Judges have taken for many generations. I invite attention to three pledges which each Superior Court Judge makes in the first person:

1. "I will do equal law and right to all persons, rich and poor, without having regard to any person."

2. "I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever;"
and in case such letters or orders come to me contrary to law,
I will proceed to enforce the law, such letters or orders notwithstanding."

3. "And finally, in all things belonging to my office,
during my continuance therein, I will faithfully, truly and
justly, according to the best of my skill and judgment, do
equal and impartial justice to the public and to individuals."

Despite the fact that it is the office of the judge to interpret law, and not to make law, a theory wholly incompatible with
government by law is coming into increasing vogue in the United States.
It is that judges are at liberty to substitute their personal notions
for law while professing to interpret law. I regret to note that
judicial activists are now overworking this theory.

I will exercise at this point a right vouch-safed to all
Americans by these words of Chief Justice Harlan F. Stone: "Where
the courts deal, as ours do, with great public questions, the only
protection against unwise decisions, and even judicial usurpation,
is careful scrutiny of their action, and fearless comment upon it."

As one who reveres government by law and abhors tyranny on the
bench as much as tyranny on the throne, I was astounded by the recent
case of Harper v. Virginia State Board of Elections, when a majority
of the Supreme Court of the United States overruled two sound decisions
to the contrary, Breedlove v. Suttles (302 U.S. 277), and Butler v.
Thompson (341 U.S. 937), and adjudged unconstitutional under the
Equal Protection Clause, the Virginia poll tax as a prerequisite to
voting in State elections.

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I hold no brief for the legislative policy of a State which imposes a tax of this nature. But I do hold a brief for the proposition that under the Constitution rightly interpreted such a poll tax is just as constitutional as the Supreme Court itself. The Supreme Court so held in the Breedlove and Butler Cases, and Congress and the States agreed when they adopted the Twenty-Fourth Amendment. Justices Black, Harlan, and Stewart expressed views to this effect in their dissents in the Harper Case.

When one analyzes the majority opinion in the Harper Case, he cannot escape the conclusion that its writer, Justice Douglas, used the Equal Protection Clause without constitutional or intellectual justification to invalidate the Virginia poll tax simply because a majority of the Justices did not personally approve of Virginia's action in requiring a citizen to pay $1.50 a year — his earnings at the minimum wage for 72 minutes — to the State which educates his children and secures due process of law to him for the privilege of voting in elections held by it.

Justice Douglas came very close to making a candid admission to this effect. He gives no reason of substance to justify the decision of the majority beyond this bare declaration: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."

What this statement means in plain English is merely this: When the "notions" of Supreme Court Justices change, the meaning of constitutional provisions change accordingly.

If this theory becomes the norm of the judiciary in the United
States, government by laws will become as extinct as the dodo in our land, and Americans will be ruled by the nebulous notions of judges, which the dictionary says are "more or less general, vague, or imperfect conceptions or ideas."

My view finds corroboration in the writing of one of America's wisest judges of all time, Benjamin N. Cardozo, who affirmed that if judges substitute their notions for law, their action "might result in a benevolent despotism if the judges are benevolent men," but that "it would put an end to the reign of law."

As I close this Law Day meditation, I make a prayer. May citizens, lawyers, and judges consecrate themselves anew to the preservation of our government of laws. This is a task of supreme moment, for if our government of laws perishes, liberty perishes.