

## **ETHICAL AND PROFESSIONAL: TO BE OR NOT TO BE, HAMLET, ACT 3, SCENE 1**

By United States District Judge Fred Biery

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I. With gratitude to those who grew, prepared, served and clean up after us.

II. My hope today is for us to think and feel together and perhaps share some smiles and a bit of laughter, though I hope you won't agree with a witness who said, "Judge Biery is full of ...t."

### **III. THE MICRO OF ETHICS AND PROFESSIONALISM**

A. Henry David Thoreau: "Simplify, simplify, simplify."

B. Uncle Gibby: "Don't do that."

C. Examples of "to do's" and "not to do's."

### **IV. THE MACRO OF PROFESSIONALISM**

The nomenclature "legal industry" is a misnomer. We are not industrialists. We are professionals like our colleagues in journalism, medicine, education and the clergy. Like ostrich heads in the ground, if we ignore the news and shrink from our responsibility, there will be no profession to profess nor to protect. We can be lemmings following others off an authoritarian cliff, or we can be Martin Luther King, Jr., drum majors for justice. Speaking of drum majors, there was a little boy who grew up in a trailer park about ten miles south of here. He was the drum major at South San High School. Some years later, President Reagan plucked him out of the U.S. Attorney's Office and appointed him to be a federal judge in Washington, D.C. Two weeks ago, in successfully ordering the Executive Branch to restore 12 million dollars for Radio Free Europe, Judge Royce Lamberth wrote, "If our nation is to thrive for another 250 years, each coequal branch of government must be willing to courageously exert the authority entrusted to it by our Founders. I am fulfilling my part in this constitutional paradigm."

In a future appropriate case, with a nod to Diana Ross, a judge might write, "This Court having now ruled, the Supremes can choose to sing for a would-be king or give voice to the Constitution."

It can be burdensome to live in a democracy, to use our professional skills to preserve and bear witness to what millions of women and men have given us and for which they have sacrificed. And those who gave their lives so we could wonder why they did if we don't.

We began with Hamlet. We near the close with Henry VI.

Jack Cade said, "And when I am king, as king I will be, and the good people will worship me their lord." Then, his right-hand man, Dick the Butcher, said, "The first thing we do, let's kill all the lawyers," who were the protectors and guardians of English rights and to do so in order for Cade to achieve his illegitimate seizure and usurpation of power.

One might say Mr. Shakespeare was not only a gifted writer but also prescient, though now, instead of homicide, it is the denial of law firm security clearances, banning lawyers from federal buildings, firing Assistant United States Attorneys for doing their job, attempting to intimidate judges and physical threats, some of which in the past have come to fruition. WE. WILL. NOT. BE. INTIMIDATED. We do not have to pledge our lives and our fortunes as did the Founders, but we do pledge our sacred honor. We pledge fealty not to the President who nominated us, but loyalty to and abiding faith in the Constitution and the rule of law. And we make rulings based on the law applied to the facts. To those who disagree with our decisions, assassination and harassment are not solutions, but if you must, please leave our families alone. Thank you.

About fifteen years ago President Musharraf of Pakistan did not like decisions of the Supreme Court and so he fired the chief justice and put the justices under house arrest. Courageous

Pakistani lawyers took to the streets. Around the same time, the President of Hungary did not like what Hungarian judges were doing and had the mandatory retirement age reduced to 62 so he could name judges who would do his bidding. I thought to myself, as perhaps you did, “Tsk, tsk, that could never happen here.” We revolted after Mr. Jefferson wrote of King George, “He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.”

Others in the Executive Branch have sought to expand their power by suspending habeas corpus, trying to pack the Supreme Court and interning American citizens which Judge Sakai’s family knows only too well. And in the 1970s, a President used federal agencies to target political opponents.

Ultimately, the separation of powers, checks and balances and the North Star of our Constitution prevailed with the professional commitment of lawyers and judges, exemplified by the voice of Texas lawyer Barbara Jordan echoing in the halls of Congress: “My faith in the Constitution is whole; it is complete; it is total. And I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.”

Fifty-two years ago, I took an oath to this document and five times since then for various judicial offices.

It was written with a feather by flawed and hypocritical men. Before then, two men whose names are little remembered, John Pulling and Robert Newman, in their own small way helped to begin a new nation by hanging lanterns, one if by land and two if by sea, in the Old North Church. That journey continues with us if we also do our small part.

In this moment, when our ship of state sails on a stormy sea, we can be a Simon and Garfunkel bridge over those troubled and divided waters by using and invoking our professional voices to speak up for due process and the rule of law, with the hope that our motto for a nation of immigrants, E Pluribus Unum, might mean what it says.

Today I choose to take that oath for the seventh time. Perhaps you will as well.

I solemnly affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; that I will seek justice without fear or favor and do justice for the poor as well as the rich; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

The thoughts of Pastor Niemöller are also apropos. "First they came for the Communists, and I did not speak out because I was not a Communist. Then they came for the Socialists, and I did not speak out because I was not a Socialist. Then they came for the trade unionists, and I did not speak out because I was not a trade unionist. Then they came for the Jews, and I did not speak out because I was not a Jew. Then they came for me, and there was no one left to speak for me." And I would add, "Then they came after the lawyers and judges, and there was no one left to speak truth to power."

In England, on occasions like this, barristers and solicitors raise a toast, "Long live the King." May our words be: "Long live the Constitution."

After the constitutional convention, a lady asked, "Well, Dr. Franklin, what do we have?" "A republic if you can keep it."

Now, ladies and gentlemen, in our time it is up to us to do the keeping. Our children and grandchildren are watching and wondering what we will do.