

## LEADING WITH OUR JESUIT VALUES IN CHALLENGING TIMES

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Bradley W. Joondeph

My perspective is that of a student of our Constitution—in particular, constitutional law as it has been elaborated by the Supreme Court in tens of thousands of judicial opinions. But that perspective seems too narrow for the present moment, so I will try to widen my lens.

In more ordinary times, our constitutional system operates on what is often called a “presumption of regularity”: a presumption that the government—and particularly the executive branch of the federal government—acts in good faith. This good faith is not some Pollyanish notion that politicians will think only of the common good or pursue an agenda of lovingkindness. It is a less idealistic, more pedestrian idea, but one that is essential to the functioning of our democracy. It is the presumption that the government will:

- \* value and speak the truth, especially in its official pronouncements;
- \* adhere not just to the narrowest conceivable interpretations of the constraints on its authority, but to reasonable, relatively conventional understandings of those constraints; and
- \* when it believes those constraints to be unjustified, challenge them in an open and transparent way, adhering to the conventional understandings of those limits until authorized to do otherwise.

In short, it is the presumption that the government actually *cares* about the legality of its actions—that it sincerely values the rule of law and the sustenance of our constitutional order (beyond how the degradation of that order might affect its own power).

That is not this moment. Presently, the federal executive branch is acting without “regularity”—without apparent concern for the Constitution or our long-established constitutional norms. The examples are too numerous to list, but the pattern is clear: its *modus operandi* has been to pursue its objectives constrained only by the extent of its own raw power, placing the burden on others to stop it. And this is suffocating our constitutional system, depriving it of the mutual trust that serves as its oxygen.

I think about all the sacrifices people have made throughout our history to nudge us towards becoming a more perfect union. I see this precious, fragile gift we have been endowed, and I feel it being exploited and squandered for personal gain. It is heartbreaking.

To be sure, the Constitution endows various actors with tools to constrain the President. But those tools, at least thus far, have not been up to the task. Congress—the body with the greatest capacity to stand up to the President—has shown no interest. The federal courts, on balance, have performed reasonably well under immense pressure. But the judiciary can only do so much; with neither the purse nor the sword, it lacks the power to thwart a determined executive. A handful of state governments have thrown some sand in the gears, with a modicum of success. But in our system of federalism, states are at a structural disadvantage in disputes with the federal government. Perhaps most hopefully, heroic individuals have risked their lives in protest—Alex Pretti and Renee Good most prominent among them.

In the end, though, no constitutional system can withstand unyielding attacks from an executive branch that is indifferent to the rule of law, at least when enabled by the national legislature. As Madison noted, the Constitution is a mere parchment. It sets down certain principles and ideals, the rules that organize our politics. But a well-functioning constitutional system depends on the polity’s defense of

those principles and ideals. If We the People do not hold the government to account for transgressing those constraints, there is no safety net.

As I think about my own response in this moment, I am guided by the spiritual principles I have learned since coming to Santa Clara—lessons I have taken from so many patient and wise teachers in the Jesuit tradition. Candidly, there have been many days when all I could do was disengage, when I have wondered: *What is the point of teaching constitutional law at a time like this?*

But for a person with my privilege and position, the capacity to compartmentalize is a luxury. My understanding of Ignatian spirituality counsels that turning away from the world *as it really is*—or worse still, giving in to cynicism or despair—is profoundly self-indulgent. We have been warned that the path would not be easy, that darkness would test our faith. Whether in a daily Examen or otherwise, I need to ask myself, with a genuinely open mind and an open heart: Am I really honoring my first principle and foundation? Am I really living my life for others, asking nothing in return?

As best I can discern, what I can do in this moment is hold steadfast. To speak the truth, carefully and rigorously, but without fear. To draw attention to the many ways our government is acting illegally and undermining our precious constitutional values. To stand with those targeted by the government's cruelty and brutality. And to say no—calmly but insistently—to being intimidated or extorted.

I see the current threat as systemic and existential: a breaking of our constitutional way of proceeding. So it is critical we do whatever possible to preserve our enduring constitutional values. Among other things, that means:

- \* protecting free expression, including speech we find abhorrent;
- \* honestly seeking the facts and the truth, even when they upend our comfortable narratives;
- \* affording every human being due process of law, especially when it is costly or inconvenient;
- \* respecting the validity of duly enacted laws, even when we think them unjust;
- \* respecting the legitimacy of judicial decisions, especially ones with which we disagree; and
- \* protecting an independent and apolitical criminal justice system, even when it means that criminal acts will go unpunished.

These are not progressive or conservative commitments, red or blue or something in between. They are simply preconditions for the rule of law.

In short, my aim is to play some small role in keeping the flame burning—in preventing this darkness from demeaning or diminishing who we are, as individuals or as a community. When a new day dawns, I hope that flame can help ignite a project of *restoration*: restoring the presumption of regularity to our constitutional order, replenishing the trust and good faith that make a free, diverse, and democratic society possible.