

**Garrett Epps' Address
to the Lane County Chapter
of the ACLU of Oregon**

February 2008

Thank you. It's a great honor to be asked to speak at this meeting and I regret that I will begin by telling you one of the four Great Lies. I am sure you know what they are:

1. When a debtor says, "The check is in the mail."
2. When a lover says, "Of course I'll marry you."
3. When a bureaucrat says, "I'm here to help you."
4. And finally, when a law professor says, "I will be brief."

Nonetheless, I will try to be brief, so that we can spend some time in discussion rather than in my talking at you.

Thirty years ago, Justice William Douglas warned of a slow transition from a free society to a dictatorship: "As nightfall does not all come at once," he wrote, "neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air – however slight – lest we become unwitting victims of the darkness."¹

The phrase "twilight zone" has multiple connotations. As a constitutional matter, it evokes Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube*. In that case, the Court upheld President Truman's seizure of the steel mills to keep them operating during the war in Korea. Justice Jackson refers to the President's authority in a case where Congress has neither authorized nor forbidden a given use of executive authority. And he warns,

"There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants."

As a matter of culture, of course, the phrase evokes memories of Rod Serling's TV show, in which the viewer finds herself in new realities,

¹ Letter from William O. Douglas to the Young Lawyers Section of the Wash. State Bar Assoc. (Sept. 10, 1976), in *THE DOUGLAS LETTERS* 162 (Melvin I. Urofsky ed., 1987).

places that though they seem familiar have been unexpectedly altered in ways that would have seemed impossible.

Both uses of the phrase seem relevant to me today. In large part because of the extension of presidential authority since September 11, we do find ourselves in a country that looks familiar but behaves in ways we can hardly recognize. And there is every reason to believe that this new country is in fact in Justice Douglas's "twilight zone," an ominous transition between self-governing democratic republic and an imperial despotism, where citizens are at the mercy of a secretive government apparatus that spies, censors, imprisons, tortures and perhaps even kills without due process, transparency or accountability.

Obviously the work we do as members, volunteers and cooperating attorneys of the ACLU is vital to the attempt to prevent the current twilight from deepening into moonless darkness. Many of you do work that I not only respect but that I could not do at all. My talent in life is words; and long ago I decided that if I will be remembered at all, it will be only, to paraphrase Dr. King, as a very minor drum-major for democracy. The people in this room play a far more important role in the ACLU's work than I do. The ACLU is often the last refuge for citizens at the mercy of overbearing government officials and passionate, intolerant majorities. The efforts we make are crucial to preventing democracy from sliding into bureaucratic oppression. We do it by advocating, organizing and litigating to preserve the structure of civil liberties that have been bequeathed to this generation—originally in fairly robust condition—by the generations of Americans who came before.

But vital though they are, these rights may not be sufficient to prevent the onset of night. That's because a structure of rights cannot survive in a society that has abandoned the democratic ideals that inspired them. Without robust democratic values both in the culture and in the political system, rights soon become mockeries of themselves, abstractions to be given lip-service by a government that systematically violates them without fear of exposure or punishment. Remember that no written constitution in history has guaranteed more rights than did the Constitution promulgated by Stalin in the USSR during the 1930s. Without a democratic culture, without a national commitment to the rule of law, without a genuine belief in human equality, rights will become formal husks without meaning.

I want to talk very briefly about these other conditions I think are necessary to maintain a free and democratic society. Those are, again, a democratic culture, the rule of law, and concern and respect for each

individual as an equal member of society. I recognize that the ACLU cannot fight for all these values – we lack both the resources and the mandate to be a general drum-major for democracy. But we as citizens can internalize the requirements of a truly self-governing democratic system; we can learn of their genesis in American history; we can master the language that holds them as ideas intact before the eyes of the American people; and we can by force of outcry and political action fight the attitudes, actions and inactions of government – and the distortions of culture and public discourse – that can crush these sometimes fragile values, or condemn them to a long slow death by indifference and distortion.

I draw my lessons from the five years of research I did for my latest book, *Democracy Reborn*. *Democracy Reborn* tells the story of what I consider our *real* constitution: the Fourteenth Amendment to the Constitution, which for the first time covenanted that all persons born or naturalized in the United States are our fellow citizens; which for the first time required state governments to observe due process and the Bill of Rights; which for the first time in American history introduced the concept of human equality into our nation's governing law. That Amendment was proclaimed ratified July 21, 1868, and it was written in the full glare of public scrutiny by a group far more radical in their political beliefs, and far more visionary about the country they wished to build, than were the propertied gentlemen who met in secret in Philadelphia in 1787.

The ideas of Philadelphia were not ones we would wish to live by today. The Framers, for all their wisdom, constructed a society with a hierarchy by law. At the top, free, propertied white males, who alone were fit to exercise political rights; below them the landless and the urban workers whose desire for economic reform and justice they distrusted; below them intermediate classes only partially free, such as apprentices and so-called "free blacks"; below them women, who were all at most second-class citizens and who underwent so-called "civil death" upon marriage; and finally, at the bottom, chattel slaves, who were held as property and whose children would be property until the last generation. Whatever Thomas Jefferson may have written in the Declaration of Independence, the Philadelphia Framers did not act like men who believed that "all men are created equal"; nowhere did the Constitution even mention that idea. Whatever we believe today, they did not believe in a robust regime of individual rights. Remember that our Bill of Rights was a grudging afterthought, inserted only after popular outcry threatened to derail the project of the Constitution. In fact, the great scholar John Hart Ely once argued, the original Constitution contained protections for one and only

one substantive political value – the value of slavery, which the document in dozens of ways protected and guaranteed.

The First American Republic – the republic of hierarchy and the Slave Power – died at Cemetery Ridge on July 3, 1863, when the flower of my native state, Virginia, led by General George Pickett, threw their lives away against the Union guns. The Second Republic – the republic of which we today are the stewards and beneficiaries – was born 15 days later, on July 18, 1863, when the fabled 54th Massachusetts threw itself against the Confederate guns of Battery Wagner in South Carolina; and though those brave African-American soldiers gladly threw their lives away, their sacrifice had won a battle – a battle for citizenship and equality not only for former slaves but for their children until the last generation.

It was to secure that victory that the Framers of the Fourteenth Amendment gathered to point their way to the promised land of a true republic. Dishonest and distorted historical accounts have suggested that these Framers were conservative men who wished to make as few changes to the Philadelphia design as possible. In fact, they were as radical as any group of political leaders in our history. Simply as one example, consider the credo of Rep. John Armour Bingham of Ohio, who told his colleagues even before the Civil War,

It is the high heaven of the nineteenth century. The whole heavens are filled with the light of a new and better day. Kings hold their power with a tremulous and unsteady hand. The bastil[il]es and dungeons of tyrants, those graves of human liberty, are giving up their dead . . . the mighty heart of the world stands still, awaiting the resurrection of the nations, and that final triumph of the right, foretold in prophecy and invoked in song.²

What were the ideas these nineteenth century Framers wrote into our fundamental law? I could go on for hours, but I will not. I will summarize them quickly, and perhaps we can develop them during questions. The key ideas were these: in a true republic, all native persons – all of our own, with no exceptions for the unworthy were citizens and all citizens were equal before the law; Immigrants – those whom Bingham called “the stranger inside your gates” – were to be treated as fellow human beings and governed by equal laws; governments

² ERVING BEAUREGARD, BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY 35 (1989).

could not silence their enemies; neither police nor other officials could arrest, imprison, punish or despoil anyone without faithfully following the ancient procedures of the common law. And finally, a true republic was a nation, where national commitments to equality and openness and pluralism always trumped the local majorities pursuing the agendas of tribalism, enforced silence and conformity. The only holders of rights in such a republic were citizens. Governments had duties; they had limited powers; but no government, no political subdivision, had "rights" that it could interpose between ordinary people and their participation in the nation.

The high heaven of Bingham's vision is for us in this country what the Promised Land was for the people of Israel: a goal ever going before, a cloud by day, a pillar of fire by night. We have not gotten there, but in our greatest eras – the New Deal, the Civil Rights and antiwar eras, the heydays of feminism – we have moved toward it without fear or apology.

This, I fear, will not be remembered as one of our great eras. As we look around today, we see the commitment to free speech scorned and undermined, both by government and by the powerful owners of media quasi-monopolies. Only a few years ago, a spokesman for the White House warned citizens to "watch what they say." We see the ideas of due process and of equal concern openly flouted; we see the concept of self-government – the idea that elections should reflect the often surprising preference of the people as a whole rather than the foreordained choices of an elite – dismissed as a fantasy. Under a true republic, voters pick their leaders; under the new model, apparently, it is to be the other way around. And finally, we see the ideals of equality systematically under attack. Media hatemongers and political opportunists seek to reduce 12 million of our fellow residents to a subordinate status in which they will have no rights a white man is bound to respect. Some demand the deportation of this population – an atrocity on a scale the Third Reich could not have imagined. Some even clamor to make "illegal" status hereditary, to void the birthright citizenship that is the centerpiece of the Fourteenth Amendment framers.

Some seek, in other words, to re-establish slavery; and many of those also seek to establish authoritarian government, and even to legitimate torture. Government officials solemnly debate whether drowning – there is nothing "simulated" about it – is "torture." Ordinary citizens, seeing once unbreakable moral boundaries thus rendered porous, clamor for more and more brutal treatment of enemies. I recently heard an excerpt from a right-wing radio show in which a caller explained that she was opposed

to John McCain because, "he's against torture and I am pro torture." Lest we think that this is some lone lunatic, note that one of the Justices of the Supreme Court—designed as the keeper of legality—has expressed his view that "so-called torture" may not necessarily be prohibited by the US constitution, and that "smacking someone in the face" may be a good idea in the counter-terrorism context.

Could anyone have imagined on September 10, 2001, that we would permit a terror attack so thoroughly to coarsen our public morality and so viciously to corrupt our government? I think we are in a dark time indeed, darker than even we know, for darkness falls gradually and we seek to adjust to it and deny it. "(R)eason by degrees submits to absurdity," Samuel Johnson wrote in 1750, "as the eye is in time accommodated to darkness."

Increasingly, we live in a time of moral death; and to paraphrase Lincoln at Gettysburg, it is for us the living to finish the work that was begun 150 years ago. The kind of people who are gathered here must dedicate themselves not solely to fighting for legal rights, but to opposing the fashionable notions of authoritarianism, official brutality, secrecy, empire and human subordination by birth or citizenship. Sometimes I feel, as others in this room must sometimes feel, like Kevin McCarthy at the end of *Invasion of the Body Snatchers*, running into oncoming traffic and shouting, "They're here already! You're next! You're next! You're next!"

But that won't be enough. We must hammer out not just a danger and a warning, but a love between our brothers and our sisters all over this land. We must show them not only that today our people walk in darkness but that there is a bright land of equality and justice that was promised to us more than a century ago; that we can and should go there without fearing the malice of our enemies or our own weakness and need for authoritarian leaders.

As citizens, we must be not only the guardians of rights, but the drum-majors of democracy, in our words and our lives. And if enough of us do our duty, our children will remember this time as an era of greatness, not of brutality and shame. We will not be those who meanly lost our heritage to the darkness, but as those who nobly saved their country. We will not remember the twilight zone, but the new dawn of freedom. The people in this room, all of you, are among my heroes in this fight, and the struggle continues.

Thank you.