

BY LISA E. DAVIS



The Rule of Law dates back to at least the Magna Carta of 1215. It is the foundational principle of our Republic, best expressed by Thomas Paine, who said, “For as in absolute government the King is law, so in free countries the law ought to be king; and there ought to be no other.”¹

In the United States, the principle of adherence to the Rule of Law is expressed in our Constitution, the architecture from which the edifice of our democracy was built. Although the Constitution was decidedly imperfect at its inception, in denying African Americans any measure of humanity or women the full rights of citizenship, its enduring strength is evidenced by the fact that brilliant lawyers used the selfsame tool to correct those glaring oversights and push our country to live up to its credo that “all men are created equal.”

The articles and amendments of our Constitution are the guardrails of our civil society. We must recognize that challenges to the legitimacy or universal applicability of our Constitution are challenges to the Rule of Law itself and treat them as such. We have treated the Rule of Law as something unchangeable that we don’t have to work to maintain. The events of the last year should have shaken us all out of our complacency.

Last November, for the first time in modern history, the United States elected as president a non-lawyer who has never demonstrated an understanding of, or a reverence for, the Constitution or the Rule of Law. To the contrary, Donald Trump’s constant derision of the press as “fake news” is evidence of his antipathy to the First Amendment.

Despite having taken an oath to “preserve, protect and defend the Constitution of the United States,”² Trump routinely displays what could most charitably be framed as ignorance of the protec-

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The Lawyer’s Oath and the Rule of Law

tions afforded to citizens by our Constitution. Many have argued that Trump violated the “Emoluments Clause” of Article II since his first day in office.³ His intemperate calls to send accused terrorists to Guantanamo evince his ignorance of the Sixth and Eighth Amendments. What stands out most during Trump’s tenure, though, is his relentless attack on the rights guaranteed by the First and Fourteenth Amendments.

Trump’s fundamental lack of understanding of the relationship between a free press and a functioning democracy was evident in his very first press conference after the election. Trump refused to take a question from CNN’s Jim Acosta, calling the network, “fake news.”⁴ Trump berated the “dishonest media” for accurately reporting his equivocation on the character of the Nazis who marched in Charlottesville.⁵

In its brief duration, the Trump administration has also promoted policies that make a mockery of the Fourteenth Amendment guarantee of equal protection of the laws. Virtually every policy initiative has involved singling out categories of Americans for differential and punitive treatment under the law. From the travel ban that numerous courts found to be a fig leaf for anti-Muslim animus, to the transgender military ban, to the withdrawal of protection from the Dreamers, the policy agenda of this administration seems to be to establish classes of Americans entitled to less legal protection than others, in direct contravention of the Fourteenth Amendment.

As Americans, this should unnerve us. As attorneys, this should spur us to act. Regardless of our practice area, or whether we serve in public office, each of us took an oath to “support the Constitution and the laws of the State of New York.” Although few of us have

probably thought about the meaning of those words since we recited them with raised right hands many years ago, now is the time for us to recognize that the words we affirmed to become members of the bar are more than a talismanic phrase devoid of meaning. They confer an obligation.

Whether by responding to the Muslim ban by flooding the airports armed with nothing more than laptops and Lexis passwords⁶ or volunteering at clinics to assist DACA recipients with the documentation required to remain in the only country they have ever known, New York lawyers have been answering the call and showing that we understand that to “support” the Constitution means to “uphold or defend” it as “valid or right.”

Benjamin Franklin famously quipped that the Founders had created “a republic, if you can keep it.” As lawyers, we must recognize our pivotal role in answering Franklin’s challenge. At a time when those in government abandon their obligation to uphold the Constitution, lawyers must step into the breach and advocate, not only for our clients, but for the Rule of Law itself. ■

1. Thomas Paine, *Common Sense*.

2. U.S. CONST., art. I, § 1.

3. Eric Lipton and Adam Liptak, *Foreign Payments to Trump Firms Violate Constitution, Suit Will Claim*, N.Y. Times, Jan. 22, 2017, A18.

4. Dylan Byers, *Donald Trump attacks press, conflates CNN, BuzzFeed reporting at news conference*, CNNmedia, Jan. 11, 2017, <http://money.cnn.com/2017/01/11/media/sean-spicer-mike-pence-donald-trump-press-conference/index.html>.

5. Brian Naylor and Tamara Keith, *Trump Defends Charlottesville Comments At Phoenix Rally*, by NPR.org, Aug. 22, 2017, <https://www.npr.org/2017/08/22/545226284/trump-heads-to-arizona-to-push-border-wall-funding-rally-supporters>.

6. Dahlia Lithwick, *The Lawyers Showed Up*, by Slate, Jan. 28, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/lawyers_take_on_donald_trump_s_muslim_ban.html.