

All the President's Lawyers

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Everyone deserves a lawyer. It's a bedrock principle of the American legal system; the centerpiece of any civilized society's approach to criminal justice; the ethical backbone of *To Kill a Mockingbird*, the novel that propelled countless would-be Atticus Finches to law school.

But are there limits?

The landmark 1963 Supreme Court case involving Clarence Earl Gideon guaranteed an indigent defendant's right to counsel in criminal cases. Yet attorneys invoke the "everyone deserves a lawyer" mantra reflexively to rationalize client representations that go far beyond that constitutional protection.

A little more reflection might be in order, especially when the client uses the world's most powerful podium to attack the rule of law itself and enlists the support or complicity of lawyers to help him.

President Trump is entitled to legal representation. But when he undermines America's constitutional foundation, he has no right to assistance from enablers with law degrees. Respect for the rule of law is not a partisan issue. It's the legal profession's animating force, central to the Constitution's design. It is also fragile. Remove any single leg of the separation-of-powers stool and our democracy collapses.

Every law school graduate understands the implications of abandoning that principle. Forsake it and all other policy controversies fade away, as the great American experiment disappears

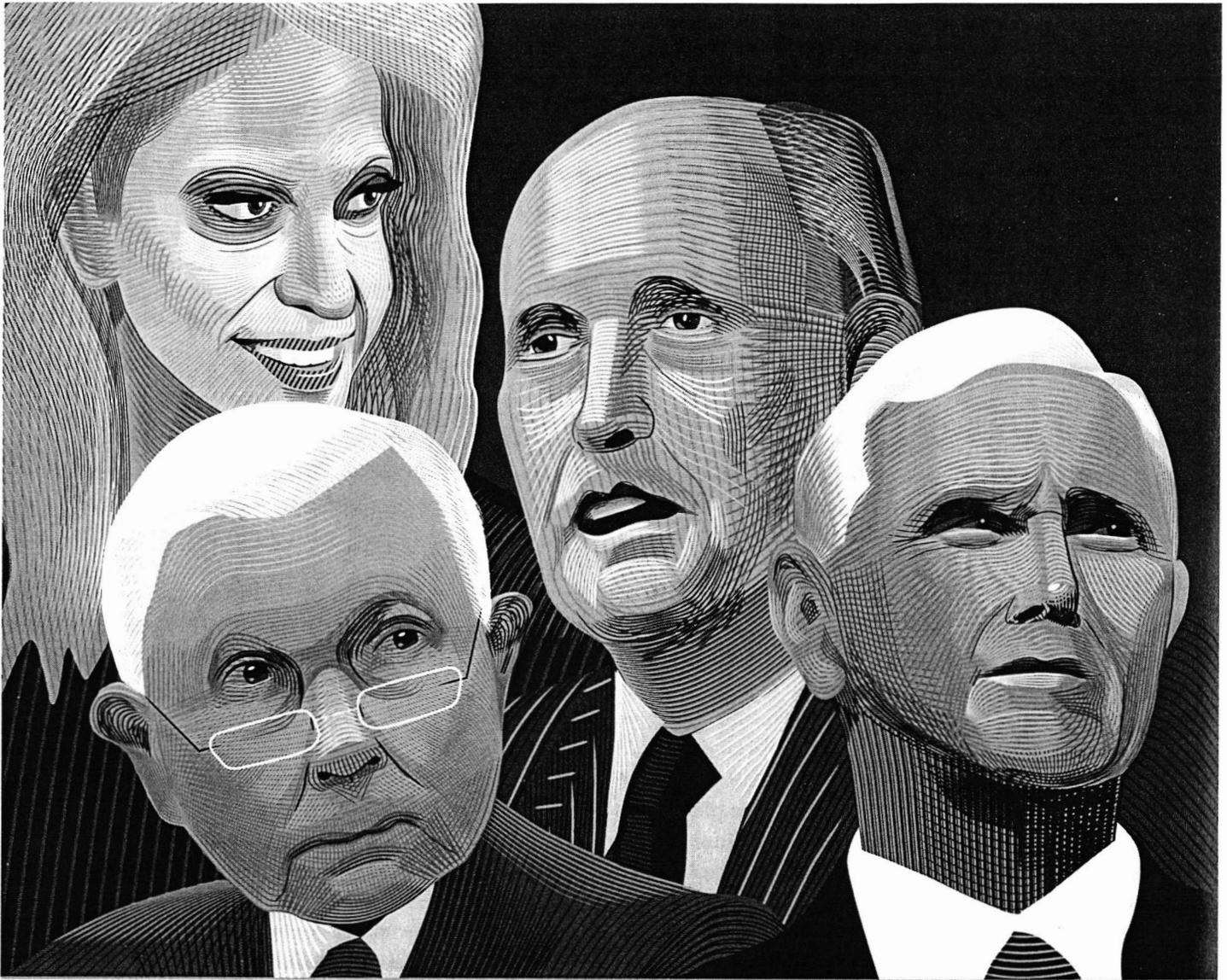
into history's dustbin of failed republics. The president seems indifferent to that outcome.

Unfortunately, some of the attorneys surrounding him don't seem to care either. Perhaps the prospect of fulfilling an immediate policy agenda motivates them. Maybe the lure of future wealth or the proximity to power is overwhelming. Whatever the reason, too many lawyers have yielded to the lesser angels of their nature. As they betray their profession and the country's founding ideals, the rest of us must call them out.

Disrespect for the Rule of Law

Early and often, Trump touted his disrespect for the rule of law and the Constitution's separation of powers. Repeatedly, advisers with law degrees defended and thereby emboldened him. As a candidate, he encouraged rough treatment of protesters at his rallies. In December 2015, he called for a ban on all Muslims entering the country.

That same month, he launched the first missile in what became an ongoing attack on the *Washington Post* and its owner, Amazon's Jeff Bezos, for what Trump claimed was negative coverage of him and his campaign. The assault morphed into Trump's threat that, if he became president, Amazon would have "such problems." Then, in February 2016, he promised to "open up"



the nation's libel laws so he could win "lots of money" by suing papers such as Bezos's *Post* and the *New York Times*. He attacked "FAKE NEWS" that wasn't fake; rather, he just didn't like it.

Perhaps it was easy to dismiss those rants because Trump was not yet the party's nominee. But even after emerging as the likely head of the Republican ticket, he persisted. Trump's June 2016 barrage against an Indiana-born federal judge for his "Mexican heritage" crossed yet another red line. Judge Gonzalo Curiel had ruled against a Trump-branded "university" that promised to help students get rich investing in real estate. In circular fashion, Trump reasoned that *his own* comments about Mexicans and immigration somehow meant that the judge couldn't be impartial. Had they come from an attorney, Trump's caustic remarks would have warranted immediate strong sanctions.

Plenty of intelligent people with law degrees—and even plenty of those without—saw the danger in Trump's diatribes. But many of his defenders convinced themselves that if Trump

won the presidency, restraining influences would keep him in check. "He'll have a White House counsel," said Senator Mitch McConnell (JD, Kentucky, '67). "There will be others who point out there's certain things you can do and you can't do."

But it hasn't happened that way.

Instead, a dangerous normalization of abhorrent presidential behavior began. Sure, there was a White House counsel—Donald McGahn (JD, Widener, '94)—and many other close advisers with law degrees: Vice President Mike Pence (JD, Indiana-Robert McKinney School of Law, '86); Kellyanne Conway (JD, George Washington, '92); Jared Kushner (JD/MBA, NYU, '07).

Until Attorney General Jeff Sessions (JD, Alabama, '73) and chief of staff Reince Priebus (JD, Miami, '98) fell from Trump's grace, they were in the mix too. To use McConnell's words, all of them have been in a position to point out the things that Trump can and can't do. But instead, all of them and many others in the White House with JDs became his enablers.

Since the inauguration, Trump's assault on the rule of law has intensified. Making good on a campaign promise, he issued a ban on travelers from several Muslim-majority countries. When Judge James Robart ruled against the first travel ban, Trump tweeted to 50 million followers, criticizing the "so-called judge," attacking the appellate court that affirmed the decision, and spewing venom at other federal courts reaching the conclusion that the ban was unconstitutional.

As federal judges continued to rule against Trump's travel ban, he lashed out further. And, disgracefully, his enablers with law degrees defended his outbursts:

- Kellyanne Conway: "I think his tweet was perfect. . . ." and "If there are any politics in any judicial decision, then the president and his people have a right to call that out."
- Jeff Sessions: "I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States. . . ."
- Mike Pence: "I think the American people are very accustomed to this president speaking his mind and speaking very straight with them. . . ."

But wait. What happened to the Model Rules of Professional Conduct?

"A lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority," states its preamble.

How about Model Rule 8.2, which forbids a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge"?

And what about the oath that every lawyer takes to uphold the Constitution? By the way, the presidential oath includes that commitment, too.

As Trump advanced to terrain that was increasingly dangerous to the Constitution's framework, his lawyer enablers followed. The first court to rule against his attempt to deny federal funds to sanctuary cities found itself on the receiving end of an official White House statement that read as if it had come from a banana republic, not the beacon of the free world:

- "Today, the rule of law suffered another blow, as an unelected judge unilaterally rewrote immigration policy for our Nation. . . ."
- "Sanctuary cities, like San Francisco, block their jails from turning over criminal aliens to Federal authorities for deportation."
- "Once again, a single district judge, this time in San Francisco, has ignored federal immigration law to set a new policy for the entire country."

- "This case is yet one more example of egregious overreach by a single, unelected district judge."
- "Today's ruling undermines faith in our legal system. . . ."
- "Ultimately, this is a fight between sovereignty and open borders, between the rule of law and lawlessness, and between hardworking Americans and those who would undermine their safety and freedom."

White House Counsel Don McGahn's job was to review that statement before it went out. But if he is telling Trump "what he can and can't do," there's little evidence that Trump listens. Professor Jack Goldsmith, a former member of the Justice Department's Office of Legal Counsel for President George W. Bush, suggested that McGahn must be either incompetent or ineffective.

If we members of the legal profession—especially the litigators—do our jobs properly, our nation will survive.

In response to a terrorist attack in New York during fall 2017, Trump entertained briefly the idea of sending the suspect to Guantanamo. Urging a quick dispatch for the yet-to-be-tried suspect, he referred to America's criminal justice system as a "joke" and a "laughingstock." Trump's advisers with law degrees remained silent, just as they did when he told a rally crowd that he'd like to see the police get tougher on suspects.

When asked about Trump's ambivalent, ambiguous, and contradictory statements about white supremacist violence and neo-Nazis in Charlottesville, Pence said, "I stand with the president, and I stand by those words."

None of Trump's legal advisers raised a voice or a finger after he acted without the usual multiyear analysis from the Justice Department and pardoned former Maricopa County Sheriff Joe Arpaio, guilty of criminal contempt relating to his department's notorious civil rights law violations. The pardon was more than a finger in the judiciary's eye; it was tantamount to Trump declaring that he is the law. And in May 2018, Pence heaped praise on then GOP Senate candidate Arpaio: "A great friend of this president, a tireless champion of strong borders and the rule of law. Sheriff Joe Arpaio, I'm honored to have you here."

Then there's Russia, which attacked a presidential election, the heart of American democracy. Less than a month after his inauguration, Trump asked the director of the Federal Bureau of Investigation (FBI) at the time, James Comey, for "personal loyalty" and didn't get it. Attorney General Sessions, complying with Justice Department regulations, recused himself from the Trump-Russia probe—an act of disloyalty for which Trump never forgave him.

When Trump told his advisers with law degrees that he planned to fire Comey, they were loyal and helped him promote a lie. According to numerous media reports, Mike Pence saw Trump's draft termination letter—a "rant," according to one description. Jared Kushner saw it too. So did Donald McGahn. So did Deputy Attorney General Rod Rosenstein (JD, Harvard, '89), who then drafted the memo that Sessions endorsed and that—apparently to Rosenstein's later surprise—anchored the false White House cover story for Comey's firing on May 9, 2017.

Kushner, McGahn, Pence, and Priebus reportedly worked on talking points for the false narrative. Kellyanne Conway took to the airwaves and marketed Trump's lie. Pence himself went to Capitol Hill and said that Deputy Attorney General Rosenstein "came to work, sat down and made the recommendation for the FBI to be able to do its job that it would need new leadership. He brought that recommendation to the president. The attorney general concurred with that recommendation."

As a reward for their personal fealty, Trump threw them under his bus. In a private Oval Office meeting on May 10, he told Russia's ambassador and foreign minister, "I just fired the head of the FBI. He was crazy, a real nut job. I faced great pressure because of Russia. That's taken off." The next day, with NBC's Lester Holt, he went public. Rosenstein's recommendation was irrelevant, Trump said. He fired Comey because of "this Russia thing."

Then Rosenstein incurred Trump's wrath. Prioritizing the rule of law over personal loyalty to Trump, Rosenstein appointed Robert Mueller (JD, UVA, '73) as special counsel.

Trump's sudden turns against Sessions and Rosenstein didn't stop Jay Sekulow (JD, Mercer, '80) from joining Trump's attack team in June 2017. Sekulow had an unfortunate public debut. When the *New York Times* learned in July 2017 about a June 9, 2016, Trump Tower meeting among Paul Manafort (JD, Georgetown, '74), Jared Kushner, Donald Trump Jr., and several Russians, reporters asked Don Jr. about it. His first statement read, "We primarily discussed a program about the adoption of Russian children."

On national television, Chief of Staff Priebus called the episode a "big nothingburger."

Then Don Jr. changed his story again and, on July 11, released the emails that had led to the meeting. They promised "dirt" on Hillary Clinton "as part of Russia and its government's support of Mr. Trump." Don Jr.'s response to that message: "I love it."

On July 12, Sekulow told ABC's George Stephanopoulos that Trump had no role in drafting Don Jr.'s original statement. "The president didn't sign off on anything," he said. "The president wasn't involved in that." On July 16, he told NBC's Chuck Todd the same thing: "I do want to be clear—that the president was not involved in the drafting of the statement and did not issue the statement."

Two weeks later, even the White House admitted that Sekulow's earlier denials were not true. Yet, on he soldiered for Trump. As *Politico* reported in February 2018, "Sekulow has turned the live weekday talk-radio show he hosts into a regular forum for trashing the legitimacy of the federal probes into Trump's Russia connections."

Attacks on the Rule of Law

Repeatedly, Sekulow's co-counsel, Rudy Giuliani (JD, NYU, '68), has spun the press and the public away from facts, truth, and respect for the rule of law. Defying Thomas Jefferson's maxim that a properly functioning democracy depends on an informed electorate, Giuliani's August 2018 statement that "truth isn't truth" was the perfect bookend to Kellyanne Conway's January 2017 invocation of "alternative facts." In between, Trump provided a thematic bridge connecting them: "What you're seeing and what you're reading is not what's happening."

Except, of course, that it is. Trump's unhappiness with what the public is seeing and hearing is evident in his relentless assaults on the investigation into Russia's interference with the election. His targets have included Sessions, Rosenstein, Mueller, Comey, the Department of Justice, the FBI, and even key FBI witnesses who corroborate Comey's testimony that Trump spoke to him about "letting [former national security adviser Michael Flynn] go." Trump defends his Twitter rampages and verbal abuse as "fighting back." But lawyers know an attack on the rule of law when they see it. So do his enablers with law degrees.

For more than a year, Trump has railed against the Trump-Russia investigation as a "witch hunt." If so, it bagged a lot of warlocks in record time. Only 10 months after his appointment, Special Counsel Mueller had secured 22 indictments, including five guilty pleas. To put that in perspective, the Iran-Contra and Whitewater investigations continued for more than four years and had a lot less to show for their efforts.

Even so, on May 10, 2018, Mike Pence weighed in on Mueller: "It's been about a year since this investigation began. . . . In the interests of the country, I think it's time to wrap it up."

Only two months later, Mueller indicted 12 Russian military officers for hacking the Democratic National Committee and Hillary Clinton's campaign. At the same time, he charged a Russian spy with conducting an influence campaign using the National Rifle Association as a vehicle to affect Republican positions and

policies. In August, a jury found former Trump campaign manager Paul Manafort guilty of tax evasion and bank fraud. On the same day, Trump's longtime personal lawyer Michael Cohen (JD, Cooley, '91) pleaded guilty to violating campaign finance and tax laws. Not counting Cohen (whose investigation Mueller had referred to the U.S. attorney in Manhattan), Mueller had notched more than 100 criminal counts against 32 individuals and three companies by the end of August. Yet, throughout it all, Giuliani and Sekulow repeated the Pence talking point that Mueller should "wrap it up."

This is simply not a level playing field. The entire executive branch is subordinate to Trump, who has the added power of a formidable social media presence as mass media chase his shiny objects. For law enforcement professionals who are just trying to do their jobs—upholding the fundamental principle that no one is above the law—the pressure coming from the top has been immense.

The additional demands from a compliant Congress have increased that pressure. In that body, Trump has an ample supply of JD enablers too, including the voices of Senator Lindsey Graham (JD, South Carolina, '81) and Representative Jim Jordan (JD, Capital University, '01). In the face of Trump's dangerous behavior, the pervasive silence of almost every other GOP member of Congress has been deafening. Rosenstein is one positive example of resistance; at times, so is Sessions. But in the search for similar role models in Trump's inner circle and among congressional Republicans, it's slim pickings.

Judges are similarly powerless to deal with Trump's assaults. The Judicial Code of Conduct renders them mute. While Trump freely violates the norms that underpin our system of government, judges faithfully honor the rules prohibiting self-defense.

Who is left to protect the republic?

Look in the mirror. As past Section of Litigation Chair Laurence Pulgram observed: "That leaves to us, the lawyers, the task to speak up on behalf of judges unfairly accused." L. Pulgram, "When Attacks on Judges Go Beyond the Pale," 43 LITIGATION 1 (Fall 2016). Pulgram notes that the ABA has a guidebook for state and local bar organizations to use in dealing with such situations: "Rapid Response to Unfair and Unjust Criticism of Judges." That quick read is worth every attorney's time.

The underlying principles of the guidebook also apply to the special counsel and his team. Like judges, Mueller must proceed secretly and cannot respond to Trump's vitriol. The public learns about his work only when a grand jury issues an indictment or when Mueller issues a final report. Meanwhile, he relies on the rest of us to speak—not in *his* defense, but on behalf of the rule of law that he and his colleagues, as dedicated legal professionals, are trying to uphold.

Some lawyers have risen to the challenge. To her credit, then ABA President Paulette Brown condemned Trump's verbal

attack on Judge Curiel. Likewise, then president of the American College of Trial Lawyers Bartholomew Dalton criticized Trump's response to the federal court rulings that found the original travel ban unconstitutional.

But if the rule of law is to survive, the counterpunches to Trump must become pervasive, stronger, and more systematic. That means publicly and persistently confronting Trump's defenders when they go astray.

Respect for the rule of law is not a partisan issue; it's the legal profession's animating force.

Why does it matter? If lawyers become complicit—or even just acquiescent—when a wayward leader attacks the rule of law, so what?

Two Troubling Precedents

At least two precedents are especially troubling, though not everyone sees them the same way.

One, lawyers were central players in the creation and preservation of World War II Japanese internment camps. In February 1942, President Franklin D. Roosevelt's lawyers wrote Executive Order 9066 establishing the camps. A month later, Roosevelt signed legislation that gave it teeth. In December 1944, six of Roosevelt's eight Supreme Court appointees sided with the government's defense of the camps in *Korematsu v. United States*—a decision that has joined the ignominious ranks of the rulings in *Dred Scott v. Sandford* and *Plessy v. Ferguson*.

Some see that episode as an isolated incident born of ignorance and fear. Others regard it as a profound lesson about the need for special vigilance at critical moments, lest a powerful majority marginalize a helpless minority. Either way, there is little dispute about the objective outcome: However innocent or well-meaning the motives may have been, the law operated as a tool of oppression during a dark chapter in American history. And through both sins of omission and sins of commission, attorneys bore a significant share of the blame.

Two, lawyers facilitated an even darker chapter of world history—Weimar Germany. When discussing Trump, some regard any invocation of the years when Adolf Hitler rose to power as hyperbole that permits them immediately to stop listening or

reading. “Things were much different then,” they say. “That could never happen here.” For others, Trump keeps marking boxes on any “dictator’s checklist”: stoking fear, demonizing opponents, shunning facts, attacking the media, and seeking personal loyalty over respect for the rule of law.

Any debate about comparisons between Trump and Hitler is beside the point. The issue isn’t them; it’s us. In a constitutional democracy, how should the legal profession respond to a chief executive who systematically attacks the rule of law? During the 1930s, Germany confronted that question, and as its democracy slid into oblivion, what were its lawyers doing? Some were greasing the skids.

As with Japanese internment camps in America, an essential precondition was widespread public fear. The newly appointed chancellor, Hitler, exploited the Reichstag fire as an act of domestic terrorism, a Communist plot to overthrow the country. From there, attorney fingerprints were all over the destruction of democracy in Germany.

One day after the Reichstag fire on February 27, 1933, Nazi leaders persuaded an aging President Paul von Hindenburg to issue the Decree of the Reich President for the Protection of the People and the State, which suspended important provisions of the German constitution, especially those safeguarding individual rights and due process of law. The days of a free and independent press became numbered.

A month later came the Law to Remedy the Distress of the People and the Reich. Commonly known as the Enabling Act, it allowed the German chancellor to promulgate laws that violated the Weimar Constitution. On August 20, 1934, a new Oath of Loyalty for All State Officials required obedience to the nation’s leader personally, rather than the German constitution. The Nuremberg Race Laws were enacted on September 15, 1935.

Hitler didn’t draft decrees or legislation. Rather, it was his lawyers—acting as enablers—who helped him dismantle the rule of law. Without the active involvement of attorneys, he could not have turned the legal system against itself. A complicit legislative body assisted and then became irrelevant. Through effective lawyering, the predator made Germany’s legal apparatus his host species. He created a justice system in which he alone was the law to which all others swore personal loyalty.

Perhaps history does not repeat itself. But sometimes it rhymes in unsettling ways. On March 31, 2016, Trump said, “Real power is—I don’t even want to use the word—fear.” His manipulation of fear and his track record in the search for personal loyalty above all else speak for themselves.

This isn’t about whether everyone is entitled to legal counsel. That’s sophistry, of course. No one disputes that attorneys must provide their best advice to clients and advocate zealously on their behalf. But those professional responsibilities have limits. An attorney cannot knowingly permit a witness to commit

perjury. An attorney cannot follow a client’s directive to aid or abet criminal behavior. And an attorney cannot disregard a sworn oath to support the Constitution and the rule of law.

Preserving the Rule of Law

“Lawyers play a vital role in the preservation of society.” So starts the Model Rules of Professional Conduct. During the Trump era, preserving society means confronting head-on a president who veers dangerously off course. It means speaking out against his assaults on the rule of law—every single time. It means standing up for targets and victims who cannot stand up for themselves, including judges and the special counsel’s team investigating potential presidential crimes. It means remembering that, for most of us, our biggest impact occurs one person at a time.

Trump is neither the first populist nor the first demagogue to attack the rule of law in this country. Several years ago, former White House counsel John Dean (JD, Georgetown, ’65) told a meeting of the Pennsylvania Association of Criminal Defense Lawyers that in assembling the names of participants in Watergate wrongdoing, he counted 21 attorneys. In addition to himself and President Nixon (LL.B., Duke, ’37), there were White House Domestic Affairs Adviser John Ehrlichman (LL.B., Stanford, ’51); Attorney General John Mitchell (LL.B., Fordham, ’38); White House Special Counsel Charles Colson (JD, George Washington, ’59); Nixon’s personal attorney, Herbert Kalmbach (JD, USC, ’51); and Egil “Bud” Krogh (JD, University of Washington, ’68), who headed the “Plumbers” unit involved in the break-in.

Thanks to other lawyers—especially litigators—who put the country above their self-interest, political affiliations, and personal policy preferences, most of those criminals with law degrees served prison time.

If we members of the legal profession—especially the litigators—do our jobs properly, our nation will survive. And when the Trump era ends, the profession will have met the challenge that Benjamin Franklin posed when he emerged from the Constitutional Convention in 1787. “Well, Doctor,” he was asked, “what have we got—a republic or a monarchy?” “A republic,” he replied, “if you can keep it.”

However the Trump presidency ends, future generations will ask, “In the struggle to keep the republic, which side were you on?” There is only one correct answer. And every lawyer knows it. ■