The Rule of Law in the U.S. is being threatened as never before.

The President appears thirsting to create a constitutional crisis. He is either ignorant of the cornerstone of our constitutional democracy, the Separation of Powers, or chooses to willfully ignore it; he attempts to delegitimize the other branches, in particular, the judiciary and the press, by crudely and crassly demeaning those institutions and the people who responsibly work for them (he doesn’t similarly have to attack the Republican Senate because they have become spineless and hypocritical toadies, though he does bully and slur the House Democrats who have the temerity to look into his corrupt and immoral behavior); and he is running the Government as though it is his private business dedicated to expanding his visibility, brand and pocketbook, all the while ruling by executive fiat, without listening to aides or reading briefing books, but running roughshod over the checks and balances of the other participants in government who stand in his path.

Many of us lived through the constitutional crisis spawned by Watergate. But this is far worse. Nixon respected and was concerned about the country, and, even amidst his impeachment, was willing to abide by our traditions and processes. (His counsel, Len Garment, once lamented in a panel I moderated that “he should have burned those f___ tapes”, but he didn’t, abiding by the judicial process instead.) He also cared about his historical legacy.

Trump is interested in none of this. He is only looking out for himself. He believes that if he emasculates the press, he can write his own legacy. Therefore, it is reasonable to fear that he is posed to take the country down with him.

Putting aside any substantive differences on policies, this threat to the rule of law ought to be of paramount concern to all lawyers. His attacks on our most fundamental tenets and on our constitutional democracy ought to be rebuffed by all. His lies (the Washington Post counts over 13,000 false or misleading claims in his 1,000 days in office), his corrupt behavior, and his end-running constitutional balances - this whole unnecessary drama he has plunged us into - should be of the gravest concern to all citizens. But it should be of particular concern to attorneys, as custodians of the legal process.
And so, as lawyers, we should do what we can to push back on these attacks on our system. While we can’t do everything, or perhaps even a lot individually, what we can do is take steps to defend the legal system from being destroyed and devalued. In particular, we can help defend our judiciary.

The relationship between the media – and its lawyers – and the judges used to be much more antagonistic. When I started in this bar, just as Richmond Newspapers was being decided, there was fairly open warfare between judges, steeped in the tradition of closing courtrooms and sealing documents for the benefit of the parties before them (and sometimes themselves), on the one hand, and media lawyers on the other. During the 1980’s those issues resolved themselves and the Supreme Court’s precedents on open courts became generally accepted by judges below. While in the 80’s I found myself going to Court once a week to argue for open proceedings, by the 90’s, when casual clothing became the rule, I didn’t fret not wearing a jacket and tie, as unexpected court appearances to rectify court closings became exceedingly rare.

Today the media and the judiciary find themselves in the same boat. Far from being antagonists, Trump has turned us into allies. We are the two greatest subjects of his attacks. Not surprising, since with Congress ineffective and a profile in cowardice, we are the two institutions which can stand in the President’s path. Therefore, since he is used to getting his way, he has embarked on an intentional strategy of bad-mouthing and bullying both of us so as to downplay our respect and credibility among the public, and, hence to render us as toothless, unable to effectively block his often dangerous initiatives.

It is true that, of late, Trump’s direct criticism of the judiciary has been less acute; more often the White House’s recent messages about the courts have related to the number of judicial appointments Trump has made. (The fact that the ABA has determined that a number of those judges were unfit for lifetime appointments is a separate problem.) And it would be a mistake to believe that unfair criticism of the courts arises solely from the right. Out of desperation at the incompetence and malignity that flows from the White House and goes unchecked by the Senate, many on the left have looked to the judiciary for salvation as if it possessed veto authority over Trump’s vicious policy decisions. That misconception of the role of the judiciary has led to good judges of both parties being accused of political partisanship or cowardice when they do not block unwise but lawful actions by the president. These attacks, which are an indirect result of Trump’s actions, are almost as corrosive as direct attacks by the executive branch on the judicial branch.
As it happens, last month I was named to the ABA’s Section of Litigation’s Committee on the American Judicial System. And while that seems like a committee with a pretty broad jurisdiction, it became clear that its primary mission is to protect the independence and reputation of the judiciary so as to allow it to fulfill its role contemplated by Article III of the Constitution and its state equivalents. Prime among our projects is to establish procedures for “Rapid Response to Fake News, Misleading Statements and Unjust Criticism of the Judiciary.” That is something we, as media lawyers, with our professional experience and access to the media, should be able to handle.

An ABA booklet supporting that effort prompts that “inaccurate, unjustified, and simply false criticisms of judges should be answered promptly and fully.” While it assumes that bar associations would take a leading role in responding to such unfair criticisms, often the individual lawyer – particularly one, such as many of us, with connections to the media – can respond more quickly and at least just as well.

To be more specific, the mission is to respond 1) where criticisms or misleading statements unjustly impugn the integrity of a judge or the judiciary, and 2) where a response will address a misunderstanding of the judge’s role or of how the judicial system works. The booklet stresses the importance of a quick response, particularly in the age of social media where “fake news” (I hate that meaningless rhetorical device) can spread almost instantaneously. The overall purpose is to better educate the public with information to help them understand particular legal issues, including the role of judges, the application of the law and the restrictions and responsibilities placed on judges by the canons and rules.

Of course, we, as media lawyers, may have a quite different view as to what commentary is unjustified and what impugns the integrity of a judge than a bar association. Thus, an article which lists a city’s 10 worst judges, with sufficient support, may be looked at as demeaning and inappropriate by the bar establishment, but as fair opinion by the media bar. On the other hand, a piece which lambasts a judge for issuing a too light sentence when the judge was just following the sentencing guidelines or reports, hypothetically, or a politician saying a judge is presumptively unfair because she is of a certain ethnicity I think ought to be considered unfair and unjustified by anyone.

The booklet cautions that one should consult the judge being attacked before making a public response, since sometimes the judge might prefer no response. It emphasizes quickness – that the response should optimally be in the same news cycle as the unfair attack. It stresses – as most of us know, but many of us lawyers have a hard time with – that we should develop a coherent message using good sound bites and lay terms. It suggests that it’s best for the
response to come in the same media outlet as the original attack, and that social media, letters to the editor, op-eds or editorials are all worthy vehicles to use. Of course, since many of us have some degree of access to the latter vehicles, we can be particularly effective here.

There are more guidelines, steps and criteria in the booklet itself which has been placed on our website here. And obviously, none of this is meant to suggest that you should be calling for favors from your clients or local media leaders. Moreover, it may seem that the above seeks a cozier relationship between the judiciary and the media than is appropriate. But these are unique times, and, at least in my view, the press and the judiciary are suffering from the same outlandish and made-up attacks, all designed to diminish our vital role and mar our constitutional democracy in favor of an egomaniacal chief executive bent on running our government virtually alone. We should not countenance this, and whatever each of us can do to right the balance is as, if not more, important than any other work we may do.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month’s MediaLawLetter.

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