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Proving Tilden Was Right

By [Jerry H. Goldfeder](#)

After the [presidential election of 1876 was stolen from former New York State Governor Samuel J. Tilden](#), he addressed a civic group in Manhattan, and, with an equanimity that would today seem quaint at best, [urged the assembled group to be optimistic](#). He said, in part:

“Be of good cheer. The Republic will live. The institutions of our fathers are not to expire in shame. The sovereignty of the people shall be rescued from this period and [be] re-established.”

Tilden was right in one sense. One hundred and fifty years later, our nation is thriving.

But today our institutions and the norms that sustain our constitutional framework are being severely tested, and the story is being written daily as to whether the republic as we know it will indeed survive. Just within the first month of the new administration, we have witnessed [wholesale and chaotic purges at the FBI, Department of Justice and other federal agencies](#), as well as the [politicization of the criminal justice system](#).

[In response to this onslaught, the American Bar Association issued a scathing statement condemning the new Administration’s actions entitled “The ABA supports the rule of law.”](#) In it, ABA President William R. Bay pulled no punches: “we see wide-scale affront to the rule of law.” Then, quoting the words of [United States District Court Judge John Coughenour, who blocked President Trump’s executive order that sought to eviscerate the constitutional right of birthright citizenship](#), Bay reminded us that “The rule of law is a bright beacon for our country.”

He then urged all attorneys to take action:

“We cannot afford to remain silent. We must stand up for the values we hold dear. The ABA will do its part and act to protect the rule of law. We urge every attorney to join us and insist that our government, a government of the people, follow the law. It is part of the oath we took when we became lawyers...[w]hatever your political party or your views...”

Consistent with the ABA’s urgent warning, [hundreds of attorneys have brought multiple lawsuits to check the Administration’s actions](#), and federal judges are, at least so far, consistently

restraining improper directives. In the words of former [Ambassador Norman Eisen, President Obama's Ethics Counsel](#), attorneys are building a veritable “architecture of patriotic opposition,” [case by case](#).

And just last week, we witnessed a stirring example of how attorneys are embracing the rule of law by the [resignations of Interim United States Attorney Danielle Sassoon and six of her colleagues](#) in the Eric Adams case. It remains to be seen how [United States District Court Judge Dale Ho](#) addresses the [dueling narratives](#) involved in the government’s motion to dismiss, but [calls for a full hearing](#) on the matter have already been made.

Amidst the many lawsuits, [one of which has already been brought to the United States Supreme Court, Vice President of the United States, no doubt conveying the posture of the administration, has said that the courts have no business ordering the president how to implement his policies](#) – and their [acolytes](#) are [attacking the courts for interfering with President Trump’s authority](#).

Constitutional scholar [Kate Shaw, professor at the University of Pennsylvania Law School](#), is not ready to give up, though, [offering her opinion that it is “an open question whether the administration will be as contemptuous of courts as it has been of congress and the constitution. At least so far, it hasn’t been.”](#) Hoping Professor Shaw is right, lawyers from around the country, in efforts to preserve the rule of law, continue to seek redress from the courts, and attorneys are [being encouraged to volunteer in these cases](#).

Non-partisan organizations such as [State Democracy Defenders](#) and [Committee for Responsibility and Ethics in Washington \(CREW\)](#), to name just two, as well as various bar associations, are seeking volunteer lawyers.

Of course, not every attorney has the constitutional law or litigation expertise to assist with the lawsuits being brought – but the preservation of the rule of law can be effected in ways big and small.

Toward that end, groups such as the [ABA Task Force for American Democracy](#) offer a variety of suggestions, to which I add my own. Individually and cumulatively, such work helps promote the rule of law and contribute to the health of our polity:

1. If you are involved in a civic or faith-based group, speak out to members as to the importance of the rule of law. Help educate them and consider a plan of action the organization might take. [These groups matter in shaping the public discourse](#).
2. Contact a not-for-profit that provides services to people whose funding has been cut off or is being threatened. Assist in fundraising, and help provide such services. [As the scripture says, helping one person is akin to saving the world](#).
3. If you have children or grandchildren in high school or college, go there and speak to students about our constitutional democracy and their role in preserving it. As we have seen time and again, [younger people can make a critical political difference](#).
4. Speak to members of Congress of both parties as to their [special obligation to maintain their integrity and authority](#).

5. Write letters and opinion pieces for independent media outlets and on social media extolling the importance of judicial independence and non-partisan law enforcement. [These make a big difference](#), especially when written by respected members of the community.

No one activity or lawsuit is talismanic, but each is significant in preserving the rule of law. And undertaking such work is part of our ethical obligations. As the Preamble to the [New York Rules of Professional Conduct](#) provides:

“a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.”

Put another way, we attorneys are mandated to prove Tilden was right.

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