

An Open Letter from Constitutional Law Scholars to President-Elect Donald Trump

December 8, 2016

Dear President-Elect Trump:

On January 20, 2017, you will recite the presidential Oath of Office and pledge to “preserve, protect and defend the Constitution of the United States.” As constitutional law scholars, we write to underscore what this profound commitment entails. Specifically, we urge you to uphold and adhere to the rule of law; to take responsible positions on constitutional issues; to make appointments to the executive branch and the courts that will unify, rather than further divide, our nation; and to denounce emphatically the hate crimes and other hateful acts that people have been committing with increasing frequency since your election.

Some of your statements and actions during the campaign and since the election cause us great concern about your commitment to our constitutional system. The following list illustrates, but does not exhaust, our concerns.

1. The First Amendment protects the rights of free speech and a free press, both of which are critical to preserving a functioning democracy. Yet you have demonstrated extreme hostility toward the press, including by denying access to your campaign events to media outlets that you have perceived as antagonistic, threatening to sue journalists, and calling for changes to our nation’s libel laws that would seriously hinder the ability of the media to report on matters of public importance. Your conduct and rhetoric fail to register that the institutional role of the press in the United States is to check candidates for office and government officials, the President paramount among them. Once you are in office, it will be critically important for you—like your predecessors from both political parties—to ensure that the press is able to report and opine candidly on your activities, positions, and decisions without fear of politically motivated reprisal or restrictions on access to the White House. We urge you to allow the press to do its job, and we call upon you to commit to honoring First Amendment principles more broadly. For example, your recent threats to punish and revoke the citizenship of Americans who burn the American flag are flatly inconsistent with the modern cross-ideological consensus that flag burning is protected political expression—as the Supreme Court has twice held in majority opinions joined by your model Justice, Antonin Scalia—and with longstanding Court holdings that the state may not strip persons of citizenship for being acutely critical of, or even deeply antagonistic to, the government.

2. In December of last year, you proposed prohibiting all Muslims from entering the United States. When asked about Muslims serving in our military abroad who want to come home, you suggested that you were calling for “vigilance.” Although your exact position was difficult to pin down, your identification of an entire group of people for differential treatment based only on their religious upbringing, affiliation, or beliefs raises extraordinarily troubling questions about how your administration will understand the rights of religious minorities. These rights are expressly protected by the Free Exercise Clause of the First Amendment, and respecting them is a value fundamental to our constitutional tradition. Moreover, following the Paris terrorist attack last November, you suggested that you would “strongly consider” closing mosques in response. We urge you to renounce this and other poisonous anti-Muslim rhetoric, which threatens our First Amendment guarantee of freedom of religious exercise and the Fifth Amendment’s promise of equal protection of the laws.

To make matters worse, your proposed national security advisor, Michael Flynn, has described what he calls “Islamism” as a “vicious cancer inside the body of 1.7 billion people” that “has to be excised.” Such rhetoric is shocking in its

ignorance and bigotry; it must not become normalized. We continue to hear talk of a “Muslim registry” being created by your administration—or a nationality-based registry that would be a proxy for religious discrimination. To our national shame, the federal government during World War II carried out—and the Supreme Court’s discredited *Korematsu* decision upheld—the mass internment of Japanese Americans based upon no individualized suspicion of wrongdoing; the federal government under President Ronald Reagan subsequently apologized and paid reparations. We urge you to reconsider your naming of Flynn and to renounce a Muslim registry or anything like it.

3. Our Constitution creates a system of separated powers and checks and balances. As James Madison wrote in *Federalist No. 51*, the “separate and distinct exercise of the different powers of government ... [is] essential to the preservation of liberty.” A fundamental component of this system is the independence of our judiciary. In May, you asserted that a judge presiding over civil litigation to which you are a party should recuse himself because he has “an absolute conflict” on account of his “Mexican heritage” and your promise to “build a wall,” even though the case had nothing to do with either the judge’s heritage or your immigration proposals. In keeping with the Judicial Code of Conduct, the judge properly did not respond to your attack, which House Speaker Paul Ryan correctly condemned as “racist.” These sorts of unjustified attacks have the potential to undermine the public’s confidence in the judiciary, and we remain concerned about what this episode may signal about your administration’s respect for the independence of the judicial branch.

4. Your comments during and since the election that you would accomplish the overruling of *Roe v. Wade* through the appointment of Supreme Court Justices causes further concern about your commitment to an independent judiciary and reveals a lack of understanding of what an overruling of *Roe* would mean. When asked what pregnant women would then have to do in order to obtain an abortion, you said that they would have to go to another state. While that highly problematic option would remain available to some women, it would be illusory to many other women whose economic, health, work, family, and other life circumstances would not support their ability to travel interstate and who would instead be compelled to resort to unsafe, illegal abortions. Your statement betrays a disturbing lack of awareness of, or insensitivity to, this reality for many women in our country. Your suggestion also ignores past and promised future efforts to enact federal legislation that would restrict abortion nationwide. Unless you mean to oppose any such efforts, your suggestion that the permissibility of abortion restrictions should be decided at the state level is disingenuous in addition to harmful to women. We urge you to renounce your commitment to appointing Justices with the aim of denying women their long-established, fundamental constitutional rights.

5. Your nominee for U.S. Attorney General, Senator Jefferson Sessions of Alabama, had a troubling history on voting rights and civil rights from when he served as the U.S. Attorney for the Southern District of Alabama and as Attorney General of Alabama, and he continues to have one of the worst records on those issues of any Senator. More recently, he expressed incredulity about the Court’s protection of same-sex marriage, and he appears far more likely to pursue charges of voter fraud that lack any evidentiary basis than to protect the voting rights of all Americans. His appointment as Attorney General threatens to erase years of progress in ensuring equal citizenship in the United States. We urge you to withdraw his nomination for Attorney General and to appoint a less polarizing person who enjoys broad bipartisan support.

6. You recently stated: “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.” You have offered no evidence to support this extraordinary allegation. We urge you to cease making baseless charges concerning voter fraud and to communicate with the American people honestly and responsibly about threats to the integrity of our election system, the maintenance of which is crucial to the stability of our political system.

7. Hate crimes and other hate-filled speech and actions against racial, ethnic, and religious minorities have been rampant since your election. Your inflammatory rhetoric during the campaign has been taken as an invitation to discriminate and to act out in all kinds of hate-filled ways. Neo-Nazi and white supremacist groups feel legitimated and empowered to make their presence publicly known, and some of them invoke your name in the apparent belief that your election vindicates their hatred. Rather than strongly condemn such groups, you have offered only half-hearted criticism in response to questions from the media, and you have appointed as your chief strategist Steve Bannon, who has described himself as having close ties to the “alt-right,” a euphemism for individuals and groups that spout hatred and bigotry. We urge you to reconsider your close association with Bannon. We also urge you to strongly and unequivocally condemn—and use the power of your future office to combat—racism, sexism, misogyny, homophobia, xenophobia, Islamophobia, and anti-Semitism.

Although we sincerely hope that you will take your constitutional oath seriously, so far you have offered little indication that you will. We feel a responsibility to challenge you in the court of public opinion, and we hope that those directly aggrieved by your administration will challenge you in the courts of law. We call upon legal conservatives who cherish constitutional values to join us in speaking law to power. And we call upon citizens, lawyers, educators, public officials, and religious leaders to use every legal means available to protect the most vulnerable members of our society and our constitutional guarantees. At no point that any of us can remember has this need been more imperative than it is now.

Sincerely,

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