



## Supreme Court of Illinois

April 26, 2019

### **ILLINOIS SUPREME COURT CHIEF JUSTICE PENS LAW DAY ARTICLE ON "FREE SPEECH, FREE PRESS, FREE SOCIETY"**

In celebration of Law Day on May 1, please consider running the below article in your publication. The theme for Law Day 2019 is "Free Speech, Free Press, Free Society" to focus on these cornerstones of representative government.

#### **Law Day 2019: "Free Speech, Free Press, Free Society"**

*By Illinois Supreme Court Chief Justice Lloyd A. Karmeier*

On May 1, judges throughout the state will be participating in the organized bar's annual Law Day activities. Perhaps you will be one of them. If so, I hope you will find it as meaningful as I do. While the event falls during a time that is typically busy for the Supreme Court, I look forward to it as an opportunity to pause and consider what is most important about the American system of justice, how we got here, and where we are headed.

When [President Eisenhower](#) recognized the very first [Law Day](#) in 1958, in the midst of the [Cold War](#), he proclaimed that "[i]n a very real sense, the world no longer has a choice between force and law. If civilization is to survive it must choose the rule of law." The wisdom of that advice seems more apparent with each passing news cycle. As we prepare to observe the 61st annual Law Day celebration, upholding the rule of law is as urgent as it has been at any time in our modern history. Core values of democracy are under stress. Basic notions of separation of powers are being challenged. Critical principles of state and federal comity are in peril. Some days, the courts and the legal system seem to be the only institutions still willing and able to prevent our system of government from running off the rails.

At times like these, the role of judge takes on particular significance. Government may be treated as a game by some, but it is not. To quote *The Big Lebowski*'s [Walter Sobchak](#)<sup>1</sup>, "This is not 'Nam. There are rules." Each of us who has been given the privilege of wearing judicial robes plays a central role in insuring that those rules are obeyed. When our fellow citizens voted us into

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<sup>1</sup> *The Big Lebowski*, Dir. Joel and Ethan Coen, Perf. Jeff Bridges, John Goodman, *et al.*, Gramercy Pictures, 1998.

office, they entrusted us with a special responsibility: serving as guardians of the rule of law. It is therefore for us, above all others, to ensure that the protections enshrined in our State and Federal Constitutions are available to all, equally. It is for us, and especially us, to stand up for those protections when they are jeopardized and to remain resolute in the face of attacks on judicial institutions and judicial independence.

Recent Law Day themes have explored the central role of the rule of law in achieving the type of democracy envisioned by the Founding Fathers. They have included [Realizing the Dream: Equality for All](#) (2013); American Democracy and the Rule of Law: [Why Every Vote Matters](#) (2014); [Magna Carta: Symbol of Freedom Under the Law](#) (2015); [Miranda: More than Words](#) (2016); [The 14th Amendment: Transforming American Democracy](#) (2017); and [Separation of Powers: Framework for Freedom](#) (2018). This year the tradition continues with Free Speech, Free Press, Free Society.

The topic is a timely and important one. Under our Constitutional order, ultimate political power does not lie with the government or any branch of government. It is reserved to the people. That the rights of freedom of speech, freedom to assemble and freedom of the press are placed in the very first amendment is therefore no accident, for they are the tools by which the power reserved to the people is best realized. When all else fails, the people may still gather and speak out and present their grievances to the government.

Throughout our history, the press and the media have been among the most important defenders and advocates of these precious First Amendment rights. Since colonial times, freedom of the press has been important to the dissemination of political ideas and holding ruling authority to account. When [Peter Zenger](#) was put on trial in 1735 because an article in his newspaper criticized the local British governor, he was acquitted by a jury that believed the press should be unrestrained in its efforts to report and criticize. Later, political pamphlets, handbills and newspapers proved essential to the success of the American Revolution and the creation of the United States. Without the New York newspapers, there would have been no effective forum for [Madison](#), [Hamilton](#) and [John Jay](#) to publish the [Federalist Papers](#), key documents in the effort to win support for the new Constitution.

The Founders' attitude toward freedom of the press may have been best expressed by [Thomas Jefferson](#) when he observed, "The basis of our government being the opinion of the people, the very first object should be to keep that right. Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I would not hesitate a moment to prefer the latter."

The critical function of the press in American political life has never been forgotten. Nearly two centuries after Jefferson authored those words, [Justice Brennan](#) reiterated the importance of the press for democracy when he wrote in [New York Times v. Sullivan](#): "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been

settled by our decisions\*\*\*. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means \*\*\* is a fundamental principle of our constitutional system." 376 U.S. 254, 269 (1964).

The media's frequent preoccupation with celebrities and scandal may lead some to question whether the deference afforded the press is truly justified. It is important to remember, however, that what we see today is nothing new. Some form of it has been with us since the earliest days of the Republic. The Frenchman [Alex De Tocqueville](#) noted following his famous tour of America in the early 1800's that "[t]he characteristics of the American journalist consist in an open and coarse appeal to the passions of his readers; he abandons principles to assail the characters of individuals, to track them into private life and disclose all their weaknesses and vices." Little has changed. Were De Tocqueville to return today, [The Inquirer](#) and [TMZ](#) would seem unsurprising and familiar.

As petty and trivial as the press may sometimes be, its power to inform and to educate on the important issues of the day has endured. Those in positions of authority do not always appreciate it, of course. When power is confronted by inconvenient facts and unfavorable press, the response is often a resort to rebuke, denunciation and intimidation. Lawful process may be disregarded. Libel actions may be threatened. Officials may attempt to silence their opponents by seeking court orders to prevent compromising information from being disclosed.

When leveled directly against newspapers and other media defendants, such efforts have, for the most part, been unsuccessful. In cases such as *New York Times v. Sullivan*, supra, and the so-called Pentagon Papers Case ([New York Times v. United States, 403 U.S. 713 \(1971\)](#)), the U.S. Supreme Court has invoked First Amendment principles to set a very high bar for suing media defendants for libel or imposing any form of prior restraints on what they wish to publish. Because of the protections they have received from the courts, the greatest challenge faced by most print and broadcast media in America today has nothing to do with combating censorship or government oppression. Their biggest problem is simply how to make enough money to stay in business amid rapidly changing economic, technological and demographic conditions. Notwithstanding the "Trump bump" experienced by some major papers earlier in his term, [newspaper circulation and ad revenues are in general decline.](#)

While traditional news media may be faltering, political debate remains robust. Innovative new ways of gathering and disseminating information on matters of public importance are being developed. Consumers of news are gaining an awareness of the need to be careful about the veracity of the sources they rely on and becoming more discerning about the truthfulness of representations made by both elected leaders and the reporters who cover them. What constitutes a public forum for free expression is being re-imagined in our new digital age. And when leaders dissemble or are dismissive of the views of those they are supposed to represent, the citizens of this country have proven that they are as willing as at any time in America's history to take to the

streets in protest. Just as importantly, the courts have shown that they remain committed to the Constitutional right of those citizens to do so, subject only to narrowly-tailored, content-neutral regulations related to the time, place or manner of the expression.

All this is good for democracy. And it is precisely what the drafters of the Constitution would have hoped for. As we commemorate the 61st annual Law Day next week, we shall therefore still have cause to celebrate.

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