

Lessons from Hamilton

An Independent Judiciary Is Vital to Our Democracy

By John F. Kuppens, DRI President

“The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other.”

—Alexander Hamilton, *Federalist No. 71*, Mar. 18, 1788

Our founders created an independent judiciary to protect against abuse of power.

I recently saw the musical *Hamilton*, and I came away with renewed reverence for the United States Constitution and the democracy that it formed. We learn as schoolchildren the reasons for the separation of powers and the checks and balances that protect our three, co-equal branches of government from abuse of power. However, “only a little more than one-third of Americans can name the three branches of government, let alone describe their role in our constitutional democracy.” Justice Sandra Day O’Connor, “The Importance of Judicial Independence,” *Stanford Law Journal*, May 15, 2008. That is a disturbing realization, especially at a time when efforts to undermine judicial independence are a real threat to our system of government. This knowledge void may make the public more susceptible to the type of misinformation tactics discussed below. As lawyers who understand the importance of these checks and balances, we should step forward and speak out in favor of their preservation. For over a decade, DRI has been highlighting these threats to judicial independence and sounding the alarm. DRI’s Judicial Task Force published the acclaimed white paper *Without Fear or Favor* in 2007, and continues to update it.

Let me be clear in saying that the importance of judicial independence is the same no matter whether the criticisms are from the left or the right. This is not about favoring any political views or philosophy; it is about maintaining the rule of law. Fair criticism serves an important purpose in improving courts, but politically motivated attacks that highlight unpopular decisions and imply that the results are “out of step” with what the public wants are incompatible with the rule of law and the judiciary’s role in our constitutional structure.

While these efforts target both federal and state judges, the state judiciary is particularly vulnerable.

The reality is that state court judges, unlike federal judges, are not protected from political winds, changing popular opinion, or special interest money. Rather, states employ a patchwork of different systems

for judicial selection and retention that leave the judiciary vulnerable to attack. In fact, no state court mirrors the federal constitutional mechanism designed to ensure judicial independence: appointment with lifetime tenure with removal only for high crimes and misdemeanors.

Justice Barbara Pariente, “What’s Politics Have to Do With It? Reinvigorating Our Defense of State Courts,” *ABA Journal*, Aug. 23, 2018.

Foreign powers seek to undermine public confidence in our government.

Some threats to judicial independence originate from foreign powers just as much today as they have in the past:

These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?

Alexander Hamilton, writing as “Publius,” *Federalist No. 68*, Mar. 14, 1788.

Suzanne Spaulding, a former undersecretary at the Department of Homeland Security, wrote an op-ed in which she warned of Russia’s “strategic campaign to undermine support for democracy and weaken the United States.” Suzanne Spaulding, “Don’t Overlook the Kremlin’s Threats to Our Courts,” *The Washington Post*, Oct. 30, 2017. She explained:

A key element of the West’s appeal is the idea of an independent judiciary that protects the rights of individuals and ensures the fair and consistent application of the law. This pillar of democracy is particularly vulnerable to information operations because it relies so heavily on public confidence in the legitimacy of its outcomes. Active measures such as those used to undermine elections could also be used to threaten the credibility of our legal system.



At the September meeting of the ABOTA Roundtable, at which leaders of many legal professional organizations gather to discuss current issues, Ms. Spaulding provided examples of Russia's active measures to undermine confidence in our judiciary by using social media and other techniques to claim political biases in judges. Hamilton 68 Dashboard is a website designed to shed light on Russian and other state actors' propaganda efforts on Twitter, which just last month seized on domestic U.S. events to inflame tensions surrounding immigration. "Pro-Kremlin accounts quickly latched on to the murder of 20-year old college student Mollie Tibbetts by an immigrant to the United States to spread divisive content. The pro-Kremlin network propelled hashtags such as 'mollie-tibbetts,' 'buildthatwall,' and 'buildthedam-wall' to the top of the dashboard's trending lists." *Securing Democracy Dispatch*, Alliance for Securing Democracy (Aug. 27, 2018).

Similarly, in December 2017, Hamilton 68 Dashboard identified propaganda capitalizing on "the not guilty verdict in the murder of Kate Steinle, who was shot and killed by an undocumented immigrant in San Francisco, to inflame discussion over immigration." *Id.* Clemson University research "confirmed this trend, revealing that Russian Internet Research Agency accounts were actively tweeting on both sides of the immigration debate following the Steinle verdict." *Id.* As Senator Lindsey Graham (R-SC) noted last month, "[o]ur nation's under attack. Not just by Russia, but other outside influences. They're not knocking buildings down—they're not killing people—but they're trying to destroy our democracy."

Politicizing judicial decisions is contrary to our governmental structure.

Here at home, politically motivated attacks on the judiciary ask voters to evaluate judicial candidates by the same political criteria as candidates for legislative or executive offices, often use misconceptions about the meaning or result of judicial decisions, and ask voters to hold sitting judges accountable for unpopular decisions. Here are just two examples of efforts to oust judges

not because they misapplied the law, but because their decisions were unpopular:

- In 2010, voters in Iowa voted to remove three, sitting state supreme court justices because they did not like the result of a 2009 decision that struck down Iowa's same-sex marriage ban.
- A California state trial judge's sentencing decision in a sexual assault case provoked a judicial-recall movement. Over a million people signed a recall petition, and the voters ousted the judge in a June 2018 recall election.

As explained elsewhere, "[t]o some degree, tension between state courts and state government is normal." Amber Phillips, "West Virginia's Efforts to Impeach the State's Supreme Court Are Just the Latest in a Worrisome Trend," *The Washington Post*, Aug. 15, 2018. "But," according to Doug Keith, of the Brennan Center for Justice, "what is going on now is not." *Id.* Sixteen states have considered bills to minimize the role of state courts. *Id.*

A recent report noted that 56 percent of television advertisements in 2013 through 2014, either criticizing or supporting judges, focused on the candidate's criminal justice "record." These attacks perpetuate misunderstandings about courts by confusing the institutional roles of the judiciary and legislative branches of government. Judges are responsible to the law rather than public opinion. Judges decide cases based on the evidence that they receive in court after applying the law to the facts, not on perceptions of an electoral mandate or the public's will.

Nonetheless, arguing that voters should rein in judges who are "out of step" with popular opinion appeals to the public's lack of understanding of the democratic ideals referred to above. It should not surprise us that "the onslaught on attacks has undermined public confidence in the judiciary. As of September 2005, a survey revealed that more than half of American households are angry and disappointed with the nation's judiciary and feel that "judicial activism" has reached crisis proportions." *Without Fear or Favor: A Report by DRI's Judicial Task Force* 25 (2007).

The legal community should speak out in support of judicial independence.

Unlike politicians, judges should be immune from public opinion and special interests and must decide cases according to the law, even when doing so may be unpopular: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves." Alexander Hamilton, *Federalist No. 78*, June 14, 1788. Judicial independence is one of the most important principles of the rule of law. It is critical in defending people from intrusions and overreach by the government and preserving a free and democratic society. The courts are apolitical by design. They can protect leaders who are voted out of office from retribution by the new government; they also guard the rules for free and fair competition, protecting all sides. "The doctrine of the separation of powers was adopted... not to promote efficiency but to preclude the exercise of arbitrary power." Justice Louis Brandeis, *Meyers v. U.S.* (1926)

We should resist attempts to punish judges for making unpopular decisions or even from hearing cases that deal with controversial issues. These are attempts to circumvent the authority of the courts. DRI has been a leader in this area, and it will continue its important work to preserve the independence of the judiciary. All of us in the legal community should stand up and speak out in their support of the independence of the courts.

"These bedrock principles—an independent judiciary, a free press, and a mechanism that guarantees basic rights to all—work together. An interlocking framework of principles must be in place if a nation is to ensure the liberty of its citizens. Unless judges are free to enforce the law without fear of reprisal, the other principles and goals of a free society can easily become empty promises."

—Justice Sandra Day O'Connor