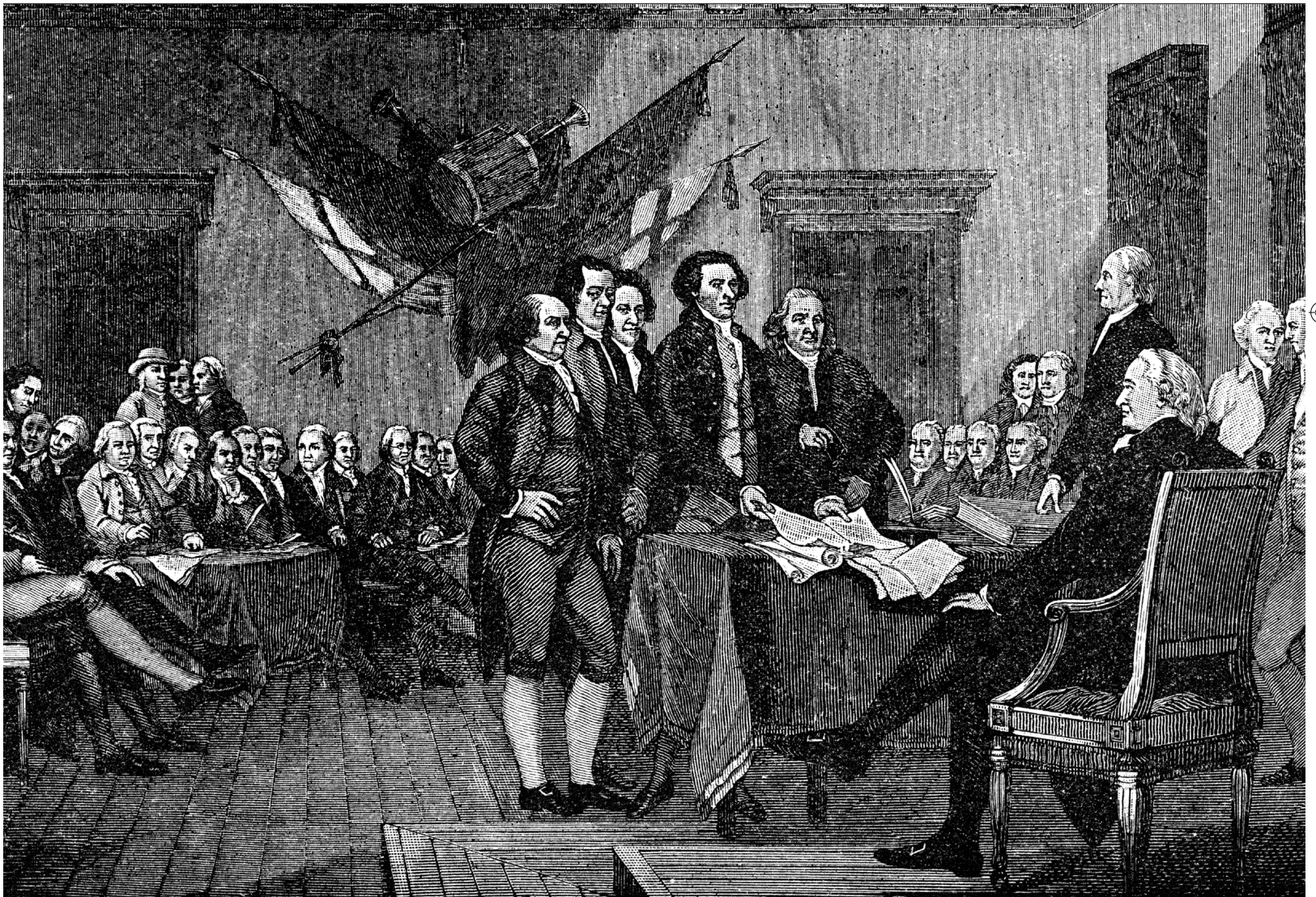


BY HON. THOMAS J. WALSH

Lawyers, Judges, The Third Branch: A Republic, If You Can Keep It





As the third branch of government, the judiciary has a special role in the maintenance of our republic and each member of the legal profession has a special role in the maintenance of the judiciary. The author calls for reflection by each one of us, lawyers and judges alike, about the role we play each day in advancing the dignity of the profession and thereby the justice system, in the maintenance of the third branch and thereby the republic.



On September 17, 1787, Benjamin Franklin was leaving the Constitutional Convention and was asked by Elizabeth Willing Powel: “Well, Doctor, what have we got, a republic or a monarchy?” His response, of course, has gone down in history as something of both a congratulatory and a cautionary tale: “A republic, if you can keep it.”

James Madison, Franklin, and the other members of that convention designed a government for us that has three branches. Each of those branches has a role in “checking” the other branches so too much power does not fall in any one branch. This article focuses on the role of what is generally thought of as the third branch because it appears in the third article of the Constitution: the judiciary. The judiciary has a special role in the maintenance of our republic and each member of the legal profession has a special role in the maintenance of the judiciary. Therefore, each member of the legal profession has a special role in helping to ensure that we can “keep” a republic.

As attorneys and as members of the judiciary we owe our republic a branch of government that distinguishes itself. After all, of the three branches of government ours is the only branch that trains an entire profession with advanced degrees (attorneys) to specifically operate and ensure the integrity within that branch of the government. Yet still, we fall short in our custodial responsibility for the third branch. Falling short is not failure nor is it an embarrassment, but failure to keep trying is.

Regarding the Function of the Judiciary in a Republic

The concept of having disputing parties go before a third-party magistrate to resolve their disputes is

very old. According to the Bible, King Solomon heard and resolved a complex custody case when he told two litigants that he would split a baby in half – one half to each. The reaction of the litigants to his decision ultimately caused him to reconsider his decision and arrive at a better one – helping to expand upon the legend of “the wisdom of Solomon.” Yet the function and role of the judiciary in our society, and indeed in any modern society, is much more significant than merely making straightforward decisions to resolve disputes in various types of cases.

In the present-day United States, those seeking a better understanding of the proper role of the judiciary generally look to our founding documents, specifically, the Constitution. There are also other documents from our founders that are consulted and shed light on the topic, including the Declaration of Independence, the Federalist Papers, and other writings of our founders. Yet, the structure our founders infused into our government did not originate with them. It has its origins even further back in human history.

The concept that powers in a government should be compartmentalized and separated to prevent abuse is generally attributed to Charles Louis de Secondat, baron de La Brede et de Montesquieu, more commonly and simply known as Montesquieu. His treatise, *Spirit of the Laws*, is thought to have inspired the Declaration of the Rights of Man (France) and the U.S. Constitution. Montesquieu and an earlier philosopher, John Locke, were widely read by the founders of the United States, and their principles were instilled in our Declaration of Independence, the Constitution, and the Federalist Papers.¹

In the U.S. Constitution, the judiciary is one of three separate branches of the federal government, and, in fact, it is also one of three branches



in each state government. Despite being seen as an equal branch of government, the judiciary is, by design, the weakest of the three branches. The only power possessed by the judiciary is “judgment.”² The executive branch controls the military and law enforcement, the legislative branch controls spending, but the judiciary only makes decisions. On both the federal and state levels, the judiciary’s decisions are enforced based upon the respect of the other two branches and, in addition, based upon respect from the public. Once that respect is lost and either the public or the other branches of government see the judiciary as compromised, the government gets out of balance and the republic is compromised.

Certainly, the federal judiciary under the leadership of Chief Justice John Marshall attempted to assert greater authority and press its position as an “equal” branch of government in *Marbury v. Madison*.³ In that case, Justice Marshall noted that:

“[I]f a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.”⁴

In short, Justice Marshall asserted that the courts have the ability to determine whether a law passed by the legislature and signed by the executive is invalid because it violates the constitution. That is quite an assertion by the court system. Nonetheless, despite these assertions of authority, the authority of federal and state judiciaries continues to rest largely on the willingness of the other two branches to respect that authority and the willingness of the people to continue to look to the judiciary for conflict resolution.

Thus, in a republic such as ours, judges continue to make straightforward decisions to resolve disputes in various

types of cases. The executive branches of the various levels of government continue to enforce those decisions and legislative branches continue to fund the judicial system, albeit not always at a level that makes it function as effectively and efficiently as it could.⁵ Nonetheless, the role of the judicial branch is not just about punishing crimes or sorting out domestic relations. In a larger sense it is about instilling confidence in the citizenry that the rule of law prevails in their interactions with each other and that there is certainty in the results – the notion that, in this country or this state or this community, if you go out on the street in the morning and are wronged by another person or entity, there is a reliable way to seek redress and punish wrongdoers without resorting to violence. Also, whether you are wronged by a person of limited means or a person of power and high standing in the community, the court will treat everyone the same. This is what allows our citizenry to most fully exercise their liberty and permits freedom of contract and freedom to conduct business. Regardless of political affiliation, every American seems to agree that this is what we want – that equality before the law will prevail in the courts. This confidence by the public is essential if a republic is to survive, and it is instilled best when the public sees it happening in their courts.

Public Opinion and the Functioning of the Justice System

It is generally accepted that the perception of the justice system in the United States, particularly the criminal justice system, has drastically declined in recent years.⁶ Perhaps some of that decline can be attributed to the COVID-19 pandemic and resulting court appearances via videoconferencing with litigants showing up to court reclining on a sofa and attorneys showing up for court in any state of dress that was near at hand when they got out of bed. Some of it might be due to the other branches of

government, and to a certain extent the public, placing the justice system in the position of deciding highly politicized and divisive cases and thereby making many decisions that are very controversial. Yet, the increased partisanship that has arrived in recent years and the participation of our profession in infusing that partisanship, seems to have an outsized role. There may have been periods in our history when the judicial system faced the same kind of political pressure, but the proliferation of social media has increased the ability of political parties, interest groups, and even individuals to mobilize and advance attacks on the judiciary for political gain.

In reflecting on this phenomenon, one commentator opined that “there comes a time when political and media criticism of the courts or a court decision reaches a point when it threatens to undermine public confidence in the courts”⁷ Furthering this thought, the commentator went on to note the following:

“The point here is that the courts are at considerable risk if politicians or the media venture on a campaign of criticism of judges for political or other expedient advantage. In other words, it is a matter of great importance that the courts as a fundamental national institution should not be made a target of irresponsible criticism.”⁸

This assessment seems to hit the nail on the head for the justice system in our country and our state. Being by design the weakest branch of government, attack from the stronger branches and loss of credibility with the people create a crisis in the republic.



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It is certainly true that press reports can exacerbate some of these problems.

“The media is quick to seize upon lenient punishment of offenders and use it as a basis of criticism of the judges. Politicians do not lag far behind if a ‘law and order’ political campaign offers prospect of electoral advantage. In a community that is anxious about any perceived upsurge in the incidence of violent crime, lenient punishment is naturally regarded as an indication that the judiciary is ‘soft’ on crime.”⁹

Yet, as members of the judicial system, lawyers and judges do not simply have to sit back and take it. While it would certainly be inappropriate to start advocating online or in the press on behalf of a particular outcome in a pending case, the notion that we simply remain silent in the face of irresponsible criticism of the justice system seems complicit. The notion that we would participate in the denigration of the justice system seems contrary to the education we spent years obtaining.

For example, an attorney or judge campaigning for election against an opponent who is also a lawyer and criticizing the opponent for representing sexual offenders in criminal cases disregards the fact that these defendants have a constitutional right to representation and that these cases are often taken by public defenders or appointed through the public defender and that for the system to function, we need attorneys to take those appointments. Hearing such assertions in a campaign and failing to speak out against them seems to make us complicit in such claims.

Other similar examples can certainly be offered. When judges running for higher office are criticized in a vacuum for decisions they have made but no facts are provided in the advertisement to help evaluate whether the decision was made recklessly or with the wisdom of Solomon, the public can rightfully be confused. The fact that such advertisements seem to “work” with the electorate does not change the analysis or our duty to

the republic. In fact, the notion that such advertisements “work” despite their insult to our system of justice suggests that we, as legal professionals, have an even greater responsibility than the average candidate when running for office. It may be naive to think that candidates would modify their behavior because it is the right thing to do, yet by consistently feeding the public disrespect for our justice system, we normalize disrespect.

When the public observes members of our profession berating other members

of our profession for simply performing their responsibilities or doing so devoid of any context, it undermines what all of us do – including those leveling the criticism. These types of things assist in degrading the justice system in the view of our citizens and thereby they degrade the stability of the republic.

Regarding the Function of Attorneys and Judges in the Judiciary

The role played by attorneys in society has been under fire for centuries.



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Shakespeare is often and famously quoted: “The first thing we do, is kill all the lawyers.”¹⁰ This quotation is often used to suggest that attorneys do more harm than good to society. However, the discussion surrounding the meaning of this quote sheds light on the role lawyers play in society.

One view of this quote comes from U.S. Supreme Court Justice John Paul Stevens. He argued that the quote is complimentary toward our profession. That is, he noted that the character speaking these words, Dick the Butcher, was an insurrectionist and criminal. He was an individual who needed lawyers disposed of so that he could take advantage of innocent people. “As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.”¹¹

Alternatively, there is another view of this quote, which also considers the character of its source and arrives at a different conclusion. That is, the speaker is from the lower class and is a revolutionary seeking to overthrow a government controlled by men with money. Attorneys were seen as utilizing their legal skills to manipulate the legal system to protect

the interests of the upper class.¹² By this reading, getting rid of all the lawyers would benefit poor people and cease their exploitation by the wealthy. This second view, to a certain extent, still exists as a mindset today. That is, rich people can afford better representation and, therefore, better results.

Although deciphering a line from Shakespeare will not reveal the true nature of our profession, Justice Stevens continued his discussion of the role of attorneys in the American justice system. His thoughts deserve further reflection. He noted that “[a]s a profession, lawyers are skilled communicators dedicated to the service of their clients”¹³ and that “the citizen’s right to consult with an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless.”¹⁴ Further, “the citizen’s right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.”¹⁵ He finally lamented that the majority opinion in the case under consideration demonstrated an “apparent unawareness of the function of the independent lawyer as guardian of our freedom.”¹⁶

Justice Stevens’ opinion seems to

encapsulate the general function of attorneys in a republic – providing a client insight into the law and a voice before the court. The availability of qualified lawyers to rich and poor alike would ensure that conflicts are resolved fairly and that the individual liberty of citizens is preserved.¹⁷ Simple enough and mostly true. Whether you appear in court on a regular basis or represent your client by working from your office, serving your client through advice and advocacy seems to go to the heart of our profession.

Intuitively, however, more is involved in an attorney’s role than advice and advocacy. If the role of the justice system includes demonstrating to the public that the rule of law prevails, it follows that one of the functions of attorneys and judges is to facilitate and administer the fulfillment of that role. That is, to ensure that the system is accorded respect, citizens of the republic must observe that those who operate within the system respect it and treat that system with dignity. Aside from criticism from the executive branch or criticism and failures to fund by the legislative branch, if those who work within the system, lawyers and judges, conduct themselves so as to bring disrepute on themselves and the justice system, then why should the public have any respect for or confidence in lawyers, judges, and that justice system? This concept seems vital to the role of attorneys and judges in our justice system.

Judges’ and lawyers’ conduct in the justice system can be observed in the minutiae, such as dressing appropriately when appearing in the courtroom, showing up when scheduled, and addressing opposing parties with respect. It can be observed by our clients in the way we communicate with them. For example, when a judge rules on an objection, or on a motion, or after giving a decision following a bench trial, the process is functioning as it should. Yet, criticizing the judge to a client regarding that ruling or suggesting that the judge doesn’t understand the law or acts with malice or bias

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or that such a decision is evidence that the system is unfair degrades the judicial process. This conduct also degrades the attorney who is communicating in this fashion to a client.

Similarly, when a judge inappropriately berates attorneys in the courtroom or when attorneys berate each other to their client or to each other in front of the clients, the interests of the litigants are subordinated, and the justice system suffers. Our conduct can also be demonstrated in more dramatic ways, such as the manner in which we conduct ourselves during an election. All of this conduct reflects on the justice system as whole. At the same time, we are also observed and listened to when we push back in social settings against unwarranted attacks on the justice system. All these things, and the range of conduct in between, reflect on the system by which this republic dispenses justice, albeit to different degrees. To deny this reality is, again, to deny the training we have received in our law schools and to deny common sense.

In fact, our legal training should speak to us when we consider our behavior. In a commencement address at William & Mary Law School, U.S. Supreme Court Justice Antonin Scalia discussed how our legal education helps define who we are. “Most of all, it is good to be learned in the law because that is what makes you members of a profession rather than a

trade. It is a goal worthy to be achieved – as you have achieved it – for itself. To say you are a lawyer is to say you are learned in the law.”¹⁸ One commentator noted, when reflecting on Scalia’s view of the importance of legal training, that law schools “fail their students when they neglect to inculcate virtues necessary to sustain our republican government.”¹⁹ Being true to our education is being true to the third branch and to our republic.

It is worth noting that judges and lawyers do not have control over all of this. When individuals with a platform start attacking the justice system it almost becomes too loud for a sufficient response from the judicial system. Nonetheless, lawyers and judges have control over their part in it. Even if the legislature does not fund portions of the judiciary so that the public sees it does not function efficiently or if our elected representatives routinely bring disrepute upon the judiciary, it does not follow that we also have license to bring disrepute on the system. In those circumstances it would seem that at least those functioning within the judicial system should be mindful of the need for diligence and vigilance in our own behavior. It is also important to keep in mind the other admonition of Benjamin Franklin: “little strokes fell great oaks” or alternatively, “great things are done by a series of small things brought together”²⁰ or, we can at least do our part however small.

Conclusion

When middle-school kids visit my courtroom to learn about the judicial system, I perform an exercise with them. I give them four names and see whether the students know who they are: St. Thomas More, Mohandas Gandhi (the Mahatma), Nelson Mandela, and Abraham Lincoln. After straightening out who they are, I ask if anyone knows what those four people have in common. Routinely I get answers such as “peacemakers,” “fighters for freedom,” “patriots” and other noble labels. I recognize all of them as good answers, but I explain that the answer I am seeking is that they were all lawyers. The lesson is, of course, that being a lawyer is a noble profession.

None of us needs to rise to the level of those four individuals (principled martyrs and imprisoned advocates for justice), but all of us in the legal profession should at least rise up. This paper is not meant either as a specific criticism of anyone nor some kind of assertion that the judicial system in this state or federally is hopeless. Rather, it is a call for reflection by each one of us about the role we play each day in advancing the dignity of the profession and thereby the justice system, in the maintenance of the third branch and thereby the republic. **WL**

ENDNOTES

¹For further discussion of the role these individuals played in the theories developed by our founders, see Jeffrey Rosen, *The Pursuit of Happiness, How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America* (Simon & Schuster 2024).

²See Federalist 78, noting that “the judiciary is beyond comparison the weakest of the departments of power” (citing Montesquieu, *Spirit of Laws*, vol. i., page 186. “Of the three powers above mentioned, the judiciary is next to nothing”).

³5 U.S. 137 (1803).

⁴*Id.* at 178.

⁵For a more complete discussion of the effects on justice of lack of sufficient funding of the court system, see generally, *A Focus on Our Courts*, Wis. Counties 6-27 (Dec. 2024).

⁶Shawn Patterson Jr., Matt Levendusky, Ken Winneg, & Kathleen Jamieson, *The Withering of Public Confidence in the Courts*, 108 *Judicature* 22, 26 (2024) (noting that public “trust and confidence” in the judicial branch overall has declined).

⁷Sir Anthony Mason, Address to the National Institute of Government and Law, March 20, 2022.

⁸*Id.*

⁹*Id.*

¹⁰William Shakespeare, *Henry VI*, Act IV, Scene II.

¹¹*Walters v. Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985).

¹²Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare’s Legal Appeal* 26 (1994).

¹³*Walters*, 473 U.S. at 363.

¹⁴*Id.* at 371.

¹⁵*Id.*

¹⁶*Id.*

¹⁷The notion that wealthy Americans seem to be able to obtain better lawyers, at least in the civil context, is beyond the scope of this article. However, it is absolutely a legitimate area of inquiry when addressing the ability of the third branch to adequately fulfill its function.

¹⁸Antonin Scalia, Commencement Address, William & Mary Law School, May 11, 2014.

¹⁹Adam J. White, *Antonin Scalia, Legal Educator*, Nat’l Affairs (Fall 2017).

²⁰Quotation attributed to Vincent Van Gogh. **WL**