



Threats to Founding Principles

As you will discover if you read on, the topic for this month's column is judicial independence, and the State Bar's unwavering commitment to that principle.

As I write, I remain hopeful the incidents that served as the catalyst for the topic's selection will have vanished from the headlines and faded from our memories by the time it appears. The topic is, however, timely and important at any juncture.

Impairing judicial impartiality, and our society's belief in it, is an invitation to chaos.

For the past several weeks, we here in Phoenix have been treated to the spectacle—and that's the right word for it—of an elected prosecutor characterizing the decisions of a judge as a threat to the public safety and accusing all the judges of the Maricopa County Superior Court of bias. We have spoken out against this threat to judicial independence. In return, our Discipline Department's decision to investigate the incidents has reportedly been termed "disgusting."

That's a topic for another day. Reiterating our support for the principle of judicial independence is a large enough task for one column.

This is not an original thought on our part. At the time our country was being formed, Alexander Hamilton wrote in *Federalist No. 78*, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution" and "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

In a sense, though, "independence" may be the wrong word. Critics of the judiciary would twist that word to mean "unrestrained" or "untethered." That is sophistry. Our judges are subjected to public Judicial Performance Reviews, and they are accountable to the Commission on Judicial Conduct and the electorate. Independence is the precondition; impartiality is the goal.

In any society, disputes will arise between its members or between its members and those selected to govern. Our society has settled upon a system under which its citizens are required to bring those disputes to our courts to be resolved, rather than settling them in the streets. Such a system breaks down when people cease to believe that their grievances will be heard in a forum free of extraneous and irrelevant influences and that will give them a fair and impartial hearing.

Just in my lifetime, we have witnessed instances where the people's faith in the integrity of our courts has broken down, and the nearly disastrous consequences that followed. Impairing judicial impartiality, and our society's belief in it, is an invitation to chaos.

But why should public criticism of judicial decisions have that effect? Some ask. Why can't our judges just develop thicker skins? After all, in assuming the presidency, Abraham Lincoln said that judges "have a duty, from which they may not shrink, to decide cases properly brought before them; it is no fault of theirs, if others seek to turn their decisions to political purposes." Some judges will be unaffected by public attacks on their wisdom and integrity. It is naive to believe that all will, and unwise at best to ask them to.

I suspect that few of us relish the thought of seeing our names in the morning's headlines identified as having done or said something that places society at risk, and we will probably do whatever is in our power to avoid that.

Judges who tire of having to explain to their families, who have read the newspaper or watched the evening news, that they really haven't issued a decision that places them at risk, have several alternatives available. They can just tolerate it, and most of them do. They can also subconsciously shade their decisions in favor of those who would subject them to this type of public criticism. Or they can determine that enough is enough and move on to perceived greener pastures. Society is the loser if these latter alternatives are chosen.

And what message are we sending to those who would aspire to judicial office? Telling them that, in addition to earning less than they could in private practice, they will also be subject to public vilification will hardly encourage them to pursue that dream.

It is for these reasons, among a host of others, that the State Bar is committed to the principle of judicial independence, and will speak out when it is threatened. Abraham Lincoln, Alexander Hamilton and the other Founding Fathers felt the same way. I guess we're in pretty good company. ■



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