

Defending Judicial Independence and the Rule of Law

Thank you for the introduction. And thank you for inviting me to speak today and for organizing this event.

There's a tradition I often invoke, a Yiddish tradition, "let me say a few words before I speak." In this case, let me start by expressing my gratitude for the Colorado Judicial Institute's ("CJI"'s) important work. For over 40 years, CJI played a critical role in making Colorado's judicial system into one of the best in the country. Your efforts made CJI's mission statement a reality. Thank you.

I also must start by recognizing that we are living in a time of rising distrust in our institutions. That makes your work, focused on building public trust in our state courts, more important than ever. In Colorado, it is crucial that the public can trust that the state courts will provide all Coloradans their day in court and treat them with dignity and respect. To further the goal of building trust, and a bench that reflects the diversity of Colorado, your diversity on the Bench Initiative has had a real impact. At the Department of Law, we are working hard to elevate our Diversity, Equity, and Inclusion effort. All of us in Colorado need to do our part, and I appreciate CJI taking on a leadership role here.

My talk today will focus on the importance of an independent judiciary and the challenges and opportunities ahead. I'll focus on three points: (1) that judicial independence is more imperiled now than ever, as polarization threatens to irreparably divide our country; (2) in light of growing tribalism, the judiciary as a whole would be well served by following the values we see in action in Colorado—a collegial, learning mindset that acts in defense of the rule of law; and (3) it is important that we think creatively about transparency and accountability to shore up public confidence in the judicial branch.

I. The Enduring Importance of Judicial Independence

First, our traditional judicial independence—and the rule of law—faces threats like never before.

Since our nation’s founding as a democratic republic, we celebrated judicial independence.¹ The Framers of our Constitution believed that the judiciary must be free of political interference, independent from the executive and legislative branches, and protected from retaliation. As Alexander Hamilton famously wrote in *Federalist No. 78*, “the judiciary is beyond comparison the weakest” of the three branches of government.² It has, Hamilton continued, “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”³ To safeguard federal judicial independence, our Constitution calls for judges to be appointed for life, or, in the Constitution’s words, “during good Behaviour,” and Congress is prohibited from reducing their salaries.⁴ Those protections have endured and are an example of how to protect judicial independence.

Just as judicial independence dates to our nation’s earliest days, so too do attacks on the judiciary. In the early years of our republic, Thomas Jefferson criticized the judiciary for being politically motivated and inattentive to public opinion. Based on that concern, he advocated for fixed terms for federal judges⁵ and orchestrated the impeachment trial of a Supreme Court justice.⁶ During this period, Chief Justice John Marshall defended the judiciary’s independence and worked to build confidence in the institution. Challenges to judicial independence continued over the course of our history. After the Civil War, congressional Republicans redrew circuit boundaries, repealed the Supreme Court’s habeas corpus jurisdiction, and debated numerous measures to prevent the courts from impeding their Reconstruction efforts.⁷ And, famously, Franklin Roosevelt’s frustration with Supreme Court decisions striking down a number of his

¹ See generally FEDERAL JUDICIAL CENTER, JUDICIAL INDEPENDENCE AND THE FEDERAL COURTS (2006), <https://www.fjc.gov/sites/default/files/pdf/JudicialIndependence.pdf>.

² ALEXANDER HAMILTON, THE FEDERALIST PAPERS: NO. 78 (1788), <https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470>.

³ *Id.*

⁴ U.S. CONST. art. III, § 1.

⁵ See *supra* note 1, at 4.

⁶ See U.S. SENATE, IMPEACHMENT TRIAL OF JUSTICE SAMUEL CHASE, 1804-05, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm> (last visited May 5, 2021).

⁷ See *supra* note 1, at 4-5.

New Deal programs led to Roosevelt’s court-packing threat to add six justices to the Supreme Court.⁸

Over the last several years, broadsides against the judiciary have become more partisan, corrosive, and widespread. These attacks coincide with increasing political polarization and the rise of social media. Politicians of all levels—all the way up to a former president—accuse judges of political motivations, characterize judicial decisions they don’t like as “judicial activism,” and question judges’ impartiality.⁹ Political commentators and special interest groups do the same, often in deceitful and personal terms. And the media now regularly describes judges by referencing the political affiliation of the executive who appointed them. These attacks undermine perceived judicial independence and politicize the courts. And worse, they endanger the rule of law itself.

II. The Rule of Law in An Era of Political Polarization

To defend the rule of law, judicial officers—and all attorneys—must lead with collegiality and a growth mindset. These traits are essential to institution building. As Jonathan Rauch explains, institution building is “more important for containing tribalism than pretty much anything that public policy could do.”¹⁰ “[I]nstitutions are enemies of tribalism,” Rauch describes; “[b]y definition, they bring people together for joint effort on common projects, which builds community.”¹¹

First, on collegiality, the late Justices Ginsburg and Scalia set a powerful example. Though they were ideological opposites, they developed a dear friendship. They attended opera together, celebrated holidays together, and traveled together—all while forcefully disagreeing on divisive issues.¹² What can be learned from their friendship? Justices Ginsburg and Scalia

⁸ See *supra* note 1, at 6-7.

⁹ See, e.g., BRENNAN CENTER FOR JUSTICE, IN HIS OWN WORDS: THE PRESIDENT’S ATTACKS ON THE COURTS (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts>.

¹⁰ Jonathan Rauch, *Rethinking Polarization*, NATIONAL AFFAIRS (2019), <https://www.nationalaffairs.com/publications/detail/rethinking-polarization>.

¹¹ *Id.*

¹² See generally Eugene Scalia, *Opinion: What we can learn from Ginsburg’s friendship with my father, Antonin Scalia*, WASH. POST, Sept. 19, 2020,

demonstrated that it is possible to develop friendships rooted in empathy and shared interests across doctrinal lines. And they showed us that such relationships among judges can further the judiciary’s collective project—a belief in the rule of law, apart from popular sentiment, politics, and personal views. We would all do well to develop more friendships like theirs.

And second, as psychologist Carol Dweck explains, a growth mindset is “based on the belief that your basic qualities are things you can cultivate through your efforts.”¹³ It contrasts with a fixed mindset, in which one believes their intelligence, personality, and moral character are static and effort is seen as fruitless.¹⁴ The benefits of adopting a growth mindset are life-altering. Dweck’s research shows that those with a growth mindset exhibit creativity, perseverance, resilience, and increased achievement.¹⁵ Imagine how transformative it would be for all judicial officers to approach cases and their professional development with a growth mindset.

Of course, CJI exists to strengthen the institution that is Colorado’s judiciary and has long recognized the value of collegiality and open-mindedness. Your judicial education efforts reflect this very work.

As the incoming chair of the Conference of Western Attorneys General, also known as the Attorney General Alliance, I am launching a new Ginsburg/Scalia Initiative. This year and next, we will host state attorneys general from across the nation to explore how we might work towards a more perfect union through listening, dialogue, and collaborative problem solving. I believe that building these relationships, particularly among public officials from different political parties, promises to not only de-escalate the heated rhetoric that is eroding trust and threatening the rule of law, but also to rebuild our institutions and confidence in government.

The dialogue CJI cultivates and that the Ginsburg/Scalia Initiative will support are just some of the meaningful conversations happening around our state and country. As we consider

https://www.washingtonpost.com/opinions/eugene-scalia-rbg-friendship-oped/2020/09/19/35f7580c-faaa-11ea-a275-1a2c2d36e1f1_story.html; Dara Lind, *Read Justice Ginsburg’s moving tribute to her “best buddy” Justice Scalia*, VOX (Feb. 14, 2016, 4:00 PM), <https://www.vox.com/2016/2/14/10990156/scalia-ginsburg-friends>.

¹³ *Carol Dweck: A Summary of Growth and Fixed Mindsets*, FARNAM STREET (Mar. 2015), <https://fs.blog/2015/03/carol-dweck-mindset/> (quoting CAROL DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (Ballantine Books, 2007)).

¹⁴ *Id.*

¹⁵ *Id.*

what it takes for the rule of law to prevail and for the judiciary to remain independent, I believe that we need many more such dialogues. Those conversations will be most productive—and enjoyable—if they are rooted in collegiality and a growth mindset. As we consider how to support more effective civic education, I would include a focus on dialogue and collaborative problem solving as core values to advance.

III. Building Trust Through Transparency and Accountability.

My final point is that we must think creatively about transparency and accountability in the judicial branch. These two values are essential to advance our goals of protecting judicial independence and strengthening the rule of law. That’s because appropriate transparency and accountability are necessary to maintaining the public’s trust and confidence in our judiciary and the rule of law. And that’s true for all institutions in our justice system, including prosecutors and law enforcement officers.

The public expects judges to act ethically and behave with moral authority.¹⁶ When that doesn’t happen, public perception of judiciary takes a hit. As we know, we recently witnessed a range of newspaper reports with allegations of misconduct of members of our state’s judicial branch.¹⁷ In reaction to these reports, the state chief justice acknowledged a corresponding “crisis of confidence” in our state courts, and, in an important step forward, pledged to work towards greater trust.¹⁸

We all can and should work together to restore public confidence in the judiciary. A foundation of this effort involves increasing appropriate transparency and ensuring accountability for any proven misconduct. To be sure, Colorado has some valuable mechanisms

¹⁶ See LOGAN CORNETT & NATALIE ANNE KNOWLTON, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, PUBLIC PERSPECTIVES ON TRUST & CONFIDENCE IN THE COURTS (2020), 7-8, https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf.

¹⁷ E.g., Lucy Haggard, *Colorado’s judicial branch to be investigated for sexual harassment, gender discrimination*, THE COLORADO SUN, Feb. 16, 2021, <https://coloradosun.com/2021/02/16/colorado-judicial-branch-investigated-sexual-harassment-gender-discrimination/>.

¹⁸ See Shelly Bradbury, *Chief Justice admits “crisis of confidence,”* DENVER POST, Feb. 19, 2021, <https://tinyurl.com/v8jmkztw>.

in place to advance that goal, including judicial performance evaluation commissions and retention elections. But we must do better and important work to that end is underway. To begin the process of restoring confidence, the Colorado Supreme Court commissioned an independent investigation and, at the chief justice's request, Governor Polis, members of the General Assembly, and I created a panel that will select independent investigators who will probe allegations of sexual harassment, hostile work environment, and improper contracting practices. Ultimately, this investigation will "provide a report to the public,"¹⁹ which will be an important step forward.

As we reflect on and learn from how our state's judiciary oversees alleged improper behavior, we have an opportunity to make lasting improvements that ensure appropriate transparency and accountability. To advance that work, the Colorado Women's Bar Association ("CWBA") reached out to our office to work together on identifying solutions that respect judicial independence and increase accountability.²⁰ Indeed, it has also established working groups to craft recommendations.²¹ I applaud CWBA's engagement and commitment to this important effort.

As we consider ways to promote equality in the judiciary in particular and in the workplace more generally, the reports of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace²² and the Federal Judiciary's Workplace Conduct Working Group²³ both provide valuable guidance. As the reports explain, workplace harassment remains a problem and is likely to be underreported. They also note that elements of a judicial workplace, including significant power disparities, may increase the

¹⁹ See David Migoya, *\$350K to be paid for inquiry*, DENVER POST, Apr. 23, 2021, <https://tinyurl.com/424fr4zf>.

²⁰ Letter from Miranda K. Hawkins, CWBA President, to Chief Justice Brian Boatright and Justices of the Colorado Supreme Court (Feb. 17, 2021), <https://tinyurl.com/3bbhxaau>.

²¹ Kathryn Starnella, *CWBA Ad Hoc Committee on Sexual Harassment and Sex Discrimination in the Judicial System: What's Been Happening?*, THE 1891: CWBA'S BLOG (Apr. 16, 2021), <https://tinyurl.com/4fyd3k6r>.

²² CHAI FELDBLUM & VICTORIA LIPNIC, EEOC, REPORT OF CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

²³ FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

likelihood of harassment. These reports offer recommendations worth considering, including model codes of conduct, the value of clear, consistent standards and responsibilities, and the importance of developing multiple informal mechanisms to support employees.²⁴

I encourage us all to consider how we can build upon the mechanisms Colorado already has in place to rebuild public trust and confidence in the state judiciary in particular and to promote fair and equal workplaces in general. CJI is especially well positioned to engage in and be a part of this work.

Conclusion

Our democratic republic may well be at an inflection point. Today, powerful forces undermine the public's trust in the judiciary and in our legal institutions. To rebuild those institutions, and to ensure that *all* Americans can share in a more perfect union, we all have some work to do. At the Department of Law, we are considering how best we can support this work. I know that you are as well and I appreciate your engagement and leadership. Thank you.

²⁴ *Supra* note 24, at 20-28, 36-39.