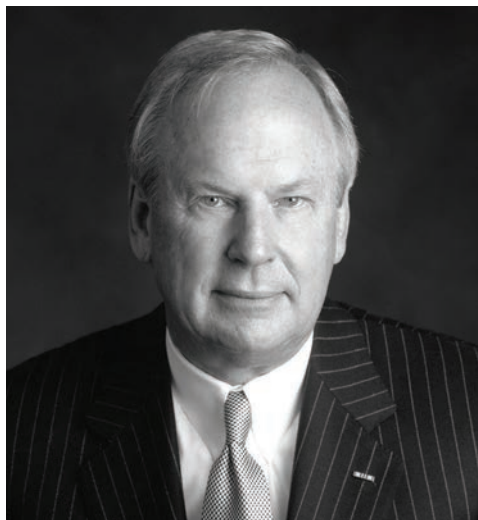




# Protecting the Rule of Law

What's Your Responsibility?

BY JOHN VAUGHT



If you were fortunate enough to see the musical *Hamilton*, you were also blessed to witness the strong, albeit disparate, spirit of the Founders when they debated the issues that led to the U.S. Constitution and the Bill of Rights. Through the medium of historical fiction, theater characters took you into

“the room where it happened”<sup>1</sup>—that is, where the U.S. version of the Rule of Law was born.

We often talk in legal and social circles about the Rule of Law, yet as important as it seemingly is to our democratic republic, there is no one paragraph within the Constitution that defines that term. So where do we find its meaning? How do we, as lawyers, understand our duty to protect that governing concept? Collectively, all of the founding documents, the independence and interconnectivity of the branches of government, and the customs and traditions developed and honored over the last 230 years comprise the means by which this country has chosen to limit the power of government, and these make up the Rule of Law. It is the Rule of Law to which our duty as lawyers is owed.

## Elements of the Rule of Law

Some define the Rule of Law as “no man is above the law.” While that distinguishes our nation from monarchies, dictatorships, and totalitarian

forms of governments, it fails to address the core and collateral issues that our Founders were struggling to define. That is, faced with the “raw power” of an unrestrained government, and applying the historical concepts of the Rule of Law, the Founders looked first for ways to divide that power.

At the Constitutional Convention of 1787, they chose to divide the government into three branches as an initial means to restrain government. The order of that division of government was not fortuitous. The legislative branch—the branch most responsive to the electorate and the maker of our laws—was designated Article I. As the first among equal branches, Congress was expected to be particularly vigilant in maintaining its separation from the other two branches of government. Yet when overlaps occurred—for example, confirmation of cabinet members and approval of federal judges—it was Congress that was entrusted with that task. The goal of separation of powers and independence of governance continued in the drafting of Article II (executive branch) and Article III (judicial branch).

Another element of the Rule of Law that restrains the power of government is the familiar “checks and balances” provisions in our founding documents. For example, the president’s ability to veto legislation restrains Congress’s power to adopt laws. The two-thirds vote to override a veto again balances the chief executive’s power.

An Article III court’s power to declare legislation unconstitutional, as recognized by the Supreme Court in *Marbury v. Madison*,<sup>2</sup> once again checks both Congress and its power to pass legislation. The Rule of Law depends on the fiercely guarded independence of the judiciary, perhaps more than any other branch of government.

## What about Politics?

Clearly, separation of powers, checks and balances between and within branches of government, and judicial independence are elements of the Rule of Law. But there’s another element that has served our governmental institutions well: the absence of party politics.

Politics—or a loose affiliation of individuals who influence a particular outcome in govern-



ment—is not addressed in our Constitution. In the early days of our country, political parties did not exist as we know them today. Although Hamilton and Jefferson clearly held disparate views on governance of this country, those differences faded as the founding documents were adopted by Congress and eventually by a vote of the people. Things began to change around 1831, when then-candidate Martin Van Buren introduced the equivalent of a modern-day political party to a presidential election. Today, political parties (with their ability to raise money) are increasingly challenging the Rule of Law.

Dysfunction has arguably permeated all three branches of government. The current executive branch has repeatedly challenged the institutions that have traditionally contested and checked the chief executive's power, the legislative branch, the judicial branch, and similar institutions *within* the executive branch.<sup>3</sup>

The political power within the executive branch is not alone in its effort to erode the Rule of Law. Congress has also frequently proven itself dysfunctional, applying political party loyalty to important decisions to block matters that otherwise may serve the best interests of the country and specifically the Rule of Law.

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Finally, even at the Supreme Court level we have recently witnessed nominees alleging “political conspiracy” in response to questions raised in the confirmation process. Such political challenges arguably undermine the process and

the dignity of the court. And they sow the seeds that will eventually undermine the Rule of Law.

### **What's Your Responsibility?**

So the question becomes, as a lawyer and as a citizen, what is your obligation to speak up or to act when you witness a challenge to the Rule of Law?

Unlike everyday citizens, you have taken an oath of admission and are subject to the Rules of Professional Conduct in Colorado. As such, you have a heightened obligation to support the Constitutions, and thus the Rule of Law. So review (and renew) that oath. Take it seriously. Police yourself in the practice of law. Support the independence of the three branches of government—particularly the judicial branch. Have the courage of conviction to speak up when others abuse the Founders' principles stated in our governing documents.

Second, be a mentor for civility, ethics, and professionalism—all of which encompass the standards set forth in our oath of admission and ethics rules. When I see a lawyer who isn't civil, ethical, or professional, I say to myself: There is someone who didn't have a mentor. Professionalism—and thus respect for the Rule of Law—must be conveyed person-to-person, lawyer-to-lawyer, mentor-to-mentor. Make a personal commitment to mentor a colleague on professionalism.

Finally, when you see your political party or independent candidate encouraging the abuse or even destruction of the Rule of Law, cast a vote for some individual who understands that this amazing country has, over the last 230 years, consistently developed respect for, not contempt of, the Rule of Law. Your support for those principles is critical. It's your professional obligation to have a continuing presence in “the room where it happens.” <sup>CI</sup>

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### **NOTES**

1. Lyrics from Miranda et al., “The Room Where It Happens,” *Hamilton* (2015).
2. *Marbury v. Madison*, 5 U.S. 137 (1803).
3. For example, the Department of Justice.