

“THE CONSTITUTION PROTECTS judicial independence not to benefit judges but to promote the rule of law: Judges are expected to administer the law fairly, without regard to public reaction.” That statement by Chief Justice William Rehnquist may have been inspired by the recent spate of unfortunate and personalized political attacks on judges who have made highly publicized decisions. Criticism of the courts inspired by political opposition to particular rulings is neither new nor unexpected. Unfortunately, the current rhetoric not only is shrill but is directed at individual judges, with the suggestion that they should be “held accountable” for their decisions.

It is inevitable that courts will decide issues that touch deeply held beliefs. In the climate of the current “culture wars,” inflamed by special interest groups and the media, decisions on abortion, same-sex marriage, and the role of religion in public life are guaranteed to generate highly emotional responses. As lawyers, we are obliged, no matter how strong our own beliefs on the issues, to refrain from disparagement of the system and to respond to threats of retribution directed toward judges who have made unpopular decisions. Reasoned and even sharp criticism of the legal basis for a decision is appropriate. Suggestions that the bench officer who made the decision should be “held accountable” are wholly inappropriate. As Ted Olson eloquently stated in a recent Wall Street Journal editorial: “We expect dignity, wisdom, decency, civility, integrity and restraint from our judges. It is time to exercise those same characteristics in our dealings with and commentary on those same judges.”

Although the executive and legislative branches are required to respond to current events and controversies, each has far greater freedom to select which issues to address, and, unrestrained by stare decisis, each has far greater freedom to choose a position on those issues they do address. Those who speak scornfully of “activist judges” should recall that the courts do not solicit their business. It is the litigants that determine which issues will be brought to the court.

The current round of judicial criticism should be viewed with some historical perspective. The constitutional system of checks and balances all but guarantees that there will be tension among the branches of government—it is intended to do so. Politically inspired disparagement of the judiciary has periodically erupted throughout our history. Criticism has emanated from all sides of the political spectrum depending on who holds the greater sway in each branch of government. From the brief research for this column, it was interesting to note that the most heated rhetoric has flared when the executive and legislative branches were controlled by the same party, and the court was viewed as the “check” that maintained unwanted “balance.”

After the Democratic-Republican party swept both houses of Congress in 1800, with Democratic-Republican Thomas Jefferson in the White House, the power struggle with the “Federalist judiciary” resulted not only in *Marbury v. Madison* but also in the attempt to impeach Justice Samuel Chase. While Chase was not a model of judicial temperament or conduct, the impeachment effort failed, largely because of the admissions by those seeking his ouster that their motivation was his “dangerous opinions” and that the effort was intended to open the office for a Democratic-Republican loyalist.

When Democratic president Franklin Roosevelt, with the support of an overwhelmingly

Democratic Congress, found the Supreme Court a roadblock to the progressive reforms he supported, he launched his infamous court-packing plan as a way to provide “a constant and systematic addition of younger blood” to “vitalize the courts” to meet the “the actual present needs of the largest progressive democracy in the modern world.” The New York Times reported upon announcement of the plan that the “stunned” Republicans proclaimed that the administration, “having already destroyed the economic stability of the country, apparently will not be content until it destroys the judicial stability.” Although initial reports were that the plan would be approved, the Roosevelt attack on the courts proved to be an embarrassment to the administration after the organized bar, the press, and eventually public opinion rallied against the proposal.

Strong public rhetoric has also been generated by particular decisions. In the nineteenth century the Supreme Court was attacked for its infamous Dred Scott decision. At the end of the last century, progressives criticized a more conservative Court for decisions invalidating many labor reforms and protections. The conservative response was to point out that the function of the Court was to uphold the Constitution even against the popular will. As the philosophy of the court changed, so too did the positions of those who would defend and those who would attack the courts. The decision in *Brown v. Board of Education* was met with outright defiance that required the executive branch to send federal troops to enforce desegregation. Other court decisions invalidating a host of repugnant racial restrictions were met with cries for impeachment of the judiciary. Such rhetoric was not limited to the South. When the federal court in Los Angeles ordered desegregation for local schools, far too many called for defiance and direct action against the judge and the courts.

The California Supreme Court held in 1948 that “[i]f the right to marry is a fundamental right then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one’s liberty.” Justice Traynor wrote, “The caprice of the politicians cannot be substituted for the mind of the individual in what is man’s most personal and intimate decision.” In 1967 the U.S. Supreme Court agreed, invalidating antimiscegenation laws throughout the country. Decisions on the right to marry were met with assertions that the court was interfering with “God’s plan.” Some called for impeachment, some called for stripping the courts of jurisdiction over such matters, and some called for violent action against both the justices and those who would take advantage of the decisions.

The judiciary cannot easily rise to its own defense. Attempts to do so risk dragging the courts into heated political discourse inappropriate for judicial officers. The Canons of Ethics require judges to “avoid political activity that may create the appearance of political bias or impropriety.” Instead the bar has a responsibility to ensure that “an independent, fair, and competent judiciary will apply the laws that govern us.” When personal threat is directed to a bench officer, we have the obligation, individually and collectively, to step forward to educate those who fail to recognize that the role of the judiciary is central to the American concept of justice. We must also remember to temper our own rhetoric when we disagree with a decision. Assertion that the legal reasoning is in error is legitimate; a diatribe directed toward the bench officer is not.

When a political attack is directed toward the system as a whole, we must also step forward. The

recent attacks on the jury system, many of which are based on wildly inaccurate information, seek to eliminate the critical protections provided by that system. Many bar organizations have programs that convey the importance of the jury system to the public. Even small efforts contribute; think twice before responding to the inevitable groans from your friends who have received a jury summons with a recommendation on how to avoid service. Try instead a brief endorsement of the one-day-one-trial system that has eliminated the endless days of jury room ennui. Be sure you have all the facts before disparaging a jury's decision in a high-profile case, especially since media reports may not accurately reflect what was actually presented to the jury.

Support for the courts and the judiciary does not mean that legitimate criticism cannot be made or that legitimate channels cannot be used to seek improvements in the system and in the judiciary. As long as the efforts are not inspired by personal animus or politically driven motive, the bar has the responsibility to work to make the system the best it can be. A court with the highest quality judicial officers making the most well-grounded and reasoned decisions will be the least subject to criticism and the easiest to defend from unfair attacks.

The Los Angeles Superior Court, with over 500 bench officers, is the largest court in the nation. The Association has joined with the court to establish a multitude of programs to assist in ensuring that it is also the finest. Association officers, committee members, and other representatives serve on multiple bench/bar committees designed to address problems encountered by both bench and the bar. Our members are asked by the court to assist in judicial training. The officers meet regularly with the court leadership to review responses to the Association's Judge Your Judge program. The court is committed to addressing legitimate concerns raised in these responses. Subsequent discussions, between court leadership and judges who were unaware of the problems created by their courtroom practices, have solved some problems. Over time we have had success, working with other bar organizations, in securing the court's commitment to elimination of local-local rules, in securing random reassignment following 170.6 challenges, and in addressing unreasonable time standards imposed in some venues. We have participated as amicus in cases directly affecting the ability of our members to practice, including *Oliveros*, which confirmed that decisions on continuances "must be made in an atmosphere of substantial justice."

In 2000, the Association released the report of its Blue Ribbon Commission, which examined issues of concern raised by superior court constituents, including parties, lawyers, jurors, staff, security personnel, and attorney services. With the cooperation of the court, the commission's recommendations helped to solve many problems. Yet, the thorniest issue remained. To address that problem, our immediate past president, John Collins, who chaired the original Blue Ribbon Commission, appointed the "New Blues" to seek answers to the extraordinarily difficult challenge of preserving judicial independence while providing appropriate means of addressing those few but consequential situations in which a bench officer is abusive, incompetent, or perpetually unprepared. I look forward to working with John, the distinguished members of the bar who comprise the New Blues, and the leadership of the superior court to make this project a success.