

CHAIR'S REPORT

Enough is Enough: No More Political Attacks on the Judiciary



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WE TRIAL LAWYERS HAVE ALL DISAGREED WITH RULINGS FROM THE BENCH. Not every call goes our way. But with few exceptions, Texas lawyers have maintained a respectful tone after their losses, refraining from accusations of judicial bias or corruption. Recently, however, some troubling trends have emerged in our nation's and our state's discourse, with politicians – and sometimes lawyers – attempting to undermine judicial decisions and apply political pressure with ad hominem attacks on judges who have rendered those decisions.

Political leaders of all political stripes have unfairly criticized judges; ACTL and ABOTA have spoken up for the judiciary

Much has been written about the growing chasm between the political parties and the heated rhetoric between liberal and conservative politicians. With each passing election cycle, political discourse reflects increasing polarization, intensity, and vitriol. Partisan news outlets and social media echo chambers only fan the flames. Politicians lash out at those with opposing opinions.

I write about a specific category of political attacks: those leveled at the judiciary. Consider the following recent real-world examples of politicians' criticism of judges whose rulings displeased them:

- a court “has established itself as an unfair venue where litigants’ fate is predetermined by the court’s political leanings”;
- a judge made an “activist and politically-motivated decision”;
- “an extremist, right-wing zealot with no regard to human life”;
- “a Highly Politized Democrat Judge”;
- an “unhinged Judge,” “highly political and fully biased,” who “has lost all credibility”;
- a “stone-cold ideologue” whose decisions are “made before [the issue is] even presented” and who “writes press releases on behalf of” an interest group; and
- a “court has escalated its troubling pattern of behaving as a political actor instead of an impartial arbiter of disputed cases.”

As you can glean from this sampling, the judicial attacks come from both ends of the political spectrum. Some of the underlying judicial decisions may rest on tenuous reasoning; I have no idea. The losing side in any legal battle has every right to file an appeal, question the substantive judicial decisions, and express disagreement in the press. Like all of us, sometimes judges miss the mark and are subject to correction or critique. Questioning the merits of a decision is fair game, but undermining the judicial process itself should be off limits.

Justice Sandra Day O'Connor acknowledged years ago that American politicians have long directed anger toward judges. But she expressed concern that “the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history.” *The Threat to Judicial Independence*, WALL STREET JOURNAL Sept. 27, 2006, at A.18. Justice O'Connor acknowledged that judges sometimes render incorrect decisions, and criticism may be appropriate, even healthy. But she emphasized the Rubicon: “we must be more vigilant in making sure that criticism does not cross over into intimidation.”

My point is a modest one: a political leader or an attorney goes too far when making unfounded accusations that a judge or court is biased and incapable of fair decisions. I am not alone in this opinion: two of the most respected organizations of trial lawyers in the United States issued statements critical of some of the statements listed above. In a September 2023 press release (available at <https://www.actl.com/detail/news/2023/09/28/actl-denounces-statements-against-judges-made-by-governor-newsom-and-donald-trump>), the American College of Trial Lawyers (“ACTL”) referenced “troubling examples” of a “growing number of threats and invective made against judges in recent years.” That same month, the American

Board of Trial Advocates (“ABOTA”) issued a press release (available at https://www.abota.org/Online/News/2023_News/ABOTA_Defends_Federal_Judge_Against_Unfair_Criticism.aspx) taking issue with similar statements.

Some of the statements quoted above took aim at a specific ruling. Others more broadly attacked a judge’s impartiality across cases. Some were fleeting references in social media posts. Others were published on official governmental websites, giving the allegations of bias the apparent imprimatur of a governmental body. This last category strikes me as perhaps the most dangerous of the group, suggesting that the government itself takes the official position that a member of the judicial branch is biased and politically motivated.

Why this matters: we need an independent judiciary that has earned public confidence

So why should we attorneys care? You and I may not have any interest whatsoever in the cases that have rankled politicians enough to criticize the judiciary. But we all serve as officers of Texas courts. Most of us have committed to comply with the Texas Lawyer’s Creed, which provides: “I will always recognize that ***the position of judge is the symbol of both the judicial system and administration of justice***. I will refrain from conduct that degrades this symbol.” The Lawyer’s Creed rightly recognizes that each Texas judge symbolizes our judicial system, and that any attack on a judge, if given credence, will erode public faith and confidence in the court system and the rule of law.

The separation of powers represents a fundamental tenet of American democracy, with an independent judiciary serving a crucial function in maintaining the equilibrium established by our nation’s founders. Unfounded allegations that judges have succumbed to bias and political motivations have no place in that delicate balance. If the day comes when the public loses trust in our judges and concludes that outcomes are dictated by political agendas rather than the facts and the law, then the judicial branch will struggle for continued relevance. The United States Supreme Court has recognized this principle: “The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Standing on a soapbox constructed of social media and partisan soundbites, politicians today have a unique power to damage the judiciary’s reputation amongst that portion of the public whose fealty they have captured. If a Texas citizen hearing a politician’s or attorney’s accusations comes to believe that a specific judge is unfairly biased, why should he have any confidence in the rest of the judicial system? The judiciary is only as strong as the trust and confidence it earns from the public. Political or governmental attacks can lead to a loss of faith in the judiciary, as Texans may perceive decisions as being influenced by partisan motives rather than legal principles. Indeed, unfair criticism of one judge may place pressure on others on the bench – when a judge sees a judicial colleague attacked, will he or she have in the back of her mind the risk of suffering a similar fate for a politically unpopular ruling? Each unwarranted attack on any judge undermines the vital independence of the entire judiciary. ABOTA recently published a whitepaper titled *Preserving a Fair, Impartial, and Independent Judiciary* that provides important insights regarding the history, threats, and proposed solutions applicable to an independent judiciary (available at https://abota.org/Online/Resources/Judicial_Resources/Online/Resources/Judicial_Resources). Among the threats the whitepaper identifies are “political interference and intimidation.”

To be sure, if politicians or citizens believe that a judge has rendered an incorrect decision or behaved inappropriately, they can avail themselves of means of redress. Recourse includes filing an appeal, lodging a grievance, or campaigning for a rival candidate in the next election. But we attorneys as well as those in power should refrain from alleging bias and impropriety simply because of an unfavorable outcome in a particular matter. Politics has become a blood sport, with social media and vitriol added to the arsenal employed by those seeking to curry favor with voters. Barbs directed toward an independent judiciary should not be part of the weaponry.

If there is a way that the Litigation Section can serve you better, please do not hesitate to contact me. I can be reached at ggannaway@beckredde.com.

Sincerely,



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