

The Importance of Defending Judges, Part II

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We tend to think that the problems of today are a product of our current environment, whether it the isolation of Covid, the political divide that pits neighbor against neighbor, or the prevalence of social media, which can be manipulated to enhance the opinions of some, at the exclusion of others. In many ways, all are correct, but the tendency towards recency bias should be a warning that things are not always as they seem. For instance, our country has suffered through politically divided times more than a few times in our almost 250 year history. George Washington, for instance, was so disgusted by the political divide between the two political parties of his day, the Federalists and the Democratic-Republicans, that he decided not to seek a third term as President.

So while we tend to think that all problems are of recent vintage (or more divisive now than in the past), so is the problem that is the topic of this paper and the recent article in *The West Virginia Lawyer*. Defending judges from unjust criticism seems more important today because of the heightened scrutiny that The Supreme Court of the United States is experiencing. And to be sure, the prevalence of social media, whereby everyone has a megaphone to espouse their opinion on any topic, accentuates the problems of unjust criticism of judges. But we know, for instance, that the ABA prepared a report in 1986 on unjust criticism of the judiciary. That predated cellphones, social media, 24-hour cable news and the internet.

Likewise, *The Atlantic* published an article in 1911 (six years before America entered World War I, about the problems of criticizing the courts. The article, which is attached, makes the point that judges were usually the subject of criticism by experts and lawyers, especially on appeal, where arguing the errors of the court below was part of the fabric of appellate jurisprudence. In retrospect, the belief that criticism must come from experts appears helplessly naïve in today's world of Twitter and Facebook users with no science background taking on nationally recognized experts in infectious diseases, immigration policy, climate change and Constitutional Law. But I digress....

As lawyers, we honor the right of free speech, and are committed to protecting our system of justice that guarantees the right to free expression. But we also have an obligation to preserve our system and to defend the judges who are so integral to the protection of rights. While some may argue that judges are no different than any other public official, and should be subjected to scrutiny and criticism when their decisions do not reflect the will of the people, that opinion fails to recognize that the rule of law is often based not on protecting the will of the majority, but the rights of the minority to disagree. Judges make decisions not like a weather vane measuring the direction of the popular wind, but on the state of the law as it has developed over time. Frequently, our laws have been at the forefront of policies that were considered radical at the time, like school desegregation and rights for criminal defendants.

As practicing lawyers, we also know that judges will make decisions that are contrary to the points that we advocate in briefs, pleadings and hearings. We know that juries can (and will) decide cases that are contrary to what we are arguing before them. It is this recognition of the necessity of an adversarial process that enables seasoned lawyers to not take losses too personally (but it still might sting) and that judges who rule against you are making decisions that reflect their view of the law, even if you disagree.

The American Board of Trial Advocates, one of the preeminent invitation-only organizations of the best trial lawyers in the country, recognized these issues and tried to encapsulate a Protocol for Responding to Unfair Criticism of Judges. The ABOTA protocol, which is attached, called for a quick response team, of sorts, to be established in each state, made up of lawyer members who would agree to vet opportunities to respond to unjust criticism or misrepresentations about the judiciary. It attempted to define those circumstances where a response would be necessary, such as when criticism was likely to have lasting impact on how the judiciary is viewed in the community, when the criticism is materially inaccurate or when the criticism reflects a lack of understanding of a legal issue or proceeding.

As we endeavor to find our voice on this important issue, it would be wise to consider the following questions:

1. How has social media impacted the issue of criticism of judges?
2. Where is the line between fair or constructive criticism of judges, and unfair criticism of judges?
3. How should the organized bar address the issue of unjust criticism of judges?
4. Is there a way to balance free speech rights with a lawyer's obligations to defend the judiciary?
5. Are there times when a lawyer has an obligation to speak out against the action of a judge?

A dialogue on these issues will hopefully lead us to a path where judge's interests are protected and our system of justice is stronger.

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