

The Effects of Public Criticism of the Judiciary on Judicial Independence.

International Association of Judges  
First Study Commission—October 2018  
U.S. Federal Judges Association  
Hon. Marilyn L. Huff, President

**1. Please provide at least one example, which can be used as a case study, of an occasion in your jurisdiction where a judge, the judiciary, or the courts have been unfairly criticized by:**

- a) A politician or politicians;**
- b) The mainstream media;**
- c) Social media.**

I serve as president of the United States Federal Judges Association. The members of the FJA are district and appellate court judges working in the United States federal courts. The United States federal court system is an independent national judiciary providing civil and criminal adjudication within the jurisdiction conferred by the United States Constitution and Congress. The federal judiciary serves as an important check on the powers exercised by the elected branches of government by ensuring that governmental actors comply with the limitations set by the Constitution and Acts of Congress.

Because the United States judiciary is often tasked with reviewing the legality of controversial, high-profile government actions, there is a long history of public criticism of judicial officers dating back to the nation's founding. For example, one issue that dominated early American political discourse was whether Congress had the authority to charter a national banking system. In 1819, the United States Supreme Court held that the Constitution impliedly granted Congress the power to create national banks,<sup>1</sup> a decision which generated years of public attacks on the judiciary from citizens and politicians opposed to an expansive interpretation of federal power.<sup>2</sup> After the decision, American founding father and former President Thomas Jefferson called the judiciary a "subtle corps of sappers & miners constantly working underground to undermine the foundations of our confederated fabric."<sup>3</sup> More than a decade later, in vetoing a bill to reauthorize the banking system, then-President Andrew Jackson argued that the "opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges," and the "authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."<sup>4</sup> In spite of the criticisms, the Supreme Court's decision has become accepted over time.<sup>5</sup>

---

<sup>1</sup> See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

<sup>2</sup> Constitutional Rights Foundation, John Marshall and the Bank Case, at 4 (2012), available at <http://www.crf-usa.org/images/pdf/JohnMarshallandthBankCase.pdf>.

<sup>3</sup> Letter from Thomas Jefferson to Thomas Ritchie, Dec. 25, 1820, available at <https://founders.archives.gov/documents/Jefferson/98-01-02-1702>.

<sup>4</sup> Andrew Jackson, Veto Message to the Senate, July 10, 1832, available at [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp).

<sup>5</sup> See, e.g., Watters v. Wachovia Bank, N.A., 550 U.S. 1, 10 (2007).

## 2. What effect, if any, have those criticisms had:

- a) **On the independence of the judiciary;**
- b) **On the separation of powers;**
- c) **On public confidence in the judiciary.**

American federal judges hold life appointments, subject to a rarely invoked impeachment process requiring the approval of both houses of Congress, and cannot have their salaries reduced during their tenure in office. Because of these robust protections, the federal judiciary has continued to rigorously police the separation of powers required by the United States Constitution even during times of heightened judicial criticism. For example, in one recent high profile case, a panel of the United States Court of Appeals invalidated an executive action related to immigration policy on separation of powers grounds.<sup>6</sup> However, many state and local judges outside of the federal system are directly elected, and some scholars have argued that sustained political attacks have the potential to compromise judicial independence in those courts.<sup>7</sup>

Public confidence in the judiciary can be difficult to assess, and often fluctuates over time based on how the courts are discussed in the country's broader political debate.<sup>8</sup> However, despite protracted periods of intense judicial criticism over the years, the federal judiciary has traditionally enjoyed broader public support than other major government institutions.<sup>9</sup>

## 3. What steps, if any, were taken to deal with the criticism? How effective were those steps?

Because of its apolitical structure and role, the judiciary as an institution does not formally respond to public criticism. Canon 3(A)(6) of the Code of Conduct for United States Judges provides that a "judge should not make public comment on the merits of a matter pending or impending in any court."<sup>10</sup> However, individual judges frequently use their public platform to

---

<sup>6</sup> City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D04-19/C:17-2991:J:Rovner:aut:T:fnOp:N:2142410:S:0>.

<sup>7</sup> See, e.g., Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308 (1997).

<sup>8</sup> See Megan Brenan, Gallup Inc., Confidence in Supreme Court Modest, but Steady, (July 2, 2018), available at [https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx?g\\_source=link\\_NEWSV9&g\\_medium=tile\\_4&g\\_campaign=item\\_4732&g\\_content=Confidence%2520in%2520Supreme%2520Court%2520Modest%2c%2520but%2520Steady](https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx?g_source=link_NEWSV9&g_medium=tile_4&g_campaign=item_4732&g_content=Confidence%2520in%2520Supreme%2520Court%2520Modest%2c%2520but%2520Steady).

<sup>9</sup> For historical polling data regarding public approval of the Supreme Court, see Gallup, Inc., Supreme Court, <https://news.gallup.com/poll/4732/supreme-court.aspx> (last visited July 16, 2018).

<sup>10</sup> Judicial Conference of the United States, Code of Conduct for United States Judges (last revised March 2014), available at <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d>. It should be noted that Rule 2.10(E) of the American Bar Association's Model Code of Judicial Conduct permits judges to "respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter," although that permission does not extend to statements "that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." See Am. Bar Ass'n, Model Code of Judicial Conduct (3d ed. 2011), available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_10judicialstatementsonpendingandimpendingcases.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_10judicialstatementsonpendingandimpendingcases.html).

extol the value of judicial independence. For example, former Supreme Court Justice Sandra Day O'Connor has written:

People must understand the role of the judiciary so that they can properly uphold its independence and ensure its accountability to the law of the land. This understanding is essential to the functionality of our government. [American founding father] Alexander Hamilton wrote in *The Federalist Papers* that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” Thus the independent judiciary is the only way to ensure that the tenets of our Constitution will be upheld even when they may be unpopular.

The concept of judicial independence is essential to justice for each individual because, as Hamilton also said, “[N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.” The citizens must understand that it is ultimately in their self-interest for judges not to be influenced by their policy preferences because of the possibility that one day they will be in a position in which their own cherished rights are politically unpopular. By building this perspective, we can grow a vibrant constituency of active citizens for judicial independence.<sup>11</sup>

Often, the role of defending the judiciary during times of heightened criticism has fallen to the American legal community, which is best positioned to understand the vital services the court system provides to the public.<sup>12</sup> As the American College of Trial Lawyers has written:

Because it is the weakest of the three [branches of government], the judicial branch has the greatest need to be defended. But who is to provide the defense? Not the judiciary itself, because it is by design not a political entity; its power to enforce its decrees and protect its independence are limited. The other two branches, its potential antagonists, cannot always be counted on for that defense.

---

<sup>11</sup> Sandra Day O'Connor, [The Importance of Judicial Independence](https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence), 78 STANFORD LAWYER (Spring ed. May 15, 2008), available at <https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence>; see also Sean Sullivan, [Gorsuch Calls Attacks on Federal Judges ‘Disheartening’ and ‘Demoralizing’](https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/?utm_term=.b5559a96ffed), WASHINGTON POST (March 21, 2017), available at [https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/?utm\\_term=.b5559a96ffed](https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/?utm_term=.b5559a96ffed).

<sup>12</sup> See Judith Kaye, [Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts](#), 25 HOFSTRA L. REV. 703, 715 (1997) (“[T]he fact is that judges today cannot and do not answer back, but hold up the banners of judicial dignity, judicial impartiality and judicial independence, and look to the bar to hold up the other end of those banners. The prevailing view is that a judge’s defenses are best left to the objectivity of a local, county or state bar association.” (internal quotation marks omitted)).

The judiciary's principal defense must then come from its intended beneficiaries, the people. As a practical matter, lawyers, both individually and through the organized bar, must take the lead in that defense.<sup>13</sup>

The bar has regularly proved equal to this task. For example, the New York City Bar Association issued a robust defense of a former federal judge when President Bill Clinton and various United States Senators called for the judge's resignation after a ruling suppressing evidence in a drug prosecution in 1996.<sup>14</sup> Similarly, one former president of the American Bar Association recently wrote that:

Public trust is eroded when leaders attack judges' character and competence. Disagreeing with a decision is one thing. But personal attacks on judges are attacks on our Constitution. The ABA and the legal community cannot tolerate assaults on the judiciary because they can chip away at the legitimate authority of that branch of government and give undue influence to the legislative and executive branches.

...

Because judges must follow professional codes of conduct that prohibit them from speaking about pending cases, they are often prevented from publicly defending themselves from attacks. It is therefore up to the bar, the legal community and all citizens to protect the integrity of the courts.<sup>15</sup>

Likewise, legal academics have frequently been vocal in defending the judiciary from partisan political attacks. For example, the Deans of Harvard Law School and Yale Law School recently published an editorial defending the judiciary after President Donald Trump attacked a federal judge that ruled against his administration as a "so-called judge."<sup>16</sup> Legal academics also published strong responses to President Trump's allegation that another federal judge ruled against one of the President's businesses in a civil lawsuit because of the judge's ethnicity.<sup>17</sup>

---

<sup>13</sup> Am. College of Trial Lawyers, Judicial Independence: A Cornerstone of Democracy Which Must Be Defended 2, (Sept. 2006).

<sup>14</sup> See Maria L. Marcus, Is There a Threat to Judicial Independence in the United States Today?, 26 FORDHAM URB. L. J. 1, 1 & n.3 (1998), available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1724&context=ulj>.

<sup>15</sup> Linda A. Klein, Independent Courts Are Vital to Democracy, ABA JOURNAL (June 2017), available at [http://www.abajournal.com/magazine/article/independent\\_courts\\_protect\\_democracy](http://www.abajournal.com/magazine/article/independent_courts_protect_democracy); see also John Dean, President Trump's Unseemly Attacks on the Federal Judiciary, JUSTIA (April 28, 2017), available at <https://verdict.justia.com/2017/04/28/president-trumps-unseemly-attacks-federal-judiciary>.

<sup>16</sup> See Martha Minow & Robert Post, Standing Up for 'So-Called' Law, BOSTON GLOBE (Feb. 10, 2017), available at <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdjCn8qs5FPJaK/story.html>.

<sup>17</sup> See, e.g., Cruz Reynoso, I'm Mexican American, and I Was a Judge. What Trump Is Doing Is Appalling, WASHINGTON POST (June 8, 2016), available at [https://www.washingtonpost.com/posteverything/wp/2016/06/08/im-mexican-american-and-i-was-a-judge-what-trump-is-doing-is-appalling/?utm\\_term=.cbdf9e26223e](https://www.washingtonpost.com/posteverything/wp/2016/06/08/im-mexican-american-and-i-was-a-judge-what-trump-is-doing-is-appalling/?utm_term=.cbdf9e26223e).

In sum, although judicial ethics canons and the need to maintain respect for the judiciary as an institution limit a judge's ability to respond to public criticism, the broader legal community has traditionally played a robust role in defending the judiciary from unfair partisan attacks.

#### **4. What is regarded as the boundary between legitimate and unfair criticism?**

Article 2-5 of the Universal Charter of the Judge provides a useful principle for distinguishing between legitimate and unfair judicial criticism when it states that: "Any criticism against judgments, which may compromise the independence of the judiciary or jeopardize the public's confidence in the judicial institution, should be avoided." Not all judicial criticism carries the potential to "compromise the independence of the judiciary or jeopardize the public's confidence in" judicial institutions. As one commentator aptly put it:

There is no question that fair criticism plays a critical role in improving the quality of the courts. Every appeal, every petition for rehearing, every dissent is a criticism of a judicial decision. Decisions like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *McCleskey v. Kemp* should be criticized. Citizens should ask if these decisions were correct. What does the Constitution require? Should it be amended? If the case involved a matter of statutory interpretation, should Congress respond with legislation?

It is equally clear that everyone in the United States has a First Amendment right to be a demagogue and to make irresponsible criticism. But irresponsible criticism which brings about the removal of judges from office or influences their decisions is incompatible with judicial independence and the rule of law. Courts have a duty to protect the rights of minorities--political, racial, ethnic--no matter how unpopular their rulings may be. Legislators or executives may base their decisions on focus groups or public opinion polls, but judges may not. Judges are expected to enforce the law, whether it be the First Amendment freedom of the radical right or the radical left to publish political views which may seem distasteful to some, the right of *The New York Times* to publish the Pentagon Papers, or the right of a suspected child molester to a fair and impartial trial. As Edmund Burke put it, the judiciary is to serve as "safe asylum" during times of crisis.<sup>18</sup>

To summarize the general principle, it is perfectly legitimate—and indeed, essential—for the public and the bar to scrutinize the correctness of judicial decisions. Often, this discourse can lead to greater understanding of the law, and can give Congress and the judiciary itself the tools to correct errors that went unnoticed in their own time, but were subsequently illuminated under the glare of history.

But a line is crossed when critics impugn the personal integrity of judges who author decisions they disagree with, or imply that a judge has ruled purely out of his or her political preferences. Not only do such attacks undermine public confidence in the judiciary based on the flimsiest evidence—a commentator's purported ability to read a judge's mind—but they ignore the tireless efforts judges make to ensure fairness and transparency in their decision-making

---

<sup>18</sup> Bright, *supra* note 7, at 308–09 (footnotes omitted).

process. Unlike most public officials, judges undertake the time-and-labor-intensive process of issuing a written opinion explaining the reasoning behind their most consequential decisions. Any criticism of the judge's decision should focus on the persuasiveness of the written opinion, which must stand or fall based on its own merits. Personal attacks and demagoguery do nothing to advance the broader legal discourse, and merely serve to undermine the legitimacy of important public institutions.

**5, 6 & 7. What approaches have been adopted in your jurisdiction to improve the accuracy of reporting of court decisions and fair treatment of judges and the justice system? What have been the benefits of and any problems caused by those procedures? What suggestions can you make for improving the accuracy of reporting of court decisions, and the fair treatment of judges and the justice system by politicians, the media, and in social media?**

The Supreme Court and nearly every federal Court of Appeals post audio recordings of oral arguments online for the public to review. The Court of Appeals for the Ninth Circuit, which supervises the District Court I serve on, also live-streams both video and audio of arguments heard before that court. In one recent high profile appeal related to immigration policy, millions of Americans were able to watch the oral argument before the Ninth Circuit on public access television, as well as online.<sup>19</sup>

By allowing the public to directly hear the parties' arguments as they are presented to the court, the judiciary can increase public investment in judicial proceedings, and diminish the potential of later confusion about court decisions stemming from inaccurate or misleading reporting. Moreover, since judicial opinions are increasingly parsed and reported by journalists without any legal training, it is helpful for courts to use plain, understandable language in their opinions, and to briefly summarize the opinion's contents near the beginning.

Court systems that do not formally transcribe all proceedings should consider permitting the parties to use simple recording technology to create an audio record of important hearings and formal testimony, if legally authorized. Such technology is often inexpensive, and available on mobile phones. Creating an objective record not only improves the accuracy of media reporting about court proceedings, but also strengthens the legitimacy of the proceedings themselves by allowing appellate courts to get a clearer picture of how the case unfolded at the trial court level.

Finally, it may be helpful for courts explore methods of directly disseminating legal opinions and orders in cases of great public interest through social media. The public mostly learns of court decisions through second-hand reporting, which can increase the potential for distortions and inaccuracies to seep into the public's understanding of a case. Most laypersons lack an understanding of how to find legal opinions, even when they have a strong interest in a case. Disseminating electronic links to important opinions through social media may allow more members of the public to directly review the Court's rationale, increasing engagement with and understanding of the judicial process.

---

<sup>19</sup> Ann E. Marimow, Federal Judges Are Rarely Heard in Real-Time Outside the Courtroom. For Trump's Travel Ban Hearing, You Can Listen Live, WASHINGTON POST (Feb. 7, 2017), available at [https://www.washingtonpost.com/news/true-crime/wp/2017/02/07/federal-judges-are-rarely-heard-in-real-time-outside-the-courtroom-for-trumps-travel-ban-hearing-you-can-listen-live/?utm\\_term=.da791921f210](https://www.washingtonpost.com/news/true-crime/wp/2017/02/07/federal-judges-are-rarely-heard-in-real-time-outside-the-courtroom-for-trumps-travel-ban-hearing-you-can-listen-live/?utm_term=.da791921f210).