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Russell J. Otter

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# President's Column

## JUDGES HAVE A JOB TO DO

Russell J. Otter

In recent times, there has been a marked increase in attacks on the independence of the judiciary in democratic societies—Pakistan, Venezuela, Turkey, Canada, and the United States. These attacks are significantly more damaging when they emanate from the other branches of government—the legislative and the executive. In response, judges must speak out to preserve and protect judicial independence, a vital pillar in the architecture of healthy and vibrant democracy.

The concept of judicial independence can be traced back to 18th century England. At its simplest, it means that the judiciary needs to be separated from the other branches of government. Courts should not be subject to improper influence from the other branches of government or from private and partisan interests. Though not a huge fan of the judiciary, President Andrew Jackson did say that “all rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.” I particularly enjoy the colorful phrasing of a 19th century British Prime Minister, Lord Salisbury: “The judicial salad requires both legal and political vinegar, but disastrous effects will follow if due preparation is not observed.”

Justice Neil Gorsuch, the most recent appointment to the U.S. Supreme Court, asserted during his Senate confirmation hearing that “[u]nder our Constitution, it is for this body, the people’s representatives, to make new laws. For the executive to ensure those laws are faithfully enforced and for neutral and independent judges to apply the law in people’s disputes.” When members of the other branches of government label a judge’s decision “ridiculous,” characterize a judge as “so-called,” or threaten to defund courts that struck down laws they found unconstitutional, judicial integrity and independence are needlessly harmed.

Accordingly, on April 29, 2017, the Board of Governors of the American Judges Association, acting in the AJA’s role as the Voice of the Judiciary®, issued this statement in a news release:

The late Chief Justice William Rehnquist once said that criticism of judges and their decisions “is as old as our Republic” and can be a healthy part of the balance of power between the branches of government. Today, however, recent attacks on judges have not only become unhealthy but threaten to undermine the public’s understanding of the role of judges in a democratic society.

In a democratic society, judges will inevitably make rulings that challenge the authority of the other two

branches or that protect the disadvantaged and those without political power.

Intemperate personal attacks on judges by political leaders are simply wrong. The political leaders of our country have an obligation to foster public understanding of the role of courts, even when they disagree with a court’s ruling.

Judges have historically been reluctant to respond to unfair attacks. But as far back as Chief Justice John Marshall, there have been times when judges have seen the need to speak up. This is one of those times.



The leaders of the American Judges Association will speak out in defense of judges who are unfairly attacked, and we encourage others to do so too. Unfair or unseemly attacks on individual judges are not merely an attack on that individual judge—they are an attack on the institution of the judiciary, an institution indispensable to our democracy.

All of us should use every opportunity to educate the public of the role of the judiciary in a democracy—who it is; what it does; and who the public is and why what it thinks matters. Schools, service clubs, public forums, and even written judgments are excellent mechanisms to do this “job.” A very effective initiative employed by at least two Canadian provincial chief judges was to participate in call-in talk-radio shows.

It is worth remembering that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristics that best offer the possibility of responsiveness to minority concerns in the face of majoritarian pressures, namely independence. Decisions in specific cases are made independent of the voters’ electoral judgment. Court decisions can and will attract controversy—free speech permits that. What should not be condoned are unwarranted ad hominem attacks on judges. Education by judges can be a very effective weapon to blunt these types of attacks.

There is no better way to prepare for such presentations than to attend judicial education programs like the ones being offered by the American Judges Association at its annual meeting, September 10-15, 2017, in Cleveland, Ohio. Sessions will include lectures on judicial independence, procedural fairness, and pretrial justice for both juveniles and adults.

You can prepare to educate the public on judicial independence. Hope to see you there.