

# JOURNALISTS, JUSTICES, OBAMA JUDGES, AND TRUMP JUDGES

Tony Mauro\*

When I was asked to opine about ways in which judges, lawyers, and law professors could soothe the angry divisions in the law and society, I thought I had an easy way to say no. I am not a judge, a lawyer, or a law professor. Simple as that.

But as a journalist who has covered the U.S. Supreme Court and appellate courts for more than forty years, I felt obliged to say yes. Journalists who cover the courts are more than innocent bystanders. As fair and neutral as we may be when we write stories that begin with “The Supreme Court today ruled . . . ,” we play a role that can fan the flames of division in the legal realm, especially if we get things wrong or we exaggerate the divisions that inevitably occur in an adversarial system when one party wins and the other party loses.

So, I am approaching this topic in two ways. First, by exploring how appellate judges, professors, and practitioners can help the media do better, and second, explaining why we cannot always please them.

## I. TALK TO US

By coincidence, I wrote about the first element in the Fall 2007 edition of *The Journal of Appellate Practice and Process*, in an article titled “Five Ways Appellate

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\* Tony Mauro has covered the U.S. Supreme Court since 1979, at first for Gannett News Service and *USA Today*, and since 2000 for *Legal Times* and *The National Law Journal*. He semi-retired in 2019.

Courts Can Help the News Media.”<sup>1</sup> My first sentence was “The title of this article probably has some readers fuming—especially those of you who wear robes to work.”<sup>2</sup>

That may be true today as well. Judges have a long history of ignoring and disdainning journalists, and some still find it odious or unethical to even speak to reporters, much less help them. In a long-ago conversation at a social gathering at the Supreme Court, Chief Justice William Rehnquist once told me and other journalists, “The difference between us and the other branches of government is that we don’t need you people of the press.”<sup>3</sup>

But that was a long time ago, and the relationship between journalists and jurists has changed.

One factor has been the growth of social media, which has loosened the lips of people of all stripes, including judges and legal professionals who would never have spoken so bluntly and tersely before.

State court judges tweet routinely, and it is likely that some Supreme Court Justices have social media accounts, if for no other reason than to keep up with family members. Until he ascended to the U.S. Court of Appeals for the Fifth Circuit in 2018, Judge Don Willett was a prolific Twitter user while serving as a justice on the Texas Supreme Court, earning him the moniker of “Tweeter Laureate of Texas.”<sup>4</sup> Likewise, lawyers and law professors, formerly a reticent bunch, have now become as provocative and opinionated online as angry politicians.

Another new dynamic is also at play. Judges used to complain about what they saw as the low-quality

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1. Tony Mauro, *Five Ways Appellate Courts Can Help the News Media*, 9 J. APP. PRAC. & PROCESS 311 (2007).

2. *Id.* at 311.

3. Author estimates this comment to be circa 1995 at a social gathering at the Supreme Court, at which many reporters who cover the Court, including the author, attended.

4. Jacob Gershman, *Judge Designated as Official Texas “Tweeter Laureate,”* WALL ST. J.: L. BLOG (June 5, 2015, 2:43PM), <https://www.wsj.com/articles/BL-LB-51454>.

journalism produced by journalists covering the courts. Now, many judges complain because there is no coverage at all. Newspapers around the country have cut their staff drastically, especially journalists who cover local news.

At some level, judges—state and federal—realize that the dearth of coverage is making them invisible to the public. If the judiciary is invisible, the public begins to care less about the importance of the courts. Like any government institution, the judiciary needs a constituency to keep its budget and relevance at a high level. And on the occasions when the judiciary does become highly visible—which surely has been the case in recent months and years—the public lacks background knowledge of the everyday role of the courts and how they operate. In that sense, Justice Rehnquist’s admonition is no longer correct. The judiciary needs the media. (By the way, of course, the media need the judiciary.)

Not all of my “five ways appellate courts can help the news media” are as pertinent as they were in 2007, but here are thumbnails of a few of them:

- **Write with clarity and verve.** Many of the opinions that judges hand down, and the briefs that lawyers hand up, are just plain inscrutable, not suitable for consumption by most mortals. Not every decision can match up to the plain language “I know it when I see it” definition of obscenity in *Jacobellis v. Ohio*<sup>5</sup> or “falsely shouting fire in a theatre [*sic*]” in *Schenck v. United States*.<sup>6</sup> But judges really need to try harder to make their decisions understandable to the press and the public—especially now that the documents are usually available online. A brief summary at the beginning is one idea; writing in conversational style is another.

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5. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

6. 249 U.S. 47, 52 (1919).

- **Talk to us.** As previously mentioned, many judges are still reluctant to interact with reporters about anything. But that needs to change. Whenever I talk to young reporters on the court beat, I urge them to make contact with judges by phone or in person. Judges should surprise them and invite them into chambers for a chat. If they can build trust with one another, the judge may even help the reporter understand a decision that is difficult to decipher. It is worth a try. It will make for better journalism.
- **Understand us.** At an appearance in 2006 Justice Antonin Scalia said, “The press is never going to report judicial opinions accurately. . . . [W]ho is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won?”<sup>7</sup> His point was that reporters do not explain the legal reasoning behind a decision. Rather, all we care about is who won. To a degree, I say, “guilty as charged.” If I were a sports reporter and did not say who won the game in the first few paragraphs, I would be encouraged to find another profession. I would meet the same fate if I started my story with the rationale, as in “The Supreme Court used heightened scrutiny rather than strict scrutiny in reaching a decision yesterday.” In short, we have to make a story readable so the public can understand, even in small doses, what the courts have done, and why.

All of this said, I do not think it is possible for the press ever to please judges and lawyers in terms of cooling divisiveness, and this gets to my second approach to this topic.

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7. John Heilprin, *Scalia Sees Shift in Court's Role*, WASH. POST (Oct. 23, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR2006102200965.html>.

## II. “OBAMA JUDGES” AND “TRUMP JUDGES”

For decades, the non-partisan Freedom Forum hosted gatherings titled “Judges and Journalists” to encourage dialogue between those in the Fourth Estate and the federal judiciary, both so important to our democracy.

To open the discussion, jurists would be asked what they disliked the most about the press. Invariably, judges would answer that their greatest pet peeve comes when journalists, in covering the work of the judiciary, would tag the judges they write about with the name of the president who appointed them.

Their complaint was that by doing so, reporters feed the incorrect notion that federal judges are political figures, beholden to their benefactors and ready to rule based on political pressure rather than facts and the law. Repeating this meme would only exacerbate the division that the law and society are experiencing.

At these events, my answer was this: Mentioning a judge’s backer is a shorthand way of conveying information about the judge’s background, akin to saying that the judge was a Yale graduate or a former prosecutor.

I also had another retort: reporting the name of the judge’s backer could be a teachable moment, if the judge ruled in an unexpected way. Telling readers that “Justice Alito, a Bush appointee, penned an opinion today favoring a death row inmate” would inform readers that judges in fact are independent.

Neither of my points sat well apparently, and I know that because it is still a pet peeve that has expanded beyond the courthouse to the White House. When President Donald Trump angrily attacked a federal judge’s opinion in an immigration case in 2018 as the work of “an Obama judge,”<sup>8</sup> the usually restrained Chief Justice John Roberts Jr. said in a public statement:

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8. Cheyenne Haslett, *President Trump Blasts Judge’s Ruling Blocking Asylum Restrictions, Predicts He’ll Win in Supreme Court*, ABC NEWS (Nov. 20,

We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . The independent judiciary is something we should all be thankful for.<sup>9</sup>

Rarely chastened by criticism, Trump fought back with a tweet: “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country.”<sup>10</sup>

True or not, the tables turned in 2020 when Trump and his lawyers litigated heavily after the presidential election to advance their false assertions that the election was riddled with fraud. Time and again, reporters underscored that many of the lawsuits were rejected by judges appointed by Trump. Indeed, those were teachable moments that forcefully made the point that judges are and can be independent even under tremendous pressure and high stakes.

History may point to the judiciary as the essential steady force amid the rancorous, deeply divisive behavior of the executive and legislative branches in 2020. With luck, the debate over describing jurists as Obama or Trump judges will subside. By and large, Chief Justice Roberts was correct. At a time of deep division, judges proved to be independent, and journalists conveyed that message loud and clear.

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2018, 2:38PM), <https://abcnews.go.com/Politics/president-trump-blasts-judges-ruling-blocking-asylum-restrictions/story?id=59323086>.

9. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, AP NEWS (Nov. 21, 2018), <https://apnews.com/article/c4b34f9639e141069c08cf1e3deb6b84>.

10. Donald Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 12:51PM), [https://web.archive.org/web/20181123015653if\\_/https://www.twitter.com/realDonaldTrump](https://web.archive.org/web/20181123015653if_/https://www.twitter.com/realDonaldTrump).