“THE CONSTITUTION PROTECTS judicial independence not to benefit judges but to promote the rule of law: Judges are expected to administerthe law fairly, without regard to public reaction.” That statementby Chief Justice William Rehnquist may have been inspired by therecent spate of unfortunate and personalized political attacks onjudges who have made highly publicized decisions. Criticism of thecourts inspired by political opposition to particular rulings is neithernew nor unexpected. Unfortunately, the current rhetoric not only isshrill but is directed at individual judges, with the suggestion that they should be “held accountable” for their decisions.

It is inevitable that courts will decide issuesthat touch deeply held beliefs. In the climate ofthe current “culture wars,” inflamed by specialinterest groups and the media, decisions onabortion, same-sex marriage, and the role ofreligion in public life are guaranteed to generatehighly emotional responses. As lawyers,we are obliged, no matter how strong our ownbeliefs on the issues, to refrain from disparagementof the system and to respond to threatsof retribution directed toward judges whohave made unpopular decisions. Reasoned andeven sharp criticism of the legal basis for a decision is appropriate.Suggestions that the bench officer who made the decision should be“held accountable” are wholly inappropriate. As Ted Olson eloquentlystated in a recent Wall Street Journal editorial: “We expectdignity, wisdom, decency, civility, integrity and restraint from ourjudges. It is time to exercise those same characteristics in our dealingswith and commentary on those same judges.”

Although the executive and legislative branches are required torespond to current events and controversies, each has far greater freedomto select which issues to address, and, unrestrained by stare decisis,each has far greater freedom to choose a position on those issuesthey do address. Those who speak scornfully of “activist judges”should recall that the courts do not solicit their business. It is the litigantsthat determine which issues will be brought to the court.

The current round of judicial criticism should be viewed with somehistorical perspective. The constitutional system of checks and balancesall but guarantees that there will be tension among the branchesof government—it is intended to do so. Politically inspired disparagementof the judiciary has periodically erupted throughout our history.Criticism has emanated from all sides of the political spectrumdepending on who holds the greater sway in each branch of government.From the brief research for this column, it was interestingto note that the most heated rhetoric has flared when the executiveand legislative branches were controlled by the same party, and thecourt was viewed as the “check” that maintained unwanted “balance.”

After the Democratic-Republican party swept both houses ofCongress in 1800, with Democratic-Republican Thomas Jefferson inthe White House, the power struggle with the “Federalist judiciary”resulted not only in Marbury v. Madison but also in the attempt toimpeach Justice Samuel Chase. While Chase was not a model ofjudicial temperament or conduct, the impeachment effort failed,largely because of the admissions by those seeking his ouster that theirmotivation was his “dangerous opinions” and that the effort wasintended to open the office for a Democratic-Republican loyalist.

When Democratic president Franklin Roosevelt, with the supportof an overwhelmingly

Democratic Congress, found the SupremeCourt a roadblock to the progressive reforms he supported, helaunched his infamous court-packing plan as a way to provide "a constantand systematic addition of younger blood" to "vitalize thecourts" to meet the "the actual present needs of the largest progressivedemocracy in the modern world." The New York Times reportedupon announcement of the plan that the "stunned" Republicansproclaimed that the administration, "having already destroyed the economicstability of the country, apparently will not be content until itdestroys the judicial stability." Although initial reports were that theplan would be approved, the Roosevelt attack on the courts provedto be an embarrassment to the administration after the organized bar,the press, and eventually public opinion rallied against the proposal.

Strong public rhetoric has also been generated by particular decisions.In the nineteenth century the Supreme Court was attacked forits infamous Dred Scott decision. At the end of the last century, progressivescriticized a more conservative Court for decisions invalidatingmany labor reforms and protections. The conservative response wasto point out that the function of the Court was to uphold theConstitution even against the popular will. As the philosophy of thecourt changed, so too did the positions of those who would defendand those who would attack the courts. The decision in Brown v.Board of Education was met with outright defiance that required theexecutive branch to send federal troops to enforce desegregation. Othercourt decisions invalidating a host of repugnant racial restrictions weremet with cries for impeachment of the judiciary. Such rhetoric wasnot limited to the South. When the federal court in Los Angelesordered desegregation for local schools, fartoo many called for defiance and direct actionagainst the judge and the courts.

The California Supreme Court held in1948 that "[i]f the right to marry is a fundamentalright then it must be conceded thatan infringement of that right by means of aracial restriction is an unlawful infringementof one's liberty." Justice Traynor wrote, "Thecaprice of the politicians cannot be substitutedfor the mind of the individual in what isman's most personal and intimate decision."In 1967 the U.S. Supreme Court agreed,invalidating antimiscegenation laws throughoutthe country. Decisions on the right tomarry were met with assertions that the courtwas interfering with "God's plan." Somecalled for impeachment, some called for strippingthe courts of jurisdiction over such matters,and some called for violent action againstboth the justices and those who would takeadvantage of the decisions.

The judiciary cannot easily rise to its owndefense. Attempts to do so risk dragging thecourts into heated political discourse inappropriatefor judicial officers. The Canons ofEthics require judges to "avoid political activitythat may create the appearance of politicalbias or impropriety." Instead the bar hasa responsibility to ensure that "an independent,fair, and competent judiciary will applythe laws that govern us." When personalthreat is directed to a bench officer, we havethe obligation, individually and collectively,to step forward to educate those who fail torecognize that the role of the judiciary is centralto the American concept of justice. Wemust also remember to temper our ownrhetoric when we disagree with a decision.Assertion that the legal reasoning is in erroris legitimate; a diatribe directed toward thebench officer is not.

When a political attack is directed towardthe system as a whole, we must also step forward.The

recent attacks on the jury system,many of which are based on wildly inaccurateinformation, seek to eliminate the criticalprotections provided by that system. Manybar organizations have programs that conveythe importance of the jury system to the public.Even small efforts contribute; think twicebefore responding to the inevitable groansfrom your friends who have received a jurysummons with a recommendation on how toavoid service. Try instead a brief endorsementof the one-day-one-trial system thathas eliminated the endless days of jury roomennui. Be sure you have all the facts before disparaginga jury's decision in a high-profilecase, especially since media reports may notaccurately reflect what was actually presentedto the jury.

Support for the courts and the judiciarydoes not mean that legitimate criticism can-not be made or that legitimate channels cannotbe used to seek improvements in the systemand in the judiciary. As long as the effortsare not inspired by personal animus or politicallydriven motive, the bar has the responsibilityto work to make the system the bestit can be. A court with the highest quality judicialofficers making the most well-groundedand reasoned decisions will be the least subjectto criticism and the easiest to defendfrom unfair attacks.

The Los Angeles Superior Court, withover 500 bench officers, is the largest courtin the nation. The Association has joinedwith the court to establish a multitude ofprograms to assist in ensuring that it is alsothe finest. Association officers, committeemembers, and other representatives serve onmultiple bench/bar committees designed toaddress problems encountered by both benchand the bar. Our members are asked by thecourt to assist in judicial training. The officersmeet regularly with the court leadershipto review responses to the Association's JudgeYour Judge program. The court is committedto addressing legitimate concerns raised inthese responses. Subsequent discussions,between court leadership and judges whowere unaware of the problems created bytheir courtroom practices, have solved someproblems. Over time we have had success,working with other bar organizations, insecuring the court's commitment to eliminationof local-local rules, in securing randomreassignment following 170.6 challenges, andin addressing unreasonable time standardsimposed in some venues. We have participatedas amicus in cases directly affectingthe ability of our members to practice, includingOliveros, which confirmed that decisionson continuances "must be made in an atmosphereof substantial justice."

In 2000, the Association released thereport of its Blue Ribbon Commission, whichexamined issues of concern raised by superiorcourt constituents, including parties, lawyers,jurors, staff, security personnel, and attorneyservices. With the cooperation of the court,the commission's recommendations helpedto solve many problems. Yet, the thorniestissue remained. To address that problem, ourimmediate past president, John Collins, whochaired the original Blue Ribbon Commission,appointed the "New Blues" to seek answersto the extraordinarily difficult challenge ofpreserving judicial independence while providingappropriate means of addressing thosefew but consequential situations in which abench officer is abusive, incompetent, or perpetuallyunprepared. I look forward to workingwith John, the distinguished members ofthe bar who comprise the New Blues, and theleadership of the superior court to make thisproject a success.