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The Dangerous Myth of the Judicial ‘Resistance’

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Imagine this: In the days after a new president’s central domestic policy initiative becomes law, a number of state attorneys general and public interest groups — committed ideological opponents of the president — march into the courts seeking its invalidation. By cherry-picking friendly district judges in parts of the country hostile to the president’s politics and values, in judicial circuits with longstanding reputations for legal approaches more sympathetic to one end of the political spectrum, these challengers become remarkably successful in persuading at least some of the courts to embrace legal theories soundly criticized by many in the legal academy — and novel even in the views of some of their proponents. And when these lawsuits finally reach the Supreme Court, the justices deliver a mixed verdict, upholding the core of the president’s initiative, but also sustaining enough of the challengers’ objections that all involved can claim some kind of victory.

That scenario is an apt description of the challenges President Trump’s “travel ban” has sustained and continues to face. It is also a fitting characterization of lawsuits filed back in 2010, challenging the substantive centerpiece of President Barack Obama’s Affordable Care Act known as the individual mandate. Yet despite the distinct sense of history repeating itself, conservative and libertarian legal commentators (many of whom were on the challengers’ side opposing Obamacare in the 2010 litigation) are now accusing individual judges — and sometimes entire federal courts — of shirking their institutional roles as neutral magistrates and “joining the resistance” in the various suits against President Trump.

From [National Review](#) to [The Wall Street Journal](#), these critics are voicing the idea that if President Trump loses any of his legal battles, it will be because progressive judges are out to get him. The fact that many of these rulings have come from Republican appointees or centrist Democrats and that they are often rooted in sound doctrinal principles is left out. To the critics, these judges aren’t real judges; they’re partisan hacks in robes. These critics, in the guise of dispassionate legal analysts, are using the same kinds of language and tactics deployed by the president they claim not to be defending to attack judges and their rulings.

For instance, Josh Blackman, a professor at South Texas College of Law, argued in [National Review](#) this month that opposition to the president’s policies had been “advanced” by federal judges “who abandoned their traditional role out of a fear that Donald Trump posed an existential threat to the republic.” And Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, argued on the [Cato at Liberty blog](#) in late May that “what’s going on here isn’t a sober legal analysis” but “a wholesale rejection of Donald Trump.”

This is dangerous new ground, to cast judges who rule against a president as biased or unprincipled frauds. Unlike the current legal battle over the travel ban, there was no broad effort by Obama supporters to discredit every single judge who ruled against that administration — as opposed to criticizing the reasoning of their decisions on substantive grounds.

To be sure, there are principled disagreements to be had about some of the central and often novel legal questions now arising out of the Trump administration — whether a president's public statements or tweets should bear on the legality of a formal government policy like the travel ban, whether the Foreign Emoluments Clause applies to the president, whether the president's Twitter feed is a public forum for First Amendment purposes and so on.

But in examining court decisions on these questions, one would search in vain for indications that partisan political opposition, rather than legal analysis, is driving the decision-making. Instead, what appears to be driving the critics' broad and novel claim against federal judges who rule against President Trump is nothing more than the assertion that these judges have simply gotten it *wrong*, often by making things up to push their own political agenda. In some instances these judges may be wrong, but that point alone doesn't suffice to prove the point. There would be no reason to have a federal judiciary with well over 1,000 judges — and multi-member appellate courts — if every case had one inescapably correct outcome; a well-programmed robot could handle that.

But discrediting federal jurists as having joined “the resistance” isn't merely an argument lacking in analysis or evidentiary support; it's also profoundly dangerous, for it suggests that any and all rulings against President Trump are not just doctrinally incorrect but also illegitimate. Much like criticism of all unflattering media reports as “fake news,” and attacks on the loyalty or patriotism of legislators who don't vote in support of the president's agenda, denouncing and dismissing all judges with the temerity to rule against Mr. Trump represents a direct attack on the independence and integrity of the entire judicial branch.

Attacks on individual judges based on a single ruling or upon the geographic location of their court or the president who appointed them are broadsides against the entire judicial branch. These attacks undermine public confidence in the impartiality of judges and will make it harder in the future for the courts to stand up to the political branches, even in cases in which their current critics think they should.

Of course, the individual judges who are maligned by these critics could fight back — much like most of the other institutions, including entire media outlets, the former F.B.I. director James Comey and Senate Republicans like Bob Corker of Tennessee, who have been subjected to what Orin Kerr of George Washington University Law School has described as the “politics of delegitimization.” But, in an irony upon which their critics may be relying, the judiciary is the only institution in our system that cannot properly defend itself against such attacks, lest it be accused of engaging in the very political activism for which it is being unfairly criticized.

The as-yet small but influential number of activist critics seeking to destabilize and undermine an independent judicial branch are well aware that judges called out for fealty to “the resistance” don't write op-eds and don't tweet back. But they should stop their attack before their argument goes mainstream. Large-scale assaults on judicial integrity are so pernicious precisely because judicial integrity demands no response. And although we might expect these kinds of broadsides from those who see no value in the rule of law and in checks and balances, dismissing every

jurist with whom you have a disagreement as an unhinged partisan represents unhinged partisanship. Lawyers, above all, should understand that.