

THE DISPATCH

Why Officials Should Reserve Judgment in Criminal Cases

It used to be the norm.

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November 30th, 2021

“Lock up Kyle Rittenhouse and throw away the key.” That's what Rep. Hakeem Jeffries, Democrat from New York and fifth-ranking member of the House Democratic leadership, tweeted November 10, nine days before a jury acquitted Rittenhouse on all charges following claims of self-defense in the shooting deaths of two men during the Kenosha riots in 2020. Jeffries, a member of the House Judiciary Committee, had, ironically, made a name for himself as an advocate of defendant-oriented criminal justice reform.

The Jeffries comment, on which he later doubled down, passed with little national notice. Believe it or not, however, it was once expected that prominent elected officials in the U.S. speak in cautious and tentative tones about allegations of criminality before a verdict had been reached in court.

In 1970 President Richard Nixon imprudently suggested at a press conference that cult leader Charles Manson, then on trial for the still-infamous Tate-LaBianca murders, was in fact guilty. An outcry promptly forced Nixon to issue a statement walking back the comment. An excerpt:

"My remarks were in the context of my expression of a tendency on the part of some to glamorize those identified with a crime. The last thing I would do is prejudice the legal rights of any person, in any circumstances.

"To set the record straight, I do not know and did not intend to speculate whether the Tate defendants are guilty, in fact, or not. All of the facts in the case have not yet been presented. The defendants should be presumed to be innocent at this stage of their trial."

Of course, when it comes to destroying norms surrounding discussion of the judiciary, no public figure has done as much as Donald Trump, who rose to power amid chants of "Lock her up!" directed at opponent Hillary Clinton, who was never charged with anything, much less convicted. Both as a presidential candidate and as president, Trump weighed in loudly and regularly on pending legal matters, even going so far as to repeatedly demand the death penalty

for persons not yet on trial for charged offenses. (The liberal Brennan Center compiled a roundup.)

Trump may be uniquely bad, but he has company even in some of his most distinctively awful moves, such as menacing judges with consequences over rulings that come out the wrong way. (Senate Majority Leader Chuck Schumer has done that too, targeting Supreme Court justices Neil Gorsuch and Brett Kavanaugh.)

Citing a list of instances, law professor Josh Blackman has made the case that Barack Obama went well beyond the standard of his near predecessors in the White House in pronouncing on the merits of pending Supreme Court cases. In a separate and less lofty matter, Obama backed off after controversially wading into a dispute between Harvard professor Henry Louis Gates and the Cambridge, Massachusetts, police, but the episode appears to have hurt him in polls.

There are plenty of solid reasons to back up the old norm.

To begin with, if we want a judiciary that is independent and impartial, that independence should be both real and visible, free from the appearance as well as the reality of political pressure. Juries and judges must be free to do their work without looking like they heeded signals from political leadership.

In fact, high-profile statements can complicate the task of preserving a fair trial. After Nixon's 1970 comments made big headlines, Manson's lawyers smuggled a copy of the *L.A. Times* into court. Manson himself then waved a copy of the paper around the courtroom displaying the headline "MANSON GUILTY, NIXON DECLARES." His lawyers then demanded a mistrial, a motion the judge denied after individually interviewing jurors to determine that they had not been improperly influenced. Afghan war deserter and former Army Sgt. Bowie Bergdahl, too, fought without success to get his (relatively light) punishment dismissed on grounds that Trump, both as commander in chief and as public figure, had prejudiced his military trial.

It is also worth noting that when politicians speak cautiously they protect themselves from being embarrassed by later events. When initial reports emerged of a possible hate crime against actor Jussie Smollett on the streets of Chicago in January 2019, Sens. Kamala Harris and Cory Booker responded by calling it an "attempted lynching" requiring a congressional response. That went well beyond the facts that could have been known at the time, and has since left them out on a limb, with actor Smollett facing trial starting this week on charges of filing a false police report in the case.

The norm has collapsed, I know. But I miss it.