ADDRESS TO THE AMERICAN COLLEGE OF TRIAL LAWYERS
2023 LEADERSHIP WORKSHOP

JUDGE PAUL L. FRIEDMAN

Conrad Hotel
Washington, D.C.

Friday, October 13, 2023

I want to thank President Murphy for that very kind introduction. And I congratulate him and all of you on his election as president of the American College of Trial Lawyers. I know Bill will serve the College well, and that it will be a year of significant accomplishments for all of you.

It is truly a privilege for me to be here. I was honored when Bill asked me to address the leaders of the College. And I was certainly honored when nearly 40 years ago – hard for me to believe – I got the unexpected call telling me that I had been elected as a Fellow in this revered organization.

Both before I became a judge and since taking the Bench, one of the things I have tried very hard to do as a Fellow of the College is to identify trial lawyers from sectors that traditionally were not well represented and bring them to the attention of my State Chair and Regent. I have worked hard to identify women and minority lawyers, as well as experienced trial lawyers from the U.S. Attorney's Office and the Federal Public Defender who have appeared before me in court.

And I believe I also made one quite significant contribution to the College. One day, while still in private practice, I received a call from Bob Fiske. Now, for a young lawyer in his 40s a call from Bob Fiske in those years was a big deal! Bob asked me, as a relatively new member of the American College, to serve on the Regents Nominating Committee. Of course I

said yes, and once the membership of the Committee was announced publicly, I quickly learned of the four prominent trial lawyers in the District of Columbia who might be interested in being elected as Regent.

Suddenly, I began to receive lots of phone calls and letters and pressure and lobbying on behalf of three of the four. I provided chapter and verse about the qualities of the three whose supporters had importuned me. But the fourth candidate did not call. Nor did he ask anyone to call on his behalf. When the Committee met, someone asked me about the fourth D.C. lawyer: What about Earl Silbert? I said no one had lobbied me on Earl's behalf, even though I knew him better than all the others. I had worked for him in the U.S. Attorney's Office and with him on Watergate. He and Pat had been at our wedding. And then I realized that the reason no one had lobbied me on Earl's behalf was because of Earl himself: his humility and lack of self- promotion were part and parcel of how he operated. Earl never even called me! Needless to say, Earl Silbert was elected as the Regent, and the rest is history.

But I am here today because Bill Murphy and I had a conversation in June at the D.C.-Maryland College dinner at the Supreme Court. Then, as I frequently do, I was lamenting the lack of trial skills that so many judges see today in lawyers who appear in our courtrooms. Many lawyers seem uncomfortable and ill-prepared examining and cross-examining witnesses and seem totally lost about how to raise evidentiary objections properly. And a major explanation for this, I'm convinced, is what the College has called the vanishing jury trial. So Bill and I agreed that I would talk to you today about this issue that has been and continues to be of concern to the College.

I later told Bill there was another matter that I was focused on these days – namely, the increasingly vitriolic and personal attacks on judges, on the courts, on judicial independence, and on the rule of law. By happenstance, the day Bill and I talked was right after

the College had issued its statement condemning the increasing number of threats and invective made against judges by politicians in recent years.

And so, if you will indulge me, I will share with you my thoughts on these two totally unrelated but hugely important topics to which the American College of Trial Lawyers is already devoting substantial attention and resources.

First, the vanishing jury trial and its effect on our professional skill set: In a 2017 article by Jeffrey Q. Smith and Grant R. MacQueen, entitled "going going, but not quite gone" that appeared in Judicature magazine, the authors pointed out that "while trial remains a theoretical possibility in every case, the reality is quite different." And the authors identified several reasons why. The first is the Federal Rules of Civil Procedure and decisions by the Supreme Court interpreting and applying the Rules. As those of you who litigate civil cases know, in 1986 the Supreme Court decided a trilogy of cases saying that summary judgment should no longer be considered "a disfavored procedural shortcut, but should be used when appropriate to secure the just, speedy, and less expensive way to resolve a case." Federal judges got the message. And so today, approximately 19 per cent of civil cases in federal courts are resolved by summary judgment.

The Supreme Court's summary judgment cases were followed by two decisions – Twombly in 2007 and Iqbal in 2009 – that seemed to raise the pleading standards needed to state a viable civil claim. Dismissal of cases now was encouraged to reduce the unnecessary expenditure of time and money by the parties and the courts. As a result, dispositions by motions to dismiss are also granted more readily today than ever before. In addition, as we all know, discovery has become more expansive and expensive, particularly after the advent of electronic discovery, email, social media, and the like. Yale Law School professor John Langbein believes that the current discovery provisions in the Federal Rules of Civil Procedure,

and the emphasis on judicial case management and settlement contained in Rule 16, "have had the effect of displacing trial in most [civil] cases." Indeed, he says, "precisely because discovery allows such far-reaching disclosure of the strengths and weaknesses of each side's case, discovery often has the effect of facilitating settlement."

These three developments – encouraged summary judgment, heightened pleading standards, and more expansive and expensive discovery – have dramatically reduced the number of civil jury trials in the federal courts. A study by the Civil Justice Research Initiative, part of the UC Berkeley School of Law, reported that in 2019 juries disposed of just 0.53 per cent of filed federal civil disputes. And the study found that in the state courts, civil jury trials were even rarer.

The pattern in federal criminal cases is similar. Following the passage of the Federal Sentencing Guidelines, the percentage of criminal cases resolved by trial in the federal courts significantly declined. And in my view, the decline in criminal trials is the direct result of three things: the advent of the Federal Sentencing Guidelines; mandatory minimum sentencing statutes; and the resulting increase in prosecutorial power in both charging decisions and plea negotiations. For some defendants, the stakes have become just too high to risk going to trial. As a result, we have seen the virtual disappearance of the criminal trial in the federal courts.

In the late 1960's and early 1970's, nearly 20% of all criminal defendants charged in federal court exercised their constitutional right to a trial. Today trials occur in only about 2% of federal criminal cases. And the most dramatic drop in the number of trials and increase in the number of pleas occurred almost immediately after the Sentencing Guidelines and mandatory minimum sentences firmly took hold.

As the College recognized in its 2004 report on the vanishing trial, with the diminishing numbers of both civil and criminal trials, we are at risk of losing both a genuine trial

bar and a genuine trial bench. As Judge Sidney Thomas of the Ninth Circuit recently noted, many attorneys appear to be losing their trial skills. Nowadays, he said, lawyers often spend four to five years litigating discovery disputes with no real intention of ever going to trial, and then they settle.

Everyone in this room understands how important it is that lawyers know how to examine and cross-examine witnesses, make objections based on a real understanding of the rules of evidence, deliver effective opening statements and closing arguments, and separate the wheat from the chaff. But how can we assure that young lawyers today build these skills? As the College recognized in its 2019 Task Force report, the legal profession needs to do a better job of teaching trial skills to all lawyers, young and experienced. To that end, the College has made their excellent training materials available online at no cost and has created an annual in-person trial advocacy program for young lawyers from diverse backgrounds. And as I know we have all said before in numerous contexts – mentoring, mentoring, mentoring! The time and attention devoted to these efforts will provide long-term dividends to our profession.

And with fewer trials, there are not only fewer lawyers with trial experience but fewer judges who have significant trial experience, as well. Indeed, some of you have likely experienced that in your own practice. The average federal district court judge in the United States today tries only 17 cases a year, 5 civil and 12 criminal. So I ask, what can be done to make sure that those appointed to the Bench are people who really understand how to preside over trials because they themselves have had actual experience as trial lawyers? One suggestion I have for leaders of the Bar like you is to urge your home state Senators to recommend to the president for appointments to the federal district courts primarily lawyers with significant trial experience and that you convey the same message to the ABA Standing Committee on the Federal Judiciary.

I bemoan the lack of trials not only because – as those in this room know so well – the art of trial advocacy is worth preserving for its own sake, but also because skilled, effective, persuasive advocates can make a real difference to your client and often to the very outcome of a case. It's a qualitative distinction that sets apart the accomplished and skilled trial lawyer from the less effective.

And there are institutional concerns as well; a transparent and public court system requires effective advocacy by skilled and competent professionals as counsel for both sides in a case. Quality advocacy promotes the legitimacy and fairness of the courts, the entire justice system, and the real-life meaning of the rule of law. As U.S. District Court Judge David Campbell said recently, the decline in trials is the "single biggest loss," not only to the system, "but also a great loss for society." And as my friend John Keker – a Fellow of the College and Susan Harriman's law partner – has put it: "Trials let light into the process, helping keep prosecutors honest, cops more honest, judges in check."

Now, pivoting to my second topic, threats to judicial independence and the rule of law, let me start with the Constitution itself. As you all know, the idea of separation of powers was thought to be one of the unique contributions of those who wrote our Constitution. Unlike other countries, the Founders created three separate and co-equal branches – the Executive, the Legislative, and the Judicial. Because the Founders were concerned about guarding against a too powerful and overreaching Legislative branch – and also wanted to ensure that the rights of the minority were protected against a tyranny of the majority – they made the Judicial branch independent of the other branches in order to keep the other two in check. To assure such independence, the Framers provided that federal judges would be appointed for life – technically, for good behavior – that Congress could not reduce the compensation of federal judges, and that

we could only be removed from office by impeachment for high crimes and misdemeanors. In other words, they created a judiciary that was immune, by and large, from political pressure.

The Founders thought these safeguards necessary because – as Alexander Hamilton noted in Federalist No. 78 – the Judiciary does not have the power of the purse nor the power of the sword. It wields "merely judgment." And just as important as the Judiciary's actual independence is its perceived independence. As Justice Ginsburg observed 214 years after Hamilton, "[b]ecause the courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe." Judicial independence can only be maintained, she noted, when the public has "confidence in the integrity and impartiality" of its judges and "accepts and abides by judicial decisions."

Judicial independence as the Framers saw it – and as we recognize today – obviously doesn't mean a lack of accountability. Certainly, we federal district court judges know we are not free agents. We are all too often reminded of that by our friends on the courts of appeals who review our decisions. Judges must follow the law and the Constitution, not our own political or philosophical predilections. And we are expected to approach each case with an open mind and render unbiased judgments. Judicial independence is the ability of judges to be free from outside pressure so we can decide cases impartially, without fear or favor. Chief Justice Rehnquist said that "[t]he Constitution protects judicial independence not to benefit judges, but to promote the rule of law."

Judges at the state court level, however, are not so insulated from outside pressures. Today 38 states elect judges, a practice that is virtually unknown to the rest of the world. And, because of the fallout from Supreme Court decisions like Citizens United and Republican Party of Minnesota v. White, many are elected in heavily financed, often vitriolic campaigns – campaigns that literally invite future conflicts of interest for judges. I can only

imagine the pressure elected judges must face on a regular basis. How challenging it must be to know that the decisions they make can become fodder for the opposition campaign when they next stand for election and could cost them their job. Margaret Marshall, former Chief Justice of the Supreme Judicial Court of Massachusetts, put it this way: "When litigants enter the courtroom hoping their attorney has contributed enough to a judge's election coffers, we are in trouble, deep trouble." Chief Justice Nathan Hecht of the Supreme Court of Texas has said: "[W]hen partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty."

Predictably, both state and federal judges have in fact increasingly become targets for unsatisfied politicians who serve in the other branches of government. Some government officials seem to reject the notion that a judge should be responsive only to the laws, to judicial precedents, and to federal and state constitutions – not to public opinion and public or political pressure. And, sadly, it appears the drumbeat of this message from politicians running for office or serving in government has resonated with the public. A number of recent polls show that the public's respect for judges, courts, judicial decisions – and ultimately the rule of law – has plummeted throughout the country in recent years. Increasingly, citizens are more distrusting of judges, less likely to believe they act impartially, and more likely to think they are "just politicians in black robes." One poll taken in 2013 showed that nearly 90 percent of voters believe that campaign contributions play a role in how state court judges decide cases.

And many people now have begun to believe that federal judges, too, decide cases in accordance with their political preferences or party affiliations. Nearly two-thirds of respondents in a Harvard CAPS/Harris poll in 2018 said they thought decisions of federal judges are "influenced by politics" and that our rulings are based "more and more on [our] political

views." The poll showed that only 34 percent of people now believe that federal judges act independently and issue rulings based on the law as written. Clearly, we have a serious and growing public perception problem. And it doesn't help that government officials and candidates for office are fueling the fire.

Let me be clear: I am not suggesting in the least that the work of judges and courts should go unexamined. Judges certainly make mistakes and we federal judges do deal with some hot-button issues. Our decisions must always be open to thoughtful, principled – maybe sometimes harsh – criticism. It comes with the territory. But even though developing a thick skin is part of the job, it is hard for me to remember a time when judges and courts have been subjected to so much gratuitous personal criticism, vitriolic commentary, and purposely misleading attacks. And it is particularly problematic when such criticism comes from presidents, governors, and members of Congress.

Going back in history we see that criticism of the Judiciary is not new – even from Presidents. Thomas Jefferson accused the courts of being politically motivated, ambitious and subject to outside influences. His proposed solution – just a few years after the Framers created an independent federal judiciary with judges appointed for life – was to elect federal judges in order to make them directly answerable to the people and to impeach Supreme Court Justice Samuel Chase, who had criticized Jefferson during a grand jury proceeding. Theodore Roosevelt railed against Justice Oliver Wendell Holmes, and President Eisenhower called Chief Justice Earl Warren the biggest mistake he had ever made. President Franklin Roosevelt, of course, threatened to pack the Supreme Court. And during his campaign for re-election, President Bill Clinton called U.S. District Court Judge Harold Baer's suppression of evidence in a notorious drug case "grievously wrong" and called on Judge Baer to resign or, if he did not, to face impeachment.

Criticism from members of Congress is not new either. Many of us here today are old enough to remember Congressman Gerald Ford's efforts to impeach Justice William O. Douglas, and other attacks on the so-called "activist" Warren court. Some may also remember Congressman Tom DeLay in 2005 criticizing an elected, state court judge, Judge George Greer, in the Terry Schiavo case, calling him a terrorist and murderer and a symbol of "an arrogant, out of control, judiciary," a judiciary which "thumbed its nose at Congress and the President." But what I know concerns the American College of Trial Lawyers – and so many lawyers and judges today – is that the number of attacks on judges has grown exponentially, and the attacks have gotten more partisan, more personal, more threatening, and more purposefully misleading than ever before.

Let me refresh your memory of somewhat recent events. As a candidate for president in 2016, Donald Trump accused U.S. District Court Judge Gonzalo Curiel of being biased against him and against Trump University because of the judge's Mexican heritage and because he had been appointed by President Obama. Trump called the judge "a hater of Donald Trump," demanded that Judge Curiel recuse himself, and said that someone "ought to look into" Judge Curiel.

Things only accelerated after Mr. Trump won the election. When U.S. District Judge James Robart in Seattle enjoined the president's travel ban, President Trump referred to Judge Robart – appointed by Republican President George W. Bush, by the way – as a "so-called judge," who is "taking law enforcement away from our country." When the Ninth Circuit affirmed Judge Robart's decision, President Trump called the appellate decision "disgraceful" and "political." He later leveled personal attacks against three other federal judges in California – Judge Jon Tigar, Judge William Alsup, and Judge William Orrick, and called the Ninth Circuit "a complete and total disaster," saying, "it is out of control."

But candidate and then President Trump was not alone in attacking judges personally. In one incident – which the College has addressed and condemned – during an abortion rights rally held outside the Supreme Court in March 2020, then-Minority Leader Senator Chuck Schumer said: "I want to tell you Gorsuch, I want to tell you Kavanaugh – you have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions."

In 2021, California Governor Gavin Newsom attacked U.S. District Court Judge Roger Benitez, who had struck down California's assault weapons ban. He called the judge a "stone-cold ideologue" and a "wholly-owned subsidiary of the gun lobby and the National Rifle Association." "We need to call this Federal judge out," the Governor said, or "[h]e will continue to do damage." And, as the College noted in its statement just last month, after Judge Benitez issued a decision striking down the California law banning the possession of large-capacity fire arm magazines, Governor Newsom renewed his attacks, saying: "Judge Benitez is not even pretending anymore. This is politics pure and simple."

I have tried to emphasize in recounting this history – and its impact on the public's confidence and respect for the courts – that in some respects this is not new. There have been politicians throughout history – and from both political parties – who have been among the transgressors. But I am afraid I must come back now to former President Trump, because during his current campaign for president, he seems to have ratcheted up to a new level the kinds of personal attacks on judges. Other candidates and politicians have criticized judicial <u>decisions</u> – as is certainly appropriate and expected in a democratic society. But – particularly in the wake of four criminal indictments and multiple civil cases – President Trump's personal attacks on the integrity and motives of individual judges stand out. And the consequences of this rhetoric are exacerbated by social media, as politicians' personal attacks on judges are disseminated instantly

to a wide audience with the resulting effect of creating an intimidating environment in which to be a judge.

In recent months, President Trump's statements have become ever more personal, vicious, false and misleading. He has said of Southern District of New York District Court Judge Lewis Kaplan – the judge in the E. Jean Carroll defamation case – that the judge is "a Clinton appointed judge" who hates Donald Trump "more than is humanly possible." He has said my colleague, Judge Tanya Chutkan, "obviously wants me behind bars," and "she's running election interference against Trump." He said New York State Supreme Court Justice Juan Merchan, who oversees the Stormy Daniels hush money case, "obviously hates me" and has a "Trump-hating wife." He has called Judge Arthur Engoron, who is presiding over the civil fraud case involving the Trump organization's properties in New York, "a far-left Democrat" who is "just a bad guy." And he continued: "He's interfering with an election, and it's a disgrace." Judge Engoron, he said, is a "vicious, biased, and mean rubber stamp for the Communist takeover" of Trump's companies.

As Judge Barbara Lynn, former Chief Judge of the U.S. District Court for the Northern District of Texas, recently said: At one point "virtually everyone recognized how inappropriate it was to threaten the life or security of a judge because of a disagreement with the judge's decisions. Now there are a lot of people who don't think there's anything wrong with that." President Trump's widely disseminated personal attacks on judges, as magnified through social media, undoubtedly have contributed to this trend, even though – let me emphasize – neither he nor other politicians have themselves personally threatened judges with physical violence.

Sadly, examples of direct threats to judges now abound. In 2019, while my colleague Judge Amy Berman Jackson was presiding over the Roger Stone case, Mr. Stone

posted a photo of her on Instagram with the image of cross-hairs next to her head. While Mr. Stone later deleted it, within minutes it had been viewed by hundreds, perhaps thousands, of people. In 2020, while presiding over the trial of General Michael Flynn, my colleague Judge Emmet Sullivan received a voicemail graphically threatening to kill the judge and his staff, and also threatening members of his family.

The man who threatened Judge Sullivan eventually entered a guilty plea before my colleague, Judge Trevor McFadden. Judge McFadden – appointed by President Trump, incidentally – sentenced the defendant to 18 months in prison. During the sentencing, Judge McFadden said that the threat to Judge Sullivan heightened the sense of danger felt by many judges amid a sharp spike in such threats. "Judicial robes," he said, "are not bullet proof." Judge McFadden continued, saying the threat was clearly "intended to subvert the criminal justice system" by intimidating Judge Sullivan and his staff. The threatening message was "nothing less than an attack on our system of government."

As we all know, in June of 2022, a man was arrested outside Justice Brett Kavanaugh's home armed with a Glock-17 pistol with two magazines, ammunition, pepper spray, zip ties, a crow bar, and duct tape. When arrested, he said he was there to kill Justice Kavanaugh because he was upset about the leaked draft of the abortion decision from the Supreme Court. A number of Republican Senators saw a clear connection between this threat to the security of a Supreme Court Justice and Senator Schumer's earlier comments.

Then just last year, U.S. Magistrate Judge Bruce Reinhart – who had approved the search warrant for President Trump's Mar-a-Lago estate – received a number of threats and his home address was posted on certain websites along with anti-Semitic slurs. In August of this year, a woman called Judge Tanya Chutkan's chambers and left a voicemail threatening to "kill

anyone who goes after" President Trump, saying: "You are in our sights; we want to kill you." The woman has been arrested and charged.

Threats like these are not just reprehensible; they don't just undermine the reputations of judges who have dedicated themselves to the administration of justice. They are, as Judge McFadden said, "nothing less than an attack on our system of government."

After 25 years as a practicing lawyer observing judges in action and then nearly 30 years on the Bench, I believe – as I know the Fellows of the American College of Trial Lawyers do – that most judges, whatever their political backgrounds, do take their oaths of office seriously. Most federal trial judges understand that we are not legislators or policymakers and that we are meant to operate under significant constraints: to interpret the laws as written by Congress and faithfully to apply the legal precedents announced by the Supreme Court and the courts of appeals. Now I fully acknowledge that there are some people appointed to the Bench who do, in fact, come to the job with agendas of their own. But I would like to think that the vast majority of judges believe and act as did the late D.C. Circuit Judge (and former Senator) James Buckley – who died a couple of months ago at age 100. Judge Buckley said: "I think a lot of the law I am required to apply is awful. But I view my oath as requiring me to come out with the result the lawmakers intended. I take my orders from the Constitution and from the Supreme Court."

And this is no less true of most of the judges appointed by President Trump nationwide. Certainly none of the four judges he appointed to my court hesitated to rule against President Trump or his Administration when his policies did not adhere to the Constitution or the laws passed by Congress. And they have had strong words for defendants convicted in the January 6 Capitol insurrection cases, particularly those defendants who have been convicted of assaulting law enforcement officers. Judge Timothy Kelly said during the sentencing of Enrique

Tarrio, the leader of the Proud Boys: "What happened that day did not honor the founders; it was the kind of thing they wrote the Constitution to prevent." Judge Dabney Friedrich said during one sentencing of a January 6 defendant that "what [this defendant] and others who attacked the Capitol on January 6 did is the antithesis of patriotism. Not only are they not patriots, they are a direct threat to our democracy. Patriots honor and respect the rule of law."

As I conclude these remarks, let me emphasize again, it is not just the independence of judges but the rule of law itself that I believe is at serious risk. As I have discussed, people today simply do not trust the courts and the impartiality of judges and their rulings as they have in the past. Too many now increasingly question judges' motives, integrity, politics, and commitment to principles of neutrality and nonpartisanship. So it is more important than ever that we work together to restore respect for the judgments of the courts. As my friend, retired D.C. Circuit Judge Thomas Griffith, said at the ceremony for the unveiling of his portrait last week: "When we are beset by a toxic political polarization that poses an existential threat to the Constitution," it "is up to the judiciary" – and I would add, the leaders of the Bar – "to show the nation how to engage in reasoned argument with respect for one another."

It is my fervent hope that – with your help and that of other respected members of the Bar – the judiciary under attack will overcome this moment in time. Together we must attempt to restore our nation's commitment to such reasoned, respectful argument in our mutual quest to help renew the public's faith in the integrity and impartiality of our courts. Now more than ever before we judges need leaders in the profession – like the Fellows of the American College of Trial Lawyers – to come to the defense of the courts, their independent role, and the rule of law itself.

I welcome your thoughts and suggestions about how to address these troubling issues within the profession and with the American public. Thank you.