



A Fair, Impartial and Independent Judiciary

By Sandra Day O'Connor

For more than 85 years, the League of Women Voters has been helping to support our democracy through citizen education. This is an important mission and one I wholeheartedly support. When a national survey finds that more American teenagers can name The Three Stooges than can name the three branches of our government, we know there is much work to do.

PHOTOGRAPH BY DAVID PENLAND, SMITHSONIAN INSTITUTION,
COURTESY OF THE SUPREME COURT OF THE UNITED STATES

Judicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy.

When I was in school, we learned the basics of our constitutional structure: three branches of government—legislative, executive and judicial—that regulate each other by a system of checks and balances. Since the founding of our nation, this system has ensured that each branch of government can function effectively, but cannot overpower the other branches. The main check that the judicial branch has on the other two branches is the power to declare executive or legislative acts unconstitutional.

But when courts exercise this power, the President or Congress can become very angry. The effectiveness of the courts, therefore, relies on the knowledge that judges will not be subject to retaliation for judicial acts. In order for judges to be able to decide cases fairly and impartially, based on our Constitution and laws, judges cannot be subject to retaliation for a particular decision.

As James Madison put it, an independent judiciary is “an impenetrable bulwark against every assumption of power in the Legislative or Executive.” I agree with Madison that the courts are important guardians of constitutionally guaranteed freedoms in our system, and that the system breaks down without judicial independence.

If we look back at the Declaration of Independence, we see that one complaint was that the King “has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” In other words,

judges lacked independence because the King could hire and fire them, and pay them or not, depending upon how they interpreted the law and decided cases.

Our Constitution addresses this by providing that federal judges appointed under Article III “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” These two provisions—retaining office during good behavior (often referred to as “life tenure”) and a salary that cannot be cut—give federal judges independence. They cannot be removed for deciding a case in an unpopular way, or fired at the will of the President or Congress. And their pay cannot be docked to punish them. Security in pay and position frees judges to exercise their best legal judgment in applying the law fairly and impartially to the parties before them.

By guaranteeing judges life tenure during good behavior, the Constitution tries to insulate judges from the public pressures that may affect elected officials. To borrow a phrase from Australia’s tenth chief justice, Sir Gerard Brennan, judicial independence exists “to serve and protect not the governors but the governed.” Chief Justice William Rehnquist used to compare a judge’s duty to that of a basketball referee who is obliged to call a foul against the home team in the waning seconds of a close game. The crowd will boo,

but the referee, like the judge, has to call it like he or she sees it. But if the crowd could do more than express its displeasure, and intimidate the referee into making the wrong call out of fear, then the system would quickly break down.

This does not mean that federal judges cannot be punished for misconduct. They can be disciplined under federal law, and for serious misbehavior they can be impeached. And I am not suggesting that judges should not be criticized. Criticism of judicial decisions is an integral part of the democratic process. That is one reason why federal judges have life tenure—so that criticism from the losing side in often emotionally charged cases does not deter judges from ruling based on the law rather than pressure from the public or politicians. Criticism is fine; retaliation and intimidation are not.

Judicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy. It has taken many years to nurture a culture where the political branches are, by and large, willing to acquiesce in the judicial branch’s interpretation of the law. After all, judges do not have the ability to go out and enforce their judgments. As Alexander Hamilton described it: “The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights

The League in Action

The League of Women Voters, working at the national, state and local levels, has been active in promoting a fair and independent judiciary since 2001. The League's current program, *Safeguarding U.S. Democracy: Promoting an Independent Judiciary by Defending the U.S. Constitution*, is a nationwide campaign to educate the electorate about this critical issue. In 2006, the League was honored by the American Bar Association with the first Burnham "Hod" Greeley award in recognition for its work in promoting public awareness about the courts. In 2008, Leagues nationwide are focusing on voter education through a range of activities such as the inclusion of judicial candidates in voters' guides, judicial candidate forums, judicial candidate debates and other issues relating to the judiciary with emphasis on the 21 states with contested state supreme court elections. These guides will be included in the League's voter information Web site, VOTE411.org. To find out more, please visit www.lwv.org/faircourts.



of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

Life tenure is well and good for federal judges, but what about state court judges? After all, close to 98 percent of the litigation in this country takes place in our state courts. We are fortunate in my home state of Arizona to use a merit selection process to appoint our judges. (See “Sounding Off” in the February 2007 issue of *The National Voter*.) A bi-partisan commission composed of lawyers and non-lawyers evaluates applicants for judicial openings and sends a list of names of qualified candidates to the governor. The governor appoints the judges from that list to serve for a certain term. During their service, the judges’ performances are evaluated by people involved in the process—jurors, lawyers, witnesses, parties to cases—and the results of the evaluations are made available to the public on the Internet. When the terms expire, the judges run in a retention election—that is, the voters decide whether or not each judge should be retained in office.

But most states select or retain their judges through partisan or non-partisan

elections. In many of these states, judicial elections have turned into expensive and partisan political campaigns. Partisan judicial elections, and the campaign cash that goes with them, tend to undermine the respect necessary for the courts to function. Not surprisingly, people tend to believe that if judges are receiving large cash contributions—often from the very lawyers who appear before them—it might affect their judgment in particular cases. Likewise, we are putting judges in a very difficult spot when they know that their opponents will use decisions that are required by the law, but may be very unpopular, in advertising campaigns to unseat them during the next election. The upcoming 2008 elections of state supreme court judges in several states is of grave concern in this regard.

It will not be easy to change the systems in those states where judges are elected. But there are steps that can be taken to improve the systems in place. Judges’ terms can be lengthened, so that they do not face election as often. Partisan elections can be replaced by non-partisan elections. Transparent and timely reporting requirements for those who contribute to judicial campaigns can be instituted. States can implement thorough and public performance evaluations of judges, and can include that information in voter guides. All of these steps aim to ensure that we have competent, impartial, independent judges.

Alexander Hamilton once remarked that “a steady, upright, and impartial administration of the laws is essential, because no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.”

But as the Founders knew, statutes and constitutions do not protect our judicial independence—people do. As President Woodrow Wilson wrote, government “keeps its promises, or does not keep them, in its courts. For the individual, therefore, ... the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts.”

One way of getting people to protect our system is to be sure that they understand it. The mission of the League of Women Voters has always included encouraging the informed and active participation of citizens in their government through education. The League’s educational activities include organizing town hall meetings and candidate debates, and producing voter guides. I encourage you to participate in the League’s education efforts. ■

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VOTER LINKS

■ www.lwv.org/faircourts