

A conversation about JUDICIAL INDEPENDENCE and IMPARTIALITY



Chief Justice Ruth McGregor:

When we talk about judicial independence and judicial impartiality, we're really speaking both of the need for individual judges to make decisions impartially, free from political or other outside influence, and of the independence of the judicial branch to operate as a separate and co-equal branch of government. The two concepts are often intertwined and interdependent, and when I separate them I will refer to independent decision making as judicial impartiality and judicial branch separateness as judicial independence.

Justice O'Connor, you have written that the first critical safeguard in the American system is the independence of the judiciary. Why the concern about judicial impartiality and independence? What's the downside if we limit or lose them?

Justice Sandra Day O'Connor: We have to go back to basics. I think it's elementary high school civics that we have three branches of government that regulate each other by a complicated system of checks and balances, and the main check that the judicial branch has on the others is the power to declare statutes or execu-

Following the presentation of the Second Annual Dwight D. Opperman Award for Judicial Excellence to Arizona Chief Justice Ruth McGregor on September 19, 2005, the chief justice participated in a discussion of judicial independence and impartiality with U.S. Supreme Court Justice Sandra Day O'Connor and the 2004 Opperman Award recipient Wisconsin Chief Justice Shirley Abrahamson. Here is an edited version of their conversation.

tive acts unconstitutional, although sometimes we act in softer ways by interpreting the statute in light of constitutional values or by ruling that some regulation or executive act is not authorized by statute.

But whatever courts do, we have the power to make the president or Congress or, at the state level, a governor or a state legislature really angry. In fact, if we don't make them mad some of the time we probably aren't doing our jobs.

Our effectiveness as judges relies on the knowledge that we will not be subject to retaliation for our judicial acts. Now, as James Madison put it—and we call him the father of the Con-

stitution, so he ought to carry some weight—an independent judiciary is an impenetrable bulwark against every assumption of power in the legislative or executive.

Well, the word "impenetrable" may be putting it a bit strongly, but if you believe, as Madison and I do, that the courts are important guardians of constitutionally guaranteed freedoms in our common law system, you know the system breaks down without judicial independence. Independence is tremendously hard to create, and

it's easier than most people imagine to destroy.

I think that's why the building where I work features a larger-than-life statue of John Marshall, who spent 35 years trying to nurture a culture where the political branches were, by and large, willing to acquiesce in the judicial branch's interpretation of the law.

Now, they don't always acquiesce, but fortunately most of the time politicians don't challenge the courts to enforce their judgments themselves, as Andrew Jackson did after the Supreme Court's decision in *Worcester v. Georgia*.

It's been very heartening to see



To have impartial judges deciding the cases of citizens who come before them is really essential so that people can feel they are treated fairly.

Chief Justice Ruth McGregor

judicial independence take root in some of the countries that formed after the breakup of the Soviet Union. I really am excited that that has occurred. But at the same time, we're seeing some threats to it in our own country.

McGregor: Justice Abrahamson, turning to judicial impartiality, this isn't the first time in history that one group or another has tried to limit judicial impartiality. What do you see as the types and sources of these threats and are they really different from efforts made in the past to limit the ability of judges to judge impartially?

Chief Justice Shirley Abrahamson: Well, the sources can be, as Justice O'Connor said, the executive and legislative branches. But a source can also be the public. Various groups in the public can attack the judiciary on the substance or the result of a decision rather than on the reasoning and understanding of a decision. They try to influence others into thinking that the judges are not doing their job as fair, independent, neutral umpires—a phrase that has come into common parlance recently.

And, of course, you have the media and you have the Internet. Although I don't know how to do it, it seems as if everybody can have a blog. And so you have an enormous amount of information available to the public that may be a threat to the ability of judges to judge impartially. So the sources of attack are numerous.

And what's the nature of the attack? Well, it can vary. First, there could be threats to impeach a judge. I think it's very hard to impeach a judge on the basis of decisions, rather than malfeasance in office, but the threat is still very uncomfortable. The judge has to hire lawyers and respond to the threat.

The threat can be to limit the jurisdiction of the court so that the court can't make decisions that someone doesn't like. In an elective state, you can also have a recall of a judge.

We have had in recent weeks and months physical violence against judges. These other threats are idea threats, talk threats, but physical violence is not only directed to the judge, but directed to the judge's family. The poor family hasn't done anything other than be supportive, but they are the ones who are under attack, too.

McGregor: When we talk about impartiality we tend, maybe, to focus, particularly in the media, on big constitutional issues, but those aren't the issues that affect most people. Most people come to court with a dispute or with a personal injury action. To have impartial judges deciding the cases of these citizens who come before them is really essential so that people can feel they are treated fairly.

Abrahamson: Studies show if people are treated well in court they think they're getting a fair hearing. Even if they lose, they're not unhappy. They've been heard, they've gotten a hearing, they've gotten a decision, and they go on with their lives. The studies also show that if people come to court and win but are not treated with respect or dignity and don't think they got a fair hearing, they are unhappy even as winners.

McGregor: Justice O'Connor, the federal Constitution and all the state constitutions establish the judicial branch as a separate and co-equal branch of government. Given that fact and given our long history with that, why is there so much continuing dispute about the appropriate exercise of judicial power?

O'Connor: It's not clear why, but things have gotten pretty heated

lately. The value of judicial independence is a lesson that I think some of our nation's leaders really haven't learned.

In a recent speech at a conservative conference a prominent House leader said judicial independence does not equal judicial supremacy. In particular, he faulted the courts for their decisions on abortion and school prayer and for improperly citing international law.

Now, this was after the Terri Schiavo case, when the federal courts applied Congress's one-time-only statute as it was written but, alas, perhaps not how the congressman wished it had been written. In response to this flagrant display of judicial restraint, the congressman blasted the courts for ignoring congressional intent. These are not examples of a mature society, he said, but of a judiciary run amok.

Speakers at that conference advocated mass impeachment and stripping the courts of jurisdiction to hear certain cases and using Congress's budget authority to punish offending judges.

Now, mass impeachments, that's something we haven't heard suggested until lately. Impeachment for a judge's judicial acts has been politically taboo since the failure of Justice Samuel Chase's impeachment back in 1805. Jurisdiction-stripping proposals are nothing new, but their ancient use is no defense.

In the 1950s, a proposal suggested stripping federal courts of jurisdiction over desegregation and domestic security cases. In the 1960s, the controversy was over the admissibility of confessions in criminal cases. In the 1970s, it was over busing. In the 1980s, it was about abortion and school prayer. Now we have the pledge of allegiance and gay mar-



I really am concerned about judicial reform, whether coming from Republicans or Democrats, that is driven by nakedly partisan result... Supreme Court Justice Sandra Day O'Connor

riage thrown into the mix as well.

Well, the measure or merits of all these are debatable, but I think the concept of retaliation against the courts for past federal court decisions is very troublesome, and as Chief Justice Abrahamson has pointed out, death threats have become increasingly common.

Many of the comments have come from Republicans, but, of course, Republicans aren't the sole inventors. A former Democratic president complained in words that sound a lot like those I've read that the Court has more and more often, and more and more boldly, asserted a power to veto laws passed by the Congress and state legislatures. The Court has been acting not as a judicial body but as a policy-making body. He accused the Court of improperly setting itself up as the third house of Congress, a superlegislature, reading into the Constitution words and implications that aren't there and that were never intended to be there.

Now, this former president paid lip service to judicial independence, saying "I want, as all Americans want, an independent judiciary as proposed by the framers", but he made clear that he did not mean a judiciary so independent that it can deny existence of facts that are universally recognized. He believed in a government of laws and not men, but believed that we had to take action to save the Constitution from the Court

and the Court from itself. The president's plan was simply to appoint a new judge every time one reached the age of 70. I'm sure you remember this was Franklin Roosevelt's fire-side chat in March 1937.

I really am concerned about judicial reform, whether coming from Republicans or Democrats, that is driven by nakedly partisan result or any other reason.

McGregor: We had a suggestion last year in Arizona by one legislator that perhaps the answer was to reduce the judicial budget by 10 percent for every decision we handed down that he didn't like.

Justice Abrahamson, I think many people believe that it's the public that has to be willing to save, in some ways, the judiciary from the attacks. Why should they be willing to invest their energy and what can we do to encourage interest from the public?

Abrahamson: As I see it, judicial independence is not for the judges, and it's not for the lawyers; it's for the people who come to court, and it's for everyone else who doesn't come to court but whose life is affected by what happens in court. Sooner or later, we all wind up in court. Maybe it's probate court. We're all there. And what we all want is a fair, neutral, impartial umpire.

The truth is we would like an umpire who favors us. But since you can't be assured of a favorable umpire to your side, and you don't

want an umpire that favors the other side, you take, I say jokingly, the second best thing, which is a neutral umpire. That's what you must want if you believe in our democratic system and you believe in the rule of law.

People go to court with matters that affect their families, their basic liberties, their jobs, and their property, and we depend on the rule of law. I think the people accept these principles, if they think about it, but most of the time they're too busy and don't think about it.

It is the public that benefits from judicial independence, judicial independence meaning judges making decisions on the basis of law and facts, not extraneous matters. And we have to persuade—continue to persuade—the public about the role of the judiciary. That's why in Arizona and in Wisconsin and in states across the country and in the federal system we are attempting to bring the public into the courts and bring the courts out to the public to talk about the role of the judge, and explain that whether you like an opinion or not, the issue is, did the judge call it fairly on the basis of the law and facts.

It's okay, I say, to criticize a judge or a decision. And you have that right in the United States, and the judiciary will protect that right. We will protect that right under the Constitution and the First Amendment.

The public has to understand that

...judicial independence is not for the judges, and it's not for the lawyers; it's for the people who come to court,... Chief Justice Shirley Abrahamson



we are the least understood branch of government. You talk to any group and ask, "have you ever been in court," and they haven't. "Do you know who Judge Judy is?" 100 percent, from kindergarten students to senior citizens.

We have to get the public to understand what we do, and it's a long-term educational process. But we can do it. We have been doing it. We will do it because it's important to our system of government.

McGregor: Justice O'Connor, you referred briefly to some of the developing countries, and I know you have traveled to many countries and spoken to judges and politicians in countries where they're trying to develop an independent judiciary, often for the first time. Do the concerns you hear there mirror the concerns here or are they different? How would you compare?

O'Connor: Well, we've seen some interesting examples recently. Let me give you one from Ukraine, where you read about the Orange Revolution, and there was an election not long ago where the so-called reform candidate was poisoned by someone opposed to his election, and the election got pretty nasty. There were allegations of voter fraud on a massive scale on behalf of the incumbents in power. And the issue of fraud in the election ended up before the Ukrainian Supreme Court.

I've been involved with a program sponsored by the American Bar Association called Central European and Eurasian Law Initiative (CEELI) that has provided training programs in Ukraine for the judges and justices on election law, on the importance of independence of judges, and some of these basic concepts we're talking about today.

When the case of voter fraud went before the Ukrainian Supreme Court, those judges, who had participated in those programs, put the proceedings on national television, and everyone in Ukraine had the opportunity to hear the arguments based on the evidence. The court found massive voter fraud. The

result was a peaceful new election and a transfer of power that we would respect in this country and that the Ukrainian people were thrilled to have happen in their own country. I am really proud of that kind of development in a part of the world that hadn't experienced independent judiciaries until recently.

On the other side of the coin, you see a country like Zimbabwe where the justices on their supreme court had mobs come into the courtroom and make noise and beat on their bench and make it impossible to conduct proceedings and where they had been forced to step down.

McGregor: Justice Abrahamson, you come from a state that elects its judges through nonpartisan elections. Have you seen changes in judicial elections over the last 30 years, and how are they impacting, if there are changes, independence and impartiality of the judges?

Abrahamson: In Wisconsin we have not seen great changes in judicial elections, and I think we've been lucky. But in many states there have been enormous changes, with special interest groups coming in with large sums of money in an attempt to either promote or defeat the candidacy of particular judges, usually on the state supreme court. This activity has the danger of politicizing the bench.

Judges have great difficulty raising campaign funds. In fact, in Wisconsin judges cannot personally raise money. If any money is raised in a campaign, it's done by a committee, not the judge. What you don't want is a judge who is supported by large sums of money from any particular group or groups who feels, or appears to feel, obligated to those groups in deciding cases.

So we're seeing very significant changes in the election of judges. I would say we probably are seeing significant changes in selection of judges by appointment as well. Thus, we have to do whatever we can in any selection system to be sure that we preserve judicial impartiality.

McGregor: Justice O'Connor, you were elected as a trial court judge in

Arizona, but at the same time as you were standing for election you worked hard for a merit selection system in Arizona, which was adopted by constitutional amendment in 1974. What were the concerns that led you to support the change to merit selection?

O'Connor: Exactly what Chief Justice Abrahamson has been describing. The elective system, where judges ran, as they did in Arizona, in partisan elections, ultimately resulted in a lot of fundraising. And where do you get the money? You get it from the lawyers. And what lawyers? The lawyers who are active in court. And the campaigns of people running for the office tended to be "I'll be tougher on criminals than my opponent." It was very unattractive. If you look broadly at the results of that kind of system, we didn't have, I think, anything like as splendid a judiciary as we have today under a merit selection plan.

I became persuaded as a state senator that we ought to try to get Arizona's voters to change the system, and we drafted something. We could get a constitutional amendment for the ballot out of the state senate but not out of the house of representatives. The concern was that we don't want voters to give up their right to speak as to who should be a judge.

The beauty of the merit selection plan that was adopted in Arizona, as well as some other states, was that voters do retain under the system the right to vote periodically on whether the judge should be retained in office or not, and that's a more meaningful vote after they've had a chance to see how the person performs in office.

I was persuaded that it was worth pursuing, and we then pursued it in Arizona by an initiative measure, rather than through the legislature. It passed very narrowly in the same election in the same year that I was elected under that unfortunate old system.

I lived just long enough in my home state of Arizona to see the improvement we got with the merit selection system. Occasionally the

voters have decided not to retain a judge, so it shows that voters are selective in casting their ballot and that they do it based on better knowledge than just a whole array of partisan opponents on an election ballot.

McGregor: Probably most people in this room know that we have merit selection for all of our appellate courts and in our two large counties, Maricopa and Pima, for our trial judges. For about a four-month period every trial court judge who is going to be on the retention ballot is rated by everyone who comes into the courtroom—the witnesses, the litigants, the people representing themselves, the lawyers, the staff, the jurors..

Of this group, obviously about half of them lost their case or testified for somebody who lost their case, but even so 95 percent of the people who rated the judges in the last election rated them satisfactory or above, and about 75 to 85 percent, depending on the particular category, rated them very good or superior. I think that's a really telling measure of what a good job the judges are doing.

Justice Abrahamson, you've written and spoken often of the need for judicial accountability. In what way should judges be held accountable and how do we go about doing that?

Abrahamson: Well, it's not easy, but it can be done. For example, the system ought to manage its funding well. It ought to squeeze everything it can out of every dollar we get from the legislative and executive branches, and we should be held accountable for having done that. We should be held accountable for seeking funding outside the state; for example, federal grants and such.

We ought to be accountable as to case management: how many cases are we handling, how quickly do we handle them, how can we improve the management of the court system? We should be accountable for assisting people who represent themselves, As you know, in family law cases across the country, 60 to 80 percent of the people don't have a lawyer. Our system is designed for lawyers, and yet here we have people

representing themselves, and they have to be assisted.

We have to be held accountable for how well we treat people who cannot speak or understand the English language. We have whole new waves of immigrants in every state of the Union, and what kind of fair trial do you get if you don't understand what's happening? So we must be held accountable for providing—even with the very limited funds that we all have—a system of qualified interpreters.

So there are whole areas where we should be held accountable for providing access to justice for all of our people.

McGregor: I'm going to ask you both to respond to this last question: what are the steps that we can take—judges, lawyers, members of the public, organizations like AJS—to maintain judicial independence and integrity?

O'Connor: Well, I personally hope that everyone who cares at all about the rule of law will try to preserve the concept of having judicial review carried out by qualified and independent judges as part of the arsenal that we as a people have to enforce the rule of law and protect individual freedoms.

Everyone should care about that. The threats of losing judicial independence in this country are real, and I hope that you, through organizations to which you belong, will start to take an interest and start to talk about it and start to see what we can do to protect it. It's very important.

Abrahamson: I totally agree with Justice O'Connor. First, I think all judges have to stand tall, or rather sit tall. None of us can be intimidated. None of us can pull or change or temper a decision because we are concerned that somebody might say—and this is a code word—“you are an activist judge.” “Activist judge” means the person doesn't like the decision. If you understand that, you understand everything that's happening in the United States, I think, to judges. So judges have to stand tall and remember our oaths and abide by them. That's our function, and I think we're doing that.

I also agree with Justice O'Connor that it's everybody's function to educate ourselves and educate the public. Judges are limited as to what they can or should say. They should not decide cases outside the courtroom. But they can talk about what they do, how they do it, why they do it, and the value of what they do.

We ought to have joint judicial, legislative, and executive seminars, which we have in Wisconsin. We have one on statutory interpretation with legislators, explaining that we try and interpret legislation as if the legislature was reasonable.

We do a whole variety of educational programs with students. We have classes come to the Wisconsin Supreme Court, and a justice meets with them at lunch. It's called Court with Class. We have a website. We have a case of the month for school students and they get materials about it. We have a teacher's institute every year to teach teachers to talk about law.

And we do a whole variety of other things, and so does the United States Supreme Court, and so does your court. It's not enough, but we have to start somewhere, and this is a cumulative effort. We have to continue to do public outreach, and education is for the long haul. I think we're on the right side of the issue, and we will succeed.

But democracy is messy, and that doesn't mean, with all of our efforts, we will not be subject to partisan, political, ideological attacks. But the judiciary is strong, and it's our job to rise above the attacks even if it's uncomfortable and even if sometimes it is dangerous.

McGregor: This is a topic that obviously is of great interest and great concern to many of the people in this room. We've tried to touch on just a few of the areas where judicial impartiality and independence are important; some of the areas of concern, some of the things we can do to respond. There is much more that can be said, but we hope this has given you at least food for thought. ☞