

## Grade 7–12 Strategy: Independent Courts: How Important Are They?

**Title** What Is Judicial Independence?

**Time Required** 1–2 class periods

**Overview** This activity asks students to explore what judicial independence is and why it is important. Students are given a quick overview of the history of judicial independence here and abroad, then are asked to look at some scenarios to determine which actions may violate judicial independence. A final exercise asks students to relate judicial independence to the process of becoming a judge in three jurisdictions.

### Presentation

#### Introduction

Begin the class by introducing yourself to the students. As you do so, remember when you were this age and what you might like to know about other people.

Be sure to provide a brief explanation of why you are in the classroom on this particular day. If you have an official Law Day poster, hang it where all can see it. You might consider saying the following, in your own words.

*Today, people throughout the United States are celebrating Law Day. I believe it is very special because I work in the legal field and am very proud of the work I do. But, more importantly, it is special because it allows us to stop and think about our country, the United States of America, and the freedoms we all share. It is also special because this day provides us with an opportunity to talk about the laws that protect us and provide us these very special freedoms.*

Establish a focus for the activity by asking the students to describe what they think of when they hear the words “independent courts” or “judicial independence.” Allow for several responses. Explain that today you will be discussing this concept with them and asking them how it works in practice.

#### Activity

1. Begin by noting how rare judicial independence is in the most parts of the world.

About 15 years ago, judges in the Soviet Union often used a concept called “telephone justice” to render their decisions: They would call the Communist Party leadership and ask, “What does the party want in this case?” and then rule accordingly. Not surprisingly, judges, courts, and the law in general were held in very low regard in the Soviet Union.

In the not too distant past, Russian presidents often declared rulings by the highest court null and void because they did not like them. In South Africa, until its new Constitution took effect in 1994, the all-white, undemocratic Parliament had final say on the constitutionality of laws, not the courts. In Latin America, people often criticize their governments for having laws on their books that are enforced by neither the courts nor the police.

2. Define judicial independence.

Judicial independence in a democracy means acting impartially, making just decisions, and being perceived to act without the undue influence of outside forces. Professor John Ferejohn of Stanford University maintains that an independent judiciary upholds three critical values for a democratic society:

(a) **The rule of law:** ensuring that every individual, of whatever social standing, is subject to the same protections and restrictions under the law and that powerful people do not manipulate legal proceedings;

### Objectives

Students will

- Determine why judicial independence is important by understanding its place in our history and how unusual it is in other parts of the world.
- Determine what constitutes judicial independence by looking at some practices that may violate it.
- Understand the link between methods of selecting judges and judicial independence by examining the process of becoming a judge in three jurisdictions.

### Preparation

- Be sure to talk with the teacher in advance about this activity. Provide the teacher with a copy of the activity.
- This activity is enhanced if delivered by a judge, lawyer, or member of the judicial district’s nomination committee or judicial performance committee. Otherwise, the individual should serve as a resource person for the activity.

### Materials

Sufficient copies of the following handouts for class distribution.

- Handout 1: Independent Courts in the U.S. (page 33)
- Handout 2: Do These Practices Violate Judicial Independence? (page 33)
- Handout 3: Judicial Selection Methods—An Overview (page 29)
- Handout 4: Teresa Wants to Be a Judge (page 34)

- (b) **Constitutional integrity:** preserving the ability of the Constitution to protect our freedoms and order our society by ensuring that one societal institution has the power to overturn laws that violate the Constitution; and
- (c) **Enforcement of the law:** guaranteeing that legitimate laws will actually be enforced, not simply stated as theory.

Independent courts are an integral part of the U.S. system of government. Under the Constitution's system of checks and balances, one role of the courts is to restrain the legislative and the executive branches by ruling actions void when they violate the Constitution. This power was first exercised in 1803 in the case of *Marbury v. Madison*. (See insert in this guide for more on this case).

3. What is judicial independence in practice?

Distribute the handout titled "Independent Courts in the U.S." and give students a few minutes to read it. Then divide the class into several small groups and distribute Handout 2, the judicial independence activity. Ask each group to consider whether each "practice" violates judicial independence. Give them five to ten minutes to discuss the items and decide, by majority vote, whether or not each of these practices violates principles of judicial independence.

Then ask one group to report on its findings in situation one. Ask the other groups whether they concur. Have students explain how they reached the decision they did. Why did they think the situation violated or did not violate judicial independence? Have another group report on its findings in situation two, and repeat the process until all situations have been fully discussed.

The discussion should clarify what judicial independence is, why it is important, and what does (or does not) violate it.

4. Conclude by looking at the selection of judges and how it impacts judicial independence.

Tell students that the methods by which judges are selected have a very strong impact on the ability of judges to be independent. The federal method of selecting judges is very conducive to judicial independence. The President nominates all federal judges for a life term, and they are confirmed or rejected by a vote of the U.S. Senate. They can only be removed by impeachment, which has happened very rarely in American history.

Though the federal process gets more attention in the media, most jurists in the United States are state judges. There are more than 30,000 judges in the 50 states, 87 percent of whom—in 39 states—must face voters regularly in some type of popular election. The election structure differs among the states, though most judges are elected in nonpartisan contests, meaning that they do not run under the banner of one political party.

Distribute to students the handouts "Teresa Wants to Be a Judge" and "Judicial Selection Methods—An Overview" (p. 29). Ask students to read them, then pose the questions about where Teresa should seek to become a judge. This should help students see the very different methods of judicial selection. The third question asks students to link these methods to the degree of independence Teresa would have under each system.

If there is time, you might go on to discuss some of the issues with judicial selection methods. Note the problems with even nonpartisan elections. Organizations such as the American Bar Association have criticized elections, saying they undermine the independence of judges. Recently, a report by the Committee for Economic Development (CED) concluded that "elective systems tend to undermine the independence and impartiality of the judiciary" and called on leaders to "take actions to initiate reforms that would eliminate judicial selection by election."

If the election system is to be changed, what is the alternative? Many believe that the nomination and confirmation system laid out in Article III of the Constitution is the best method of safeguarding judicial independence, but only a few states have moved from straight elections to a gubernatorial or legislative nomination process. Only one, Rhode Island, has gone to the federal system of lifetime appointments.

The most popular alternative to straight elections is known as the "Missouri Plan." Under the Missouri Plan, a nominating commission comprising lawyers and laypersons, often chaired by a respected judge, would propose the names of potential judges. The commission in some cases has the power to name the judges outright; in others, it sends a name or names to the governor of the state, who makes the final selection. The system, often referred to as "merit selection," is supported by many who believe it results in a much higher caliber of judge than elections or straight appointments by a governor, who may appoint political cronies or campaign contributors.

Another aspect of the Missouri Plan that has been widely adopted is that of "retention elections." Generally this means that the name of a judge who was initially appointed through a nominating commission or another type of merit selection is placed on the ballot. The voters then vote "Yes" or "No" to retain or not retain this judge for another term. The advantage of this system is that the judge does not have to run against another candidate. Yet the retention system does not eliminate all the dynamics of judicial elections—candidates still take positions and seek campaign contributions.

This activity was written by Ed O'Brien, Executive Director of Street Law, Inc. It is adapted from a longer article that is posted on the Law Day website <[www.lawday.org](http://www.lawday.org)>.



## STUDENT



## Handout

## Independent Courts in the U.S.

We inherited our system of judicial independence from Great Britain. In the 1600s citizens spoke out against the dependence of judges on the monarchy. The king or queen could assign judges to the bench and then remove them summarily if they did not represent the sovereign's interests. These complaints resulted in the Bill of Rights of 1689, which provided English judges a measure of constitutional protection, including the promise that they could serve during "good behavior." This is a term later included in Article III in our own Constitution, which protects judges from being removed at the political whims of executive or legislative officeholders.

Though judges in Britain developed some independence, their counterparts in the American colonies remained essentially Crown officers, whose duty was to enforce British policies and law, leading to frequent conflicts with the colonists. This led Americans to embrace the idea of the jury trial, which took some power away from these not-so-independent judges. When independence came, the framers of the Constitution worked to create a third branch of government that was relatively independent of the executive and the legislative branches.

In Article III, Section I, the U.S. Constitution provides, "The Judges, both of the supreme and inferior Courts, shall hold Office during good Behaviour." Section 1 also states, "The Judges... shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." These provisions ensure lifetime appointments for federal judges, making it difficult to remove them except through cumbersome impeachment proceedings. They also prevent Congress from lowering their salaries during their terms of office.

Those who criticize the life appointments of federal judges say that this system limits accountability. But the framers of the Constitution, in giving the power of the purse to Congress, provided for some oversight of the judiciary by the legislative branch. This oversight is frequently exercised through the Congressional budget process. The federal judiciary must submit a proposed budget each year to Congress, which frequently holds hearings to inquire into issues such as how the courts are using their money, how many cases they have heard in the past year, and how many judges are really needed.

## STUDENT



## Handout

## Do These Practices Violate Judicial Independence?

Judges are not in ivory towers. They are part of the community. Here are a series of ways the community interacts with their work. Which of these practices violate judicial independence? Should these practices be allowed or prohibited?

1. Judge Frank Toms has ruled that demonstrators must not come closer than 100 feet to women seeking counseling or abortion services at clinics. The local newspaper writes an editorial criticizing him, and people picket in front of his home.
2. At a party at the home of a friend, Margaret Warner, who is the head of a company, meets Judge Jones, who is presiding over a case in which executives of a large corporation are on trial for releasing false statements regarding the corporation's economic performance during the past year. Warner says to Jones, "I think it is very unfair the way the government is prosecuting corporate executives these days for things that are not their fault."
3. XYZ Electronics Corporation gave \$10,000 to the campaign of Judge Sanchez when he was running for office two years ago. XYZ's biggest client is Johnson Television Co., which buys parts from XYZ. Johnson Television Co. comes before Judge Sanchez as a defendant in a lawsuit filed by some of its female employees for sexual harassment.

4. Certain state legislators are very upset by a recent written decision by the state Supreme Court's Chief Judge. They threaten to cut the budget of the Court next year.

5. The state Supreme Court does not like the decision of a trial court in the state that allowed vouchers to be used to pay for private and parochial schools. The state Supreme Court reverses the decision on the grounds that it violated the state constitution's clause calling for separation of state and church. Is this an abuse of judicial independence?

6. A judge has been known to have an alcohol problem and sometimes drinks at lunch and then presides over the court in the afternoon. His case is referred to a Commission on Judicial Discipline in the state.

7. The U.S. Supreme Court has held that burning the American flag, if performed as a political statement (e.g., to protest a war), is not a crime but an act protected by the freedom of speech clause in First Amendment. Members of Congress introduce a law that says the Court can no longer review flag-burning cases.

## STUDENT



## Handout

## Teresa Wants to Be a Judge

Teresa Rodriguez has just graduated from law school in California, where she has lived for the past three years. She has done very well in law school, has been recognized by a number of law professors as a good student, has a number of law student friends who come from California, and has been actively working in opposition to Proposition 26, a statewide referendum to end affirmative action. Teresa has been offered a job as a public defender in California.

Teresa comes from Texas, where her family has lived for 30 years and where her father is an official in the local Democratic Party. She has worked on campaigns for family friends and others who have been elected to county offices such as county sheriff, judge, and county commissioner. Teresa has been offered a job in the States Attorney's Office prosecuting crime in her hometown in Texas.

Teresa has been offered a job with a law firm in Washington, D.C. This law firm is very well respected, and in the past many of its lawyers have been appointed judges in the local District of Columbia courts.

Looking at the handout entitled "Judicial Selection Methods—An Overview," answer the following:

1. Assume that someday Teresa wants to become a judge. What are the arguments for her choosing each of the three places to move to after law school? What are the reasons against moving to each?
2. If you were Teresa, where would you move and why? Consider the job offers, personal reasons, and the likelihood that she can become a judge in each place, taking into consideration its system of selecting judges.
3. One of Teresa's law school professors asks for her recommendation on the method of judicial selection that would ensure judicial independence and select the best judges. If you were Teresa, which method would you recommend and why?

## Website Resources for Law Day Planning

### Resources to Help You Be Successful

Now that lawyers, judges, and school people have agreed to participate in the Law Day celebration, the next question is, "What will we do? What can we do?" There are countless good models to borrow or build on. All over the country, hundreds of thousands of people are

involved with myriad Law Day activities. Many exciting websites will help you this Law Day, and a number provide significant information for designing programs on courts and judicial independence. The list below is just a sampling.



### Law Day/Judicial Independence Websites

#### The American Bar Association

<[www.abanet.org/judind/resourcekit/home2.html](http://www.abanet.org/judind/resourcekit/home2.html)> This resource kit contains judicial independence materials from a variety of sources. Unless specifically stated, materials do not necessarily represent the official policy of the ABA.

<[www.manningproductions.com/ABA245/OMK/main.html](http://www.manningproductions.com/ABA245/OMK/main.html)> An online media kit on "Justice for Sale." It gives you media releases, images, and audio on the issue of campaign contributions to judges.

<[www.abanet.org/justice](http://www.abanet.org/justice)> The ABA's Office of Justice Initiatives is a clearinghouse for information about court improvement efforts of all kinds.

<[www.abanet.org/jd/judgesnetwork.html](http://www.abanet.org/jd/judgesnetwork.html)> The ABA's Judicial Division has begun a "Judges Network" program to harness the power of successful judicial outreach efforts across the country. The Judges Network and its website offer the opportunity to make a difference in a community and to share best practices with a national audience.

<[www.abanet.org/barserv/stlobar.html](http://www.abanet.org/barserv/stlobar.html)> The ABA's Bar Services Division has contact information that will help you involve your state or local bar association in Law Day activities of all kinds.



## Law Day/Judicial Independence Websites

Justice at Stake	< <a href="http://www.justiceatstake.org">www.justiceatstake.org</a> > A national partnership working for fair and impartial courts.
The Constitution Project	< <a href="http://www.constitutionproject.org/newtoolbox/index.html">www.constitutionproject.org/newtoolbox/index.html</a> > A bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues. Its Court Initiative conducts public education on judicial independence.
Brennan Center for Justice	< <a href="http://www.brennancenter.org">www.brennancenter.org</a> > The Judicial Independence Project combats threats to the independence of the judiciary.
The National Center for State Courts	< <a href="http://www.ncsconline.org">www.ncsconline.org</a> > The National Center has posted state-by-state information about efforts to bolster public trust and confidence in the justice system.
America Judicature Society	< <a href="http://www.ajs.org">www.ajs.org</a> > An excellent site with a large section on judicial independence.

### Youth Court Resources

American Bar Association Division for Public Education	< <a href="http://www.abanet.org/publiced/youth">www.abanet.org/publiced/youth</a> > The ABA Division for Public Education is a clearinghouse of information on youth courts.  < <a href="http://www.abanet.org/publiced/tab17.pdf">www.abanet.org/publiced/tab17.pdf</a> > The ABA Division for Public Education also has a Technical Assistance Bulletin that can be downloaded.
Youth Court Center	< <a href="http://www.youthcourt.net">www.youthcourt.net</a> > The national Youth Court Center has an excellent website offering ideas on training volunteers and links to youth courts around the country.

### Program Models

American Bar Association Division for Public Education	< <a href="http://www.abanet.org/publiced/youth">www.abanet.org/publiced/youth</a> > Provides a comprehensive website on law-related education with information about volunteer opportunities in education from kindergarten through high school, as well as links to state and national programs, publications, and resources.  < <a href="http://www.abanet.org/publiced/lre/main.html">www.abanet.org/publiced/lre/main.html</a> > Provides a comprehensive list of state and national programs, many linked directly to helpful websites containing materials and projects you can use in reaching out to student groups.
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### Other Excellent National Law-Related Education Projects

Center for Civic Education	< <a href="http://www.civiced.org">www.civiced.org</a> >
Constitutional Rights Foundation	< <a href="http://www.crf-usa.org">www.crf-usa.org</a> >
The Constitutional Rights Foundation—Chicago	< <a href="http://www.crfc.org">www.crfc.org</a> >
Street Law	< <a href="http://www.streetlaw.org">www.streetlaw.org</a> >

### Special Law Day/Law Week Activities

There are plenty of exciting opportunities for Law Day.

American Bar Association Division for Public Education	< <a href="http://www.lawday.org">www.lawday.org</a> > A great resource is the “sample programs” section that lists more than 100 models of good programs around the country. Also included are dozens of lessons at all grade levels and speech ideas/talking points on a wide range of topics.
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### Mentoring Opportunities

America’s Promise	< <a href="http://www.americaspromise.org">www.americaspromise.org</a> > and < <a href="http://www.jobshadow.org">www.jobshadow.org</a> > Great resources for mentoring opportunities and educating about careers.
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