

REMARKS FOR ACLU CEREMONY
Judicial Independence
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June 19, 2001

Thank you for inviting me to present this award and to offer a few remarks. I am pleased to be able to do both. Knowing of your interest in judicial integrity and the rule of law, applied equally and without favor, allow me to offer some brief words on judicial independence, a matter that has been a part of our political discourse at least since the writing of our Federal Constitution in 1787.

When the drafters met in Philadelphia to “revise” the Articles of Confederation, the idea of an independent judiciary was linked to the doctrine of separation of powers and checks and balances. If the people were to remain sovereign, then governmental power must be exercised only to the extent it was delegated to the people’s representatives and consistent with the Constitution. The founders accepted the idea of the independence of the judiciary as a check against abuse of governmental power by the other branches, and to some degree, by state and local government as well. The judicial check on the exercise of power by state and local governments, of course, got a major boost with the ratification of the 14th Amendment in 1868.

To ensure an independent federal judiciary, the framers included an Article III the so-called “twin pillars” of judicial independence: life tenure and protection against salary diminution. During that same period, some of the states also adopted similar systems for selecting judges for their courts. In discussing judicial independence, however, we should not overlook the appointment process. Under the Federal Constitution, the President nominates judges, and with the advice and consent of the Senate, appoints

them. Here in Massachusetts, the Governor appoints judges, recommended by the judicial nominating commissions, with the approval of the Governor's Council. Both systems of appointment should be considered in any discussion of the independence of the judiciary.

At the federal level, Senator Jeffords' recent resignation from the Republican Party has raised once again the role of the Senate in maintaining an independent judiciary. Since that remarkable event, Republican and Democratic Senate leaders have been discussing the new arrangement. For the first time, the Republicans are insisting that all presidential nominations for the Supreme Court be voted upon by the entire Senate, notwithstanding any decision of the Senate Judiciary Committee. In addition, the Republicans are asking that "holds" be disclosed publicly. Under Senate tradition, a home state Senator may delay or block (place a "hold" on) a judicial nominee whom that Senator does not like. Some have found these Republican suggestions ironic and indeed laughable, considering that the Senate Judiciary Committee under Republican leadership buried many of President Clinton's judicial nominees, including a number of women and minorities.

Of course, what is really at stake is the ideological composition of the Federal judiciary, including the United States Supreme Court. Just as some Senate Republicans blocked Clinton nominees they considered too "liberal," some Senate Democrats want to block Bush nominees they consider too "conservative." Is there a neutral principle here upon which both sides can agree or is it simply payback time?

One answer is simply to let the system work as it has worked: Republican presidents and Senators will select judges who are more liberal. Over time, the result

should be a federal judiciary with some ideological balance: liberals, moderates, and conservatives serving together. We should remember also that judges do not always behave in predictable ways. Some observers believe that Justice Frankfurter ruled more conservatively than his presidential patron, FDR, expected, and that Justice Brennan was more liberal than his patron, President Eisenhower.

Recall too the appointment of Murray Gurfein, a friend of and dinner guest at the Nixon White House. Very soon after President Nixon appointed him to the United States District Court in Manhattan in 1971, he ruled against President Nixon when his Attorney General sought to suppress the Pentagon Papers. On the other hand, some of you may believe that the Senate should play a more active role to ensure that only nominees devoted to civil liberties should be appointed to the court. You may believe that such important matters should not and cannot be left to the vagaries of the political process.

To you I would say simply this: in selecting judges, do not underestimate the importance of the popular will as expressed through their elected representatives. While we think of an independent judiciary as protecting minorities against majoritarian rule, it may be that all rights ultimately come down to the will of the majority. To paraphrase Judge Learned Hand, no court can save a people where the spirit of liberty is lost, and no court need save a people where the spirit of liberty flourishes. So perhaps we should join with Mr. Dooley, the colorful Irish saloon keeper in Chicago, made famous in Finley Peter Dunne's writings, who once told a customer (probably too drunk to appreciate his remark): "I don't know whether the constitution follows the flag, but I am certain the Supreme Court follows the election returns."

Before I conclude, let me say a few words about judicial independence in the state courts. In their early years, many states followed the federal judicial model of life tenured judges. At the turn of the 19th century, however, the progressive movement, which brought us initiative, referendum, and recall, also introduced the idea of elected judges. Many states then moved away from life tenure in favor of popular election of judges for a specified term of years.

The New York Times recently reported that some states are currently rethinking their systems of electing judges. Indeed not long ago, New York returned to the appointment system for its highest court, the New York Court of Appeals. Other states are also considering restoring the appointment system for judges, at least with regard to their highest courts. States wishing to maintain their systems of electing judges are considering public financing of judicial elections to prevent campaign excesses that have characterized some state judicial elections.

Here in Massachusetts we have had life tenure for a very long time, with the addition of a State Commission on Judicial Conduct designed as a check on the judiciary. Some of you may be following the case of Judge Maria Lopez, whom the Commission is currently investigating. You may recall that she gave an offender accused of assaulting a child a relatively light sentence, which has precipitated the inquiry. What may not be as well known is that the Massachusetts Legislature has a procedure called a “bill of address,” which permits any member to seek the removal of a judge by legislative action. Currently pending in the House is a bill of address seeking to remove Judge Lopez. I do not expect the House to pass that bill.

In summary, the appointment process, state judicial conduct commissions, bills of address, recall, and the popular election of judges all serve as checks on the exercise of judicial power. While they may, from time to time, threaten the independence of the judiciary, they should be seen as mechanisms for strengthening it. Each time we utilize one of these procedures or discuss its viability, it reminds us once again of the importance of judicial independence, and asks us to reconfirm it.

Consequently, the current discussion among United States Senators, for example, on the processing of judicial nominees offers us another opportunity to examine the system we use to appoint federal judges and the broader question of judicial independence. Similarly, the challenges to Judge Lopez in the House and before the State Commission also give us the chance to reconfirm or redefine the meaning of the independence of our state judiciary. Rather than wring our hands over the propriety of such matters, we should view them as opportunities to renew our commitment to judicial independence and, if necessary, to refine its contours.

Thank you very much.