Sandra Day O'Connor

Fair & independent courts

More than one hundred years ago Roscoe Pound delivered an important address to the American Bar Association called "The Causes of Popular Dissatisfaction with the Administration of Justice."[1] In that address, Pound, who would later become dean of the Harvard Law School, warned his audience, "[W]e must not be deceived . . . into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for the law, which exists in the United States today."[2] I believe that Pound's words apply with at least equal force today as they did in 1906.

The United States has promoted the notion of the rule of law as a means for helping to ensure peace and democracy around the world. In our work with emerging nations and with the breakup of the Soviet Union, we have continually advocated the importance of the rule of law. One necessary component to achieving the rule of law, of course, is a fair, impartial, and independent judiciary. The United States's federal judiciary has been the envy of the world for many years, as other nations have attempted to emulate our federal court system. Given the intense criticism that is consistently leveled at so-called activist judges who supposedly legislate from the bench, however, I fear that some of that admiration for our judicial system could end up eroding.

Although this point need not be dwelled upon at length, it is important to point out that the rule of law is not a novel concept. Indeed, the notion stretches back many centuries. Judith Shklar has noted that Aristotle believed the Rule of Law to be "nothing less than the rule of reason," balanced by considerations of equity so that just results may

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1 This essay is taken from remarks given at Fair and Independent Courts: A Conference on the State of the Judiciary, convened by the Georgetown University Law Center in September 2006.

2 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *American Bar Association Reporter* 29 (1906): 395.

be achieved in particular cases.[3] More recently, our late Chief Justice Rehnquist indicated that "the creation of an independent constitutional court, with the authority to declare unconstitutional laws passed by the state or federal legislatures is probably the most significant single contribution the United States has made to the art of government."[4]

Like the rule of law, directing anger toward judges has, regrettably, also enjoyed a long tradition in our nation. President Thomas Jefferson was a spirited antagonist of judges appointed by the Federalists. And, more recently, President Franklin Roosevelt took issue with the decisions of the Supreme Court when it invalidated some of his New Deal legislation. And I well remember as a youngster driving around the highways near the Lazy B Ranch and seeing signs calling for the impeachment of Earl Warren. So, while scorn for some judges is not an altogether new phenomenon, I do think that the breadth of the dissatisfaction currently being expressed – not only by public officials, but also in public opinion polls – indicates that the level of anger directed toward judges today exceeds that of the past.

On the federal level, Congress has engaged in recent efforts to police the judiciary. Seeking to constrain the legal sources that are available to judges, some members of Congress have advocated measures that would forbid judges from citing foreign law when they are interpreting the Constitution. The House of Representatives passed legislation in 2006 that would prohibit the Supreme Court from considering whether the Pledge of Allegiance's inclusion of the words "under God" violates the First Amendment. And there have been troubling calls during the nomination and confirmation processes to require a nominee to state how he would rule on particular cases.

On the state level, there has historically been far less political controversy in the selection of judges due, in part, to a perception that state judges do not often make decisions on politically controversial issues. This perception is changing, however, and powerful interest groups have begun to pour money – and politics – into the state judicial selection process to influence decisions on issues ranging from gay rights to medical malpractice. These efforts are particularly troubling in states that elect their judges through partisan judicial elections, where candidates for judge have become highly dependent on funding from politically motivated special interest groups to get elected. In 2007, the final four candidates running for open seats on the Supreme Court of Pennsylvania raised more than $5.4 million combined, shattering fundraising records in Pennsylvania judicial elections. Since 2006, high-court campaigns in Georgia, Kentucky, Oregon, and Washington also set fund-raising records. Since 2004, nine other states broke records for high-court election spending.

There is seemingly no ceiling for fundraising in state judicial races, as campaign spending by advocates on one side of any sensitive cultural or economic debate spurs increases in spending by the other. The weapons in this judicial "arms race" are campaign advertisements bankrolled by these groups. Advertisements in judicial races too often send an unmistakable message to our

3 Judith N. Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998), 21 – 23.

4 William H. Rehnquist, Symposium on Judicial Independence, University of Richmond T. C. Williams School of Law, March 21, 2003.

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citizens that a judicial candidate should be elected *because* she will rule based on her biases, instead of suggesting voters should trust her to be impartial enough to set those biases aside.

As a result, voters in states that elect judges are more cynical about the courts, more likely to believe that judges are "legislating from the bench," and less likely to believe that judges are fair and impartial. This distrust has the perverse effect of making voters more inclined to elect their judges through partisan processes. If you do not believe that judges are or can be fair and impartial, you will want to select judges by a process that you believe will be most likely to result in a judge who is partial to you and unfair in your favor.

Alexander Hamilton once observed 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."[5] Hamilton's point is a profound one because he understood that judicial independence was not designed only – or even principally – for the benefit of judges. Rather, judicial independence is for the benefit of all of society, protecting the exalted and the humble alike. Preserving an independent judiciary is the work of an educated citizenry, and we must be ever-vigilant against those who would strong-arm judges into adopting their preferred policies. Judges must be loyal to the law alone. Their duty to the people is to make unpopular decisions when the law demands it. If we fail to communicate this vital message, judicial independence will perish, and with it the assurance that each citizen will enjoy the full protections of our Constitution and the rule of law.

5 Alexander Hamilton, The Federalist No. 78, in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York: New American Library, 1961), 470.