

What Is an Independent Judiciary?

Overview

In this lesson, students learn about the independence of the judicial branch of government. First, students read and discuss an article on the role and principles of an independent judiciary. Next, they role-play voters deciding whether or not to recall judges.

Standards and Topics

- CCSS.ELA-LITERACY.RH.11-12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.
- CCSS.ELA-LITERACY.SL.11-12.1.A: Come to discussions prepared, having read and researched material under study; explicitly draw on that preparation by referring to evidence from texts and other research on the topic or issue to stimulate a thoughtful, well-reasoned exchange of ideas.
- CCSS.ELA-LITERACY.SL.11-12.1.B: Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.

Topics: judicial independence; U.S. Constitution; checks and balances; democracy

Objectives

Students will be able to:

- Explain the nature and importance of an independent judiciary to our system of checks and balances.
- Describe the rationale and controversy behind judicial elections.
- Evaluate whether to retain or recall hypothetical judges.

Materials

[Handout A – What Is an Independent Judiciary?](#) – 1 per student

[Handout B – The Voters Decide](#) – 1 per each small group of students

Procedure

I. Focus Discussion

- A. Hold a brief whole-class discussion by asking students: Do you think judges and courts promote justice? Why or why not? (*Accept reasoned responses. Look for answers that demonstrate the role of judges in applying the law fairly to everyone in society.*)

II. Reading and Discussion:

- A. Distribute [Handout A – What Is an Independent Judiciary?](#) to each student. Have students read the handout and annotate the text by jotting down questions in the margins, circling unfamiliar terms, and underlining the main points of the text.

- B. Conduct a whole-class discussion using the Writing & Discussion questions on the handout or assign the questions for assessment (see Part IV(A) below).
1. What are the reasons for having an independent judiciary? (*Accept reasoned responses. The main reason is to keep judges from being swayed by politics or popular opinion.*)
 2. Describe the different methods used to select judges. (*Where judges are appointed, voters may recall judges or participate in retention elections. Other states allow direct partisan elections of judges.*) Which do you think is best? Why? (*Accept reasoned responses. Answers should stress the importance of maintaining judicial independence.*)
 3. In most states, judges are on the ballot. What do you think voters should consider when voting for judges? (*Accept reasoned responses. Based on the reading, students may emphasize that judges should adhere to the Constitution, have a basic sense of fairness, or want to make sure that justice is always upheld, even when the majority in society demands otherwise.*)

III. Activity: Role Play: The Voters Decide

- A. Tell students that today they are voters who must decide whether to recall or retain three judges.
- B. Divide the class into pairs of two or groups of three students each. Distribute [Handout B – The Voters Decide](#) handout to each group. Review the instructions and answer any questions that students may have.
- C. Allow students time to read the handout aloud, discuss each judge, make their decisions. When they finish, discuss each justice and vote as a class on each one.
- D. Debrief the activity by discussing this question: What are valid reasons for voting to recall or retain judges?

IV. Assessment/Closure

- A. Option 1: Have each student write answers to the Writing & Discussion questions. Look for answers that use the text and the activity discussions as evidence.
- B. Option 2: Have each student write a well-developed paragraph arguing either for or against judicial retention elections. Students should cite at least three facts from the text and from their activity discussions to support their argument.

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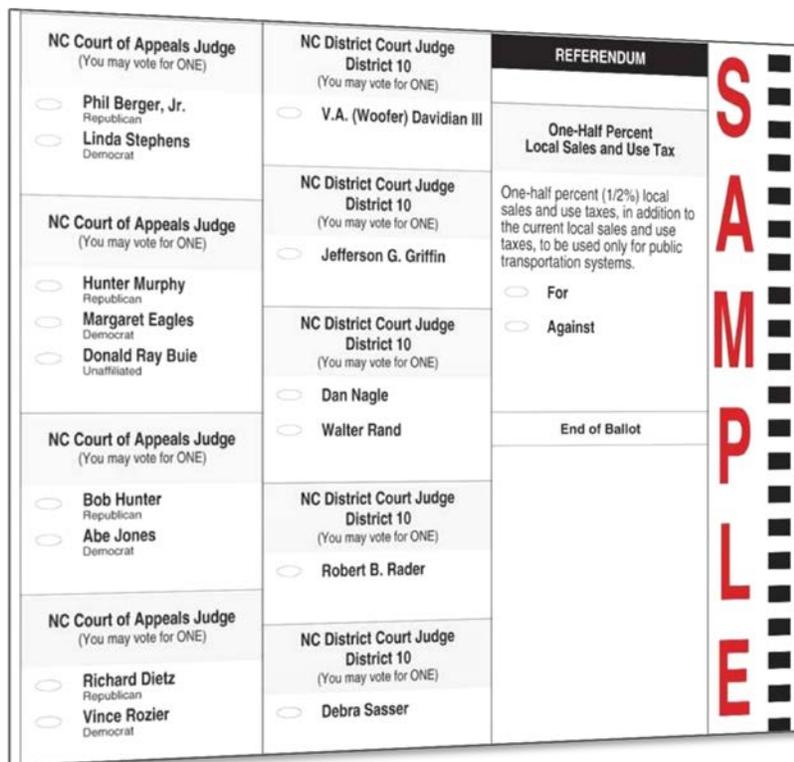
Patrick Heller - nakrsm/flickr.com (CC by 2.0)

When trial judges preside over lawsuits and criminal trials, they make many legal rulings: Should this evidence be admitted? Should this objection be sustained? What law applies to this case? Is the law constitutional? If a party appeals, appellate court judges review these rulings. All judges — trial and appellate — are supposed to be fair and impartial. When judges interpret and apply the law, they must base their decisions on statutes, constitutional law, and prior court cases. They must never be swayed by politics or popular opinion. The rule of law (the fair application of the law to the powerful and the powerless alike) and our democracy depend on an independent judiciary.

The U.S. Constitution attempts to ensure judicial independence through certain checks and balances. All federal judges are appointed by the president, confirmed by the U.S. Senate, and serve for life. Under the Constitution, there is only one way that federal judges can be removed: The U.S. House of Representatives can vote to impeach any federal judge for “treason, bribery or other high crimes or misdemeanors.” The judge is then tried by the Senate. To remove the judge, two-thirds of the Senate must vote to convict. Only 13 federal judges in our history have been impeached by the House. Seven have been convicted by the Senate. All have been impeached for alleged criminal behavior. None has ever been convicted for making unpopular decisions or for holding an unpopular judicial philosophy.

But most judges in the United States are not members of the federal judiciary. Most serve on state courts. And, unlike federal judges, most state judges have to face the voters. The question arises: How can states preserve judicial independence and still make judges accountable to voters?

In many states, voters can recall judges that they believe do not belong on the bench. People opposing a judge must get a certain number of signatures on recall petitions. Then the judge’s name is put on the ballot and voters decide whether they want to retain or recall the judge. If a majority votes to recall the judge, then the judge must be replaced — either by election or appointment, depending on the state.



Eighteen states hold direct, partisan elections for trial judges, and 21 states hold direct, nonpartisan elections for trial judges. Direct elections allow voters to elect judges in their district instead of the governor appointing every judge. In partisan elections, judges' political party affiliations appear on the ballot. Thirty-eight states hold elections for state supreme court justices, and seven such states elect them in partisan elections.

In direct judicial elections, judges must raise money for campaigns, often from lawyers who will appear before them. That gives the appearance that lawyers are

paying for favoritism. Judicial campaigns in themselves are problematic. Judges can't make campaign promises that they will rule in a certain way. That would make the judge biased. Bringing judges into the political process can make them seem less neutral in the courtroom.

For these reasons, some states have moved away from direct election of judges. In these states, the governor usually appoints all state appellate court judges and most trial court judges. In some states the governor makes selections from a list prepared by a judicial commission, which searches for the most qualified judicial candidates.

But most of these states still require judges to face voters. Appellate judges usually go on the ballot in the next general election after being appointed. These are called retention elections, because voters get to decide whether or not to retain the judges. No one can run as a competing candidate. Citizens simply vote "yes" or "no" on retaining each of the judges. If voters retain them, they serve what remains of their term of office and then stand for election to a full term. Judicial terms vary from state to state; California appellate judges serve 12-year terms, whereas those in Ohio serve for six years.

Trial judges also go before the voters in the next general election after their appointment. But their terms are shorter, typically six years. And in some states, opponents can run against them.

This system has generally shielded judges from politics. It allows judges to serve long terms with a limited degree of accountability to voters.

But over the last couple of decades, some recall and retention elections have provoked controversy. For example, in California, an unsuccessful campaign targeted two justices in 1998 because they had voted to strike down a state law requiring minors to get parental consent before they get an abortion. In Iowa, voters successfully removed three justices in 2010 from the Iowa Supreme Court because the justices had voted unanimously to legalize same-sex marriage in the state. The leader of the campaign to remove the justices said, "It's we the people, not we the courts." Opposing the removal, Dean of California's UC Berkeley School of Law Erwin

Chemerinsky said removal “might cause judges in the future to be less willing to protect minorities out of fear they might be voted out of office.”

More recently, in 2018, voters in Santa Clara County, California, voted to remove a superior court trial judge because of the judge’s lenient sentence in a criminal case. In 2015, a jury found Brock Turner, a student and athlete at a local college, guilty of three felonies connected to his sexual assault of an unconscious woman. Prosecutors asked for a six-year prison sentence. However, Judge Aaron Persky only sentenced Turner to six months in jail and three years’ probation. Judge Persky cited the fact that Turner was drunk during the crime as a mitigating factor (a reason for lessening the punishment). Turner only served three months of his jail sentence.

In each of these cases, the people mounting the campaigns were upset with decisions the judges had made and accused them of misusing the law. Supporters of the judges saw the issue as one of judicial independence. They believed that judges should not be removed because they dare to make unpopular decisions.

The late Bernard Witkin, a noted legal scholar, warned: “What we’re seeing is a new way to approach judicial elections, challenging judges’ qualifications on the basis of particular decisions that affect particular groups. . . . If we reach the point where . . . we end up telling the court, ‘If you don’t do as we want, we’ll remove you,’ then the courts won’t be worth saving.”

Writing & Discussion

1. What are the reasons for having an independent judiciary?
2. Describe the different methods used to select judges. Which do you think is best? Why?
3. In most states, judges are on the ballot. What do you think voters should consider when voting for judges?

Role Play: The Voters Decide

Below are descriptions of three judges who are subjects of recall elections. You are voters who have the opportunity to vote to recall or retain these judges. In a small group, discuss and vote on each judge. Prepare reasons for your decision on each judge to present to the whole the class.

Group members: _____

Magnolia Fish

Justice Fish worked as a public defender for 13 years in before she was appointed chief justice of the state supreme court by the governor. Chief Justice Fish was retained by a slim margin (51.7 percent of the vote) after her first term on the appellate court. In the same election, an overwhelming majority of voters passed an initiative to expand the use of the death penalty as criminal punishment. In the next three years, 39 defendants were sentenced to death. In each case, Justice Fish voted to overturn the sentence. A majority of the other judges joined Justice Fish to overturn 29 death sentences but in 10 of these capital-punishment cases, Justice Fish stood alone.

recall

retain

Reasons: _____

Carson Rowan

Justice Rowan is a well-respected judge recently appointed to the state supreme court. Before his appointment, Justice Rowan resigned as a board member of the National Rifle Association (NRA). One year later, the state supreme court struck down a state law requiring a two-week waiting period for all firearms purchased at gun shows. The court ruled 4–3 that the law violated an individual’s constitutional right to bear arms. Gun control groups are demanding that Justice Rowan be recalled, claiming that his vote to strike down the law reflected a conflict of interest between his role as a state supreme court judge and a former board member of the NRA. Others say that judges should not be recalled simply because they must make decisions on issues that involve their personal beliefs or attitudes.

recall

retain

Reasons _____

Kieran Castro

Just months after Judge Castro was appointed as a trial judge, she presided over an environmental group’s lawsuit against a land development corporation. Judge Castro dismissed the case before trial, finding no merit in the group’s lawsuit. Soon thereafter, the environmental group discovered that Judge Castro was a stockholder in the land development corporation. Judge Castro was censured by the state judicial board, and the case was appealed, reversed, and retried before another judge.

recall

retain

Reasons: _____