PEABODY The Politics of Judicial Independence

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The Politics of Judicial Independence

Courts, Politics, and the Public

EDITED BY Bruce Peabody

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The Politics of Judicial Independence

Foreword

Because of my strong and long-held belief that the American judicial system was in danger of losing some of its institutional and decisional independence from a variety of threats, "judicial independence" became a centerpiece of my tenure as president of the American Bar Association from 2008–2009. Indeed, during my run-up year as president-elect of the ABA, I conducted what was essentially a listening tour of the United States legal community. During that time, bar associations and bar leaders, lawyers, judges, and litigants from all across the country spoke to me about their concerns with their own court systems. What they said struck me initially as disparate and unconnected, but as I reflected further, their concerns coalesced into a conviction that, in one way or another, judicial independence was being threatened.

These perceived threats included some well-known ones, such as the high-dollar, highly politicized electoral races for seats in those states that elect judges, including my own home state of Alabama. But other threats were more insidious and subtle. These ranged from ballot initiative attempts in Colorado to impose severe term limits on judges to "national rankings" of court systems that seemed primarily based on disagreement with the results of judicial rulings to inadequate funding of the third, supposedly co-equal branch of government.

The Politics of Judicial Independence recognizes what was related to me by many sources during my years as president-elect and president of the ABA —that we are at an important era for American judicial systems, in which courts and judges face an extraordinarily hostile political situation. It also recognizes what some defenders of judicial independence deny—that politics always plays a role in judicial systems. In many speeches as ABA president, I often utilized the imagery of a boiling pot as an analogy for thinking about critiques of our courts. So long as the heat is controlled, the pot will not boil over; however, if the heat is too high, the contents may well be lost to the atmosphere. So it is with politics and judicial independence. We must

ensure that the heat, which is always present, does not boil off the important contents of our legal system. After all, what we aspire to is a judiciary that is perceived as fair and impartial, not unduly influenced by political pressures, campaign contributions, or tightening budgetary purse strings. This book helps us move toward these goals by unflinchingly examining what we really mean by judicial independence and by recognizing that politics inevitably plays a role in both endangering this independence and, ultimately, preserving it.

H. Thomas Wells Jr.

The Politics of Judicial Independence

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Introduction

Bruce Peabody

This is a book about the contemporary politics of judicial independence, that is, the conditions under which our celebrated commitment to autonomous courts and judges might be compromised in today's political environment. In exploring this theme, this introduction and the chapters that follow focus on criticisms of the judiciary over the past forty years and the threats these criticisms pose to judges' distinctive functions and, by extension, our constitutional system as a whole.

Since the ratification of the Constitution, politicians, citizens, and a wide range of scholarly and popular commentators have praised the American court system and its reliance on judges who are free from the direct influence of the "coordinate branches" of government and the vagaries of public passions and opinions. At the same time, these voices have frequently fretted about perceived dangers to American courts, ranging from proposed laws seeking to curtail the judiciary's powers and privileges to popular movements seeking to impeach and remove judges to presidential calls to undo controversial rulings.

This book examines whether prominent recent criticisms of courts pose significant problems for American politics and law, especially by making it harder for courts to fulfill roles and perform functions we have come to rely upon or at least expect. Should we be troubled about contemporary complaints about courts generated by politicians, interest groups, and even judges themselves?

Relevant Scholarship

There is, of course, scholarship and other work pertinent to this question. To begin with, there is a vast, complex, and important literature examining the relationships between courts and elected officials and the conditions under which politicians, interest groups, and the public can direct, influence, temper, and even neutralize judicial authority and judgments. This book draws on and contributes to these debates as part of its exploration of judicial independence and the critiques of courts.

A second, related set of research has focused more directly on various aspects of judicial independence: how we should define it, what its purposes are, and how a judiciary becomes compromised by political and electoral forces. While relevant to this volume, much of the judicial independence literature focuses on nations outside of the United States and is generally courts-centered, that is, it examines the topic using the perspectives and concerns of courts and court advocates. This book attempts to move beyond this emphasis.

A third and final body of pertinent research considers the seriousness, validity, and merits of different criticisms leveled against the contemporary judicial system, like the charge that certain judges are "activist." In general, these writings employ one of two distinctive analytic approaches, sometimes in complementary fashion. Much of this work uses legal arguments, examples, and interpretation to defend, refute, or qualify a variety of critiques brought against the judiciary and to explore the conditions under which sanctions against courts might be legally permissible. Other work in this area is more empirical, probing for the underlying factors likely to induce criticism of courts or spur attempted limitations on judicial power. A subset of these studies evaluates the validity of particular assertions about certain objectionable behaviors, such as judging on ideological rather than legal grounds. But this work tends to focus on the nature, meaning, and accuracy of various criti-

cisms of courts, rather than thinking through their implications for judicial independence and constitutional government generally.

New Orientation Points

An Important Moment?

The Politics of Judicial Independence draws on this literature but also attempts to advance existing scholarship by assuming two distinctive perspectives. First, this book presumes that we are at an important moment for court systems, both in the United States and throughout the world. Since the 1980s, American courts have become more Republican and conservative, especially at the federal level. Today, ten out of the thirteen federal circuits are majority Republican-appointed. Even with President Barack Obama's nomination of two justices to the U.S. Supreme Court, a majority of the Court has been selected by Republican presidents. At the same time, scrutiny of the courts from both the left and the right is intense, especially given the close division of the judiciary on important subjects (such as gay rights, affirmative action, civil rights, civil liberties, and anti-terrorism) and heightened public interest in specific court decisions at all levels.

Internationally, a number of nations striving to build autonomous and effective court systems are experiencing political and sometimes physical battles over these issues. Even in countries with more established traditions of judicial independence, changes in the political priorities and agendas of these nations have frequently induced passionate critiques of judges abroad. While this project primarily considers the U.S. judiciary, many of its arguments and claims pertain to courts overseas.

Our contemporary politics, therefore, are likely to remain preoccupied with the problem of how much power and independence to cede to courts. In turn, this book's investigation of contemporary critiques of courts presumes that these attacks are, at a minimum, politically significant and part of a milieu of heightened judicial scrutiny that is unlikely to disappear.

Revisiting Judicial Independence

A second major orientation point for this book is based on expanding our traditional ways of talking about judicial independence in order to evaluate better whether contemporary critiques of courts and judges are problematic or even historically unusual.

Some of the citizens, judges, and academicians who are most opposed to criticisms of courts make unrealistic assumptions about the judiciary's removal from American politics and depict it as an institution capable of acting in isolation. A countervailing theme running throughout this book is that our conversations and claims about judicial independence need to be placed in political context. More specifically, we cannot identify potentially dangerous political influences on the courts without appreciating the many ways that elected officials, interest groups, and the public already communicate with and shape judicial decisions and policy implementation. On the other side, we should not condemn or dismiss criticisms of judges and courts without trying to understand in a sympathetic way the motivations that undergird the behavior of legislators, presidents, and other officials.

A New Climate of Criticism? Evidence and Initial Discussion

The judiciary has been the target of elected officials, interest groups, and the broader public since before the ratification of the Constitution. The Anti-Federalist Brutus famously warned about the "immense powers" of the Supreme Court and its lack of accountability to "every power under heaven." In the early eighteenth century, Thomas Jefferson and his political allies went after not only Chief Justice John Marshall but also other federal judges, most famously by impeaching (although not successfully removing) Supreme Court Justice Samuel Chase.

Congress, too, has been a recurring, active, and sometimes effective agent in checking the federal courts, regularly proposing constitutional amendments to counter individual decisions of the courts or otherwise seeking to limit judicial power. The Eleventh, Fourteenth, Sixteenth, and Twenty-Sixth amendments to the Constitution all overturned Supreme Court decisions and changed how courts approach significant legal issues. Larry Kramer and Barry Friedman, among other scholars, have also recently offered extended and vivid accounts of the nearly continuous tradition in U.S. politics of "popular constitutionalism" and democratic resistance to individual court judgments and the judiciary's broader impact on policy and politics.

Critiques since 1948: Two Views

Nevertheless, recent decades have seen a significant change in the frequency and intensity of criticisms of American courts. There are a number of indications of this shift: one is the treatment of the judiciary in national party platforms; another is congressional "court-curbing legislation" since World War II. These changes are in line with additional developments distinctive to our more recent political landscape.

National Party Platforms and Judicial Critiques: 1948–2008

While party platform statements are imperfect instruments for capturing party positions and policy goals, they do provide a formal and prominent record of party sentiment for a particular era. Table I.1 lays out what Democratic and Republican platforms have had to say with respect to the judiciary for every four-year cycle from 1948 to 2008.

Up to the 1976 platform, both Democrats and Republicans appear to have been deferential to courts in these official party statements—generally avoiding reference to the judiciary entirely. Interestingly, both the Democratic and Republican platforms of 1956 expressed support for courts in connection with *Brown v. Board of Education* (1954), the then controversial decision ordering desegregation of public schools (Republicans reaffirmed this support four years later). Beginning in 1976, however, we can detect a notable shift in party attitudes, especially for Republicans. As table I.1 shows, Republican platforms became increasingly detailed and negative in discussing courts and judges over this period, while Democrats continued to give the courts a low profile. In responding to *Roe v. Wade* (1973), the Republican platform of 1976 indirectly objected to both the decision and the Court's curtailment of a "public dialogue on abortion." Republicans also expressed support for "enactment of a constitutional amendment to restore protection of the right to life for unborn children."

Save for 1984 (when Republicans had consolidated power, made numerous appointments to federal and state court systems, and President Ronald Reagan's likely reelection raised the prospects of further GOP influence on courts), all Republican platforms from 1976 to 2008 made at least some negative reference to the judiciary. These statements frequently chafed against individual decisions (on such topics as abortion, parental rights, religion, the rights of the accused, and gay marriage) and, at other times, called for specific

Table I.1 References to Courts and Judges in Major Party Platforms, 1948–2008

	Major Party Platforms			Major Party Platforms	
Year	Democrat	Republican	Year	Democrat	Republican
1948	none/neutral	none/neutral	1976	none/neutral	negative
1952	none/neutral	none/neutral	1980	none/neutral	negative
1956	positive	positive	1984	positive	none/neutral
1960	positive	positive	1988	none/neutral	negative
1964	none/neutral	none/neutral	1992	none/neutral	mixed
1968	none/neutral	none/neutral	1996	none/neutral	negative
1972	none/neutral	none/neutral	2000	positive	negative
			2004	none/neutral	negative
			2008	none/neutral	negative
	Totals, 1948–1972			Totals, 1976–2008	
Overall	Democrats	Republicans	Overall	Democrats	Republicans
71% neutral; 29% positive	71% neutral; 29% positive	71% neutral; 29% positive	44% neutral; 17% positive; 33% negative	78% neutral; 22% positive	11% neutral; 11% positive; 89% negative

moves to counter the judiciary (such as the 1988 pledge supporting "congressional use of Article III, Section 2 of the Constitution to restrict the jurisdiction of federal courts"). Starting with the 1980 platform, Republicans also began calling for the appointment of particular judges whose rulings would be consistent with their policy aims. In sum, the 1976 platform seems to have uncorked a steady flow of tough language from Republicans in their official party statements. Democratic responses, apart from a detailed response in 1984 (warning about the "radical" rights restrictions that would be imposed by a "Supreme Court chosen by Ronald Reagan"), were essentially invisible.

Court-Curbing Legislation, 1948–2008

Examining congressional legislation aimed at limiting the powers of the courts reveals a distinct but complementary pattern of attacks on the U.S. judiciary over the past sixty years. To evaluate the ebb and flow of Congress's interest in such efforts, I use a "court-curbing" data set compiled by political scientist Tom Clark. Clark identified and collected congressional proposals "to restrict, remove or otherwise limit judicial power" from 1789 to 2008. As Clark notes, the "typical Court-curbing bill is what might be characterized as an institutional assault on the Court rather than a case-specific effort to

Table I.2 Court-Curbing Legislation Introduced into Congress by Year, 1948–2008

Year	Court-curbing bills	Year	Court-curbing bills	Year	Court-curbing bills	Year	Court-curbing bills
1948	0	1967	21	1984	1	2003	8
1949	1	1968	34	1985	9	2004	10
1950	1	1969	53	1986	1	2005	25
1951	2	1970	7	1987	8	2006	11
1952	1	1971	34	1988	1	2007	20
1953	4	1972	4	1989	3	2008	5
1954	0	1973	22	1990	4		
1955	6	1974	5	1991	9		
1956	5	1975	25	1992	2		
1957	13	1976	7	1993	8		
1958	3	1977	32	1994	2		
1959	15	1978	3	1995	6		
1960	1	1979	22	1996	2		
1961	6	1980	3	1997	8		
1962	5	1981	26	1998	3		
1963	8	1982	4	1999	10		
1964	4	1983	13	2000	1		
1965	9			2001	3		
1966	5			2002	3		
1948–1966 average: 4.73		1967–1983 average: 18.52		1984–2002 average: 4.42		2003–2008 average: 13.17	

Source: Tom S. Clark (unpublished data set).

reverse a Court decision." Thus, instead of criticizing and singling out, say, an individual First Amendment decision perceived as hostile to religious interests, a members of Congress might propose a bill to eliminate "Supreme Court and Federal district court jurisdiction to review and hear any case arising out of State law relating to voluntary prayer in public buildings and schools."

A review of Clark's data over the past six decades reveals four waves of court-curbing legislation. As table I.2 indicates, from 1948 to 1966, Congress averaged under five court-curbing proposals every year. These numbers are somewhat inflated by the special dynamics of the Congresses of the 1960s, which included southern and conservative lawmakers bitterly opposed to contemporary civil rights and civil liberties decisions, most famously *Brown v. Board*. From 1967 to 1983, Congress entered a period of sustained interest in court-curbing bills that (to date) is without precedent, introducing an average of almost nineteen court-curbing bills every year.

Consistent with the political dynamics surrounding party platforms, this modern enthusiasm for curbing courts and judges seems to have run its course by the second term of the Reagan presidency, presumably reflecting Republican satisfaction with gaining greater purchase on the court system.

From 1984 to 2002, court-curbing proposals dropped back down to a yearly average under five (remarkably close to the 1948–1966 period), climbing again from 2003 to 2007, a five-year surge in court-curbing proposals that was matched only a few times before in our nation's history.

While certainly preliminary, these discussions suggest several general conclusions about critiques of the American judiciary over the past sixty years. First, starting in the late 1960s and continuing into the 1980s, political rhetoric targeting the courts increased in profile and frequency, sometimes accompanied by policy initiatives seeking to impose limits on courts and judges.

In the states, hostility to courts and judges was also stoked over this span, as illustrated by the "Impeach Warren" campaign in the 1960s and, later, by the popular removal of California Supreme Court Chief Justice Rose Bird. Bird, the first woman to serve on her state's highest court, came under fire in the 1970s and 1980s for her rulings and views, especially her opposition to the death penalty. After an organized, high-profile campaign by social conservatives and business groups, Bird and two other justices were voted off the California Supreme Court by the state's voters in 1986. The Bird episode suggested the emerging importance of organized interests in shaping state and national debates about the composition and ideological tenor of courts.

Beginning around 2003, criticisms of courts, and proposals channeling this animus, seem to have gained renewed force. As figure I.1 depicts, the 109th Congress (2005–2006) ushered in a span of heightened legislative interest in checking the judiciary. This conclusion is reinforced by research showing a rise in the use of the term "legislating from the bench" (almost invariably as a criticism) by members of Congress starting in 2003.

Moreover, it is notable in this regard that while the State of the Union addresses since 1948 have sounded generally supportive or neutral themes when discussing the judiciary, in four out of George W. Bush's final five State of the Union speeches, he criticized judicial behavior. In 2006, for example, the president warned that "judges must be servants of the law and not legislate from the bench." In his 2010 State of the Union message, President Obama took the somewhat unusual step of criticizing a recent Supreme Court decision with six justices in attendance. Obama charged that the ruling, *Citizens*