WHEN
COURTS &
CONGRESS
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The Struggle for Control of America’s Judicial System

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With a New Preface and a Foreword by Sandra Day O’Connor

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To my family of origin—

Patricia Keeney Geyh,
Gardner Asahel Keeney (1898–1982), and
Prudence Martin Keeney (1901–91)

—for their unqualified love and support,
from Milwaukee to Minong and back
President Woodrow Wilson once wrote: “[Government] keeps its promises, or does not keep them, in its courts. For the individual, therefore, who stands at the center of every definition of liberty, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts.” This insight transcends the passage of time, for only with independence can the reality and appearance of zealous adherence to the rule of law be guaranteed to the people. The United States has professed a commitment to an independent and impartial judiciary throughout its history, and for many years, our courts set an example for the world. I worry, however, whether that can still be said today, in the wake of ongoing attacks on judicial independence that continue to increase in number and intensity.

It is inevitable in our system of government that Congress and the president will sometimes be angered by the decisions judges make. President Thomas Jefferson was a spirited antagonist of judges appointed by his predecessors. President Andrew Jackson openly challenged the Supreme Court’s authority to impose its view on the constitutionality of governmental action on the other branches. Before, during, and after the Civil War, the congressional majority was sometimes furious with judicial decisions that, in its view, impeded Congress’s ability to avert the war or to facilitate reconstruction of the nation in the war’s aftermath. An irritated President
Franklin D. Roosevelt proposed to “pack” the Supreme Court with additional justices as a means to alter the course of the Court’s decisions, which had invalidated several pieces of his New Deal agenda. In my lifetime, the slogan “Impeach Earl Warren” appeared on billboards and yard signs in angry response to the decisions of his Court.

The nature of the role of the judiciary in the U.S. government’s intricate system of checks and balances is such that the courts’ determinations will at times conflict with the positions of the other two branches. Sometimes, the judicial branch checks the legislature and the executive directly, by exercising the power of judicial review—the power to declare statutes or executive acts unconstitutional. At other times, the courts check the political branches indirectly, by qualifying the interpretation of a statute in light of constitutional values or by ruling that a regulation or executive act is not authorized by statute. In either case, when courts tell a political branch of government that it will not be getting its way, an angry response may follow. That is as it must be, for if the courts forever sought to avoid conflicts with the other branches of government by declining to keep them in check, the judiciary would not be doing its job.

While some anger is therefore inevitable, the animosity has recently reached a troubling level of intensity. So-called activist judges who “legislate from the bench” have become the target of choice for many politicians and pundits. Public figures are not the only ones expressing their unhappiness; opinion polls show that there is a widespread and disturbing level of dissatisfaction with the judiciary today. In response, some members of Congress have sought to constrain the legal sources available to judges, advocating measures that would forbid judges from citing foreign law when interpreting the U.S. Constitution. Bills have been introduced both in the House and the Senate supporting the creation of an inspector general to investigate and monitor the federal branch. At a recent conference, members of Congress advocated “mass impeachment,” stripping the courts of jurisdiction to hear certain cases, and using Congress’s budget authority to punish offending judges.

At least as disturbing as attacks from outside sources are attacks from within. Judges themselves are beginning to launch attacks against the federal judiciary. Alabama Supreme Court justice Tom
Parker recently effectively urged his colleagues to defy a ruling of the U.S. Supreme Court. He argued that state judges should not follow Supreme Court opinions “simply because they are ‘precedents.’” He criticized what he called “activist federal judges,” adding that “the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state.”

It should come as no surprise that the increased scapegoating of the judiciary has coincided with an increase in anger directed toward individual judges. The number of threats and inappropriate communications directed toward the federal bench has quadrupled in the past ten years. The U.S. Marshals Service reports that complaints about similar behavior continue to be logged at an alarming rate. Congress has recently made funds available for federal judges to install home security systems. While this is a positive step, the very fact that such systems have become necessary is disheartening in itself. It does not help when a U.S. senator and former judge, after noting his “great distress” at judicial decisions he sees as activist, remarks that there may be “a cause-and-effect connection” between such activism and the “recent episodes of courthouse violence in this country.”

Judicial independence does not mean that judges and their decisions are above criticism. To the contrary, criticism is a sign that our democracy is working as it should and that the public is engaging in the business of self-government. Judges are human and, as such, make mistakes that should be called to their attention; neither the public nor judges themselves should regard members of the judiciary as being above the very laws that they are charged with interpreting. There are mechanisms already in place that properly hold judges accountable to the law. Erroneous judicial decisions may be reversed by higher courts. Judicial misconduct may result in discipline. Criminal misconduct may subject judges to prosecution. In extreme cases of corruption or other high crimes and misdemeanors, judges may be removed from office via an impeachment process. In each of these instances, problems giving rise to the need for remedial action may first come to light or later be clarified in important ways by public criticism. Only when the line between legitimate criticism and judicial intimidation is crossed do problems arise.
Our own political culture teaches us that we must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies. Federal judges are fortunate in that Article III of the Constitution provides them with some protection, ensuring that judges will enjoy their salary and tenure during good behavior. But, as the founders of our nation knew, the ultimate authority to protect judicial independence (or not) resides not in the Constitution but with the people. A primary theme of the present book underscores this very point: to perpetuate judicial independence, a sound constitutional structure may be necessary but is by itself insufficient. Rather, the breathing room judges require to follow the law as best they can without intimidation derives from a culture of respect for the judge’s independence that has been over two centuries in the making.

Lawyers and judges certainly have the duty to oppose attacks on judicial independence, but the legal community needs help from other sectors of society to ensure that the rule of law is not compromised. The public needs to understand that the notion of judicial independence is not for the benefit of judges but for the benefit of the people judges serve. The courts are important guardians of constitutionally guaranteed freedoms in our common-law system, which is why the framers of the Constitution initially established an independent judiciary. But the effectiveness of this system depends on judges knowing that they will not be subject to retaliation for their judicial acts. Judges who are afraid—whether fearing for their jobs or fearing for their lives—will be tremulous guardians who cannot adequately fulfill the considerable responsibilities that the position demands.

The best defense against these threats is the maintenance and expansion of our precious legacy: a political culture in which such threats are simply unacceptable and hence unable to take root. The problem is that there is no natural constituency for judicial independence. For those interested in the rulings judges make, an independent and impartial judge superficially seems less desirable than one who can be controlled to assure the outcome sought. It is only upon deeper reflection that we can clearly see the rightness of the point made by Alexander Hamilton when he wrote that “a steady, upright and impartial administration of the laws is essential, because no man can be sure that he may not tomorrow be the victim of a spirit of
injustice, by which he may be the gainer today.” To preserve and promote the design of the framers of the Constitution, it is essential that U.S. citizens understand the critically important role a fair and impartial judiciary plays in protecting our constitutional rights. All our citizens must know and understand the story of judicial independence in the United States. This book tells that story.

Sandra Day O’Connor
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Since the clothbound edition of this book was published, two important events occurred. First, Justice Samuel Alito was confirmed to the Supreme Court with considerably less controversy than many predicted. Like Roberts before him, Alito, in his Senate confirmation hearings, professed allegiance to the rule of law but declined to share his views on issues that could come before him as a justice, which frustrated Democrats in their efforts to find a smoking gun with which to convict Alito of extremism in the court of public opinion. Moreover, Senate Democrats lacked the credibility and support they needed to filibuster Alito for refusing to answer their questions, in no small part because they had spent what political capital they had challenging President George W. Bush’s circuit court nominations for the previous five years. A Democratic filibuster could have led the Republican majority to exercise the “nuclear option” of ruling that the filibuster was inapplicable to confirmation proceedings, which could, in turn, have prompted Senate Democrats to retaliate by obstructing other Senate business. By declining to filibuster the Alito nomination, Senate Democrats never took the first step down the road to what some described as “political Armageddon,” thereby forestalling further destabilization of the appointments process.

Second, in the midterm elections of 2006, the Democrats regained control of the House and Senate for the first time since 1994. The immediate explanation for this transition of power had nothing to do
with the issues discussed in this book: voters simply were angry with Republicans for an unpopular war in Iraq and for ethics scandals involving a number of Republican legislators. One consequence of this transition, however, was to wrest power from the conservative wing of the Republican Party that had been leading the anticourt crusade for over a decade. The net effect was to end, at least temporarily, what had been ongoing efforts to strip the federal courts of jurisdiction to hear cases on various subjects of particular concern to evangelical conservatives—such as the constitutionality of the Pledge of Allegiance and public displays of the Ten Commandments—and to establish an office of inspector general for the federal judiciary.

This transition of power acquires special significance when viewed against the backdrop of history. Cycles of anticourt sentiment have come and gone for over two centuries. Each cycle has begun with a major political realignment heralded by the arrival of a new political order: the Jeffersonian Republicans, the Jacksonian Democrats, the Populists and Progressives, and so on. In each instance, judges of the ousted regime were left behind, to the irritation of the new world order. When judges of the old regime made decisions that clashed with the ideology of legislators in the new regime, threats to the autonomy of the judges ensued. Court defenders rose up to oppose the threats as inimical to judicial independence; more politically compatible judges were appointed by the new regime, which may have diminished the frequency of unpopular decisions; court defenders gained traction, equilibrium was restored, and the cycle wound down.

The 2006 election may signal a weakening of the conservative regime that has more or less dominated the American political landscape since 1980, with increased focused on judicial politics. If so, it suggests the possibility that the latest cycle of anticourt sentiment may be on the verge of running its course. Even if this is occurring, however, it is doing so amid a postrealist age that, as discussed in chapter 6, has engendered a new and potentially more enduring skepticism of judicial independence. If independent judges come to be generally understood as renegade legislators in black dresses who follow their political predilections rather than the law, one might reasonably predict shorter spans between future cycles of anticourt sentiment, as legislators swept into power on the waves of lesser political
realignments quickly seek to assert themselves over holdover judges in response to smaller provocations.

Moreover, the federal system, as important as it may be, is just one of many judicial systems in the United States. There are fifty others, and if one is truly serious about studying the changing nature of the judicial role and its relationship to the judiciary’s independence from popular and political control, state judiciaries are where the action is. Recent developments at the state level concerning judicial elections, judicial campaign finance, judicial speech, judicial ethics, court funding, and myriad other issues counsel against rosy generalizations about the state of judicial independence in the United States or predictions of an imminent return to normalcy and underscore the need for a more systematic study of state court systems that is only now beginning to occur.
Acknowledgments

This is my first book. That is probably why I have found myself struggling with the temptation to acknowledge those who have contributed not just to the development of this monograph but to the development of me, from J. D. Salinger and JFK to the nuns at Alverno College Elementary School and my childhood hamster, Stubby. I am pleased to report, however, that after grappling through several drafts, I have emerged, if not triumphant, then at least with my worst excesses in check.

First and foremost, I thank my spouse, Emily Field Van Tassel. I know that authors often acknowledge their partners at times like these, but I really need to acknowledge mine. Emily has published a body of work that is quite familiar to students of federal court history generally and judicial impeachments and resignations in particular. As originally conceived, the present book was to be a jointly authored project, and chapter 1 is indeed derived in significant part from my section of an article written by the two of us. Issues of schedule and timing ultimately conspired against our following through on plans to write the book together, but her impact on the project remains profound. I rely heavily on her scholarship throughout the chapter on impeachment, and more broadly, she has influenced the direction and scope of the work through innumerable conversations and manuscript edits. The expression of thanks that I offer here grossly understates the extent of my dependence on her support and guidance.
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