Judicial Independence in Perspective

Review of *The Politics of Judicial Independence*, edited by Bruce Peabody (Baltimore: The St. John's University Press, 2011) 334 pp.

*Adam M. Dodek**

In February 2011, Canada's Minister of Citizenship, Immigration and Multiculturalism, the Honourable Jason Kenney, delivered a speech at the Faculty of Law at the University of Western Ontario. The speech was entitled "Dialogue with the Courts: Judicial Actions and Integrity of Canada's Immigration and Refugee System."[1] The speech began with Minister Kenney making the rather banal observation that Canada is a popular destination for immigrants and refugees. He then focused on the problem of people coming to Canada illegally through overstaying visas, illegal entries and human smuggling. According to Minister Kenney, "[t]his is a serious problem because, when the integrity of our immigration system is compromised, it undermines the entire immigration process, and it undermines the confidence and respect

* Associate Professor, Faculty of Law, University of Ottawa (Common Law Section) and co-editor with Lorne Sossin of *Judicial Independence in Context* (Toronto: Irwin Law, 2010). The author has experience working with the judiciary in three countries, having clerked at the Supreme Court of Canada, the US Court of Appeals for the Ninth Circuit and the Supreme Court of Israel. He also worked interdependently with the judiciary as Senior Policy Advisor and then Chief of Staff to the Attorney General of Ontario (2003–06). He has written about judicial independence and other subjects. See generally Adam M Dodek's Scholarly Papers, online: Social Science Research Network <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=888207#reg>; See also Adam M Dodek, "Pornography Decision: Who is Guardian the Guardians?", *The Toronto Star* (15 February 1999) and Adam M Dodek, "Court Bashing: Finally, an issue to unite the right", *The Toronto Star* (16 March 1999).

1 See Minister Jason Kenney, "Dialogue with the Courts: Judicial Actions and Integrity of Canada's Immigration and Refugee System" (Speech by Minister Kenney delivered at the Faculty of Law, University of Western Ontario, 11 February 2011), [unpublished], online: Jason Kenney <http://www.jasonkenney.ca/news/minister-kenneys-speech-dialogue-with-the-courts-judicial-actions-and-integrity-of-canadas-immigration-and-refugee-system-given-at-university-of-western-ontario-law-school-february-11–2011/> [Kenney Speech].

for that process that we require amongst all of those law-abiding immigrants. When Canadians—and furthermore, when Canadians don't think the government can control its own borders, public support for generous levels of immigration drops significantly."[2] He then outlined the work that his government had done to strengthen the integrity of the immigration system. Minister Kenney then turned to the courts.

Minister Kenney identified the Federal Court's interpretation of the laws that Parliament had passed as "a recurring challenge to any attempt to reform Canada's immigration system." He asserted that government reforms would be for naught if we "can't find a way to reduce the interminable process by which immigration cases creep through the courts, slouching from one appeal to the next to the next, the changes will be of little use, and the progress that Parliament and the government has made will be for naught." As evidence, Mr. Kenney provided the details of convicted hijacker Parminder Singh Saini who waged a 15-year battle against removal from Canada.[3] He then discussed the reforms contained in various legislation.

Focusing squarely on the courts, Minister Kenney stated that he believed that "in a free and democratic society such as ours, judicial decisions should encourage debate over where the line is drawn between legitimate legislative objective and constitutionally protected rights and freedoms." Minister Kenney then invoked the Supreme Court of Canada, stating: "I believe Justice Iacobucci put it best when he wrote that our constitutional structure encourages a dialogue between each of the branches. With that in mind, I offer the following thoughts in the spirit of constructive dialogue between the legislative branch and the judiciary."[4] Minister Kenney continued and asserted that the "integrity of the decisions made by the decision makers" in his department was being questioned too often by courts without sufficient justification. He also criticized the courts on various other issues related to their handling of immigration matters and claimed that Canadians were frustrated by actions

2 *Ibid.*

3 Mr. Saini was convicted of hijacking a plane from India to Pakistan in 1984 and served ten years in jail in India before entering Canada in 1995 under a false name and making a successful claim for refugee status: See generally *Saini v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 153, 94 Imm LR (3d) 165. During this time he completed law school and all the requirements for being called to the bar in Ontario. The only issue was whether he was of good character. The Law Society of Upper Canada decided that he was not: See *Parminder Singh Saini of the City of Brampton (Applicant) and The Law Society of Upper Canada (Respondent)*, 2010 ONLSHP 5 (CanLII).

4 Kenney Speech, *supra* n 1.

such as these.[5] He concluded by saying that he believed that it is important to engage in a "dialogue" with the judiciary on these matters because "we legislators are not an island, and we don't act alone. We need the judiciary to understand the spirit of what we are trying to do."[6]

The reaction to the speech from the legal community was swift and strongly negative.[7] The Canadian Bar Association (CBA) issued a statement asserting that "recent criticism of judges and courts by the federal Minister of Citizenship, Immigration and Multiculturalism will erode public confidence and weaken the administration of justice."[8] In a letter written to the Minister, the CBA's president chastised Mr. Kenney for his comments: "Your public criticism of judges who follow the law but not the government's political agenda is an affront to our democracy and freedoms. The effectiveness of the administration of justice depends, in large measure, on public confidence. Public comments by a Minister of the Crown with unjust criticism of judges and courts erodes that public confidence and weakens the administration of justice."[9] The president proceeded to criticize the Minister for inviting the Federal Court to engage in a "constructive dialogue." The president then laid out his understanding of dialogue, concluding with the assertion that the executive "does not … have the option of publicly reprimanding the judiciary for not supporting its political agenda."[10]

The CBA President concluded by asserting that "[o]ther countries look to Canada's justice system as a model. Canadians expect their political leaders to build respect and public confidence in our judicial system. Your public criticism of an entire court and specific judicial decisions that you think do not advance the government's agenda can only undermine the respect and public

5 *Ibid*.

6 *Ibid.*

7 See e.g. Chris Carter, "Strong Reaction to Kenney Speech" *CBC News, Inside Politics Blog* (22 February 2011) online: CBC News <http://www.cbc.ca/news/politics/inside-politics-blog/2011/02/kenney-speech-drawing-fire.html> and Audrey Macklin & Lorne Waldman, "When cabinet ministers attack judges, they attack democracy" *The Globe and Mail* (18 February 2011) online: The Globe and Mail <http://www.theglobeandmail.com/news/opinions/opinion/when-cabinet-ministers-attack-judges-they-attack-democracy/article1912110/>.

8 Canadian Bar Association, News Release, "CBA criticizes Immigration Minister's comments about judges" (22 February 2011) online: CBA <http://www.cba.org/CBA/News/2011_Releases/2011–02–22-Kenney.aspx>.

9 Letter from Rod Snow, President, Canadian Bar Association, to The Honourable Jason Kenney, PC, MP, Minister of Citizenship, Immigration and Multiculturalism (22 February 2011), online: CBA <http://www.cba.org/CBA/submissions/pdf/11–12-eng.pdf> [Snow Letter].

10 *Ibid.*

confidence upon which our system depends."[11] Six months later, the Chief Justice of Canada revived the controversy by thanking the CBA for coming to the defence of the courts "to preserve judicial independence and public confidence."[12]

Several months after "L' affaire Kenney" erupted in Canada, similar attacks on the immigration system were launched in England. The attackers charged that immigrants allegedly exploit the British legal system in a "wholly abusive" manner, asserting that 85 percent of them have no merit. The critics took direct aim at the judicial review process, noting that out of 12,500 judicial reviews in 2010, about 7,500 concerned asylum or immigration. These judicial reviews occur after the claims have been considered and dismissed by the Secretary of State and at least one immigration tribunal, thus making the judicial review "the second—or sometimes the third or fourth—bite at the cherry." They further claimed that "Most claims fail, most of the claims which fail are without merit, and many are wholly abusive of the court's process" and criticized the role of lawyers in the process.[13]

The substance of the concerns and criticisms expressed in both Canada and England are quite similar. The difference is that in England they were launched by judges. The above accusations were levelled by the Judicial Council of England and Wales, the body of judges that advises the Lord Chief Justice on judicial matters. This body is also responsible for defending judicial independence.[14]

These two events on separate shores of the Atlantic provide an interesting lens through which to consider the politics of judicial independence, which is both the title and the subject of a collection of ten essays edited by Bruce Peabody, a political scientist at Fairleigh Dickinson University in Madison,

11 *Ibid*.

12 See The Rt Hon Beverley McLachlin, "A busy court, access to justice, and public confidence" (Speech to the Council of the Canadian Bar Association, delivered at the Canadian Legal Conference, Halifax, NS, 13 August 2011), [unpublished] online: iPolitics <http://ipolitics.ca/2011/08/16/beverley-mclachlin-address-to-the-council-of-the-canadian-bar-association/>.

13 Judges' Council of England and Wales, "Response of a Sub-Committee of the Judges' Council to the Government's Consultation Paper", CP 12/10 *Proposals for the Reform of Legal Aid in England and Wales* at para 17, online: http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/response-judges-council-legal-aid-reform-consultation.pdf. See generally James Slack, "Judges launch scathing attack on the 'abusive' way migrants exploit appeals and say most cases have no merit" *Mail Online* (20 June 2011) online: Daily Mail <http://www.dailymail.co.uk/news/article-2005634/Judges-scathing-attack-abuse-migrant-appeals.html>.

14 See Judges' Council of England and Wales, online: Judiciary of England and Wales <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/index/judges-council>.

New Jersey. Subtitled "Courts, Politics and the Public," *The Politics of Judicial Independence* is very much concerned with challenges to judicial independence in the United States, although it has two chapters devoted to issues outside that country. However, much of the analysis is relevant to the consideration of judicial independence in Canada and elsewhere.

If, as CBA president Rod Snow stated, Canada's justice system serves as a model to nations elsewhere,[15] as it surely does, we should also take stock and be self-critical. As Lorne Sossin and I have written, judicial independence is a highly dynamic and contextual concept.[16] It is therefore through the lens of a Canadian scholar that I reflect upon what will be of interest to Canadian readers in *The Politics of Judicial Independence.*

The Politics of Judicial Independence is a book of essays written primarily by political scientists. It is fair to say that as a group, political scientists do not share in the absolutist positions regarding judicial independence that are often propagated by lawyers and legal organizations. Political science often offers a more nuanced and methodologically rigorous analysis of the courts and of judicial independence at both the qualitative and quantitative levels.

In his introduction, Peabody explains that his book is 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."[17] Peabody attempts to situate *The Politics of Judicial Independence* within what he identifies as relevant scholarship sets. The first set of research examines "the relationship between courts and elected officials and the conditions under which politicians, interests groups, and the public can direct, influence, temper and even neutralize judicial authority and judgments."[18] In Canada, some of the dialogue about the relationship between the courts and elected officials would fall into this category, as would scholarship on the influence of interest groups. The second set of research focused on aspects of judicial independence such as how it should be defined, what its purposes are and how a judiciary becomes compromised by political and electoral forces.[19] In Canada, there have been limited attempts to address these issues comprehensively. As in many subjects related

15 Snow Letter, *supra* n 9.

16 Adam Dodek & Lorne Sossin, "Judicial Independence in Context" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 1 at 1.

17 Bruce Peabody, ed, *The Politics of Judicial Independence* (Baltimore: The St. John's University Press, 2011) at 1.

18 *Ibid* at 2.

19 *Ibid*.

to the courts, Peter Russell has led the way.[20] On this research set, Peabody asserts that much of the literature on judicial independence focuses on countries outside the United States as it 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."[21] The third body of related research "considers the seriousness, validity, and merits of different criticisms leveled against the contemporary judicial system, like the charge that certain judges are 'activist.'"[22] Canadians are familiar with this debate from charges levelled against the Lamer court in the 1990s.

The Politics of Judicial Independence is grounded in this literature but attempts to move in a new direction through identifying two orientation points: (1) the fixation on judicial power and independence in the United States and around the world is likely to continue to be politically significant, as it will continue to operate in an environment of heightened scrutiny of the judiciary for the foreseeable future; and (2) the need to expand traditional ways of discussing judicial independence "in order to evaluate better whether contemporary critiques of courts and judges are problematic or even historically unusual."[23] This latter point is of particular interest to Canadian readers because the analysis of critique of courts and judges in Canada has been analytically anemic.

Peabody believes that it is important to put current criticism of courts and judges in historical perspective. He asserts that the American judiciary "has been the target of elected officials, interest groups, and the broader public since before the ratification of the Constitution…. Nevertheless, recent decades have seen a significant change in the frequency and intensity of criticism of American courts."[24] Peabody analyzes the treatment of the judiciary in national party platforms and congressional "court-curbing legislation" since 1945.[25] He concludes that up until 1976, both Democrats and Republicans

20 See Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987); Peter H Russell, "Toward a General Theory of Judicial Independence" in Peter H Russell & David M O'Brien, eds, *Judicial Independence in the Age of Democracy* (Charlottesville & London: University Press of Virginia, 2001) 1; and Peter H Russell, "Conclusion: A General Theory of Judicial Independence Revisited" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 599.

21 Peabody, *supra* n 17 at 2.

22 *Ibid* at 2.

23 *Ibid* at 3.

24 *Ibid* at 4–5.

25 *Ibid* at 7. Peabody identifies four "waves" of court-curbing legislation. Wave 1 from 1948–1966 when an average of 4.73 court-curbing bills were introduced in Congress; (2) 1967–1983 (average of 18.52 bills); (3) 1984–2002 (average of 4.42) and (4) 2003–2008 (average of 13.17 bills).

mostly ignored the courts and appeared deferential to courts in official party statements. Since that time, all Republican platforms from 1976 to 2008 (except for 1984) made some negative reference to the judiciary.[26] Peabody also finds it notable that four out of the final five of George W. Bush's State of the Union Speeches and Barack Obama's 2010 State of the Union contained criticisms of the judiciary.[27] In contrast, four out of five Throne Speeches from the Harper Government did not mention the judiciary and one speech was deferential to neutral regarding the judiciary.[28]

Peabody identifies additional trends suggesting that American courts will face an unusual and hostile political climate in the foreseeable future: bipartisan interest in reform and critique; heightened interest group activity in court critique; more overt public exchanges between judges and critics; and state criticism of courts. Peabody asks how we are able to assess concerns about judicial independence unless we define judicial independence and identify its social value. In short, what is judicial independence and what it is good for?[29] A number of scholars have struggled with this question.

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26 *Ibid* at 5.

27 *Ibid* at 8. President Obama's criticism was probably the most strident as he took aim at the recent Supreme Court decision of *Citizens United v Federal Electoral Commission*, 558 US 50, 108 S Ct 876 (2010), with six justices in attendance.

28 See Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, "Speech from the Throne" (Speech delivered to Parliament in Ottawa, ON, 4 April 2006), [unpublished] online: Prime Minister of Canada <http://pm.gc.ca/eng/media.asp?id=1087> (no mention of courts or judges); Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, "Speech from the Throne: Strong Leadership. A Better Canada" (Speech delivered to Open the Second Session of the 39th Parliament of Canada, 16 October 2007), [unpublished] online: Privy Council Office <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2007-eng.htm> ("**Our government will address Canadians directly on the challenge of protecting our free and open society with a statement on national security. The government will introduce legislation to make sure that Canada has the tools it needs to stop those who would threaten our cities, communities and families, including measures to strengthen the Anti-Terrorism Act and to respond to the Supreme Court decision on security certificates.**"); Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, "Speech from the Throne: Protecting Canada's Future" (Speech delivered to Open the First Session of the 40th Parliament of Canada, 19 November 2008), [unpublished] online: Privy Council Office <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2008-eng.htm> (no mention of courts or judges); Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, "Speech from the Throne" (Speech delivered to Parliament in Ottawa, ON, 26 January 2009), [unpublished] online: Government of Canada <http://www.sft-ddt.gc.ca/eng/media.asp?id=1384> (no mention of courts or judges); His Excellency the Right Honourable David Lloyd Johnston, Governor General of Canada, "Speech from the Throne" (Speech delivered to Parliament in Ottawa, ON, 3 June 2011), [unpublished] online: Government of Canada <http://www.sft-ddt.gc.ca/local_grfx/docs/sft-ddt-2011_e.pdf> (no mention of courts or judges).

29 Peabody, *supra* n 17 at 12.

Thus, Peabody identifies what he describes as "the traditional understanding of judicial independence." It rests upon three foundational beliefs: "First, it sets the judiciary apart from the other branches of government. The need for 'independence' seems to be a peculiar concern for courts and judges."[30] Second, the courts are institutionally fragile, since they lack a power base and any substantial capacity to influence the other branches of government. Third, the special functions of courts in our legal and political order make it important to defend the courts' distinctiveness.

The Politics of Judicial Independence sets out to expand and question these traditional approaches. It succeeds in opening up the conversation about judicial independence rather than closing it down, which is sometimes seen in assertions about judicial independence.[31] Peabody and many of the contributors in this text challenge the assertion that "independence" is "uniquely important for defending courts and their prerogatives."[32] Instead, they focus on the interdependence between the courts and other branches of government. Peabody challenges the often-invoked catchphrase that the courts are the weakest branch of government, noting that the courts are hardly shadow players in American politics.[33] The same can surely be said about the courts in Canada.[34]

Peabody argues that an analysis of judicial independence necessitates "moving beyond the presumptions that courts work best in political isolation, that they necessary operate from a position of institutional weakness, and that their independence is primarily justified by strictly legal objectives."[35] Thus, Peabody restates his account of judicial independence as "an independent court is one that can fulfill the judicial role without improper political influence from external or internal forces. Such an account concedes that the courts regularly face political pressures and agendas but denies that this exposure automatically imperils judicial functions."[36] The question of what is "improper" versus acceptable political influence is a defining one for this book and for judicial independence.

30 *Ibid* at 13.

31 On this topic see Roger E Hartley, "Judicial Independence as Political Argument", *Law and Courts Newsletter* (Summer 2011) online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858109>.

32 Peabody, *supra* n 17 at 14.

33 *Ibid* at 15.

34 See e.g. Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Viking, 2011).

35 Peabody, *supra* n 17 at 17.

36 *Ibid* at 17.

The first two chapters of *The Politics of Judicial Independence* deal with conflict between the courts and the US Congress. The two authors, Charles Geyh (Indiana University School of Law) and Neil Devins (William and Mary Law School) have written prolifically on this subject.[37] It is notable that these chapters are two of the few contributed by law professors. Both provide a much wider perspective on judicial independence and the relationship between the courts and Congress than is often found within the legal academy and the profession.

In "The Choreography of Courts-Congress Conflicts," Charles Geyh documents how conflict between the two branches have been an ordinary feature of American politics. Geyh identifies seven periods of anti-court sentiment in American history which follow a pattern than he likens to a four-step dance: "first comes political realignment; then attacks against holdover judges; counter-attacks against court critics; and, finally, normalization."[38] Geyh explains that the declining effectiveness of cyclical attacks on federal courts and judges has resulted from the development of norms of judicial independence (what he calls "customary independence") "that emerged in the nineteenth century, became increasingly entrenched with each passing cycle, and gradually enabled court defenders to thwart anti-court campaigns more effectively."[39] The net effect of this entrenchment is that it has become politically unacceptable for Congress to use its strongest, most destructive weapons for controlling rogue judges: impeachment, budget cuts, disestablishment of targeted courts, the wholesale stripping of subject matter jurisdiction or simple defiance of court rulings.[40]

Geyh's comments on "dialogue" between courts and legislatures are worth considering. Geyh dismisses such terminology because the idea of "measured and civil exchanges [does] not capture the rough and tumble of the interaction in its ordinary course. . . ." Instead, Geyh likens the relationships to a schoolyard fracas.[41] Normatively, he does not see a problem with at least some of this interaction which he views as part of the normal friction between two branches of government. Since the Supreme Court of Canada endorsed Hogg's dialogue theory in 1998,[42] commentators and critics have

37 See e.g. Neal Devins & Keith Whittington, *Congress and the Constitution* (Chapel Hill: Duke University Press, 2005); and Charles Geyh, *When Courts and Congress Collide: The Struggle For Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006).

38 Peabody, *supra* n 17 at 19–20.

39 *Ibid* at 22.

40 *Ibid*.

41 *Ibid* at 23.

42 See *Vriend v Alberta*, [1998] 1 SCR 493 at paras 137–39, 178, 156 DLR (4th) 385.

appropriated this language and applied it well beyond the parameters set out by Hogg & Bushell in their 1997 law review article.[43] As discussed in more detail below, Minister Kenney's invocation of the dialogue metaphor supports Geyh's analysis.

Most interesting for Canadian readers, Geyh employs a three-tiered typology of courts–Congress disputes: (1) forms of interaction that are used regularly or without much controversy; (2) forms of interaction that are used sparingly and only in exceptional circumstances; and (3) forms of interaction that are avoided as antithetical to independence norms and what is presumed to be appropriate relationship between the two groups."[44]

In his "Tier One" group of forms of interaction between the courts and Congress that are used regularly and without controversy, Geyh places the following methods available to Congress: critical commentary, legislative override of a court's statutory interpretation, introduction of constitutional amendments, the judicial confirmation process, judgeships legislation, encouraging judicial self-regulation, general regulation of court jurisdiction, lesser restrictions on judicial review, and the budgetary process. Tier One methods available to the courts include commentary (critical and not); judicial conference policy positions; year-end reports on the Federal judiciary; judicial review; and the "passive virtues" of justiciability doctrines which allow courts to avoid or dismiss matters.[45]

Forms of interaction reserved for exceptional circumstances in the Tier Two category available to Congress include threats to impeach errant judges, threats to alter court size, disestablish courts and cut budgets; significant manipulation of subject matter jurisdiction and "jurisdiction-stripping proposals."[46] Comparable tools for the courts involve exploiting the power of judicial review to further the judiciary's institutional self-interest; and lobbying against such legislation. Geyh sees this as potentially threatening "to disrupt the dynamic equilibrium that has preserved independence norms for generations." He warns that "[i]f the courts do not want Congress to jettison independence norms and exploit the greatest powers at its disposal to manipu-

43 See Peter W Hogg & Alison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

44 *Ibid.*

45 *Ibid* at 29–31.

46 *Ibid* at 31–34.

late judicial decision-making, then judges must think twice about using such powers to manipulate congressional decision-making." [47]

Tier Three methods unacceptable for Congress include making good on the threats from Tier Two: impeachment, disestablishment, budget courts, stripping courts of subject matter jurisdiction and open defiance of court rulings.[48] Courts may have potential responses to such methods which have not yet been used, making their very existence uncertain. These include asserting the inherent power over court budgets and the inherent power to remove judges under the common law.

Neal Devins's contribution, "Congress and Judicial Supremacy," sets out to solve the following "puzzle": Why is today's Congress so willing to criticize judicial decision-making but so reticent to use court-stripping and other powers to check the courts?[49] Through the use of case studies, Devins concludes that ideological divisions in Congress are unlikely to produce the necessary anti-courts coalition; that Republicans have little to gain and much to lose by taking aggressive action against the courts; that lawmakers who disapprove of the court decisions can take action short of enacting legislation; and, finally, that stripping a court of jurisdiction does not actually overrule prior decisions. Devins ends with a caution that widespread accusations of judicial activism against a court can erode its "reservoir of support."[50]

In his chapter "Presidential Manipulations of Judicial Power," political scientist Stephen Engel (Marquette) observes that politicians usually attempt to exploit judicial legitimacy, not to undermine it. This statement applies even more strongly to Canada with our preclusion for appointing judges to conduct reviews, head public inquiries, advise government, etc.[51] Engel notes that most presidents tend to defer to the judiciary as the ultimate interpreter of the Constitution, but that a few presidents have claimed to a right to interpret the Constitution independently. Most notably, Abraham Lincoln "found a way to maintain judicial authority without deferring to it as supreme."[52] In Canada,

47 *Ibid* at 35.
48 *Ibid* at 36–38.
49 Peabody, *supra* n 17 at 45–46.
50 *Ibid* at 66.
51 See generally Adam Dodek, "Judicial Independence as Public Policy Instrument" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 295 [Dodek, "Judicial Independence as Public Policy Instrument"].
52 Peabody, *supra* n 17 at 92.

judicial exclusivity is virtually unchallenged,[53] especially as the notwithstanding clause of the *Charter* has become a political taboo. In part, the greater strength of judicial exclusivity in Canada has to do with different constitutional histories and traditions in Canada and the United States.

Presidents and prime ministers have great opportunities to shape the judiciary through their appointments to the bench. Engel argues that we need to think beyond judicial appointment in terms of presidential influence on the judiciary.[54] Other contributors, including Mitchell Pickerill, pick up this thread.

Mitchell Pickerill's contribution, "Institutional Interdependence and the Separation of Powers" is a reminder that the judiciary does not operate in isolation. Rather, it functions in "a dynamic environment of mutual deference, conversation, criticism, and adjustment."[55] Pickerill, a political scientist at Washington State University, asserts that institutional interdependence, comity and accommodation are the necessary background for evaluating attacks on the courts. According to Pickerill, "while a number of attacks on courts may be ill-advised and impolitic," when they are properly understood, "they do not constitute a serious threat to the U.S. judiciary."[56] Pickerill then reviews attacks on the US judiciary in the first decade of the 21st century and strong opposition to such efforts by the likes of retired US Supreme Court Sandra Day O'Connor. Pickerill challenges the assertion that politicians in the US "are seeking to compromise the independence and impartiality of courts to achieve their own policy or partisan objectives."[57] He believes that it is not clear how accurate these fears are. They may amount to real threats or they may have created the perception of a problem. Pickerill believes that the concerns about the compromising of judicial independence "are based on an outdated notion that courts actually exercise power in a hermetically sealed world without any connections to the broader political universe." Pickerill

53 See Graham Huscroft, "'Thank God We're Here': Judicial Exclusivity in Charter Interpretation and its Consequences" (2004) 25 SCLR (2d) 241; Janet Hiebert, "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 British Journal of Political Science 235; Janet Hiebert, "New Constitutional Ideas: But can new parliamentary models resist judicial dominance when interpreting rights?" (2004) 82 Texas Law Review 1963; and Janet Hiebert, "Why must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative," (1999) 10:1 Public Law Review (Australia) 22.

54 Peabody, *supra* n 17 at 99.

55 *Ibid* at 100.

56 *Ibid* at 101.

57 *Ibid* at 105.

pleads for both an empirical as well as a normative understanding of judicial independence.[58]

According to Pickerill, the judiciary is more interdependent than independent of the other branches of government. The judiciary is both influenced by and influences other branches of government.[59] For both the US and Canada, this is a far more useful account of the relationship between the branches than the notion of dialogue, which has limited explanatory use.[60] Pickerill asserts that the courts' relative independence has to be assessed in the context of how it and the other branches of government share powers and participate in institutional decision-making: "Courts are inherently connected to politics and the other branches of government in basic ways."[61] Pickerill explains that the laws that judges are interpret are the product of politics, judges attain office through political processes, Congress controls the judiciary's budget, and the courts rely on the other branches to enforce or implement judicial decisions.[62]

Pickerill's point regarding interdependence applies with even more force in Canada because there is no formal separation of powers under our Constitution (but there is a functional separation of powers between executive, legislative and judicial power).[63] Thus, judges in Canada exercise more legislative and executive powers than they do in the United States. While their role is more symbolic than functional, the Chief Justice of Canada (and of each province) serves as the Deputy Governor General (or deputy Lieutenant Governor) and provides royal assent to laws in the absence of the Governor General (or Lieutenant Governor). Canadian judges serve on executive-created public inquiries, reviews and other assignments.[64] Judges also work with the executive in the judicial appointment process, either formally through their membership in judicial appointments committees[65] or informally by being consulted by

58 *Ibid*.

59 *Ibid*.

60 Hogg and Bushell's dialogue theory was not intended as a grand theory of the relationship between the judiciary and other branches of government. Rather, it was both a normative and descriptive theory of the single issue of judicial review. See Peter W Hogg & Alison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75. In this sense, Minister Kenney's invocation of the "dialogue" metaphor is inapt.

61 Peabody, *supra* n 17 at 108.

62 *Ibid* at 108–09.

63 See *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 33.

64 See Dodek, "Judicial Independence as Public Policy Instrument", *supra* n 51.

65 See e.g. *Courts of Justice Act*, RSO 1990, c C-43, s 43 (providing for the establishment of a judicial appointments advisory committee composed of two provincial judges appointed by the

the executive on judicial appointments. References are a Canadian example of a highly politicized process that demonstrates the interdependence of the courts and the other branches of government. Finally, court administration is the best example of day-to-day interdependence between the courts and the executive.[66]

Rethinking simplistic accounts of judicial independence leads Pickerill to conclude that the many of the attacks on the judiciary in the first decade of the 21st century were largely about Republican politicians signalling to their voters that they were concerned about their issues.[67] Pickerill does not find efforts to curb courts or expressions of disagreement to be unusual or unexpected: "[c]ourts and judges can no more exist above criticism than any other political institution or actor…. Absent evidence that judges have indeed been coerced into becoming mere agents of elected officials or otherwise obstructed from participating in an inter-institutional system of shared powers, it is farfetched to claim that independence, autonomy, or institutional parity have been compromised as a result of these "assaults" on the judiciary."[68]

A contribution by political scientist Tom Clark (Emory University) on "The Public and Judicial Independence" continues the theme of criticisms of the courts. Clark examines the motivation behind Congressional attacks on the judiciary and concludes that they can usually be sourced to public dissatisfaction with the courts. Clark finds that many of the anti-judicial Bills introduced (but not passed) in Congress satisfy voters' desires.[69]

Much of the criticism of courts and judges in the US today is aimed at state courts and their judges. These judges obtain office through a variety of processes but many are elected[70] (all federal judges are appointed by the presi-

Chief Justice of the Ontario Court of Justice, three lawyers, seven lay persons and a member of the Ontario Judicial Council). On the Ontario Committee see "Judicial Appointments Advisory Committee", online: Ontario Court of Justice <http://www.ontariocourts.on.ca/jaac/en/>.

66 For a recent explanation of the respective roles of the judiciary and the Ministry of the Attorney General and of how they work together in compiling court statistics see *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172, 104 OR (3d) 588.

67 Peabody, *supra* n 17 at 122.

68 *Ibid.*

69 For a full-length account of Clark's analysis see Tom S Clark, *The Limits of Judicial Independence* (Cambridge: Cambridge University Press, 2011).

70 For a comprehensive overview of the methods of appointment of US state judges see Jameson W Doig, "Judicial Independence in the United States?—Complexities and a Sometime Thing" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 411.

dent and must be confirmed by the US Senate[71]). Northern Illinois political scientist Matthew Streb's chapter "Judicial Elections and Public Perception of the Courts" provides some counterpoint to the conventional wisdom regarding US state judges. Streb finds that the American public's perception of state courts does not differ significantly from that of federal courts. The American public strongly supports the idea of an elected state judiciary. Surprisingly, Canadian polls show both a high level of satisfaction with the courts as well as a strong desire for an elected judiciary.[72] In a realist assessment, Streb accepts that judicial elections are unlikely to disappear in the states and focuses on reforms to improve the process such as nonpartisan elections and public financing. Streb identifies conflicts of interest as the biggest concern for the future of judicial legitimacy, specifically those involving judges and campaign contributors.[73] However, he concludes that the more serious threat to judicial legitimacy is the initiative processes that exist in twenty-four states. Streb asserts that state judiciaries are often forced to invalidate such measures because they are unconstitutional and this can create great resentment against judges.[74] This serves as a caution for supporters of such Canadian proposals in the name of addressing the "democratic deficit."

There are only two comparative chapters in this collection and unfortunately neither discusses Canada. Jason Pierce's "Conflicts with Courts in Common Law Nations" addresses only Great Britain and Australia, while Israel is the focus of Maya Sabatello's "The Siege on the Israeli Supreme Court." As is frequently the case with comparative offerings, both authors justify the relevance of their contributions to a book on judicial independence in the United States. Recalling assaults on judicial independence in Venezuela, Zimbabwe and Pakistan, Pierce questions the value of a book on the relatively minor incursions against judicial independence in the United States. He explains that an understanding of assaults against judicial independence around the world puts the American situation into perspective and that comparisons with jurisdictions like Great Britain and Australia "enables finer distinctions and more precise conclusions to be drawn about the U.S. experience."[75] The comparison with Israel requires more explanation. According to Sabatello, Israel shows that in a politically and religiously divided society, human rights advanced by courts may be controversial. Second, the Israeli high court has

71 US Const art I, § 2.

72 See Kirk Makin, "Two-thirds back electing judges", *The Globe and Mail* (9 April 2007) online: The Globe and Mail <http://www.theglobeandmail.com/news/national/article751496.ece>.

73 Peabody, *supra* n 17 at 167.

74 *Ibid.*

75 *Ibid* at 171.

had a unique experience dealing with sensitive social, religious and political cases. Third, Israel's high court has long grappled with the democratic dilemmas of balancing human rights and national security in times of crisis. This is probably the most compelling point of the case for Israeli comparison. Finally, the Supreme Court of Israel is actively involved in "transnational law dialogue" or the exchange of ideas, cases, precedents etc between courts around the world.[76]

In the section on Great Britain, Pierce analyzes the impact of the United Kindgom's *Human Rights Act* on the courts. Some cases ignited significant criticism of the Act and of specific judges. One of the tabloid newspapers undertook a "naming and shaming campaign" where they published the names and mug-shot like photos of judges who were said to give soft sentences. The public was invited to submit their suggestions online.[77] The experiences of Great Britain, Australia and Israel all support what Pierce calls "juridification," the transfer of power to the courts to adjudicate significant public policy issues that has resulted in a predictable backlash. Canadian readers will be familiar with a similar thesis offered by Michael Mandel in *The Charter of Rights and the Legalization of Politics*.[78] According to Pierce, the High Court of Australia is under siege because of its constitutionalization of unenumerated or "implied rights," especially in the area of indigenous rights.[79] A similar case has occurred with the Supreme Court of Israel.

At first glance, the inclusion of a chapter on the Supreme Court of Israel in a collection devoted primarily to judicial independence in the United States is an odd one. However, Israel is often featured in collections on courts and judicial independence.[80] This is likely a factor of both the interest and the

76 *Ibid* at 193–94.

77 *Ibid* at 176.

78 Michael Mandel, *The Charter of Rights and the Legalization of Politics*, revised ed (Toronto: Thompson Educational Publishing, 1994).

79 Peabody, *supra* n 17 at 179–86.

80 See e.g. Shimon Shetreet, "The Critical Challenge of Judicial Independence in Israel" in Peter H Russell & David M O'Brien, eds, *Judicial Independence in the Age of Democracy* (Charlottesville & London: University of Virginia Press, 2001) 233; Eli M Salzberger, "Judicial Appointments and Promotions in Israel: Constitution, Law and Politics" in Kate Malleson & Peter H Russell, eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 241; and Amnon Reichman, "Judicial Non-Dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the *Provincial Judges Reference*—The Israeli Perspective" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 438.

accessibility of the Israeli judicial "story."[81] One may question why other comparable jurisdictions like Canada or New Zealand were not selected over Israel. However, the Israeli judicial experience has much to offer in way of reflection for those interested in the politics of judicial independence in the United States and elsewhere. As Sabatello explains, Israel is a poster child for the "judicialization of politics."[82] However, few courts have gone as far as the Supreme Court of Israel in adjudicating core political issues. It has adjudicated cases involving military exemptions for religious students, coalition agreements, peace treaties, etc. In the course of doing so it has basically eviscerated the doctrines of standing and justiciability. This combined with jurisdiction that provides direct access to the Supreme Court in many cases of judicial review has led to frequent, affordable and controversial litigation against government action at the High Court. For decades, the Supreme Court of Israel has also adjudicated sensitive security issues, which in a post-9/11 world has become increasingly relevant for other countries. There has been a backlash in response to the perceived activism of the Supreme Court of Israel. This has involved a drop in public trust of the court, mass marches and protests against the court, threats against individual justices and the introduction of jurisdiction-stripping legislation. The Israeli case study is thus a cautionary tale for judicial independence in terms of courts' relationships with other branches of government and with the public.

Judicial regulation is an underdeveloped area of scholarly interest in Canada.[83] Thus, lawyer Scott Gant's chapter on "Self-Regulation and an Independent Judiciary" provides stimulating thought for Canadians. The issue of regulation of the judiciary is an aspect of collective component of judicial independence. In Canada, there is a system of strong self-regulation for the judiciary established by federal and provincial regulation. At times, individual judges have unsuccessfully challenged aspects of this system as violating their constitutional rights.[84] In this chapter, Gant describes a different type of con-

81 It is likely also a factor that one of the leading scholars of judicial independence was and remains the Israeli academic Shimon Shetreet. See Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing Company: 1976); Shimon Shetreet & Jules Deschenes, *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985); and Shimon Shetreet & Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Boston: Martinus Nijhoff Publishers, 2011).

82 Peabody, *supra* n 17 at 199.

83 The leading work on the issue remains Martin Friedland's *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

84 See e.g. *Cosgrove v Canadian Judicial Council*, 2005 FC 1454, [2005] FCJ No 1748, [2006] 1 FCR 327, rev'd 2007 FCA 103, [2007] FCJ No 352, [2007] 4 FCR 714, leave to appeal to SCC refused,

stitutional challenge—that to the system of self-regulation in the US on the basis that the US Constitution, like the Canadian Constitution, provides that federal judges shall hold office "during good behaviour" and that their salaries shall not be diminished. Only Congress can impeach and convict federal judges in order to remove them from office. This is analogous to the removal of federally-appointed Canadian judges through a Joint Address to the House of Commons and the Senate.[85] These issues have been litigated in the US but to date the US Supreme Court has declined to rule on them, leaving the constitutionality of judicial self-regulation an open question. For Canadians, this is a cautionary tale.

In statements that apply equally to Canada, Gant asserts that self-regulation of the judiciary serves an important mutual need of the judiciary and the legislative branch: avoiding interbranch conflict.[86] The alternative to judicial self-regulation would be some agency charged with investigating judges and authorized to impose sanctions for perceived misconduct. Constitutionally, if Parliament or provincial legislatures can create self-regulating bodies for judges, they could alternatively create other forms of regulatory bodies for judges. In Canada, there is no doubt that such attempts would immediately be met with claims of infringement of judicial independence. But as Gant so aptly demonstrates in his chapter, the issue is much more complex.

In the final chapter of this collection, entitled "Judicial Credibility," Louis Fisher argues that many of the current debates about the US judiciary are "largely misguided and overly differential to the Court's purported position as our supreme expositor of constitutional law."[87] Fisher's contribution fits squarely within the body of "dialogue" literature in Canada. Fisher attempts to break away from much conventional debate about the court's role, contending that the issue is "not one of democratic legitimacy but how well the Court performs its constitutional task."[88] Fisher asserts that where the US Supreme Court "fails to make a persuasive case to elected officials and the public, it is seen as acting in an arbitrary and capricious manner."[89] Fisher argues against judicial exclusivity in constitutional interpretation and concludes that an

[2007] SCCA No 242; Canadian Judicial Council, *Report of the Inquiry Committee Concerning the Hon. P. Theodore Matlow* (May 2008), online: CJC <http://www.cjc-ccm.gc.ca/cmslib/general/CJC_20080528.pdf>.

85 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 99(1), reprinted in RSC 1985, App II, No 5.

86 Peabody, *supra* n 17 at 226.

87 *Ibid* at 227.

88 *Ibid* at 227.

89 *Ibid* at 228.

overly deferential approach to court rulings undermines self-government and a system of checks and balances.[90]

Conclusion

Judicial independence must be considered in context. *The Politics of Judicial Independence* helps put issues of judicial independence in Canada in perspective. The recent attack on the courts by Minister Kenney would only warrant a Tier One classification under Charles Geyh's rubric. Moreover, the statements by Chief Justice McLachlin in support of the Canadian Bar Association demonstrate the increasing willingness of judges in Canada to wade into policy and political issues. This is only likely to increase friction between the courts and other branches of government. However, as many of the contributors to *The Politics of Judicial Independence* have demonstrated, such friction is to be expected and perhaps welcomed. The judiciary, as body exercising public power, should not be above criticism. However, attempting to defend such criticism as part of an accepted "dialogue" between the courts and the executive mischaracterizes and misconceives the nature of this interaction. Minister Kenney levelled some very serious accusations against the operation of our immigration and refugee system in the courts. Corresponding critiques were levelled by the judges themselves in England. These parallel accusations demonstrate both the public interest in these issues and the interdependence of the courts and other branches of government. Claims of "judicial independence" should not be used as a trump card to silence legitimate public policy criticism.

In his letter to Minister Kenney, CBA President Rod Snow wrote that "Judicial independence exists for the benefit of all Canadians, not for the personal benefit of the judge…. Judicial independence is the cornerstone of the rule of law. A free and independent judiciary is the last line of defence against the power of the state and majority opinion."[91] President Snow is absolutely correct that judicial independence is a public asset. *The Politics of Judicial Independence* reminds us that it is a much more nuanced and complex concept than is often bantered about in political rhetoric. It also reminds us that defining and analyzing and defending judicial independence is not the monopoly of the courts or of the legal profession. This fact alone makes *The Politics of Judicial Independence* a valuable contribution to the literature on judicial independence.

90 *Ibid* at 248.

91 Snow Letter, *supra* n 9.