Book Review

Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America*. Cambridge: Harvard University Press, 2012, pp. 381, $29.80.

Reviewed by Laurie L. Levenson

Who do you fear more? In constructing a framework to understand the history of judicial independence in America, *The People's Courts* provides an indispensable service in probing what lies at the core of judicial independence. It is not a simple matter of resisting attacks on individual judges. Judicial independence is one of the most complex and nuanced issues in the law. Volumes have been written about it,[1] but few have been able to present the detailed historical context set forth in Professor Jed Shugerman's new book.

Judicial elections were originally an effort to avoid undue legislative or executive influence over appointees and to create greater judicial accountability

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1. *See generally* Michael P. Seng, What Do We Mean By an Independent Judiciary?, 38 Ohio N.U. L. Rev 133 (2011); Linda D. Jellum, "Which is to be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 UCLA L. Rev 837 (2009); Hon. D. Brooks Smith, Because Men are Not Angels: Separation of Powers in the United States, 47 Duq. L. Rev. 687 (2009); David E. Pozen, The Irony of Judicial Elections, 108 Colum. L. Rev. 265 (2008); Stephen Breyer, Judicial Independence: Remarks by Justice Breyer 95 Geo. L.J. 903 (2007); Charles Gardner Geyh, The State of the Onion: Peeling Back the Layers of America's Ambivalence Toward Judicial Independence, 82 Ind. L.J. 1215 (2007); Daniel M. Klerman, Legal Infrastructure, Judicial Independence, and Economic Development, 19 Pac. McGeorge Global Bus. & Dev. L.J. 427 (2007); Brian K. Landsberg, The Role of Judicial Independence, 19 Pac. McGeorge Global Bus. & Dev. L.J. 331 (2007); William H. Pryor, Jr., Judicial Independence and the Lesson of History, 68 Ala. Law. 389 (2007); Michael Traynor, Judicial Independence: A Cornerstone of Liberty, 37 Golden Gate U. L. Rev. 487 (2007); Ryan L. Souders, A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States, 25 Rev. Litig. 529 (2006); Hon. Harry L. Carrico, A Call to Arms: The Need to Protect the Independence of the Judiciary, 38 U. Rich. L. Rev. 575 (2004); Robert M. Howard & Henry F. Carey, Is an Independent Judiciary Necessary for Democracy?, 87 Judicature 284 (2004); Stephen B. Burbank, What Do We Mean by "Judicial Independence"?, 64 Ohio St. L.J. 323 (2003); Editorial: Judicial Independence at the Crossroads, 85 Judicature 260 (2002); John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. Cal. L. Rev. 353 (1999); Pamela S. Karlan, Two Concepts of Judicial Independence, 72 S. Cal. L. Rev. 535 (1999); Saikrishna B. Prakash, America's Aristocracy, 109 Yale L.J. 541 (1999); Joseph H. Rodriguez, New Threats to Judicial Independence, 35 Judges' J. 27 (1996); James Zagel & Adam Winkler, The Independence of Judges, 46 Mercer L. Rev. 795 (1995).

directly to the public. However, as politics changed, judicial elections made judges less independent. While those in favor of judicial independence sought refuge in the "rule of law," the pendulum swung back toward appointment systems that would give judges more freedom from direct political forces. Thus, the history of judicial independence in America has really been a story of how politics frame our discussion of how much power and how much accountability judges should have.

Jed Shugerman has done an expert job of chronicling the history of judicial selection in America. Unless one understands how the politics and economics of an era influence judicial independence, one cannot speak meaningfully about judicial independence. This book will challenge students to understand that the concept exists within an essential paradox—namely, that judicial independence requires judges to be both free from other democratic institutions, but also accountable to them.

What is Judicial Independence?

Shugerman starts with the basic question: What is judicial independence? He answers that "[j]udicial independence has different meanings, but at its core, it refers to a judge's insulation from the political and personal consequences of his or her legal decisions" (7). In other words, judicial independence is the freedom of judges to decide cases based upon what is right for the parties in that case and not what might serve to benefit the interests of others, including the judge.

Yet, in practice judicial independence is an elusive concept. Complete judicial independence is neither desirable nor possible for a judge. "General independence does not mean absolute autonomy; a judge might still be influenced informally by public opinion, elite opinion, reputation, and ambitions for promotion" (7). The pertinent question is really which institutions should have more or less influence over the judge. The reality is that as "judges become more independent from one set of powers [they become] more accountable to another" (7). Rather than speaking of absolute judicial independence, Shugerman uses history to explain the concepts of relative and general judicial independence. Relative judicial independence asks *from whom* the judge is independent. General judicial independence, by contrast, asks *how much* independence from political pressure the judge possesses. Reforms such as job security and protection of jurisdiction and salary foster general judicial independence. Reforms such as judicial selection foster relative judicial independence (7).

Shugerman uses the lens of American history to show how political interests and economics have shaped the concepts of judicial independence. In an era of corrupt appointments, reformers will push toward judicial elections. In an era in which judges seem to be at the arbitrary majoritarian will of the voters, reformers will support appointment processes. Today, when some fear that the electoral system will be corrupted by corporate influences, it is likely that those in favor of judicial independence will look again toward merit appointments.

Shugerman makes a compelling argument that the very "notion of what 'politics' judges [are] supposed to be independent *from* change[s] over time, in part because the notions of what kinds of politics [are] necessary [as opposed to corrupting] also change[s] over time"(6, italics in original). Thus, to truly understand judicial independence, one must understand the history of judicial selection in America. Ranging from Thomas Jefferson and Alexis de Tocqueville to Rose Bird and the Supreme Court's decision in *Citizens United*,[2] this book makes the reader a witness to history as the pendulum of judicial independence swings from one reform to another. Ironically, judges are rarely the motivating force for these changes. Rather, most of the influences are external and framed by those whose livelihoods and values are affected most by the courts.

Before reviewing briefly Shugerman's history of judicial independence reforms, it might be best to recall why we care. Although Shugerman does not dwell on this question, establishing trust in the judiciary underlies the discussion throughout the book. We care about judicial independence because the people's trust in the judiciary and its effectiveness depends heavily on whether judges are seen as pawns of corrupting influences or as paragons of integrity. The ability to attract qualified individuals to serve as judges is easily influenced by the reputation of the judiciary. Further, judges' ability to influence the law depends on whether they have the political stature that will result in the enforcement of their rulings. Most importantly, judicial independence plays a fundamental role in separation of powers. The history of judicial independence in America is really a story about the role of separation of powers in our democratic system.

Shugerman's book is a wonderful history of judicial independence, but its relevance goes far beyond that. Today, we face fundamental questions about the role of judges, how judges should be selected and how long they should serve. We are moving toward another crossroads as we decide between "a flawed-but-promising judicial meritocracy and a flawed-and-worsening judicial plutocracy" (12). Americans will need to make some important decisions regarding judicial reform. Understanding the history of judicial independence in America may, as Shugerman states, "help us find a plausible path back to judicial independence" (12).

In a chronological review of judicial independence in America, Shugerman teaches the fundamental lessons that must be understood in order to tackle current challenges to independence. With interesting anecdotes and scholarly detail, Shugerman takes the reader through the history of judicial appointments, elections, and judicial politics in America.

Lessons of the Colonial Era: "What is a Judge?"

From the beginning, Shugerman compels the reader to rethink the very notion of how judges might operate. Today, we think of judges as persons of

2. Citizens United v. FEC, 130 S.Ct. 876 (2010).

authority who decide individual cases. However, that has not always been the case. In colonial times, judges were part of the aristocracy of power. Borrowing from the British system, elected members of legislative assemblies doubled as judges and local elected officials who wore the different hats of each branch of government. Thus, "[c]olonial assemblies not only exercised control over judges; they also served as judges, similar to the English House of Lords" (15).

As Americans pursued independence from England, the Founding Fathers, including Benjamin Franklin, advocated a system of judicial independence based upon the concept of "during good behavior." Judges could serve as long as they "behaved well" and generally performed their duties. The goal was to insulate judges from removal based upon the mere whim of the other branches of the government. Thus, while legislators still had the power to choose judges, job security would give judges a certain amount of independence in making their decisions.

The Federal Constitutional Convention embraced this approach in drafting Article III of the federal Constitution,[3] but the provision met with considerable resistance amid growing concerns that life-tenure judges would be too powerful and aristocratic. Thus, crafting a mechanism to remove judges who demonstrated too much of a tendency toward judicial supremacy became critical. For early Americans, judicial independence meant independence from England or legislators who sought to control the courts.

The idea of judicial elections grew from a desire to make judges more accountable to popular control and to establish a democracy based upon separation of power. However, opposition to judicial power was not the only impetus leading to judicial elections. "Instead, [judicial elections] were a shield to defend localities against the elite outsiders in more remote capitals, and they were a means of separating powers to increase the courts as a check against legislative power" (58). Election of judges was a colonial frontier practice. Thus, for example, Vermonters in 1777 rebelled against New York's remote legal regime by electing their own judges.

There was another governing force leading to states' early experiment with judicial elections. In Georgia, for example, judicial elections were a reaction against corruption in the state legislature. Given that the legislature had been appointing the judges, the best check on the legislative powers was to shift power from the legislature to the people. Judicial independence was not thought of as absolute lattitude for judges to do as they please. Rather, it was a political vehicle to make judges more accountable to the people than legislators in making their decisions.

Finally, judicial elections were adopted because they served political and personal agendas. For example, in the Indiana territory in 1816, electing

3. Article III, Sec. 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

judges provided a vehicle for ousting Virginia Aristocrats who favored slavery and replacing them with frontiersmen who were strongly antislavery. Judicial independence was focused less on protecting the will of the individual judge than on the political forces the judge's election or appointment would serve. Shugerman gives a state-by-state analysis of early judicial elections that poignantly proves his point. "In Mississippi—as well as in Vermont, Georgia, and Indiana—interest groups framed judicial elections in terms of judicial independence" (83). Judges decided cases, but their independence was determined by whether they were a political asset to key stakeholders in democracy.

Lessons of the 1840s: "Crisis and House Cleaning"

Historically, the issue of judicial independence arose when failed economic policies led to fiscal crises. Not surprisingly, judges (like their legislative and executive counterparts) who have upheld controversial economic programs have found their way to the chopping block. Judicial elections provide the opportunity not just to remove an unpopular judge, but also to clean house.

Shugerman offers a wonderful example from New York's 1846 Convention which he describes as "the Barnburners' 'bench-clearing brawl'" (92). The economic crises of the early 1840s and the Panics of 1837 and 1839 led to New York's Constitutional Convention of 1846. The crises began in the banking industry and quickly spread throughout the economy. Legislatures went on a spending binge, the bottom fell out of state budgets, and judges found themselves a target of anxious and vengeful politicians. In New York, the "Hunkers" (insiders who had "hunkered" for spoils from the appointment or patronage system) were opposed by the "Barnburners" (those who threatened to "destroy the canals, corporations and banks in order to curb the debts, corruption, and abuses associated with them") (88). Because the Hunkers had a monopoly on Supreme Court justices, part of their opponents' political strategy was to institute judicial elections in the name of "judicial independence."

New York's example served as a model for other states that convened constitutional conventions and reassessed their manner of selecting judges. Judicial elections were a political tool to make judges independent from disfavored parties that had dominated state politics. Importantly, "New York's adoption [of a new model for selecting judges] was pivotal in lending credibility to judicial elections and demonstrating that voters could be trusted to choose established, experienced, and qualified judges" (101).

The move toward judicial elections continued throughout the 1840s and 1850s as part of an anti-legislature agenda. However, there were additional considerations including the growing belief that judicial elections would "foster a more confident, pure, professional judiciary that would actually rise above politics and would be faithful to legal principle and 'science' instead" (105). Thus, contrary to the current belief that judicial elections would restrain a judge's independence, the movement toward judicial elections in the mid-

1800s was designed to give judges more independence. Reformers believed that "direct democracy would be better at insulating the courts" (111-112) and that judicial elections, even if run through political parties, would better serve the public. As Shugerman notes, "faith in party-run judicial elections reflect[ed] a long-term shift from the view that mass party politics threatened democracy to the view that mass party politics protected democracy" (114).

Lessons of the Newly-Elected Judges: Counter-majoritarianism and Judicial Review

Indeed, the newly elected judges were more aggressive on behalf of the rights of "the people." However, not in the manner expected. Judges flexed their power of judicial review to strike down popular legislation when they viewed the will of the majority as trampling on individual rights, including vested property rights. "[S]tate judges around the country generally used their new power not as much for the most important purpose of 'the American revolutions of 1848' (fiscal restraint on legislative spending). The most frequent use of judicial review was for their own institutional self-interest: the protection and expansion of judicial power against legislative encroachment" (133).

Elected judges had an uncomfortable relationship with democracy. They were expected to be both accountable to the public, but also to differentiate themselves from the other branches that could be corrupted by political powers. Judges turned to the "rule of law" to create an elite status. Through the power of judicial review, judges could thrive in America because they were simultaneously "the guardians of democracy and the guardians against too much democracy" (143).

Yet, judges never completely escaped politics in the broadest sense of that term. Throughout history, business interests, opportunities for advancement, and local constituencies have always had an influence on how judges do their job. Shugerman demonstrates, however, that judges' commitment to "the rule of law" was important in establishing that they would not be as vulnerable to corruption as other political branches would be.

Lessons of Partisan Judicial Elections: Appearances of Impartiality and Pushing the Pendulum Back

Today, it would be very odd to think of a partisan judicial election system as one that would promote judicial independence. After all, to the extent that judges need the support of their political parties to succeed, they would be far from independent from the parties' interests. However, part of the genius of Shugerman's historical review is in realizing that assumptions about judicial independence depend on the political era in which they occur.

For example, popular elections in the mid-19th century generally involved a partisan nomination process. "Reformers believed that the emerging political parties were necessary for the people to organize and mobilize against the

'monster banks,' corporations, and the 'interests'" (148). Parties were seen as a vehicle toward achieving judicial independence. Rather than fearing one particular institution as a threat to judicial independence, the lesson of history is to evaluate each special interest through the lens of its times. As we have learned, special interests may come with different names–legislatures, political parties, or even "judicial independence" commissions.

Once parties became too influential, it was time to devise other nonpartisan plans to preserve the independence of the judiciary. In 1906, the pendulum began to swing back. American Judicature Society members proposed not just eliminating partisan elections but also reviving an appointment process. Throughout the early 20th century, there were general efforts to institute a "merit system" for civil service employees. However, it took the Great Depression to move toward an elite and professionalized "nonpartisan court plan."

Sometimes, it takes a good crime wave, preceded by a cataclysmic depression, to bring on political and judicial reforms. Shugerman does a wonderful job of describing how Earl Warren rode the tide of both. The push for a return to an appointment system for judges was preceded by the "Public Enemies" crime era of Bonnie and Clyde, Al Capone, John Dillinger and Baby Face Nelson. One solution to the violence that swept the streets was an appointed bench filled by judges with expertise and independent from mob corruption. Earl Warren was active in the creation of Western committees tasked to flesh out the details of the new system. The "Curb Crime" campaign in California proposed a judicial selection plan which was consistent with the Judicature Society's model. It included a nominating board for judicial candidates from which the governor would make his appointments. To keep their seats, judges would periodically stand for popular retention elections.

Soon, as Shugerman describes in detail, the proposal morphed in some jurisdictions into an appointment process whereby the governor nominated a person who required approval from an evaluation committee. This new "merit" system met the progressive worldview that government needed more qualified, efficient managers. The only thing left was to create a campaign that would use an initiative process by which the people themselves would demand that they have less say in the judicial selection process. The plan worked and California led the way for revival of judicial appointments in America. The voters embraced merit plans because they were promoted as based on "fairness, equal justice and judicial independence" (239).

Lessons of Today's Elections: Money, Greed and Judicial Elections

For many of us, the touchstone event associated with the battle over judicial independence was the retention election of 1986, in which the Californians voted out three state Supreme Court justices, including Chief Justice Rose Bird. Many factors led to that result and Shugerman carefully describes each: the tort revolution of the 1960s and 1970s, law enforcement and their opponents' battle over the death penalty, and general concerns that the judges

were dismissive of the state's key business interests. Political coalitions poured money into defeating the marked "liberal" justices and a new era was born.

> In the late eighteenth century, appointments during good behavior were designed to separate judges from the political branches. In the mid-nineteenth century, corruption and capture led states to adopt direct elections in order to separate the courts from the political branches even more decisively. In the twentieth century, the partisanship and corruption of direct elections led to a hybrid of appointment and election" (258).

Yet, we are now in a time when political and financial forces can not only unseat judges, but also actually seat political favorites to the bench. Today, a nearly-unrestricted flow of money threatens to corrupt even a merit system that includes retention elections. The U. S. Supreme Court's decision in *Citizens United* has opened the Pandora's box. Without limits on electoral spending, corporations have the opportunity to reshape judicial elections.

How will judicial independence be preserved in this era? Retention elections make judges less vulnerable, but they do not immunize judges completely. In the last segment of his book, Shugerman searches for answers to today's challenges to judicial independence.

Moving Forward: Democracy and Due Process

Again we are faced with the challenge of creating a judicial selection system that allows judges to be independent enough to reach just verdicts and yet accountable to those who will be affected by those verdicts. While the majority of *The People's Courts* illuminates the historical context of judicial elections and appointments, toward the very end of the book, Shugerman offers his own suggestions for maintaining relative judicial independence in current times. He is a strong advocate for retention elections, and he seeks modifications to make them as fair as possible and to avoid the domination of the courts by those with money and political power.

Of his many suggestions, two stand out. First, he puts faith in the Due Process Clause and the power to recuse judges as a way of countering efforts to buy rulings in cases. I wish I shared his confidence. While the Supreme Court did hold in *Caperton v. Massey*[4] that judges must recuse themselves from the cases of major political donors, the Court did not offer a clear standard for applying due process standards and there continues to be concern over whether corporate interests will dominate judicial elections.[5] Second,

4. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

5. *See* Stephen M. Hoersting & Bradley A. Smith, The *Caperton* Caper and the Kennedy Conundrum, 2009 Cato Sup. Ct. Rev. 319 (2009); Jed Handelsman Shugerman, In Defense of Appearances: What *Caperton v. Massey* Should Have Said, 59 DePaul L. Rev. 529 (Winter 2010); Gabriela D. Serbulea, Due Process and Judicial Disqualification: The Need for Reform, 38 Pepp. L. Rev. 1109 (2011); Eric Sandberg-Zakian, Rethinking "Bias": Judicial Elections and the Due Process Clause After *Caperton v. A.T. Massey Coal Co.*, 64 Ark. L. Rev. 179 (2011); Raymond J. McKoski, Judicial Disqualification After *Caperton v. A.T. Massey Coal Company*: What's Due Process Got to Do With It?, 63 Baylor L. Rev. 369, 391 (2011).

Shugerman embraces the political system as a countervailing force to keep judges in check. He writes, "[i]nstead of voting judges out of office, voters might focus instead on the substance of their rulings through constitutional amendment and legislative override, just as many progressives had suggested in the 1910s" (264). In abstract terms, he is probably right. Separation of powers is designed to protect judges yet keep them accountable. However, the logistical difficulties of accomplishing those overrides may make them little more than theoretical possibilities.

Conclusion

Thanks to Professor Shugerman's fine work, professors now have a firm foundation upon which to teach the history of judicial independence in America. "[T]he value of judicial independence has been a surprisingly robust, resilient, and popular value from the colonial era to the present" (268).

The primary value of this book is to get everyone to think harder and deeper and to understand that judicial independence, as with other concepts in the law, is not an absolute. It must be contextualized to historical times and considered as an aspect of broader important concepts in the law, including separation of powers, judicial accountability, and the importance of the rule of law. In the end, Shugerman's title teaches it all. The judges are "The Peoples' Courts." The challenge is in figuring out who these "People" are, how they will be represented, and how much accountability there should be to them by judges ruling on their cases.