



Issues in **GOVERNANCE STUDIES**

Number 7

April 2007

Judicial Independence and Judicial Accountability in the 110th Congress and Beyond

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EXECUTIVE SUMMARY

The last several Congresses have seen an unusually high level of contention between legislators and federal judges, spawned in part by unpopular decisions and demands by some for a more “accountable” judicial branch. Although the 110th Congress is likely to see less heated rhetoric, efforts to balance judicial independence and accountability will continue. The Bush administration will try, probably with limited success, to continue to shift the composition of the federal courts, especially the thirteen courts of appeals. Other judicial matters on the legislative agenda likely will include sentencing policies, experimentation with specialist judges, judicial ethics, and video coverage of judicial proceedings.

Judicial Accountability and Judicial Independence

Memories are fading over charged battles in recent Congresses about federal court decisions on capital punishment, public religious displays, abortion, gay rights, eminent domain, and refusing to intervene in the state court litigation



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over Terry Schiavo’s medical condition. The battles produced stand-offs over judicial nominations, impeachment threats, the House Working Group on Judicial Accountability, investigations of judges for alleged procedural manipulation and illegal sentences, and bills to eliminate federal court jurisdiction in important areas of constitutional adjudication. Former House Majority Leader Tom DeLay referred to an “arrogant, out-of-control, unaccountable judiciary.” Retired Supreme Court Justice Sandra Day O’Connor warned that “strongarm[ing] the judiciary” was the first step in the road to dictatorship.

Americans, at varying levels of rhetorical intensity, have argued off and on since 1789 about how to balance judges’ independence with their accountability. Judicial accountability has gotten a bad name recently because of the excesses of some court-curbing advocates, such as DeLay and sponsors of South Dakota’s proposed Judicial Accountability Initiative Law (or J.A.I.L.), which would have stripped that state’s judges of immunity from prosecution for vaguely defined acts of “judicial malfeasance.” Clearly, though, being held accountable for stewardship of funds for court operations or efficient docket management is not a threat to judges’ independent decision making, even if reasonable people can disagree about the precise elements of either. Likewise, the contentious but constitutional process of presidential nomination of judges and senatorial debate about those nominees does not threaten judicial independence as long as there is no demand for nominees’ *quid pro quos*.

The 110th Congress and the Federal Courts

Members of the 109th Congress who pushed court-curbing measures are no longer in the majority, if they are in Congress at all. The hot-button issues in the last Congress may return but with less visibility and even less chance of success. Today’s 110th Congress seems likely to reverse last year’s unsuccessful efforts to fund enhanced security for federal (and state) judges, and there is even some prospect for an overdue judicial salary increase. Already, this Congress has continued the last several decades’ practice of funding the federal courts comparatively generously—providing them a fiscal 2007 increase of 4.9 percent over the 2006 level even as it held most agencies to that level or less.

On technical issues, the 110th will no doubt continue efforts at bipartisan cooperation with the Judicial Conference of the United States— the body of 27 federal judges, chaired by the Chief Justice of the United States, that makes administrative policy and oversees legislative relations for the judicial branch. Some efforts in the 109th Congress produced legislation that provided judges the same authority that executive officials have to defer capital gains taxes when they sell holdings to avoid conflicts of interests, and that granted federal courts, post-Katrina, leeway in where to convene.

Other legislative efforts, though unsuccessful, still belie the view of a no-holds-barred war between federal courts and the Congress. Then-House Judiciary Committee

Court of Appeals nominees, however, are more likely to reflect both patronage and the administration's judicial policy preferences because they are courts of last resort for all but the handful of cases that the U.S. Supreme Court decides.

Chairman F. James Sensenbrenner and current ranking member Lamar Smith riled the Conference with proposals for a judicial branch inspector general and mandatory civil sanctions. Yet they also worked with the Conference in unsuccessful efforts to enact both a technical jurisdiction-clarification bill and a bill letting chief federal judges authorize emergency suspensions of some statutory deadlines for filing or processing cases. Sensenbrenner and then-Senate Judiciary Chairman Arlen Specter both introduced bills, with bi-partisan co-sponsorship, to force the General Services Administration to charge the judiciary no more for rent than required to maintain its courthouses, a key Conference goal.

U.S. Court of Appeals Judges and Judgeships

Ninety percent of any president's judicial appointees are at least nominal members of the president's political party, a practice that democratic theorists endorse as a means of keeping courts accountable to the preferences of the popular majorities that elect presidents and senators without sacrificing any individual judge's secure tenure and capacity for independent decision making. District court nominees are largely the prerogative of senators or others of the president's party. Court of Appeals nominees, however, are more likely to reflect both patronage and the administration's judicial policy preferences because they are courts of last resort for all but the handful of cases that the U.S. Supreme Court decides. The law those courts declare and their judges' increasingly long tenure explain why circuit judge nomination battles have become increasingly contentious.

In fact, predicting judges' decisions based on the president who appointed them is hardly the slam-dunk that talk radio or the blogosphere make it out to be. Data in University of Chicago law professor Cass Sunstein and his colleagues' 2006 Brookings Institution Press book *Are Judges Political?* are instructive: over the last several decades, in ideologically salient cases, all judges cast "liberal" votes 40 percent of the time, and all cast "conservative" votes 48 percent of the time. The differences in the "liberal" and "conservative" portions of Republican and Democratic appointees' decisions are striking in some areas, such as affirmative action, and negligible in others, such as criminal procedure. Real or perceived though, the differences have created a cottage industry of interest groups that push the president and Senate relentlessly to try to affect the composition of the Courts of Appeals.

Table 1 shows the number and percentage of the 179 judgeships on those courts occupied by Republican and Democratic appointees at the end of the two previous administrations and in late March 2007. When President Clinton took office, a substantial majority of the full-time judges were Republican appointees. Clinton basically evened out that number. President George Walker Bush (Bush 2) has increased Republican appointees a bit closer to their number at the end of the administration of President George Herbert Walker Bush (Bush 1), but it is unlikely he will reach that level, and he

certainly won't go beyond it.¹

Table 1

Courts of Appeals Judges	End of Bush 1 administration Jan. 1993	End of Clinton administration Jan. 2001	Seventh Year of Bush 2 administration March 2007
Republican appointees	114 (64%)	73 (41%)	98 (55%)
Democratic appointees	37 (21%)	78 (44%)	67 (37%)
Vacancies	28 (16%)	28 (16%)	14 (8%)
Total judgeships	179	179	179

Table 2 shows that when Clinton took office, all 13 Courts of Appeals had Republican-appointed majorities. Clinton cut that almost in half. The current president has brought the number back to 10.

Table 2

Courts of Appeals With Majorities of:	End of Bush 1 administration Jan. 1993	End of Clinton administration Jan. 2001	Seventh Year of Bush 2 administration March 2007
Republican appointees	13	7 (1st, 5th, 7th, 8th, 11th, DC, Fed.)	10 (1st, 4th-8th, 10th, 11th, DC, Fed.)
Democratic appointees	0	5 (2nd-4th, 6th, 9th)	2 (2nd, 9th)
Neither	0	1 (10th)	1 (3rd)

How much more the current administration can affect these numbers depends on how many nominees it sends up, how many would replace Democratic appointees, and how many the Senate confirms.

Nomination opportunities arise when existing judgeships become vacant and when Congress creates additional judgeships, something this Congress might well do. Since 1990, when Congress set the number of circuit judgeships at 179, Court of Appeals filings have increased by 58 percent per judgeship and “merits terminations” (cases not disposed of on procedural grounds) by 53 percent. In 2005, the Judicial Conference asked for 12 additional circuit judgeships and 59 district judgeships. Judgeship legislation failed when House Republicans coupled it with a proposal to divide the Ninth Circuit. This year the Conference has requested 15 circuit judgeships and 52 district judgeships.

But any circuit judgeships that the 110th Congress creates will likely be filled after 2008. Look at what the first President Bush was able to do with the 11 circuit judgeships created early in December 1990, with more than two years left in his term. He filled only five of them. The current Senate majority, rather than rush to create more judgeships for the current administration to fill, will first process nominations for current vacancies, especially Democratic-acceptable nominees for “judicial emergencies.” The Judicial Conference has so designated 11 of the current 14 circuit judge vacancies based on court

¹ Information on judicial appointments comes principally from The Federal Judges Biographical Database, available at www.fjc.gov, and the “Judges and Judgeships” page of www.uscourts.gov.

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workload or the length of the vacancy. At the end of March, nominations for only five of the 11 were before the Senate.

Nomination opportunities also arise when judges die, resign, or, most commonly, take “senior status,” a form of semi-retirement available to judges whose age (65 or older) and years of judicial service (10 or more) total 80. Three-fourths of both Bush 1’s and Clinton’s circuit appointments filled seats of retired judges. Of the current administration’s 53 appointees as of late March, 50 filled such seats. But 59 percent of Bush 1’s appointments to senior-status-created vacancies were to seats vacated by Democratic appointees and 58 percent of Clinton’s were to seats vacated by Republican appointees. On the other hand, only 29 percent of the current administration’s appointments to senior-status-created vacancies have been to seats vacated by Democratic appointees. That figure, not likely to rise much, has limited its ability to reshape the courts of appeals as greatly as some predecessors. (The percentages change little by including the few appointees who replaced judges who died or were appointed to the Supreme Court.)

Looking forward, if the administration fills all 14 current circuit judge vacancies, it will raise the number of Republican appointees from 98 to 112—from 55 percent to 63 percent of the 179 judgeships. If the administration can fill one of the two vacancies on the Third Circuit’s Court of Appeals, that court would gain a slim majority of Republican appointees, but even filling all 14 vacancies would not switch the other two appellate courts currently with Democratic-appointee majorities—those in the Second and Ninth Circuits.

Of course, additional vacancies will occur before January 2009, and every Democratic appointee whom the administration replaces will raise the overall Republican-appointee presence on the courts of appeals. But it probably won’t have the chance to replace many Democratic appointees. Forty-two circuit judges are now or will be senior-status eligible by the end of 2007—16 Democratic and 26 Republican appointees. By late March, three Republican appointees but no Democratic appointees had announced their intention to take senior status. Two Republican appointees and four Democratic appointees will become eligible for senior status in the first six months of 2008.

Thus, barring deaths or resignations, the highest number of Democratic appointees Bush could replace is 20, but the chances are slim at best that many of them—if any at all—will go senior before time runs out on this Congress’s confirmation process. The current administration has been rather lackadaisical about the pace of nominations, and with Congress stepping up investigations of administration legal policies, the pace may slow even more.

Judicial Process

Sentencing. Sentencing discretion has been a core element of recent courts-Congress conflicts, especially the 2003 Feeney Amendment, which Congress tacked on to a statute

that expanded the national system to locate kidnapped children. The amendment reduced judges' already limited sentencing discretion and provided for easy Congressional access to individual judges' sentences and supporting documents. Florida Republican Rep. Tom Feeney said Congress needed the documents "to ensure that judges are actually following the guidelines," but the Judicial Conference—21 of whose 27 members had been appointed to the bench by Republican presidents—recommended the amendment's repeal by an overwhelming majority.

The Supreme Court's 2005 decision in *U.S. v Booker* told federal judges to treat the federal sentencing guidelines as advisory, rather than the mandatory rules that Congress required in 1984. Immediately after *Booker*, some legislators were eager to accept the Court's invitation to reestablish the guidelines as Congress saw fit, albeit without the flaw identified in *Booker*—judges' decisions about offender conduct that the Constitution allows defendants to have juries decide. That rush slowed but may get legs in the 110th depending on two Supreme Court decisions later this spring about whether sentences imposed within the guideline ranges are presumptively "reasonable," the standard announced in *Booker*. In the unlikely event the Court sets a low bar for calling out-of-guideline sentences "reasonable," there may be a move, at least by Republican legislators (and the Justice Department), to legislate tighter limits. For example, the guideline sentencing ranges for various offenses currently do not go as high as the statutory maximum sentences; one proposal, opposed by the Judicial Conference, would move the top of the guideline range to the statutory maximum. On the other hand, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, has said it may examine the impact of controversial sentencing policies, such as mandatory minimum sentences, on crime reduction.

Habeas corpus. This Congress will focus on restoring habeas rights to enemy detainees, not on Sen. Jon Kyl's Streamlined Procedures Act, which the Senate Judiciary Committee considered in 2005 but did not report. The bill, strongly opposed by the Judicial Conference, would have restricted state prisoners' access to federal court review of their convictions—restrictions beyond those imposed a decade ago.

Specialist judges. In early February, the House passed by voice vote a bill introduced by Republican Rep. Darrel Issa, a patent holder, to change how U.S. District Courts handle patent and plant variety protection litigation. The co-sponsor is Rep. Adam Schiff, a Democrat and co-chair of the House Caucus on the Judicial Branch, which was created, in its words, to "improv[e] the relationship between the legislative and judicial branches." The bill's immediate impetus is what various industry groups and intellectual property organizations and experts claim is district judges' unacceptably high reversal rate in patent cases in the U.S. Court of Appeals for the Federal Circuit (the exclusive appellate venue for patent litigation below the Supreme Court). Bill supporters attribute the high reversal rate to the complexity of patent litigation procedures and the scientific evidence involved. Under the bill, the federal courts' Administrative Office would designate at

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least five U.S. District Courts as pilot courts, where patent and plant variety protection cases could be assigned to judges on each court who volunteered to take them. The office, along with the Federal Judicial Center, would evaluate reversal rates, disposition times and perceived forum shopping in the pilot courts.

Although the Judicial Conference has not taken a position on the bill, it is at odds with the federal judicial branch's long-standing preference for random case assignment to generalist judges. This bill is worth watching as it pertains to patent cases and for what it may presage for legislation about other complex federal litigation. A bill skeptic, District Judge T.S. Ellis, III, from the patent litigation-rich Eastern District of Virginia, echoed a view of many federal judges that "individuals [who] accept an appointment to the bench [have an] obligation to do their jobs, and this will include" learning how to manage patent cases. Whether Congress should initiate this pilot project depends on whether systematic data confirm what Ellis acknowledged was "the abundance of anecdotal information" about district judges' "failure . . . to engage and understand the patent technology in the course of ruling on claim construction disputes," and, if so, whether specialist judges are the best solution. (Ironically, the bill would authorize \$5 million a year for judicial education and science expert law clerks for the pilot districts' patent judges. Congress appropriates roughly \$5 million annually for the Federal Judicial Center's education programs for the more than 1,500 federal judges across the country.)

Ethics and Transparency

Regulating judicial ethics. The independence-accountability balance is revealed as well in Sen. Charles Grassley's and Rep. Sensenbrenner's proposed Judicial Transparency and Ethics Enhancement Act of 2007. The House Judiciary Committee cleared a similar bill last September by a 20-6 vote (most Democrats not voting), but it went no further. The bill would direct the Chief Justice, after consultation with the majority and minority leadership in Congress, to appoint a judicial branch "inspector general" to investigate alleged judicial misconduct, fraud, waste and abuse. Judges and some commentators worried that an inspector general could find pretext—and feel legislative pressure—to focus waste and abuse inspections on judges who make unpopular decisions. The current bill somewhat responds to that objection by barring the inspector general from "investigat[ing] or review[ing] any matter that is directly related to the merits of a decision or procedural ruling by any judge or court" or "punish[ing] or disciplin[ing] any judge or court."

Although the judicial branch would not support, and this Congress will not pass, even this revised inspector general bill, House Republicans will keep it visible. And legislators of both parties will monitor judicial implementation of internal policies that respond to some of the bill's supporters' complaints of lack of accountability. For instance, some judges have disobeyed the statutory mandate that they step aside in any case where they own even one share of stock, attributing the lapses to their inadvertent

failure to track small items in diverse investment portfolios. In response last September, the Judicial Conference mandated judges' use of software systems to identify any conflicts in litigation assigned to them. Some legislators prefer the practice of posting each judge's conflict list on their courts' public Web sites (currently done by a handful of district courts).

Moreover, Grassley and Sensenbrenner said an inspector general should investigate judges' failure to disclose funds received from private organizations to attend their education seminars. In September, the Conference, under its authority to regulate gifts to judges, required most private organizations that provide such seminars to disclose their programs' funders and speakers on the federal judiciary's public Web site. It also required judges who attend such programs with private funds to certify that they reviewed the disclosure, and to list on their courts' Web sites programs that they attended with private funds. These policies took effect in January 2007 and "seminar disclosure" buttons are appearing on court Web sites. A few Democratic senators, including Leahy, Feingold and Kerry, have tried since 2000 to prohibit judges from accepting any private funds to attend seminars that critics charge are one-sided critiques of environmental regulation, but for now they seem willing to give the Judicial Conference policy a chance to work.

Legislators also will monitor how the judicial branch implements the recommendations of a committee that Chief Justice Rehnquist appointed in 2004 after then-House Judiciary Committee Chairman Sensenbrenner charged the judiciary with lax investigations of judicial misconduct complaints under a 1980 statute. Last September, the committee, chaired by Justice Stephen Breyer, found that the judicial branch generally implemented the statute properly but with significant enough problems in some major complaint dispositions to call for more centralized judicial branch oversight of complaint processing and for chief circuit judges to initiate complaints themselves when allegations of judicial misconduct surface publicly.²

Televising federal court proceedings A federal rule of criminal procedure bars video cameras in District Court criminal proceedings, the regional federal judicial councils have barred them in civil proceedings (at the Conference's request), and the Supreme Court has steadfastly refused requests to televise its proceedings. Only the Courts of Appeals permit such coverage (which is widespread in state trial and appellate courts).

A bi-partisan group of senators have reintroduced two bills, both of which last year's Senate Judiciary Committee approved. One—its accountability goals obvious in its title, the "Sunshine in the Courtroom Act"—would authorize federal courts, including the Supreme Court, to permit video recording, subject to various approvals by parties and witnesses. Another would require the Supreme Court to allow coverage unless the Court determined, on a case-by-case basis, that doing so would harm due process rights. (Sen. Specter introduced that bill with a Senate floor speech denouncing, as he frequently does,

² Disclaimer: The author of this brief provided staff support to the Committee.

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what he regards as the Court's disrespect in its federalism decisions for legislative fact-finding.)

The federal courts have become more media friendly. Some make audio recordings of their proceedings available online. The Supreme Court has sped the release of oral argument transcripts and has released audio recordings of arguments in some high-visibility cases the same day. The Justices are giving more written and electronic press interviews. But at least some of the Justices are adamantly opposed to televising the Court's proceedings. Justice Clarence Thomas said he didn't "see how it helps us do our job," and Justice Souter famously remarked that it would occur "over my dead body." It's hard to see how Congress lacks authority to mandate coverage as long as it grants judges the authority to prohibit it under specific conditions. But that doesn't resolve whether it should defer to the courts, permitting but not requiring coverage. "Please," said Justice Anthony Kennedy, "don't introduce into the dynamics that I have with colleagues [in oral argument] the . . . insidious temptation . . . to think that one of my colleagues is trying to get a sound bite for television." It may be instructive that the bill permitting coverage in all courts has more co-sponsors than that requiring coverage in the Supreme Court. Still, it would not be a high risk to bet that greater video access to federal courts is coming at some point—by legislation or by judicial volition, or some combination.

A Reshaped Landscape?

Despite today's calm, federal courts may be but one unpopular decision away from a resumption of legislative attacks. Even without such a decision, it would be a mistake to assume that legislative-judicial tension is over. Some is inevitable. Heightened tension did not spring up overnight and is not going away tomorrow. Judicial decisions over the last century, first protecting property rights against social welfare legislation, and then protecting personal and civil rights, have popularized the notion that judges' decisions reflect little more than their policy predilections. Liberals—seen today as courts' natural defenders—proposed court-curbing measures in the 1920s and 1930s to limit what they saw as an activist, conservative judiciary. Congress over the past 50 years has brought attention to federal courts by legislating protections for racial and other minorities, women, the elderly and disabled and others, but leaving their implementation largely to litigation. And 24-hour news cycles in many different media have made it easier to mount interest group campaigns about courts.

Furthermore, the same impulses to control federal court decision making are showing up in the states. Industry groups' and trial lawyers' efforts to influence state tort law have produced \$40 million in spending by and for state supreme court candidates in the last two election cycles. After the U.S. Supreme Court in 2002 barred states from prohibiting judicial candidates from stating their views on disputed legal and political issues, interest groups began to push candidates to tell voters where they stand on same-

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Governance Studies Program**Production & Layout**

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sex marriage and other hot-button topics likely to arise in litigation. Finally, although voters rejected anti-judge measures on last November's ballots—such as South Dakota's J.A.I.L. for Judges proposal referenced above, and a proposal to term limit all of Colorado's appellate judges—sponsors have vowed to continue pressing them.

These developments suggest, if not a coordinated effort, at least a cultural change that will keep all courts under interest group scrutiny. The necessary debate on how to balance judicial independence and judicial accountability, which has recurred cyclically throughout U.S. history, may now be a permanent part of the landscape.

The views expressed in this piece are those of the author and should not be attributed to the staff, officers or trustees of the Brookings Institution. Research for this brief was supported in part by a grant from the Dwight D. Opperman Foundation. The Foundation is in no way responsible for the analysis or conclusions.