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## IDENTIFYING “INDEPENDENCE”

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### INTRODUCTION

A recurrent theme in the excellent symposium sponsored by the Boston University School of Law on contemporary judging was the importance of, and the need to preserve, “judicial independence.” Yet, to a remarkable degree, the concept of such “independence” was presented as an unanalyzed given. Most speakers agreed that it is a good thing in the abstract, but there was no real discussion of what exactly the “it” is. There was much concern over attempts to limit judicial independence, i.e., fear of *too little* independence; there was little discussion, however, about the possibility of there being *too much* judicial independence. As one reviewer of a valuable collection of essays, *Judicial Independence at the Crossroads*,<sup>1</sup> stated, “judicial independence is common as a public policy debate touching on what the role and power of courts *should be* in societies around the world.”<sup>2</sup> Yet, “[e]ven with this degree of interest and attention to judicial independence . . . we have little understanding of, or

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<sup>1</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>2</sup> Roger E. Hartley, Book Review, 12 LAW & POL. BOOK REV. (2002), <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Burbank-stephen.htm>.

agreement about, the meaning of the concept. . . . [I]t is very difficult to separate the meaning of judicial independence from the politics that surround it.”<sup>3</sup> There is at least some correlation between one’s level of political support for what courts in fact do and the degree to which one embraces a robust notion of judicial independence. Indeed, given the ineluctable linkage of the term “judicial independence” with normative political positions, Professor Lewis Kornhauser suggested that we would be better off abandoning the concept as a useful analytical tool,<sup>4</sup> though, of course, one might remain extremely interested in its role in ongoing political rhetoric.

This is reminiscent of debate surrounding free speech, where it has been demonstrated that no sensible person would in fact support an entirely unconstrained regime of “free speech.”<sup>5</sup> Fred Schauer has made a similar point with regard to quick invocation of “censorship” – at least as a negative term – in debates about speech, precisely because it turns out that everyone supports limitations on free speech under some circumstances, even if we tend to disagree on what those circumstances are.<sup>6</sup> As is true of so many terms in political discourse, “judicial independence,” like “free speech,”<sup>7</sup> “equality,”<sup>8</sup> “liberty,”<sup>9</sup> or “freedom,”<sup>10</sup> is what political theorists call an “essentially contested concept.”<sup>11</sup> Not only do such concepts present significant analytical complexities, which is true, of course, of many, if not most, concepts, but they also serve as positive markers in ordinary political discourse. There are probably few people resolutely willing to describe themselves as opposed to free speech, liberty, freedom, equality, or judicial independence. It is far easier to attempt to present sometimes tendentious definitions of these terms that conveniently exclude from the concept itself what one dislikes, as with the classic distinction between “liberty” (good) and “license” (bad). To take one further example, the United States, at least since the Civil War and the

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<sup>3</sup> *Id.*

<sup>4</sup> Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, *supra* note 1, at 45, 54.

<sup>5</sup> See STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* 102-19 (1994).

<sup>6</sup> FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 119 (1982).

<sup>7</sup> See FISH, *supra* note 5, at 102 (arguing that free speech is an “abstract concept[] . . . filled with whatever content and direction one can manage to put into [it]”).

<sup>8</sup> See DOUGLAS RAE ET AL., *EQUALITIES* 133 (2d ed. 1989) (demonstrating that the term “equality” lends itself to at least 108 “structurally distinct interpretations”).

<sup>9</sup> See ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY* 166, 168 (Henry Hardy ed., 2002) (stating that historians of ideas have recorded “more than two hundred senses” in which the concept of liberty has been understood).

<sup>10</sup> See ERIC FONER, *THE STORY OF AMERICAN FREEDOM*, at xiv (1998) (describing freedom as a concept that “by its very nature is the subject of disagreement”).

<sup>11</sup> W.B. Gallie, *Essentially Contested Concepts*, in *THE IMPORTANCE OF LANGUAGE* 121, 121 (Max Black ed., 1962). For an especially useful discussion of the notion, see WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10-12 (2d ed. 1983).

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meaning assigned it in Lincoln's Gettysburg Address – i.e., the triumph of government *of* and *by* the people, and not just for the people – prides itself on being a "democracy." Such pride requires an almost willful ignorance of the extent to which the Constitution established a system that can easily be described as undemocratic.<sup>12</sup> It is obvious that a great deal of ideological baggage is inevitably invested in arguments about how to resolve such disputes.

What follows is certainly not meant as a full analysis, but rather a brief contribution to a long overdue conversation as to exactly what constitutes "judicial independence" and why it is necessarily a good thing. My argument is short, simple, and perhaps simplistic: there are conceptions of judicial independence in clear tension with other important values, the most important one being accountability to the general public. Almost no one, I suggest, could possibly wish to *maximize* judicial independence any more than most sensible people would wish to maximize other positives, such as equality and liberty. With regard to all major values, as Isaiah Berlin argued, we live in a pluralized universe where one is inevitably balancing values rather than taking any given value to some logical limit.<sup>13</sup> Our two principal options are to resolutely admit that we are constantly balancing judicial independence against other equally attractive goods, or to present definitions of "judicial independence" that, as with any magician's handiwork, smuggle the rabbit into the hat and deflect our attention from what is being elided in a given conception of the term.

#### I. THE CONCEPT OF JUDICIAL INDEPENDENCE

Any full description of what one might mean by "judicial independence" would have to examine a host of variables, of which I mention only three. First, one might emphasize the pressures, both formal and informal, that can be brought to bear on judges during their terms of office with regard to shaping their specific decisions. Second, one might look at the freedom that judges have from what might be termed the involuntary leave-taking from their offices. Finally, one might focus on methods of selecting judges and the relationship between any given method and immersion in what might be termed "ordinary politics."

##### A. *Formal and Informal Pressures*

With regard to the variable of formal and informal pressures, for example, it is worth examining the obvious fact that no "inferior" judge in a judicial hierarchy is "independent" of the reality of appellate review and reversal. To refer to American district court judges as "independent" merely states that they are formally subject only to superiors in a judicial hierarchy rather than to

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<sup>12</sup> See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006) (citing, among other things, the presidential veto power and the egregiously undemocratic apportionment of voting power in the Senate).

<sup>13</sup> BERLIN, *supra* note 9, at 213-14.

extra-judicial authorities. Independence emphasizes institutional autonomy, not any claims to similar autonomy by actors within the institutional structure. Many district judges, no doubt, would love to be “independent” of review by appellate judges whom they might not particularly respect or agree with regarding highly controversial and almost inevitably politically saturated views of what “the law” requires. Supreme Court Justices, of course, possess far more genuine independence-as-autonomy, notwithstanding the theoretical possibility that even constitutional decisions can be overruled by constitutional amendment, as exemplified by the 26th Amendment, which displaced the Supreme Court’s decision in *Oregon v. Mitchell*.<sup>14</sup> Still, the infrequency of amendment – a function of the near-impossibility of constitutional amendment with regard to anything that is truly controversial<sup>15</sup> – makes it reasonable to describe the Supreme Court as quite autonomous with regard to facing the formal overruling of its decisions by other branches of government. Comparatively, however, the very possibility of overriding amendments supports the claim that the U.S. Supreme Court is less truly “independent” as a conceptual matter than is the German constitutional court, which operates under a constitution that explicitly makes unamendable certain constitutional provisions and, presumably, judicial constructions of those provisions.<sup>16</sup> To the extent, then, that most analysts view Article V of the U.S. Constitution as placing no limits on what “we the people” can do through the amendment process,<sup>17</sup> the U.S. Supreme Court is less “independent” or “autonomous” than is the German court.<sup>18</sup>

#### B. *Protection Against Involuntary Leave*

As to the second measure of independence – protection against involuntary leave-taking – the federal judiciary of the United States may be among the most protective in the world. “Life tenure,” though not explicitly set out in the

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<sup>14</sup> 400 U.S. 112, 118 (1970) (holding that Congress cannot compel states to allow eighteen-year-olds to vote in state elections), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI, § 1.

<sup>15</sup> See LEVINSON, *supra* note 12, at 159-60.

<sup>16</sup> See GRUNDGESETZ [Constitution] art. 79 (F.R.G.), *translated in GERMANY* (Gisbert H. Flanz trans., 2003), *in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, at 66 (Gisbert H. Flanz et al. eds., 2006) (declaring that “[any amendment affecting] the principles laid down in Articles 1 and 20 is inadmissible”).

<sup>17</sup> See, e.g., John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, *in* RESPONDING TO IMPERFECTION 191, 211-12 (Sanford Levinson ed., 1995). Some academics, however, have argued that amendments which would destroy the values of constitutional democracy would be invalid. See Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION, *supra*, at 163, 178 & n.49.

<sup>18</sup> India’s Supreme Court has claimed similar powers to declare amendments to the constitution unconstitutional. See David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 684 & n.125 (2005).

Constitution,<sup>19</sup> is taken to be the norm. Most post-World War II constitutions, for example, have ten- to fourteen-year term limits for service on the "constitutional courts," and have assigned the specific duty of enforcing constitutional norms against potential infringement to other political institutions.<sup>20</sup> It is hard to believe that this lack of life tenure casts doubt on the integrity of these courts. And, as Professor Tom Ginsburg informs us, "[a]lthough one might think that lifetime appointments are always longer than designated terms, this is not the case because virtually all other systems with 'lifetime' appointments provide for a mandatory retirement age of sixty-five to seventy years of age."<sup>21</sup> Additionally, in some political systems, appointments come relatively late in life. In Japan, for example, judges are appointed at a sufficiently old age so that, given the mandatory retirement age of seventy, the average term of service is approximately six years.<sup>22</sup> Even if one properly believes that this is too short a term of office, it is obviously the case that one need not adopt the American "solution" of both a younger age of appointment and then endless tenure. The United States appears to be joined only by Kenya in defining "life tenure" as truly "for life" without any required retirement age.<sup>23</sup> This means, among other things, that the average term of office on the Supreme Court is four times that of Japanese judges.<sup>24</sup>

### C. *Method of Selection*

While many judges, such as those from my home state of Texas, have only limited terms of office and are subject to popular and partisan elections,<sup>25</sup> the process of maintaining one's office – as contrasted with the initial appointment or election – may very well threaten certain conceptions of judicial independence. It is hard, for example, to escape the belief that judges may be especially reluctant to stand up to powerful constituencies, whether measured by campaign funds or popular votes, where passions are high, such as in

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<sup>19</sup> See U.S. CONST. art III, § 1 (declaring that judges "shall hold their Offices during good Behaviour").

<sup>20</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 819-22 (2006).

<sup>21</sup> TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 46 (2003).

<sup>22</sup> See *id.*

<sup>23</sup> See Rebecca Wood, Comparing Judicial Selection Systems in Common Law Democracies 19 (Mar. 25, 2006) (unpublished paper presented at the 2006 Annual Meeting of the Midwest Political Science Association, Chicago, Ill., Apr. 20-23) (on file with author).

<sup>24</sup> See Calabresi & Lindgren, *supra* note 20, at 771 ("[F]or those Justices who have retired since 1970, the average tenure [is] 26.1 years."). I have written elsewhere about my own opposition to life tenure on the Supreme Court, and I will not repeat those arguments here. See LEVINSON, *supra* note 12, at 123-39.

<sup>25</sup> TEX. CONST. art. 5, § 2(c) (declaring that justices of the Texas Supreme Court "shall be elected" and "shall hold their offices six years").

abortion, affirmative action, and death penalty cases. Moreover, the issue of potential “discipline” – and, therefore, lack of independence – is implicated in the process of elevating federal district court judges to the circuit courts of appeals or from the circuits to the Supreme Court. It is hard to escape the belief that judges in effect campaign for promotion by issuing decisions, and writing opinions, designed to appeal to the “judge-pickers” in the Department of Justice and the White House. Special problems are presented by the peculiar institution of “recess appointments” to the federal judiciary.<sup>26</sup> It is difficult to reconcile temporary circuit court appointments, which last a maximum of approximately two years – unless the Senate confirms the appointment while knowing how the nominee has exercised his judicial responsibilities – with any sense of judicial independence. It may be the case, as suggested by Judith Resnik’s extremely illuminating contribution to this symposium,<sup>27</sup> that the contemporary federal judiciary includes so many non-Article III participants, such as magistrates and bankruptcy judges, that one should take recess appointments in stride. If this is the case, though, it certainly calls into severe question some of the assertions as to what is required to assure genuine “judicial independence.”

Even with regard to procedures of initial judicial selection, it might make a significant difference whether one is thinking about basic trial courts, national supreme courts, or, as observed in many countries, particularly after World War II, special “constitutional courts.” In Europe especially, judging is viewed as a bureaucratic profession, with lower court judges chosen through what is basically a meritocratic procedure similar to choosing any professional civil servant.<sup>28</sup> Thus, the Italian Constitution states that “[a]ppointment of judges [to the lower ranks of the judiciary] takes place by means of competitive examinations.”<sup>29</sup> This discussion is restricted to the selection of members of the highest courts, though that is not from any belief that what happens in lower, less visible, courts is any less important from the perspective of the ordinary citizen.

## II. MAXIMALIST NOTION OF JUDICIAL INDEPENDENCE

I begin by sketching out what might be described as a *maximalist* notion of judicial independence. Consider in this context Article 104 of the Italian Constitution: “The judiciary is an autonomous order and independent of all

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<sup>26</sup> See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate . . .”).

<sup>27</sup> See generally Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

<sup>28</sup> See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1538 (2000).

<sup>29</sup> COSTITUZIONE [Constitution] art. 106 (Italy), translated in ITALY (Karin Hermanska trans., 2003), in 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 16, at 23.

other powers."<sup>30</sup> How might one manifest such autonomy and independence? One answer is to emulate such autonomous and independent institutions as the French Academy or the Harvard Corporation. When a vacancy occurs in either of these estimable institutions, it is filled by an election in which all of the votes are held by the remaining members of the institution.<sup>31</sup> Such self-perpetuating institutions certainly have great autonomy and independence, as they are not formally accountable to anyone nor subject to anyone's direction. Harvard alumni have voting rights with regard to selecting the ostensible "overseers" of the University,<sup>32</sup> but have no right at all to participate in the election of the people who have ultimate power over the University, the President, and Fellows of Harvard College: the six self-perpetuating members of the Harvard Corporation and the President that they themselves choose.<sup>33</sup> The same autonomy is enjoyed by living members of the French Academy.<sup>34</sup>

As a political scientist, I am certainly aware that even the most formally autonomous of institutions may nonetheless feel constraints. Former Harvard President Lawrence Summers' abrupt departure from office was presumably hastened by the very public loss of confidence on the part of the Harvard faculty, though the faculty had absolutely no formal power over his tenure in office.<sup>35</sup> Members of the French Academy might tremble at the likely reaction from *Le Monde* when a new member is announced. That said, it should be obvious that there is a difference between such informal constraints and the formal limits generated, for example, by having to seek approval of one's choices from an outside body that possesses veto power. Although unhappy alumni or faculty at Harvard can vote with their checkbooks or with their feet, they cannot dismiss a President or members of the Corporation, or play any formal role in their respective replacements.

Any "spectrum" of possible definitions of "judicial independence" would surely place the French Academy and Harvard Corporation models at one end, inasmuch as the presumptive analogy is sitting members of the judiciary simply picking their successors. This constitutes the maximum separation of "law" from "politics" and declares that "politicians" – in this context, almost certainly a term of denigration – have no role in selecting guardians of the law. The more one accepts a model of "the law" and "the rule of law" as standing

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<sup>30</sup> *Id.* art. 104, translated in ITALY, *supra* note 29, at 22.

<sup>31</sup> See D. MACLAREN ROBERTSON, A HISTORY OF THE FRENCH ACADEMY 263 (1910); RICHARD NORTON SMITH, THE HARVARD CENTURY 17 (1986).

<sup>32</sup> See SMITH, *supra* note 31, at 26.

<sup>33</sup> Though the choice of the President must apparently be ratified by the Board of Overseers, there are, at least to my knowledge, no instances where this ratification process has served as anything other than a rubber stamp of the Corporation's decision.

<sup>34</sup> See ROBERTSON, *supra* note 31, at 263.

<sup>35</sup> See Alan M. Dershowitz, Op-Ed., *Coup Against Summers a Dubious Victory for the Politically Correct*, BOSTON GLOBE, Feb. 22, 2006, at A15 (asserting that Harvard faculty members were the driving force behind Summers' resignation).

outside the political realm, the more attracted one might be to such a separation.

A. *Foreign Experience*

The self selection model is not completely unknown. Professor C. Neal Tate has suggested that with regard to the actualities of judicial selection, the Supreme Court of India “is in fact just about as close to judicial self selection as it is possible to get.”<sup>36</sup> Although India’s constitution provides for appointment by the President of India,<sup>37</sup> Tate describes the President as a “largely ceremonial Head of State” who consults with and invariably follows the advice of the Chief Justice of the Supreme Court and senior justices.<sup>38</sup> In fact, “the Supreme Court has interpreted the ‘consultation’ to REQUIRE the Government to accept the nominee(s) put forward by the Chief and his colleagues (now called ‘the Collegium’).”<sup>39</sup> This is a perfect example of a valuable distinction proffered by Professor Rebecca Wood between formal “appointing authority,” which the President of India possesses, and the actual “selection authority” held by another institutional entity, in this case the Collegium.<sup>40</sup>

It is also worth noting that the appointment of the Chief Justice of India “is initiated by the outgoing Chief Justice of India for the appointment of ‘the senior most Judge of the Supreme Court considered fit to hold the office.’”<sup>41</sup> There is no spectacle of Presidents appointing the occupant of that office. Jack Balkin and I wrote an article in 2001 expressing our anger at *Bush v. Gore*,<sup>42</sup> in part because the conservative majority of the Supreme Court in effect picked the President who would appoint the Justices’ presumptively conservative successors, a hope amply vindicated by the promotions of John Roberts – as Chief Justice, of course – and Samuel Alito to the Supreme Court instead of Al Gore’s presumably far less compatible nominees.<sup>43</sup> Indian justices apparently do not have to go through such middlemen. Whatever objections one might have to an Indian equivalent of *Bush v. Gore*, they would not include an unseemly attempt by the Court to exercise unwarranted influence in determining its future members. Members of India’s Supreme Court appear to

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<sup>36</sup> E-mail from Chester Neal Tate, Professor of Political Science and Law, Vanderbilt Univ., to author (May 22, 2006, 20:44 CST) (on file with author).

<sup>37</sup> INDIA CONST. art. 124, § 2.

<sup>38</sup> Email from Chester Neal Tate to author, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> See Wood, *supra* note 23, at 8-10.

<sup>41</sup> M.P. Singh, *Securing the Independence of the Judiciary – The Indian Experience*, 10 IND. INT’L & COMP. L. REV. 245, 271 (2000) (quoting Supreme Court Advocates on Record Ass’n v. Union of India, A.I.R. 1994 S.C. 268, 442).

<sup>42</sup> 531 U.S. 98 (2000).

<sup>43</sup> See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053 (2001).

have what might be called "warranted influence." This is a degree of judicial independence that the U.S. Supreme Court can only dream about (and the rest of us, perhaps, have nightmares about).

Other countries have selection systems that, at least on paper, place them far closer to this maximal institutional autonomy model than is our own.<sup>44</sup> For example, Colombia apparently has "four roughly coequal, supreme judicial organs."<sup>45</sup> Members of the Corte Suprema de Justicia, which is the highest court of criminal law, "are selected by their peers from the nominees of the Superior Judicial Council for eight-year terms,"<sup>46</sup> and members of the highest court of administrative law, the Council of State, are also appointed in the same manner.<sup>47</sup> Similarly, with regard to the Corte Suprema of Chile, "judges are appointed by the president and ratified by the Senate from lists of candidates provided by the court itself."<sup>48</sup> Moreover, the "president of the Supreme Court is elected by the 21-member court."<sup>49</sup> Similar structures of self-perpetuation are found in the Constitutional Court established by Turkey's constitution.<sup>50</sup> As described by Turkish political scientist Hootan Shambayati, seven of the eleven members of the Constitutional Court "are nominated by the plenary sessions of the high courts (including military courts) from among their own members and appointed by the president (an indirectly elected 'non-partisan' official)."<sup>51</sup> One member "is nominated by the Board of Higher Education (a body in charge of supervising institutions of higher education) from among professors of law or social sciences and appointed by the President," while the remaining three members "are appointed by the President

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<sup>44</sup> See, e.g., CONSTITUCIÓN [Constitution] art. 231 (Colom.), translated in COLOMBIA (2005), in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 16, at 69 (stating that high court judges will be appointed "from lists drawn up by the Superior Council of the Judicature," a body consisting of judges).

<sup>45</sup> CIA, THE WORLD FACTBOOK 2005, at 123 (2005) [hereinafter WORLD FACTBOOK].

<sup>46</sup> *Id.* The Colombian Senate is charged with electing the judges of the Constitutional Court. CONSTITUCIÓN art. 173, translated in COLOMBIA, *supra* note 44, at 49. The Superior Judicial Council itself, described as having primary responsibility for administering and disciplining the civilian judiciary, and resolving jurisdictional conflicts among other courts, is composed of members "elected by three sister courts and Congress for eight-year terms." WORLD FACTBOOK, *supra* note 45, at 123. I am grateful to Raul A. Sanchez Urribarri for providing me with information about the Latin American systems.

<sup>47</sup> WORLD FACTBOOK, *supra* note 45, at 123.

<sup>48</sup> *Id.* at 113.

<sup>49</sup> *Id.*

<sup>50</sup> ANAYASA [Constitution] art. 146 (Turk.), translated in TURKEY (Ömer Faruk Genckaya trans., 2003), in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 16, at 55 ("The Constitutional Court elects a President and Deputy President from among its regular members for a term of four years . . .").

<sup>51</sup> E-mail from Hootan Shambayati, Assistant Professor, Bilkent Univ., to author (May 21, 2006, 18:29 EST) (on file with author).

from among high civil servants and lawyers in private practice.”<sup>52</sup> According to Professor Shambayati, “[t]he usual practice is for each nominating body to submit a list of three candidates to the President and for him to appoint one of them to the Court.”<sup>53</sup>

A number of other countries give judicial institutions autonomous appointment authority over at least some of the seats on the constitutional courts established to conduct judicial review of legislation. In the Republic of Georgia, the Supreme Court appoints three of the nine judges comprising the Constitutional Court,<sup>54</sup> and in Italy, “the members of the ordinary and administrative supreme courts” appoint five of the fifteen members of the Italian Constitutional Court.<sup>55</sup> In South Korea, presidential appointments to the Constitutional Court are “based partly on nominations by [the] National Assembly and Chief Justice of the court.”<sup>56</sup>

The process by which members of the Israeli judiciary have been picked – through a committee effectively dominated by the President of the Israeli Supreme Court – is also noteworthy.<sup>57</sup> As described by the critical *Jerusalem Post*, “new justices are chosen by a nine-member panel consisting of two ministers, two Knesset members (one coalition and one opposition), two Bar Association representatives and three sitting justices, including the court president.”<sup>58</sup> At a formal level, then, the sitting justices comprise only one-third of the selection panel. However, the justices in fact “dominate the process even without the ironclad tradition whereby other panel members defer to them: The justices, chosen by the court president, consistently follow his lead; the elected officials are divided, coalition-opposition; and the Bar representatives are reluctant to antagonize justices who will decide their future cases.”<sup>59</sup> Thus, “never has a new justice been chosen over the sitting justices’ objections, and only rarely have the justices’ candidates been rejected.”<sup>60</sup> Still,

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> KONSTITUCIA [Constitution] art. 88 (Geor.), translated in GEORGIA (2005), in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 16, at 32.

<sup>55</sup> COSTITUZIONE [Constitution] art. 135 (Italy), translated in ITALY, *supra* note 29, at 33. Of the remaining ten judges, the President and the two houses of the Italian Parliament, meeting in joint session, each appoint five judges. *Id.*, translated in ITALY, *supra* note 29, at 33.

<sup>56</sup> WORLD FACTBOOK, *supra* note 45, at 304. For a riveting analysis of judicial institutions in South Korea, Mongolia, and Taiwan, see generally GINSBURG, *supra* note 21.

<sup>57</sup> See Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 241, 249 (Kate Malleson & Peter H. Russell eds., 2006); Jonathan Rosenblum, *Court-Packing Israeli Style*, JEWISH LAW, <http://www.jlaw.com/Commentary/CourtPacking.html> (last visited Dec. 1, 2006).

<sup>58</sup> Evelyn Gordon, Op-Ed., *Judicial Power Grab*, JERUSALEM POST, May 18, 2006, at 15.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

this dominance may be described as a contingent truth rather than a necessary one, and things may well change because the extremely forceful former Supreme Court President Aharon Barak has made way for his successor, Justice Dorit Beinisch.<sup>61</sup>

B. *The American Experience*

The obvious question is whether any American reader of this Essay would in fact wish for us to emulate these models of "judicial independence," whether through formal rules or by informal convention. Although there is sometimes informal consultation by American Presidents with sitting Justices on the Supreme Court,<sup>62</sup> it is obvious that the Supreme Court has no formal role in designating even the pool from which their successors will be chosen, nor, of course, does the Court play any formal role in deciding who shall be appointed to one of the "inferior courts." It may be worth noting, though, that Professor Ruger has valuably demonstrated the remarkable degree of unilateral power enjoyed by the Chief Justice with regard to appointing members of the Foreign Intelligence Surveillance Court,<sup>63</sup> a court recently much in the news as the result of disclosures about surveillance by the National Security Agency. The Chief Justice must answer to no one, such as his colleagues, for the appointments, nor does the Congress engage in any oversight of the process.<sup>64</sup> Far from applauding such "judicial independence," or at least "Chief Justice independence," one might certainly wish that the Chief Justice were more accountable. French Prime Minister Georges Clemenceau's famous comment that "war is too important to be left to the generals" has spawned a number of analogies to the judiciary that the shape of the court system is too important to be left to the judges.<sup>65</sup>

I feel certain that almost every American reader will wish that non-judicial institutions continue to play some role in judicial appointments, which, I am arguing, logically entails that one is averse to maximizing "judicial independence." There are, obviously, a great many ways to inject what most of us would describe as "political" considerations into choosing a judiciary. The federal approach is to place selection in the hands of *both* other branches

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<sup>61</sup> See Dan Izenberg, *Court's Barak Era Comes to a Close*, JERUSALEM POST, Sept. 14, 2006, at 2.

<sup>62</sup> See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 210 (2000) (asserting that President Kennedy was dissuaded by Chief Justice Warren and Justice Douglas from appointing William Hastie as the first African American member of the Supreme Court because they viewed him as far too close to Felix Frankfurter in his approach to the Constitution).

<sup>63</sup> Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 366-67 (2004).

<sup>64</sup> See *id.* at 367.

<sup>65</sup> See, e.g., William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 4-5.

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of government, by giving the President the right to nominate and the Senate the authority to say yea or nay to such nominations.<sup>66</sup> Presidential candidates often campaign on platforms that explicitly promise the appointments of ideologically congruent judges, and Presidents regularly try to change the general drift of judicial decisions by appointing those deemed more compatible with the President's (or, just as much to the point, his political party's) vision of the Constitution – or, for that matter, statutory construction. Similarly, senators, going back to the very beginning of the United States, have not been reluctant to interpose their own understandings of constitutional norms against a President deemed not to share them. Many American states, of course, emulate the federal model, though, especially as one moves westward to those states formed after the Jacksonian Revolution, one finds a greater tendency toward some form of *popular* accountability, including, as in Texas, the direct election of judges.

#### CONCLUSION

A constitutional designer must inevitably make decisions as to the degree to which the initial selection of a judge should maximize institutional independence – which would counsel self-selected successors – or instead give some role to the public, whether directly (as in elections) or indirectly (as in confirmation by popularly elected officials). The more one moves toward popular control, the less one is enamored of judicial autonomy as what might be termed a dominant value. The values of such autonomy must inevitably be balanced against other political values. The resolution of debates about “judicial independence,” therefore, will not be found through some notion of conceptual “clarification,” but rather in the process of political disputation itself. Such is true of every “essentially contested concept” that structures our political world.

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<sup>66</sup> U.S. CONST. art. II, § 2, cl. 2.