

University of Nevada, Reno

An Examination of Judges in Israel and the United States

A thesis submitted in partial fulfillment of the requirements for the degree of
Master of Judicial Studies

By

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May 2015

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Entitled

An Examination Of Judges In Israel And The United States

be accepted in partial fulfillment of the

requirements for the degree of

MASTER OF JUDICIAL STUDIES

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May, 2015

Abstract

The writer of this thesis studied the governments of Israel and the United States of America. They share a common means of choosing their political leaders. They are both democracies, in the sense that they hold elections to determine who will serve as a political leader (law makers and enforcers). This thesis compares and contrasts the method of choosing judges in Israel to that of Illinois, which is one of 50 states that make up the United States of America. Israel appoints their judges and Illinois elects their judges. Both approaches of determining who will serve as a judge have negative attributes. Israel's approach suffers from members of the appointment committee favoring candidates who share their political views. Illinois' approach suffers from the need to raise large amounts of money to finance judicial campaigns, which can lead to undue influence from donors.

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INTRODUCTION

This is a thesis written as part of the scholastic requirements for a Master's Degree in Judicial Studies.

I developed the idea for this Thesis while I was studying with judges from Israel. I was immensely impressed with their passion for justice and wanted to know more about them. During discussions, I learned that they were appointed to serve as judges. I come from a State (Illinois) that elects their judges. Illinois has a long history of corruption and favoritism amongst our otherwise admirable judges. I began to wonder if we could prevent the corrupt judges from ever taking the bench if we used a system of appointments.

The debate over how best to select judges is hardly novel. Most would agree that the solution has yet to be found. As long as the issue has yet to be resolved, scholars have a continuing responsibility to address it. The answer to the complex question will not be found in this Master's Thesis. What I hope to do in this Thesis, is to give general information about a sample government (Israel) where judges are appointed and a sample government (USA) where judges are elected.

It may seem peculiar to compare a country with a population of 8 million with a country of over 300 million. The comparison is fair in that both are democracies and hold themselves out as model governments that recognize human rights. I also felt most comfortable discussing Israel's courts because I spent six weeks over two years studying with Israeli judges and under Israeli Academics. I was also given very detailed tours of Israeli Courts, including their

Supreme Court. I felt I had a better understanding of Israel's courts than any of the United States Courts that use the appointment system. I also wanted to give the reader of similar discussions some fresh information that they were not likely to receive otherwise.

I will start by offering some background information on how each government came into existence. The reader will find that Israel came into existence through a UN mandate and the United States came into existence through a revolution.¹ I will then describe how each is governed. The reader will find that while the titles of the office holders differ in each government, democracy is prevalent throughout both. I will then move on to the role of the judges in each government. I will rely on Israeli judges and scholars to describe what is expected of Israeli judges and on USA judges and scholars to describe what is expected of USA judges. The reader will find that what is expected in Israel and the USA is very similar; this reinforced my initial impression that I chose the correct governments to analyze in this thesis. This thesis will offer general facts about judges in both Israel and the United States. The reader will come away with basic knowledge of the qualifications and environment of the judges.

I will then review the two very different models of becoming judges. I will describe how Israel appoints judges and how judges are elected in the USA.

¹ A fascinating debate would be which has greater integrity. The distinction is between one's peers recognizing your right to exist as a government, Israel, versus a self-recognition that the Creator has given you the right to form a government that others, including atheists, should recognize, the United States.

The reader will find that both systems look perfectly acceptable, as a means to ensure a just judiciary on paper. This thesis will include a critical examination of both approaches. The reader will find that in practice, both systems have major flaws.

I will end this thesis with a summary of the facts and arguments that have been discussed.

ESTABLISHMENT OF ISRAEL

In this section I will summarize the history of the land called Israel as it relates to Jewish people. The reader will find that the Jews have staked a claim for the land comprising Israel since round 1250 B.C.

Jewish people² trace their origin to Abraham, who established the belief that there is only one God, the creator of the universe. Abraham, his son Yitshak (Isaac), and grandson Jacob (Israel), are referred to as the patriarchs of the Jewish People (Israelites). All three patriarchs lived in the Land of Canaan, that later came to be known as the Land of Israel.³ They and their wives are buried in the Ma'arat HaMachpela, the Tomb of the Patriarchs, in Hebron.⁴

The rule of the Jewish people in Israel starts with the conquests of Joshua (ca. 1250 BC). The most noteworthy kings were King David (1010-970 BC), who made Jerusalem the Capital of Israel, and his son Solomon (Shlomo, 970-931 BC), who built the first Temple in Jerusalem as prescribed in the Tanach.⁵

In 587 BC, Babylonian Nebuchadnezzar's army captured Jerusalem, destroyed the Temple, and exiled the Jews to Babylon (modern day Iraq). The year 587 BC marks a turning point in the history of the region. From this year

² Originally, the Hebrew term *Jews* [Yehudi] referred only to members of the tribe of Judah. Later, after the destruction of the northern kingdom of Israel, the term Jews was applied for the tribes of Judah, Benjamin and Levi, as well as scattered settlements from other tribes. ("Who Is a Jew?" Judaism101. Retrieved 8 February 2014)

³ The term Jews in its original meaning refers to the people of the tribe of Judah or the people of the kingdom of Judah. The name of both the tribe and kingdom derive from Judah, the fourth son of Jacob. "Jew", Oxford English Dictionary.

⁴ Genesis, Chapter 23

⁵ See Old Testament.

onwards, the region was ruled or controlled by a succession of superpower empires of the time in the following order: Babylonian, Persian, Greek Hellenistic, Roman and Byzantine Empires, Islamic and Christian crusaders, Ottoman Empire, and the British Empire.⁶ The area had been governed by Great Britain since 1922. Since that time, Jewish immigration to the region had increased, and tensions between Arabs and Jews had grown.

In 1917, The Balfour Declaration was introduced by the British government. It enshrined in a League of Nations mandate in 1920, that a "national home for the Jewish people" would be founded in Palestine, while preserving the "civil and religious" rights of non-Jewish communities there. The British were unsuccessful because they could not reconcile the conflicting principles.⁷

The Holocaust of European Jewry in the Second World War⁸ reinforced the Jews determination for a Jewish State. Their quest was realized on 29 November 1947, when, exhausted by World War II and increasingly intent upon withdrawing from the Middle East region, Britain referred the issue of Palestine to the UN. The United Nations General Assembly voted on United Nations Resolution 181.⁹

⁶ Israel Science and Technology Directory 1999-2015.

⁷ BBC, 6 May 2008

⁸ The Holocaust was the systematic, bureaucratic, state-sponsored persecution and murder of six million Jews by the Nazi regime and its collaborators. "Holocaust" is a word of Greek origin meaning "sacrifice by fire." United States Holocaust Memorial Museum, Washington, D.C. Encyclopedia Last Updated June 20, 2014.

⁹: 2015 Encyclopedia Britannica, Inc.

The resolution passed by the United Nations General Assembly called for the partition of Palestine into Arab and Jewish states, with the city of Jerusalem as a *corpus separatum* (Latin: “separate entity”) to be governed by a special international regime. The fate of the proposal was initially uncertain, but after a period of intense lobbying by pro-Jewish groups and individuals, the resolution was “passed with 33 votes in favor, 13 against, and 10 abstentions”.¹⁰ The Palestinian and other Arabs challenged the United Nations’ legal competence to partition Palestine. Moreover, they argued that Palestine was to be included in the Arab territories that had been promised independence through an agreement with Britain in 1915 in exchange for Arab support in confronting the allied Ottomans and Germans during World War I in the Arab region¹¹. Nonetheless, an Israeli state was declared in 1948 and the Israelis subsequently defeated the Arabs in a series of wars without ending the deep tensions between the two sides¹². In October 2011, Mahmoud Abbas, President of the Palestinian Authority since 15 January 2005, stated that “the Arabs made a mistake in 1947 when they rejected the UN partition”¹³.

¹⁰ Ibid.

¹¹ “What is the Origin of the Palestinian/Israeli Conflict” Trans Arab Research Institute, by Elaine Hagopian.

¹² Central Intelligent Agency The World Fact Book.

¹³ Reuters, 10/30/2011

The following is part of the text of the crucial UN resolution regarding the partition of Palestine¹⁴:

***Resolution 181 (II). Future government of Palestine
PLAN OF PARTITION WITH ECONOMIC UNION
Future constitution and government of Palestine***

***A. TERMINATION OF MANDATE, PARTITION AND
INDEPENDENCE***

- 1. The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948.*
- 2. The armed forces of the mandatory Power shall be progressively withdrawn from Palestine, the withdrawal to be completed as soon as possible but in any case not later than 1 August 1948.*

The mandatory Power shall advise the Commission, as far in advance as possible, of its intention to terminate the Mandate and to evacuate each area.

The mandatory Power shall use its best endeavors to ensure that an area situated in the territory of the Jewish State, including a seaport and hinterland adequate to provide facilities for a substantial immigration, shall be evacuated at the earliest possible date and in any event not later than 1 February 1948.

3. Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem, set forth in part III of this plan, shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in parts II and III below.

4. The period between the adoption by the General Assembly of its recommendation on the question of Palestine and the establishment of the independence of the Arab and Jewish States shall be a transitional period.

¹⁴ U.N. Resolution 181.

ESTABLISHMENT OF THE UNITED STATES OF AMERICA

In this section I will discuss the establishment of the USA. The reader will find that the inhabitants recognized a right to self-determination and declared themselves an independent nation.

The first Europeans to arrive in North America -- at least the first for whom there is solid evidence -- were Norse, traveled west from Greenland, where Erik the Red had founded a settlement around the year 985. In 1001 his son Leif is thought to have explored the northeast coast of what is now Canada and spent at least one winter there¹⁵. The Norsemen were followed by French, Spanish, Dutch, and British explorers. The British were the most successful at establishing colonies, from both a financial and a cultural perspective.

North American colonists found themselves progressively at odds with British imperial policies regarding taxation and frontier policy in the 1760s and early 1770s. After repeated protests failed to sway British policies, and instead resulted in the closing of the port of Boston and the declaration of martial law in Massachusetts, the colonial governments sent delegates to a Continental Congress to coordinate a colonial boycott of British goods. Hostility broke out between American colonists and British forces in Massachusetts. The Continental Congress worked with local groups, originally intended to enforce the

¹⁵ U.S. Department of State.

boycott, to coordinate resistance against the British. The British officials throughout the colonies found their authority challenged by informal local governments, although loyalist sentiment remained strong in some areas.

Colonial leaders nevertheless hoped to reconcile with the British Government, and all but the most radical members of Congress were unwilling to declare independence. “However, in late 1775, Benjamin Franklin, then a member of the Secret Committee of Correspondence, hinted to French agents and other European sympathizers that the colonies were increasingly leaning towards seeking independence.”¹⁶ While perhaps true, Franklin also hoped to convince the French to supply the colonists with aid. The French officials would only consider the possibility of an alliance after the colonists achieved Independence.

During the winter of 1775–1776, reconciliation with Britain seemed unlikely. The members of Continental Congress increasingly viewed independence as the only course of action available to them. The disenchantment grew after the British Parliament prohibited trade with the colonies on December 22, 1775. In January 1776, the publication of Thomas Paine’s pamphlet “Common Sense”¹⁷ was widely distributed. It encouraged the colonies’ independence. By February of 1776, colonial leaders were discussing the possibility of forming foreign alliances and began to draft the Model Treaty that would serve as a basis for the

¹⁶ U.S. Department of State January 2009.

¹⁷ Full title – *Common Sense; Addressed to the Inhabitants of America, on the Following Interesting Subjects*
<http://name.umd.umich.edu/004831091.0001.000>.

1778 alliance with France. In April of 1776, the Continental Congress responded to the British Parliament by prohibiting trade with the colonies by opening colonial ports. Leaders for the cause of independence wanted to make certain that they had sufficient congressional support before they would bring the issue to the vote. On June 7, 1776, Richard Henry Lee introduced a motion in Congress to declare independence. Other members of Congress were amenable but thought some colonies not quite ready. However, Congress did form a committee to draft a declaration of independence and assigned this duty to Thomas Jefferson¹⁸.

The Declaration of Independence set forth the ideas and principles behind a just and fair government, and the Constitution outlined how this government would function. It officially broke all political ties between the American colonies and Great Britain.¹⁹

The Declaration assertion that rights are innate, rather than created²⁰. Professor Charles L. Black, Jr. states that the Declaration of Independence

¹⁸ Office of the Historian, Bureau of Public Affairs, United States Department of State.

¹⁹ US Citizen and Immigration Service M654 (rev. 07/08)

²⁰ There is some debate over the meaning of creator. "The most famous religious phrase in the Declaration—that people are "endowed by their Creator with certain inalienable rights"—was not included in Jefferson's original draft. He had written that people derive inherent rights from their "equal Creation." The iconic language was added by a small committee, including Benjamin Franklin and John Adams. "Creator" was a theologically ambiguous word. Most Deists used it, but it was also commonly spoken by the most orthodox religions of the day. Timothy Dwight, a Congregational minister who served as president of Yale College from 1795-1817, delivered a sermon stating that the Bible contained "as full a proof, that Christ is the Creator, Wall Street Journal the Creator is God." Was the Declaration of Independence Christian? By Michael I. Meyerson July 5, 2012

recognizes a safeguard of human rights, the Declaration of Independence “commits all the governments in our country to ‘securing’ for . . . people certain human rights²¹”:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .²²

THE STRUCTURE OF THE GOVERNMENT OF ISRAEL

In this section I will describe the structure of the government of Israel. Israel is comprised of three branches of government. The Legislative, Executive and Judicial branches act to give governance to the eight million Israelis²³. According to the Israel Ministry of Foreign Affairs, the three branches are described below²⁴.

Israel is governed by a multi-party parliamentary system. Their democratic rule is rooted in the following principles and institutions: basic laws which lay down the order of government and of the citizens' rights; the holding of elections to the house of representatives and to municipal councils every few years, following which, a central government and local authorities are set up, based on the principle of the rule of the majority, with the rights of the minority guaranteed by law; the principle of the separation between the legislative branch, the executive branch, and the judiciary, to which the institution of state control has been added; freedom of the press.

THE EXECUTIVE BRANCH: THE GOVERNMENT

Until 1992, it was the President who assigned the task of forming a new Government to the head of the list with the best

²¹ 698 Cornell Law Review [Vol. 97:693].

²² U.S. Declaration of Independence, (1776).

²³ World Population Review 2014

²⁴ Israel Ministry of Foreign Affairs

chances of succeeding, who was also usually the head of the largest party in the Knesset. The Government required the approval of the Knesset, so that it needed to represent a coalition supported by a majority of the Knesset members, even if not all of its supporters were actual members in it.

In an amendment to the Basic Law, the Government adopted in 1992 established a system of direct election of prime minister, which was in effect for three elections: May 1996, May 1999, and the special election of prime minister in February 2001. In March 2001 the Knesset voted to revert to the previous electoral system, under which voters cast one ballot for a political party to represent them in the Knesset.

Following consultations, the president presents one Knesset member with the responsibility of forming a government. To do so, the Knesset member has to present, within 28 days of being given the responsibility for forming a government, a list of ministers for Knesset approval, together with an outline of proposed government guidelines.

Most of the ministers are responsible for one or more Government Ministries, but can also serve as a Minister without Portfolio. Ministers do not have to be Knesset members, while Deputy Ministers - and there can be more than one Deputy Minister in each Ministry - must be members. The addition of new Ministers to the Government in the course of its term of office, or a change in the distribution of functions among them, requires the Knesset's approval.

It is the Government which determines its own working arrangements and the manner in which it adopts decisions. It usually meets for one weekly meeting on Sundays, though in urgent cases additional meetings may be called. The Government may also act by means of standing or occasional Ministerial Committees, some of whose decisions require the approval of the Government as a whole.

A Government which has resigned or has been brought down by a vote of no-confidence, continues to serve until a new Government is formed, and is then called a transitional Government.

The number of Ministries maintained by the Government varies from time to time according to the needs and to coalition constraints.

THE PRESIDENCY

The President of the State is elected by the Knesset in a secret vote, and primarily fulfills ceremonial functions as Head of State. Candidates for the presidency are customarily proposed by the large parties, and are usually well-known public figures. The

President is appointed for one term of seven years.

The functions of the President are defined in the Basic Law: he is President of the State. The President assigns the task of forming a new Government to a member of Knesset. In addition, the President assumes public functions and activities in accordance with the customs which have crystallized on the issue, and with his personal inclinations. Among the President's formal functions are signing laws (even though he has no control over their content) opening the first meeting of the first session of a new Knesset, receiving the credentials of new ambassadors of foreign states, approving the appointment of civil and religious judges, the State Comptroller and the Governor of the Bank of Israel, pardoning prisoners or commuting their sentences, etc.

The legislative authority, the Knesset, Israel's Parliament, includes 120 members. They are elected by popular vote and assigned seats for members on a proportional basis. Members serve four-year terms.

The Powers and functions of the Knesset are described by The State of Israel. The Knesset is the House of Representatives (the parliament) of the State of Israel, in which the full range of current opinions are represented. Nevertheless, parties that reject the existence of the State of Israel as the state of the Jewish People, its democratic nature, or that incite racism may not participate in the elections.

Within the framework of the Israeli democratic system, the Knesset is the legislative branch, with the exclusive authority to enact laws. The Knesset may pass laws on any subject and in any matter, as long as a proposed law does not contradict an existing basic law, and the legislative process is carried out as required by the law.

As heir to the authority of the Constituent Assembly, the Knesset has a constituent-constitutional role, even though this role was denied by some in the past. According to the Proclamation of Independence, the constitution of the State of Israel should have been prepared by October 1, 1948, but even today Israel does not yet have a complete written constitution. Once all the basic laws are passed, they will together constitute the state's constitution.

The Knesset supervises the work of the Government through its committees and the work of the plenum. The Knesset has several quasi-judicial functions, which include the power to lift the immunity of its members, and the power to have the President of the State and State Comptroller removed.

The Knesset also has an elective function through which several public officials are elected²⁵.

A general description of the functions of the Israeli Judicial system is offered by the Israel Ministry of Foreign Affairs²⁶:

The courts deal with cases of persons charged with a breach of the law. Charges are brought by citizens against other citizens, by the state against citizens, and even by citizens against the state.

The sessions of the courts of law are usually public, unless it is decided to hold closed hearings under special circumstances. When more than one judge is presiding, and the judges do not agree on a verdict, the opinion of the majority is decisive. Israel does not have trials by jury.

The cases brought to the courts are of two types: criminal cases and civil cases. A criminal case is one involving a transgression of the social order, and its intention is to punish the offender if his guilt has been proven. In a civil case the plaintiff is a private person or association and the defendant is a private person or association. The subject of the trial is the demand that a contract signed between the parties be fulfilled, a debt be returned or compensation be paid for damages caused. In a civil trial there is no punishment, but a duty to pay financial or other compensations.

The Organization of Courts of Law is managed by The Directorate of Courts and is headed by the Director of Courts. The system is headed by the President of the Supreme Court of Law and the Minister of Justice.

The organization of the Courts of Law in Israel includes all the Courts of Law in Israel:

1. The Supreme Court
2. The District Courts of Law
3. The Magistrates Courts (the first instance)
4. National Labor Court
5. Regional Labor Courts

There are three areas of jurisdiction in the regular courts: magistrate courts, which have the authority to try light and intermediate offences or civil cases in which the sum claimed is no higher than one million shekels (approximately U.S. \$300,000); district courts, which try serious offenses and civil cases in which the sum claimed is over one million shekels; and the Supreme Court, which sits in Jerusalem. The number of judges serving on

²⁵ See, The State of Israel, 2010.

²⁶ Israel Ministry of Foreign Affairs

the Supreme Court is determined by the Knesset. The judges elect a permanent President of the Supreme Court and a deputy from amongst themselves.

The Supreme Court is divided into two areas of responsibility. The first hears appeals for verdicts given by district courts. In this capacity it is called the Supreme Court of Appeals. The verdict of the Supreme Court of Appeals is final. The second hears appeals by persons who feel that they have been wronged by one of the State authorities or statutory bodies. In this capacity the court is called the High Court of Justice. The High Court of Justice functions by means of orders.

The Organization of Courts of Law is managed by The Directorate of Courts and is headed by the Director of Courts. The system is headed by the President of the Supreme Court of Law and the Minister of Justice.

In addition, the judicial system also includes the Bailiff Office that is, according to the law, linked to the Magistrates Court and the Center for Collection of unpaid fees and expenses. The latter is an administrative unit within the Directorate of Courts in charge of collecting fines and other debts as sentenced by the Courts of Law. The Courts of Law are deployed in 50 regions throughout Israel and are organized into six districts.

In addition to the ordinary courts, there are special courts which are authorized to deal with specific matters only. The most important amongst these are the military courts and the religious courts. There are religious courts of the four main religious denominations: Jewish, Muslim, Christian, and Druze. Each religious court can try cases applying only to members of its own religious community who are citizens of the State or permanent residents. Since matters of personal status in Israel are usually decided on the basis of religious laws, the religious courts deal with them.

THE STRUCTURE OF THE GOVERNMENT OF THE UNITED STATES

In this section I will describe the structure of the government of the United States. The reader will find that the United States is comprised of three branches of federal government and 50 individual States. Each of the 50 States has its own three branches of government. The branches perform similar roles in the

federal and state levels. The three branches are the Legislative, Executive and Judicial.

On July 4, 2014, the population of the United States was 318,881,992 people²⁷. The Constitution of the United States divides the federal government into three branches to ensure a central government in which no individual or group gains too much control. It nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants, nor does it expressly enjoin maintenance of a system of checks and balances. Yet, it does grant the three separate branches the powers to legislate, to execute, and to adjudicate, and it provides throughout the document the means by which each of the branches could resist the blandishments and incursions of the others. The Framers drew up our basic charter against a background rich in the theorizing of scholars and statesmen regarding the proper ordering in a system of government of conferring sufficient power to govern while withholding the ability to abridge the liberties of the governed²⁸.

The 3 Branches of Government are:

1. Legislative – Makes laws (Congress)
2. Executive – Carries out laws (President, Vice President, Cabinet)
3. Judicial – Evaluates laws (Supreme Court and Other Courts)

²⁷ U.S. Census Bureau

²⁸ See: M. Vile, *Constitutionalism and the Separation of Powers* (1967).

The U.S. government's official web portal, USA.gov²⁹, describes the role and powers of each branch:

Each branch of government can change acts of the other branches as follows:

The president can veto laws passed by Congress. Congress confirms or rejects the president's appointments and can remove the president from office in exceptional circumstances. The justices of the Supreme Court, who can overturn unconstitutional laws, are appointed by the President and confirmed by the Senate.

Legislative Branch

The legislative branch enacts legislation, confirms or rejects presidential appointments, and has the authority to declare war. This branch includes Congress (the Senate and House of Representatives) and several agencies that provide support services to Congress. American citizens have the right to vote for senators and representatives through free, confidential ballots.

Senate - There are two elected senators per state, totaling 100 senators. A senate term is six years and there is no limit to the number of terms an individual can serve.

House of Representatives - There are 435 elected representatives, which are divided among the 50 states in proportion to their total population. There are additional non-voting delegates who represent the District of Columbia and the territories. A representative serves a two-year term, and there's no limit to the number of terms an individual can serve.

Executive Branch

The executive branch carries out and enforces laws. It includes the President, Vice President, the Cabinet, executive departments, independent agencies, and other boards, commissions, and committees.

American citizens have the right to vote for the president and vice president through free, confidential ballots.

Key roles of the executive branch include:

President - The president leads the country. He/she is the head of state, leader of the federal government, and commander-in-chief of the United States Armed Forces. The president serves a four-year term and can be elected no more than two times.

Vice President - The vice president supports the president. If the president is unable to serve, the vice president becomes

²⁹ USA.gov

president. He/she can serve an unlimited number of four-year terms.

The Cabinet - Cabinet members serve as advisors to the president. They include the vice president and the heads of executive departments. Cabinet members are nominated by the president and must be approved by the Senate (with at least 51 votes).

Judicial Branch

The judicial branch interprets the meaning of laws, applies laws to individual cases, and decides if laws violate the Constitution.

The judicial branch is comprised of the Supreme Court and other federal courts.

Supreme Court - The Supreme Court is the highest court in the United States. The justices of the Supreme Court are nominated by the president and must be approved by the Senate (with at least 51 votes). Congress decides the number of justices. Currently, there are nine. There is no fixed term for justices. They serve until their death, retirement, or removal in exceptional circumstances.

Other Federal Courts - The Constitution grants Congress the authority to establish other federal courts.

THE ROLE OF THE JUDGE IN ISRAEL

In this section I will describe the role of judges in Israel, from the perspective of Israeli scholars and judges. The reader will learn that there are many types of judges in Israel. What will be addressed here is the general role that they are expected to play as part of government--in other words, what society expects of them.

Israeli judges are said to work under a “mixed legal system.” “Although it inherited The British law, many statutes in important areas of law, mainly private law, enacted since the establishment of the state, adopted Civil Law doctrines.³⁰”

A thorough analysis of Israeli judges was offered by Judge Amnon Straschnov. Judge Straschnov is a judge in the district court of Tel Aviv. He delivered an analysis of the role of Israeli judges at a Luncheon for the Jewish Federation of Tulsa on February 10, 1999.

Judge Straschnov concentrated on specific points related to Israeli judges. They include, judges not having the benefit of a jury system or written Constitution, not hearing capital cases³¹ and the difficulty judges have deciding cases involving orthodox and non-orthodox Jews.

Regarding the lack of a jury system, unlike the judiciary in the United States, Israeli judges not only make decisions on legal issues, but perform the role as finders of facts as well, “professionally trained judges handle all aspects regarding the administration of justice.³²” Israeli judges are not only required to decide cases but they are required to justify their decisions, “Israeli judges are responsible not only for giving the verdict, but also for providing extremely

³⁰ Judicial Appointments and Promotions in Israel - Constitution, Law and Politics, Eli M Salzberger.

³¹ Capital cases are cases where the defendant may receive the death penalty as a punishment see Lane, J. Mark: "Is there life without parole? A capital defendant's right to a meaningful alternative sentence"; 26 *Loyola of Los Angeles Law Review* 327 (1993).

³² Amnon Straschnov, The Judicial System in Israel, 34 *Tulsa L. J.* 528 (1998).

detailed opinions which are fit to proceed to the upper courts. Generally, laymen would not take part in a judicial decision in Israel”³³.

Judge Straschnov offered reasons why Israeli judges must decide the cases that they hear. The first reason involves the difficulty of finding an unbiased jury. “It is believed impossible to find twelve people who do not know each other, or the grandmother of the prosecutor, or the son in-law of one of the witnesses. Such familiarity among potential jurors makes the creation of an unbiased jury equally impossible”³⁴. The other reason involves the difficulty of people agreeing in general: “Additionally, and most importantly, one would be hard pressed to find twelve Israelis who agree unanimously on a certain fact or point, let alone an entire case”³⁵. Judge Straschnov believes that a system where judges decide cases best serves the Israeli people and Israeli justice: “Therefore, this author believes that a system without a jury best serves the Israeli people and Israeli justice”³⁶.

Judge Straschnov spoke of the difficulty that Israeli judges have without the benefit of a written constitution. He offered that in spite of the fact that Israeli judges do not have a written constitution for guidance, litigants nevertheless receive justice. He credits the judges, “they (judges) possess the powers to adjudicate constitutional or quasi-constitutional rights”³⁷. He also credits the strength of the Supreme Court of Israel, “but even without a written constitution, it

³³ Ibid

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid. *at* 535

seems to me that the Supreme Court of the State of Israel is a very strong and powerful court, which succeeds in maintaining and preserving human rights in general, especially in balancing human rights and the needs of security in the State of Israel,”³⁸. Judge Straschnov made the argument that in the end a just result trumps all other considerations, “what is more important is not what the written constitution says, but how and in which way the Justices of the Supreme Court interpret the constitution.” This remark ironically echoes the observation of a famous American jurist. When asked once what does the Constitution of the United States mean, Chief Justice Charles E. Hughes replied that the U.S. Constitution means what the judges say it means³⁹.

Straschnov believes that Israeli judges would prefer to have a written constitution but Israel is unique and that uniqueness makes that very difficult, “Israel has many factions of the people, Arabs and other minorities; ultra-orthodox Jews who do not serve in the army; we have religious Jews and the secular Jews, all with different kinds of views and beliefs.” The differences between these segments of Israeli society “have prevented and may continue to prevent us from having a written constitution”⁴⁰.

On the issue of Israeli judges not applying the death penalty, Judge Straschnov points out that the laws of Israel, West Bank, and the Gaza Strip all permit capital punishment in special circumstances: “Offenses performed by the

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

Nazis and their aides during World War II, crimes against humanity, and high treason in times of war are all punishable by death.”⁴¹

Judge Straschnov cited only one person being executed in Israel since its establishment. The “Infamous Nazi Adolf Eichmann was sentenced to death and executed in 1962 after he was captured and brought from Argentina to Israel. Eichmann played an important role in the Nazi regime. He was personally responsible for the extermination of millions of Jews in concentration camps, and was in charge of the “final solution” of the Jewish people. Judge Straschnov does not see the policy of not invoking the death penalty in Israel as likely to change, “despite the constant struggle against terrorist activity, human rights still prevails over security”⁴².

The complex make up of orthodox and non-orthodox Jews in Israel is a challenge judges in Israel are expected to overcome. Judge Straschnov offered the following example of the difficulty Israeli judges face when dealing with issues of religion:

The first Prime Minister of Israel, as well as its founding father, David Ben-Gurion, made compromises with the ultra-orthodox Jews by exempting the yeshiva students from serving in the Army. Because of the compromises Israel's laws have evolved with strong consideration of the orthodox religious beliefs. The initial compromise had permitted the yeshiva students to avoid military service by going to study in the Yeshiva. Not surprisingly, this created unrest and

⁴¹ Ibid at 528

⁴² Ibid at 530

dissatisfaction among the secular population. Many petitions opposing such policy went before the Supreme Court, but it always decided this issue was a "political question," to use the American terminology. The Court encouraged the people to lobby the legislature to reform the situation, however, they did not succeed and the law was not amended.

Finally, the issue went to the Supreme Court. The petition noted that the exemption of the yeshiva students amounted to about 29,000 people; more than a brigade. Additionally, Israeli soldiers complained that their mandatory service of three years would be reduced if the yeshiva students were not exempted from service.

The Supreme Court sat as the High Court of Justice, in a special panel of eleven justices. The Court finally spoke and upheld the petition finding that the yeshiva student exemption was "unconstitutional," unjust and unfair to the entire population. The Court further ordered the Israeli parliament, the Knesset, to amend the situation within a year. The Knesset must enact a law that enumerates and details exactly who may be exempted and its rationale behind each exemption. The legislature, according to the Court, had not gone far enough to ensure fairness, and the Court as its overseer demanded the legislature create equitable laws⁴³.

Aharon Barak was appointed Justice of the Supreme Court of Israel in 1978; Justice Barak served as Supreme Court President from 1995 until 2006. He studied law at the Hebrew University of Jerusalem where, after completing a

⁴³ Ibid at 534

term of service in the Israeli Defense Forces, he received his Doctorate in Law in 1963.

In 2006 Justice Barak published through Princeton University press, "The Judge in a Democracy". In his book he describes the role of a judge who serves in a democracy similar to Israel. He stated that judges must adhere to the legislative branch while interpreting laws, "The Judge has an important role in the legislative process. The judge interprets statutes. Statutes cannot be applied unless they are interpreted. The judge may give the statute a new meaning, that seeks to bridge the gap between life and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs. The court fulfills its role as junior partner in the legislative project. It realizes the judicial role by bridging the gap between law and life"⁴⁴.

Justice Barak explained that judges are expected to examine the differences between law and life and may have to give new and modern meaning to an old statute. But he stated that this is not always possible. He offered that judges can only go so far in filling the gaps, "sometimes the judge lacks the power to bridge the gap between the old language of the statute and society's new reality. In such a case the judge must set aside his work tools. The judge may not act against the law. He can only hope that the legislature will do its job

⁴⁴ 2006 Princeton University press, "The Judge in a Democracy," page 4.

and repeal the old statute. The judge, as a faithful interpreter, cannot achieve such a result.”⁴⁵

When an Israeli judge faces a statute that became obsolete, that judge is not expected to repeal it. Justice Barak asserts, “I personally do not think that it is the proper solution to a particular problem. The right way is not to rely on judges to repeal obsolete laws but rather for the legislature to do so. Indeed, the Israeli legislature occasionally collects pieces of old legislation that are no longer necessary and repeals them. That is the right way to proceed”⁴⁶.

Judges are expected to distinguish statutes from common law and have leeway when addressing common law. According to Justice Barak, “the court may not repeal an obsolete statute. It may, however, repeal a common law holding that has become obsolete. It may change even a non-obsolete precedent if it does not suit today’s’ social needs. Indeed, judges created common law. In doing so, they sought to provide a solution to the social needs of their time. As these needs change, judges must consider whether it is appropriate to change the judicial precedent itself, by expanding or restricting the existing law or overturning an old precedent. Sometimes the new social reality necessitates creating new law to resolve problems that did not arise at all in the past, where the goal of the new case is to bridge the gap between law and the new social reality.”⁴⁷

⁴⁵ Ibid at page 8

⁴⁶ Ibid

⁴⁷ Ibid

THE ROLE OF THE JUDGE IN THE UNITED STATES

In this section I will describe what is expected of a judge in the United States from the perspective of United States judges and scholars and judges. What will be addressed here is the general role that they are expected to play as part of government--in other words, what society expects of them.

Richard A. Posner is a Judge, in the U.S. Court of Appeals for the Seventh Circuit and a Senior Lecturer at the University of Chicago Law School. He gave the keynote address at a symposium sponsored by the Boston University School of Law on "The Role of the Judge in the Twenty-First Century" on April 21, 2006.

Judge Posner offered that the role of the judge can be broken down into 3 concepts. They are formalism, attitudinalism, and pragmatism. Formalism expects judges to accept laws on their face and apply laws to facts in each case:

Formalism is the conventional, one might say the official, conception of the judicial role. It was expressed, I assume tongue-in-cheek, in an especially unconvincing form by that skilled advocate John Roberts at his triumphal confirmation hearing. He said that the judge, even if he is a Justice of the U.S. Supreme Court, is merely an umpire, calling balls and strikes. Roberts was updating, for a sports-crazed century, Alexander Hamilton's view of the judge as one who exercises judgment but not will, and Blackstone's view of judges as the oracles of the law.⁴⁸

Judge Posner does not expect United States judges to rule under the formalist conception of judging: "No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the

⁴⁸ 1060 *Boston University Law Review* [Vol. 86:1049].

Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.⁴⁹

Judge Posner described Attitudinalism as the opposite extreme Formalism. Under Attitudinalism a judge is expected to forgo the laws as rules in accordance with their personal preference:

At its crudest, this is the idea that judges and Justices simply vote their political preferences, so if you know whether they are Democrats or Republicans you can predict their decisions; a more refined version substitutes ideology for party affiliation. It is unquestionably true that there are liberal and conservative judges and Justices and that if you know which camp a particular judge belongs to, you know a lot about how he or she is likely to vote.⁵⁰

Judge Posner's third conception of the judicial role is Pragmatic. The pragmatic approach is a middle ground of Formalism and Attitudinalism:

The judicial imperative is to decide cases with reasonable dispatch, as best one can, even in what I am calling the interesting cases – the ones in which the conventional materials of judicial decision making just won't do the trick. For the judge, the duty to decide the case and to do so, moreover, with reasonable dispatch is primary. One's political preferences will do the trick some of the time, as the attitudinalist school has demonstrated, but not always, because they are bound to be tempered by other concerns. These include the feasibility of a particular judicial intervention given the limited knowledge and powers of courts, the effect on the law's stability and the court's reputation if its attitude toward precedent and statutory text is seen as too cavalier, and the judge's desire for ideological consistency (which is different from, though often correlated with, political preference).⁵¹

Eva S. Nilsen is an Associate Clinical Professor at Boston University School of Law. She authored a special issue of the Boston University Law

⁴⁹ Ibid at 1051.

⁵⁰ Ibid at 1052.

⁵¹ Ibid at 1053.

Review based on a symposium on "The Role of the Judge in the Twenty-First Century". The symposium was held on April 21st and 22nd, 2006 at the Boston University School of Law. At the symposium a distinguished group of federal judges and academics exchanged ideas about judges and what society expects from them.

The following are selected excerpts from her article. Nilsen states that Professor Erwin Chemerinsky rejects the Formalism approach: "Judges decide cases based on their politics and other values, and that this is just as true of conservative judges as liberal ones denies that there is any such thing as discretion-free judging. In his view, judges make law constantly, and in doing so they draw on their judgment, which is based on their ideology and experiences"⁵².

Professor Ward Farnsworth also rejects the Formalism approach: "Once a case is close enough to create dissent, the source of law involved tends to diminish in importance; the decision ends up being made on the basis of policy judgments that cut across the divide between constitutional and non-constitutional sources of law."⁵³

First Circuit Chief Judge Michael Boudin agrees with the other panelists that the work of judges today is no longer simply resolving criminal and civil disputes: "Judges are indeed lawmakers"⁵⁴. Boudin had concerns about judges overstepping their role. "This role can only remain beneficial and secure if it is

⁵² 86 *Boston University Law Review*. 1038.

⁵³ *Ibid*.

⁵⁴ *Ibid* at 1040

employed with due regard for the legislature. When courts act as reformers and effect dramatic innovation, they set themselves up against the democratic process and invite a backlash”⁵⁵.

Professor Judith Resnik also sees the role of the judge changing over time. “There has been a dramatic shift over the past thirty years, as cases once decided in courtrooms before Article III judges are now decided by administrative agencies and private providers. This has been facilitated by Congress, with its willingness to delegate much of the Article III power to non-Article III judges”⁵⁶.

Associate Clinical Professor Nilsen discussed larger caseloads, more complex cases, and the increasingly specialized nature of litigation as affecting the role of the judge:

Some commentators argue that complex cases absorb inordinate judicial resources, drawing some judges away from more routine cases and increasing the burden on others. Unless we increase their numbers, judges may not be able to devote enough time to cases, thereby risking erroneous decisions. Specialized courts are invoked by many as a potential solution to the problem that increasingly specialized knowledge is required to decide complex cases.⁵⁷

Professor David Faigman, also sees the role of the judge as changing. “Judges today are required to adjudicate issues turning on complex questions of economics, statistics, science, social science, and mathematics. Scientific and technological advances and the increasing use of expert witnesses tax the

⁵⁵ Ibid

⁵⁶ Ibid.

⁵⁷ Ibid.

generalist judge"⁵⁸. He calls on judges to learn science: "Scientifically illiterate judges pose a grave threat to the judiciary's power and legitimacy."⁵⁹

Professor Jeffrey Rachlinski, discussed research that found bankruptcy judges outcomes depending on their political orientation. He suggests that this finding may counsel against over-reliance on specialized courts. The more specialized courts we have, Rachlinski warns, the more politicized our courts could be.⁶⁰

Professor Geoffrey Stone looks at the courts previous mistakes to make a point on present day judges: "The decision to uphold bans on anti-government speech in World War I, the Japanese American internment in World War II, and the numerous anti-Communist laws during the Cold War. Eventually, all three became cause for profound regret; these cases have come to be regarded as constitutional failures and as black marks on the Court's reputation"⁶¹. Stone is optimistic that the Court has learned from the mistakes of the past, the Nixon-era Pentagon Papers case, the enemies-list wiretapping case, and the recent cases involving prisoners of war at Guantanamo. These cases, in Stone's view, "discarded the "logical" presumption favoring the government's national security measures in exchange for a "pragmatic" presumption of close judicial scrutiny of

⁵⁸ Ibid at 1042

⁵⁹ Ibid

⁶⁰ Ibid at 1043.

⁶¹ Ibid

government's national security measures in exchange for a "pragmatic" presumption of close judicial scrutiny."⁶²

First Circuit Judge Juan Torruella addressed the future role of judges. He sees large-scale immigration exerting great strains on court resources. "Caseloads will become dominated by immigration and civil rights issues."⁶³

ISRAEL'S APPOINTMENT OF JUDGES

In this section I will describe how someone becomes a judge in Israel. The reader will find that Israel appoints their judges. For now, I will address how a nine member committee representing Israel's three branches of government plus the legal profession chooses who will serve as a judge in Israel. I will address the faults of this way of selecting judges later in my discussion.

Eli M. Salzberger (Professor of Law at the University of Haifa Faculty of Law in Israel) wrote on how Israelis become judges. His work is entitled, *Judicial Appointments and Promotions in Israel - Constitution, Law and Politics* (also referenced in *The Role of the Judge in Israel*).

First and foremost, and in spite of a committee choosing Israel's judges, Israel is a democracy. "It is said that out of the very many new states established after the Second World War, only very few have managed to establish and maintain a real democracy, a liberal democracy. Israel is one of them."⁶⁴ Israel's judiciary is credited for Israel's success as a democracy, "the Supreme Court of

⁶² Ibid at 1046.

⁶³ Ibid.

⁶⁴ *Judicial Appointments and Promotions in Israel - Constitution, Law and Politics*
Page 1.

Israel, together with other legal institutions, such as the Attorney General and the prosecution agencies, managed to construct important features of Israel's democracy and protect others."⁶⁵ Israel's judges are held in high regard by their international peers: "The quality of the Israeli judiciary and especially its Supreme Court was acknowledged recently by Lord Wolf, the Lord Chief Justice of England and Wales, who declared that the Israeli Supreme Court is one of the best courts he is aware of world wide."⁶⁶

Israel has relied on appointment of its judges almost since its inception. "The basic framework of judicial selection for the general courts system in Israel has been in practice for more than 50 years now. It's most important component is the judicial appointments and promotions statutory committee."⁶⁷

All three of Israel's branches of government along with non-government lawyers serve on the selection committee:

"The nine members committee represents the three branches of government plus the legal profession. Politicians - two parliament members elected by the Knesset, traditionally one from the opposition, and two government ministers one of whom is the Minister of Justice, the chair of the committee - have an important input, but the majority of members are professionals - two Bar members, elected by the Council of the Bar for three years, and three Supreme Court justices, the President of the Court and two judges elected by all the Court's members for a period of three years. The Supreme Court judges are the biggest block."⁶⁸

Candidates must be nominated. "Nominations for the committee's consideration can be made by the Minister of Justice, The President of the

⁶⁵ Ibid at 2

⁶⁶ Ibid at 3

⁶⁷ Ibid at 10

⁶⁸ Ibid

Supreme Court and any three members of the committee. In practice, this requirement means that in most cases the Nominees are agreed upon by the Minister and the President of the Court.”⁶⁹

One must be a lawyer or a legal academic with minimum experience to be considered for the position of judge, “candidates for judicial positions can be practicing lawyers or legal academics with a minimum period of experience (five years to the peace court, seven years to the district court and ten years to the Supreme Court) prior to the nomination.”⁷⁰

Candidates come from a varied background and tend to serve as prosecutors before serving as a lower court judge. Judges then tend to work their way up from lower court to higher court:

“The law also allows a ‘significant jurist’ to be a nominee to the Supreme Court, provided that he or she gains the support of three quarters of the selection committee members. In practice, most peace courts’ judges are selected from among private and public practitioners (mainly prosecutors). Most district court judges are either peace court judges who gain promotion, or senior prosecutors and other state legal office holders who are nominated directly to the district court. The Supreme Court judges are either district court judges who gain promotion, or very senior state legal officers, such as the Attorney General or State Attorney, or, occasionally, senior academics.”⁷¹

The appointment of judges started when the land Israel occupies was under British influence.

“Appointment of all judges was entrusted to the High Commissioner, while the Supreme Court appointees had to be approved in London. Judges were to hold office during His

⁶⁹ Ibid.

⁷⁰ Ibid at 11.

⁷¹ Ibid.

Majesty's pleasure. From the 1930's, however, the High Commissioner formed an informal advisory committee consisting of representatives of the Bar and presiding judges, to assist him in judicial selection, and from 1943 the members of this committee were appointed by the Chief Justice."⁷²

The judges consisted of both Jews and Arabs.

"Jewish and Arab professionals, non-political figures were appointed to the peace and district courts (by 1948 nine out of twenty district courts judges and thirteen out of forty-one peace court judges were Jewish), but the nine-members' Supreme Court was manned mainly by British judges with a representation of one Jew and one Arab. For this reason the Supreme Court also gained the powers of a high court of justice. All petitions against the government or applications for judicial review were under the exclusive jurisdiction of the Supreme Court."⁷³

Once Israel was formed, British influence was replaced with influence from Israelis, "however, the government declared that because of the great importance of the composition of the Supreme Court, its judges should be appointed by the Provisional Council upon nomination by the Minister of Justice. In other words, the government delegated to Parliament the competence to appoint judges, maintaining its powers to nominate the candidates. This was the appointment procedure until the enactment of the *Judges Law* in 1953."⁷⁴

Israel's independence over selecting its judges increased in 1953.

"The government initiated the Judges Act already in 1951, but it did not pass the third reading until 1953. The law increased the structural independence of the judiciary by holding that judges would have tenure until the mandatory retirement age of 70, and that their wages could not be decreased separately. But the most significant component of this law was a new procedure for the

⁷² Ibid.

⁷³ Ibid at 5

⁷⁴ Ibid

appointment and promotion of judges. In an interesting move the government and the Knesset gave up their powers to appoint judges and the law established a committee to perform this task, while giving the formal appointing power to the President of the State.”⁷⁵

Professor Saltzberger notes that Israel’s current structure has been in place since 1984. “In 1984 the Knesset replaced the *Judges Act* by *Basic Law: Judicature*, which retained the procedure for the selection of judges, but upgraded its normative status to a basic law, to be part of Israel’s Constitution. In addition, small changes in the wording of the article strengthened the status of the selection committee as the final decision making body regarding the appointment and promotion of judges and reinforcing the fact that the role of the President of the state is purely a formal one.”⁷⁶

BASICS OF A JUDGE IN ISRAEL

In this section I will offer facts about judges in Israel. Nothing in this section is in dispute, and the information is offered simply to give the reader a better understanding of Israeli judges.

According to Basic Law: 71 The Judicature. Courts Law [Consolidated Version], 5744-1984, Sections 1-24, the following are facts about an Israeli judge:

Appointments

Judges are appointed by the President of the State upon the nomination of “the Judges’ Nominations Committee”. The Nominations Committee is composed of nine members: three judges (the President of the Supreme Court, and two Supreme Court justices), two Ministers (one of them being the Minister of

⁷⁵ Ibid at 6

⁷⁶ Ibid.

Justice), two members of the Knesset and two representatives of the Israel Bar Association. At the head of the Committee is the Minister of Justice.

The three organs of the State - the legislative, executive, and judicial branch, as well as the Bar Association are represented in the Judges' Nominations Committee. Thus, the shaping of the judicial body, through the manner of judicial appointment, is carried out by all the authorities together.

Operation of Judges' Nominations Committee

The manner of nominating judges in Israel and the composition of the Nominations Committee ensure that the considerations taken into account in the nomination of a judge are relevant and material: the nominee's legal stature, his experience, his capability and integrity.

Notice as to the requirement of a judicial appointment is published in Reshumot (the official government gazette). An attorney who wishes to be appointed a judge submits to the Judges' Nominations Committee a request on the questionnaire that the Committee prescribes. The candidate appears before a sub-committee of the Nominations Committee, which presents its findings to the Nominations Committee. In addition, the following may propose candidates: the Minister of Justice, the President of the Supreme Court, and the three Committee members. The Committee decides on the appointment of a judge by majority vote of members taking part in the ballot.

Qualifications

The following are qualified to be appointed a justice of the Supreme Court of Israel: a person who has held office as a judge of a District Court for a period of five years, or a person who is inscribed, or entitled to be inscribed, in the roll of advocates, and has for not less than ten years –continuously or intermittently- (of which five years at least in Israel) been engaged in the profession of an advocate, served in a judicial capacity or other legal function in the service of the State of Israel or other service as designated in regulations in this regard, or has taught law at a university or a higher school of learning as designated in regulations in this regard. To the Supreme Court can also be appointed “an eminent jurist”.

The following are qualified to be appointed a judge of a District Court in Israel: a person who has held office as a judge of the Magistrates' Court for a period of four years or a person who is inscribed, or entitled to be inscribed, in the roll of advocates, and has for not less than seven years –continuously or intermittently- (of which three years at least in Israel) been engaged in the profession of an advocate, served in a judicial capacity or other legal function,

or has taught law at a university or a higher school of learning as designated in regulations in this regard.

The following are qualified to be appointed a judge of the Magistrates' Court: a person who is inscribed, or entitled to be inscribed, in the roll of advocates, and has for not less than five years -continuously or intermittently- (of which two years at least in Israel) been engaged in the profession of an advocate, served in a judicial capacity or other legal function, or has taught law at a university or a higher school of learning as designated in regulations in this regard.

Citizenship

A person may not be appointed as a judge if he is not a citizen of Israel.

Declaration of Allegiance

Prior to the commencement of his term of office the judge declares before the President of the State his "allegiance to the State of Israel and its laws; to dispense true justice, not to pervert the law nor to show favor".

Salary

The salary of the judges and other sums paid to them during their tenure or subsequently, or to their beneficiaries after their death, are determined by law or by resolution of the Knesset, or one of its committees. The law does not permit a resolution specifically intended to lower the salary of judges.

Exclusivity of Office

A judge may not be engaged in a further occupation or take up a public function, except as prescribed by law, or with the consent of the President of the Supreme Court and the Minister of Justice.

Term of Office: Commencement and Conclusion

The term of office of a judge commences with his declaration of allegiance. It does not terminate other than at one of the periods determined by law. These are: on retirement at pension - the age of retirement is 70, and a judge cannot serve past this age, resignation, death, by his election or appointment to a position whose bearers are proscribed from being Knesset candidates. The term of office of a judge also terminates with his removal from office - whether by resolution of the Judges' Nominations Committee passed by a majority of at least seven members, or by decision of the Judges' Disciplinary Tribunal. A judge may be required to retire on pension before reaching retirement age, if the Nominations Committee, on the basis of a medical opinion, establishes that by reason of the state of his health he is unable to continue carrying out his functions.

Disciplinary Proceedings

Judges are subject to the Judges' Disciplinary Tribunal. The Presiding Judge of the Disciplinary Tribunal is appointed by the President of the Supreme Court. All the members of the Disciplinary Tribunal are judges or retired judges.

Criminal proceedings

Judges are subject to criminal proceedings, in the manner specified by the law. The initiation of a criminal investigation against a judge requires the consent of the Attorney General. A statement of indictment against a judge can only be filed by the Attorney General. A criminal trial against a judge can only be held before a District Court, sitting with a bench of three judges, unless the defendant judge agrees that the case be heard in the regular fashion.

Further Advanced Study for Judges

In Israel judicial training per se is not a precondition to judicial appointment. The Israeli judge is an experienced jurist who is chosen, as stated, from the judiciary, from amongst attorneys, the State legal service, or from teachers of law at universities. Yet, in order to preserve as well as invigorate the high standard of the judiciary, there has been established, under the auspices of the Supreme Court in Jerusalem, an Institute of Judicial Training for Judges, named after Dr. Yoel Sussmann, a former President of the Supreme Court. The advanced studies are intended for serving judges, new judges, as well as candidates for the judiciary. At the head of the Institute are justices of the Supreme Court. Amongst its teachers are judges and lecturers of law faculties in Israel, as well as guest lecturers from abroad.⁷⁷

ELECTION OF JUDGES IN THE UNITED STATES

In this section I will describe how a lawyer becomes a judge in the United States. I will use Illinois, the State in which I practice law, to illustrate how someone becomes a judge in the United States. Illinois is comprised of 102 Counties and is one of 50 states which make up the United States of America.

⁷⁷ The Judicature. Courts Law [Consolidated Version], 5744-1984, Sections 1-24.

Illinois is a perfect illustration of the process of judicial elections because it relies primarily on elections to determine who will serve as a judge.⁷⁸ Illinois also has a few appointed judges⁷⁹ and has a history of corruption in its judicial branch⁸⁰.

⁷⁸ “There are two kinds of judges in the circuit court: circuit judges and associate judges. Associate judges are appointed by circuit judges, pursuant to Supreme Court rules, for four-year terms. An associate judge can hear any case, except criminal cases punishable by a prison term of one year or more (felonies). An associate judge can be specially authorized by the Supreme Court to hear all criminal cases. Circuit judges in a circuit elect one of their members to serve as chief circuit court judge.” State of Illinois, Welcome to Illinois Courts. Illinois Circuit Court General Information.

⁷⁹ The following is information on applying for an appointed position as a judge in Illinois. “Appointment to the bench. The application. If you're seeking an appointment as an associate judge in any circuit, you'll have to fill out a written application form, obtainable from the Illinois Supreme Court (see sidebar). The comprehensive 16-page application, available from the Administrative Office of the Illinois Courts, requires candidates to disclose such matters as whether they've ever received treatment or counseling for alcohol or substance abuse; any mental or physical disabilities that might prevent them from carrying out judicial duties; all continuing legal education attended within the last five years; full citations to all published articles on legal matters; their own and their spouse's business interests; whether they've ever been personally involved in any litigation, disciplinary, or criminal matters; whether their professional conduct or ability has ever been criticized in a written opinion by a judge or tribunal, or the subject of a complaint before any disciplinary authority; whether their law licenses or right to practice law have ever been denied, revoked, or suspended; the names of judges and adversaries with knowledge of their character and abilities, including the cases which they and the candidates handled; and any community service they've performed” Illinois Bar journal Volume 98 • Number 9 • Page 456.

⁸⁰It was called OPERATION GREYLORD, named after the curly wigs worn by British judges. And in the end—through undercover operations that used honest and very courageous judges and lawyers posing as crooked ones... and with the strong assistance of the Cook County court and local police—92 officials had been indicted, including 17 judges, 48 lawyers, eight policemen, 10 deputy sheriffs, eight court officials, and one state legislator. Nearly all were convicted, most of them pleading guilty (just a few are shown in our photo). It was an important first step to cleaning up the administration of justice in Cook

In this section, I will describe in the Problems with Elected Judges Section below, many believe that the reason we have corruption in the judiciary is due to the fact that judges rely on elections to acquire the position. The reader will find that those wishing to serve as judges must go through an election process.

The specific language setting forth the way these judges come into power is found in the Constitution of the State of Illinois, Article VI The Judiciary Section

7. Judicial Circuits Section 12. Election and Retention:

(a) Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

(b) The office of a Judge shall be vacant upon his death, resignation, retirement, removal⁸¹ or upon the conclusion of his term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at

County. The federal Bureau of Investigation Investigations of Public Corruption, 03/15/04.

⁸¹ An example of why a judge would be removed from the bench is because of the judges' mental health "While expressing sympathy for Brim's mental health issues, the Illinois Courts Commission said "the only appropriate remedy" was to remove her from office because of her 18-year history of mental breakdowns and repeated failures to follow through with proper medical treatment. The decision was effective immediately." *Chicago Tribune*, Cook County judge removed from bench May 09, 2014, by Steve Schmadeke

the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

BASICS OF A JUDGE IN THE UNITED STATES

In this section I will offer facts about judges in the United States. I will describe Cook County judges. Cook County is the most populous County in Illinois⁸². Nothing in this section is in dispute and the information is offered to give the reader a better understanding of the environment of a typical United States judge.

The Circuit Court of Cook County of the State of Illinois is the largest of the 24 judicial circuits in Illinois and one of the largest unified court systems in the world. It has more than 400 judges who serve the 5.1 million residents of Cook

⁸² According to US Census Bureau, Cook County's population was 5,240,700 in 2013. US Census Bureau State & County Quick Facts, Cook County, Illinois.

County within the City of Chicago and its 126 surrounding suburbs. More than 1.2 million cases are filed each year.

The Circuit Court of Cook County was created by a 1964 amendment to the Illinois Constitution which reorganized the courts in Illinois. The amendment effectively merged the often confusing and overlapping jurisdictions of Cook County's previous 161 courts into one uniform and cohesive court of general jurisdiction.

Today, the Circuit Court of Cook County is a unified court system in which all trial courts are consolidated under the chief judge, Honorable Timothy C. Evans, who has centralized authority to coordinate and supervise the administrative functions of the court.

Chief Judge Evans is responsible for the assignment of approximately 400 judges throughout the court's ten divisions and six geographic districts and the appointment of a presiding judge to head each division and district. The Chief Judge also oversees the court's Surety Section and the Juvenile Justice and Child Protection Resource Section, appointing a judge to head each of those sections as well.

The Office of the Chief Judge is the administrative arm of the court. It prepares the court's annual budget and supervises more than 2,000 non-judicial employees who work in 13 offices that provide probation and other court-support services, including court reporting and foreign language interpreting. Copyright 2015 by Circuit Court of Cook County.

For administrative and management purposes, the court has divided Cook County into six geographic sub-districts. This allows the court to better serve the county's large population. To accommodate its vast caseload, the court is organized into three functional departments: County, Municipal and Juvenile Justice and Child Protection.⁸³

FAULTS WITH APPOINTING JUDGES IN ISRAEL

In this section I will review the negative aspects regarding appointing judges in Israel. As we saw in the *How to Become a Judge in Israel* Section, Israel goes to great pains to find the best candidates to serve as judges. What we find in this Section is that even with the best intentions, politics permeates in the appointment of judges in Israel.

Critiques of the how Israelis select their judges argue that it results in a majority of judges with a particular political ideation. A recurring complaint is that the appointment committee selects judges with a left- leaning ideology. On October 20, 2013, The Times of Israel printed an article by Lazar Berman. In the article he described such contention amongst Israelis:

“I think we have a distorted system that no other country in the world has, in which the judges themselves participate in their own selection. Coalition chief MK Yariv Levin, who is leading the effort to get the bills passed, told Israel Radio on Sunday, ‘It is done in a system of cronyism....I think there is no place for this. The change is positive because a foundation of democracy is that no

⁸³ Circuit Court of Cook County, 2015

branch should be able to choose itself, so it cannot be that judges will control the system of selecting themselves”⁸⁴.

Levin argued that the court was controlled by a far-left faction that imposes its agenda on the Israeli public. He addressed calls for changes in the make-up of the committee that selects judges. These measures, he said, are being pushed in order “to end the court’s intervention, in which it relies on its own judgment in place of the legislative and executive branch in matters that have to do with one’s worldview. The same minority that controls the judiciary tries to use its strength in order to impose its values on the entire society.”⁸⁵

He described the court as “sometimes even radical,” accused them of regularly siding with non-Israelis over Israelis on the basis of the litigants’ identities.⁸⁶

Berman’s article offers suggested remedies. “The Knesset would elect the Supreme Court president for a five-year term, changing the make-up of the selection committee by replacing two justices with a retired District Court judge who would be chosen by the heads of the District Courts, and an academic chosen by the prime minister and making it easier for the Knesset to reenact legislation that the Supreme Court struck down under the Human Dignity and Liberty and Freedom of Occupation Basic Laws. The bill would allow a simple Knesset majority of 61 votes to attempt to repass legislation within four years of the Supreme Court decision. The Knesset currently needs at least 80 members to circumvent the court.”⁸⁷

The *Jerusalem Post* ran a story by Gil Hoffman and Jeremy Sharon 06/03/2013. The article touched on the concern about the political make-up of

⁸⁴ October 20, 2013, *The Times of Israel* by Lazar Berman, “Bills aimed at checking judicial power head to Knesset”

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

the Judicial Selection Committee. The concern is that is Committee is left-leaning (dovish): “Prime Minister Binyamin Netanyahu’s coalition failed to elect a representative to the committee that selects Supreme Court justices, in a dramatic secret ballot vote Monday in the Knesset. The MKs normally select one MK from the coalition and one from the opposition to the two slots on the selection committee that are reserved for MKs. But the Knesset voted for MKs Isaac Herzog (Labor) and Yitzhak Cohen (Shas) over the coalition’s candidate, Yisrael Beytenu MK David Rotem. Cohen is Shas’s most leftwing MK. He recently wrote to Netanyahu urging him to adopt the Arab League’s diplomatic initiative. The vote means that the judges to be selected to replace retiring justices Asher Grunis and Edna Arbel on the Supreme Court will likely be very dovish.”⁸⁸

Zalman Ahnsaf’s article in the June 4, 2013 edition of Hamidoa also reports on the friction that politics causes in determining who serve on the judicial selection committee. The concern is over left-leaning members of the judicial selection committee.

Prime Minister Binyamin Netanyahu’s coalition suffered an embarrassing reversal as it failed to place a representative on the committee that selects High Court justices, in a secret ballot late Monday in the Knesset, the *Jerusalem Post* reported.

The ruling parties usually get one member on the committee, along with one from the opposition. But in this case, Likud-Beiteinu didn’t rule, as MKs Isaac

⁸⁸ *Jerusalem Post*, Gil Hoffman and Jeremy Sharon, 06/03/2013

Herzog (Labor) and Yitzchak Cohen (Shas) won out over the coalition's candidate, Yisrael Beiteinu MK David Rotem.

The vote reflected tensions between Netanyahu and former Knesset Speaker Reuven Rivlin, who lost his post when the former threw his support to Yisrael Beiteinu's Yuri Edelstein, the new speaker.

Rivlin actively campaigned to defeat Rotem, which was seen as an act of revenge, the *Post* said.

Cohen is considered to be Shas's most leftwing MK. He recently wrote to Netanyahu urging him to respond favorably to the Arab League's diplomatic initiative. His participation on the selection committee means that the judges to be selected to replace retiring justices Asher Grunis and Edna Arbel on the Court will likely be dovish inclined.⁸⁹

There is also concern that those who serve on the judicial selection committee hold an ideology that is right-leaning. On December 11, 2012, Mondoweiss published an article by Annie Robbins. In the article Robbins discusses a Supreme Court ruling that allowed the destruction of a mosque. She also addressed the belief that those who appoint Israeli judges hold an ideology that is considered to be extreme right leaning:

On its face, the demolition was nothing extraordinary and what we've come to expect. But the destruction of this little mosque in the village of Al Mufaqara provides yet another example of how Regavim, a rising, extreme-national-religious social movement whose goal is to encourage the state to demolish Palestinian homes and public buildings, works in symmetry with Israel's

⁸⁹ Zalman Ahnsaf, June 4, 2013 edition of HamIbidoa.

recently radicalized Supreme Court to escalate efforts to remove Palestine from the map. This is about a new political constellation: Regavim, the Supreme Court, and the Knesset are working together to circumvent the law and cleanse the land. In the past though, the court acted to facilitate the land grab. It was still an instrument of legal recourse, and at times worked in Palestinians' favor. But recent changes by the Knesset's judicial selection committee are apparently being used to make the court a more activist component of the push to clear Palestinians from Area C [Robbins, 2012].

This push to the extreme right involves coordination of Knesset legislation, the radical fanatic group Regavim, and the Supreme Court all in one fell swoop. Michael Sfard reminds us Israeli legislation does not apply to the West Bank because the Knesset does not exercise jurisdiction over the West Bank. That is left to the courts, which Ratner rightly describes as entering a "radical-fanatical right-wing phase."

Robbins also voiced concerns over the results of extreme right leaning judges, "I have serious doubts about the learning curve of a Chief Justice who sides with the powerful and, according to a former Supreme Court justice, has long supported reducing the powers of the high court. Though reducing the Supreme Court's powers may well be on hold now, given Grunis's importance to the rightwing agenda."⁹⁰

There is criticism that the appointment of judges does not result in the best candidates becoming judges. On July 11, 2013, The Jerusalem Post published an article by Yonah Jeremy Bob. The article addressed the concern that politics

⁹⁰ December 11, 2012, *Mondoweiss*, Annie Robbins, 'You have to demolish them while they're small' — Israel's chief justice approves destruction of mosque"

in the selection committed resulted in judges committing crimes: “Justice Minister Tzipi Livni on Wednesday evening took the unprecedented step of inviting the press to the opening of the first meeting of the Judicial Appointments Committee under her leadership.” There was significant public controversy surrounding the committee toward the end of the term of Livni's predecessor, Yaakov Neeman. There were incidents in which judges were accused of having committed criminal or civil crimes. Supreme Court President Asher D. Grunis was even quoted as saying that some of the judges were "ticking time bombs" being kept on the bench so as not to harm their retirement benefits.

Livni has campaigned to make the committee more transparent. However, as she has met with significant resistance, this time she settled for a press conference right outside the room where the committee was about to meet. “Choosing judges is not merely a question of professional quality, but also of judges who are humane and show social concern,” she told reporters.

She noted that the courts "embody the democracy of the State of Israel and its values," adding, "I believe that politics will remain outside this room [where the meeting was to occur], and that our work will be properly focused" to best serve Israel's citizens."⁹¹

Mary L. Clark is a Professor of Law, Interim Dean of Academic Affairs and Senior Vice Provost of American University. She wrote an article that addressed concerns held by the legal community regarding whether judges should serve on

⁹¹ July 11, 2013, *The Jerusalem Post*, Yonah Jeremy Bob, “Livni convenes Judicial Appointments Committee”

commissions that select judges. The article is titled “Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?”

In the article, Professor Clark discusses ‘judges deciding who serves as judges’ as a threat to judicial integrity and impartiality:

The undue accretion of power by judges involved in judges’ screening commission service raises related concerns for judicial integrity and impartiality. Potential threats to judicial integrity and impartiality include: (a) undermining of elevation candidates’ decisional autonomy; (b) judges’ undue involvement in the overtly political (indeed overtly partisan) activity of judicial appointments; and (c) judges’ engagement in ideological and/or other strategic behavior as commission members.⁹²

According to Professor Clark, concern of the impact on decisional autonomy of elevation stems from a potential lack of objectivity.

Candidates Including judges on judicial screening commissions raises questions for potential impacts on the decisional autonomy, or individual independence, of currently serving judges who are interested in elevation and whose candidacies would be reviewed by judicial colleagues on the commission. At bottom, the question is whether judges interested in elevation could be affected by, including being motivated to curry favor with, judges known, or anticipated, to be serving on judicial screening commissions. This dynamic has the potential to influence elevation aspirants’ judicial conduct, including case reasoning and/or judicial outcomes.⁹³

Professor Clark addressed those who do not share her concern about judicial integrity. She stated their argument: “The typical judge’s chance of promotion is so low that it is unlikely that desire for promotion affects the

⁹² 41 *Penn State Law Review* [Vol. 114:1] Page 87.

⁹³ *Ibid* at 88.

decisions of more than a handful of judge.”⁹⁴ Professor Clark counters this argument by citing literature on European civil law: “Still, concern for sitting judges currying favor with other judges for promotion purposes has long been expressed in the literature on European civil law judiciaries, where senior judges evaluate the promotion merits of more junior judges. As Peter Russell observes there is danger to the independence of judges:

“[J]udicial independence may be threatened . . . by senior judges [i.e., those higher on the judicial hierarchy] using administrative and personnel controls to direct the decision making of individual judges lower in the judicial hierarchy.” [T]he danger point for judicial independence may be more in the process of promotion and career advancement than initial appointment.” He warns, “[I]f those who control career advancement within the judiciary are perceived to reward or punish a particular ideological orientation in judicial decision making, judicial independence can be seriously compromised.”⁹⁵

Professor Clark asserts the politics in the selection committee is no different than politics in elections for judges:

Concern that politics will emanate from judges’ involvement in judicial appointments; critics of the use of judicial screening commissions decry the political nature of these bodies, asserting that they are no less political than the elective system; the politics have simply gone underground. While the ABA’s and other proposals seek to ameliorate the partisanship infecting judicial appointments by employing a self-consciously bipartisan model, their proposals do not eliminate the partisanship. After all, ‘bipartisan rarely means nonpartisan.’ No doubt, political considerations—indeed, partisan considerations—will continue to influence judicial candidate deliberations.⁹⁶

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 89.

⁹⁶ *Ibid* at 92.

Professor Clark also argued that even good intentions can be influenced by subconscious bias. Her concern is that judges may subconsciously or consciously favor judges who share their ideology.

Related to this last concern for judges' undue political and/or partisan involvement in judicial appointments is concern for judges' potentially ideological and/or other strategic behavior in evaluating judicial candidates while serving on judicial screening commissions, whether consciously done or not. Might it be natural for judges serving on a screening commission to more highly evaluate prospective colleagues with whom they share judicial philosophies, again whether conscious or not? Concern for this potential could be addressed in part by a rule prohibiting judges from participating in the screening of candidates for judgeships within their own circuit. Even so, there would remain a larger concern for ideological evaluation of Article III candidates, with implications for the judiciary's overall composition. Closely related to the potential for judges' ideological evaluation of judicial candidates is the question of to what extent judges serving on Article III commissions might act strategically, or otherwise indirectly, in order to further the selection of judges sympathetic to their particular judicial philosophies. This could be a factor, for example writing samples.⁹⁷

FAULTS WITH ELECTING JUDGES IN THE UNITED STATES

In this section I will describe the faults with electing judges in the United States. As we saw earlier in this thesis, both Israel and the United States pride themselves on being democracies. The reader will find that the problem with judicial elections is the expense of running for office. The need for money leads to undue influences on the candidates. Judicial candidates are no different from other candidates. Another concern is that the nature of politics also affects who is elected as a judge. Political leaders reward those who help to make them powerful, as opposed to rewarding a candidate with the best qualifications.

⁹⁷ Ibid at 93.

Pamela S. Karlan is a Professor of Law at Stanford Law School.⁹⁸ She wrote an article that addressed influences on judges who rely on elections, “Electing Judges, Judging Elections, and the Lessons of Caperton.”

Professor Karlan agreed that judges facing elections can be influenced by outside forces.

Money can play a critical role in judicial elections. Especially because many judicial elections are low-salience, down-ballot races, political spending often serves as the major source of information to voters. Just as judicial candidates may face a temptation to shade their decisions to attract voters support, so too they may face the temptation to shade their decisions to attract the financial support that enables them to appeal to voters.^{99 100}

Professor Karlan discussed the Supreme Court’s recognition that judges must be impartial: “Every member of the Court recognized that the Due Process Clause requires that judges be impartial.¹⁰¹ She also discussed the U.S. Supreme Court’s recognition of the likelihood that judicial candidates will be influenced by their reliance on voters. She looked at the ruling in *Chisom v. Roemer*¹⁰². The Court recognized the difficulty of “crediting judges with total

⁹⁸ Pamela S. Karlan, currently on leave from the Law School, is serving as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice.

⁹⁹ 82 *Harvard Law Review* [Vol. 123:80 At 90].

¹⁰⁰ See James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns, 102 *AM. POL. SCI. REV.* 59, 64 (2008) (describing recent changes in judicial elections); Pamela S. Karlan, Two Concepts of Judicial Independence, 72 *S. CAL. L. REV.* 535, 541 (1999).

¹⁰¹ *Ibid* at 86. See: *Republican Party of Minnesota v. White* 536 U.S. at 776.

¹⁰² 501 U.S. 380, 399 (1991)

indifference to the popular will while simultaneously requiring them to run for elected office.”¹⁰³

Karlan observes that the Court also recognized the likelihood that judges will be influenced by their reliance on voters to remain in office: ‘If judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.’¹⁰⁴

On May 22, 1988, *The New York Times* published an article by Mary Connelly. The article was written in response to calls by bar associations and others, that New York change from electing judges to a system of appointment known as merit selection. In the article, Mary Connelly gave former Secretary of State Cyrus R. Vance, a past president of the Association of the Bar of the City of New York and chairman of a lobbying group called the Committee for Modern Courts, an opportunity to express his reason for a system of appointment known as merit selection for judges. He stated that judicial elections do not result in the best candidate being elected: “The major problem with electing judges is that New York doesn't really have “elections.” Justices of the State Supreme Court, our principal trial court, are not selected by the voters in primary elections, but are handpicked by unelected party bosses and nominated at something called a judicial convention. When the nominating process is over, the election is, too. In

¹⁰³ 82 *Harvard Law Review* [Vol. 123:80 at 90].

¹⁰⁴ *Ibid* at 87. See *White*, 536 U.S. at 788–89

most parts of New York one party is so dominant that its candidates are all but guaranteed election. Thus the party bosses not only select their party's candidate, but in effect "appoint" the judges."¹⁰⁵

Vance stated that certain candidates are guaranteed victory based on being backed by certain political leaders. "Candidates picked by the Democratic Party bosses in New York City - such as Stanley Friedman, former county leader of the Bronx, and the late Donald Manes of Queens - are guaranteed victory. In a great many places outside of New York City the nomination of the Republican Party is tantamount to election."¹⁰⁶

Vance said the result of political bosses determining which candidates win judicial elections is bad judges. "All this is an inevitable part of the partisan election system. And while the system has given us some outstanding jurists, too often judges are selected for their political service rather than their judicial ability. Far too often judges chosen by the bosses have been lazy, incompetent or, worse, corrupt."^{107 108}

¹⁰⁵ *The New York Times*, article by Mary Connelly, May 22, 1988, "Pro & Con: Selection vs. Election; Should New York Take Judges off The Ballot?"

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Vance suggests appointment as a preferred means of choosing judges. "Since 1940 there has been a strong movement throughout the United States to replace judicial elections with a process that combines the best elements of the elective and appointive systems, a process that embodies the American ideal of respecting ability and effort above political connections. That process is called merit selection of judges. Under the merit selection system for the New York Court of Appeals, in operation now for 10 years, our Governors have selected outstanding jurists upon the nomination of a bipartisan nominating commission. Our much admired Chief Judge, Sol Wachtler, who belongs to a different political party from the Governor, is a fine example of the

PBS' *Frontline* produced a program on the issue of selecting judges. It is titled, "How should judges be selected?" The program offered an unattributed quote to sum up the anti-election sentiment:

'Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench,' one commentator famously wrote on the causes of popular dissatisfaction with the administration of justice. And this was back in 1906.¹⁰⁹

The program included an interview with John Hill, a lawyer and former Chief Justice of the Texas State Supreme Court. Justice Hill gave his reasons for favoring the appointment of judges. He stated that it was the will of the people. "I think if it were ever put to the vote of the people of Texas it would pass readily, but we've been stopped by politics. We've been stopped by the political parties. We've had a lot of political factors that have thwarted our efforts, but we have made a lot of progress."¹¹⁰

Justice Hill was asked about the source of money that judicial candidates must rely on. "In the meantime you have a system where there's a great deal of money that has been spent on judicial elections over the past decade. And that money comes from, among others, law firms like your own." Justice Hill described the need for money and where the money comes from.

Absolutely. We're involved in it. I'm not casting stones at others when I'm talking about this problem. It's built into the system

new system at work. The next step is to extend that process to the trial courts." Justice Edward R. Greenfield, "Governors, Too, Have Political Interests."

¹⁰⁹ PBS' *Frontline*, "How should judges be selected?"

¹¹⁰ Ibid.

that we have. The judges have to have money to run these expensive races because the state is so large, we have so many television markets. . . That's the system that we're trying to change. In the meantime, while we are working for change, we can't turn our backs on the judges that we believe should be the judges of choice. And we have to support their election. So we do it, and our firm does it. Plaintiff's bar does it, the defense bar does it, the business community does it. Other interest groups do it, so then you have the problem that we're talking about: that the public out there just looking and seeing all the money flowing and they say, 'Well it's bound to be having some impact' So why can't we all get together and just take the money out.¹¹¹

Justice Hill responded to the question "Is justice for sale in the state of Texas?" by saying that there is such a perception. "I don't think it is, but there's a very widespread perception that there's an element of favoritism, there's an element of partisanship, that it matters who your lawyer is, that's out there. To what extent I don't know. But if it's out there to the extent that people are concerned about coming to Texas or having their legal affairs dealt with in Texas then we ought to take that very, very seriously. . . ."¹¹²

Justice Hill again stressed the harmful effect of judges having to rely on donations when he was asked whether someone is trying to win some favor with the court by donating money to a judicial candidate.

Once again I'm really hammering on that word. . . The public believes that there's some kind of relationship of those philosophical results from the contributions being made by the supporters that affects specific cases--that has got to be dealt with because it's a very bad situation. . . So I'm trying to suggest to you that yes, there has been a philosophical change in the court, but I don't think that the quid pro quo thing is necessarily true of either court. . . I don't think it's true. I think what the problem is that you

¹¹¹ Ibid.

¹¹² Ibid

have so much money coming into the system in these partisan expensive elections that come primarily from lawyers, that the people believe that the lawyers have gained improper control, of the courts. And that will never stop. . . So it's a system that has to be changed. I sound like a broken record. . .¹¹³

Frontline also referenced Jona Goldschmidt's article on merit selection of judges. The article is titled "Merit Selection: Current Status, Procedures, and Issues".¹¹⁴

Goldschmidt offered four reasons for merit selection of judges. They stem from the inherent problems with elections. She first noted that the public does not do its homework before voting.

There are several arguments raised in favor of merit selection. The first addresses the weaknesses of both partisan and nonpartisan elective systems. These methods do not allow for rational judicial selection: 'Elections ... are premised on a dubious assumption: that the public is attentive and well informed about the candidates.' In fact, it is common knowledge that the public is uninformed about judicial candidates, and, worse still, some believe that ethnic name recognition is the basis for many voting decisions. Election contests are usually issueless and have low voter turnout. Most incumbents are easily reelected and often run unopposed.¹¹⁵

Goldschmidt's second reason for not using elections for choosing judges stems from elections not necessarily attracting the best candidates: "Elections also discourage many well-qualified people from seeking judicial office. Many

¹¹³ Ibid

¹¹⁴ The entire article was published in the *University of Miami Law Review* (Fall, 1994) and can be found at 49 *U. Miami L. Rev.* 1.

¹¹⁵ Ibid

attorneys ... have a philosophical distaste for politics and political campaigning, and thus refrain from seeking office.¹¹⁶

Goldschmidt's third reason for not using elections for choosing judges revolves around judges being held to the whim of the electorate, "Elections also compromise the independence of the judiciary; judicial officers, unlike other elected officials, should not be governed by the transient whims of the public which is likely to vote an unpopular, although competent, judge out of office for rendering correct but controversial decisions."¹¹⁷

Goldschmidt's final reason for not using elections for choosing judges comes from the nature of the election process. Her fear is that that electioneering takes judges away from judicial duties. "No less significant are the problems associated with judges who must campaign and seek campaign contributions and with getting court business accomplished during reelection time."

Professor Brandice Canes-Wrone of Princeton University and Assistant Professor Tom S. Clark of Emory University coauthored an article, "Judicial Independence and Nonpartisan Elections" (*Wisconsin Law Review*), that discussed judges and elections. In the article they concede the existence of a conflict between the public's desire for an independent judiciary and their desire for oversight of judicial actions.

Because independence eliminates a judge's need to fear politically motivated punishments, the property is inherently at variance with judicial

¹¹⁶ Ibid.

¹¹⁷ Ibid

accountability. Indeed, in contrast to the notion of independence, accountability requires the public to have an important role in selecting and monitoring judges. This inherent tension between these concepts has not prevented Americans from seeking them simultaneously. As Professor James Gibson summarizes, “[T]he American people . . . seem to want both independence and accountability from their courts.” Americans from seeking them simultaneously. As Professor James Gibson summarizes, “[T]he American people . . . seem to want both independence and accountability from their courts. at 2009:21 *Wisconsin Law Review*, *Judicial Independence* 23.¹¹⁸

Billy Corriher of the Center for American Progress Action Fund wrote an article on November 1, 2012, addressing his dissatisfaction with judicial elections. He specifically addressed policies that could help mitigate the influence of corporate campaign cash in judicial elections.

Corriher stressed the need for judges to be free from outside influences: “Judges must be independent from political pressure so they can vindicate constitutional rights without fear of political backlash. The judiciary is the only institution that can remedy violations of the constitution by the other branches of government.” (*Merit Selection and Retention Elections Keep Judges Out of Politics* November 1, 2012, at 2.)

Corriher has concern for the integrity of government in general if judges do not objectively rule on issues involving the government.

¹¹⁸ See James L. Gibson, *Judicial Institutions*, in *The Oxford Handbook Of Political Institutions* 514, 528–30 (R.A.W. Rhodes et al. eds., 2006).

More than any other institution, judges have to keep the government true to its constitution. The framers of the U.S. Constitution and state constitutions established governments with checks and balances. The executive, legislative, and judicial branches have distinct roles. In general, the legislatures make the laws; the executive branches enforce them; and courts interpret the laws, including constitutions. A judiciary free from political constraints is crucial to this system of separation of powers. Without this independence, judges are just politicians in black robes.¹¹⁹

Corriher continued with his concern for the integrity of government if judges are subject to outside influences. “If the judiciary becomes another political branch responsive to political pressure, then there would be no branch of government that could check the power of legislatures or executives when they infringe on the constitutional rights of individuals.”¹²⁰

Corriher blames the need to fund elections as a major impediment to judicial independence.

As the amount of money donated to judicial campaigns has exploded in recent elections, the influence of campaign cash on the judiciary has become a more urgent problem. Candidates in state Supreme Court races from 2000 to 2009 raised around \$211 million—two and a half times more than in the previous decade. Conflicts of interest have arisen as special interests and parties before high courts have spent money to influence elections to those courts.¹²¹

Corriher cites Sandra Day O’Connor to further make his point about the danger judges relying on money. “Retired U.S. Supreme Court Justice Sandra Day O’Connor said that, ‘When you enter one of these courtrooms, the last thing

¹¹⁹ Ibid at page 3

¹²⁰ Ibid at 5

¹²¹ Ibid at 1

you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law.’ ”¹²²

Nathan S. Heffernan was a Justice of the Wisconsin Supreme Court from 1964-1983 and Chief Justice from 1983-1995. He wrote an article on the effects of elections on judges. The article was published in the *Marquette Law Review*.

Justice Heffernan gave a brief history of judicial elections:

The theory of popular election of all officers, which came to be known as "Jacksonian Democracy," held sway from the late 1840's until the middle of this century. In fact, by the time of the Civil War, twenty four of thirty-four states had adopted an elected judiciary. It was not until 1959, with the admission of Alaska, that any new state stood against the tide of a fully elected judiciary. 'Initially all of the new states selected their judges by executive appointment shared with the legislature. Gradually, however, with the expansion of the frontier, some states adopted the elective system. Of the original thirteen states, Georgia was the first to shift to an elective system for the selection of lower court judges in 1812. Indiana, admitted to the Union in 1816, provided in its constitution for the election of some of its judges, and in 1832, Mississippi decided to elect all of its judges.'¹²³

Justice Heffernan agreed that judges relying on money to attain office is problematic but offers public that public financing may be a solution. "It is my view that the elective system in Wisconsin has worked reasonably well and should not be discarded. Rather, contrary to the mandate of Governor Lucey, the elective system should be 'tinkered with' by instituting a reasonable system of

¹²² Ibid at 5

¹²³ Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 Marq. L. Rev. 1031 (1997). At 1035

public financing of judicial elections which would hopefully cure the principal ills attendant to the election of judges.¹²⁴

Thomas R. Phillips is a former Chief Justice, Supreme Court of Texas (1988–2004). He spoke at the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School. His presentation addressed whether judges should be appointed or elected.

Justice Phillips acknowledged the dispute around the issue of electing or appointing judges:

In many states, the debate rages as fiercely as ever over whether judges should be ‘appointed’ or ‘elected,’ identified by party affiliation or prohibited from any partisan activity, subject to a contested race for re-election or merely an up-or down ‘retention’ referendum, bound by the same ethical and electoral rules as other public officials, or treated as wholly distinct from the political branches. Even at the federal level, proposals for fixed judicial terms are periodically suggested, especially for the Supreme Court, and popular election of the federal judiciary has been mooted on occasion since Jefferson.¹²⁵

Justice Phillips describes money as being a major deterrent to judicial elections:

Today, judicial elections suffer from new, unprecedented challenges. The common denominators are campaign money and special-interest agitation, making judicial elections ‘nastier, noisier, and costlier’ than ever before. These new, high-octane campaigns threaten judicial independence as surely as mediocre appointments in the nineteenth century or anonymous elections in the twentieth century ever did. The more partisan, the more frequent, and the

¹²⁴ . Ibid at 1033

¹²⁵ 68 *Harvard Journal of Law & Public Policy* [Vol. 32].

more easily contestable the elections are, the more susceptible they are to these unfortunate influences.¹²⁶

Justice Phillips describes the origins of money influencing judicial elections:

First, wealthy individuals and groups with economic interests in various public policy questions realized that an individual judge can have a far greater impact on their fortunes than an individual legislator. Although judges face far more constraints in basing their official actions on their personal philosophical predilections than do legislators, few would insist that personal philosophies never affect judicial behavior. Personal injury trial lawyers in Texas were probably the first to discover that increased gifts to judicial campaigns could make a big difference in electoral outcomes, and pay big dividends in more favorable judgments. Business and professional groups countered by supporting their own judicial candidates, especially after state courts invalidated key tort reform laws. These battles were swiftly replicated in other states, particularly California and Alabama. By 2000, these local battles had essentially been nationalized, with national trial lawyer and consumer groups battling business-oriented groups in multiple jurisdictions each election cycle. Increasingly, these groups tried to influence the vote through independent expenditures, largely eschewing the candidates' individual campaigns. The advertisements purchased by these groups often feature 'slash and burn' messages crafted to trigger a vote against a candidate or slate of candidates, not to enhance support for anyone or anything. Such potent phrases and images often overwhelmed the candidates' own messages, which touted boring factoids involving qualifications, experience, and community ties. Perversely, many of these independent campaigns feature dueling charges over which candidate's record is the most 'soft on crime,' even though the funders themselves care only about civil jurisprudence.¹²⁷

Justice Phillips describes the special interest group participation in judicial elections:

¹²⁶ Ibid at 79.

¹²⁷ Ibid at 80.

Politically-oriented social-issue groups have discovered that judicial campaigns can highlight ‘hot-button’ issues that may excite and energize their ‘base’ and enhance turnout for the entire election. As in the tort wars, most of these groups rely on independent efforts, working outside any candidate’s particular campaign organization. Normally, they rely less on paid media than on grassroots networking, which can be hard for an outsider even to detect, much less to respond to effectively. Chief Justice Randall Shepard of Indiana noted that the presence of a gay marriage ban on the ballot inadvertently affected Ohio’s judicial elections by influencing which voters showed up at the polls. He explained that when such issues are at the forefront, ‘judges are not the target at all, we’re just road kill . . . for some other venture.’¹²⁸

Justice Phillips describes the defects that are especially endemic in election of judges. He offered that contestable election systems undercut the stability of the judiciary.

The concern about partisan sweeps that caused reformers to push for non-partisan elections more than a century ago is an even bigger problem today. In Texas, for example, well over one third of all opposed judges have been defeated since 1980, generally because of straight-ticket voting. But the extremely low salience of non-partisan judicial election contests make them little better. A person with an unusual name probably has a better chance of being elected President of the United States than state judge on an urban non-partisan ballot.¹²⁹

CONCLUSION

This thesis described the evolution of the judicial systems present in Israel and the United States. The historical and philosophical basis of the governments of Israel and the United States were described. We learned that Jewish people had a long stake in the land that became Israel by UN Resolution. The United

¹²⁸ Ibid at 68

¹²⁹ Ibid

States came into existence through a self-recognition that the inhabitants had such a right. The make-up of the governments was then described. The government of Israel prides itself on being a democracy. Its three branches of government are Legislative, Executive and Judicial. The United States is also a democracy and is also comprised of Legislative, Executive and Judicial branches. We then learned about the role of the judges in each government. We examined the views of judges and academics in each country. The general consensus was that judges should resolve disputes while giving as much deference to the legislative branch as each case allows. The major difference between Israel and the United States was emphasized by my discussion of the appointment of judges in Israel and the election of judges in the USA. Also included in that discussion was a statement of facts about the judges. This thesis concluded with a review of the negative aspects of Israel's appointment and the United States elections of judges.

Ironically, the solution often offered to the problems associated with the appointment of judges was to rely on the election of judges, and the solution to the problems associated with electing judges was to rely on the appointment of judges.

The longstanding quest for a resolution of the issues described in this Thesis seems destined for perpetual inaccessibility due to human involvement. Human frailty leads to problems with both approaches. In both approaches, self-interest reigns over the interests of the whole.

Those who are afforded an opportunity to appoint just judges often choose a candidate who is likely to rule in a way that is consistent with their views, rather than a candidate who has merit. It can be argued that people on the appointment committee think that their own views are consistent with what is best for the whole. They choose candidates who share their ideology on certain issues because they feel that society is best served if their ideology is manifested. This defense is hollow because it ignores academic achievements, legal experience and bar association recommendations. A candidate with limited knowledge of laws, inadequate legal experience, and lacking the recognition of their peers on bar associations would end up serving as a judge over candidates who hold these attributes.

Those who are afforded an opportunity to ensure just judges through elections are often either too lazy or too indifferent to select the best candidate. In either case, the result is an ill informed electorate deciding who will serve as judge. This allows judicial candidates to run elections that are not based on their merits but criteria that are easily attainable with big donor-begotten revenue. Big donor revenue enables a candidate to send mailers and flood the electoral battleground with signs which create non-merit worthy name recognition. A candidate who sees his opponent's mailers and signs is forced to counter with similar electoral tactics. These tactics require revenue and this creates the cyclical need for big donors. This Thesis discussed the ill effects of big donors on judicial elections. They include real and perceived (perception is just as harmful) negative influence over judge's decision making.

The ultimate solution currently rests in the laps of the individuals involved in both appointments and elections. The solution is not attainable as long they put their own interests in front of the interests of the whole.

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