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JUDICIAL INDEPENDENCE IN CENTRAL AND EAST EUROPE: THE INSTITUTIONAL CONTEXT

*Markus B. Zimmer**

I. INTRODUCTION

The economic collapse of the Soviet Union and its satellites throughout Central and East Europe in the late 1980s and early 1990s spawned experimentation with a democratic government that swept across the vast geography of the former superpower and its East block buffer states, with an energy and optimism unrivaled in modern political history. The odds were overwhelming, rooted in dysfunctional economic systems and a character groomed by paternalism that frowned on individual initiative and fostered a perverse dependence on criminally repressive¹ totalitarian regimes for such fundamental needs as housing, employment, and subsistence. Yet, courageous men and women envisioned the demise of the state and declining party control as an unprecedented opportunity to structure new political institutions. Patterned after their neighbors to the west, their efforts culminated in the formation of fledgling independent and democratically oriented governments in many of the countries of Central and Eastern Europe, as well as the new independent states. A seminal hallmark of these new parliamentary democracies was the drafting of

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1. See STÉPHANE COURTOIS, ET AL., *THE BLACK BOOK OF COMMUNISM* (1999) (for an exhaustive chronicle of terror and atrocity perpetrated to advance the political ideology of Communism).

constitutions that established and legitimized experimentation with democratic reform. The new constitutions outline governments that are organized by function, and distinguished by the manner in which authority is apportioned among those functions to achieve a separation of powers. A primary functional component of each of these new governments is a judiciary.²

Under the constitutions or laws and statutes issued under the constitutional umbrellas, the judiciary was to be organized and maintained independently.³

2. *E.g., see generally infra* note 3. Although the governments of the countries under discussion typically feature a constitutional court, such courts exist independently and fall outside the jurisdiction of the judicial branch. To that extent, they are not included in this discussion.

3. ALB. CONST. art. 145 (Adopted on August 4, 1998; states that "Judges are independent and subject only to the Constitution and the laws." To underscore that independence, § 3 adds that "Interference in the activity of the courts or the judges entails liability according to law."); BELR. CONST. art. 6 (Adopted on March 1, 1994; ordains that the State shall rely on the principle of dividing power into legislative, executive, and judicial power. State bodies, within the limits of their powers, shall be independent. They shall cooperate among themselves and check and counterbalance one another. Chapter 6, art. 110, § 1 states that "In administering justice judges shall be independent and subordinate only to the law."); BULG. CONST. art. 117 (Adopted on July 12, 1991; provides that "Judicial power is independent."); CHECHNYA CONST. art. 94 (Adopted on March 12, 1992; provides that the judicial power in Chechen Republic is executed only by court and acts irrespective of legislative, executive authority as well as of parties, other public unifications and movements. Nobody, except for bodies of justice stipulated by the Constitution and laws of Chechen Republic, have the right to incur functions and authorities of judicial power. Article 97 provides that judges are independent and subordinated only to the law. CROAT. CONST. art. 4 (Adopted in December 1990; specifies that the government "[S]hall be organized on the principle of separation of powers into legislative, executive, and judicial branches." Article 117 specifies that "Judicial power shall be autonomous and independent." ÚSTAVA ČR [Constitution] art. 2 (Czech Rep.), (Adopted on December 10, 1992; declares that "All state power derives from the people; they exercise this power by means of their legislative, executive, and judicial bodies." Article 81 provides that "Judicial power is exercised by independent courts on behalf of the Republic." Article 82 states further that "Judges are independent in the execution of their function."); EST. CONST. art. 4 (Adopted on June 28, 1992; prescribes that "The work of the Parliament, the President of the Republic, the Government of the Republic, and the Courts shall be organized on the principle of separate and balanced powers." Article 146 specifies that "The Courts shall be independent in their work and shall administer justice in accordance with the Constitution and laws."); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 50 (Hung.) (Adopted on August 20, 1949 and subsequently amended; provides that "Judges are independent and subordinate only to the law."); LAT. CONST. art. 83 (Adopted on February 15, 1922; article 83 ordains that "Judges shall be independent and subject only to the law."); LITH. CONST. art. 5 (Adopted on October 25, 1992; provides that "In Lithuania, the powers of the State shall be exercised by the Seimas, the President of the Republic and Government, and the Judiciary." Article 109 ordains that "While administering justice, judges, and courts shall be independent."); MACED. CONST. art. 98 (Adopted on November 17, 1991; states that "Judiciary power is exercised by courts. Courts are autonomous and independent."); POL. CONST. art. 10 (Adopted on April 2, 1997; provides that "The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive, and judicial powers." Article 10 allocates legislative power to the House of Representatives (*Sejm*) and the Senate, executive power

However, precisely what this independence entails is left unstated to varying degrees.⁴ Some specify that once judges are appointed, they serve unlimited terms or are guaranteed tenure until a certain age.⁵ Others ordain that once

to the President of the Republic and the Council of Ministers, and judicial power to the courts and tribunals. Article 173 identifies the judiciary as a “separate power” that “shall be independent of other branches of power.” Article 178 ordains that “Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.” The body within the Judicial Branch that is charged to “safeguard the independence of courts and judges” in art. 186 of the Constitution is the National Council of the Judiciary.); ROM. CONST. art. 123 (Adopted on December 8, 1991; provides that “Judges shall be independent and subject only to the law.”); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF][Constitution] art. 10 (Russ.) (Adopted on December 12, 1993; provides that “State power in the Russian Federation is exercised on the basis of the separation of the legislative, executive, and judiciary branches. The bodies of legislative, executive, and judiciary powers are independent.” Article 120 provides that “Judges are independent and obey only the Constitution and the federal law.”); SLOVK. CONST. art. 141 (Adopted on September 1, 1992; provides that “The judiciary shall be administered by independent and impartial courts of the Slovak Republic.” Section 2 provides that “The judiciary shall be independent of other branches of government at all levels.” Article 144 ordains that “Judges shall be independent and bound only by law.”); SLOVN. CONST. art. 3 (Adopted on December 23, 1991; provides that “In Slovenia, power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of separation of legislative, executive, and judicial powers.” Article 125 provides that “Judges shall be independent in the performance of the judicial function. They shall be bound by the Constitution and laws.”).

4. U.S. CONST. art. I, § 1 (The same characterization applies to the U.S. Constitution which, while guaranteeing judicial tenure during good behavior and undiminished judicial compensation while in office, details neither how the federal judiciary is to be governed nor its independence preserved vis-à-vis the political branches. It does, however, prescribe specific powers by which the judiciary oversees certain executive and legislative functions in the interests of preserving the supremacy of the Constitution and the sovereignty of the people).

5. ALB. CONST. art. 138 (“The time a judge stays on duty cannot be limited . . .”), art. 139, § 1 (c) (“The term of a High Court judge ends when he . . . reaches the age of 65. . .”); BULG. CONST. art. 129, § 3 (providing that judicial officers, after completing five years in office, will be dismissed from their position only upon retirement, resignation, conviction of a criminal offense, disability that extends for more than a year and renders them incapable of performing their functions, or “serious violation or systematic non-fulfillment of their official duties as well as actions that damage the prestige of the judicial power.”); CROAT. CONST. art. 122 (stating that “[t]he judicial office is permanent.”); ÚSTAVA ČR [Constitution] art. 93, § 1 (Czech Rep.) (“A judge is appointed to office by the President of the Republic without a time limit.”); EST. CONST. art. 147 (providing that “[j]udges shall be appointed for life.”); LAT. CONST. art. 84 (“The appointment of judges shall be confirmed by the Saeima and they may not be dismissed. Judges may be dismissed from office against their will only by the Saeima and in the cases prescribed by law, following a decision taken by the Disciplinary Commission of Judges or a court judgment in a criminal matter.”); MACED. CONST. art. 99 (“A judge is appointed without restriction on the duration of his/her term of office.”); POL. CONST. art. 179 (ordaining that “[j]udges are appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.”), art. 180, § 1 (providing that “[j]udges are not irremovable.”); ROM. CONST. art. 125, § 1 (“Judges appointed by the President of Romania shall be irremovable in accordance with

judges are appointed, they must disassociate themselves from previous affiliations with partisan political parties and related organizations, and further, refrain from participation in political activities.⁶ Some prohibit any effort on the part of others—whether family, friends, professional colleagues, or government officials—to influence or to attempt to influence how judges will rule.⁷ Others go so far as to provide immunity for judges from civil suits for monetary damage resulting from improper acts or omissions undertaken in their professional capacity.⁸ Some provide that judges charged with criminal activities may be

law.”); KONSTITUTSIIA ROSSIISKOI FEDERATSII [Konst. RF][Constitution] art. 121, §§ 1-2 (Russ.) (stating that “[j]udges are irremovable[,]” and that a judge’s power can neither be terminated nor suspended except as provided for under federal law); SLOVK. CONST. art. 145, § 1 (“The judges are appointed and recalled by the President of the Slovak Republic on the proposal of the Judicial Council of the Slovak Republic; he appoints them without time limits.”), art. 154, § 4 (“The judges of the courts of the Slovak Republic, appointed to their functions according to then prevailing legal regulations, are considered appointed to their functions without time limits according to this Constitution.”); SLOVN. CONST. art. 129 (ordaining that “[t]he office of a judge is permanent.”).

6. ALB. CONST. art. 143 (“Being a judge is not compatible with any other State, political or private activity.”); CHECHNYA COMMENTARY & CONSTITUTION art. 97 (prohibiting judges from membership in political parties); EST. CONST. art. 147 (“Judges may not hold any other elected or appointed office, except in the cases prescribed by law.”); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 50 (Hung.) (“Judges may not hold membership in any party and must not carry on political activities.”); LITH. CONST. art. 113 (stating that judges can not hold elected or appointed posts, and can not engage in activities of political parties and organizations); MACED. CONST. art. 100 (“The judge’s office is incompatible with other public office, profession or membership of a political party.”); POL. CONST. art. 178, § 3 (“A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.”); ROM. CONST. art. 125, § 3 (“The position of judge is incompatible with any other public or private office, with the exception of teaching positions in higher education.”); YUGO. CONST. art. 109 (“A justice of the Federal Court may not hold any other public office or engage in any other professional activity. . . .”); SLOVN. CONST. § 133 (“The judicial office is incompatible with functions in other state organs, in local self-government organs and in organs of political parties, and with other offices and activities specified by law.”).

7. ÚSTAVA ČR [Constitution] art. 82, § 1 (Czech Rep.) (stating that “[j]udges’ impartiality must not be endangered by anyone.”); BELR. CONST. art. 110 (“Any interference in the activities of the administration of justice is impermissible and liable to legal action.”); LITH. CONST. art. 114 “[C]itizens shall be prohibited from interfering with the activities of a judge or the court, and violation of this shall incur liability.”).

8. BULG. CONST. art. 132, §§ 1-2 (“While exercising judicial power, judges, procurators, and investigators do not bear criminal and civil responsibility for their official actions and acts enacted by them unless they are committed as an international crime of a general character. In [the cases just described], charges cannot be brought against a judge, procurator, and investigator without the approval of the Supreme Judicial Council.”); CROAT. CONST. art. 121 (“Judges enjoy immunity in accordance with the law.”); LITH. CONST. art. 114 (“Judges may not have legal actions instituted against them, nor may they be arrested or restricted of personal freedom without the consent of the Seimas, or in the period between sessions of the Seimas, of the President of the Republic of Lithuania.”); MACED. CONST. art. 100 (stating that “[j]udges enjoy immunity.”); KONSTITUTSIIA

prosecuted only after certain sectors of the government have granted their approval.⁹ Still others provide that judges must abide by a judicial code of conduct and further state that those in violation of the judicial code of conduct are subject to appropriate disciplinary measures, as determined by an independent review process.¹⁰ Some prohibit judges from engaging in legal and other forms of professional activity for which they receive compensation.¹¹ Finally, others are modeled after the U.S. Constitution and prohibit reduced compensation while in office.¹² Each of these fledgling governments have attempted to craft constitutional provisions designed with the ultimate goal of promoting judicial independence and to protecting judges from undue external influence.

Some of the less obvious indicia of judicial independence, equally critical but often neglected in constitutional language about the adjudicative functions of government,¹³ have to do with the manner in which judicial systems are

ROSSIISKOI FEDERATSII [Konst. RF][Constitution] art. 122, § 1 (Russ.) (ordaining that “[j]udges possess immunity.”); YUGO. CONST. art. 109 (“A justice of the Federal Court shall enjoy the same immunity as a federal deputy.”); SLOVN. CONST. art. 134 (“No one who participates in the making of judicial decisions may be held accountable for an opinion expressed during decision-making in court.”).

9. ALB. CONST. art. 137, § 1 (“A judge of the High Court may be criminally prosecuted only with the approval of the Assembly.”); EST. CONST. art. 153 (“A judge may be charged with a criminal offence during his or her term of office only on proposal by the National Court and with the consent of the President of the Republic.”); POL. CONST. art. 181 (“A judge cannot, without prior consent granted by a court specified by law, be held criminally responsible nor deprived of freedom.”); SLOVN. CONST. art. 134 (“If a judge is suspected of a criminal offence in the performance of the judicial office, he may not be detained nor may criminal proceedings be initiated against him without the consent of the State Assembly.”).

10. MACED. CONST. art. 99 (“A judge is discharged . . . as a consequence of unprofessional and unethical performance of the judge’s office, upon a decision of the Judicial Council of The Republic in a procedure regulated by law.”).

11. ALB. CONST. art. 143 (“Being a judge is not compatible with any other . . . private activity.”); BEL. CONST. art. 111 (“Judges may not engage in business activities or perform any [other] paid work, apart from teaching and scientific research.”); CHECHNYA CONST. art. 97 (“Judges may not occupy any other paid position, with the exception of educational work . . .”); LITH. CONST. art. 113 (“Judges . . . may not be employed in any business, commercial, or other private institution or company. They are also not permitted to receive any remuneration other than the salary established for judges as well as payments for educational, scientific, or creative activities.”).

12. Compare ALB. CONST. art. 138 (prohibits the lowering of judicial pay or related benefits while in office.), with POL. CONST. (“Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and scope of their duties.”).

13. See generally U.S. CONST.; see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., 2d ed. 1937) (explaining that those who authored and ratified the Constitution of the United States provided for a judiciary with express powers of government, but included neither guidance nor direction as to how the judiciary was to be governed or administered).

governed and the institutional context in which they operate. Questions that probe for constraints on judicial independence in this institutional context include:

- to what extent do agencies affiliated with the political branches of the government participate in the oversight or governance of the judiciary;
- are the functions and objectives of those political branch agencies compatible with those of the judiciary;
- are there areas in which their respective functions and objectives compete or collide with each other;
- do those political branch agencies exercise controls over the judiciary in ways that affect or have the potential to compromise judicial independence;
- is the organization and operational viability of the judiciary subject to review and manipulation by those agencies in any way; and
- does the manner in which those agencies interact with the judiciary have the potential to compromise how the judiciary should conduct its business and exercise its authority?

Some constitutions reflect broad institutional concerns. The Constitution of the United States, formally ratified in 1788, establishes three divisions of government to be headed, respectively, by a Congress, a President, and a Supreme Court. Although the language does not formally pronounce the aforementioned branches of the U.S. government as separate and independent from each other, it does grant to each of them appropriate responsibility and power. Moreover, the U.S. Constitution also imposes constraints on the exercise of power of each branch through the authority that it vests in the other two. The U.S. Constitution has become an enduring model for other nations pursuing a more functional, accountable, and representative form of government. For example, the Constitution of the Republic of Poland, enacted more than two centuries later, provides for a system of government based on the separation and balance of powers among the three branches.¹⁴ The Constitutions of Belarus, Croatia, Russia, and Slovenia also reference separation of powers into the legislative, executive, and judicial functions of government.¹⁵ Similarly, the Bulgarian Constitution provides that the power of the state shall be divided between three branches.¹⁶

14. See POL. CONST. art. 10.

15. See BELR. CONST. art. 6; CROAT. CONST. art. 4; KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF][CONSTITUTION] art 10 (Russ.); SLOVN. CONST. art.3.

16. See BULG. CONST. art. 8.

The separation of powers doctrine first emerged as a fundamental principle of the foundation for a democratic government,¹⁷ and more recently, for an independent judiciary. As evidenced by the constitutions of several Central and East European countries cited above, the separation of powers doctrine is routinely invoked in constitutional language. However, judicial independence is not guaranteed simply by what is set forth in a constitution. There are other important institutional elements that work in tandem with constitutional provisions to guarantee judicial independence. Among these are:

- a mutual and professional respect on the part of officials in each branch of government for their counterparts in the other branches;
- a strong, active, well-educated, and independent bar whose members subscribe to ethical principles of professional responsibility and the rule of law;
- university law faculties that provide a rigorous and thorough education in the fundamentals and principles of the law, the legal system, and the rule of law;
- an understanding by the political branches of the government that unpopular judicial decisions must not only be tolerated, but respected and enforced;
- a source of comprehensive, permanent, and uncompromised jurisdiction, trial and appellate, over conflicts and violations that arise in the context of the constitution, laws, and regulations of the state;
- court proceedings that are open to the public; that are governed by fair, accessible, and consistently applied rules, procedures, and law; and to which all citizens have equal access;
- a non-partisan and objective selection process that appoints men and women of high moral character, intelligence, experience, and understanding to positions as judges;
- judicial immunity from lawsuits brought by dissatisfied litigants and personal protection from violence and other acts of revenge and hatred;
- a self-governing framework by means of which the judiciary can define, advocate, control, and administer its financial and other needs.

Although all of these elements are critical to any discussion of judicial independence, this discussion focuses on the last one—a self-governing framework by means of which the judiciary can define, advocate, control, and administer its financial and other needs.

17. See generally 1-4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., 2d ed. 1937) (referencing the separation of powers argument in the debates among the framers).

The judiciary provisions of the constitutions of many democratic governments in Europe, and that of the United States, are either largely silent as to how the judicial branch should be governed or provide for an oversight body and specify in broad terms what its functions are.¹⁸ The issue is a delicate one. Judges who carefully consider the range of issues that define the concept of judicial independence traditionally shun efforts to impose any form of non-judicial institutional control over how they operate, even if such controls appear to have nothing to do with the exercise of their judicial powers. Their aversion notwithstanding, the determination of how the judiciary as an institution is to be governed typically lies with the legislative arm. In the United States, as is detailed below, each stage in the progressive 200-plus-year evolution of the federal judiciary's internal governing structure was advanced by legislative initiative.¹⁹

The early development of governance structures in many of the new democracies in Central and Eastern Europe and the new independent states have followed a continental model that, while proclaiming the independence of the judiciary,²⁰ provide for a substantial role by the minister of justice, an appointed

18. ALB. CONST. art. 147, §§ 1, 2, 4, 6 (providing for a High Council of Justice in section 1 that is chaired by the President of the Republic as indicated by section 2 and whose functions include judicial discipline and, when warranted, removal of judges from office in sections 4 and 6); BULG. CONST. art. 130, 131-133 (authorizing a Supreme Judicial Council in article 130 and setting forth its functions in article 131-133); CROAT. CONST. art. 123 (providing for a State Judicial Council); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 50, § 4 (Hung.) (briefly referencing the National Judiciary Council which administers the Hungarian Judiciary); LITH. CONST. art. 112, § 5 ("A special institution of judges provided by law shall submit recommendations to the President concerning the appointment of judges, as well as their promotion, transference, or dismissal from office."); MACED. CONST. art. 105 (listing eight functions of the Judicial Council of the Republic relating to such topics as elections, discipline, and discharge of judges); POL. CONST. art. 179 (providing for a National Council of the judiciary to move the appointment by the President of the Republic of judges to the Polish courts); *id.* at art. 186, §§ 1, 2 ("[S]afeguard[ing] the independence of the courts and judges . . . mak[ing] application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges."); ROM. CONST. art. 133, 134 (providing for a High Council of the Judiciary whose functions are to nominate judges and public prosecutors for approval by the President of Romania as well as providing disciplinary functions); SLOVN. CONST. art. 130-32 (providing for a Judicial Council which recommends judicial nominees to the State Assembly and proposes dismissal of judges, to the State Assembly who violate the law or abuse their judicial office).

19. That is not to suggest, however, that high level judicial branch officials as well as leaders of prominent bar associations and influential legal scholars did not exercise their prerogative to stimulate such legislative initiatives and influence the direction they took. Powerful Chief Justices, such as Taft, Hughes, and Warren prompted, shaped, and ensured passage of important enabling legislation that defined and empowered the institutional independence of the Judicial Branch.

20. GRUNDGESETZ [GG] [Constitution] art. 97 (F.R.G.) ("Judges are independent and subject only to the law."); *but see* 1958 CONST. 64 (Fr.) ("The President of the Republic is the guarantor of

executive branch official, in the appointment of candidates for judicial office and in administration of the courts.²¹ Moreover, either in their constitutions or in follow-up legislation that addresses the minutia of judicial branch governance, many of these fledgling democracies, mimicking this continental model, provide for administrative management and oversight of the judiciary by the minister of justice or by a high-level national council member. These councils variously comprise members of the judicial, legislative, and executive branches,²² prominent attorneys and professors of law, and of which the justice minister is a prominent member, may exercise significant authority over judicial branch affairs.²³

the independence of the judicial authority.”); *id.* (showing the President is assisted by the High Council of the Judiciary).

21. 1958 CONST. 65 (Fr.) (“The High Council of the Judiciary is presided over by the President of the Republic. The Minister of Justice is its vice-president *ex-officio*. He may stand in (*Il peut suppléer*) for the President of the Republic. [Furthermore,] [t]he section of the High Council of the Judiciary with jurisdiction for judges makes nominations for the appointment of judges in the Court of Cassation (*Cour de cassation*), the first presidents of the court of appeal and the presidents of the superior court (*tribunal de grande instance*). Other judges shall be appointed with its assent.”); GRUNDGESETZ [GG] [Constitution] art. 95, § 2 (F.R.G.) (“The judges of each of [the Supreme Courts of the Federation] are chosen jointly by the competent Federal Minister [presumably justice] and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.”); *id.* at art. 98, § 4 (“[Applying this to the states,] [t]he Länder may provide that Land judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges.”); COST. art. 105 (Italy) (“The High Council of the Judiciary, in accordance with the regulations of the judiciary, has jurisdiction for the appointments, assignments and transfers, promotions and disciplinary measures of judges.”); *id.* at art. 104 (“The High Council of the Judiciary is presided over by the President of the Republic. Members by right are the first president and the procurator general of the Court of Cassation.”); *id.* at art. 110 (“Without prejudice to the competence of the High Council of the Judiciary, the Minister of Justice has responsibility for the organization and functioning of the services concerned with justice.”).

22. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 21 (during the debate among the framers of the United States Constitution during the Federal Convention of 1787 included a resolution by Virginia delegate Edmund Randolph for a similarly constituted council of high-level representatives from more than one branch); *id.* (“[His council of revision would be comprised of] the Executive and a convenient number of the National Judiciary . . . to examine every act of the National Legislature before it shall operate . . . and that the dissent of the said Council shall amount to a rejection . . .”). Had it been approved, this council would have exercised the equivalent of a veto power over the Legislative Branch’s initiatives by, among others, Judicial Branch officials. The framers declined to accept it.

23. ALB. CONST. art. 147, § 1 (explaining that the membership of the Albanian High Council of Justice includes the Minister of Justice); *id.* at art. 147, §§ 4, 6 (demonstrating that the High Council disciplines and transfers judges); *id.* at art. 137, § 3 (showing that the Council also approves the criminal prosecution of judges of all courts except the High Court); BULG. CONST. art. 130, § 5 (explaining that the Bulgarian Supreme Judicial Council is chaired by the Minister of Justice in a non-voting capacity); *id.* at § 1 (noting that the members include the government’s

Judges in many of these countries, unlike their more resigned judicial colleagues in Western European countries,²⁴ are struggling with the issue of how to divorce their court systems from the oversight and administrative control exercised by ministerial government officials, and how to transfer those controls to their respective judiciaries. They should not be discouraged if the resolution of those issues seems glacial, frustrating, and hopeless. In the United States, the federal judiciary's efforts to wrest administrative governance from the executive, to secure legislative confidence, and finally to achieve institutional independence began with relatively innocuous initiatives. It was a protracted process that slowly gathered steam in an erratic but progressive stream of events. In fact, it consumed more than two hundred years. A brief review of those efforts is instructive.

II. INSTITUTIONAL INDEPENDENCE IN THE U.S. JUDICIARY

We begin with the ratification of the U.S. Constitution in 1788.²⁵ Section I of Article III authorizes the Congress to establish a Supreme Court and "such inferior courts as the Congress may, from time to time, ordain and establish."²⁶ Apart from that authority, the Constitution provides no additional guidance. Cognizant of the need to develop an organizational framework for these inferior

Chief Procurator); CROAT. CONST. art. 121 (showing that the State Judicial Council is tasked with judicial discipline); *id.* at art. 123 ("[The members of the State Judicial Council] are chosen by the Croatian Sabor in a manner specified by the Constitution and law, among renowned judges, lawyers and university law professors."); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 50, § 4 (Hung.) (noting that the National Council on Administration of Justice is tasked with administering the courts); (The Council's membership, as specified by law, includes ten judges but also includes the President of the Hungarian Bar Association, two members of Parliament representing the Legislative Branch, and the Minister of Justice and the Prosecutor General representing the Executive Branch); POL. CONST. art. 186, § 1 ("[Poland's] National Council of the Judiciary shall safeguard the independence of courts and judges."); *id.* at art. 179 (noting that another function includes proposing candidates for judicial appointment); *id.* at art. 187, § 1 (explaining that membership on the National Council of the Judiciary includes, in addition to 15 judges, four members of the Sejm, two members of the Senate, and the Minister of Justice).

24. By contrast, their judicial counterparts in Western European countries whose judiciaries continue to varying degrees to be administered and overseen by justice or equivalent government ministries appear to have reached a comfort level with that structure that, in their view, neither threatens nor prejudices their individual independence as judges.

25. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980) (providing a summary narrative of historical developments that spawned and elaborated the concept of judicial independence in enlightenment England and the American colonies, developments crucial to the persuasions that culminated in the constraints on executive and legislative interference in the exercise of judicial power set forth in Article III of the U.S. Constitution).

26. U.S. CONST. art. III, § 1.

courts, in 1789 the U.S. Congress passed, and President George Washington signed into law, “An Act to Establish the Judicial Courts of the United States.”²⁷ In this legislation, Congress established the first iteration of a system of federal district courts, apart from the courts of the several states, and created a basic organizational framework for that system. In subsequent legislation directed toward the administration of the courts, Congress passed a variety of acts addressing everything from the daily compensation of the clerk of the Supreme Court for a day spent in court to what the marshal should be paid for summoning grand and petit juries;²⁸ from specifying the form and process for writs and executions to requiring unsuccessful defendants in forfeiture cases to pay costs;²⁹ from specifications regarding the taking of bail in criminal matters to authorizing the federal courts to “make rules and orders for their respective courts” in certain matters of process;³⁰ and from specifying the dollar threshold, exclusive of costs, necessary to appeal a case to the appropriate circuit court³¹ to authorizing the clerk of the District of Louisiana to appoint a deputy.³²

The next major legislative milestone affecting the structural framework of the federal judiciary was not enacted until more than one hundred years later. The 1891 Court of Appeals Act empowered the federal judiciary to more effectively deal with the judicial business of a country encountering rapid population growth, political sophistication, and unprecedented geographic expansion. Among its provisions, the Act established a new level of appeals or second-instance judgeship and a new tribunal or court with clearly defined intermediate appellate jurisdiction.

However, the growth of the judicial branch was missing a self-governing administrative structure. Administrative authority was exercised locally by individual judges very loosely. Although the judges were experts in applying the law, they frequently had little or no expertise in management and administration, and operated largely independent of any central administrative controls. There were few national policies, guidelines, or regulations governing the procedural operations and administration of the courts. Initially, the Department of the Treasury oversaw the fiscal administration of the lower courts. However, as the role of the federal government expanded and as Congress increased the number and diversity of executive branch departments, fiscal oversight of the judicial branch was transferred from one department to another.³³

27. *An Act to Establish the Judicial Courts of the United States*, ch. 20, 1 Stat. 73 (1789).

28. *See Act of Mar. 3, 1791*, ch. 22, 3 Stat. 217 (1791).

29. *See Act of May 17, 1792*, ch. 36, 1 Stat. 276-77 (1792).

30. *See Act of Mar. 2, 1793*, ch. 36, 1 Stat. 334-35 (1793).

31. *See Act of Mar. 3, 1803*, ch. 40, 2 Stat. 244 (1803).

32. *See Act of Mar. 3, 1821*, ch. 50, 2 Stat. 643 (1821).

33. *See Act of Mar. 3, 1849*, ch. 98, 9 Stat. 395 (1849) (providing that until 1849, fiscal oversight of the judiciary was exercised by Treasury. When Congress passed *An Act to establish*

Although the need for central administrative policies and controls emerged gradually with the growth of a system of largely autonomous courts headed by judges and staffed by their clerks, no formal leadership structure was in place to develop, implement, and enforce them. Nor did successive Chief Justices of the Supreme Court, with few exceptions, aspire to such leadership of the inferior courts.³⁴

In 1870, Congress authorized creation of the Department of Justice and transferred to it from the Department of Interior responsibility for fiscal administration of the federal courts.³⁵ Justice's acceptance and elaboration of the charge took significant forms for a judiciary unaccustomed to external controls. Annual operating budgets for the courts were to be included in the funding Congress appropriated for the department. Funding allocations from the department to the courts were handled by Justice through its agents in the courts, the U.S. marshals. Beyond appropriations, the department established personnel standards and other policies designed to rein in the careless and obstinate manner in which some courts conducted their non-judicial business. When it first assumed these administrative responsibilities, the department complained about the lack of cooperation by judges and court managers, many of whom found this imposition of external controls by the executive branch intrusive. The department encountered mixed success when, for example, it required court clerks to disclose financial transactions. Some judges steadfastly refused to comply with hiring standards set forth by the department. Others resisted the department's fiscal policies and refused to cooperate with reporting requirements.

The department generally refrained from exercising direct administrative control over individual judges or court clerks for fear of damaging the occasional

the Home Department, and to provide for the Treasury Department an Assistant Secretary of the Treasury, and a Commissioner of the Customs, it transferred that oversight responsibility to the newly created Department of the Interior. Section 4 ordains: "That the supervisory power now exercised by the Secretary of the Treasury over the accounts of the marshals, clerks, and other officers of all the courts of the United States, shall be exercised by the Secretary of the Interior, who shall sign all requisitions for the advance or payment of money out of the treasury, on estimates or accounts, subject to the same control now exercised on like estimates or accounts by the First Auditor and First Comptroller of the Treasury.").

34. Whatever supervision over the operations and administration of the inferior courts the various chief justices exercised was largely incidental to their circuit-riding duties as circumstances dictated; in most such matters, the fledgling lower courts were left to themselves. Overseeing them was a low priority for the Supreme Court, as well as for the Congress.

35. *See* Act of June 22, 1870, ch. 150, 16 Stat. 162 (1870) (In language lifted nearly verbatim from the earlier act of March 13, 1849, transferring oversight from Treasury to Interior, § 15 prescribes "That the supervisory powers now exercised by the Secretary of the Interior over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States shall be exercised by the Attorney-General . . .").

tenuous relations between the judiciary and government prosecutors. Over the next fifty years, however, the department gradually expanded the scope of administrative oversight of the courts and tightened its controls, asserting itself in everything from regulating the salaries of clerks to establishing appointment standards for support staff positions. The department established the allocation of budgets, supplies, files, furniture, and other court needs. Accordingly, Congress held the department accountable for the proper use of those goods and services, and therefore, the department could demand an accounting from the courts in such matters. The department also gathered productivity statistics of the courts and duly reported them to the Congress. Administering these services and holding the courts accountable gave the department an element of control and simultaneously created an environment of dependence that, in the view of a growing number of judges, breached the principle of separate powers.³⁶

The judiciary's formal initiative to liberate itself from this external oversight and to establish a mechanism for self-governance began in the early 1920s. On September 14, 1922, in response to the leadership of Chief Justice William H. Taft, Congress authorized creation of the Conference of Senior Circuit Judges to serve as the principal policy-making body for the federal trial and intermediate appellate courts. This special judges' conference comprised the senior circuit judge from each circuit and would be presided over by the chief justice. Among other institutional functions, it was to foster adoption of standard administrative procedures among the federal courts. The act's significance for the judiciary was fundamental; it authorized the judicial branch to establish an executive forum of judges tasked with policy-making and administrative governance of the inferior federal tribunals. With the formation of this new leadership body, the status of the judiciary had taken a major organizational step toward achieving institutional independence. The actual transition from the control exercised by Justice, however, was anything but immediate. This came as a result of: (1) few administrative mechanisms in place, (2) the judiciary had no cadre of professional administrators with broad organizational experience, and (3) in light of disagreement among the senior circuit judges as to how an internal support structure for the judiciary should be crafted and what authority it should yield vis-à-vis the judges. Thus, Justice

36. Adherence to such sentiment was by no means universal. Growing congressional and Executive Branch dissatisfaction with the administrative operation of a loosely organized federal judiciary on appellate and particularly trial levels was shared by the bar. This prompted testimony from bar leaders critical of growing case backlogs, arrogant judges, and judicial misconduct. Federal judges were not administratively beholden to a central authority charged with keeping them in line. Thus, inspiring a variety of legislative initiatives, including, in the later 1930s, the Roosevelt Administration's proposal for a "Proctor" with broad authority to gather and publicize court productivity statistics and to recommend procedural reforms for expediting the processing of court caseloads.

would continue to oversee the judiciary's bureaucracy for more than fifteen years.

In the interim, tensions continued to smolder between the department and the judges. The newly formed conference first met in December 1922. At this meeting and subsequent meetings, a major agenda item was the report by the attorney general³⁷ on the business of the United States Courts and a statistical overview of court productivity. As one might expect, the attorney general's reports at these conferences focused largely on matters of interest and importance to Justice—government litigation in general and criminal prosecutions in particular. The reports also featured a smorgasbord of complaints from the U.S. attorneys, who prosecuted defendants in federal court, about judicial behavior, arrogance, and sluggishness in processing caseload. The attorney general did not hesitate to suggest to the conference how court functions and procedures might be improved, how judges might adopt new management practices, and what the conference could do to support a legislative agenda in Congress that would be advantageous to the department. Occasionally, the attorney general complained that federal judges were imposing sentences that, in the department's judgment, were too lenient. He criticized the judiciary for failure to institute more uniform sentencing guidelines, the result of which was disparity in sentencing, not only among different courts but between different judges in the same court.

The judges complained about a host of administrative matters.³⁸ They did not appreciate the department's presumptive role as administrative overseer and fiscal agent of the Article III judiciary. They did not want Justice, as an entity of the executive branch, performing an array of sensitive oversight and housekeeping duties for the judicial branch. They wanted the department to advocate more funding for the courts and to assist in streamlining the procedural requirements that protracted the civil adjudication process. Senior circuit judges complained of the need for adequate law libraries, additional judgeships, better court facilities, more personnel, and larger budgets.

A major flash point was who should represent the judicial branch's funding requirements before the legislature. Because the legislative branch has the constitutional authority to appropriate funding to the various branches and

37. In the United States Government, the attorney general is a civilian position similar to the position of minister of justice in European countries and exercises comparable authority. The attorney general serves as the head of the Department of Justice, but also serves as the chief public prosecutor of the United States Government. *See* §§ 4, 5, 8, 16, 16 Stat. 162 (a position in some European countries that exists separate and distinct from the Attorney General. Given the Department of Justice's statutory authority to exercise fiscal oversight of the inferior courts at the time the Conference of Senior Circuit Judges was created, the attorney general was invited to participate in conference meetings and to deliver a report on the administration of those courts).

38. PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 53-55 (1973).

agencies of the government, many judges saw it as a conflict of interest and breach of the separation of powers doctrine for the attorney general to act as the judicial branch's fiscal intermediary with the Congress. Budgetary requirements established to fund judiciary operations were reviewed by the department and jointly submitted with its own. The attorney general was required by statute to report each January to the Congress on the business of the department, including federal criminal statistical trends,³⁹ and department officials appeared at legislative hearings to explain the judiciary's funding and justify its resource requirements. In some instances, funds requested on behalf of the judiciary were scaled back by the Bureau of the Budget,⁴⁰ igniting judicial outrage and provoking demands for judicial branch self-representation before Congress. Department officials also represented the judiciary in other initiatives before the Congress, such as pursuing judicial branch legislation. Legislation sought by the Conference of Senior Circuit Judges representing the judicial arm of the government, was subject to interpretation by the Department of Justice, the prosecutorial arm of the government. The conflict, clear in the mind of judicial branch loyalists and sympathizers alike, was that representation of the judiciary's needs by the agency that advocates the government's interests in judicial forums was suspect; at the least, the department would incline to pursue Judicial Branch legislation favorable to its objectives and priorities.

Although some judges directly challenged the attorney general's exercise of such authority, others opted for a less-confrontational and more diplomatic approach. Even though it raised issues of ethics and propriety, pragmatic judicial officials shrewdly concluded that the best avenue for maximizing judiciary appropriations was to cooperate with the attorney general. Some chief justices established strong working relationships with the attorney general. Others, such as Chief Justice Taft, sought to influence the appointment of candidates for the office of attorney general, throwing their support to those they calculated would actively promote the judiciary's agenda.⁴¹

Just how well the department administered the federal courts and represented their interests before the Congress is disputable. What is clear, however, is that disagreement and tension often fractured the relationship between the department and the conference. The continuing tension led to a succession of proposals for a delegation of administrative oversight and management less intrusive on the institutional independence of the judiciary. Later proposals addressed the source of the tension more directly, articulating the objective of shifting authority and responsibility for governing and administering the courts from the executive to the judicial branch. Eventually an agreement

39. § 12, 15 Stat. 162.

40. FISH, *supra* note 38, at 123.

41. *Id.* at 76.

was negotiated, and on August 7, 1939, Congress passed an act entitled "The Administration of the United States Courts" which, among other provisions, established an Administrative Office of the United States Courts.⁴² The Act called for the appointment of a director who, as the chief administrative officer of the federal judiciary and "under the supervision and direction of the conference of senior circuit judges . . ."⁴³ would have the responsibility for a host of administrative and business services heretofore performed by the Department of Justice for the inferior courts.⁴⁴ The Act also authorized the director, under the conference of senior circuit judges, to "prepare and submit annually to the Bureau of the Budget estimates of the expenditures and appropriations necessary for the maintenance and operation of the United States courts . . ."⁴⁵ To discourage other Executive Branch intrusion into Judicial Branch funding, the Act specifically prohibited the Bureau of the Budget from adjusting the judiciary's proposed budget submissions to the Congress, although it could advise reductions.⁴⁶

This watershed act has several other important provisions, one of which is the creation of councils of judges in each circuit⁴⁷ to ensure expeditious transaction of the work of the trial courts within the circuit. This provision distributed authority for governance of the judicial branch broadly among these newly formed judicial councils, tasking them with the responsibility for managing the affairs of the courts within their circuits and creating opportunity for judges in all circuits to participate in branch governance. Creation of these councils reinforced the institutional independence of the judicial branch by establishing formal representation bodies at the regional level.

Although not all of the department's oversight responsibilities were promptly transferred with passage of the act, creation of the Administrative Office substantially breached the dependence of the trial and intermediate appellate courts on the department. Today the Administrative Office of the U.S. Courts, located in Washington, D.C., provides a variety of administrative support

42. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

43. § 304, 53 Stat. at 1223.

44. For example, the director is charged in section 304(1) with "[a]ll administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts, . . . " while reserving the authority of the courts to appoint clerks and other supporting personnel; in section 304(2) with "[e]xamining the state of the dockets of the various courts[:]" . . . " in section 304(3) with "[t]he disbursement . . . of the moneys appropriated for the maintenance, support, and operation of the courts;" in section 304(4) with "[t]he purchase, exchange, transfer, and distribution of equipment and supplies . . . " § 304, 53 Stat. at 1223.

45. § 305, 53 Stat. at 1224.

46. "All estimates so submitted shall be included in the Budget without revision (but subject to the recommendations of the Bureau of the Budget thereon), in the same manner as is provided for the estimates of the Supreme Court by section 201 of said Act." § 305, 53 Stat. at 1224.

47. § 306, 53 Stat. at 1224.

services for the U.S. Courts and works through the Judicial Conference to pursue appropriations and other legislation that serve the interests of the federal judiciary.

The next major initiative was undertaken in 1948, when Congress, on the initiative of the Conference of Senior Circuit Judges, enacted 28 U.S.C. § 331,⁴⁸ which changed the name of that body to the Judicial Conference of the United States. Fewer than ten years later, in 1957, membership of the conference was increased with the addition of a federal district judge from each circuit. Over the past 50 years, the Judicial Conference has evolved into a distinguished and powerful governance and oversight body for the administration and leadership of the judicial branch. It is recognized by the Congress and the President as the governing policy making body for the judiciary. Members of the conference appear regularly at legislative hearings to testify and respond to inquiries relating to the judiciary's budget and the impact of proposed legislation on the judicial branch. They also meet with representatives of the Executive Branch to facilitate a better understanding of the needs of the federal judiciary.

Although the Conference only meets twice each year for two-day meetings, much of its preparatory work is undertaken by a network of committees tasked with providing advice and making recommendations to the Conference.⁴⁹ Committee members, with a few exceptions, consist of federal trial and appellate judges. Committee jurisdiction is carefully defined by the Conference and the Chief Justice, and it ranges over a broad array of governance matters relating to the administrative operations and management of the judiciary.⁵⁰

48. 28 U.S.C. § 331 (2000).

49. Although the Conference of Senior Circuit Judges established committees as early as 1922, their number was small and their status generally temporary. Chief Justice Stone's initiatives enlarged their number, and in the early 1940's, following creation of the Administrative Office, numerous new committees were created. As the committee system evolved, committee longevity typically shifted from *ad hoc* to permanent status. FISH, *supra* note 38, at 269.

50. As of November 2005, the committees of the Judicial Conference of the United States are as follows: Executive Committee (the senior executive arm of the Judicial Conference); Committee on the Administrative Office (to oversee the operations of the Administrative Office); Committee on Automation and Technology (to provide policy recommendations and planning oversight of the judiciary automation program); Committee on the Administration of the Bankruptcy System (to oversee the bankruptcy system); Committee on the Budget (to assemble and present to Congress the Judicial Branch budget); Committee on Codes of Conduct (to advise on the application of the Code of Conduct for United States Judges and other judicial branch codes of conduct and Titles III (relating to gifts to federal employees) and VI (relating to limitations on outside earned income, honoraria, and outside employment) of the Ethics Reform Act of 1989, as amended)); Committee on Court Administration and Case Management (to study and make recommendations on matters affecting case management, the operation of appellate, district, and bankruptcy clerks' offices, jury administration, and other court operational matters); Committee on Criminal Law (to oversee the federal probation system and review legislation and other issues relating to the administration of the criminal law); Committee on Defender Services (to oversee the provision of legal

III. MILESTONES IN ACHIEVING INSTITUTIONAL INDEPENDENCE

In the more than 200 years since passage of the Judiciary Act of 1789, it has been the experience of the United States Judiciary that although the judicial function may be identified in a constitution or follow-up legislation as separate but equal, and that although a constitution or laws that build on it may provide broadly for the independence of judges, there are no guarantees. The larger institutional context and framework of government within which the judiciary operates may threaten, undermine, ignore, or call for the repeal of those declarations under any number of presumptive justifications, typically political and inflammatory in character. It is there that judicial leaders must exercise due vigilance. The interpretation of proclamations regarding independence and the legislation generated to foster their implementation need to be carefully monitored. Judicial leaders, empowered through formal judicial system governance structures established on legislative initiative, should use their influence and the authority of their office to ensure that in the evolution of mature governmental institutions, the judiciary attains institutional independence from and self-governing parity with the other branches. Reviewing some general guidelines about institutional context and how it can impede judicial independence may prove helpful here.

A. Judicial System Governance by a Council of Presiding Judges

Democratic governments recognize the need to establish judicial system governance structures, and legislative or parliamentary bodies enact laws that detail the organization of those structures and establish the authority with which

representation to defendants in criminal cases who cannot afford an adequate defense); Committee on Federal-State Jurisdiction (to analyze proposed changes in federal jurisdiction and to serve as liaison with state courts); Committee on Financial Disclosure (to supervise the filing and review of financial disclosure reports by judicial officers and employees); Committee on Intercircuit Assignments (to assist the Chief Justice in assigning and designating Article III judges for service outside their circuits); Committee on International Judicial Relations (to foster and coordinate relations with foreign judiciaries and related organizations and agencies committed to promote the rule of law); Committee on the Judicial Branch (to address problems affecting the judiciary as an institution and affecting the status of federal judicial officers); Committee on Judicial Resources (to oversee the administration of human resource development needs, assessments, requirements, and allocation for the Judicial Branch); Committee on the Administration of the Magistrate Judges System (to oversee the federal magistrate judges system); Committee to Review Circuit Council Conduct and Disability Orders (to review circuit council action on judicial misconduct and disability complaints and to review related legislative proposals); Committee on Rules of Practice and Procedure (to study the operation and effect of the federal rules of practice and procedure with support from advisory committees on the appellate, bankruptcy, civil, criminal, and evidence rules); Committee on Security and Facilities (to oversee the security, space, and facilities programs of the judiciary). See *Judicial Councils & Conferences*, http://www.uscourts.gov/understanding_courts/89914.htm (last visited Dec. 16, 2006).

they are to act. A typical European model is the governing council. The responsibilities of these councils differ from one country to the next, both in their scope and in the authority delegated to them,⁵¹ but they all play key roles in making important determinations on judicial branch policies, governance, development, administration, judicial selection, tenure, and discipline.

However, in many instances and unlike the Judicial Conference of the United States, the membership of these councils includes, in addition to judicial officers: (1) high-level officials from the political branches or agencies of the government such as members of the parliament or legislature; (2) executive branch representatives; (3) members of the council of ministers such as the minister of justice;⁵² and (4) heads of independent justice-related agencies, such as the prosecutor general. Some council includes non-government representatives such as prominent attorneys and senior-level law professors. Even though judges serve on councils and frequently sit in the majority, political branch and other non-judicial members bring to these councils non-judicial interests, priorities, and perspectives. Although there may be value in the contributions of these non-judicial members, granting them full membership and voting status in the body tasked with judicial branch governance suggests a democratic model of government in which the judicial branch is subordinate to the political branch. This formal participation by the other branches in judicial branch governance structures constitutes, at best, a benign intrusion into high-level judicial branch affairs and policymaking. To assert that the judiciary is as independent as an institutional entity, and to simultaneously mandate standing membership for political branch officials in these governance councils, invokes a tension that is parasitic on the claim of independence.

If these mixed councils were a common feature of the other branches of government, their significance for this issue of institutional independence would still be troubling, but the discrepancy afforded the judicial branch would evaporate. However, no statutory provisions exist that establish executive oversight structures, such as political branch councils, that mandate the membership or participation of judicial branch representatives. No legislative acts authorize judges to sit on the council of ministers or to participate in the leadership hierarchy of a parliament or national assembly. The issue, then, is why the governance structure of the judiciary should include these non-judicial

51. *See supra* note 19 (constitutional references to and brief descriptions of various Central and East European judiciary councils and their authority).

52. Recall that the Attorney General of the United States, roughly equivalent to a minister of justice, routinely addressed meetings of the Conference of Senior Circuit Judges and served as the liaison between the Judicial Branch and the Congress on matters affecting the courts. The Attorney General did so until the responsibility for fiscal oversight of the courts to be exercised under the supervision of the Chief Justice and the Judicial Conference was transferred to the Director of the Administrative Office of the U.S. Courts.

participants. If there is no reciprocation in the political branches, then the assertion that the judiciary is co-equal with them and institutionally independent fails on the merits.⁵³

Some may argue that the power vested by the government in the judiciary appropriately requires the oversight of the legislative and executive functions. Clearly, however, those oversight controls already exist and tilt the ultimate balance of power in favor of the political branches. The judiciary exercises no independent control over the purse of the government—the revenue sources essential to underwrite its operations. For that, it is wholly dependent upon legislative initiative, a control sufficient in itself and duly exercised. Moreover, in a number of governments, constitutional or statutory authority provides the legislative branch the ability to impeach and try high-level judicial officials for serious violations of their oath of office.

The judiciary also exercises no direct control over the sword of the government - the military, police, or other civil order and law enforcement entities—as instruments to execute its judgments; for that, it is wholly dependent upon the cooperation of the executive arm of the government, again, sufficient control in itself and duly exercised. Moreover, the executive retains the power to prosecute judges on criminal charges. To argue that additional institutional oversight and governance controls are required is to argue that the judiciary, although vested with the authority of the state to interpret and apply the law, effectively is incapable of governing itself. Such logic collides with constitutional provisions that the judiciary is co-equal and independent; it concedes that the principle of the separation of powers, although theoretically desirable, is impractical from the perspective of institutional utility.

The initiative that judges and other judicial branch guardians should press for is the support for legislative amendments to enabling laws that preclude the appointment of political branch officials to these governing councils, restricting their membership to senior-level judicial branch officials. Once purged, these governing councils should be vested with the requisite authority and responsibility for governance and oversight of all internal judicial system management, administration, operations, policy making, and procedural guidance. To conserve their attention and energy for executive oversight and policy formulation, these councils should delegate day-to-day administrative authority to the director of a support organization or bureau that reports to judicial authority and is tasked with provisioning and assisting the courts to

53. This is not to suggest that it is inappropriate or violative of the separation of powers principle to include, as guests, the equivalent of a high-level judicial conference political branch official to address matters of inter-branch or government-wide concern and interest, just as judicial branch officials may be invited to address executive branch forums or testify in legislative hearings on matters of interest to both. Indeed, such exchanges facilitate the proper function of democratic government.

perform their functions. The concept of such an administrative support bureau is discussed below.

As a corollary to this self-governing authority, the judiciary should wield some control over the procedural framework within which judges perform their official functions and exercise their authority.⁵⁴ This includes the prerogative to establish and enforce system-wide rules of process and procedure consistent with legislative intent. It also contemplates the authority of each level of court to make and enforce local rules governing the conduct of its business and the processing of cases insofar as those rules are consistent with the national rules promulgated by the supreme governing judicial council and relevant legislative intent. The legislative branch may reserve the right to review and modify such national rules.⁵⁵ The initiative of granting the judicial branch rule-making authority should be addressed jointly by representatives of both branches, legislative and judicial. Once granted, the rule-making process should be public and actively involve not only judges, but also representatives of the practicing bar. Proposed rules and amendments to existing rules should be publicized with requests for comments from the bar and the public. The context in which the rules and amendments to them are issued should make clear the authority of the judiciary to enforce compliance, regardless of the status of the parties. The rules should apply equally to all attorneys and to all litigants.

B. Truncating Adjudication and Prosecution

Under the separation of powers doctrine, distinct functions are defined and authority is apportioned among the divisions of the government to create a balance of power and to foster a framework of tension that maintains it. The relationship between the branches is set forth in the constitution and the observance of those laws by all branches serves to maintain political stability and preserve the institutions of government.

The institutional framework of a democratically oriented government characteristically provides for law enforcement and prosecution functions within

54. This position was advocated broadly by Virginia Delegate Edmund Randolph, with regard to the legislation that eventually resulted in passage on September 24 of the Judiciary Act of 1789. Randolph, who subsequently would be appointed the first Attorney General of the United States, wrote to James Madison on June 30 that “[t]he minute detail ought to be consigned to the judges. Every attempt towards it must be imperfect, and being so may become a topic of ridicule to technical men . . . I wish even now that the judges of the [S]upreme [C]ourt were first to be called upon, before a definitive step shall be taken.” Letter from Edmund Randolph to James Madison (June 30, 1789), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 432-433 (Maeva Marcus ed., Columbia Univ. Press 1992).

55. In the United States, for example, the Rules Enabling Act specifies that the “Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.” 28 U.S.C. § 2071(a) (1994).

the executive arm under a department or ministry of interior, justice, or equivalent. To sustain the tension between the prosecutorial and the adjudicative functions of government, between prosecutor and judge, judicial functions are installed in a separate branch or department. Ideally, that branch is neither ideologically nor administratively aligned with the prosecutorial and enforcement functions; nor should it be supported by them. Some European scholars argue that this separation-of-powers model of democratic government is but one of several and not necessarily the most desirable. They suggest that in the interest of efficiency, having a justice ministry exercise administrative oversight of the judicial and prosecutorial functions of the government is politically manageable and economically more feasible. Further, such an arrangement neither violates nor undermines the objective of an independent judiciary. Indeed, in the continental civil law tradition, this is an accepted model⁵⁶ and one that justice ministry officials in some Central and East European countries invoke to justify the oversight and control functions that their ministries perform for their judiciaries.⁵⁷

It is also a common model in the emerging democracies of Central and East Europe, where, to varying degrees, justice ministries are tasked with the organizational functions of (1) prosecution to uphold the law and protect the interests of the government, and (2) adjudication of disputes through analysis and interpretation of the law. In this model, the minister of justice, or equivalent, serves as both the executive prosecutorial officer for the government and as the executive administrator of the judiciary.⁵⁸ This organizational

56. *See supra* note 22.

57. In a meeting with Poland's Vice Minister of Justice, the Honorable Janusz Niemcewicz and two of his associates on June 9, 1997, the author contrasted the Ministry's strong role in governance of the Polish Judiciary with the self-governing structure of the federal judiciary of the United States. One of the associates, Zloig Szczaska, Ph.D., who oversees public relations for the prosecutorial division of the Ministry of Justice, responded that the differences between common and civil-law systems justify the Ministry's administrative control of the judiciary in the latter. He went on to characterize the American preoccupation with the separation of powers doctrine as a peculiar aberration in political theory, attributable primarily to Montesque.

58. In Croatia, for example, although the Law of Courts provides authority for court presidents, equivalent to chief judges, to exercise certain oversight and self-policing functions in their own as well as in the lower courts, many administrative oversight responsibilities are delegated to the Ministry of Justice. These include, but are not limited to, the following:

- *review and monitor the constitution, work methodology, and operations of the courts and take such action as is required to promote court productivity;
- *review and maintain records on the status and professional advancement of court personnel;
- *determine criteria - including judicial workload levels - for allocating judgeships;
- *provide the supplies, equipment, and other goods and services required for court operations;
- *issue orders and other instructions necessary to implement effective court administration;

structure presumes that the interests of the state under the law, which the prosecutorial function exists to promote and defend, are compatible with the broader interest of securing justice, that there is a convergence of interest in the prosecutor's zealous advocacy in enforcing the law and the judge's impartial role in interpreting and applying the law. These are, at best, tenuous propositions.

Even under ideal circumstances, an inherent tension exists where the judicial system is managed by and administratively subordinate to the minister of justice who also manages the prosecutorial arm of the government.⁵⁹ Although it may not manifest itself directly, there will be occasions when the outcome of the work of the judicial function will be in conflict with that sought by the prosecutorial function. There will be instances where the judiciary's reasoned view of justice will confront and reject that advocated by the prosecution and, by association, the state.

Where the judiciary interprets the law to subordinate the interests of the state to the dictates of justice, it places itself at risk if it is subject to the oversight of the minister, an appointed official sworn to uphold the interests of the state under the law. Within such a framework, the judiciary as an institution cannot accurately be described as an independent and separate arm of the government. Such a framework, however benign, invites manipulation of the judiciary where it is perceived as uncooperative in pursuing the government's agenda.

*analyze court performance and productivity to ensure compliance with existing laws and regulations;

*investigate court-related complaints dealing with how the courts are administered, the efficiency of legal proceedings, and public and client relations;

*provide automation support to the courts;

*develop and approve rules of procedure for the courts;

*determine compensation and remuneration levels for lay judges;

*provide rules for the design of judicial robes;

*review and consent to the number of technical, professional, and clerical support staff positions in the courts;

*develop regulations governing the qualifications, performance standards, and other matters related to the employment of court support staff;

*establish the number of judicial trainees authorized for employment in the courts;

*determine the regulations that govern how the fiscal and procurement functions of the courts are to be carried out.

59. There are, however, some exceptions to this model. In Macedonia and Hungary, for example, the prosecutorial function is vested under law in the office of a separate and independent Prosecutor General who does not report to the Minister of Justice. Such a tri-partite division of justice-related functions palliates the ethical quandary of cross-purposes when adjudicative and prosecutorial functions co-exist under a single umbrella of authority and administrative oversight. However, the separation of powers issue remains unresolved and gnaws at claims that the judiciary is independent when it is administered by an agency of the Executive Branch under the direction of an appointed official.

Where, as in many of the world's emerging democracies, scarce governmental resources must be sparingly allocated and frequently are sufficient to fund only the most fundamental operations of government, the needs of the judiciary may be determined by a minister to be subordinate to those of the prosecution and underfunded accordingly. Such determinations are the appropriate province of the people's assembly or parliament whose representatives, unlike an appointed official, are directly accountable to the people.

Where a justice minister is persuaded that the judiciary is undermining the interests of the state by ruling too often against its perceived interests, subtle retaliation may result in those areas in which the minister exercises administrative oversight over the judiciary—from more stringent resource allocation to ideological litmus tests for prospective judges, from subtle manipulation of the nominee approval process to media grandstanding about out-of-control, extremist judges,⁶⁰ and from postponing authorization for critically needed support personnel to withholding equipment and expertise for automating court operations. The organizational structure of government and the distribution of power within that structure should minimize the potential for such retaliation and manipulation; the most effective model is based on the concept of the institutional separation of powers.

C. Creating an Internal Administrative Support Organization

Transferring responsibility for the administrative management of the judicial branch from the ministry of justice entails creation by the legislative branch of a separate and permanent organizational structure within the judiciary. There may be detractors in the assembly or parliament who argue for maintaining administrative management and oversight of the judiciary in the ministry and who criticize proposals to form another costly administrative bureau. They also may undermine the effort to effect a clean transfer of the administrative authority and responsibility to the judiciary by seeking to reserve key authority, such as fiscal oversight, to the ministry. These detractors fail to appreciate the importance of ensuring against conflicts of interest that plague systems in which administrative control of the judiciary is vested in a non-

60. As is well documented in the United States, such political intrigues and maneuvers are not uncommon, and their destructive potential for undermining public confidence in the courts is a serious one. However, they typically originate not with the attorney general but with legislative branch leaders when the congressional majorities represent one mainstream party and the president represents the other.

judicial organization and how such external control compromises the objective of attaining an independent judiciary.⁶¹

Ideally, this new judicial branch agency or bureau should not be attached to any court whose needs might dominate its resource capacity at the cost of compromising effective service to the whole. Organizationally, it should fall within the hierarchy of the judiciary, and its administrator should answer to the presiding justice of the Supreme Court, chair of the judicial council, or other institutional authority designated as the head of the governing body of the judiciary. This bureau should provide administrative services and support to the institutional governance structure of the judiciary and to all judicial branch courts. Such an office would ease the burden on the judicial governance structure by handling many of the administrative functions relative to supporting the court system in the areas of budget, finance, court automation, human resources, day-to-day liaison and advocacy with the legislative branch, and other categories of expert assistance. Initially, given limited funding and to the extent that legislative approval is required, such an administrative bureau might start out with modest aspirations and a small staff whose number would expand over time as additional funding was made available.

Planning for the bureau should be undertaken with care to ensure the enabling legislation comprehends the broad scope of functions such a bureau should perform. The legislation should provide for a single bureau rather than several offices among which the functions and responsibility are distributed; the various offices proposed in the following section should all fall within the organizational structure of one administrative entity.

D. Achieving Self-Representation in Budgetary Matters

Constitutional or legislative provisions that the judiciary is independent become suspect when the control of the resources essential to the operation of the judiciary is vested in the executive arm of the government, essentially a second stage of control after the legislative branch allocates broad categories of revenue for the various functions of government. Judicial systems are not self-sustaining;⁶² their operating costs must be funded by sources under the control of elected representatives of the people to ensure appropriate accountability. As such, judiciaries operate from a subordinate position and are subject to meddling

61. The Hungarian Parliament authorized creation of such a judicial branch administrative bureau several years ago to serve the judiciary and, in doing so, transferred a number of administrative oversight functions from the Ministry of Justice to this new bureau.

62. There is growing enthusiasm in some quarters to attach fees and related charges for services provided by court systems to offset operating costs and revenue requirements. Such initiatives, however, risk excluding from the process some of the most vulnerable litigants judicial systems exist to protect by imposing unmanageable financial burdens on them that compromise their ability to seek justice.

by the legislative function that controls the purse. It is a reality with which judicial systems must contend and which the constitution and the laws that spring from it should anticipate and minimize.

This subordination is needlessly exacerbated and the dependence compounded when an additional layer of authority and control is imposed on the judiciary's ability to obtain the resources it needs in order to function. The most common example, and one with which the United States judiciary once wrestled, is an executive branch ministry or department authorized to oversee the formulation, advocacy, and fiscal administration of the judiciary's budget.

The oversight responsibility usually takes two forms. First, ministry representatives appear before the legislative arm of the government to seek funding for ministry needs, of which the judiciary's needs become a subset. This excludes the Judicial Branch from the opportunity to appear before and directly advocate its interests and needs before the elected representatives and encumbers Judicial Branch independence. The presiding judges of the Supreme and constitutional courts in some countries do appear and advocate their respective courts' budget requirements directly before the appropriate legislative body. However, the inferior courts of those countries are beholden to their respective ministries; there is no judicial branch authority to advocate system needs before the legislature on behalf of the judiciary as a whole. Inferior court interests and needs are subject to ministry interpretation and risk being filtered through ministry policies and priorities that may or may not comport with and promote those of the judiciary. This reporting arrangement also precludes the judiciary from engaging in periodic and necessary dialogue with the Legislative Branch and from responding on its own to legitimate legislative inquiries and concerns about judicial system function and performance.

Second, once the legislative arm has determined the level of funding for the judiciary and appropriated it, distribution of that funding is subject to ministry control and monitoring. Because the ministry is accountable, it also supervises the procurement function for the judiciary. It is not uncommon for the ministry to micro-manage this monitoring function. Under such administrative subordination, judicial officials lack the authority to procure equipment necessary to perform court services and conduct operations. Instead, they are compelled to petition the ministry, justify the need, and wait while the bureaucratic review and authorization processes run their course.

The irony strikes home when the constitution declares the judiciary is an independent branch of government, but the presiding judge of a large metropolitan court of appeals must justify in writing his secretary's need for a new computer or his chief administrator's requirement for a new facsimile machine. Although, taken strictly, this administrative context is not part of the adjudicative process, failure to adequately staff, equip, and supply the judiciary directly impacts its work and the efficiency with which it dispatches the

administration of justice. To that extent, it constrains judicial independence and undermines the institutional integrity of the system.

In effect, to validate its status as an independent arm of the government, the judicial branch should represent itself before and communicate its resource requirements directly to the legislative arm, not through a competing agency supervised by an appointed official. Moreover, once funding levels have been established and approved, the appropriation should be transmitted directly to an administrative structure within the judicial branch, not to an intermediary in the executive branch. There is movement in this direction in several countries in East and Central Europe, as noted below.⁶³

Judicial system officials must recognize that delegation by the Legislative Branch to the judiciary of the authority to develop, advocate, and manage its budget carries with it the assumption of fiscal responsibility for monitoring the expenditure of appropriated funds and for all associated accounting and auditing functions. The judiciary must be in a position to demonstrate to the legislative organs the capability to managing its financial affairs and to do so in compliance with the strictest government standards. This entails staffing the administrative ranks of judicial support structures with financial, accounting, statistical, planning, and budget specialists and managers to ensure that funds allocated to the judiciary are utilized according to the procurement and other regulations set forth for government entities.⁶⁴ Working together, these specialists should develop formulae that relate caseload to positions or work units on the basis of statistically verified models of what is required to complete the tasks essential to court operations. Once these formulae have been tested and validated, costs can be associated with them and used as the basis for computing the annual budget that the judiciary submits to the legislative branch for review and approval. By basing its budgetary requests on quantifiable and validated standards and formulae, the judiciary will establish the credibility and legitimacy of its budgetary requirements.

Assumption of this fiscal responsibility should trigger the appointment of a special committee or standing group of presiding judicial officers knowledgeable in matters regarding budgetary and financial management to ensure that: (1) the judiciary's annual budgetary requests are coherently formulated and can be

63. *See supra* note 19.

64. In the Republic of Hungary, for example, the Parliament recently authorized creation of a bureau within the judiciary that is tasked with a variety of responsibilities relating to the administration of the court system, including budgetary authority. Several of the officials with responsibility for managing the judiciary's budget are trained economists and financial managers who performed similar functions for the judiciary while employed with the Ministry of Justice. When those functions were shifted from the ministry to the judiciary, these officials were ideally suited and experienced to effect the transition and to provide the judiciary with the requisite financial management expertise.

justified to the legislative officials; and (2) funding, once allocated, is distributed equitably among the various courts that the judiciary comprises. This, in turn, should trigger creation of standards that define cost thresholds for space, furniture, furnishings, equipment, and other work-related items purchased with government funds. These standards should be endorsed and approved at the highest levels of the governance structure of the judiciary to ensure broad compliance across all levels of judicial officers and court officials.

It also will require general salary standards for the various categories of support positions within the judiciary. Each of these categories should have specific qualifications and experience requirements attached to it to ensure that salaries are as commensurate as possible to the value of the work performed and the level of expertise brought to bear upon the work. There are myriad ways in which the trust and confidence of the Legislative Branch can be undermined if the judiciary fails to adequately manage and execute the budgetary authority delegated to it and if it fails to establish and apply objective and measurable standards related to allocation of its appropriations, procurement of its equipment and supplies, and compensation of its employees.

Assumption of this fiscal responsibility should trigger creation of an office of audit to ensure that funds allocated to the judiciary are expended in a manner that is responsible and that comports with the regulations and guidelines established by the government. The functions of this office should include making periodic visits to the various courts to review court financial and procurement records to determine compliance with those policies. As a follow-up to these visits, the office should prepare reports that detail the auditors' findings and outline actions necessary to remedy violations, such as applying appropriate standard practices, procedures, policies, and regulations. Where audits reveal possible fraud, embezzlement, or other criminal activity, the guidelines should provide for prompt notification of authorities so investigations can be initiated.

Assumption of this fiscal responsibility also should trigger the development and the conducting of training programs for court presidents, administrative managers, and other staff who will be tasked with these new financial functions. If the judiciary is to demonstrate that it can shoulder both the authority and the responsibility for budget planning, management, and execution, it must ensure that those who are directly responsible for it have the requisite training. Several governments, as noted above, already have taken the initiative to establish independent budget authority for their judicial systems.⁶⁵ Others have taken the

⁶⁵ See *supra* notes 61 & 64.

initial steps to bring the issue before their respective legislative bodies for consideration.⁶⁶

E. Abandoning the Legacy of Dependence

In many of the countries under discussion, a legacy of subordination of the judiciary to state interests and to the party apparatus, and exploitation of the judiciary by the state as an official device to validate its prerogatives continues to cloud how judges and court systems are perceived. The residuals of this legacy are lingering sentiments of fear of, distrust in, and contempt for the institution of the judiciary, frequently perpetuated by a hostile media. Overcoming this legacy is a burden with which these judiciaries continue to wrestle, often ineffectively. That the legacy continues to persist has two primary sources. The first is the citizenry who are disillusioned with judicial systems that promoted the agenda of the state and the party when doing so entailed steam-rolling human rights and individual dignity. The second is their elected representatives, many oriented toward democratic reform and bent on purging from government those who promoted that legacy but who have taken refuge in political or civil service appointments. As outspoken members of the legislative arm, they do not shrink from focusing media attention on former party bosses recast as social democrats and occasionally in high-level judicial positions. Others publicly lambaste the institution of the judiciary for corruption on the part of few. Launched from an institutional context, these attacks undermine what should be an effective and productive working relationship between the two branches, and they nourish public distrust in and contempt for the judiciary.

Judicial branch officials should strive to eliminate the remnants of this legacy and take a more pro-active role in promoting good relations with their

66. For example, the Bulgarian Constitution provides in art. 117, section 3 for the judicial branch to have an independent budget, a concept that is elaborated in the Judicial System Act in the section entitled Judiciary's Budget, Amend. SG No. 74/2002 Art. 196, § 1 (2002), available at <http://www.legislationonline.org/legislation.php?tid=112&lid=2911&less=false> (last visited, Dec. 16, 2006). In Albania, in the summer of 1997, legislators were presented with a "Draft Law on the Establishment of the Center of Administration of the Budget of the Judiciary for the Republic of Albania." The Macedonian Judiciary recently formed an Independent Court Budget Committee. In August 1998, two members of the committee, Professor Ljupco Arnaudovski, a member of the Republic Judicial Council, and Justice Dragan Tumanivski of the Macedonian Supreme Court and former high-level official in the Ministry of Justice, drafted a position paper entitled "Report on the Independent Court Budget and the Financing of the Judiciary in the Republic of Macedonia" that outlined the justification for and the benefits of transferring budgetary authority for the Macedonian court system from the Ministry of Justice to the judicial branch. In Poland, at a September 1999 conference sponsored by the National Judicial Council and attended by the President of Poland, leaders of Parliament, and judicial branch officials, participants debated competing proposals on the budgetary and administrative independence of the judiciary.

counterparts in government and with the communities in which the courts function. That effort might take the following directions:

(1) They can establish an office, under the supervision of the governing body of the judiciary, responsible for maintaining positive and open relations with the political branches and for promoting an understanding of the judiciary and its needs. Significant benefits can accrue to the judiciary by maintaining a strong professional relationship and coordinating closely with the legislative branch on matters of importance to both branches. Examples include improving (a) the operating efficiency of the judiciary to raise the level of confidence international investors have in the rule of law and operation of the court system, and (b) the overall quality and competence of judges in the judicial system to promote greater confidence in the ability of the courts to dispense justice according to the law. Once the appropriate legislative bodies have a better understanding of the goals and objectives of the judiciary, how they relate to the interests of the country, and the means for achieving them, they will be more likely to provide the resources necessary for them.

(2) They can establish an office, under the supervision of the governing body of the judiciary, responsible for publicizing the work of the judiciary and the importance of the rule of law for a democratic society. Projects might include pamphlets that explain how the courts function, how judges are appointed, the rules of professional conduct to which judges are subject, and a description of the process whereby complaints about judicial misconduct are filed and processed. They might include court system newsletters distributed free of charge and community outreach programs. Bar associations, law faculties, and public-interest groups might organize, in conjunction with their local courts, open forums in which charismatic judges participate as panelists on discussions having to do with the rule of law, the role of law in society, and related topics.

(3) They can establish in each region or division into which the judiciary is organized a council of court presidents charged with investigating charges of ethical and related violations of the oath of office brought against judges. Charges against judicial officers should be reviewed thoroughly but promptly through an internal review process. If the review process determines that the charges are not frivolous, the council should ensure that they are investigated and, where appropriate, that disciplinary action is taken. Creating the perception in the mind of the public and the political branches that the judiciary is self-policing will help to erode the negative institutional legacy of subordination and dependence. It also will assuage the urgency with which elements in the legislative branch are inclined to oversee and micro-manage the judiciary.

F. Adequate Compensation for Judges

Inadequate compensation has potentially grave institutional consequences that promote dependence and mediocrity. Judges are public officials charged with understanding, interpreting, and applying the law in a manner that is open to the legal profession and the public and subject to review. To do so in a context free from external influence and internal bias, judges assume a responsibility whose comparative difficulty vis-à-vis that of other public office ranks high and should be compensated accordingly to attract high caliber candidates with unquestionable integrity. Removing critical elements of this responsibility, such as independence and freedom from external influence, as was routine under previous regimes, diminishes its significance and the level at which adjudication should be compensated. Although those elements have been reintegrated into the function of judging in the emerging democracies, commensurate enhancement of compensation has not followed.

The level at which the legislative branch sets judicial salaries reflects the importance it attributes to the responsibility of judging. Although those salary levels do not approximate those of successful, senior-level practitioners, the ideal is to set them at levels that suffice, when linked with the prestige of the position and the opportunity to provide an important public service, to draw the interest and commitment of bright and competent law graduates. In many of these countries, legislative policy sets judicial salaries at levels that do not approach this ideal. Because the position's prestige is in slow recovery from the legacy outlined above, the social status of judicial service falls below that of younger and relatively inexperienced private practitioners. The public perception of government-based adjudication still reduces to a necessary evil in which efforts to achieve justice essentially pit the individual against the state with correspondingly low odds. The problem perpetuates itself because without higher salaries to compensate for the profession's low public perception and to attract capable and career-oriented applicants, the image does not change. The outcomes of this general judicial salary policy are several:

- (1) Most who aspire to prestigious positions look elsewhere than the judiciary for fulfilling and rewarding professional opportunities.
- (2) Most who aspire to public service positions look elsewhere in the government than the judiciary for self-fulfilling and rewarding careers.
- (3) Many who do opt for the profession of judging, after a few years of service, use their experience as a springboard to launch their careers as private practitioners or notaries where they earn substantially more under better working conditions.
- (4) Those who remain generally fall into one of two categories: those who are competent and dedicated public servants for whom judging is the career of choice, regardless of the money, prestige, or public perception;

and those who are marginally competent and for whom the option of moving successfully into private practice is not a promising prospect.

The institutional consequences of inadequate compensation are debilitating and do little to promote a positive perception of the judiciary as a vibrant, proactive, and self-assured arm of the government:

- (1) The best and brightest are promoted into positions of management where demands on their time are dominated by administrative functions that should and easily could be delegated to professional managers with the results that (a) the courts would be more efficiently administered and (b) judges could concentrate on the primary business of the courts.
- (2) The best and brightest are responsible for preparing, training, and overseeing the constant influx of newly appointed judges, an ongoing and time-consuming function that diverts their talents and energy from the business of adjudicating cases.
- (3) Prospects for improving the judiciary are undermined as judges, once equipped with a few years experience and training, leave for greener pastures. Entry into the judicial profession is viewed as an apprenticeship in preparation for the more lucrative legal profession, the costs of which are born by the judiciary and by the taxpayer. Those costs are substantial, both in tax revenues and in the judiciary's ability to forge a core of experienced and competent judges.
- (4) The disproportionately large corps of new judges hearing cases for which they are not prepared results in large numbers of appeals, a high percentage of which are reversed. These appeals clog the second-instance courts with cases that should have been disposed of in trial courts. The consequence is that the judiciary is burdened with unnecessary repetitive work—a burden that precludes judges from attending to and focusing their energy on significant appeals that deserve more attention.
- (5) An important issue is the extent to which failure to fairly compensate judges inadvertently promotes corruption. Otherwise honest and dependable individuals who, after completing an arduous course of study and legal apprenticeship, then being appointed to positions of substantial authority and responsibility, may have a greater propensity than their more fairly compensated colleagues in the West to succumb to proffers of gifts and bribes by unscrupulous attorneys or wealthy litigants simply in order to supplement their meager incomes.

There is no guarantee that increasing judicial salaries would stem this loss of new judges and eliminate corruption, but indicators suggest it would. As

judicial salaries become more competitive, the exodus is likely to slow. There would be other positive consequences. For example, over time, applicant quality for judicial appointments would increase as would the prestige of the profession.

The prospect of achieving an independent judiciary is daunting, particularly for fledgling democracies that have emerged from but remain mired in the tradition and collective social memory of an institution of the government that exploited the judicial function and manipulated it to serve the interests of the state. The judiciaries of East and Central Europe and those of the new independent states are burdened by this institutional legacy whose remnants are deep seated and difficult to transcend. But there is cause for hope. In each of these judiciaries, there are men and women of courage, vision, energy, and leadership who are affecting serious and lasting institutional reforms in the judiciaries of their respective countries. Slowly but inexorably, they are organizing their colleagues into vibrant and pro-active judges' associations that are undertaking sustained campaigns for individual and institutional independence. There is much at stake and there are strong elements, even within the respective judiciaries, that fail to descry this vision and prefer to cling to the past. But the forces of change and prospects for reform are gaining momentum, and in bits and pieces, these judicial systems are progressing toward institutional independence.

