

UPHOLDING JUDICIAL SUPREMACY IN INDIA: THE NJAC JUDGMENT IN COMPARATIVE PERSPECTIVE

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INTRODUCTION

On October 16, 2015, the Supreme Court of India (Supreme Court) issued a landmark judgment in *Supreme Court Advocates-on-Record Association v. Union of India* (NJAC Judgment).¹ The judgment held unconstitutional the Ninety-ninth Amendment to the Indian Constitution (Constitution) and accompanying legislation, which established a National Judicial Appointments Commission (NJAC or Commission).²

The Indian Parliament (Parliament) created the NJAC in response to criticisms of the existing “collegium” system, in which senior Supreme Court Justices had the final word on appointments to the higher judiciary.³ The NJAC comprised the Chief Justice of India, two other senior Justices, the union minister of law and justice, and two “eminent persons.”⁴ By including political leaders and civil society representatives, Parliament sought to bring greater transparency and accountability to the process of judicial selection.⁵

The Supreme Court, however, denied Parliament the authority to make this determination by issuing the NJAC Judgment before the Commission began to operate. In a long and convoluted majority opinion, Justice Khehar held that the NJAC violated the

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1. *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 4 SCC 1 (India) [hereinafter NJAC Judgment].

2. *Id.* at 437, 449.

3. See Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 48 *ECON. & POL. WKLY.* 27, 27 (2015).

4. INDIA CONST. art. 3, amended by The Constitution (Ninety-ninth Amendment) Act, 2014. For more on “eminent persons,” see *infra* note 17.

5. See Sengupta, *supra* note 3, at 27.

“basic structure” of the Constitution because it compromised judicial independence.⁶ According to the majority, judicial primacy in appointments—that is, giving the Chief Justice and other Justices the determinative role in the selection of judges—is integral to the judiciary’s independence.⁷ Since only three of the six members of the Commission would be drawn from the judiciary, the NJAC denied sitting Justices the determinative vote on appointments.⁸

This Article argues that the NJAC Judgment is flawed in two distinct ways. First, as a matter of constitutional law, the judgment does not make a persuasive case as to why the Constitution requires judicial primacy in appointments. Neither the constitutional text nor the Constituent Assembly debates provide any support for this position. Moreover, even if the Constitution requires judicial primacy in appointments, the judgment does not explain how judicial primacy forms part of the unamendable “basic structure.” Second, the judgment does not explain why judicial primacy promotes or secures judicial independence. Indeed, as a comparative analysis will show, no other major constitutional democracy gives sitting judges the final word on judicial appointments. India is unique in this regard largely due to historical circumstances that required the judiciary to assume an outsized role.⁹ The NJAC Judgment is, therefore, best understood in institutional terms: it represents the Indian judiciary’s reluctance to cede its supremacy to the executive and legislative branches.

This Article has four parts. Part I outlines the structure and composition of the proposed Commission and provides an overview of the NJAC Judgment. Part II analyzes relevant constitutional text and history to determine if judicial primacy in selecting judges is constitutionally mandated, as well as Supreme Court precedent on “basic structure.” It also examines the independence of the judiciary to locate the source, if any, for the proposition that judicial primacy is an unamendable feature of the Constitution. Part III examines judicial appointments across a range of constitutional democracies, including the United States, Canada, Australia, South

6. NJAC Judgment, 4 SCC at 428. The Basic Structure Doctrine emerged out of a series of Indian Supreme Court (Supreme Court) cases in the 1960s and 1970s. It prevents India’s Parliament (Parliament) from amending the Indian Constitution (Constitution) in ways that would alter the Constitution’s core identity. See *infra* Section II.B.1.

7. NJAC Judgment, 4 SCC at 341.

8. *Id.* at 346–47.

9. For a detailed analysis of the Supreme Court’s institutional rise, see Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39 BROOK. J. INT’L L. 1 (2014).

Africa, and the United Kingdom, to demonstrate that India is an outlier. The Article concludes with an institutional explanation as to why the Supreme Court ruled as it did in the NJAC Judgment, despite clear textual, precedential, and empirical authority to the contrary.

I. OVERVIEW OF THE NJAC AND THE SUPREME COURT'S JUDGMENT

A. *The Creation of a National Judicial Appointments Commission*

In late 2014, the Parliament enacted two pieces of legislation establishing the NJAC: the Constitution (Ninety-ninth Amendment) Act and the National Judicial Appointments Commission Act (NJAC Act).¹⁰ The constitutional amendment altered, *inter alia*, the text of Articles 124 and 217 of the Constitution.¹¹

Prior to the Ninety-ninth Amendment, Article 124(2) provided, “Every Judge of the Supreme Court shall be appointed by the President . . . after consultation with such of the Judges of the Supreme Court and of the High Courts . . . as the President may deem necessary.”¹² It further required that the “Chief Justice of India shall always be consulted.”¹³ Similarly, Article 217(1) empowered the president to appoint high court judges “after consultation with the Chief Justice of India, the Governor of the State and . . . the Chief Justice of the High Court.”¹⁴

In both articles, the Ninety-ninth Amendment replaced the language pertaining to “consultation” with “on the recommendation of the National Judicial Appointments Commission.”¹⁵ Thus, the NJAC’s recommendations on appointments to the Supreme Court and high courts were binding on the president.¹⁶

10. The Constitution (Ninety-ninth Amendment) Act, 2014 (India); National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India). Under Article 368 of the Constitution, the Constitution (Ninety-ninth Amendment) Act had to be passed by two-thirds of each house of Parliament and presented to the president for her assent. INDIA CONST. art. 368.

11. The Constitution (Ninety-ninth Amendment) Act, 2014 (India), arts. 3, 6. Articles 222 and 224 were also amended to give the National Judicial Appointments Commission (NJAC or Commission) the final word on the transfer and additional high court appointments, respectively. INDIA CONST. arts. 222, 224.

12. *Id.* art. 124, cl. 2.

13. *Id.* The only exception is for Chief Justice appointments.

14. The chief justice of the high court need not be consulted for appointments to that position. *Id.* art. 217(1).

15. The Constitution (Ninety-ninth Amendment) Act, 2014 (India), art. 2, cl. a; *id.* art. 6.

16. *See id.*

The Ninety-ninth Amendment also established the basic framework of the NJAC. Article 124A provided that the NJAC would consist of the Chief Justice of India, the next two most senior judges of the Supreme Court, the union minister of law and justice, and “two eminent persons.”¹⁷ Article 124B set forth the duties of the NJAC, which include: (1) recommending persons to be appointed to the Supreme Court and high courts; (2) recommending transfers of judges from one high court to another; and (3) ensuring that recommended nominees are “of ability and integrity.”¹⁸ Article 124C permitted Parliament to both regulate appointment procedures and empower the NJAC to enact those regulations necessary to carry out its functions.¹⁹

The NJAC Act, accompanying the Ninety-ninth Amendment, did precisely this. It specified that the NJAC could issue regulations to “carry out the provisions” of this Act,²⁰ and largely left it to the Commission to determine the procedures for judicial appointments and transfers.²¹ One important restriction imposed by the Act, however, was that the NJAC could not recommend a nominee for judicial office if two of its members did not concur.²² This provision became significant in the NJAC Judgment, for it effectively allowed any two members of the NJAC, including the “eminent persons,” to veto judicial nominations.²³

B. *The NJAC Judgment*

In early 2015, the Supreme Court Advocates-on-Record Association and Senior Advocates filed writ petitions before the Supreme Court challenging the constitutionality of the Ninety-ninth Amendment and the NJAC Act.²⁴ The petitions alleged, *inter alia*, that the NJAC violated the basic structure of the Constitution by compromising the judiciary’s independence.²⁵ Given that they raised sub-

17. The eminent persons were to be nominated by a committee comprised of the prime minister, the leader of the opposition in the Lok Sabha (the lower house of Parliament), and the Chief Justice. *Id.* art. 3.

18. *Id.*

19. *See id.*

20. National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India), art. 12.

21. *See id.* arts. 5–6, 9.

22. *Id.* art. 5(2).

23. *See infra* Section I.B.

24. *See* NJAC Judgment, (2016) 4 SCC 1, 17–61.

25. *See* Mohit Singh, *NJAC Act and 99th Constitutional Amendment Faces Challenge at Supreme Court; Petitions by AoR Association and Senior Advocates*, ONE L. ST. (Jan. 10, 2015), <http://onelawstreet.com/2015/01/njac-act-and-99th-constitutional-amendment-faces->

stantial questions of constitutional interpretation, the Supreme Court referred this case to a five-judge bench.²⁶

The NJAC Judgment, issued on October 16, 2015, contains five opinions and is over one thousand pages long.²⁷ The Court split four to one, with four Justices—Khehar, Lokur, Goel, and Joseph—in the majority, and Justice Chelameswar in the dissent.²⁸ All five Justices authored opinions on the merits in this case.²⁹

Prior to reaching the merits, however, the Justices were faced with two preliminary matters. First, the petitioners raised an objection to Justice Khehar's participation in the litigation.³⁰ As the third most senior Justice excepting the Chief Justice, Justice Khehar was a member of the "collegium"—the extant system in which senior Supreme Court Justices have the final say on appointments to the bench.³¹ The petitioners argued that Justice Khehar could not be impartial since he exercised "significant constitutional power" in the judicial appointments process that was being challenged in this litigation.³² In a brief order, Justice Chelameswar dismissed this claim, noting that if petitioners' argument was taken to its logical end, every Justice of the Supreme Court would be disqualified because any of them could potentially serve on the collegium.³³

Second, respondents, the Union of India, filed a motion asking the Court to review the validity of two precedents that were directly relevant to the case: the *Second* and *Third Judges' Cases*.³⁴ Justice Khehar, writing for the Court, denied this request in the first part of his opinion, prior to reaching the merits.³⁵ However, these cases

challenge-at-supreme-court-petitions-by-aor-association-and-senior-advocates/ [https://perma.cc/4NUQ-5ZZX].

26. Mohit Singh, *Supreme Court Refers NJAC Challenge to Constitution Bench—SCAORA v. UOI*, ONE L. ST. (Apr. 8, 2015), <http://onelawstreet.com/2015/04/njac-challenge-referred-to-constitution-bench-supreme-court-aor-association-v-uoi-judgment-7-april-2015/> [https://perma.cc/7NCV-2DC6]. Article 145(3) of the Constitution requires that a minimum of five Justices adjudicate constitutional matters. INDIA CONST. art. 145, cl. 3.

27. See NJAC Judgment, 4 SCC 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See *id.* at 47.

34. See *id.* at 118. Specifically, they asked for a referral to a nine-judge—or even larger—bench because that was the size of the bench that decided the *Second Judges' Case*. See *id.*; Gautam Bhatia, *The NJAC Judgment and Its Discontents*, INDIAN CONST. L. & PHIL. (Oct. 16, 2015, 2:06 PM), <https://indconlawphil.wordpress.com/2015/10/16/the-njac-judgment-and-its-discontents/> [https://perma.cc/JEM6-9NLN].

35. See NJAC Judgment, 4 SCC, at 132–33.

were discussed in detail when Justice Khehar later considered the merits.³⁶ As a result, the majority opinion conflates its discussion on the soundness of these precedents with the separate question of whether the Ninety-ninth Amendment and NJAC Act pass constitutional muster.³⁷

A few key holdings emerged from the NJAC Judgment. First, the Court held that the Constitution mandates judicial primacy in appointments.³⁸ Second, based on the constitutional text and longstanding practice, the Court held that judicial primacy is not only constitutionally required, but is also part of the unamendable basic structure because it is integral to the independence of the judiciary.³⁹ Third, and as a consequence of the prior holdings, the NJAC was held unconstitutional for violating the requirements of judicial primacy and judicial independence.⁴⁰

Justice Khehar identified two ways in which such a violation could occur. Under the NJAC Act, any two members of the commission could veto a nomination.⁴¹ According to Justice Khehar, that the Chief Justice and two other senior Justices could “consider a nominee worthy of appointment to the higher judiciary” and that “the concerned individual may still not be appointed . . . would be outrightly obnoxious[] to the primacy of the judicial component.”⁴² This was exacerbated, in his view, by the fact that two “eminent persons,” who would not necessarily have any legal training, could veto nominees advanced by the Justices on the Commission.⁴³ Justice Khehar later held that the lack of qualification requirements for the “eminent persons” in the Ninety-ninth Amendment rendered it unconstitutionally vague.⁴⁴

The second issue concerned the union minister of law and justice. The Court identified a potential conflict of interest arising from the minister’s participation in the judicial appointments process as a member of the NJAC.⁴⁵ Because the government is the most frequent and prominent litigant in the higher courts, the minister is an interested party and therefore might not have been

36. *See id.* at 132.

37. *See Bhatia, supra* note 34.

38. NJAC Judgment, 4 SCC at 325.

39. *Id.* *But see* Sengupta, *supra* note 3, at 28–29 (arguing that a majority of Justices do not agree on this point).

40. NJAC Judgment, 4 SCC at 437–38.

41. *Id.* at 326.

42. *Id.* at 357.

43. *Id.* (noting that the attorney general conceded that they would be “lay persons”).

44. *Id.* at 380.

45. *Id.* at 369.

impartial in his nominations to the higher judiciary.⁴⁶ The Court concluded that, although the minister exercised no veto power or determinative vote, his mere presence on the NJAC undermined judicial independence and separation of powers—another tenet of the Constitution’s basic structure.⁴⁷

II. JUDICIAL INDEPENDENCE IN THE INDIAN CONSTITUTION

The NJAC Judgment relies primarily on two points of constitutional interpretation: first, that the Indian Constitution requires judicial primacy for appointments to the higher judiciary; and second, that such primacy is part of the Constitution’s basic structure.⁴⁸ This Part analyzes the soundness of both these conclusions through a careful examination of the relevant constitutional text, history, and precedent.

A. *Judicial Primacy in the Constitution*

Article 124(2) of the Constitution states, “Every Judge of the Supreme Court shall be appointed by the President . . . after consultation with such of the Judges of the Supreme Court and of the High Courts [T]he Chief Justice of India shall always be consulted.”⁴⁹ The NJAC Judgment largely hinged on the meaning of “consultation.”⁵⁰ If the term were defined as it is in the dictionary, where it is synonymous with “discussion,”⁵¹ then the president would not be required to follow the judges’ advice in making appointments.⁵² However, if “consultation” were considered a term of art, intended to bind the president to the judges’ advice, then judicial primacy in appointments would prevail under the Constitution, just as the Supreme Court held in the NJAC Judgment.⁵³

46. *Id.*

47. *Id.*

48. *Id.* at 338–39.

49. INDIA. CONST. art. 124, cl. 2. The Chief Justice need not be consulted when the appointment is to his own position. *Id.* Article 217(1) similarly requires “consultation” with the Chief Justice of India, the governor of the state, and the chief justice of the high court when the president makes high court appointments. *Id.* art. 217, cl. 1.

50. NJAC Judgment, 4 SCC at 127–31, 347.

51. *Consultation Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/consultation> [<https://perma.cc/MMR3-A73G>] (last visited Mar. 23, 2017) (“A discussion about something that is being decided.”).

52. INDIA. CONST. art. 124, cl. 2; *id.* art. 217, cl. 1.

53. *See* NJAC Judgment, 4 SCC at 341.

1. The Constituent Assembly Debates

To resolve this issue, the Court first looked to the Constituent Assembly Debates (CADs).⁵⁴ The Constituent Assembly, which for nearly three years, from 1946 to 1949, debated and drafted India's post-independence Constitution, discussed the judicial appointments process only briefly.⁵⁵ The main debate took place on May 24, 1949, when the Constituent Assembly discussed draft Article 103.⁵⁶ In draft form, this article closely resembled the present Article 124.⁵⁷ It empowered the president of India to nominate judicial candidates in consultation with Supreme Court and high court justices.⁵⁸ It further provided that the Chief Justice must be consulted in all appointments other than for the position of Chief Justice.⁵⁹

Several members of the Constituent Assembly proposed amendments to this provision. Three are noteworthy. First, Professor Shibban Lal Saksena from the United Provinces suggested that a two-thirds majority in both houses of Parliament should confirm all judicial appointments.⁶⁰ He explained that this would insulate potential judicial nominees from unwarranted executive influence and therefore safeguard the judiciary's independence.⁶¹ A second proposal, with a similar justification, was put forth by B. Pocker Sahib from Madras.⁶² In his view, the best "safeguard against political and party pressure" would be to require the Chief Justice's "concurrence" for all judicial appointments.⁶³ Finally, Professor K.T. Shah from Bihar suggested substituting consultation with Jus-

54. The Constituent Assembly Debates (CADs) are widely used in Indian constitutional law and scholarship to ascertain the original meaning of constitutional provisions. See H.R. KHANNA, *MAKING OF INDIA'S CONSTITUTION* 184 (2d ed. 2008) ("The speeches in the Constituent Assembly can be referred to for finding the history of the constitutional provision and the background against which said provision was drafted. The speeches can also shed light to show . . . the mischief sought to be remedied and what was the object . . . sought to be attained in drafting the provision."). While the CADs are authoritative, they are not binding on Indian courts. *Id.*

55. See GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 176 (1999).

56. This would become Article 124 in the Constitution. See *CONSTITUENT ASSEMBLY DEBATES* VOL. VIII, at 230–31 (May 24, 1949).

57. *Id.*; INDIA. CONST. art. 124.

58. INDIA CONST. art. 124.

59. *Id.*

60. *CONSTITUENT ASSEMBLY DEBATES* VOL. VIII, at 231.

61. *Id.* at 231–32.

62. *Id.* at 232.

63. *Id.*

tices for consultation with the “Council of States.”⁶⁴ Once again, the proffered explanation centered on judicial independence: the Council of States—India’s upper house of Parliament at the time—would offer a check on unfettered executive power.⁶⁵ Shah pointed for support to the “obvious precedent of the United States,”⁶⁶ where the president appoints U.S. Supreme Court Justices with the “advice and consent of the Senate.”⁶⁷

Dr. B.R. Ambedkar, chairman of the drafting committee, offered a rebuttal to these proposals. He said that there could be no question that the judiciary must be both “independent of the executive” and yet competent in its own right.⁶⁸ To achieve these objectives, Ambedkar cautioned against adopting either the British system—where the Crown, through the executive, has absolute authority—or the American system of judicial selection.⁶⁹ While the former leaves too much discretion in executive hands, the latter involves the legislature, which would be “cumbrous” and might import “political pressure and political considerations” into the process.⁷⁰ The draft article, as Ambedkar pointed out, “steers a middle course.”⁷¹ It does not give the president sole authority to make appointments; rather, it requires her to consult with the Chief Justice and other judges who are “well qualified to give proper advice” in these matters.⁷² Thus, Ambedkar disposed of both Saksena’s and Shah’s amendments.⁷³

Ambedkar then turned to Pocker Sahib’s amendment to require “concurrence” from the Chief Justice. He pointed out that, while the Chief Justice would be “a very eminent person,” he would nonetheless have all of the human “failings[,]sentiments[,]and prejudices” that afflict everyone else.⁷⁴ Ambedkar, therefore, concluded that to give the Chief Justice a “veto” over appointments would be a “dangerous proposition,” as it would vest too much authority in a single individual.⁷⁵

64. *Id.* at 234.

65. *Id.* at 234–35.

66. *Id.*

67. U.S. CONST. art. II, § 2, cl. 2.

68. CONSTITUENT ASSEMBLY DEBATES Vol. VIII, at 258.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *Id.*

75. *Id.*

Ambedkar exerted enormous influence over the drafting process and his words are still taken very seriously in determining the meaning of constitutional provisions. In the NJAC Judgment, for example, the Supreme Court largely relied on Ambedkar in its analysis of the term “consultation.”⁷⁶ However, its conclusion that “consultation” essentially requires the president to follow the Chief Justice’s advice is not supported by Ambedkar’s statements or by the Constituent Assembly’s actions.⁷⁷

Following Ambedkar’s speech, all three amendments were put to the votes and all were rejected.⁷⁸ This means that the Constituent Assembly considered replacing “consultation” with “concurrence” in draft Article 103, but declined to do so.⁷⁹ In his NJAC Judgment majority opinion, Justice Khehar glossed over this important fact.⁸⁰ Instead, he stressed that Ambedkar sought to limit political influence in the appointments process.⁸¹ As Justice Khehar rightly noted, Ambedkar was skeptical of proposals that vested appointment authority solely in the executive or jointly in the executive and legislature because of the risk of political influence.⁸² Justice Khehar, therefore, concluded that “consultation” in Articles 124 and 217 was meant to “curtail the free will of the executive.”⁸³

However, Justice Khehar proceeded to exaggerate the import of these specific remarks and therefore misconstrued the meaning of “consultation.” He later noted, for instance, that the “real purpose sought to be achieved by the term ‘consultation’ was to *shield the selection and appointment of Judges . . . from executive and political involvement.*”⁸⁴ Thus, “the term ‘consultation’ was meant to be understood as something more” than the ordinary, dictionary definition of the term.⁸⁵ Shortly thereafter, Justice Khehar concluded, “[T]he entire discussion and logic expressed during the debates of the Constituent Assembly . . . vest[s] primacy with the judiciary.”⁸⁶

The CADs do not support the inferences drawn above. As a preliminary matter, there is nothing in Ambedkar’s remarks to suggest

76. See NJAC Judgment, (2016) 4 SCC 1, 137–45.

77. CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 258; INDIA CONST. art. 124, cl. 2; *id.* art. 217, cl. 1.

78. See CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 258.

79. See *id.*

80. NJAC Judgment, 4 SCC at 141–47.

81. *Id.*

82. *Id.* at 146–47.

83. *Id.* at 146.

84. *Id.* at 148 (emphasis added).

85. *Id.*

86. *Id.* at 149.

that he or the Constituent Assembly sought to “shield” the appointments process from all political involvement.⁸⁷ Rather, as Justice Khehar had previously noted, the objective was more modest: to “curtail” executive discretion.⁸⁸ By conflating “shield” with “curtail,” he overstates the purpose of “consultation.”⁸⁹ As Ambedkar’s statement made clear, while the president would ultimately decide whom to appoint to the higher judiciary, Articles 124 and 217 would require her to obtain the input of judges who are “well qualified” to dispense advice on these matters.⁹⁰

A more serious flaw in Justice Khehar’s reasoning arises from his conclusion that the CADs establish judicial primacy over appointments.⁹¹ This simply ignores what Ambedkar said at the end of his remarks.⁹² Recall that after he rebutted proposals for Parliament and the Council of States to confirm judicial appointments, Ambedkar similarly rejected Pocker Sahib’s proposal to require the Chief Justice’s “concurrence.”⁹³ In so doing, Ambedkar specifically cautioned against giving any actor, including the apolitical Chief Justice, a veto on appointments.⁹⁴ In his dissent from the NJAC judgment, Justice Chelameswar pointed out this inconsistency,⁹⁵ summarizing the “salient features” in Ambedkar’s statement, and correctly noting that “providing for the concurrence of the [Chief Justice] . . . in substance means transferring the power of appointment . . . without any limitation.”⁹⁶ He added that the Constituent Assembly “thought it imprudent to confer” similar, sole authority on the president.⁹⁷ Thus, Justice Khehar’s statement that the “entire discussion and logic” of the CADs vests primacy in the judiciary is false.⁹⁸ To the contrary, much of the Constituent Assembly’s discussion revolved around how to involve multiple actors in the appointments process to prevent any single actor or branch of government—including the Chief Justice and judiciary—from exercising unchecked authority in this area.⁹⁹

87. See CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 258 (May 24, 1949).

88. NJAC Judgment, 4 SCC at 146.

89. *Id.*

90. INDIA CONST. art. 124, cl. 2; art. 217 cl. 1.

91. NJAC Judgment, 4 SCC at 341.

92. CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 258.

93. *Id.*

94. *Id.*

95. NJAC Judgment, 4 SCC at 497–500 (Chelameswar, J., dissenting).

96. *Id.*

97. *Id.*

98. *Id.* at 149 (emphasis added).

99. See CONSTITUENT ASSEMBLY DEBATES Vol. VIII.

2. An Autonomous Role for the President?

Justice Khehar's discussion of the term "consultation" in Articles 124 and 217 proceeds against the backdrop of Article 74, which delineates presidential authority.¹⁰⁰ Article 74 established a "council of ministers," headed by the prime minister, to "aid and advise" the president in exercising his functions.¹⁰¹ In its original form, Article 74 was ambiguous as to whether the president was required to follow his ministers' advice.¹⁰² The CADs and early constitutional analyses do not fully clarify this relationship but provide some useful insights.

B.N. Rau, a prominent jurist who served as constitutional advisor to the Constituent Assembly, is particularly insightful on this matter.¹⁰³ The Assembly appointed a Union Constitution Committee to "report on the 'main principles' of the Constitution."¹⁰⁴ This committee asked Rau to gather members' views on these principles.¹⁰⁵ Rau circulated a questionnaire to all committee members, soliciting feedback on the designations, functions, and structures of each branch of government.¹⁰⁶ He supplemented his questions with descriptions of how constitutions around the world have tackled similar issues.¹⁰⁷ For instance, one question asked, "What should be the nature and type of the Union Executive?"¹⁰⁸ It was followed by a summary of the British, American, Swiss, and Irish models of executive power.¹⁰⁹

As Rau noted, the British executive—a cabinet drawn from Parliament that must sustain a majority's confidence to remain in power—was "the one with which we are most familiar in India."¹¹⁰ Perhaps as a result of this familiarity, the five—out of fifteen—Union Constitution Committee members that responded to Rau's questionnaire all favored adopting the British model.¹¹¹ Rau sub-

100. INDIA CONST. art 74, cl. 1.

101. *Id.*

102. *Id.* art. 74.

103. See generally, B.N. RAU, INDIA'S CONSTITUTION IN THE MAKING (B. Shiva Rao ed., 1963).

104. SHUBHANKAR DAM, PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES 54 (2015).

105. *Id.*

106. RAU, *supra* note 103, at 42–67; AUSTIN, *supra* note 55, at 119.

107. RAU, *supra* note 103, at 42–67.

108. *Id.* at 22.

109. *Id.* at 22–24.

110. *Id.* at 23.

111. AUSTIN, *supra* note 55, at 119. In an editor's note in *The Constitution in the Making*, B. Shiva Rao claims that only one member sent replies to the questionnaire, while another

sequently prepared a Memorandum on the Union Constitution, along with a draft of several constitutional provisions that would ultimately form the basis of India's Constitution.¹¹² While Rau intended this memorandum to reflect the views of committee members, he received so few responses to his questionnaire that it was not possible to accurately represent their positions.¹¹³ Thus, he drafted the memorandum independently, and it largely reflected his own views.¹¹⁴ Rau thus assumes an important role in establishing the contours of presidential authority under the Constitution.

Article 10 of Rau's memorandum formed the basis for what would become Article 74 of the Constitution, with one significant modification. It provided, "There shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President . . . *except in so far as [she] is required by this constitution to act in [her] discretion.*"¹¹⁵ Rau added in an explanatory note that "the appointment of judges" would be an appropriate matter for the president to exercise this discretionary power.¹¹⁶

In June 1947, based on Rau's recommendations, the Union Constitution Committee decided that India should adopt "the parliamentary system of constitution, the British type of constitution, with which we are familiar."¹¹⁷ The committee, however, rejected the notion of discretionary powers for the president.¹¹⁸ As noted historian Granville Austin put it, these powers were "too reminiscent of arbitrary, imperial authority."¹¹⁹ Yet, this did not settle what the president's role would be. Would she be merely a figurehead like the British monarch? Or would she still exercise some independent constitutional authority, as Rau's memorandum envisioned? When this matter came before the Constituent Assembly, its members cautioned against unchecked executive authority.¹²⁰

This caution took two different forms. Minority groups, particularly Muslim leaders, voiced concern that a council of ministers drawn from a majority in Parliament would marginalize or exclude

sent a memorandum with "general directives as well as a draft constitution." RAU, *supra* note 103, at 62.

112. RAU, *supra* note 103, at 62.

113. *Id.*

114. *Id.*

115. *Id.* at 97 (emphasis added).

116. *Id.*

117. AUSTIN, *supra* note 55, at 120 (internal quotation marks omitted).

118. *Id.* at 129.

119. *Id.*

120. *Id.* at 125–32.

minorities.¹²¹ In response, the drafting committee put together an “Instrument of Instructions” for the president that would, *inter alia*, require the president to include in her cabinet as many members of important minority communities as possible.¹²² In a subsequent Instrument of Instructions, Ambedkar included a provision for an “Advisory Board,” comprised of members of Parliament and chosen through proportional representation, which would advise the president on judicial appointments and appointments to various independent commissions.¹²³ But would the president have to follow the advice of her ministers and other advisors? Here, a second concern emerged: if the Constitution left this ambiguous, the president might disregard their advice and therefore might not be responsible to Parliament.¹²⁴

Ultimately, however, Ambedkar and the drafting committee agreed to leave these details unspecified and the Constituent Assembly declined to adopt any of the “Instruments of Instruction.”¹²⁵ This meant that the majority party or coalition in Parliament would have plenary authority to select the council of ministers to “aid and advise” the president under Article 74.¹²⁶ It also meant that, in the Westminster tradition, the Constitution would rely on unwritten convention to bind the president to the advice of her ministers.¹²⁷ As early constitutional scholar (and younger brother of B.N. Rau) B. Shiva Rao pointed out, there was widespread agreement that the president would be liable to impeachment if she did not act pursuant to the ministers’ advice.¹²⁸ Thus, there was “no necessity for setting out in detail . . . what the functions and incidence of responsible government would be.”¹²⁹

Rajendra Prasad, who would become India’s first president in 1950, challenged this conventional view. In April 1948, he wrote to B.N. Rau stating that he did not find a constitutional provision “laying it down in so many terms” that the president is bound by his

121. See generally CONSTITUENT ASSEMBLY DEBATES Vol. VIII, at 230–31 (May 24, 1949).

122. AUSTIN, *supra* note 55, at 125.

123. *Id.* at 132.

124. See *id.* at 126–28.

125. *Id.* at 128.

126. INDIA CONST. art. 74.

127. See HARSHAN KUMARASINGHAM, A POLITICAL LEGACY OF THE BRITISH EMPIRE 37 (2013).

128. See B. SHIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION: A STUDY 380 (1968).

129. *Id.*; see also AUSTIN, *supra* note 55, at 138–39 (noting that, in any event, an Instrument of Instructions would not be binding and that therefore “[c]onventions were the tidiest and simplest way of limiting executive authority”).

ministers' advice.¹³⁰ In August, Prasad wrote to Rau again asking whether a governor could withhold his assent to a legislative bill and, if that governor were to refer the bill to the president, whether the president had the discretion to withhold assent as well.¹³¹

When Prasad became president, the issue of presidential discretion arose again. In 1951, Prasad wrote to Prime Minister Jawaharlal Nehru to state his intention to rely on his own discretion—and not just the advice of his ministers—in assenting to parliamentary bills, sending messages to Parliament, and returning bills for reconsideration.¹³² Prasad's motivations were likely self-interested.¹³³ A conservative Hindu, Prasad wished to withhold his assent from the Hindu Code Bill that sought to modernize Hindu personal law.¹³⁴ Nehru referred these issues to Attorney General M.C. Setalvad and former Advocate General of Madras A.K. Ayyar, who firmly opposed Prasad's position.¹³⁵ The attorney general replied that Article 74 of the Constitution required the president to consult with her council of ministers "in all matters."¹³⁶ Ayyar concurred, noting that the Indian president is "analogous to the Constitutional monarch in England."¹³⁷

Ayyar's opinion overlooks some important differences between the British monarch and the Indian president. B.N. Rau, writing a few years later in the widely circulated English daily *The Hindu*, set out in detail the powers of the president under the Constitution.¹³⁸ He noted that the Indian president is elected and is eligible for reelection to a second term.¹³⁹ The president is, therefore, answerable to her constituents and must have some independent power.¹⁴⁰ Moreover, Rau pointed out that certain constitutional provisions might be rendered meaningless if the president had no

130. See AUSTIN, *supra* note 55, at 135 (internal quotation marks omitted) (noting that while Rau's response is not known, "we may assume that he pointed out Prasad's error to him").

131. *Id.* at 135–36.

132. *Id.* at 140.

133. *Id.*

134. *Id.*

135. *Id.* at 141–42.

136. *Id.* at 141.

137. *Id.* at 142 (internal quotation marks omitted).

138. RAU, *supra* note 103, at 374.

139. *Id.* at 377. An electoral college consisting of members of Parliament and members of the state and union territory legislative assemblies indirectly elect the president. See INDIA CONST. arts. 54, 55.

140. RAU, *supra* note 103, at 377.

discretion at all.¹⁴¹ For instance, Article 111 of the Constitution allows the president to withhold assent from a bill and return it to Parliament for reconsideration.¹⁴² Rau correctly noted that the president's council of ministers, drawn from the majority in Parliament, would not recommend that the president withhold assent from bills that they supported.¹⁴³ Thus, she must retain some independence in this area.¹⁴⁴

The president might also have some discretion if her council of ministers advise her to act unconstitutionally.¹⁴⁵ The president takes an oath to "preserve, protect and defend the Constitution."¹⁴⁶ Notably, no other government officials in India, except for state governors,¹⁴⁷ are required to take this or a similar oath to uphold the Constitution.¹⁴⁸ This suggests, at a minimum, that the president has a constitutional duty to inform her ministers to reconsider their advice if she believes they advised her to act contrary to the laws or Constitution of India.

This is precisely what B.N. Rau concluded in *The Hindu*.¹⁴⁹ He provided the example of a parliamentary bill that, in the president's view, would violate India's treaty obligations.¹⁵⁰ According to Rau, whether a bill violates the law "is a matter of opinion," and the council of ministers would presumably have arrived at the "considered opinion" that this bill would not infringe any treaty obligations.¹⁵¹ Thus, for Rau, the president would not violate the Constitution by accepting the minister's advice "in the last resort."¹⁵² Rau does not address the possibility of ministers advising the president to adopt a bill that was unquestionably unconstitutional.¹⁵³ In this situation, the president could plausibly choose

141. *Id.*

142. *Id.* at 374.

143. *Id.* at 376.

144. *Id.* at 377.

145. *Id.*

146. INDIA CONST. art. 60.

147. *Id.* art. 159.

148. *Id.* Third Schedule (Forms of Oaths or Affirmations). For a detailed analysis of the president's oath of office and independent power, see Khagesh Gautam, *Controlled Semi-Presidentialism: The Case for Semi-Presidentialism Under the Indian Constitution*, 29 COLUM. J. ASIAN L. (2015).

149. RAU, *supra* note 103, at 382.

150. *Id.* at 381.

151. *Id.*

152. *Id.* at 381–82.

153. *See id.* at 374–82.

to ignore the ministers' counsel to fulfill her broader obligation to "preserve, protect and defend the Constitution."¹⁵⁴

In any event, this issue was conclusively resolved in 1977 with the adoption of the Forty-second Amendment to the Constitution, which altered the language of Article 74(1) to provide that the president "shall . . . act in accordance" with the advice of her ministers.¹⁵⁵ It further provided that the president may ask the ministers to "reconsider" the advice provided, but "shall act in accordance with the advice tendered after such reconsideration."¹⁵⁶ Thus, the amendment codified what Rau had believed was the convention—the president may question her advisors, but ultimately must accept their advice.¹⁵⁷ This meant that an autonomous role for the president, along the lines Prasad envisioned, was no longer possible.¹⁵⁸

3. Presidential Authority in the NJAC Judgment

In Part VII of the NJAC Judgment majority opinion, Justice Khehar compared Articles 124 and 217 of the Constitution to other constitutional provisions on presidential appointments.¹⁵⁹ Recall that Article 124 directs the president to consult with "such of the Judges of the Supreme Court and of the High Courts" as she deems necessary in making judicial appointments.¹⁶⁰ It also mandates that the Chief Justice "always be consulted."¹⁶¹ By contrast, Justice Khehar pointed out that in other appointment-related provisions, including Articles 148, 155, 280, and 316, the president is not required to consult any additional authorities.¹⁶² Thus, Justice Khehar concluded that these appointments are subject only to the "aid and advice" of the ministers provided for in Article 74.¹⁶³ As he put it, "[F]or all intents and purposes, the authority vested in the President . . . truly means that the power of such appointment is vested in the [parliamentary] executive."¹⁶⁴

154. INDIA CONST. art. 60.

155. *Id.* art. 74, cl. 1.

156. *Id.*

157. RAU, *supra* note 103, at 381–82.

158. *But see* Gautam, *supra* note 148 (arguing that the president retains some autonomy, particularly when asked to act unconstitutionally).

159. NJAC Judgment, (2016) 4 SCC 1, 163–73.

160. INDIA CONST. art. 124, cl. 1.

161. *Id.* art. 124, cl. 2.

162. *Id.* arts. 148, 155, 280, 216.

163. *Id.* art. 74, cl. 1.

164. NJAC Judgment, 4 SCC at 164.

Justice Khehar then analogized Article 74 to Articles 124 and 217. Specifically, he compared the “aid and advise” clause in Article 74 with the term “consultation” in Articles 124 and 217.¹⁶⁵ For Justice Khehar, “a process of ‘consultation’ is really the process of ‘aid and advice’ [N]either of the two . . . can be understood to convey, that they can be of a binding nature.”¹⁶⁶ He said that both are couched in polite, non-binding language out of respect for the president and the “exalted position” that she occupies.¹⁶⁷ As he put it, “[I]t would have been discourteous to provide that [the president] . . . was to discharge his functions in consonance with the directions, command, or mandate of the executive.”¹⁶⁸ Justice Khehar concluded that since “aid and advice” and “consultation” have the same meaning, if either of them is practically, if not formally, binding, then the other must be as well.¹⁶⁹ He referred here to the Forty-second Amendment, which, in his view, simply clarified the original understanding that the president is bound to follow her ministers’ advice.¹⁷⁰ Thus, if “aid and advice” in Article 74 is binding, then the “consultation” with the Chief Justice in Articles 124 and 217 is similarly binding and “in all conceivable cases . . . will and should be accepted.”¹⁷¹

This analysis is flawed for at least two reasons. First, there is no evidence in the CADs that “aid and advise” and “consultation” were intended to have similar meanings.¹⁷² Indeed, Justice Khehar does not cite any evidence, yet concludes they are similar based on his common sense analogy.¹⁷³ As discussed, however, the Constituent Assembly chose the term “consultation” instead of “concurrence” precisely to prevent the Chief Justice from having a determinative role in judicial appointments.¹⁷⁴ In Article 74, the Constituent Assembly decided to adopt the British parliamentary executive, which included a cabinet selected from a majority in Parliament to advise the president.¹⁷⁵ While the Constituent Assembly declined to adopt an “Instrument of Instructions” for the president, it relied

165. INDIA CONST. art. 124, cl. 2; *id.* art. 217, cl. 1.

166. NJAC Judgment, 4 SCC at 169–70.

167. *Id.* at 170.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 170–72.

172. See CONSTITUENT ASSEMBLY DEBATES Vol. VIII, at 258 (May 24, 1949); INDIA CONST. art. 74, cl. 1; *id.* art. 124, cl. 2; *id.* art. 217, cl. 1.

173. NJAC Judgment, 4 SCC at 169–70.

174. See discussion *supra* Section II.A.1.

175. INDIA CONST. art. 74, cl. 1.

on the Westminster convention to bind the president, for the most part, to her ministers' advice.¹⁷⁶ There was no such convention requiring the president to follow the Chief Justice's advice against which Articles 124 and 217 were meant to be interpreted.¹⁷⁷

Second, Article 74 was amended in 1977 to explicitly require the president to act on her ministers' advice.¹⁷⁸ Even if this amendment was merely "clarificatory in character,"¹⁷⁹ it supports the conclusion that Article 74, following the British precedent, did not originally envision an autonomous role for the president.¹⁸⁰ Articles 124 and 217 have not been similarly amended.¹⁸¹ If Parliament wanted the president to obtain the Chief Justice's concurrence, as Pocker Sahib and others had suggested in the CADs, it could have amended these provisions to impose such a requirement.¹⁸² The Indian Constitution is not difficult to alter; it has been amended one hundred times since 1950.¹⁸³ Thus, Justice Khehar's claim that an amendment to Article 74, which pertains to executive power and uses the phrase "aid and advise," also implicitly altered or affected Articles 124 and 217, which are concerned with judicial appointments and quite deliberately use the term "consultation," is tenuous at best.¹⁸⁴

Nevertheless, Article 74 might still provide a tenable argument as to why the Constitution as it is today should be read to require judicial primacy under Articles 124 and 217. Assume for the sake of argument that Article 74 originally left the president some discretion in performing her constitutional functions.¹⁸⁵ Assume further that this discretion allowed her to put forward judicial nominees on her own accord, without relying on her council of ministers. Or perhaps this discretion allowed her to independently select nominees from a list provided by her ministers.¹⁸⁶ In these

176. See *supra* Section II.A.2.

177. See generally Kate Malleson, *Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 117, 117–19 (H.P. Lee ed., 2011) (describing the appointments process in the United Kingdom in which, prior to 2005, the Lord Chancellor had the final word on judicial appointments).

178. See INDIA CONST. art. 74, cl. 1, *amended by* The Constitution (Forty-second Amendment) Act, 1976.

179. NJAC Judgment, (2016) 4 SCC 1, 170.

180. INDIA CONST. art. 74, cl. 1.

181. See *id.* arts. 124, 217.

182. See CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 231–32 (May 24, 1949).

183. See The Constitution (Amendment) Acts, INDIA CODE, <http://indiacode.nic.in/coiweb/coifiles/amendment.htm> [<https://perma.cc/GT6A-GMMF>].

184. See NJAC Judgment, 4 SCC at 170–72.

185. INDIA CONST. art. 74, cl. 1.

186. In either event, the president would be required to consult with the Chief Justice.

scenarios, judicial appointments would be insulated from the sort of political influence that both members of the Constituent Assembly and a majority of the Justices in the NJAC Judgment feared.¹⁸⁷ However, with the passage of the Forty-second Amendment in 1977, any such discretion was eliminated and the president was ultimately bound by her cabinet's advice.¹⁸⁸ Thus, the argument goes, judicial primacy should be read into Articles 124 and 217 after 1977 to prevent a small group of parliamentarians—the cabinet—from exerting too much influence over the appointments process.¹⁸⁹ Justice Khehar does not employ this line of reasoning, but it seems the only plausible, if unlikely, theory as to why judicial primacy in appointments is constitutionally required today.

B. *Judicial Primacy as Part of the Constitution's "Basic Structure"*

Assuming the Constitution requires judges to have the last word on judicial appointments, the NJAC would still be lawful. After all, it was enacted through a constitutional amendment, which altered the language of Articles 124 and 217, among others, to bind the president to the NJAC's recommendations.¹⁹⁰ Justice Khehar, therefore, had to further establish that judicial primacy in appointments was part of the Constitution's basic structure and therefore could not be amended.

1. The Emergence of Basic Structure

A full discussion of the "basic structure doctrine" is beyond the scope of this Article,¹⁹¹ but the events leading up to its adoption are worth summarizing. In 1965 in *Sajjan Singh v. State of Rajasthan*, two Supreme Court Justices, in concurring opinions, first intimated that constitutional amendments could be *ultra vires*.¹⁹² These dicta would become law in *Golaknath v. State of Punjab*.¹⁹³ Petitioners in *Golaknath* argued that the Seventeenth Amendment, and the related First and Fourth Amendments, to the Constitution violated

187. See CONSTITUENT ASSEMBLY DEBATES VOL. VIII, at 231–32; NJAC Judgment, 4 SCC at 356–59.

188. See INDIA CONST. art. 74.

189. See *id.* art. 124, cl. 2; *id.* art. 217, cl. 1.

190. See *supra* Section I.A.

191. For a comprehensive account of the doctrine, see SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

192. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 (India).

193. *I.C. Golaknath v. State of Punjab*, (1967) 2 SCR 762 (India).

certain fundamental rights granted under Chapter III.¹⁹⁴ Article 13 of the Constitution provides: “The State shall not make any law which takes away or abridges the rights conferred by [Chapter III].”¹⁹⁵ While this provision clearly applies to laws enacted by Parliament or state governments, the issue before the Supreme Court was whether it also applied to constitutional amendments.¹⁹⁶

The Supreme Court, by a narrow six-to-five margin, adopted the broader view of Article 13 and held that the First, Fourth, and Seventeenth Amendments were unconstitutional.¹⁹⁷ However, Justice Subba Rao’s majority opinion was careful to limit the decision’s scope.¹⁹⁸ He held that Article 368 did not grant Parliament the power to amend the Constitution, but simply set forth the procedures for amendment.¹⁹⁹ Justice Subba Rao further held that amendments enacted under Article 368 were “laws” under Article 13 and were therefore subject to judicial review.²⁰⁰ Justice Subba Rao also stipulated that this judgment did not actually affect the validity of the impugned constitutional amendments—under the doctrine of “prospective overruling,” the judgment only applied to future cases.²⁰¹ Thus, it left the First, Fourth, and Seventeenth Amendments on the books, even though it declared them unconstitutional.²⁰²

This case set into motion a structural revolution: by limiting the Parliament’s amendment power, the Court asserted its supremacy over constitutional interpretation to an unprecedented extent. As Austin put it, *Golaknath* “began the great war, as distinct from earlier skirmishes, over parliamentary versus judicial supremacy.”²⁰³ This battle for supremacy emerged not only from *Golaknath*’s substantive content but also from its timing.²⁰⁴ It was released just after Indira Gandhi, the daughter of India’s first prime minister,

194. See *id.* at 808–09; GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 197* (2003).

195. INDIA CONST. art. 13.

196. *Golaknath*, 2 SCR at 763.

197. *Id.*

198. Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107, 111–12* (B.N. Kirpal et al. eds., 2000).

199. *Golaknath*, 2 SCR at 763.

200. *Id.* at 764.

201. *Id.*

202. See *id.*; Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 *SAN DIEGO J. INT’L L. J.* 175, 182–83 (2010).

203. AUSTIN, *supra* note 194, at 198.

204. Ramachandran, *supra* note 198, at 112.

Jawaharlal Nehru, became prime minister.²⁰⁵ Gandhi was intent on furthering her father's socialist agenda and the Supreme Court represented the greatest obstacle to these objectives.²⁰⁶

The dispute between Gandhi and the Court concerned two major issues: the power to amend the Constitution; and control over the judicial appointments process. Though Gandhi struck the first blows, the Court eventually scored a decisive victory on both fronts.

Following Supreme Court decisions that invalidated the Gandhi government's Bank Nationalization Act and efforts to abolish princely titles and privileges,²⁰⁷ Gandhi made concerted efforts to limit the Court's authority.²⁰⁸ Her government promulgated several constitutional amendments.²⁰⁹ For the purposes of this Article, the Twenty-fourth Amendment (1971) is most significant. It altered Articles 13 and 368 to reinstate parliamentary supremacy on constitutional amendments.²¹⁰

This amendment, along with two others that insulated certain land reform laws from judicial review, was challenged in *Kesavananda Bharati v. Union of India*.²¹¹ The Supreme Court in that case issued eleven opinions containing at least three rulings.²¹² First, it overruled *Golaknath* by noting that constitutional amendments could not violate fundamental rights because the term "law" in Article 13 of the Constitution was limited to ordinary, legislative acts.²¹³ Second, it nonetheless held that constitutional amendments are invalid if they violate the Constitution's "basic structure."²¹⁴ Justice Khanna's majority opinion focused on the phrases

205. *Id.*

206. *Id.* at 112–13.

207. *R.C. Cooper v. Union of India*, AIR 1970 SC 564 (India); *Madhav Rao Scindia v. Union of India*, AIR 1971 SC 530 (India).

208. *See Mate, supra* note 202, at 182–83.

209. AUSTIN, *supra* note 194, at 234–57.

210. Article 13(4) now provided, "Nothing in this article shall apply to any amendment of this Constitution made under article 368." INDIA CONST. art. 13, cl. 4, *amended by* The Constitution (Twenty-fourth Amendment) Act 1971. Article 368, following this amendment, read as follows: "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article." INDIA CONST. art. 368, *amended by* The Constitution (Twenty-fourth Amendment) Act 1971.

211. *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 225 (India).

212. *Id.*; KRISHNASWAMY, *supra* note 191 at 26–27.

213. Ramachandran, *supra* note 198, at 113. *But see* RAJEEV DHAVAN, THE SUPREME COURT AND PARLIAMENTARY SOVEREIGNTY 167 (1976) (arguing that *Golaknath* was not actually overruled, but became "irrelevant" after *Kesavananda Bharati*).

214. *Kesavananda Bharati*, 4 SCC at 253–68.

“this Constitution” and “the Constitution shall stand amended” in Article 368.²¹⁵ He found that these terms suggested the existence of a core constitutional identity that Parliament could not alter through amendments.²¹⁶ Finally, with respect to the constitutional amendments at issue, the Court struck down a section of the Twenty-fifth Amendment that, *inter alia*, made non-enforceable Directive Principles of State Policy superior to certain justiciable fundamental rights, thereby altering the Constitution’s basic structure.²¹⁷

Kesavananda Bharati made clear that the superiority of fundamental rights vis-à-vis directive principles was a feature of the basic structure.²¹⁸ However, it did not clearly establish what other features might also be included.²¹⁹ Chief Justice Sikri’s opinion in the case suggested five essential features.²²⁰ Sudhir Krishnaswamy has put forth a similar list—secularism, democracy, rule of law, federalism, and the independence of the judiciary—along with two possible additions: socialism and equality.²²¹

2. The Battle Over Judicial Appointments

Kesavananda Bharati established that judicial independence formed part of the Constitution’s unamendable basic structure.²²² The institutional conflict between the Supreme Court and Gandhi’s government continued, but the battleground now shifted to judicial appointments and transfers.²²³ The day after *Kesavananda Bharati* was decided, President Ahmed, on the advice of Gandhi, his prime minister, nominated Justice A.N. Ray for Chief Justice.²²⁴ This was a controversial appointment as Ray, a pro-government nominee, was promoted ahead of three senior Justices who ruled against the government in *Kesavananda Bharati*.²²⁵ When Ray

215. *Id.*

216. *Id.* at 258; DHAVAN, *supra* note 213, at 144–47.

217. Mate, *supra* note 202, at 184.

218. *See Kesavananda Bharati*, 4 SCC at 225.

219. *Id.*

220. *Id.* at 170.

221. *See* KRISHNASWAMY, *supra* note 191, at 159–61 (drawing the five features from India’s former attorney general Soli Sorabjee).

222. *See Kesavananda Bharati*, 4 SCC at 768.

223. *See* AUSTIN, *supra* note 194, at 128–83. Note that the dispute over amendment power continued. Gandhi sought to nullify *Keshavananda Bharati* through the Forty-second Amendment (1977), which barred the Supreme Court from reviewing constitutional amendments. *Id.* at 370–430. However, the Janata Party government that defeated Gandhi’s Congress Party in the 1977 elections subsequently repealed this provision. *Id.*

224. *See id.* at 278.

225. *Id.*

retired, Gandhi advised the president to pass over Justice Khanna, the senior Justice, who had opposed a number of her initiatives, for the pro-government nominee, Justice Beg.²²⁶

Gandhi and her ministers also advised the president to transfer high court judges as retribution for ruling against the government.²²⁷ One Justice challenged the constitutionality of his transfer in *Union of India v. Sankalchand Himatlal Sheth* (1977).²²⁸ The president, on Gandhi's advice, had transferred Justice S.H. Sheth of the Gujarat High Court to the High Court of Andhra Pradesh.²²⁹ Justice Sheth complied with the order but simultaneously filed a writ petition before the Supreme Court.²³⁰ The petition claimed, *inter alia*, that the order was issued without his consent, which he argued was implicitly required in Article 222(1) of the Constitution.²³¹ The Supreme Court held that, while such consent is not constitutionally required, it is recommended in all cases.²³² According to the Court, if the president effected transfers without obtaining the consent of the Justices involved, it would "bring about devastating results and cause damage to the tower of judiciary and erosion in its independence."²³³ A Justice punitively transferred would be "working constantly under a threat that if he does not fall in line with the views of the executive or delivers judgments not to its liking, he would be transferred, may be to a far-off High Court."²³⁴

The Court was concerned about untrammelled presidential authority, but it noted that the Constitution included safeguards to restrict the president's discretion, as follows:

A provision empowering the President to transfer a Judge from one High Court to another can in no way be regarded as marring the independence of the judiciary, given the gloss we have given to it. It will be noticed that the power under Article 222 is hedged in by several safeguards. In the first place, the power rests in such a high authority as the President who acts on the advice of the Council of Ministers; secondly, the power can be

226. *Id.* at 435–36.

227. *See id.* at 344–47 (noting that sixteen judges were transferred without their consent from May to June 1976 and concluding that these transfers were "retribution for the justices' rulings").

228. *Union of India v. Sankal Chand Himatlal Sheth*, (1977) 4 SCC 193.

229. *Id.* at 209–10.

230. *Id.* at 210.

231. *See id.*; INDIA CONST. art. 222, cl. 1 ("The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.").

232. *See Sankal Chand Himatlal Sheth*, 4 SCC at 193, 226–28.

233. *Id.* at 285.

234. *Id.* at 243.

exercised only in consultation with the Chief Justice of India [This] is not an empty ritual or an idle formality but is a matter of moment and must be fully effective.²³⁵

A few years earlier, the Court similarly discussed judicial independence in the context of gubernatorial authority. *Shamsher Singh v. State of Punjab* concerned two judicial officers, the appellants, on probation in Punjab, whose services were terminated by the Punjab Government.²³⁶ The termination was executed in the name of the Governor of Punjab and on the recommendation of the Punjab and Haryana High Court.²³⁷ The appellants contended that this was unconstitutional: in their view, the governor could only terminate their services in his personal capacity.²³⁸ The Supreme Court dismissed this claim and, importantly, elaborated on the nature of executive power in India.²³⁹ Chief Justice Ray's majority opinion drew comparisons between governors and the president.²⁴⁰ It concluded that the president is a ceremonial head of state because India adopted the British parliamentary executive.²⁴¹ The Court held that "real executive powers" were vested in the council of ministers, whose advice the president, as well as governors, must accept in all executive and legislative matters.²⁴²

In a concurring opinion, Justice Krishna Iyer agreed that, for all practical purposes, the president is bound by her cabinet's advice, but added an important dictum.²⁴³ For Justice Iyer, the council of ministers should not have the final word on judicial appointments.²⁴⁴ Rather, "[i]n all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India In practice the last word in such a sensitive subject must belong to the chief justice of India."²⁴⁵

This dictum would play an outsized role in the NJAC Judgment. To show that Supreme Court precedent had established judicial primacy in appointments, Justice Khehar relied on *Shamsher Singh*.²⁴⁶ He specifically cited the passage above as evidence that

235. *Id.* at 269.

236. *Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831, 831.

237. *Id.* at 845–46.

238. *Id.* at 846.

239. *Id.* at 846–60.

240. *Id.* at 848–54.

241. *Id.* at 828.

242. *Id.* at 829.

243. *Id.* at 873 (Iyer, J., concurring).

244. *Id.*

245. *Id.*

246. NJAC Judgment, (2016) 4 SCC 1, 148–49.

the Chief Justice has the final word on judicial appointments.²⁴⁷ However, Justice Khehar's description of this quote is misleading.²⁴⁸ He stated that a "seven-Judge bench held" that the Chief Justice's counsel must be followed "[i]n all conceivable circumstances."²⁴⁹ This is false on two counts: first, the quoted language appears in a concurring opinion that Justice Krishna Iyer wrote on behalf of Justice Bhagwati and himself, not in the five-Justice majority opinion; and second, the quote is merely judicial dicta and does not constitute a legal holding. *Shamsher Singh* concerned a governor's discretion under the Constitution.²⁵⁰ The resolution of this case did not directly involve presidential powers, much less the president's authority to make judicial appointments. Thus, Justice Iyer's observations about the appointments power have no binding authority.

Justice Khehar later observed in the NJAC Judgment that *Sankalchand Himatlal Sheth* confirmed this view of judicial appointments.²⁵¹ In that case, Justice Chandrachud's majority opinion cited with approval Justice Iyer's concurring opinion in *Shamsher Singh*.²⁵² However, the context suggests that this reference was not intended to establish de jure judicial primacy in appointments.²⁵³ *Sankalchand* concerned the transfer of a high court justice without his consent.²⁵⁴ The Court held that consent was not constitutionally required, but recommended that the president obtain consent to safeguard judicial independence.²⁵⁵ Indeed, Justice Chandrachud essentially conceded this immediately before and after quoting Justice Iyer's concurrence.²⁵⁶ Prior to the quote he said, "It is open to the President to arrive at a proper decision of the question whether a Judge should be transferred . . . because, *what the Constitution requires is consultation with the Chief Justice, not his concurrence.*"²⁵⁷ Afterward, Justice Chandrachud expressed his wish that "these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive

247. *Id.*

248. *Id.* at 148.

249. *Id.* at 152.

250. *See Shamsher Singh*, 2 SCC at 831.

251. NJAC Judgment, 4 SCC at 152–53.

252. *See Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC 193, 228–29.

253. *See id.*

254. *Id.* at 209–10.

255. *Id.* at 228–30.

256. *Id.* at 228–29.

257. *Id.* at 228 (emphasis added).

and judiciary will be resolved by mutual deliberation.”²⁵⁸ In other words, while the Chief Justice’s advice on appointments must be taken seriously, and the president should generally follow suit, there is nothing in the Constitution to bind the president to that advice.

Thus, neither of these cases provides precedent for judicial primacy in appointments.²⁵⁹ At most, they include dicta that points towards judicial primacy.²⁶⁰ But even such dicta, in its proper context, hardly support the proposition that the judiciary, led by the Chief Justice, has the final word on judicial appointments. In any event, the dicta certainly do not suggest that judicial primacy is part of the Constitution’s basic structure.

3. Establishing Judicial Supremacy: The *Three Judges’ Cases*

While *Shamsher Singh* and *Sankalchand Himatlal Sheth* laid the foundation for the NJAC Judgment, Justice Khehar’s analysis focused primarily on the *Three Judges’ Cases*.²⁶¹ The *First Judges’ Case*, *S.P. Gupta v. Union of India* (1982), raised a number of concerns pertaining to judicial independence.²⁶² The various writ petitions filed in this case challenged, *inter alia*, the appointment of several additional justices to the high courts.²⁶³ Prime Minister Indira Gandhi, who returned to power in 1980, advised the president to make these appointments under Article 224(1) of the Constitution.²⁶⁴ Article 224(1) allows for temporary judicial appointments of up to two years in response to a “temporary increase” in a high court’s workload.²⁶⁵ Petitioners, including senior advocates in several high courts, challenged these appointments on the basis that they constituted part of a government pol-

258. *Id.* at 229.

259. *See generally id.*; *Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831, 831.

260. *See Sankalchand Himatlal Sheth*, 4 SCC at 228–89; *Shamsher Singh*, 2 SCC at 882 (Iyer, J., concurring).

261. *S.P. Gupta v. Union of India*, (1981) 1 SCC 87, 87 (India) (*First Judges’ Case*); *Advocates-on-Record Ass’n v. Union of India*, AIR 1994 SC 268 (India) (*Second Judges’ Case*); In re: *Appointment and Transfer of Judges*, AIR 1999 SC 1 (India) (*Third Judges’ Case*).

262. *S.P. Gupta*, 1 SCC at 87.

263. *Id.* at 195–203.

264. INDIA CONST. art. 224, cl. 1.

265. *Id.* (“If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as [she] may specify.”).

icy to weaken judicial independence.²⁶⁶ After all, temporary appointments might allow the government to pack the bench with judges that favored its agenda while removing protections such as fixed tenure.²⁶⁷

One argument petitioners advanced was that the Chief Justice should be given primacy in appointments to prevent this potential political manipulation.²⁶⁸ Justice Bhagwati rejected this argument.²⁶⁹ He relied on *Sankalchand* and Ambedkar's statements at the CADs to conclude that "consultation" in Articles 124 and 217 means precisely that.²⁷⁰ He said, "The Central Government is entitled to come to its own decision as to . . . whether or not to appoint the particular person as a Judge [It] is not bound to act in accordance with the opinion of the Chief Justice of India."²⁷¹

In the NJAC Judgment, Justice Khehar conceded that the *First Judges' Case* does not support judicial primacy.²⁷² However, he minimized its importance by referring to it as "[t]he solitary departure" in a chain of five cases from *Shamsher Singh* to the *Third Judges' Case* that vested primacy in the judiciary under Articles 124, 217, and 222.²⁷³ This is an exaggeration. As discussed, both *Shamsher Singh* and *Sankalchand Himatlal Sheth* concerned different legal issues and did no more than refer to judicial primacy in dicta.²⁷⁴ Moreover, the latter actually held that the president is not constitutionally required to follow the Chief Justice's counsel, which is why Justice Bhagwati cited it with approval to reach the same conclusion in the *First Judges' Case*.²⁷⁵

The *Second Judges' Case* (1994), however, reversed course and instituted judicial primacy.²⁷⁶ Unlike its predecessors, this case squarely addressed whether the Chief Justice has primacy in judicial appointments and transfers.²⁷⁷ Justice Verma's majority opin-

266. *S.P. Gupta*, 1 SCC at 87, 196–97.

267. In India, Supreme Court Justices must retire at age sixty-five, while high court justices must retire at sixty-two. INDIA CONST. art. 124, cl. 2; *id.* art. 217, cl. 1.

268. *See S.P. Gupta*, 1 SCC at 231.

269. *See id.*

270. *Id.* at 230.

271. *Id.*

272. NJAC Judgment, (2016) 4 SCC 1, 127.

273. *Id.* at 127, 130–31.

274. *See supra* Subsection II.B.2.

275. *See S.P. Gupta*, 1 SCC at 230.

276. *Advocates-on-Record Ass'n v. Union of India*, AIR 1994 SC 268, ¶ 41.

277. *Id.* ¶ 2. This case originated from a writ petition demanding that judicial vacancies be filled. *See* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 484 (2003). The Court referred the case to a nine-judge constitutional bench to reexamine the appointments power. *Id.*

ion explicitly reversed the *First Judges' Case*, finding that “the view of Bhagwati, J. (as he then was) in [the *First Judges' Case*] . . . conflicts with this constitutional scheme, and, with respect, does not appear to be a correct construction of the provisions in Article 124(2) and 217(1).”²⁷⁸ For Justice Verma, the term “consultation” in these constitutional provisions was intended to create a deliberative process between the executive and judicial branches.²⁷⁹ The “primary aim” of this process would be to take “into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who . . . is best suited to know the worth of the appointee.”²⁸⁰ Ideally there should be consensus and no need for any actor to assume primacy; if disagreements emerge, however, primacy is vested “in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.”²⁸¹

This case established the “collegium” system, where senior Supreme Court Justices, led by the Chief Justice, have the final say on judicial appointments and transfers.²⁸² The *Third Judges' Case* (1999) confirmed this arrangement and prescribed the contours of the “consultative process” that are in place today.²⁸³ Importantly, as Justice Khehar pointed out in the NJAC Judgment, the central government did not challenge the constitutionality of the collegium in that case.²⁸⁴ The attorney general instead asked the Court to expand the collegium from three to six Justices.²⁸⁵ The Court settled on a compromise: the collegium would consist of the Chief Justice and the next four most senior Justices.²⁸⁶ The Court further held that “if the majority of the collegium is against the appointment of a particular person, that person shall not be

278. *Advocates-on-Record Ass'n*, AIR 1994 SC ¶ 39.

279. *See id.* ¶¶ 40–41. Justice Verma found that “consultation” (rather than “concurrency”) was adopted “merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as [sic] individual.” *See id.*

280. *Id.* at ¶ 41.

281. *Id.*

282. *See id.* ¶ 68. The *Second Judges' Case* prescribed a process in which the Chief Justice consults with the next two most senior Supreme Court Justices before recommending nominees for judicial office. *Id.*

283. *See In re: Appointment and Transfer of Judges*, AIR 1999 SC 1, ¶¶ 14–19.

284. NJAC Judgment, (2016) 4 SCC 1, 131 (“[T]he Union of India was not seeking a review, or reconsideration of the judgment in the [*Second Judges' Case*] It is therefore apparent that [judicial primacy] . . . was conceded, by the Union of India, in the [*Third Judges' Case*].”).

285. *In re: Appointment and Transfer of Judges*, AIR 1999 SC ¶ 12.

286. *Id.* ¶ 14.

appointed.”²⁸⁷ Thus, a majority of Justices—not the Chief Justice or the president—would have the final say on judicial appointments.²⁸⁸

The *Second* and *Third Judges’ Cases* constitute binding precedent for the proposition that the Constitution requires judicial primacy in appointments.²⁸⁹ But do they hold that such primacy is part of the Constitution’s basic structure? The *Third Judges’ Case* makes no reference to basic structure whatsoever.²⁹⁰ Justice Verma’s majority opinion in the *Second Judges’ Case* refers to it only once, as follows:

[The question of judicial primacy has] to be considered *in the context of the independence of the judiciary, as a part of the basic structure of the Constitution*, to secure the “rule of law” essential for the preservation of the democratic system, the broad scheme of separation of powers adopted in the Constitution, together with the directive principle of “separation of judiciary from executive” even at the lowest strata, provide some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. *The construction of those provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vital [sic] and promote the growth essential for retaining the Constitution as a vibrant organism.*²⁹¹

This statement confirms that judicial independence is part of the basic structure. It is less clear, though, whether the judgment holds that judicial primacy in appointments, too, falls within the basic structure. Justice Verma clearly links judicial primacy to judicial independence when, for instance, he states that filling judicial appointments only with candidates approved of by the Chief Justice is “intended to secure the independence of the judiciary.”²⁹² Similarly, in the NJAC Judgment, Justice Khehar states that vesting primacy in the Chief Justice and the collegium is an “integral constituent” of Articles 124, 217, and 222.²⁹³ But merely making this connection does not place judicial primacy within the basic structure. The basic structure doctrine is intended to prevent structural changes to the Constitution that would alter its core identity.²⁹⁴ It is difficult to argue that judicial primacy, which did not exist prior to the *Second Judges’ Case* in 1993, could form part of this core iden-

287. *Id.* ¶ 19.

288. *Id.*

289. See *Advocates-on-Record Ass’n v. Union of India*, AIR 1994 SC 268; *In re: Appointment and Transfer of Judges*, AIR 1999 SC at 1.

290. See *In re: Appointment and Transfer of Judges*, AIR 1999 SC at 1.

291. *Advocates-on-Record Ass’n*, AIR 1994 SC ¶ 8 (emphasis added).

292. *Id.* ¶ 72.

293. NJAC Judgment, (2016) 4 SCC 1, 338.

294. See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 768.

tity.²⁹⁵ The burden becomes more onerous in light of *Sankalchand Himatlal Sheth* and the *First Judges' Case*, which held to the contrary.²⁹⁶

Yet, Justice Khehar made no attempt to explain how judicial primacy in appointments is part of the basic structure. Following his analysis, albeit mistaken, of the CADs and the relevant precedents, he simply assumed away the controversy²⁹⁷ and held:

“Therefore, when a question with reference to the selection and appointment . . . of Judges to the higher judiciary is raised, alleging that the ‘independence of the judiciary’ as a ‘basic feature/structure’ of the Constitution has been violated, it would have to be ascertained whether [judicial primacy] . . . had been breached.”²⁹⁸

By reaching this conclusion with no supporting argumentation or convincing evidence, Justice Khehar and the NJAC Judgment majority fail to make a coherent case for judicial primacy as part of the unamendable basic structure.²⁹⁹ Indeed, much of the evidence, particularly the CADs and early constitutional analyses, suggests that judicial primacy is not even required under the Constitution.³⁰⁰

III. THE NJAC JUDGMENT IN COMPARATIVE PERSPECTIVE

The foregoing Part makes clear that constitutional text, history, and precedent do not support judicial primacy in appointments. Perhaps, however, the NJAC Judgment could be defended on empirical grounds. The Indian Supreme Court, led by Justice Khehar, repeatedly emphasized the dangers to judicial independence posed by the executive.³⁰¹ The Court held not only that undue executive influence should be removed from the selection process, but also that *any* executive role in judicial appointments would violate judicial independence.³⁰²

295. See Sengupta, *supra* note 3, at 28.

296. See *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC 193, 226–28; *S.P. Gupta v. Union of India*, (1981) 1 SCC 87, 230.

297. See Bhatia, *supra* note 34.

298. NJAC Judgment, 4 SCC at 348.

299.

300. The Judgment further identified several other supposed constitutional defects in the Ninety-ninth Amendment and the National Judicial Appointments Commission Act. These included the powers and qualifications of the “eminent persons” and the presence of the union minister of law and justice on the Commission. See *supra* Section I.A. For a comprehensive analysis of the NJAC Judgment’s remaining legal flaws, see Sengupta, *supra* note 3, at 29–30.

301. See, e.g., NJAC Judgment, 4 SCC at 356–59.

302. *Id.* at 368–69.

This Part seeks to examine the validity of that claim. Drawing from democratic constitutions around the world, it advances three claims: (1) that the executive has historically played a decisive role in judicial appointments in several countries, including those with parliamentary systems; (2) that to the extent countries are moving away from politicized appointment processes, they have moved towards independent commissions and greater transparency; and (3) that having judges control judicial appointments has not effectively secured judicial independence in India.

A. *The Executive Role in Judicial Appointments*

Executives around the world play a role in selecting judges. In the United States, Article II, Section 2 of the U.S. Constitution empowers the president to nominate judges to the federal judiciary, and those nominees must be confirmed by the U.S. Senate.³⁰³ The U.S. president, unlike her Indian counterpart, presides over a separate branch of government and is not beholden to a council of ministers.³⁰⁴ Thus, while the U.S. president has far more autonomy, she is also an overtly political actor.³⁰⁵ It is well documented that presidents appoint judges who they believe will vote in their favor on contentious legal issues.³⁰⁶ It has also been shown that judges tend to vote in line with the party whose president appointed them to the bench.³⁰⁷ The U.S. appointments process becomes particularly politicized when the Senate majority is drawn from the political party opposing the president.³⁰⁸ These situations are often characterized by a vicious cycle in which Senate obstructionism is countered by presidential recess appointments,³⁰⁹ leading to greater obstructionism, and so on.³¹⁰

However, the politicization of the appointments process does not necessarily harm judicial independence. That is, the fact that

303. U.S. CONST. art. II, § 2, cl. 2.

304. *See id.* art. II.

305. *See* Mark Tushnet, *Judicial Selection, Removal and Discipline in the United States*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 134, 136 (H.P. Lee ed., 2011).

306. *See id.*

307. *See id.*

308. *See id.* at 139–40.

309. U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session.”).

310. *See* Michael C. Tolley, *Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 80–82 (Kate Malleson & Peter H. Russell eds., 2006).

presidents choose judges who they think will share their constitutional or legal philosophy does not always or even consistently lead to judges who vote as the president would like.³¹¹ Moreover, the fact that the U.S. Senate must confirm all nominees recognizes that judicial appointments are inherently political.³¹² Introducing a legislative check reduces the potential for executive misconduct, while the quality of appointments and transparency of the process should increase.³¹³

Turning from the U.S. presidential system to long-established parliamentary systems, similarly, the executive maintains a role in judicial appointments. In Australia, the governor-general—a figurehead executive who represents the Queen—appoints federal judges, while governors—the ceremonial state executives—appoint state-level judges.³¹⁴ At both levels, the executive acts on the advice of the attorney general.³¹⁵ Attorneys general conventionally consult the Chief Justice and other sitting judges, but, for the most part, such consultation is not statutorily required and does not always occur.³¹⁶ Australia, therefore, has a system very similar to India's prior to the *Second Judges' Case*, in which a largely ceremonial executive, advised by the government, has the final word on appointments.³¹⁷

Similarly, in New Zealand, the attorney general determines most judicial appointments.³¹⁸ For high court appointments, the attorney general consults with the Chief Justice, various other judges, and the presidents of the New Zealand Bar Association and Law

311. See David A. Yalof, *Filling the Bench*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 469, 474 (Keith Whittington et al. eds., 2008) (noting that Chief Justice Warren and Associate Justices Brennan, Blackmun, and Souter “confounded the Presidents who appointed them by taking unexpected positions on high-profile issues”).

312. See Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 502 (2011).

313. See *id.* at 459–65.

314. See H.P. Lee, *Appointment, Discipline and Removal of Judges in Australia*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 27, 28 (H.P. Lee ed., 2011).

315. See *id.*

316. See *id.* (noting that such consultation is statutorily prescribed for high court appointments).

317. *Id.* Cf. INDIA CONST. art. 74 (President of India “shall act in accordance with the advice” of the President’s Council of Ministers).

318. The only exceptions are for New Zealand’s Chief Justice, who is appointed by the prime minister, and the judges of the Maori Land Court, who are appointed by the Minister of Maori Affairs. See Philip A. Joseph, *Appointment, Discipline and Removal of Judges in New Zealand*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 66, 67 (H.P. Lee ed., 2011) (clarifying that this system has been in place since 1999; prior to 1999, the minister of justice recommended district court appointments).

Society.³¹⁹ The nominees are selected from a list drawn by the solicitor general, the Chief Justice, and the president of the Court of Appeal.³²⁰ Thus, while judges have an important role in judicial nominations, the appointments power is vested solely in the executive.³²¹

Canada, too, vests the executive with sole authority over judicial appointments. The Constitution Act, 1867 empowers the federal government—the governor-general, on the cabinet's advice—to nominate judges to the Supreme Court of Canada, the Federal Court, and the Tax Court.³²² Section Ninety-six of the Act further empowers the federal government to make appointments to the provincial superior courts.³²³ Section Ninety-two of the Act created the remaining provincial courts, and provincial governments nominate judges to those courts.³²⁴ Thus, Canada is a parliamentary democracy in which the executive makes judicial appointments and, unlike in Australia and New Zealand, it does so without any requirement—legal or conventional—to consult with sitting judges.³²⁵

B. *Recent Judicial Reforms: Toward Independent Commissions and Greater Transparency*

Many countries have reformed their judicial appointment procedures in recent years. The United Kingdom instituted sweeping reforms through the Constitutional Reform Act 2005.³²⁶ This Act not only created a U.K. Supreme Court, which replaced the House of Lords as the country's highest judicial authority, but also transformed the appointments process.³²⁷ Prior to 2005, the lord chancellor, a high-ranking cabinet official, had the authority to make judicial appointments.³²⁸ The Constitutional Reform Act 2005 transferred the appointments power to two independent commissions, one for judges in England and Wales and another for

319. See *id.* at 68 (noting that the past attorneys general have consulted the opposition “shadow” attorney general as a symbolic gesture of nonpartisanship).

320. See *id.*

321. *Id.*

322. See F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 56, 57 (Kate Malleson & Peter H. Russell eds., 2006).

323. See *id.*

324. See *id.*

325. See *id.*

326. See Malleson, *supra* note 177, at 117–19.

327. See *id.*

328. *Id.* at 117–18.

Supreme Court Justices.³²⁹ The lord chancellor retains the limited authority to reject judicial nominations on the basis that candidates are not suitable for the relevant positions.³³⁰ However, even this residual power has been the subject of potential reforms, and subsequent parliamentary bills proposed removing it altogether.³³¹

These reforms were intended to modernize judicial appointments in the United Kingdom.³³² In particular, the commissions were designed to reduce the influence of partisanship and political patronage in judicial appointments.³³³ The Judicial Appointments Commission (JAC), which appoints judges to the English and Welsh courts, is statutorily required to: select candidates only on merit; select only people of good character; and encourage diversity in the selection process.³³⁴ It is comprised of fifteen members, including six “lay people,” five judges, one solicitor, one barrister, one magistrate, and one tribunal judge.³³⁵ By including members with varied backgrounds and qualifications, the JAC is designed to promote merit-based selection among candidates for judicial office.³³⁶

South Africa has similarly reformed its judicial appointments process. The Constitution of South Africa (1996) established a Judicial Services Commission (JSC) that, *inter alia*, handles judicial appointments for all South African courts except the Constitutional Court.³³⁷ It is chaired by the Chief Justice and, like the British JAC, it comprises a range of political, judicial, and lay members.³³⁸ Its twenty-three members include: representatives from professional legal bodies, a law teacher, ten members of South Africa’s Parliament, and four members nominated by the president in consultation with opposition leaders.³³⁹ The JSC fills judicial vacancies through a standard procedure that involves a call of applications in which potential candidates must complete a

329. *Id.* at 118.

330. *Id.* at 121.

331. *See id.* at 121–23.

332. *See id.* at 119.

333. *Id.*; *see also* Kate Malleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 40–45 (Kate Malleson & Peter H. Russell eds., 2006) (noting that increasing diversity and quality in appointments were also among the purposes in establishing the Judicial Appointments Commission).

334. Constitution Reform Act 2005, c. 4, §§ 63–64 (Eng.).

335. Malleson, *Appointment, Discipline and Removal of Judges*, *supra* note 177, at 123.

336. *See id.* at 119.

337. S. AFR. CONST., 1996, § 174.

338. *Id.* § 178, cl. 1.

339. *Id.*

detailed questionnaire pertaining to their personal and professional lives.³⁴⁰ After a rigorous and deliberative process, the JSC recommends candidates to the president, who officially makes the appointments, but is required to follow the JSC's advice.³⁴¹

For Constitutional Court vacancies, the process is more involved.³⁴² The JSC recommends a list of nominees to the president, who may select any of them after consulting with the Chief Justice and the leaders of all major political parties.³⁴³ In this context, the president may refer the list of nominees back to the JSC if she feels that the nominees are unacceptable.³⁴⁴ However, once the JSC suggests additional nominees, the president must make appointments from the revised list.³⁴⁵ This is much like Article 74 of the Indian Constitution, under which the president may ask the cabinet to reconsider its advice, but is ultimately bound by that advice.³⁴⁶ Note, however, that unlike the collegium system that has developed in India since 1993, the South African president merely consults the Chief Justice on appointments to the Constitutional Court, and an independent commission has the final word on appointments.³⁴⁷

Several other countries have also instituted independent judicial commissions in recent years, including Belgium and Denmark in 1999 and Slovakia in 2002.³⁴⁸ In all three countries, the commissions play a determinative role in judicial appointments and include both judicial and non-judicial members.³⁴⁹ Even in coun-

340. See Hugh Corder, *Appointment, Discipline and Removal of Judges in South Africa*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 96, 101 (H.P. Lee ed., 2011).

341. See *id.* at 101–02; S. AFR. CONST., 1996, § 178, cl. 2.

342. S. AFR. CONST., 1996, § 174.

343. *Id.* § 174, cl. 3; *id.* § 174, cl. 4(a).

344. *Id.* § 174, cl. 4(b).

345. *Id.* § 174, cl. 4(c).

346. INDIA CONST. art. 74.

347. S. AFR. CONST., 1996, § 178.

348. See BELGIUM HIGH COUNCIL OF JUSTICE, <http://www.hrj.be/en> [<https://perma.cc/J7UD-U6VM>] (last visited Mar. 23, 2017); *Judicial Appointments Council*, DENMARK HIGH COUNCIL OF JUSTICE, <http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/judicialappointmentscouncil/Pages/default.aspx> [<https://perma.cc/AF49-ER9V>] (last visited Mar. 22, 2017); JUDICIAL COUNCIL OF THE SLOVAK REPUBLIC, <http://www.sudnarada.gov.sk/home-page/> [<https://perma.cc/N9DW-FHSV>] (last visited Mar. 22, 2017).

349. See *id.* The Danish Government is not required to follow recommendations of the Judicial Appointments Council, but always does so in practice. See also Maurice Adams and Benoit Allemeersch, *Re-Forming a Meritorious Elite. Judicial Independence, Selection of Judges and the High Council of Justice in Belgium*, in *FAIR REFLECTION OF SOCIETY IN JUDICIAL SYSTEMS—A COMPARATIVE STUDY* 65, 71–73 (Sophie Turenne ed., 2015) (ebook) (noting that in establishing the High Council of Justice, Belgium sought to safeguard judicial independence by

tries that have not adopted commissions of this sort, there have been more modest reforms, or proposals for reform, that seek to reduce political influence and enhance transparency in judicial appointments.

Since the 1970s, several U.S. states have established commissions to screen federal judicial nominees.³⁵⁰ The convention for federal district and circuit court appointments has long allowed senators from each state to recommend nominees to the president.³⁵¹ Today, senators from several states rely on judicial nominating commissions, which recommend judicial candidates for the senators to send on to the president.³⁵² Several other states have alternate screening processes for federal judicial appointments. For example, Virginia asks state bar associations, and Alabama and Georgia utilize state congressional delegations to recommend candidates.³⁵³ At the state level, judges are often chosen through popular elections.³⁵⁴ Nonetheless, thirty states and the District of Columbia rely on a judicial nominating commission to some extent.³⁵⁵ Eight states, for instance, use commissions to fill interim state supreme court vacancies, while Georgia and West Virginia require their governors to consider supreme court candidates recommended by a nominating commission.³⁵⁶

In Canada, Judicial Appointments Advisory Committees (JAACs) were established in all provinces beginning in the 1980s.³⁵⁷ The JAACs screen candidates for judicial appointments and rate each candidate as “recommended,” “highly recommended,” or “unable

transferring important powers like those over judicial appointments away from the executive and that, by doing so, it joined countries like Italy, France, and Spain where “comparable institutions” have existed since 1947, 1958, and 1977, respectively).

350. See *Federal Judicial Selection*, NAT’L CTR. FOR ST. CT., http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD [<https://perma.cc/AZE3-SNE2>] (last visited Mar. 22, 2017).

351. See Tushnet, *supra* note 305, at 137–38.

352. The following states use judicial nominating commissions: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. *Id.*

353. See *id.*

354. See MALLA REDDICK & REBECCA LOVE KOURLIS, CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES 2 (2014), http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf [<https://perma.cc/XH2Z-N7QU>] (reporting that twenty-two states rely on judicial elections to select their supreme court judges).

355. *Id.* at 3.

356. See *id.* at 3–6.

357. See F.L. Morton, *supra* note 322, at 67.

to recommend.”³⁵⁸ In 2006, however, the conservative government in Canada, led by Prime Minister Stephen Harper, eliminated the “highly recommended” category.³⁵⁹ Harper’s government also added a police representative to each of the JAACs and permitted the judicial representative to vote only as a tiebreaker.³⁶⁰ In sum, these reforms have given the government greater control over judicial selection and politicized the process.³⁶¹

In British Columbia, Alberta, and Ontario, the government can only make appointments from a pool of candidates selected by the JAAC.³⁶² In other provinces, the JAAC merely gives its recommendation on candidates selected by the attorney general.³⁶³ The latter model has been criticized and there have been calls to make all judicial appointments in Canada less politicized by empowering JAACs to have a role in the appointments process, and not simply at the screening stage.³⁶⁴

In 2016, Prime Minister Justin Trudeau and Canada’s new Liberal government established the Independent Advisory Board for Supreme Court of Canada Judicial Appointments.³⁶⁵ It consists of three members: a retired judge nominated by the Canadian Judicial Council; two lawyers nominated by the Canadian Bar Association and the Federation of Law Societies of Canada, respectively; and a legal scholar nominated by the Council of Canadian Law Deans.³⁶⁶ This body is independent and nonpartisan.³⁶⁷ Its man-

358. *Id.* at 67–68.

359. Martin L. Friedland, *Appointment, Discipline and Removal of Judges in Canada*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 46, 55 (H.P. Lee ed., 2011).

360. *Id.*

361. *Id.*

362. See F.L. Morton, *supra* note 322, at 69.

363. *Id.*

364. See Jacob Ziegel, *Promotion of Federally Appointed Judges and Appointment of Chief Justices: The Unfinished Agenda*, in JUDICIAL INDEPENDENCE IN CONTEXT 151, 152–53 (Adam Dodek & Lorne Sissin eds., 2010) (arguing that Judicial Appointments Advisory Committees should play a role in the appointments process and not simply issue recommendations on potential candidates).

365. *New Process for Judicial Appointments to the Supreme Court of Canada*, JUSTIN TRUDEAU, PRIME MINISTER CAN. (Aug. 2, 2016), <http://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> [<https://perma.cc/QQ8K-S6W5>].

366. *Id.*

367. INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS, REPORT OF THE INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS (AUGUST–SEPTEMBER 2016) 2 (Nov. 25, 2016), [http://www.fjacmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-\(November2016\)_en.pdf](http://www.fjacmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf) [<https://perma.cc/NH8S-7N2U>].

date is to provide “non-binding merit-based recommendations” to the prime minister on Supreme Court appointments.³⁶⁸

Similar reforms have been proposed in Australia and Israel. Australia retains a politicized appointments process where the governor-general (at the federal level) and governors (at the state level) appoint judges on the advice of the attorney general.³⁶⁹ Over the years, this process has come under scrutiny for alleged corruption, lack of diversity in judges appointed, and the opacity of the process.³⁷⁰ However, despite calls for reform to increase the quality of candidates and transparency in procedures, the Australian political establishment has not moved beyond legislative committee reports and proposals for change.³⁷¹

In Israel, the present system of judicial appointments has been in place since the Judges Act 1953.³⁷² The Act created a nominations committee comprised of three judges, two representatives from the Israel Bar Association, two cabinet ministers, and two members of the Knesset.³⁷³ Thus, while the “judicial” members outnumber the “political” members five to four, only three of those judicial members are sitting judges.³⁷⁴ The Committee nominates candidates to Israel’s president, who is required to follow its recommendations.³⁷⁵

In 2000, following conservative political attacks on the Israeli judiciary, a committee headed by former Supreme Court Justice Itzhak Zamir reexamined the appointments process.³⁷⁶ The committee mostly praised the existing system but suggested modest reforms to make the process more transparent and professional.³⁷⁷

368. *Id.*

369. See H.P. Lee, *supra* note 314, at 28.

370. See Elizabeth Handsley, ‘The Judicial Whisper Goes Around’: Appointment of Judicial Officers in Australia, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 122, 125–31 (Kate Malleson & Peter H. Russell eds., 2006) (noting that corruption charges arose in the 1980s when several judicial officers were tried for administration of justice-related crimes; also noting that two diversity issues were raised in the 1990s when male judges made controversial comments in sex crime cases, leading to demands for more female judges).

371. See *id.* at 133–34 (describing a *Senate Committee Report on Gender Bias and the Judiciary* published in 1994, which recommended that the criteria for judicial selection be made public and that all jurisdictions strive to increase diversity in appointments).

372. See Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 241, 243 (Kate Malleson & Peter H. Russell eds., 2006).

373. See *id.* at 247–48.

374. See *id.* at 247.

375. See *id.* at 252–53.

376. See *id.*

377. *Id.* at 253.

The reforms included publicizing the names of candidates more widely and appointing a subcommittee within the nominations committee to interview each candidate.³⁷⁸ The committee had always allowed the public to submit objections against particular candidates within a twenty-one day window, and the proposed reform sought to increase public participation in the process.³⁷⁹ Thus, even in a country that has long relied on an independent commission to appoint judges, recent reforms have focused on improving transparency and obtaining feedback from a wider range of stakeholders.³⁸⁰

C. *The Collegium System in India*

Returning to India, what if the collegium system, contrary to the comparative evidence, functions effectively and promotes judicial independence? Justice Chelameswar's dissent in the NJAC Judgment leaves little doubt on this score. He noted that after the *Second Judges' Case* established the collegium, India "witnessed many unpleasant events connected with judicial appointments—events which lend credence to the speculation that [the collegium system] . . . is perhaps not the best system for securing an independent judiciary."³⁸¹

Justice Chelameswar discussed two events that highlight the collegium's flaws. The first involves a writ petition filed by Senior Advocate Shanti Bhushan challenging the constitutionality of a judicial appointment to the Madras High Court.³⁸² As Justice Chelameswar pointed out, neither Bhushan's precise claim or the Court's findings are clearly spelled out in the judgment, but the claim appears to be that the Chief Justice did not consult the collegium in making the impugned appointment.³⁸³ The Court dismissed this claim without much discussion.³⁸⁴ What Justice Chelameswar omitted is that shortly thereafter, Bhushan's son, Senior Advocate Prashant Bhushan, claimed in an interview with *Teelka Magazine* that eight of the past sixteen Chief Justices of

378. *Id.*

379. *Id.*

380. *See id.*

381. NJAC Judgment, (2016) 4 SCC 1, 505 (Chelameswar, J., dissenting) (citing a 2011 speech by former Supreme Court Justice Ruma Pal in which she criticized the secrecy, horse-trading, and "growing sycophancy and lobbying within the system" that "compromised" judicial independence).

382. *See* Shanti Bhushan v. Union of India, (2009) 1 SCC 657 (India).

383. *See id.*; NJAC Judgment, 4 SCC at 506–07 (Chelameswar, J., dissenting).

384. *Shanti Bhushan*, 1 SCC at 657.

India were corrupt.³⁸⁵ This led to criminal contempt charges against Prashant Bhushan.³⁸⁶ Shanti Bhushan filed an affidavit in this case on behalf of his son, which included evidence that purported to show that at least eight—and perhaps even ten—of the past sixteen Chief Justices were in fact corrupt.³⁸⁷ Further judicial misconduct in appointments has been reported over the past few years.³⁸⁸ In 2014, for instance, former Supreme Court Justice Markandey Katju claimed on Facebook that three former Chief Justices had confirmed and granted an extension to a corrupt judge.³⁸⁹

The second event involved the promotion of high court Justice P.D. Dinakaran to the Supreme Court.³⁹⁰ Justice Dinakaran was serving as Chief Justice of the Karnataka High Court when the collegium recommended his elevation to the Supreme Court.³⁹¹ However, this recommendation was met with allegations of corruption and judicial misconduct from members of the Bar Council of India, including senior advocates Shanti Bhushan, Anil Divan, and Fali Nariman, as well as former Union Minister of Law and Justice Ram Jethmalani.³⁹² Specifically, they alleged that Justice Dinakaran acquired large amounts of land in Tamil Nadu that exceeded the limit prescribed by the state's land reform laws.³⁹³ The collegium then recommended transferring him to the Sikkim High Court—a move that was questioned by the prime minister

385. See Shoma Chaudhury, 'Half of the Last 16 Chief Justices Were Corrupt', *TEHELKA MAGAZINE* (Sept. 5, 2009), <http://www.tehelka.com/2009/09/half-of-the-last-16-chief-justices-were-corrupt/> [<https://perma.cc/5ZSJ-3Q9Y>].

386. See *id.*; Shanti Bhushan, 'Eight of the Last Sixteen Chief Justices Were Definitely Corrupt', *OUTLOOK* (Sept. 16, 2010), <http://www.outlookindia.com/website/story/eight-of-the-last-sixteen-chief-justices-of-india-were-definitely-corrupt/267128> [<https://perma.cc/QR7V-NZP8>].

387. See *id.*

388. See T.R. Andhyarujina, *Disciplining the Judges*, *HINDU* (Feb. 20, 2010), <http://www.thehindu.com/opinion/lead/disciplining-the-judges/article109167.ece> [<https://perma.cc/CEU8-V9WT>].

389. See Apoorva Mandhani, *Judgment in Shanti Bhushan and Another Vs Union of India (2007) Echoes Justice Katju's Allegations [Read the Judgment]*, *LIVE L.*, <http://www.livelaw.in/6-year-old-judgment-echoes-katjus-allegations/> [<https://perma.cc/LN9H-BKFR>] (last visited Mar. 22, 2017).

390. See *P.D. Dinakaran v. Judges Inquiry Committee*, (2011) 8 SCC 380 (India); *P.D. Dinakaran v. Judges Inquiry Committee*, (2011) 8 SCC 474 (India).

391. See R. Sedhuraman, *Judge's Integrity in Question: Proposed Elevation of Karnataka CJ to SC Draws Ire of Senior Advocates*, *TRIBUNE* (Sept. 14, 2009), <http://www.tribuneindia.com/2009/20090915/main3.htm> [<https://perma.cc/8V2Z-GHL7>].

392. See *id.*

393. See *CJI Summoned Justice Dinakaran to Delhi*, *HINDU* (Sept. 16, 2009), <http://www.thehindu.com/todays-paper/article184471.ece> [<https://perma.cc/7CV4-UJ3M>].

and criticized by the Sikkim Bar Association.³⁹⁴ Finally, facing a three-member panel inquiry into his conduct, Justice Dinakaran resigned from the Sikkim High Court.³⁹⁵

Justice Chelameswar aptly summarized the lesson to be drawn from this episode. He said the recommendation of Justice Dinakaran to the Supreme Court “certainly exposed the shallowness . . . of the theory propounded by this Court . . . [that] the Collegium are the most appropriate authorities to make an assessment of the suitability of candidates for appointment as judges.”³⁹⁶

In September 2016, after he was appointed to the Supreme Court Collegium, Justice Chelameswar publicly declined to attend its meetings, citing the lack of transparency in the process.³⁹⁷

The Supreme Court rejected proposed reforms that would increase transparency.³⁹⁸ Shortly after the NJAC Judgment was issued, the Court asked the government to draft a Memorandum of Procedure, which would include improvements to the existing collegium system.³⁹⁹ Among other changes, the government proposed that the collegium should follow a tradition of seniority in appointments; provide reasons, in writing, in support of its nominations; and require dissenting judges to record their objections to nominees in writing.⁴⁰⁰ The Court has rejected all government proposals thus far.⁴⁰¹

The NJAC Judgment also ruled that *any* involvement of political actors in judicial appointments would violate the independence of

394. See J. Venkatesan, *Justice Dinakaran Shifted to Sikkim High Court*, HINDU (July 30, 2010), <http://www.thehindu.com/news/national/karnataka/article542259.ece> [<https://perma.cc/B6CL-5M5M>]; *Sikkim Bar Association Protests Justice Dinakaran's Transfer*, HINDU (Apr. 9, 2010), <http://www.thehindu.com/news/national/other-states/article392924.ece> [<https://perma.cc/6FGH-X9GZ>].

395. See J. Venkatesan, *Justice Dinakaran Resigns*, HINDU (July 29, 2011), <http://www.thehindu.com/news/national/justice-dinakaran-resigns/article2305932.ece> [<https://perma.cc/LF5G-GUY6>].

396. NJAC Judgment, (2016) 4 SCC 1, 508 (Chelameswar, J., dissenting).

397. G.S. Vasu, *Justice Chelameswar Skips SC Collegium Meet for Want of Transparency in Judges' Appointments*, NEW INDIAN EXPRESS (Sept. 2, 2016), <http://www.newindianexpress.com/nation/TNIE-Exclusive-Justice-Chelameswar-skips-SC-Collegium-meet-for-want-of-transparency-in-judges-appointments/2016/09/02/article3608194.ece> [<https://perma.cc/Z75A-K2LV>].

398. See generally NJAC Judgment, 4 SCC 1.

399. Sheela Bhatt, *Memorandum of Procedure: Behind the Scenes, Govt and SC in Tug of War over Appointments—and Turf*, INDIAN EXPRESS (July 15, 2016), <http://indianexpress.com/article/india/india-news-india/supreme-court-high-court-judge-appointment-procedure-criteria-collegium-government-judiciary-2914823/> [<https://perma.cc/F9E3-RB5E>].

400. *Id.*; Vasu, *supra* note 397.

401. Vasu, *supra* note 397.

the judiciary.⁴⁰² This is a startling claim, especially since the president's cabinet effectively had the final say on judicial appointments until the Supreme Court instituted the collegium system in the *Second Judges' Case* of 1993.⁴⁰³

It is also startling in light of the experience of several other democracies, where the involvement of political actors in the appointments process is not considered per se detrimental to judicial independence. As the foregoing comparative analysis showed, many countries maintain a role for the executive in judicial appointments, often a determinative one.⁴⁰⁴ The reforms over the last thirty years have checked political discretion in this realm by creating commissions and other independent bodies to assist in judicial appointments.⁴⁰⁵ However, these bodies usually include both representatives from the executive and legislative branches, and none excludes political actors completely.⁴⁰⁶

The attorney general raised this comparative perspective in the NJAC case, but Justice Khehar seemed to misunderstand its import.⁴⁰⁷ In his majority opinion, Justice Khehar considered the evidence submitted on judicial appointment systems around the world.⁴⁰⁸ He drew attention to a submission from the attorney general showing that fifteen countries in Europe and North America make “the executive . . . the final determinative/appointing authority.”⁴⁰⁹ He further discussed an influential academic paper that tracked and analyzed the trend towards independent appointments commissions or councils.⁴¹⁰ The paper, using quantitative analysis, finds little evidence to suggest that such commissions actually improve the quality or independence of judges.⁴¹¹ It explains their recent popularity in institutional terms, attributing it to their promise that “no one institution can easily dominate the judiciary The councils, once created, provide an arena for competition and the eternal struggle to calibrate independence and accountability.”⁴¹² This is an important gloss, which likely explains why so

402. *Id.* at 366.

403. *See* NJAC Judgment, 4 SCC at 521.

404. *See supra* Sections III.A, III.B.

405. *See id.*

406. *See id.*

407. NJAC Judgment, 4 SCC at 360–67.

408. *Id.*

409. *Id.* at 360.

410. *See id.* at 372 (citing Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009)).

411. Garoupa & Ginsburg, *supra* note 410, at 130.

412. *Id.*

many jurisdictions have multiple, competing institutional players involved in judicial selection.⁴¹³

In summarizing the comparative evidence, Justice Khehar acknowledged that the global trend is “to free the judiciary from executive and political control and to incorporate a system of selection . . . based purely on merit.”⁴¹⁴ But he then conflated “the diminishing role of executive and political participation” in appointments with exclusion of political actors altogether.⁴¹⁵ As he put it, the mere “participation” of the union minister of law and justice on the Commission, and of the prime minister and opposition leader in selecting “eminent persons” to sit on the Commission, would be “a retrograde step, and cannot be accepted.”⁴¹⁶

The NJAC Judgment, therefore, retains for the judiciary the power to make judicial appointments and ignores the core lesson of the comparative experience: that a single institution, even if it is the judiciary, should not have sole authority over judicial appointments.

CONCLUSION: AN INSTITUTIONAL EXPLANATION FOR THE NJAC JUDGMENT

This Article argued that the NJAC Judgment cannot be justified on either constitutional or empirical grounds. Constitutionally, it is unlikely that Articles 124, 217, and other constitutional provisions pertaining to the appointment and transfer of judges require judicial primacy.⁴¹⁷ And, in any event, it strains credulity to maintain that judicial primacy is part of the basic structure of the Constitution and therefore cannot be amended by Parliament.⁴¹⁸ Empirically, a survey of constitutional democracies around the world shows that political actors consistently play a role, often a determinative one, in judicial appointments.⁴¹⁹ To the extent judicial reforms have altered this practice over the past thirty years, the trend has been toward increasing transparency and instituting

413. This is true both with independent commissions, which usually involve members of the executive, legislative, and judicial branches, and in some long-established systems, such as in the United States, where federal judicial appointments are proposed by the president and confirmed by the U.S. Senate. *See supra* Sections III.A, III.B.

414. NJAC Judgment, (2016) 4 SCC 1, 366.

415. *Id.* at 370.

416. *Id.*

417. *See supra* Section II.A.

418. *See supra* Section II.B.

419. *See supra* Sections III.A, III.B.

independent appointments commissions like the NJAC, not toward empowering a single institution to appoint judges.⁴²⁰

So how can one make sense of the NJAC Judgment? An institutional account, one that considers this judgment in light of the Supreme Court's role in India's political and historical context, is most persuasive. As discussed, India's collegium system emerged from a series of cases that represented a broader institutional battle between the executive and judiciary for control over judicial appointments.⁴²¹ The *Second* and *Third Judges' Cases* appeared to tip the balance decisively in the judiciary's favor by instituting the collegium and giving it primacy on appointments.⁴²² The NJAC would have shifted authority away from the judiciary, as only three of its six members would be judges; the remaining members would be the union minister of law and justice and two "eminent persons."⁴²³

The NJAC Judgment can thus be understood in the broader context of the judiciary seeking to maintain institutional autonomy from the sort of undue political interference that it experienced in the 1970s and 1980s. The Supreme Court's rise as a powerful and autonomous institution since the 1980s has been well documented.⁴²⁴ Some commentators have focused on its adoption of public interest litigation and self-styled role as the "people's court,"⁴²⁵ while others have documented its rise in broader terms, taking into account the Justices' identities and perspectives within the intellectual zeitgeist of India's professional elite.⁴²⁶

The NJAC Judgment, however, hints at a more powerful institutional prerogative. By stretching the law beyond credible limits and ignoring empirical evidence to the contrary, the Supreme Court has baldly asserted its supremacy while cloaking itself in the Constitution. Whether the political branches can legitimately reassert their authority to legislate on judicial appointments remains to be seen.

420. *Id.*

421. *See supra* Section II.B.

422. *Advocates-on-Record Ass'n v. Union of India*, AIR 1994 SC 268 (India); *In re: Appointment and Transfer of Judges*, AIR 1999 SC 1 (India).

423. The Constitution (Ninety-ninth Amendment) Act, 2014 (India), art. 3.

424. *See Abeyratne, supra* note 9.

425. *See, e.g.,* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 *THIRD WORLD LEGAL STUD.* 107, 127 (1985); Anuj Bhuwania, *Court-ing the People: The Rise of Public Interest Litigation in Post-Emergency India*, 34 *COMP. STUD. S. ASIA, AFR. & MIDDLE E.* 314, 319 (2014).

426. *See, e.g.,* Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 *B.U. INT'L L.J.* 69 (2015).