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STRUCTURING THE SEPARATION OF POWERS: THE JUDICIARY AND INSTITUTIONS OF JUDICIAL REVIEW

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The title of my response is: "Some Thoughts Stimulated by the Incisive Talk of Professor Tushnet."[1] The subtitle is: "What Constitution Makers Might Learn from Both the Successes and Failures of the American System of an Independent Judiciary and Its Tradition of Judicial Review."

I.

Our system of an independent judiciary[2] and its tradition of judicial review are among the great successes of our Constitution. I agree that one of the great achievements of the government of the United States involves individual liberty: freedom from government oppression and less evil government restrictions on civil rights. I believe that this is substantially attributable to our independent judiciary and our system of judicial review.

We have heard mentioned the freedoms protected by the constitution of the former Soviet Union.[3] There are many similarities between that document and ours. For example, both the American and the Soviet constitutions provide for freedom of speech[4] and freedom of assembly.[5]

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1. Mark Tushnet, *The Judiciary and Institutions of Judicial Review*, 8 AM. U.J. INT'L L. & POL'Y 501 (1993).

2. U.S. CONST. art. III, § 1.

3. The last constitution of the former Soviet Union was published in 1977. KONST. SSSR (1977). *See also* ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 194-201 (1981) (commenting on the constitutionally-protected rights of Soviet citizens).

4. U.S. CONST. amend. I (establishing freedom of speech as a constitutional right). The most recent USSR Constitution also contained a guaranteed right to freedom of speech. KONST. SSSR art. 50 (1977). However, this right was recognized "in conformity with the interests of the people and in order to strengthen and develop the socialist state." *Id.* Thus, freedom of speech was protected in the former Soviet Union only to the degree it did not undermine state goals.

5. U.S. CONST. amend. I. The USSR Constitution contains a similar clause

But it was an independent judiciary in the United States that protected freedom *after* speech, and freedom *after* assembly in America, in contrast to what the situation was in the Soviet Union. This, then, is an important topic.

II.

Professor Tushnet persuasively outlined[6] the risks of other government systems transposing our system of an independent judiciary and judicial review into their judicial systems. It has taken our tradition 200 years to develop and mature, and even then, I think, it is far from being fully secure. On a number of occasions in the past decade, I have had the opportunity to talk to people from such countries as Taiwan, Korea, the People's Republic of China, and, more recently, from states of the former Soviet Union. I found that these people, who believe deeply in democracy and individual liberty, and those who were judges in particular, viewed the American system of judicial review as being extremely attractive. But two centuries of the exercise of power carries a great deal of weight. Therefore, I share Professor Tushnet's thoughts regarding modes of interpretation,[7] though I am not as certain that there is as sharp a contrast between what he has labeled formalist and instrumentalist interpretation. Nonetheless, there are significant differences, and I agree with the notion that it will take time — a decade or so is probably not long enough — before a court in a new judicial system can assume the sort of authority over public affairs that the United States Supreme Court has exercised in our society.

III.

I will briefly address two issues concerning an independent judicial system that Professor Tushnet did not elaborate on. First, he mentioned the question of whether a judicial system ought to have a constitutional court (as in several western European countries) rather than what we in the United States describe as a court of general jurisdiction. The fact is that the United States Supreme Court is not far from being a constitutional court in that a very substantial percentage of its business concerns constitutional issues, many highly controversial. I think it is desirable to have a court with fairly limited jurisdiction, largely, but not

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protecting freedom of assembly. KONST. SSSR art. 50 (1977).

6. *See* Tushnet, *supra* note 1, at 501-05.

7. *See* Tushnet, *supra* note 1, at 511.

exclusively, committed to constitutional adjudication. There is a valuable expertise that may be developed by a single court making a series of decisions regarding a wide range of important constitutional questions. Strong evidence of the need to develop expertise and recognized authority in constitutional law may be seen by surveying professors of a subject other than constitutional law regarding constitutional interpretation. Generally, no matter how astute these professors may be, there is usually something missing in their overall understanding of what the Supreme Court is doing. I think this is also true in the lower state and federal courts in the American system. Highly conscientious and intelligent judges may often be found either taking too literally or too seriously what the Supreme Court has said, or putting too much weight on a single decision without fully appreciating the larger landscape on which the opinions are written.

On the other hand, I believe that the Supreme Court's non-exclusive jurisdiction has had a positive effect in our system. It has enabled the Court to make what we might call "sub-constitutional" decisions, i.e., ones that articulate important constitutional values but which nonetheless rest final authority with the political branches: either Congress or the President. It is desirable to permit the Supreme Court to render far-reaching rulings by means of statutory interpretation, or by creating federal common law principles (usually in respect to the administrative process or the criminal justice system). This gives the political branches an opportunity to consider the matter seriously, and it allows the Court to have a very substantial impact without bearing ultimate responsibility for what it has done. This is an effective self-preservation device and is largely the system in England: powerful decision-making authority by courts, but without ultimate political responsibility for what they do.

Second, the matter of the selection and tenure of judges merits attention. The United States has a unique system to preserve the independence of judges. I think this independence accounts for a large measure of our nation's success in enforcing what Professor Tushnet called precommitments[8] - ideals that most people agreed with at the time of enactment, but which fall out of favor when pressing circumstances seem to call for modifications. But the need for an independent judiciary does not reveal how we ought to select the judges. Indeed, after 200 years, we still lack a clear understanding of the respective roles of the President and the Senate in regard to selection. Strong criticism and controversy continue to surround the criteria that the President uses to make

8. *See* Tushnet, *supra* note 1, at 506, 508-14.

nominations, and that the Senate uses to confirm them. While this is neither the time nor the place for well-developed proposals, I think that this issue is entitled to careful consideration and articulation in the formation of a new constitution by a new nation, particularly if it wishes to have a powerful judiciary.

As for length of terms, the principal purpose of giving American federal judges life tenure has been to insure their independence. I believe that life tenure is a question that ought to be seriously reviewed in a new system, and even reconsidered in our system, especially for a judicial body with the policy-making role that our Supreme Court has assumed. I say this from a non-partisan perspective. In the last several decades we have observed liberal justices — many greatly admired, I should say — remaining in office beyond the time that they really wish because they do not want their successors appointed by a President with whom they do not agree. We have also observed at least one presidential administration — a strongly conservative one — make the age of potential nominees a prominent criterion. There may well be good reasons for appointing young people with fresh ideas and perspectives. But I do not consider it to be a good reason to appoint them because they promise to have an impact long after the presidential administration has ended.

There are ways to preserve the complete independence of Supreme Court justices and still limit the length of their terms. They can have long terms — say 12, 15, 18 or even 20 years. They can receive full salary after that; it wouldn't be very expensive. It might also be provided that retired justices could hold no other public office, and perhaps even no other compensated employment at all. They could continue to pursue interesting and useful professional lives by serving as judges on lower federal courts, as many retired justices have done. I suggest this matter might profitably be rethought.

IV.

Finally, there is much to be learned from the deficiencies in our constitutional system. In my view, a number of these deficiencies may even be called failures because they go to the heart of our system of representative government. These deficiencies significantly contribute to the inability of the elected officials in the political branches of our national government to confront the great challenges facing the nation. It is not that Congress is enacting oppressive legislation, and it may not even be that it is enacting bad legislation. But the sad reality is that the political branches refuse to deal with serious problems in the absence of some

crisis, problems that most people, regardless of political affiliation, feel ought to be handled in some way by our national government. For example, to take something relatively neutral: the energy shortage.

What are some of these deficiencies of our Constitution? Briefly, I think our experience has shown that its designated term of office of two years for the House of Representatives is too short, particularly when its members are as concerned as they are with their own re-election. I think the role of financial resources in political campaigns, a subject the Supreme Court has addressed, greatly limits the nation's ability to deal with the central problem. And I end with another very controversial statement, one concerning the extent of protection that the First Amendment gives to the media. In this country — and there is reason to believe that it would not be substantially different in others that emulate our system — the media play an enormous role in determining who gets elected to public office and what those officials do when they attain public office. The tail wags the dog: the candidates say what they know the media will report; the media report what they believe sells well; and substance and effective government are the eventual losers.

I think these illustrate shortcomings in our system of government that occupy a central role in the continued vitality of the United States. In important ways, emerging government systems have an opportunity to make a fresh start and learn not only from our successes but from our failures as well.