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To the People of Iceland:

The greatest threat to democracy is concentrated, unchecked power. Nations endure when powers are balanced among co-equal branches of government, minimizing risk that one branch will overwhelm the others. Chief among the protections against tyranny is an independent judiciary, one not beholden to an executive yet also capable of quelling an overreaching legislature. An independent judiciary ensures a balance of power among government actors while protecting a nation's citizens against the excesses of unchecked power.

In the Comparative Constitution Project's Constitution Rankings, Iceland's constitution receives one of the lowest judicial independence rankings.¹ The current 1944 Icelandic constitution, one of the shortest in existence, devotes only three articles (Articles 59, 60, and 61) to the judiciary.² These governing articles do not explicitly provide for an independent judiciary.³ This omission is remedied in the proposed constitution by explicitly declaring that "[t]he independence of the courts shall be ensured by law."⁴ This addition would immediately increase Iceland's judicial independence ranking. Further, this explicit constitutional declaration complies with the United Nations' 1985 Basic Principles on the Independence of the Judiciary, which requires that an independent judiciary "shall be guaranteed by the State and enshrined in the Constitution or the law of the country."⁵

An independent judiciary has two vital ingredients: (1) a separate sphere of operation from the executive and legislative branches of government, and, (2) positional and financial security for those serving as judges.

The first ingredient requires sufficient separateness from other branches of government to ensure that constitutional questions are resolved by those removed from the lawmaking process. How can there be any confidence in a judicial decision that is rendered by the same body, or by individuals selected from the same body, that crafted the law in question? There must be a division of both labor and power—one entity to make the law and a separate entity to ensure that those laws comport with the constitution.

¹ <http://comparativeconstitutionsproject.org/ccp-rankings> The Comparative Constitution Project's rankings consider six variables relating to judicial independence, including: "(1) whether the constitution contains an explicit statement of judicial independence; (2) whether the constitution provides that judges have lifetime appointments; (3) whether appointments to the highest court involve either a judicial council or two (or more) actors; (4) whether removal is prohibited or limited so that it requires the proposal of a supermajority vote in the legislature, or if only the public or judicial council can propose removal and another political actor is required to approve such a proposal; (5) whether removal explicitly limited to crimes and other issues of misconduct, treason, or violations of the constitution; and (6) whether judicial salaries are protected from reduction."

² <http://www.government.is/constitution>

³ There is some measure of protection afforded the second type of judicial independence—that relating to positional security—in Article 61. <http://www.government.is/constitution>

⁴ http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf

⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

Alexander Hamilton emphasized the importance of separate operating spheres in Federalist 78 wherein he exclaimed:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.⁶

Hamilton was not speaking about judicial superiority. Rather, in noting which governmental arm was best suited as a check on legislative and executive excesses, Hamilton reminded us that an independent judiciary would adequately preserve liberty by being focused solely on the constitution, not on outside political forces.

William Rawle, in *A View of the Constitution of the United States* (at 199–201), similarly noted:

A Constitution in which there was an omission to provide an adequate judiciary could not be successfully carried into effect; and if instead of being separate and independent, this power were either blended with the [executive or legislature], or those who administer it were dependent on the will and pleasure of others, its lustre would be tarnished and its utility destroyed.⁷

Separating the judiciary from the other branches of government is a critical feature in constitutional governments. Blackstone observed that such separation helps prevent corruption and tyranny. “In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.”⁸

The need for an independent judiciary—one separate in existence from other branches of government—was demanded in the Declaration of Independence. The colonists complained that King George controlled both the judges and the judiciary. The complaint challenged, “He has obstructed the Administration of Justice, by refusing to Assent to Law for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”⁹

This leads us to the second feature of judicial independence: positional and financial security.

An independent judiciary must be insulated from the politics of the moment. To be truly independent, judges must operate without fear of losing their position or salary during their tenure. Positional security has not presented a problem in Iceland’s past. But constitutions are drafted to guard against future mischief from unknowable threats, not merely present concerns. Positional security minimizes the chances a judge will render decisions based on political allegiances or out of fear of retribution. Terms of office that are free from political influence help ensure a judge

⁶ http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html

⁷ http://press-pubs.uchicago.edu/founders/documents/a3_1s35.html

⁸ http://press-pubs.uchicago.edu/founders/documents/a3_1s1.html

⁹ <https://www.billofrightsinstitute.org/founding-documents/declaration-of-independence>

remains loyal to the constitution alone. The independent judge serves the nation and its people, not its elected leaders.

These features of judicial independence have ancient roots, first appearing in the British Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject in 1700 and 1701.¹⁰ The Act states that “after the Limitation shall take Effect as aforesaid Judges Commissions be made Quam diu se bene Gesserint and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them.”¹¹

Hamilton spoke at length in Federalist 78 about the importance of positional security.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

...

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.¹²

While political considerations often motivate judicial appointments, insulation from loss of position or salary while in office helps inoculate those whose primary responsibility is fidelity to the rule of law. Positional confidence and financial security help avoid corrupting judges in a given political climate. Any term of office need not be permanent, but it must be sufficiently long to allow a measure of confidence in the decisional process.

The 1985 Basic Principles on the Independence of the Judiciary mandates that judges be provided legal security in their terms of office.¹³ Both the current and proposed Icelandic constitutions provide some positional security. The main distinction between the current and proposed constitution is that the proposed constitution eliminates a mandatory retirement age and limits reasons for removal.¹⁴ While both constitutions establish that judges cannot be removed from their positions without cause, the proposed constitution increases positional security by not only protecting against removal from office without “court verdict,” but by further limiting removal to

¹⁰ <http://www.british-history.ac.uk/statutes-realm/vol7/pp636-638>

¹¹ <http://www.british-history.ac.uk/statutes-realm/vol7/pp636-638>

¹² http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html

¹³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> Iceland is a member of the United Nations. Any future constitutions should contemplate its membership in international bodies. *The Basic Principles* appear to be widely accepted among nations.

¹⁴ Compare Article 102 in the proposed constitution with Article 61 of the current constitution (which establishes that a judge reaching age 65 “may be released from office”).

those instances where a judge “no longer fulfils the conditions of performing the duties of his post or no longer performs the duties related to his task.”¹⁵

A remaining shortcoming (in both constitutions) is the lack of financial security in judicial positions. The 1988 Act on the Judiciary governing Iceland’s courts does not remedy this deficiency.¹⁶ Rather, the statutory scheme empowers a civil service board to control judicial salaries.¹⁷ This approach permits real, and imagined, crises to serve as an impetus to lower judicial salaries and, possibly, influence judicial outcomes. Any entity that has vacillating power to control judicial salaries retains the power to undermine fidelity to law and opens up judicial officials to impure influences. To enhance judicial independence, judges should not fear that their salary is tied to decisional outcomes or political movements. The threat that judges may lose a portion of their salary during their tenure creates an equally serious vulnerability as if they were to lose their position. Financial security is one feature of judicial independence that helps ensure judges are guided by law and not basic financial needs.

Overall, the proposed constitution improves Iceland’s commitment to judicial independence by more clearly protecting criteria contained in sustainable constitutions. The current constitution’s articles relating to the judiciary are blended into more specific protections for judicial independence in the proposed constitution. Article 100 in the proposed constitution declares that courts “shall decide whether laws are in conformity with the constitution.” This explicit power of judicial review further ensures that the courts will provide a constitutional check against executive or legislative encroachments on citizen liberties. Additional criteria is included that provides job security untethered from age. Although the “minister appoints judges and releases them from their duties,” no judge can be “finally removed from his post except by a court verdict and only then if he no longer fulfils the conditions for performing the duties of his post or no longer performs the duties related to this task.”¹⁸ This explicit limitation on removal provides important security to judicial independence because judges can truly be bound to the governing law rather than the governing party. Such explicit protection against arbitrary removal is an important criterion in rating judicial independence. It also helps ensure that qualified individuals will seek out these positions knowing that their positions are secure despite instances where the law directs an unpopular result. Positional security also helps fulfill the mandate in the proposed constitution’s Article 103 that “judges shall only be guided by the law.”¹⁹ Protection from financial or positional backlash for rendering difficult decisions helps judges rely on the law and the constitution rather than self-interest in their positional security.

Whether the issue is financial security or positional security, the threat to judicial independence is the same. Judges must be free to decide difficult matters without fear of retribution. The proposed constitution moves further toward protecting these vital features of judicial independence and should be welcomed and embraced.

Constitutional text matters. The written words memorialize a country’s commitment to principles that do not vary, as constitutions embody permanence. Properly constructed, a constitution guards citizens against the abuses of government. It divides governmental actions and limits governmental powers. The current Icelandic constitution has many admirable features. But re-

¹⁵ See Article 102.

¹⁶ <https://eng.innanrikisraduneyti.is/laws-and-regulations/english/judiciary>

The 1988 Act has been amended several times. This section takes into consideration all amendments.

¹⁷ <https://eng.innanrikisraduneyti.is/laws-and-regulations/nr/109> See Section 25.

¹⁸ http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf See Article 102.

¹⁹ *Id.*, Article 103. This same language appears in the current Constitution at Article 61.

garding judicial independence, the current constitution can be improved by providing more specific protections to the judiciary against executive and legislative encroachments, including more firmly protecting the positional and financial security of judicial officers. The proposed constitution goes further in providing positional security than the current constitution. It comes closer to meeting the requirements of true judicial independence than the status quo. In any event, financial security for judges must be addressed. Textual commitment set forth explicitly in a constitution preserves judicial independence in ways that simple statutory protection cannot.

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