

TO CONCUR, OR NOT TO CONCUR: THAT IS THE QUESTION:
THEORETICAL AND PRACTICAL QUESTIONS REGARDING THE
JUDICIAL INDEPENDENCE OF JUDGES APPOINTED TEMPORARILY TO
THE ISRAELI SUPREME COURT

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ABSTRACT

In many democratic societies, judicial tenure is perceived to be an important safeguard for the judiciary's independence. In Israel, although judicial tenure is secured under *Basic Law: The Judiciary*, the promotion of judges from Israel's District Courts to the Supreme Court is usually preceded by a *temporary appointment*. In practice, this temporary appointment serves as a "probationary period" after which the judges are considered for the permanent position of Associate Justice. One of the important implications of this promotion system is that while serving on Israel's highest court, temporarily appointed judges continue to depend on external forces to retain their offices. Therefore, I argue that from a theoretical standpoint, temporary appointments pose a substantial threat to the judicial independence of individual judges. Because of the significant role played by Supreme Court Justices in the appointment process, I identify the threat to judicial independence as primarily originating *within* the judiciary, rather than from other branches of government.

The major objective of this study is to examine the degree to which the theoretical threat to internal judicial independence can be seen to materialize in the Israeli Supreme Court example. The study examines whether the reliance of temporarily appointed judges on the approval of their senior colleagues to gain tenure may deter them from voicing dissenting opinions or from expressing controversial views during their one-year temporary appointments.

The study employs both quantitative and qualitative methods, most of which were devised specifically for this study and which focus primarily on *individual* judges. The study surveys almost 1,000 decisions rendered between 1999 and 2005 by seven judges who were first appointed to the Supreme Court temporarily and who were subsequently appointed to Associate Justices. The quantitative study compares the decision-making *patterns* of the judges, both individually and collectively, *before* and *after* they were granted tenure. The qualitative study closely examines and compares the decisions of three of the judges *before* and *after* they were promoted, in an attempt to gauge changes in the views that they expressed on well-defined topics. In examining these changes, I offer alternative explanations for the differences both in the trends and in specific judicial decisions to better evaluate whether the changes may be attributable to tenure. Although the findings of the study are not definitive from a statistical standpoint, they offer interesting evidence pertaining to the effects of tenure on decision-making as well as valuable observations regarding the appointment process and the internal practices of the Israeli Supreme Court.

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