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Selecting the Very Best: The Selection of High-Level Judges in the United States, Europe and Asia

Christa J. Laser

Cleveland-Marshall College of Law, Cleveland State University, c.j.laser@csuohio.edu

Tefft Smith

Michael Fragoso

Christopher Jackson

Gregory Wannier

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Selecting the very best

**The selection of high-level
judges in the United States,
Europe and Asia**



This research was prepared on a pro bono basis by Kirkland & Ellis LLP.

Authors: Tefft Smith, Michael Fragoso, Christopher Jackson, Christa Laser,
and Gregory Wannier.

Selecting the very best

The selection of high-level judges
in the United States, Europe and Asia

KIRKLAND & ELLIS
A LAW FIRM SERVING GLOBAL CLIENTS

for

DPLf Due Process
of Law
Foundation

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PROLOGUE

An independent judiciary is an essential prerequisite for a democratic State governed by the rule of law. Several international instruments, as well as the jurisprudence of the Inter-American Court, recognize the independence of the judiciary from other branches of government. Judicial review of the constitutionality and legality of the acts of government, which is arguably the judiciary's most significant role in a democratic system, is only possible in a context of judicial independence. Therefore, judicial independence is an essential principle for ensuring the respect of human rights.

However, the studies executed and experience acquired by DPLF show that in Latin America, respect for judicial independence is deficient and that, as a result, the judiciaries in the region remain weak. Although threats to judicial independence may come from various sectors of society, interference in the work of the judiciary is largely caused by other political powers. Such interference can be seen clearly in the appointment of 'friends' or 'trusted' individuals to the highest courts of a country.

This has serious implications, especially in democracies where institutions are still fragile and institutional leaders play a fundamental role. Not only do they direct the course of institutions, but they also act as role models. When their leaders are competent professionals of high moral standing, institutions can make important progress in strengthening the rule of law. Otherwise, influence-peddling and corruption erode democratic institutions and become entrenched. Sadly, this is largely the case in many Latin American countries.

As a result of attempts to control the high courts of justice through politically motivated appointments –instead of nominating candidates based on their merit– the members of the highest courts in the region are not necessarily the most qualified professionals, but rather individuals having a personal or ideological affiliation with the political power in office. At the very least, this gives the impression that such judicial officials lack independence. In practice, it also prevents the effective separation of powers: due to political influence, the judiciary fails to fulfill its democratic role as a check on the other powers of government, hindering the operation of the rule of law.

Besides when influence is purely political, for instance when a powerful sector of the economy has strong links with the corridors of power, it appears that judicial decisions that affect economic interests are controlled by those powers regardless of the public interest.

Not only is the functioning of a country's highest courts of justice impacted by shortcomings in the system for the selection of their members, the lower court are affected as well. Due to the influence exerted by the highest courts over lower judges in decisions concerning appointments, promotions and disciplinary matters, controlling the justices of the highest courts of a country guarantees the power to influence the entire judiciary.

This highlights the fundamental need to improve the systems for the selection and appointment of the highest court justices. Improvements made in the selection process will not solve all the problems affecting the judiciary, but having individuals of greater integrity and ability will allow us to begin to address other concerns.

The main problems identified by DPLF¹ are:

1. Lack of an independent and autonomous body responsible for the selection procedure;
2. Lack of a clear and previously established selection procedure explaining how candidates should be assessed;
3. Lack of objective criteria for the assessment of candidates; and
4. Lack of transparency of the selection procedure and lack of meaningful civil society engagement in general.

DPLF has developed *Guidelines for a transparent and merit-based system for the appointment of Supreme Court justices*, as an input to improve selection procedures. These guidelines are based on international standards, and capture international best practices. The guidelines include suggestions concerning selection procedures and the required qualifications for justices.

With regard to the **selection procedure**, DPLF considers that:

- The entities responsible for shortlisting the candidates must be **autonomous**;
- The **desired profile** of justices should be **clearly** and **previously established**;
- The requirements and abilities of candidates should be established and published **in advance** of competitions, and the assessment criteria should be **explicitly** stated;
- The **selection procedure**, as well as the responsibilities of all actors engaged in such procedure, should be **clearly established**;
- The **transparency** and **publicity** of all stages of this procedure should be ensured;
- The entities responsible for shortlisting the candidates should be able to receive **challenges** from different sectors of society against the candidates and to investigate such challenges; and
- **Public hearings** must be held to assess the candidates' qualifications.

¹ See: Due Process of Law Foundation (DPLF), *Estado de Derecho e independencia judicial en Centroamérica*, report presented before the Inter-American Commission on Human Rights, October 2012, available at www.dplf.org.

To ensure that only the most suitable candidates are selected, DPLF believes that the **required qualifications** should include:

- **Independence and impartiality** (both objective and subjective);
- **Reputable conduct** and a **spotless personal and professional record of integrity**;
- **Extraordinary knowledge of the law**;
- **Good oral and written communication skills and analytical competency**;
- Well-developed **creative intelligence**;
- Ability to find **solutions to the problems** presented to them;
- Capacity to **seek and build consensus**;
- Ability to **take into account other people's views**;
- Commitment to the **judiciary as a public institution**;
- Demonstrated commitment to the **protection of human rights, democratic values and transparency**;
- Ability to **understand the social and legal consequences** of judicial decisions; and
- Ability to strike a **sound balance** between a high level of **productivity**, the **quality** of judicial decisions and a **careful consideration** of cases.

DPLF has found that comparative experiences regarding the selection of high-level justices can provide valuable insight. However, it is important to emphasize that suggesting new models or copying those of other countries will not suffice. On the contrary: we should bear in mind that each country's reality is different, and that local experts will be best placed to establish which elements would be useful in their country.

As many countries have dealt with the problems associated with the appointment of high court justices, a range of models are now available. Although some have achieved better results than others, we feel that important lessons can be drawn from the most salient experiences, including unsuccessful cases. Understanding why some practices have worked and others have failed is an important step. Learning about these experiences can help national experts develop suitable mechanisms for the context of their respective countries.

For this reason, DPLF considers that a comparative study of judicial appointment practices is an important contribution to this discussion. The reputable law firm Kirkland & Ellis LLP has generously agreed to conduct this study pro-bono. A highly motivated team of attorneys, led by Tefft Smith, and consisting of Michael Fragoso, Christopher Jackson, Christa Laser, and

Gregory Wannier from that law firm, performed a comparative analysis of the procedures for the appointment of high court justices in the United States, both at the federal and state levels. These practices were also examined in other European and Asian countries to provide a fuller picture of the selection of justices internationally.

DPLF believes that this study is a valuable contribution to ideas and debates in Latin America regarding judicial selection, and would like to thank Kirkland & Ellis LLP for their dedication in conducting this research and for their crucial support in making this publication possible.

Katya Salazar

Executive Director

Due Process of Law Foundation (DPLF)

Mirte Postema

Senior Program Officer

Judicial Independence Program

Due Process of Law Foundation (DPLF)

Introduction

This paper has been prepared by Kirkland & Ellis LLP for the Due Process of Law Foundation (“DPLF”), an organization dedicated to promoting and strengthening the rule of law and the respect for human rights in the Americas. The goal is to provide further stimulus to the enhancement of due process and the rule of law in Latin America by encouraging the transparent, merit-based selection and appointment of competent, independent, and impartial judges. An independent and impartial judiciary is an essential precondition to the effective operation of the rule of law, with due process for all. This, in turn, is vital for the existence of democratic societies.

There is general recognition that the protection of human rights and the promotion of economic development are best achieved under a political system governed by the rule of law. The critical importance of the rule of law is underscored by the recently initiated and comprehensive World Justice Project (“WJP”), financed by the Bill Gates Foundation and others. The Project was premised on the principle that “[e]stablishing the rule of law is fundamental to achieving communities of opportunity and equity—communities that offer sustainable economic development, accountable government, and respect for fundamental rights.”²

The overall success of a nation -- both politically and economically -- is enhanced by the perception of its general populace that the decisions of the country’s judicial system are based on the rule of law, instead of on political influence or economic corruption. The World Economic Forum issues an annual Global Competitiveness Report (“GCR”) that analyzes various countries’ legal systems on a variety of factors that highlight the importance of the rule of law for the functioning of democratic societies, with due process for all.³

The GCR report focuses on a country’s “institutional environment.” That is largely “determined by the legal and administrative framework within which individuals, firms and governments interact[.]” Key factors for an institutional environment are “judicial independence . . . from influences of members of government, citizens or firms;” legal protection of intellectual and other property rights; the level of corruption in judicial and governmental decisionmaking; the “efficiency” of the legal system in allowing challenges to governmental action and regulation and in resolving private disputes; and the “transparency” of governmental decision-making.⁴

Both the World Justice Project and the GCR have analyzed how effective the rule of law is in Latin America. They report that the general perception is that, in many Latin American countries, the judiciary is neither politically independent nor impartial. There is a belief that much of the Latin American judiciary is subject to executive governmental and economic corruption. As the WJP observed, “Latin America presents a picture of sharp contrasts. In spite of recent

² MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012-2013 1 (2013), http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf (hereinafter “WJP 2013”).

³ WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2011-2012 4 (Klaus Schwab ed., 2011), available at http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf (hereinafter “GCR”).

⁴ *Id.* at 395, 390-409.

movements towards openness and political freedoms that have positioned many countries at the forefront of protecting basic rights and civil liberties, the region's public institutions remain fragile. Corruption and a lack of government accountability are still prevalent[.]”⁵

Likewise, the GCR states that first among “the persistent challenges” that face Latin American countries is “weak” legal and other institutions. Indeed, on the critical issue of judicial independence, out of 142 nations rated, Venezuela ranked dead last, Paraguay was 138th, Nicaragua 136th, Panama 133rd, Ecuador 130th, Argentina 124th, Peru 119th, Guatemala 117th, El Salvador 106th, Bolivia 100th, Mexico 89th, Colombia 81st, Honduras 77th, and Brazil 71st. Only Costa Rica (38th) and Chile (24th) had above-average ratings.⁶

As emphasized in the World Justice Project, an essential element for assuring that judges are impervious to efforts at political and economic corruption (and that their rulings are based on the law and facts) is to assure that the judicial selection process produces a competent, independent, and impartial judiciary, committed to due process for all. Indeed, one of “the four universal principles” for the proper functioning of the rule of law is that “[j]ustice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”⁷

“Independence” means freedom from political influence or economic corruption. “Competence” is defined not only by knowledge of the law but by life and legal experience, and by a “judicial temperament.” “Impartiality” is the core qualification that has been consistently identified as being the type of judicial temperament desired for an independent judiciary.

The need for a competent and independent judiciary is universally recognized as essential to individual rights and due process of law. As Article 14 of the International Covenant on Civil and Political Rights notes, “All persons shall be equal before the courts and tribunals [and] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁸ Likewise, Article 8 of the Inter-American Convention on Human Rights provides: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law[.]”⁹

Many differing methods have been tried (with varying degrees of success) to promote the existence of a competent, independent and impartial judiciary. Selection processes range from executive appointment (sometimes with legislative approval), to popular elections, to selection by “senior” judges, or groups of legal professionals. Differing terms of service exist, varying from lifetime appointments, to specific numbers of years, to life tenure with various mandatory retirement ages and/or unless removed by popular vote, executive or legislative action.

⁵ WJP 2013, *supra* note 2, at 44.

⁶ GCR, *supra* note 3, at 31, 395.

⁷ WJP 2013, *supra* note 2, at 9.

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966 *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁹ Organization of American States, Inter-American Convention on Human Rights Article 8, section 1 (Nov. 22, 1969) *available at* <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>.

Each of these approaches has its pros and cons. The following is a review of how judges are selected in the United States and in a cross-section of European and Asian countries. The focus is upon the process for selecting the judges for the “Supreme” or highest court in each jurisdiction. Typically, a nation’s Supreme Court sets the tone for the rest of the judicial system. The Supreme Court is often not only the final authority on the interpretation of a nation’s laws, but is also responsible for the internal administration of the country’s judicial system. Further, a nation’s Supreme Court often also has disciplinary (as well as appellate review) powers over the nation’s lower-court judges.

In sum, there is no “perfect” model for selecting judges for the highest courts of a country. The results that will be obtained by any particular model are highly dependent on the political and social context of a country—or state. A method that works well in a particular country might not produce desirable results elsewhere, which is why an analysis of the local context is always an essential starting point. That said, the analyses of the strengths and weaknesses of the selection methods adopted in the United States and in various European and Asian countries may be instructive in assessing what might work for any country considering efforts to enhance the effectiveness of the operation of the rule of law in that country.

It is important to note, however, that the process for the appointment of a nation’s Supreme Court justices is but one factor in enhancing the effectiveness of the rule of law in that country. The importance of whom is to become a Supreme Court justice means that better candidates emerge and the process of selection becomes of greater public interest, promoting the transparency that is essential to the best outcomes for the public at large. The size of the Supreme Court matters as well; it should be a reasonable, uneven number. Too many justices make deliberations and decision making inefficient.

Questions have been raised about the wisdom of life tenure (as is still granted to U.S. Supreme Court Justices) in an age of extended longevity. Mandatory retirement ages have been adopted in many jurisdictions, with no seemingly detrimental effects on the ability to attract competent persons to serve on a nation’s highest court. A mandatory retirement age—of not less than 70 nor more than 80 years of age—seems sensible to this day and age.

Experience also suggests that the best outcomes are achieved where judicial pay and pensions are guaranteed.

To minimize existing governmental control over the judiciary, it has been shown that the right to remove a Supreme Court justice should be carefully circumscribed to conduct detrimental to the independence and integrity of the Supreme Court itself, *e.g.*, evidence of corruption, mental incapacity, criminal misconduct, etc. The process for removal should mirror the method for approving a justice. No justice should be removed without having the due process of open hearings on the grounds for removal. Impeachment should, for example, require a two-thirds majority vote to deter ready resort to the removal process for political dissatisfaction.

At the end of this paper, we will elaborate on these points and make more detailed suggestions on the qualifications that are desirable for the justices of a nation’s Supreme Court. Ultimately, it is the quality of the justices that will best assure their independence, impartiality and

effectiveness in enforcing the rule of law. Consideration should be given to promoting diversity on the Supreme Court, with a fair representation of women and differing ethnicities residing in the nation involved.

Lastly, and most importantly, it is essential for the effective operation of the rule of law that there be a societal as well as a governmental commitment to equal justice for all. That is best achieved by active attention to and coverage by the press and other media of what then becomes a transparent, public process for the appointment and selection of the nation's Supreme Court justices. The societal commitment is further fostered by educating the nation's citizenry—from an early age—on the values of free speech and freedom of the press *and* the benefits of a competent and independent judiciary, with Supreme Court justices who can and will enforce the rule of law, with due process for all. Therefore, a courageous press and committed educators at all levels are need if there is to develop the type of societal demand for the rule of law and respect for human rights that will be honored by the nation's governmental officials.

I. The Appointment Process for Justices of the U.S. Supreme Court

A. The Evolution of the Supremacy of the U.S. Supreme Court

The respected standing of the United States Supreme Court, as the accepted ultimate arbiter of all important legal issues facing American society, is the product of a long (albeit early on contentious) evolution. Indeed, the American Revolution of 1776 was in large part prompted by complaints of American colonists about the arbitrary and extraordinary power of the “judges” appointed by the designees of the English King.¹⁰ “Judges” were appointed not so much for their legal acumen as their social and political connections. Being a judge was simply one among many political and administrative powers.¹¹

Accordingly, immediately after the American Revolution there were efforts in many of the former English colonies to reduce the influence of the judiciary. The resulting chaos yielded the U.S. Constitution, with its “checks and balances,” and tripartite “separation of [Executive, Legislative and Judicial] powers.” The Judiciary was given an equal place within the governmental structure alongside the Executive and the Legislative branches.¹² Article III of the Constitution provided for U.S. Supreme Court Justices to be appointed by the President, with the advice and consent of the Senate, to hold office “during good Behavior,” effectively life tenure.

A lifetime appointment (subject only to Legislative impeachment for gross malfeasance) was viewed as necessary to protect the impartiality of judicial decisionmakers from fear of retribution by public and private actors.¹³ The drafters of the Constitution believed that life tenure would ensure an “independent spirit in the judges” that would permit them to protect the Constitution from “encroachment” of the more political branches of government. The drafters explained that “nothing can contribute so much to [the federal judiciary’s] firmness and independence as permanency in office.”¹⁴ The belief was that, if a judge could be removed for a politically unpopular decision, the judge would be much more likely to render politically popular decisions so that his or her future career would be better protected after leaving office. As one scholar has observed, “Regardless of whether a judge is elected by the public or appointed by public officials, if the judge has life tenure, it is thought that the judge will feel free to enforce

¹⁰ “Indeed, one of the major complaints of the American colonists against royal authority in the eighteenth century was the extraordinary degree of discretion exercised by royal judges.” Gordon S. Wood, *Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION* 49, 50 (1997).

¹¹ *Id.* at 53. Professor Wood tells of one “Thomas Hutchinson of Massachusetts,” who, in the 1760s, was “chief justice of the superior court, lieutenant governor, member of the [legislative] council, and judge of probate of Suffolk County all at the same time.”

¹² *Id.* at 52.

¹³ Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 584, 591 (2005).

¹⁴ Denis Steven Rutkus, Congressional Research Service, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* 1 (2010) (quoting Alexander Hamilton, *Federalist Paper* 78).

constitutional restrictions on public preferences. By contrast, if the judge has to come before the public or even elected officials periodically, it is thought that the judge may not feel so free.¹⁵

Independence was further protected by the Constitution's guarantee of the judiciary's pay, so that the Legislature cannot use compensation as a tool of control. The reasoning was that, if a judge could keep the job but face a pay cut for rendering politically unpopular decisions, the judge would again be leery of making those decisions.¹⁶

Notwithstanding the intent of the Constitution's authors, initially there were questions about the political independence and impartiality of the first appointees to the Supreme Court. Justices John Jay and Oliver Ellsworth notably operated as diplomats while on the first Supreme Court. Jay even served simultaneously as Secretary of State and the Court's Chief Justice.¹⁷

Shortly before John Adams's defeat by Thomas Jefferson in the Presidential election of 1800, Adams appointed one of his "Federalist" friends, Samuel Chase, as a Supreme Court Justice, with the consent of the then-Federalist-controlled Senate. The "Democrats" (or "Jeffersonians") who won both houses of Congress as well as the Presidency, promptly attempted to impeach Justice Chase based on his alleged Federalist partiality. That effort failed, thereby setting an important and now respected precedent in the United States that the Legislature should exercise caution in attempting to influence the Supreme Court with even the threat of impeachment proceedings. No U.S. Supreme Court Justice has ever been impeached.¹⁸

Fortuitously, the United States was blessed with the early emergence (and long tenure, from 1801 to 1835) of John Marshall as Chief Justice of the Supreme Court. Chief Justice Marshall "retreated from . . . advanced and exposed political positions" and forcefully fostered the pre-eminence of the impartial rule of law.¹⁹ This was most dramatically demonstrated in the most famous of all Supreme Court decisions, *Marbury v. Madison*. There, in 1803, the Court declared in an opinion by Chief Justice Marshall, that it had the right to invalidate Congressional legislation as inconsistent with the rules of law established by the Constitution.²⁰

¹⁵ Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 852-53 (2012).

¹⁶ See U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

¹⁷ Wood, *supra* note 10, at 55.

¹⁸ See WILLIAM H. REHNQUIST, *GRAND INQUESTS* 114 (1992) ("The acquittal of Samuel Chase by the Senate had a profound impact on the American judiciary. First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to *safeguard the independence* of that body."). While impeachment and conviction is possible, no justice has ever been removed from office involuntarily, though one, Samuel Chase, was impeached but acquitted, some were investigated but not impeached, and another resigned prior to an investigation. RUTKUS, *supra* note 19, at 2 n. 6.

¹⁹ *Id.* at 56.

²⁰ 5 U.S. 137 (1803).

That was the start of a process that has resulted in American “[j]udges ha[ving] acquired an independent standing in American culture,” which enabled them to effectively curb abuses of executive and legislative power.²¹

B. The Transparent Selection Process for U.S. Supreme Court Justices

1. *The Formal Process*

The “Appointments Clause” of the Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”²² The Senate has developed detailed procedures to evaluate a candidate once nominated by the President. The Senate proceedings have become very public, with live televised hearings at all levels and intense media coverage.

Since the mid-1800s, the judicial nominees selected by the President have been reviewed first by the Senate’s Judiciary Committee.²³ The Committee issues each nominee an extensive personal data questionnaire seeking information on the nominee’s past legal experience, financial holdings, and writings. Most of the answers are made part of the public record for media and other commentary, with the exception of certain financial information and information from the FBI’s investigation of the candidate. The Committee also asks follow-up questions of the nominee (often based on suggestions from the press and interested citizens who have reviewed the publicly released materials). There are also requests for information issued to organizations for which the nominee worked.²⁴

By tradition, the chair of the Judiciary Committee invites the American Bar Association to make an evaluation of the professional qualifications of the nominee. The ABA’s assessment focuses on the issues of “integrity, professional competence and judicial temperament.” Specifically, when considering “integrity,” the ABA looks to the opinions of the legal community on the nominee’s character and reputation. The ABA’s evaluation of “professional competence” embodies qualities including knowledge, writing skill, and legal experience. When evaluating “judicial temperament,” the ABA considers traits including the nominee’s patience, decisiveness, and commitment to equality under the law.²⁵

Customarily, the ABA is the first witness at the public hearings that the Committee holds to assess the qualifications of the nominee.²⁶ In making its recommendation, the ABA reviews the nominee’s personal history and any published judicial opinions, written statements and other writings. The ABA utilizes groups of law professors and others who specialize in the Supreme

²¹ Wood, *supra* note 10, at 49, 58.

²² U.S. Const., art II, § 2, cl. 2.

²³ Rutkus, *supra* note 14, at 2.

²⁴ *Id.* at 22.

²⁵ AMERICAN BAR ASSOCIATION, ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf.

²⁶ Rutkus, *supra* note 14, at 24-26.

ABA's Considerations:

- **Integrity:** “the prospective nominee’s character and general reputation in the legal community, as well as the prospective nominee’s industry and diligence”
- **Professional Competence:** “intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience”
- **Judicial Temperament:** “compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law”

Court to review the materials. It conducts extensive confidential interviews with judges, lawyers and others who are familiar with the nominee’s experience and character. The ABA then interviews the nominee, providing him or her with an opportunity to rebut any unfavorable information. Finally, the ABA prepares a written report on the nominee, which is sent to the President and to the Judiciary Committee. The ABA rates the nominee as “not qualified,” “qualified,” or “well-qualified.” The ABA has, with few exceptions, found Supreme Court nominees to be “well-qualified.”²⁷

The nominee will then testify before, and be questioned by, the Judiciary Committee. Interested organization representatives

and citizens can ask to appear to make statements and be questioned about their support for (or opposition to) the candidate. Following the hearing, the Judiciary Committee will recommend (or not recommend) the candidate for confirmation. The Senate typically accepts the Committee’s recommendation, with the most recent exception being the confirmation of now-Justice Clarence Thomas, nominated by President George H.W. Bush in 1991. Justice Thomas was confirmed by a 52-48 vote in the full Senate, overriding a close Judiciary Committee vote recommending against his nomination.²⁸

The full Senate vote follows a floor debate amongst the Senators. Both the Judiciary Committee’s hearings leading up to its recommendation and the floor debate are televised, live. As noted, this has resulted in intense media and public scrutiny of the process and the qualifications and character of the nominees.²⁹

Almost all of the materials that the Judiciary Committee and the full Senate consider are

²⁷ AMERICAN BAR ASSOCIATION, ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 9 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf; see also AMERICAN BAR ASSOCIATION, EVALUATIONS OF SUPREME COURT NOMINATIONS, available at http://www.americanbar.org/groups/committees/federal_judiciary/resources/supreme_court_nominations.html (providing a rating and written report on nominees); Statement of Kim J Askew Concerning the Nomination of The Honorable Elena Kagan before the Committee on the Judiciary of the United States (July 1, 2010), at 5, 10 available at <http://www.americanbar.org/content/dam/aba/migrated/scfedjud/SCpage/kaganstatement.authcheckdam.pdf>; Rutkus, *supra* note 14, at 24-26, 35 n. 133.

²⁸ Rutkus, *supra* note 14, at 2 29-35.

²⁹ *Id.* at 35-38. For example, public broadcast television typically shows the entirety of the hearings, while private news organizations will highlight and comment on important clips. Additionally, the nominee’s answers at the hearings are subject to commentary in newspapers and editorials. See, e.g., Charlie Savage & Sheryl Gay Stolberg, *Kagan Follows Precedent by Offering Few Opinions*, N.Y. TIMES, June 29, 2010, available at <http://www.nytimes.com/2010/06/30/us/30kagan.html>.

made a part of the public record. For example, the voluminous materials for the recent hearings concerning President Obama's nominations of Elena Kagan and Sonia Sotomayor were available by retrievable internet links on the Judiciary Committee's website. The links included the answers to the Committee's questionnaire, responses of all parties to other information requests, and letters received favoring (or opposing) the respective nominations.³⁰ As a consequence of all of this scrutiny, the appointment process for U.S. Supreme Court Justices has become an intense and lengthy, multi-month exercise.

For example, Elena Kagan was nominated in May 2010 and confirmed in August 2010. Sonia Sotomayor was nominated in May 2009 and confirmed in August 2009. Samuel Alito was nominated in November 2005 and confirmed in January 2006. Each was the subject of intense press, internet and other media and public scrutiny.

2. *Informal Processes*

Presidents recognize that the choice of a Supreme Court Justice, with life tenure, can have an impact lasting long beyond the term of their Presidency.³¹ Given the importance of the selection of a Justice, Presidents carefully consider whom to nominate.

The President solicits recommendations from high-level advisors within the Cabinet, as well as from private lawyers and other sources. The Office of the Counsel to the President exhaustively vets potential candidates. A nominee's financial records are examined by the Federal Bureau of Investigations. Presidents typically conduct in-person interviews of prospective nominees to make sure that they are comfortable with making a choice which has proven to be one of the most important Presidential acts.³²

To maximize the likelihood of a successful appointment (and to minimize the delay and disruption of divisive confirmation battles), Presidents typically consult with Senators in advance, seeking bi-partisan support, before they formally nominate a candidate. Presidents (directly or through Executive Office advisors) discuss potential candidates with Congressional leaders for both parties, the members of the Judiciary Committee and Senators from the home state of the potential nominee.³³

Given the recognized importance and public interest in who will become a Supreme Court Justice, Presidents also float the names of potential candidates to the press to gauge the media's reactions, before formally nominating anyone. This is a more recent phenomenon given the

³⁰ United States Senate Committee on the Judiciary, *The Supreme Court of The United States*, <http://www.judiciary.senate.gov/nominations/SupremeCourt/SupremeCourt.cfm>; United States Senate Committee on the Judiciary, *Associate Justice of the U.S. Supreme Court - Elena Kagan*, <http://www.judiciary.senate.gov/nominations/SupremeCourt/KaganIndex.cfm>; see also, e.g., U.S. Government Printing Office, *Senate Hearing 111-1044: The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm>.

³¹ Rutkus, *supra* note 14, at 3 n. 9 ("Looking back on his appointment a quarter century before, [President] Adams in 1826 was quoted as saying, 'My gift of John Marshall to the people of the United States was the proudest act of my life.'").

³² *Id.* at 7, 11-14; 12 n. 46.

³³ *Id.* at 7.

emergence of an increasingly partisan and aggressive 24/7 internet and cable television media.³⁴ The media itself engages in ongoing speculation as to who are the likely candidates for the next Supreme Court vacancy.³⁵

Given the intensity, importance and public focus on the Senate hearings, the Office of the Counsel to the President spends considerable time and effort to help the nominee prepare for the Judiciary Committee hearing, and the many interviews requested by individual Senators before the final confirmation vote.³⁶

C. Criteria for Selection

1. *Formal Criteria*

Other than the requirement for “good Behavior,” there are no formal rules as to who can be a Supreme Court Justice.

2. *Informal Criteria*

There are, however, many informal considerations. At a minimum, the President wants to demonstrate that his Office has made a careful choice of someone with high professional qualifications, an impeccable character, legal experience and a judicial temperament.³⁷

These are the factors that are considered to be “givens” for a Supreme Court nominee. They are the criteria expressly evaluated by the American Bar Association in making its standard report to the Senate Judiciary Committee.³⁸ They are also the criteria stated to be the primary considerations by the President and all Senators involved.³⁹

a) *Judicial Temperament: Integrity, Impartiality and Competence*

The most often-cited professional qualification of a Supreme Court nominee is “judicial temperament.” A 1996 report by the Commission on Judicial Selection declared “judicial temperament” to be the “most important” of all qualifications.⁴⁰ As one of the Founding Fathers of the Constitution observed: “[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the status as judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.”⁴¹

³⁴ *Id.* at 26-27.

³⁵ See, e.g., Bill Mears, *Supreme Court Possibilities if Obama is Reelected*, CNN, Oct. 1, 2012, available at <http://www.cnn.com/2012/09/30/politics/court-obama-list>.

³⁶ Rutkus, *supra* note 14, at 28.

³⁷ Rutkus, *supra* note 14, at 8.

³⁸ AMERICAN BAR ASSOCIATION, *supra* note 27 at 9-10.

³⁹ Rutkus, *supra* note 14, at 10-11, 38.

⁴⁰ Miller Center of Public Affairs, *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges 10* (1996).

⁴¹ Rutkus, *supra* note 14 at 10 (citing Alexander Hamilton, *Federalist No. 78* (1788), in *THE FEDERALIST* BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY 496 (Benjamin Fletcher, ed.1966)).

Presidents have consistently declared that a judicial temperament is the key qualification.⁴² Senators who argue against a nominee typically assert that the candidate will advocate from the bench for some specific group of people or cause (e.g. pro- or anti-abortion), claiming that such a person lacks the requisite judicial temperament and would “abandon impartiality and instead engage in results-oriented judging.”⁴³

As for the other qualifications, “integrity” encompasses such traits as character, reputation in the legal community, industry, and diligence. “Professional competence” is measured by “qualities of intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional and judicial experience.”⁴⁴

Recent empirical research demonstrates that, while Senators are likely to support a politically similar candidate with imperfect qualifications, they are also likely to support a politically distinct candidate who has the traditional qualifications of established legal competency, a judicial temperament and a track record of independence and impartiality.⁴⁵

b) Political Considerations

Many believe that integrity, competence and impartiality should be the only criteria for a U.S. Supreme Court Justice. As a prominent, long-serving member of the Senate Judiciary Committee stated, “[T]he Senate’s responsibility to provide advice and consent does not include an ideological litmus test because a nominee’s personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge.”⁴⁶

That was not the case in the unsuccessful 1987 nomination by President Ronald Reagan of then-D.C. Circuit judge Robert Bork. Judge Bork had been a prolific writer, espousing views that were widely regarded as “conservative,” socially, economically and politically. He had been a vocal critic of prior Supreme Court decisions on abortion and affirmative action. The result was a Judiciary Committee hearing focused on Judge Bork’s likely views on these and other “hot-button” issues. This focus was a radical departure from the traditional nomination hearings, which had involved deference to the President’s appointment powers, largely being limited to an inquiry into the nominee’s qualifications: did the nominee go to a good law school, succeed in law school, serve well on a respected court, have a good professional reputation, etc.?

The questioning of Judge Bork was hostile; his responses were often contentious. The Judiciary Committee recommended against his nomination, and the full Senate rejected Judge

⁴² Rutkus, *supra* note 14, at 10-11 (noting that both Bush and Obama considered this quality necessary).

⁴³ Statement of Senator Jon Kyl, *Senate Hearing 111-1044: The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm>.

⁴⁴ AMERICAN BAR ASSOCIATION, ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS, 3 (2009) available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf.

⁴⁵ Lee Epstein et al., The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court, 32 FLA. ST. U. L. REV. 1145, 1146-49 (2005), at 1148. The empirical study based an assessment of qualifications on several factors, including the nominee rating produced by the ABA. *Id.* at 1158.

⁴⁶ Elizabeth Rybicki, *Supreme Court Nominations* 43 (2010).

Bork's nomination on the stated grounds of "lack of judicial temperament," rather than his personal beliefs on societal, economic or political issues.⁴⁷

Judge Bork's experience has chastened subsequent nominees in their approach to Senate hearings and their willingness to discuss publicly their views on the significant social, political and economic issues of the day. Since the "borking of Judge Bork," subsequent nominees have been increasingly guarded in their answers to questions, avoiding any public statements that might reveal anything other than middle-of-the-road views. As one prominent Supreme Court practitioner recently observed, "It has led to the process being a lot more opaque on what the nominees are willing to say, and it's had a chilling effect on people's willingness to speak on topics generally if they think they might be candidates for nomination. . . . It creates a strange ritual of senators asking substantive questions and nominees basically having to say they can't answer those questions. It has a ritualized Kabuki dance kind of element or aspect that I'd say makes for a . . . different process."⁴⁸

Some legal scholars have called the current Supreme Court appointment process "broken," arguing that it has become so politicized that transparency has been lost. The Senate hearings and media coverage have tended to focus on specific ideological issues like abortion, to the exclusion of competency, impartiality and judicial temperament. Critics base this argument on the fact that the amount of media and interest-group attention on actual and prospective nominees has grown, with extensive special interest group testimony occurring at Senate hearings.⁴⁹

Other scholars have favorably noted that "controversy about individuals to serve as jurists is both a longstanding feature of American politics and reflective of the role that law itself plays in American politics."⁵⁰ This is because the Supreme Court has regularly handed down rulings that address pressing social controversies, sometimes with 5-4 votes, reflecting the then prevailing "conservative" vs. "liberal" complexion of the Court.⁵¹ Today, the public as well as the Senate knows that social issues will be shaped by the Court: "Who the life-tenured judges are is a matter of great political moment."⁵²

These realities have prompted increasing criticism of the lifetime appointment of Supreme Court Justices. The United States' establishment of life tenure is unique in the world. It permits Justices to retire any time they wish, *e.g.*, when an opening on the Court would be advantageous to a particular political party.⁵³ Some speculate that Justice Stevens, generally regarded as a "liberal Justice," stayed on the Court until he was 90 years old so that President Obama (rather

⁴⁷ Linda Chiem, Bork's Failed High Court Bid Reshaped Judicial Vetting, LAW360, Dec. 19, 2012.

⁴⁸ *Id.* (quoting Christopher Landau of Kirkland & Ellis LLP); see also Dion Farganis & Justin Wedeking, *No Hints, No Forecasts, No Previews: Analyzing Supreme Court Nominee Evasiveness, 1955-2009*, 45 U. KEN. L. & SOC. R. 525, 554-55 (2011), available at <http://www.uky.edu/~jpwede2/lawsocietycandor.pdf>.

⁴⁹ Epstein et al., *supra* note 45, at 1145, 1146-49.

⁵⁰ Resnik, *supra* note 13, at 585.

⁵¹ Rutkus, *supra* note 14, at 5 & n. 16 (noting that liberals tend to favor this approach as addressing civil rights issues that are mishandled by legislatures, while conservatives disfavor this approach as not contemplated by the Constitution).

⁵² Resnik, *supra* note 13, at 588 (emphasis in the original).

⁵³ *Id.* at 580.

than President Bush) would nominate his successor, presumably someone more “liberal” than President Bush was likely to have nominated.⁵⁴

c) *Diversity*

As noted above, one critical condition for the effective operation of the rule of law is that all people have equal access to the legal system. This means not only that there should be no artificial constraints on who can be a litigant, but that all people (regardless of race, religion, gender or cultural background) have equal opportunity to serve in the judiciary. The reasoning is that a diverse judiciary produces a more democratic application of the rule of law.⁵⁵

Diversity of race and gender are qualifications that Presidents have increasingly focused upon. President Obama emphasized the desire for diversity in his appointments to the Supreme Court, nominating two women (one Hispanic).⁵⁶ Earlier, President Reagan in appointing the first woman to the Supreme Court (Justice Sandra Day O'Connor) said, “I made a commitment that one of my first appointments to a Supreme Court vacancy would be the most qualified woman that I could possibly find.”⁵⁷

D. U.S. Supreme Court Lessons

The U.S. Supreme Court’s judicial selection and appointment process is relatively simple, with its “checks and balances” approach of nomination by the Executive, with confirmation by the Legislative branch. As such it is readily explainable to the general populace, thereby promoting public interest and attention. And the transparency of the process (given a free press and evolution through education and press attention of the public interest in who is appointed), has produced one of the most developed and effective legal systems in the world.

Indeed, the contentiousness of the recent appointments has had the positive effect of increasing public awareness and scrutiny of candidates. The net result is that the President’s reputation is affected by the choice of a nominee, as are the reputations of the Senators and overall legislature by their/its handling of the nomination. As a consequence, there are incentives to select and appoint highly qualified individuals, regardless of their specific political views or party affiliations.

The key lesson is the importance of encouraging public awareness, interest and debate about the process for selecting and appointing Supreme Court justices. This requires a trans-

⁵⁴ Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. TIMES, June 27, 2012, available at <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html>.

⁵⁵ Resnik, *supra* note 13, at 591.

⁵⁶ U.S. President (Obama, Barack H.), “Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice,” Daily Compilation of Presidential Documents, May 26, 2009, DCPD-200900402, p. 1.

⁵⁷ U.S. President (Reagan, Ronald W.), “Remarks Announcing the Intention To Nominate Sandra Day O’Connor To Be an Associate Justice of the Supreme Court of the United States, July 7, 1981,” *Public Papers of the Presidents of the United States, Ronald Reagan, 1981* (Washington: GPO, 1982), p. 596.

parent process and education of the public—by the press and in all levels of schooling—about the importance of competent, independent and impartial judges, for the enhancement of the economic development of the nation and the protection of individual rights.

A culture of free and open debate must be fostered for all this to occur. That starts with early childhood education focusing on the value of judicial checks on executive and legislative power. A culture of open discussion and debate is promoted by a free press that understands the importance of the judicial selection process and its impact on the effective functioning of the rule of law. A free press is critical to the transparency that best assures that the judges who are appointed have the competence, independence and impartiality to maximize the probability (and public perception) that judicial decisions will be made based on the published rules of law, rather than political influence or economic corruption.

II. The Judicial Selection and Appointment Process in Various U.S. Individual States

While the process for selecting and appointing U.S. Supreme Court Justices has been widely praised, it is noteworthy that a number of individual states within the United States have adopted materially different approaches for the selection and approval of the judges for the “Supreme Court” of their states.⁵⁸ That is significant because much of the economic and criminal enforcement activity in the U.S. is governed by state, not federal law.

As can be seen in the chart below, thirteen states elect their Supreme Court judges in “non-partisan” (*i.e.*, no political-party affiliations) elections. Nine states use partisan elections, for a total of twenty-two states (out of 51, counting the District of Columbia) with popularly elected jurists. Twenty-three states (including the District of Columbia) begin their appointment process with some form of nominating commission. An additional 10 states use this process for interim appointments only. Of the remaining six states, four (California, Maine, Massachusetts and New Jersey) allow their governor to appoint, with either legislative or other executive approval. Two states (South Carolina and Virginia) ask their legislatures to select judges.⁵⁹

Eighteen states have no retirement age. Thirty-two states (and the District of Columbia) have mandatory retirement ages, variously set at 70, 72, 74 and 75, with one (Vermont) at 90.⁶⁰ Some states allow judges to finish out the term for which they were elected or appointed.⁶¹ There have been a number of efforts in various states to increase mandatory retirement ages, *e.g.*, to age 75 or 80.⁶²

Notably, the various state alternatives to the U.S. Supreme Court model have not generated any generally acknowledged improvements. Indeed, the independence of the judiciary in many states has increasingly been called into question. “The independence of today’s state judges resembles that of their federal counterparts much less than it did at the Founding . . . [when] the vast majority of state judges were selected and tenured much like federal judges . . . [T]here are

⁵⁸ For a thorough overview of the various processes and perspectives, see Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077 (2007), available at <http://georgetown.lawreviewnetwork.com/files/pdf/95-4/schotland.pdf>.

⁵⁹ American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

⁶⁰ Judgepedia, *Mandatory Retirement*, http://judgepedia.org/index.php/Mandatory_retirement (last visited July 1, 2013) (a chart of retirement ages in each state and the constitutional provision or statute that mandates that age).

⁶¹ *Id.*; see *e.g.*, Florida Constitution Art. V, Sec. 8.; Louisiana Constitution Art. V, Sec. 23.

⁶² Gavel to Gavel, *A review of state legislation affecting the courts: Florida bill would raise mandatory judicial retirement age*, (Feb. 14, 2013), <http://gaveltogavel.us/site/2013/02/14/florida-bill-would-raise-mandatory-judicial-retirement-age-but-as-in-past-efforts-theres-a-catch/>; John Caher, *Assembly Bill Would Raise Retirement Age for Judges*, N.Y. L.J., Mar. 1, 2013, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202590476464&Assembly_Bill_Would_Raise_Retirement_Age_for_Judges&slreturn=20130316181407.

almost no state judges today who enjoy life tenure, and almost all of them must run in some sort of election or referendum before the public in order to win or keep their jobs.”⁶³

The impetus for the various state experiments was the belief that the election of judges (and other public officials) would make them responsive to the people and not to politicians, thus *enhancing* their independence. However, a number of studies have concluded that the effect has been to *reduce* the independence of state court judges. As one scholar has observed, “The overall effect was to increase the governors’ and legislatures’ control over reappointment, and to weaken judges’ power.”⁶⁴

The states discussed below present a cross-section of the differing judicial selection processes existing amongst various individual states in the United States. .

A. Nominating Commissions with Gubernatorial Appointments

1. New York

Many in the United States regard New York as having a particularly good state judicial system. Decisions of New York’s highest court (the N.Y. Court of Appeals) are often cited by courts of other states, as respected precedents.

New York’s system for appointing justices to its Court of Appeals is instructive. New York initially decided to elect its judges by popular vote. This was done in the belief that direct election of judges would bring the administration of justice under the control of the public, thereby avoiding the perception that judges solely came from the “elite” of society, favoring the interests of the wealthy over those of the public at large.

In 1977, New York rejected popular elections for its Court of Appeals judges, adopting a system in which a nominating commission recommends candidates for appointment by New York’s Governor. The impetus for the change was widespread dissatisfaction over a series of what appeared to be heavily financed and ideologically partisan elections that, in the eyes of many, raised questions about the competency, independence and impartiality of the judges being elected.⁶⁵ A task force, including the head of the N.Y. State Bar Association, was appointed by the Governor to study various approaches, ultimately making the recommendations adopted in 1977.⁶⁶

⁶³ Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 850, 853 (2012).

⁶⁴ Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1531 (2012) (“[R]eformers hoped that popular elections for as many public offices as possible would place government in the hands of the electorate and out of the control of political professionals.”); see also Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063, 1075 (2010) (arguing that judicial elections were a response to the financial crises of the 1830s and were intended to strengthen the judicial review power of the courts against the profligate state legislatures).

⁶⁵ Linda Greenhouse, *State Senate Urges New Way to Select Judges*, N.Y. TIMES, Mar. 23, 1976.

⁶⁶ DANIEL BECKER & MALIA REDDICK, *JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES*. DES MOINES, IA: AMERICAN JUDICATURE SOCIETY, 2003 22-23 (2003) (hereinafter “AJS6”).

Selection Methods for State Supreme Court Judges

State	Elected	or	Appointed
Alabama	Partisan election		
Alaska			Gubernatorial appointment from nominating commission
Arizona			Gubernatorial appointment from nominating commission
Arkansas	Nonpartisan election		
California			Gubernatorial appointment, with confirmation by commission on judicial appointments
Colorado			Gubernatorial appointment from nominating commission
Connecticut			Gubernatorial nomination from judicial selection commission, with legislative appointment
Delaware			Gubernatorial appointment from judicial nominating commission with senate consent
District of Columbia			Presidential appointment from judicial nomination commission, with senate confirmation
Florida			Gubernatorial appointment from nominating commission
Georgia	Nonpartisan election		
Hawaii			Gubernatorial appointment from nominating commission with senate confirmation
Idaho	Nonpartisan election		
Illinois	Partisan election		
Indiana			Gubernatorial appointment from nominating commission
Iowa			Gubernatorial appointment through nominating commission
Kansas			Gubernatorial appointment from nominating commission
Kentucky	Nonpartisan election		
Louisiana	Partisan election		
Maine			Gubernatorial appointment with senate confirmation
Maryland			Gubernatorial appointment from nominating commission with senate confirmation
Massachusetts			Gubernatorial appointment with approval of governor's council
Michigan	Partisan nomination for nonpartisan election		
Minnesota	Nonpartisan election		
Mississippi	Nonpartisan election		
Missouri			Gubernatorial appointment from nominating commission
Montana	Nonpartisan election		
Nebraska			Gubernatorial appointment from nominating commission
Nevada	Nonpartisan election		
New Hampshire			Gubernatorial nomination from selection commission recommendation, with appointment by the executive council
New Jersey			Gubernatorial appointment with senate confirmation
New Mexico	Partisan election		
New York			Gubernatorial appointment from nominating commission with senate consent
North Carolina	Nonpartisan election		
North Dakota	Nonpartisan election		

continues

Selection Methods for State Supreme Court Judges (continuation)

State	Elected	or	Appointed
Ohio	Partisan primary for nonpartisan general election		
Oklahoma			Gubernatorial appointment through nominating commission
Oregon	Nonpartisan election		
Pennsylvania	Partisan election		
Rhode Island			Gubernatorial appointment from nominating commission with house and senate confirmation
South Carolina	Legislative election		
South Dakota			Gubernatorial appointment from nominating commission
Tennessee			Gubernatorial appointment from nominating commission
Texas	Partisan election		
Utah			Gubernatorial appointment from nominating commission with senate confirmation
Vermont			Gubernatorial appointment from nominating commission with senate confirmation
Virginia	Legislative election		
Washington	Nonpartisan election		
West Virginia	Partisan election		
Wisconsin	Nonpartisan election		
Wyoming			Gubernatorial appointment from nominating commission

New York created a “non-partisan” Judicial Nominations Commission consisting of twelve members: four are appointed by the governor, four by the Chief Judge of the Court of Appeals, one each by the Legislative Assembly’s Speaker and Minority Leader, and one each by the Senate President and Minority Leader. The four appointed by the Governor and Chief Judge must be split along party lines and include two non-lawyers.⁶⁷ The Commission is charged with preparing a list of persons who are “well qualified” for an opening on the Court of Appeals.⁶⁸ This list must be between three and seven candidates for a single vacancy.⁶⁹ Once this work is completed, the Governor may appoint, with the “advice and consent” of the state Senate, a person from among the names given.⁷⁰

The New York Constitution requires that any appointee have practiced in New York for at least ten years and been admitted to the N.Y. Bar for at least five years. It leaves further qualifications to the Legislature.⁷¹ New York’s Judiciary Law obligates the Commission to select candidates who “by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office.”⁷²

⁶⁷ N.Y. Const. art. VI § 2d(1).

⁶⁸ *Id.* art. VI § 2d(4).

⁶⁹ N.Y. JUDICIARY LAW art. 3-A §63(2)(b), (3).

⁷⁰ N.Y. CONST. art. VI §2e.

⁷¹ *Id.* art. VI § 20a, c.

⁷² N.Y. Judiciary Law art. 3-A §63(1).

There is no formal retention process. Judges' terms are for fourteen years. They must apply to be reappointed. The reappointment process is identical to the original appointment: essentially the judge goes through the full process again.

There have been some complaints that the Nominations Committee process has failed to produce better candidates. Nominations have largely come from the ranks of New York's lower courts (which are still popularly elected), meaning that candidates maintain partisan affiliations. Another concern has been that the number of qualified applicants to be Court of Appeals justices has fallen significantly. This has been largely attributable to the huge disparity between the relative low pay for a Court of Appeals judge compared to the lucrative practice of private law in NY,⁷³ but has also been said to be, in part, "because it appeared that only a couple of candidates with close connections to the [Governor's] administration had any real chance of being selected."⁷⁴

Court of Appeals judges must retire at age 70 but can serve out their 70th year if their term has not yet expired. There is pending legislation to increase the mandatory retirement age to 80 in recognition of increasing life spans and mental competency, as well as the difficulty New York has experienced in finding qualified candidates, willing to serve. There are also efforts being made to increase the pay of New York judges generally to be sure that New York maintains its stature as a leader in the quality of its judiciary.

2. Arizona

Like New York, Arizona for many years had a popularly elected judiciary. In 1974, Arizona implemented a merit selection system, with retention elections every two years. This new system is predicated on the belief that popular elections were overly politicizing the judicial branch. The merit retention system still had a public election component, ostensibly informed by a poll of Arizona lawyers, run by the state government. Each member of the Arizona Bar Association was supposed to rate prospective judges based on their age, health, judicial integrity and competence in various areas of the law, with a recommendation on retention or nonrenewal. This system proved unpopular. Not all lawyers would fill out the questionnaires. The polls became more about politics and connections than judicial temperament, competence and independence. Further, the public was not well informed of the results of the lawyers' ratings.

A 1989 task force on Arizona's courts concluded that "most voters never learn the results of the bar poll" and, given the widespread public distrust of the Bar Association, those that did pay attention declined to take the poll results seriously.⁷⁵ As a result, not a single judge lost a retention election for the eighteen years between 1974 and 1992. In 1988, based on these complaints, the Chief Justice of the Arizona Supreme Court appointed a commission to make recommendations, resulting in the system in place today.

⁷³ John Caher, *Assembly Bill Would Raise Retirement Age for Judges*, N.Y. L.J., Mar. 1, 2013, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202590476464&Assembly_Bill_Would_Raise_Retirement_Age_for_Judges&slreturn=20130316181407.

⁷⁴ John Caher, *Read Tapped for Court of Appeals*, N.Y. L.J., Jan. 7, 2003, at 4.

⁷⁵ John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 655 (1998).

Arizona (like New York) now uses a nominating commission to select its Supreme Court judges. The Arizona Nominating Commission is headed by the Chief Justice of the Supreme Court. It includes five attorney members, chosen by the state Bar Association, and 10 non-attorney members appointed by the Governor “with the advice and consent of the [Arizona] Senate.” Membership must be evenly split between Democrats and Republicans. The Commission constantly rotates, with members serving staggered four-year terms.⁷⁶

When there is a vacancy on the Arizona Supreme Court, the Commission submits a list of at least three names (with people from both political parties) to the Governor. The Governor is empowered to appoint a Justice within 60 days (after 60 days, the Chief Justice may choose between the nominees on the basis of merit alone).⁷⁷

Arizona then requires the justice to run in an election after the first two years in office, and again every six years thereafter, to continue to serve. The justices do not face any opposition; voters choose only whether to retain individual judges. Any resulting vacancies are filled by the process described above.⁷⁸

Arizona implemented a system for assessing judicial performance to give the public “a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods as the court deems advisable.”⁷⁹ To that end, the Supreme Court is authorized to appoint a total of thirty members to the Commission on Judicial Performance Review (“CJPR”), whose job it is to evaluate judges and disseminate that information. The Performance Commission conducts two evaluations in each judicial cycle, one midway through the judge’s term and again just before a retention election. The midway evaluation is given only to the judge and is designed to promote improvement; the retention evaluation is made public. To assemble this survey, the CJPR surveys both lawyers and non-lawyers who have appeared or otherwise interacted with the judge in question. Those surveys are collected and transcribed anonymously to form the written reports presented to the public.⁸⁰

To be an Arizona Supreme Court justice, one must “be a person of good moral character and admitted to the practice of law in and a resident of the state of Arizona for ten years next preceding his taking office.”⁸¹ The goal of Arizona’s Nominating Commission is “to select judges who have outstanding professional competence and reputation and who are also sensitive to the needs of and held in high esteem by the communities they serve and who reflect, to the extent possible, the ethnic, racial and gender diversity of those communities.”⁸² Arizona (like 20 other states) requires its judges to retire at age 70.

⁷⁶ ARIZ. CONST. art. 6, § 36(a-c).

⁷⁷ *Id.* at § 37.

⁷⁸ *Id.* at § 38.

⁷⁹ *Id.* at §6.42.

⁸⁰ ASJ6, *supra* note 59, at 36-37.

⁸¹ ARIZ. CONST. art. 6. §6.

⁸² ARIZONA JUDICIAL BRANCH, JUDICIAL NOMINATING COMMISSIONS, UNIFORM RULE OF PROCEDURE 1, *available at* http://www.azcourts.gov/jnc/UniformRulesofProcedure.aspx#RULE_1.

The main criticism of Arizona's selection system is that neither the press nor the public have paid much attention, with the result that voting remains uninformed. The CJPR has "struggled to find the best distribution method for the results," with only 30 percent of voters even knowing about the existence of the program. Voter apathy has made it difficult to attract high-quality judges. Arizona voters have retained multiple judges whose abilities were severely questioned by CJPR.⁸³

Notably, in the many states with similar retention by popular-election systems, very small fractions of judges facing a vote have lost their bid for retention.⁸⁴ Indeed, the most remarkable fact about retention elections in the United States is that they are largely ignored. Between 1936 and 2009, 637 state Supreme Court judges faced retention elections, with 629 being retained.⁸⁵ The few who were not retained lost their election largely because of "hot button" issues like abortion, gay marriage, or the death penalty.⁸⁶

B. Direct Elections of Justices

1. Texas

Texas, like many other states, elects its Supreme Court judges through partisan elections, with mandatory retirement at age 75. Texas Supreme Court judges must be U.S. citizens, residents of Texas, have practiced law for at least 10 years and be at least 35 years old.⁸⁷

Texas is unique in the U.S. in having *two* highest courts: the Court of Criminal Appeals, which handles all criminal matters, and a separate Supreme Court for all other matters. Judges for both courts are elected for six-year terms. The only exception to this comes when a vacancy occurs by retirement or otherwise, in which case the Texas Governor is authorized to appoint someone to fill the post, until the next statewide popular election occurs.⁸⁸

Texas' partisan election system has been widely criticized. Rather than resulting in an independent and responsive judiciary, the system has seen the cost of campaigns skyrocket, with "an increased focus on the players behind the scenes who paid for pricey campaigns."⁸⁹ As a leading

⁸³ ASJ6, *supra* note 59, at 39-41.

⁸⁴ Albert J. Klumpp, *Arizona Judicial Retention: Three Decades of Elections and Candidates*, ARIZ. ATTORNEY, Nov. 2008, available at http://www.myazbar.org/AZAttorney/PDF_Articles/1108election.pdf (in Missouri, only two judges have failed retention elections since 1948, and in Illinois less than 2% of judges have failed even since it raised the retention requirement to 60% of the vote).

⁸⁵ Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, ABA J. (Jan. 1, 2011), available at http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

⁸⁶ A.Z. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>; http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

⁸⁷ TEX. CONST. art. V1-a, 2b-c.

⁸⁸ *Id.* at 3-4, 28.

⁸⁹ AJS6, *supra* note 59, at 2.

judicial elections authority has observed, “[T]he election of Texas Supreme Court justices [has] become a battleground for plaintiff and defense lawyers.”⁹⁰

All legislative efforts to move to a U.S. Supreme Court-type system have failed. One effort at reform was the Judicial Campaign Fairness Act (“JCFA”) of 1995.⁹¹ The JCFA passed a limit of \$5,000, for both individuals and law firms, on donations to campaigns for a position on the Texas Supreme Court and imposed disclosure requirements for any organization spending more than \$5000 in support of any candidate.⁹² The JCFA has reduced the total amount spent on elections in recent years, but “the perception that justice is for sale has lingered.”⁹³

2. *Mississippi*

Mississippi selects its Supreme Court judges through a nonpartisan election process. Candidates are precluded from affiliating themselves with any political party, either on the ballot or while campaigning. Although they hold office “from their state at large,” Mississippi Supreme Court judges are locally elected from three different geographic districts, for eight-year terms. Candidates must have practiced law and lived in Mississippi for at least five years, and be at least 30 years of age. There is no mandatory retirement age.⁹⁴

Critics of nonpartisan elections have pointed out that, in the absence of any political party identification, there is generalized public apathy. Voters tend to focus on factors like the candidate’s race, gender, nickname and location on the ballot, with the result that special interests (like the personal injury trial lawyer’s associations) influence judicial races regardless of their claimed nonpartisan nature. Potential judges are all the more beholden to individual contributors and special interest groups, and even less independent.⁹⁵

Nonpartisan elections are described by one commentator as “possess[ing] all of the vices of partisan elections and none of the virtues.”⁹⁶ Indeed, Mississippi has a widespread reputation for highly politicized rulings favoring the Mississippi personal injury lawyers who finance most judges’ elections.⁹⁷

It is significant that, in 1993, a Mississippi judicial-reform task force recommended that the state implement a nomination and confirmation process like that for U.S. Supreme Court.⁹⁸

⁹⁰ Peter D. Webster, *Selection and Retention of Judges: Is There One ‘Best’ Method?* 23, FLA. ST. U. L. REV. 1,26 (1995), available at www.law.fsu.edu/journas/lareview/issues/231/webster.html.

⁹¹ TEX. EL. CODE ANN. Tit. 15, § 253.151.

⁹² *Id.* at §153.155, 163.

⁹³ AJS6, *supra* note 59, at 8.

⁹⁴ MISS. CONST. art. 6 § 145, 149, 150.

⁹⁵ AJS6, *supra* note 59, at 29.

⁹⁶ Peter D. Webster, *Selection and Retention of Judges: Is There One ‘Best’ Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

⁹⁷ The Center for Public Integrity, *Mississippi Judges, Attorney Appeal Bribery Convictions* (Nov. 18, 2011), available at <http://www.stateintegrity.org/mississippi>.

⁹⁸ REPORT OF THE MISSISSIPPI BAR’S COMMISSION ON THE COURTS IN THE 21ST CENTURY (1993), available at http://heinonline.org/HOL/Page?handle=hein.journals/miscollr14&div=29&g_sent=1&collection=journals.

That proposal was rejected and the present Mississippi system implemented, based upon strong lobbying by the Mass Tort and Medical Malpractice Plaintiffs Lawyers Association. As a consequence, Mississippi's "reform" has not significantly altered the existing system, except that partisan organizations like the Trial Lawyers' Association have become more influential in judicial elections than they were before.⁹⁹

C. Legislative Appointment

The South Carolina legislature (its General Assembly) has long been empowered to select the state's Supreme Court judges. They are appointed for 10-year terms, subject to retirement at age 72. Each 10 year term is considered separate; judges may apply for reappointment and there is no formal retention process. Judges must be U.S. citizens, at least 32 years old, been licensed as attorneys for at least eight years, and have been South Carolina residents for five or more years.¹⁰⁰

South Carolina's current legislative appointment process is a response to many complaints in the 1990s that the state's judicial system lacked any independence from the legislature, which was itself highly politicized and "inbred" (all the Supreme Court justices were former S.C. legislators).¹⁰¹ Now, in making its appointments, the General Assembly is required to consult with three separate entities. The first, and most important, is the Judicial Merit Selection Commission ("JMSC"). The JMSC conducts the initial screening of Supreme Court candidates. The JMSC has 10 members, five of whom are selected by the Speaker of the House, three of whom are appointed by the Chairman of the Senate Judiciary Committee, and two by the President Pro Tempore of the Senate. Six members must be representatives, and four must be from the general public.¹⁰²

When a vacancy opens, the JMSC screens candidates and sends a list of nominees from which the General Assembly must choose. To do so, the Committee sends questionnaires to all members of the South Carolina Bar, interviews all candidates, and reviews their written statements, published writings, and past records (including criminal and financial matters in addition to academic and any judicial histories). After reviewing these materials, the Committee holds public hearings on prospective judges' qualifications.¹⁰³

The second body is the Citizens Committee on Judicial Qualifications ("CCJQ"). The CCJQ is designed to increase public participation in the selection and retention of judges. Its stated goal is for "all South Carolinians [to] have a voice in the selection of ... judges." The CCJQ is in fact five different committees of ten people who are selected by the immediate past regional chairman. Each committee picks its own regional chairman for each session. Each CCJQ reports on all candidates in its region, theoretically assisting the JMSC in its recommendation-making process.¹⁰⁴

⁹⁹ AJS6, *supra* note 59, at 31-32.

¹⁰⁰ S.C. CONST. art. V §3, 15.

¹⁰¹ See, e.g., Martin S. Driggers, Note, i, 49 S.C.L. REV. 1217, 1235 (1998).

¹⁰² S.C. CODE L. § 2-19-10.

¹⁰³ JMSC Process Overview at www.scstatehouse.gov/html-pages/judmerit.php (overview on the Judicial screening process).

¹⁰⁴ See, <http://www.scstatehouse.gov/judicialmeritpage/CitizensCommitteesOnJudicialQualificationsMis->

The third entity involved is the South Carolina Bar Association's Judicial Qualifications Committee. That Committee produces biannual reports rating all candidates, based on interviews with lawyers and others who have interacted with the candidates. The Committee rates each judge as well qualified, qualified or not qualified. The ratings are published on the Bar Association's website.¹⁰⁵

The South Carolina legislative approach to judicial selection has been roundly criticized as assuring the politicization of judges and undermining their independence. The complicated overlay of the various consultative bodies has had no apparent positive effect. Some studies have commented upon the lack of quality and independence of South Carolina's highest court, noting the S.C. Supreme Court's disregard of politically unpopular (in South Carolina) U.S. Supreme Court precedents on due process and other issues.¹⁰⁶

Recent additional reforms have been proposed. The critics of the South Carolina appointment system note that "members of the legislature, many of whom are lawyers who may appear before that judge in the future, select and then fund the judiciary." The critics say that this is "a clear violation of the three independent branches of government we all learned about in third grade." The current proposal would have the Governor present three candidates, with the state Senate voting to select one of the three.¹⁰⁷

D. Gubernatorial Appointment with Legislative Confirmation

1. California

California is the United States' largest and most economically important state. California has a complex process for appointing its Supreme Court Justices, with interactions amongst the state's Governor, a Commission on Judicial Appointments, and California voters. The state adopted this system in 1934 after years of dissatisfaction with the quality of judges produced by partisan elections.¹⁰⁸

Judicial candidates must have been state bar members or judges for at least ten years. Supreme Court justices are initially appointed for 12-year terms, with retention elections at the expiration of a term. There is no competing opponent in any retention election. There is no mandatory retirement age in California.

California's Governor appoints justices of the Supreme Court but that decision is only effective when confirmed by the Commission on Judicial Appointments. The Commission is

sion&Rules5.12.11.pdf.

¹⁰⁵ See, http://ww2.sbar.org/public_services/judicial_surveys__reports/.

¹⁰⁶ Kimberly C. Petillo, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court*, 67 ALBANY L. REV. 937, 938 (2004).

¹⁰⁷ Bill Davis, *Judging the Judges: Who Should Have The Upperhand In Selecting Our Jurists?* Statehouse Report 11.41, October 12, 2012 (www.statehousereport.com/currentissue.aspx?ID=205).

¹⁰⁸ Deborah Kiley, *Merit Selection of California Judges*, (Mar. 2, 1999), available at http://www.mcgeorge.edu/Documents/Publications/ccglp_pubs_merit_selection_pdf.pdf

a three-person panel consisting of the Chief Justice, the Attorney General, and the presiding judge who has served for the longest time on the state's intermediate appellate courts.¹⁰⁹

In making a nomination, the Governor is guided by the recommendations of a Commission on Judicial Nominees Evaluation.¹¹⁰ That Commission is charged with "confidentially" investigating and evaluating judicial qualifications of candidates identified by the Governor. The Commission consists of 27 to 38 people, at least 80 percent of whom must be active members of the California Bar. Members are appointed by the Board of Trustees of the State Bar of California. They may not endorse nor participate in any candidate's retention campaigns, nor seek appointment themselves.

In reviewing candidates, the Evaluation Commission considers an application for appointment from the Governor, past application materials, state bar records, and information from former colleagues, area attorneys and other knowledgeable parties, on the qualifications of each nominee. The Commission ranks candidates based on their qualifications, focusing on the attributes of "collegiality, writing ability, scholarship, distinction in the profession, and breadth and depth of experience." The Governor is not bound by these evaluations, but must at least consider their findings.¹¹¹

This process applies to two distinct vacancy situations. In one, a judge declines to seek reelection at the expiration of his or her term. In that case, the Governor is charged with nominating someone to succeed the retiring judge. If selected, that person must then seek election in the next general election. In the second situation, a judge either vacates the position in the middle of the term (most often due to early retirement or death), or fails to win a retention election. If this occurs, the Governor may appoint a judge to fill the seat until the next general election.¹¹²

2. *New Jersey*

Following the U.S. Supreme Court model, New Jersey gives its Governor the power to appoint justices to the state's Supreme Court, with the "advice and consent of the [New Jersey] Senate." The New Jersey Constitution requires that all judges have been admitted to practice law in New Jersey for at least ten years prior to their appointment.¹¹³

By executive order, the Governor appoints a Judicial Advisory Panel whose mission it is to "review the background and abilities of potential nominees to the judiciary." The Panel consists of seven members, appointed by the Governor for five-year terms. Five or more of the Panel members must be retired judges. The Governor is expected to "rely heavily" on the Panel's evaluations in making nominations for approval by the Senate.¹¹⁴

¹⁰⁹ CAL. CONST. art. VI §7, §16(d)(2).

¹¹⁰ CAL. GOV. CODE §12011.5h.

¹¹¹ See, <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=49Aq1IKMz54%3d&tabid=1230> 1, 2-3, 6.

¹¹² CAL. CONST. art. VI §16(c-d).

¹¹³ N.J. CONST. art. VI §VI, ¶¶1-2.

¹¹⁴ See, <http://nj.gov/infobank/circular/eojsc36.htm> ¶¶ 1,5.

The Senate in turn has the benefit of a formal oversight process provided by the New Jersey State Bar Association. According to a compact renewed with each Governor, the Bar Association reviews the qualifications of candidates, confidentially reporting its findings to the Governor. This review is conducted by a twenty-six-member Judicial and Prosecutorial Appointments Committee. The motivation for this agreement was to encourage the nonpartisan vetting of candidates and to improve the quality of New Jersey's judiciary.¹¹⁵

The N.J. Bar has set forth the following criteria for a desirable judge:

1. Undisputed integrity;
2. A high degree of knowledge of established legal principles and procedures, and a high degree of ability to interpret and apply them to factual situations;
3. That they have been a licensed attorney in New Jersey for at least 10 years;
4. An appropriate judicial temperament, which includes common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding;
5. A commitment to diligence, punctuality and effective management skills;
6. The requisite physical and mental abilities to be able to perform the essential functions of the job;
7. Demonstrated financial responsibility; and
8. Demonstrated participation in public service activities.¹¹⁶

Justices of the Supreme Court are appointed to initial seven-year terms. After that, they must go through the full nomination process, as described above, one time before being granted permanent appointments, "on good behavior," subject to mandatory retirement at age 70. By tradition, honored by all Governors to date, three of the Supreme Court's members must be from the Republican Party and three from the Democratic Party.¹¹⁷

E. Lessons from the Individual U.S. States

As demonstrated, various individual states in the United States have experimented with a number of different methods for selecting their highest court judges. It is instructive that the approaches deviating from the U.S. Supreme Court model (like in Texas, Mississippi and South Carolina) have been criticized for their ineffectiveness in producing greater independence, impartiality or overall quality in their respective judiciaries. And it is significant that states like New York and California have been gravitating back towards the U.S. Supreme Court process and balanced executive nomination with a legislative appointment approach, as adopted by New Jersey.

¹¹⁵ See, <http://www.njsba.com/about/news-archives/state-bar-association-affirms-judicial-compact.html>; <http://www.njsba.com/about/standing-committees/judicial-and-prosecutorial-appointments-committee.html>.

¹¹⁶ Susan A. Feeney, *N.J. Bar Association plays Key Role in Reviewing Judicial Candidates*, N.J. BLOG, Feb. 16, 2012 8:09 a.m.), http://blog.nj.com/njv_guest_blog/2012/02/nj_bar_association_plays_key_r.html.

¹¹⁷ See, http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ.

The popular-election and legislative-appointment models of Texas and South Carolina, respectively, have been consistently found to politicize the judiciary. In some instances the line between politicization and corruption is blurred, as demonstrated by the recent case of a Pennsylvania Supreme Court Justice who was convicted of corruption by a jury for ordering her staff to work on her electoral campaign.¹¹⁸

The various nominating commissions that have been created by California and New York add complexity without necessarily enhancing the quality of the judiciary, or the transparency of the process. If anything, it dilutes press and public interest based on its complexity and the (false) appearance that “the professional experts” are protecting the public interest.

As we saw in the discussion on the U.S. Supreme Court process, meaningful transparency is the product of an interested populace and an active free press. That assures an open airing of multiple perspectives and promotes the essential element for successful implementation of the rule of law: the public’s awareness of the importance to the society of who is selected and retained—and why—to be the ultimate arbiters of how a nation’s laws are to be interpreted and enforced.

As noted before, that is an evolutionary development requiring active promotion by the press and educators at all levels of the school system, from early grade school through law and other graduate schools. It is, in reality and of necessity, a bottom-up process based on the citizenry’s self-interest in greater individual and economic freedom. The press and public must demand, at the ballot box and otherwise, that the nation’s government itself become committed to the rule of law, with due process for all.

¹¹⁸ Matt Fair, *Pa. Supreme Court Justice Convicted of Corruption*, LAW360, Feb. 21, 2013, available at http://www.law360.com/competition/articles/417521?nl_pk=167e57cf-8e3e-4de0-bea8-8be66ad152a7&utm_source=newsletter&utm_medium=email&utm_campaign=competition.

III. Selected International Processes

Many different approaches to the selection and appointment of Supreme Court justices exist around the rest of the world. The following is a sampling of differing systems that have evolved in Europe and Asia.

A. Japan

The Japanese Supreme Court itself selects and promotes future judges. While at first it seems that such a system would be insulated from political influence (that was in fact the intent when the system was adopted after World War II), this has not been the result.¹¹⁹

Many scholars have suggested that the Supreme Court of Japan uses its administrative powers to further the political agenda of the governing Liberal Democratic Party, resulting in a stagnation of the legal system.¹²⁰ The Supreme Court almost never overrules governmental determinations, consistently deferring to the actions of the ruling party. Since its creation over seventy years ago, the Supreme Court has only struck down eight statutes on constitutional grounds.¹²¹

The Liberal Democratic Party took power nearly half a century ago. It has a firm hold on who is a part of (and is promoted within) the judicial system. The highest ranks of the judiciary are made up entirely of those who support the party's conservative political ideology. As party members are the ones who select candidates for promotion within the judicial system, the system is self-perpetuating, with no transparency.¹²²

This has been the case since the early 1970s. Back then a “young” liberal judge ruled that a government-proposed military facility could not be built on forest land because the existence of the military was unconstitutional. The judge disclosed that he had received a letter from a higher-ranking judge suggesting that it would be wiser to rule for the government. The legislative committee to impeach judges promptly convened, resulting in the junior judge's reprimand for disclosing the letter and the senior judge's complete exoneration. Shortly thereafter, many liberal judges resigned under pressure from senior judges, with the Supreme Court denying appointments to several members of a liberal political party.¹²³

Thus while in theory there are seats on the Supreme Court reserved for less-conservative members of the bar, these seats are typically not filled by liberal candidates. Even if a liberal judge reaches the Supreme Court, that judge is certain to be outvoted on every issue.¹²⁴

¹¹⁹ David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545, 1545-47 (2009).

¹²⁰ Daniel H. Foote, *The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan*, *WASH. U. L. REV.* 1745, 1745 (2011).

¹²¹ Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 *WASH. U. L. REV.* 1713-18 (2011).

¹²² Law, *supra* note 119, at 1545-47, 1560.

¹²³ Repeta, *supra* note 121, at 1724-34.

¹²⁴ Law, *supra* note 119, at 1564-68; Repeta, *supra* note 121, at 1713-14, 1574.

There have been calls for reform of the Japanese judicial appointment system. Over a decade ago, the government created the Judicial System Reform Council to examine the effectiveness of Japan's judicial system. The Council found that "the processes for nomination by the Cabinet and for appointment are not necessarily transparent, and problems have been pointed out, such as the entrenchment of fixed proportions for the numbers of justices who come from each field." Given the importance of Supreme Court judges, it recommended that "appropriate measures... be considered to secure a transparent and objective process for their appointment."¹²⁵

That report did prompt a change in the system for appointing lower-court judges. In 2003, the Japanese Supreme Court established a Lower Court Judge Designation Consultation Commission, composed of non-current judiciary members, to review candidates for appointment as lower-court judges. The minutes of the selection meetings are made public. While this would seem to be an improvement in transparency, this has not been the case. The reports are short, largely formulaic, with no statement of the reasons for selections or denials of appointments, beyond qualified or not. And, again, the Commission is dominated by Liberal Democratic Party members.¹²⁶

The stated selection criteria for new judges (and for reappointment) include law school grades, recommendations from law professors (by tradition, retired former judges), opinions of the chief judge where the candidate has worked, and softer personality traits like "cautiousness." There is no transparency; neither the public nor the press is given access to the decisionmaking process. Despite calls to make these standards clearer and more precise, the Committee has determined that confidentiality in the reasons for selection (or rejection) of candidates is paramount, refusing to open up the process to public scrutiny.¹²⁷

The lesson from the Japanese approach is summed up well by one legal scholar's observation: "There is no plausible way of designing or structuring a court so as to insulate it entirely from political influence."¹²⁸

As discussed above, transparency is essential. It assures that competing ideologies have an opportunity to influence the process, with each side having an incentive to be a watchdog to expose questions regarding the competence, independence, impartiality and judicial temperament of prospective Supreme Court justices.

¹²⁵ SHIHŌ SEIDO KAIKAKU SHINGIKAI [JUSTICE SYSTEM REFORM COUNCIL], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO—21 SEIKI NO NIHON O SASAERU SHIHŌ SEIDO [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY] (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

¹²⁶ Foote, *supra* note 120, at 1748, 1754-58.

¹²⁷ *Id.*

¹²⁸ Law, *supra* note 119, at 1546.

As noted already, transparency is most effective when there is press and public awareness of the importance to the economic success of the nation and the rights of its citizenry of having a system governed by the rule of law, enforced by competent and independent judges. Creating such a culture does not happen overnight, but rather is a process of educating the citizenry from an early age and fostering open political debate through demands for and a governmental commitment to freedom of the press and speech.

B. England

The United Kingdom has a long-established judicial system that promotes the rule of law but (like Japan) England has long had an insular, non-public system of judicial appointments. Until recently, “the power to appoint judges . . . vested in the Lord Chancellor.”¹²⁹

The Lord Chancellor was appointed by Her (or His) Majesty, on the advice of the Prime Minister of England’s Parliament. The Lord Chancellor was both the head of the judiciary of England and the presiding officer of the House of Lords, the upper and Sovereign-appointed chamber of Parliament which had final say on all major legal and other matters.¹³⁰ In deciding whom to appoint to a vacant judicial post, the Lord Chancellor would use “stringent (but unstated) eligibility criteria and ‘secret soundings’—a process of anonymous consultation with unnamed sitting judges.”¹³¹

Dissatisfaction with the Lord Chancellor’s control of the judiciary led to Parliament passing a comprehensive Constitutional Reform Act, in 2005.¹³² The Reform Act addressed two issues. *First* was the perceived need for a more independent judiciary. To that end, several structural reforms were enacted to create a clear separation of powers between the legislature and the judiciary. The Act established the Supreme Court of the United Kingdom as the highest court, taking over the role of the House of Lords. The Act also designated the Lord Chief Justice of the Supreme Court as the head of the judiciary—a position previously held by the Lord Chancellor.¹³³ The Supreme Court is composed of a president (the Chief Justice), a deputy president,

¹²⁹ Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 *FORD. URB. L.J.* 387, 387 (2006).

¹³⁰ See *The Lord Chancellor*, UK PARLIAMENT, <http://www.parliament.uk/about/mps-and-lords/principal/lord-chancellor/>.

¹³¹ Maute, *supra* note 129, at 389.

¹³² DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, *CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 4* (2003), available at <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>; see also Monica A. Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 *TEMP. INT’L & COMP. L.J.* 279, 279-80 (2008).

¹³³ *Lord Chief Justice*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/lord-chief-justice>. As head of the judiciary, “[t]he Lord Chief Justice decides where judges sit, and the type of cases they hear.” How the judiciary is governed, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/how-the-judiciary-is-governed>.

and ten justices.¹³⁴ It is the final court of appeal for all civil cases in the UK and for all criminal cases in England, Wales and Northern Ireland.¹³⁵

Second, the 2005 Reform Act redesigned the process by which members of the judiciary are appointed. This change was prompted by the recognition that “the composition of the English bench is woefully unrepresentative of the nation’s population.” The Act “create[d] both an independent body charged with judicial selection and an ombudsman to handle complaints about the appointments process.”¹³⁶ The intent was to provide transparency and thereby “strengthen judicial independence by taking responsibility for selecting candidates . . . out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable.”¹³⁷

The Reform Act created the Judicial Appointments Commission (the “JAC”), as an independent, non-governmental institution. The JAC was intended to be “independent of political patronage.” It handles selection for the Supreme Court as well as about nine hundred judicial positions, including both full- and part-time lower-court appointments.¹³⁸

The JAC is composed of a chair and fourteen commissioners. The chair must be a lay person. Of the 14 commissioners, five must be members of the judiciary, but a majority must be laypersons. Those five judicial members must come from all levels of the court system. Commissioners serve initial terms of up to five years, with a maximum of 10 years’ service. Appointment to the JAC is formally made by the Sovereign on recommendation of the Lord Chancellor, but there are significant limitations on who may be chosen.¹³⁹ “All are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges’ Council.”¹⁴⁰ This open application process focuses on “selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.”¹⁴¹

The Reform Act also created a Judicial Appointments and Conduct Ombudsman. The Ombudsman is responsible for handling complaints about judicial appointments. He or she accepts written complaints, investigates and considers any issues, and is empowered to take appropriate action to rectify any problems.¹⁴²

The Reform Act mandates that, in selecting individuals to fill a vacant judicial post, the JAC’s decision must be solely on merit—no other consideration may be considered in appointing an applicant to the bench. The JAC has formally established a set of attributes it uses to as-

¹³⁴ Constitutional Reform Act, 2005, c. 4, pt. 3, ¶¶ 23(2), 23(5), 23(6).

¹³⁵ THE SUPREME COURT, <http://www.supremecourt.gov.uk/>.

¹³⁶ Maute, *supra* note 129, at 390, 393.

¹³⁷ *About the JAC*, JUDICIAL APPOINTMENTS COMMISSION, <http://jac.judiciary.gov.uk/about-jac/about-jac.htm>.

¹³⁸ Maute, *supra* note 129, at 390, 410.

¹³⁹ Constitutional Reform Act, 2005, c. 4, § 61, sch. 12, ¶¶ 1, 2, 2.2(a), 2.2(c), 2.4(3), 7(1)-7(3), 10(2)(a), 10(2)(b), 13-14, 16.

¹⁴⁰ *About the JAC*, JUDICIAL APPOINTMENTS COMMISSION, <http://jac.judiciary.gov.uk/about-jac/about-jac.htm>.

¹⁴¹ Maute, *supra* note 129, at 412; *see also* Constitutional Reform Act of 2005, c. 4, § 61, sch. 12, ¶¶ 8-10.

¹⁴² *See Making a Complaint*, JUDICIAL APPOINTMENTS COMMISSION, <http://jac.judiciary.gov.uk/about-jac/complaints.htm>; Judicial Appointments and Conduct Ombudsman Homepage, JUSTICE, <http://www.justice.gov.uk/about/jaco>.

JAC's Considerations:

- Intellectual Capacity
- Personal Qualities
- Ability to Understand and Deal Fairly with Litigants and Disputes
- Authority
- Communication Skills
- Efficiency

sess merit. These include intellectual capacity, personal qualities, an ability to understand and deal fairly with litigants and disputes, authority, communication skills, and efficiency.¹⁴³ The Act further mandates that selection will only be made if the person is of good character. Finally, diversity on the bench is encouraged, subject to considerations of merit.¹⁴⁴

The appointment process varies slightly depending on whether the vacant post is at the Supreme Court or an inferior court. When a vacancy occurs at the Supreme Court, the Lord Chancellor must convene a selection commission. That commission consists of the president

and deputy president of the Supreme Court, one member of the JAC, one member of the Judicial Appointments Board for Scotland, and one member of the Northern Ireland Judicial Appointments Commission. The selection commission submits a report to the Lord Chancellor, making a recommendation which the Lord Chancellor may accept, reject, or require reconsideration of the nomination. Once the Lord Chancellor accepts a selection, he notifies the Prime Minister, who then recommends that nominee to the Sovereign for appointment (a mere formality). Selection to fill the vacancy must be based on merit, and no person on the commission may be selected. A highly similar process is used in the selection of the Lord Chief Justice.¹⁴⁵

Appointees to the Supreme Court must have held high judicial office for at least two years or have held rights of audience as barristers at the higher courts of England, Scotland, or Northern Ireland for at least 15 years.¹⁴⁶ “A judge of the Supreme Court holds that office during good behavior”¹⁴⁷—that is, for life, subject to the requirement that all members of the judiciary leave the bench when they turn 70.¹⁴⁸ The protection of tenure during good behavior is deemed important to independence as any legal professional “who has taken a salaried role will not be able to return to legal practice.”¹⁴⁹

¹⁴³ *Qualities and Abilities*, JUDICIAL APPOINTMENT COMMISSION, <http://jac.judiciary.gov.uk/application-process/112.htm>.

¹⁴⁴ Constitutional Reform Act of 2005, c. 4, § 61, sch. 12, ¶¶ 63(2)-(3), 64(1)-(2).

¹⁴⁵ *Id.* c. 4, sch. 8, pt. 3 §§ 29(2), 29(6), 26(3), 27(5), 27(7); c. 2, pt. 4 §§ 67-75. “Heads of Division” refers to the Master of the Rolls, the President of the Queen’s Bench Division, the President of the Family Division, and the Chancellor of the High Court.

¹⁴⁶ Constitutional Reform Act of 2005, c. 4, pt. 3, § 25. “High Judicial Office” includes seats on the Supreme Court, the Court of Appeal, the High Court, the Northern Irish High Court, the Northern Irish High Court of Appeal, or the Scottish Court of Session.

¹⁴⁷ Constitutional Reform Act, 2005, c. 4, pt. 3 ¶ 33.

¹⁴⁸ Judicial Pensions and Retirement Act, 1993, c. 8, pt. 26, § 1. However, if the “appropriate Minister” (most likely the Lord Chancellor, though the statute does not specify) finds that it is in the public interest for the jurist to continue in office after age seventy, he may authorize the person to continue to serve until the jurist is seventy-five. *Id.* § 5.

¹⁴⁹ *Becoming a judge*, JUDICIARY OF ENGLAND AND WALES, http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/judges-career-paths/becoming-a-judge.htm#wbc_purpose=Basic.rss.

Under U.K. law, a member of the judiciary may be disciplined, suspended, or removed from his or her post “[i]n cases where the judge’s conduct is seriously impugned.” A presiding judge may refer any such matter to the Lord Chief Justice and Lord Chancellor.” Those two officials “are jointly responsible for considering and determining complaints about the personal conduct of all judges in England and Wales.”¹⁵⁰ An Office for Judicial Complaints was created to “provide advice and assistance” to these two officials.

The Lord Chief Justice (with the consent of the Lord Chancellor) has largely unfettered disciplinary powers, both formal and informal. He or she may speak to any member of the judiciary informally.¹⁵¹ The Chief Justice also has the authority to “give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes.” The Chief Justice may also “suspend a person from a judicial office for any period during which” the person “is subject to criminal proceedings,” “is serving a sentence imposed in criminal proceedings,” or “has been convicted of an offence and is subject to prescribed procedures in relation to the conduct constituting the offence.”¹⁵²

The circumstances in which a judge may be removed are much more circumscribed. “Since the Act of Settlement it has only been possible to remove a senior judge from office through an Address to the Queen agreed by both Houses of Parliament.”¹⁵³ The Lord Chief Justice and the Lord Chancellor do have the power to refer a judge to the Office for Judicial Complaints to assess whether removal is appropriate and recommend a course of action. However, the exercise of the removal power is exceedingly rare: it has never occurred in England and Wales and has been used only once, “when Sir Jonah Barrington was removed from office as a judge of the Irish High Court of Admiralty in 1830 for corruption.”¹⁵⁴

While the formal qualifications and appointment procedures discussed above are important to understanding how the UK courts select members of their judiciary, the practical effect of this system largely remains to be seen. The current system has only been in place since 2005. The Supreme Court and England’s other highest courts are still dominated by senior barristers known in British parlance as “Queen’s Counsel.”¹⁵⁵

Appointment as Queen’s Counsel is an honor attained by only about 150 lawyers per year and reserved for “the most elite group of senior” lawyers. Because an appointee to the Supreme

¹⁵⁰ *Judicial conduct*, JUDICIARY OF ENGLAND AND WALES, http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/jud-conduct.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpu.

¹⁵¹ Constitutional Reform Act, 2005, c. 4, § 108(3) (“[B]ut this section does not restrict what he may do informally or for other purposes or where any advice or warning is not addressed to a particular office holder.”).

¹⁵² *Id.* § 108(4), (6). Suspension differs from removal in that “[w]hile a person is suspended under this section from any office he may not perform any of the functions of the office (but his other rights as holder of the office are not affected).” *Id.* § 108(8).

¹⁵³ *Independence*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/independence>. An address is roughly equivalent to an impeachment proceeding in the United States’ federal court system. See Senior Courts Act, 1981, ch. 54, pt. 1, § 11.

¹⁵⁴ *Judges and parliament*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/judges-and-parliament>.

¹⁵⁵ See Maute, *supra* note 129, at 410-11 (“Because the JAC is new, there were not established procedure in place to select the first commissioners.”); *id.* at 419-22.

or any other English court may not return to private practice and the judges are paid substantially less than the income of a successful barrister, judicial applicants tend to self-select for those who are in the later stages of their career.

Thus, the English judiciary consists largely of older barristers who had successful private practices and have turned to the judiciary out of a sense of duty and the long-established tradition of successful barristers “retiring” by becoming judges.¹⁵⁶ As a consequence, the World Justice Project has observed, “While the court system is independent and free of undue influence, it is not as accessible and affordable as others in the region.”¹⁵⁷

The lesson from England for Latin America is the importance of avoiding the notion that the judiciary itself should appoint its successors in a non-transparent process. The British reforms expressly recognize that transparency is essential to a more open and independent judiciary, one that is perceived as fair to the entire populace.

C. Germany

Germany, in contrast to the United States and other common law countries like Japan and England, has a civil law system. As a consequence, Germany relies on a combination of professional, civil service judges and so-called “lay” judges (private citizens acting in a judicial capacity) for most legal disputes. Supervising these judges are numerous specialized courts of appeal focusing on different fields of law, with a Federal Constitutional Court (*Bundesverfassungsgericht*) occupying the highest status, but tasked only with the narrow duty of judicial review of constitutional matters.¹⁵⁸

“Specifically designated authorities” ask questions of the Constitutional Court, which renders final answers. The Court is formally detached from all three branches of the German government. The Constitutional Court provides “advisory opinions,” reviewing laws “in the abstract” and, thus, “eliminate[ing] unconstitutional legislation and practices *before* they can do harm.” The metric against which laws are measured is the Basic Rights of the Federal Constitution.¹⁵⁹

The jurisdiction of the German Constitutional Court is invoked in three ways:

- Constitutional Complaints (*Verfassungsbeschwerden*): “This is [a]n extraordinary rem-

¹⁵⁶ *Queen’s Counsel in England and Wales, 2011-12*, JUSTICE, <http://www.justice.gov.uk/news/press-releases/moj/queens-counsel-in-england-and-wales,-2011-12> (click “Queen’s Counsel statistics 1995-12” link). For a discussion of the selection procedure, see *Background to QC Appointments*, QUEEN’S COUNSEL APPOINTMENTS, http://www.qcappointments.org/?page_id=36; *Salary*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/terms-of-service/salary> (“[I]t is worth noting that a successful solicitor or barrister from a top firm or Chambers can earn many times more than even a senior judge.”).

¹⁵⁷ WJP 2013, *supra* note 2, at 22.

¹⁵⁸ German Judiciary Act, §5, available at http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html#p0009.

¹⁵⁹ See Alec Stone Sweet, *Constitutional Courts in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 3* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1913658.

edy open to individual citizens. Any person (and to some extent also a private corporation) can petition the Constitutional Court directly and personally to declare a federal or state statute unconstitutional and void, to set aside an executive act or to reverse the decision of any other court, on the ground that the challenged act violates a right guaranteed to him in the Bill of Rights.”

- Requests by Ordinary Courts (*konkrete Normenkontrollen*): “Every court has the right and duty to pass on the constitutionality of an applicable statute, but it may only proceed to judgment forthwith if it comes to the conclusion that the statute is constitutional. Otherwise, it must, under express constitutional mandate, stay the proceedings and refer the issue to the Constitutional Court.”
- Petitions by the Federal Government, a state government (*Land*), or one-third of the membership of Parliament (*Bundestag*) to declare a federal or state statute unconstitutional and void (*abstrakte Normenkontrollen*): “Decisions of the Federal Constitutional Court are binding on all other courts and government instrumentalities. Moreover, every decision reviewing the constitutionality of a statute has itself the force of statute and is published in the Official Gazette (*Bundesgesetzblatt*).”¹⁶⁰

The Constitutional Court is divided into two “Senates,” each of which possesses a mutually exclusive jurisdiction. Both the First and Second Senates have eight members, for a total of sixteen on the Court. The Court’s president serves on one Senate while the vice president serves on the other. The two-Senate system was instituted in response to a debate over whether the Court would function primarily in a traditional legal capacity or if it would act in a more political role.¹⁶¹

As originally conceived, the First Senate would review the constitutionality of laws and hear cases arising out of ordinary litigation, while the Second Senate would hear the more “political” cases and disputes between branches and levels of government. To distribute the caseload more evenly, however, much of the First Senate’s work was passed on to the Second Senate, blurring the line between the responsibilities of the two.¹⁶²

Appointment to the Constitutional Court is a confidential process. It is “highly politicized.”¹⁶³ Judges are appointed to the Court by the federal legislature. The two German legislative bodies each elect half of the judges: the *Bundestag* (composed of members directly elected by the people) and the *Bundesrat* (composed of members selected by state governments). In the case of the

¹⁶⁰ Wiltraut Rupp-Brünneck, *Admonitory Functions of Constitutional Courts*, 20 AM. J. COMP. L. 387, 389-92 (1972) (“The question whether or not a statute is in accordance with the Constitution may theoretically arise in nearly all constitutional proceedings before the Federal Constitutional Court. Practically it arises only in the following three [set forth in the text].”).

¹⁶¹ Donald P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194, 197 (2009).

¹⁶² *Id.* at 197-98.

¹⁶³ Andreas Broscheid, *I’m *shocked*: Politics even in German constitutional court appointments*, BROSCHEID’S NOTEBOOK, July 27, 2008, available at <http://brosh.blogspot.com/2008/07/im-shocked-politics-even-in-german.html> (“Since Germany is a code law country, judicial appointments generally follow a civil-service system and are less politicized than US appointments Appointments to the German Federal Constitutional Court are different.”); see also Kommers & Russell, *supra* note 161, at 200.

Bundestag, the public election is indirect: the *Bundestag* selects 12 members to a Judicial Selection Committee (“JSC”), and the JSC elects the judges. Election to the JSC is by proportional representation (*i.e.*, by party and region).

A judge must receive two-thirds of the votes (eight) to be elected. In the *Bundesrat*, judges are also elected by a two-thirds majority of the legislative body. Members vote based on a short list of potential nominees, which often includes members of the *Bundesrat* itself. The two bodies do coordinate, with the *Bundesrat* conferring with the JSC to avoid redundant efforts. The two chambers alternate between selecting the Court’s president and vice president.¹⁶⁴

Scholars have noted, “The two-thirds majority required to elect a Judge endows opposition parties in the JSC with considerable leverage over appointments to the Constitutional Court. Social and Christian Democrats are in a position to veto each other’s judicial nominees, and the Free Democratic and Green parties, when in coalition with one of the larger parties, have won seats for their nominees through intra-coalition bargaining. Compromise is a practical necessity.”¹⁶⁵

To be appointed to the German Constitutional Court, a prospective nominee must be forty years of age and eligible for election to the *Bundestag*. He or she also must be qualified to act as a judge pursuant to the Judges Act. If elected to the Constitutional Court, the judge must not simultaneously hold office in the executive or legislative branch of the federal or a state government, or work in any other professional occupation other than as a lecturer at a German college. Furthermore, three of the eight judges on each Senate must be elected from the federal judiciary.¹⁶⁶

Judges on the Constitutional Court serve for a maximum of twelve years. No re-election is allowed. And a judge must retire at 68, even if the full twelve-year term has not expired.¹⁶⁷

The selection of Constitutional Court judges is politically important. “The election of judges to the Federal Constitutional Court . . . is accompanied by a high-profile press campaign, [with] the press as the fourth power trying to bring transparency into an obviously highly political process. It is not surprising to observe that usually the appointments run strictly along party-political lines.”¹⁶⁸

¹⁶⁴ *Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, (hereinafter “BVerfGG”))* §§ 5(1), 6(1), 6(2), 6(5), 7. 9(1). (“Throughout this process, the commission [that creates the shortlist in the *Bundesrat*] coordinates its work with that of the JSC. It is important to avoid duplicate judicial selections, and the two chambers need to agree on the particular senate seats each is going to fill and which of these seats are to be filled with Justices recruited from the federal high courts.”).

¹⁶⁵ Kommers & Russell, *supra* note 161, at 200 (“An advisory commission consisting of the state justice ministers prepares a short list of potentially electable nominees. The justice ministers on the commission, like certain state governors (*Ministerpräsidenten*) and members of the *Bundestag*’s JSC, are often themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the commission’s proceedings, specifying which states shall choose prospective Justices and in what order.”).

¹⁶⁶ *BVerfGG, supra* note 167, §§ 3(1), 3(3), 3(4), 2(3), 4(1)-(3), 19. Eligibility for election presupposes the right to vote, and eligibility can be taken away for various reason—such as being in prison for more than a year.

¹⁶⁷ *Id.* § 4(1)-(3).

¹⁶⁸ Volker G. Heinz, Speech before participants of the Australian Bar Association Conference 1998, The Ap-

The transparency is, however, significantly limited by the “confidentiality rules in Germany [that] protect all judges from public scrutiny of their views.”¹⁶⁹ Confidentiality has proven difficult to maintain, as evidenced by the failed nomination of Dr. Horst Dreier. Dreier was a noted scholar, nominated for the Court by the Social Democrats. As his nomination was being discussed, it was leaked. Having taken positions that angered both the right and left his nomination became controversial. (His support of pre-implantation genetic screening for artificial reproduction angered social conservatives while his support of “rescue torture” angered the left.) While the far-left Greens began the opposition, in the end the Christian Democrats opposed Dreier as well, and his nomination was rejected.¹⁷⁰

The Dreier incident prompted a discussion within Germany as to whether such politically important decisions ought to be made in secret, along partisan-politics lines. While some favored more public debate over potential justices, most German scholars and former jurists preferred the present system.¹⁷¹

A constitutional court like that in Germany has been a popular model for countries recently adopting (or rewriting) their constitutions. This has been the case in post-Franco Spain, post-Communist Europe, South Africa, South Korea, and some countries in Latin America.¹⁷² While ostensibly sympathetic to fundamental personal and institutional rights, the constitutional court model has also proven attractive to authoritarian regimes such as in Egypt, where a constitutional court was established by former, recently deposed President Mubarak as a way to give one-party rule a veneer of legitimacy.¹⁷³

D. Italy

Italy is another civil law system which (like Germany) has a Constitutional Court. Italy has two “highest” courts, with a Supreme Court of “Cassation” (for civil and penal matters) as well as the Constitutional Court. The Italian judiciary is comprised of career judges who advance through bureaucratic appointments with promotion based on a “global evaluation” by the Higher Council of the Judiciary. The Council is responsible for the appointment of all judges in Italy at all levels. It is composed of judges elected by the judicial profession (two-thirds) and lay members

pointment of Judges in Germany (July 7, 1998).

¹⁶⁹ *Id.* at 9.

¹⁷⁰ See Broscheid, *supra* note 163; Dietmar Hipp, *The Man Who Holds Europe’s Destiny in His Hands*, DER SPIEGEL, Sept. 11, 2012, available at <http://www.spiegel.de/international/germany/andreas-vosskuhle-has-power-to-decide-europe-s-fate-a-855100-2.html>; Ulf Gartzke, *Germans Debate “Rescue Torture,”* WEEKLY STANDARD, Jan. 25, 2008, available at http://www.weeklystandard.com/weblogs/TWSFP/2008/01/germans_debate_rescue_torture.asp.

¹⁷¹ Broscheid, *supra* note 163.

¹⁷² *Id.* at 4.

¹⁷³ *Id.* at 1 n. 2, 4. As of 2005, 62 percent of all systems of national constitutional review were of the Kelsenian (*i.e.*, Austro-German) model. (“[T]he framers of new constitutions have been more attracted to the ‘centralized model’ of constitutional review, with a specialized [constitutional court] at its core, than to the ‘decentralized (or American) model’ of judicial review exercised by the judiciary as a whole.”); see also Sweet, *supra* note 162, at 5.

(one-third) appointed by Parliament.¹⁷⁴ There are three *ex officio* members: the President of the Republic, the President of the Court of Cassation, and the Attorney General.¹⁷⁵

While the selection process is still dominated by members of the judiciary given their majority position on the Council, corruption scandals in the 1990s prompted a reform in 2002 that gave Parliament a greater role in the selection process.¹⁷⁶ The complaint was that judges were never subject to any critical review by their peers on the Council, resulting in judges being promoted *pro forma*.¹⁷⁷ The 2002 reform reduced the number of Council members from 33 to 24 and included Parliamentary appointments.¹⁷⁸

The Constitutional Court rules on questions of constitutional law, reviewing challenges to actions of the Italian Parliament, resolving disputes between bodies of government, and hearing any charges against the President of the Republic. It has 15 members, five of whom are selected by the President, five of whom are selected by Parliament, and five of whom are selected by the Higher Council of the Judiciary from the professional judiciary. Members of the Court serve nine-year terms and cannot be re-elected.¹⁷⁹

The Supreme Court of Cassation serves as the court of last resort in civil and penal cases. It is restricted to errors of substantive law (*errores in iudicando*), errors of procedure (*errores in procedendo*), and “defects” or errors of reasoning (*i.e.*, “lacking sufficient or [containing] contradictory grounds”). The Cassation Court also has the authority to determine jurisdiction and competence (that is, which Italian court should hear the case). The Court is made up of members of the professional judiciary, as selected by the Higher Council of the Judiciary.¹⁸⁰

Italian judges receive lifetime appointments, subject to mandatory retirement at 70. There is no special procedure for removal. Professional judges start as lowest-court judges at the beginning of their professional careers, serving only as judges throughout their judicial tenure.¹⁸¹

The Italian judiciary has a reputation for political corruption.¹⁸² The World Justice Project rates Italy lowest amongst the major European countries, noting that “corruption and impunity of government officials undermine the performance of state institutions,” and the justice system

¹⁷⁴ Carlo Guarnieri, *Justice and Politics: The Italian Case in a Comparative Perspective*, 4 *IND. INT’L & COMP. L. REV.* 241, 248 (1994).

¹⁷⁵ Wim Voermans & Pim Albers, *Councils for the Judiciary in EU Countries*, European Comm’n for the Efficiency of Justice, Council of Europe 70 (2003), available at http://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf.

¹⁷⁶ Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, John M. Olin Law & Economics Working Paper No. 444, University of Chicago Law School (Nov. 2008) at *6.

¹⁷⁷ Nuno Garoupa & Tom Ginsburg, *The Comparative Law & Economics of Judicial Councils*, 27 *BERKELEY J. INT’L L.* 53, 76 (2009).

¹⁷⁸ *Id.* at 76-77.

¹⁷⁹ CONST. OF ITALY Dec. 22, 1947, art. 134, 135; see also Samuel A. Alito, *An Introduction to the Italian Constitutional Court* (May 31, 1972) (unpublished A.B. thesis, Princeton University), available at www.princeton.edu/~mudd/news/Alito_thesis.pdf.

¹⁸⁰ Corte Supreme di Cassazione, *Arte e Storia*, www.cortedicassazione.it/Cassazione/ArteStoria/ArteStoria.asp.

¹⁸¹ Voermans & Albers, *supra* note 175, at 65-66.

¹⁸² *Id.* at 65.

is slow.¹⁸³ The Global Competitiveness Report similarly notes Italy's "high levels of corruption and organized crime and a perceived lack of independence within the judicial system." Italy ranks 133rd (out of 142) for the efficiency of its legal framework for settling disputes, 126th for the ability to challenge governmental action, 127th for trust of government officials, and 119th in terms of favoritism to well connected firms and individuals.¹⁸⁴

E. China¹⁸⁵

The Chinese legal system is evolving in light of the many economic and legal reforms that the ruling Communist Party has been initiating as the Party seeks to have China become the world's leading economy. As the World Justice Project observed, China has seen significant improvement in recent years. It "scores well on public safety, ranking thirty-second overall and fourth among its income peers," and has a relatively effective and speedy judicial system. But the WJP also noted that "judicial independence is a concern," "indicators of fundamental rights are weak," and "[t]he criminal justice system is . . . compromised by political interference and violations of due process of law."¹⁸⁶

Given its drive for economic development, China clearly recognizes the need to be perceived as having a legal system that is governed by the rule of law, something that decidedly was not part of China's history. In imperial China, judges had no independence. The Emperor had supreme authority in all affairs, including the administration of justice. Local officials were principally responsible for the routine duties of administration, such as the collection of taxes, but were also tasked with resolving legal disputes.¹⁸⁷

Efforts were made to establish an independent judiciary after the Emperor was overthrown with the founding of the Republic of China in 1912. The Provisional Constitution of the Republic established a Central Tribunal to exercise supreme judicial power over civil and criminal matters. The Tribunal's judges were to be appointed by the interim president and the attorney general. The provisional government set forth qualifications for appointment as judges. But this Americanized system was never implemented. The reform efforts were disrupted by infighting among various regional warlords, the beginning of World War II, and the follow-on Chinese civil war that resulted in the formation of the People's Republic of China by Mao Zedong and the Chinese Communist Party, in 1949.¹⁸⁸

Following the Communist Party's takeover, the Republic's legal system was abolished. All judicial officers were dismissed in favor of a revolutionary regime. According to the theory of class struggle at that time, the existing judicial officers were considered "class enemies," viewed

¹⁸³ WJP 2013, *supra* note 2, at 26.

¹⁸⁴ GCR, *supra* at note 3, at 27, 393-400.

¹⁸⁵ This section is gratefully acknowledged to be based on the legal research and observations of Qiang Zhou, Huiqiong Deng, and Congying Bai, Attorneys at Law and Partners, ZY Partners, Beijing, China.

¹⁸⁶ WJP 2013, *supra* note 2, at 30.

¹⁸⁷ See Mi Yong, Research on the Selection Measures of Judges 51-59 (April 2009) (unpublished Ph.D. dissertation, Jilin University).

¹⁸⁸ *Id.*

as “tools for repression of the people.” The Communist Party issued a directive called “Determining Principles of Justice in the Liberated Areas.”¹⁸⁹ The directive resulted in what has been called “the age of the socialist legal system”—in essence, a time without any rule of law—with the seemingly endless political persecutions of the Chinese Cultural Revolution.¹⁹⁰

Starting in 1976, the Communist Party began implementing the “Reform and Opening-up Policy.” As part of that effort, the Party focused on the value, for successful economic development, of a legal system that is perceived to respect the rule of law. In 1995, the Party enacted the Law of the People’s Republic of China on Judges, establishing professional qualification for the appointment of judges and creating the Supreme People’s Court. In 2001, the National People’s Congress (“NPC”) revised the Judges Law to strengthen the professionalism and independence of the judiciary, in part through the establishment of the NPC’s Standing Legal Affairs Committee.¹⁹¹

The Judges Law set minimal qualifications relating to education and legal experience for judges of the Supreme People’s Court and lower levels of the judiciary. However, political correctness remains a core requirement: “[T]o have fine political and professional quality and to be good in conduct.”¹⁹²

To be on the Supreme People’s Court, a judge must have “at least eight years” of legal experience.¹⁹³ All new judges for any court must pass a unified national judicial examination, although previously appointed judges were exempted from that requirement. That means the Chinese judiciary is still populated with many judges selected primarily by the Communist Party leaders based on their political reliability and willingness to appease the Party and its government officials.¹⁹⁴

¹⁸⁹ The main contents of the directive provided that: (i) “The judicial work of the people ... must be based on the new laws made by the people;” (ii) “Before the people’s new laws are released systematically, the judicial work shall be based upon the CPC’s policies and various guiding principles, laws, regulations and resolutions issued by the People’s Government and the People’s Liberation Army;” (iii) “The judiciaries shall always educate and reform the judicial officers by defying and criticizing ... all anti-people laws and decrees of the capitalist countries, including European countries, the United States and Japan, and learning and understanding the view of the state, the view of laws and new-democratic policies, principles, laws, orders, regulations and resolutions reflecting the Marxism, Leninism and Mao Zedong Thought”

¹⁹⁰ During the Cultural Revolution (1952-1976), knowledge of law was entirely secondary to having the proper socialist revolutionary consciousness and Communist Party affiliation in judicial appointments. Zhang Hua and Wang Li, *Research on the Judge Selection System in China*, 2004 JINLING LEGAL REV. 149-50.

¹⁹¹ Judges Law of the People’s Republic of China, *translation available* at <http://en.chinacourt.org/public/detail.php?id=2692>.

¹⁹² Article 9 of the Judges Law states: A judge must possess the following qualifications: (1) to be of the nationality of the People’s Republic of China; (2) to have reached the age of 23; (3) to endorse the Constitution of the People’s Republic of China; (4) **to have fine political and professional quality and to be good in conduct**; (5) to be in good health; and (6) to have worked for at least two years in the case of graduates from law specialties of colleges or universities or from non-law specialties of colleges or universities but possessing the professional knowledge of law; or to have worked for at least one year in the case of Bachelors of Law; those who have Master’s Degree of Law or Doctor’s Degree of Law may be not subject to the abovementioned requirements for the number of years set for work.

¹⁹³ Article 9 of The Interim Measures for Public Selection of Candidates to Newly Appointed Judges and Procurators (2008).

¹⁹⁴ Song Jianchao and Fu Xiangbo, *Explore the Judge Selection System with Chinese Characteristics*, PEOPLE’S CT. DAILY (July 11, 2005); WANG LIMING, RESEARCH ON JUDICIAL REFORM 456 (2nd ed. 2001).

The President of the Supreme People's Court is selected (and can be removed) by the National People's Congress. Other judges of the People's Court are appointed and removed by the Standing Committee of the National People's Congress, upon the recommendation of the President of the People's Court. The presidents of the local people's courts are selected and removed by the applicable local people's congress.¹⁹⁵

In practice, the judges for all courts are determined by the parallel level of the Communist Party, with all appointments reviewed centrally by the Party's Organization Department. Only candidates nominated by the Party may be submitted to Congress for election. The appointment of judges by the People's Congress is a mere formality.¹⁹⁶

The Chinese Constitution provides that Congress has the power to supervise the courts.¹⁹⁷ The authority of the Supreme People's Court is limited. The Court has no power to review the constitutionality or legality of actions by the government or the Communist Party. Accordingly, the basic function of judges is to adjudicate criminal matters and private civil disputes in accordance with the relevant laws.

Even in the performance of these limited functions, the judiciary is effectively under the influence of the Communist Party and its appointed governmental officials.¹⁹⁸ And this influence is regularly and actively exercised through Party "instructions," including shielding the illegal or criminal acts of Party leaders.¹⁹⁹

In theory, judges cannot be arbitrarily removed. The Judges Law provides that "[j]udges shall enjoy the . . . right[] . . . to be not removed or demoted from the post or dismissed, and to be

¹⁹⁵ Judges Law, *supra* note 191, art. 11.

¹⁹⁶ Sun Jian, Establishment of Judge Selection and Appointment System, *L. SCI. MAGAZINE*, Mar. 15, 2004.

¹⁹⁷ The specific provisions of the Constitution are as follows:

Article 3: All administrative, judicial and prosecutorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate. . . .

Article 67: The Standing Committee of the National People's Congress exercises the following functions and powers: . . . (6) [S]upervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate; . . .

Article 104: The standing committee of a local people's congress at or above the county level discusses and decides on major issues in all fields of work in its administrative area; supervises the work of the people's government, people's court and people's procuratorate at the corresponding level; . . .

Article 128: The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which created them.

¹⁹⁸ See Randall Peerenboom, *Judicial Independence in China* 71 (2009).

¹⁹⁹ See Guo Daohui, *Enforce the Judicial Independence, and Contain the Judicial Corruption*, 1 *LEGAL SCI.* (1999); Zhou Daoluan, A Critical Comment on Supervision in Specific Cases and Relevant Proposals, *Research on the People's Representative Congress*, 2004/3. Chinese law explicitly requires that "the people's courts should actively accept the supervision from the people's congress, the political consultative conferences, the procuratorate, and the society." "The people's courts should actively obtain the support of various social sectors, and enhance the cooperation with them, so as to build a good external environment." *Opinions of Thoroughly Implementing the Spirit of the National Television and Telephone Meeting of the Political and Judicial Work*, Supreme People's Court, December 24, 2009. See also Wang Liming, *Research on Judicial Reform*, *LAW PRESS* 87 (2001).

not given a sanction, without statutory basis and without going through statutory procedures.” But in practice, there is a relatively simple process for dismissal. The Judges Law allows for removal if a judge is “determined to be incompetent in the post through appraisal” or “disqualified from continuing to hold the post because of violation of discipline, law or commission of a crime.” These vague standards provide ample bases for removal if a judge crosses someone in power in the Communist Party. This problem is compounded by the fact that there is a system of “investigation against wrong judgments.” Under this system, a judge can, if he or she makes a “wrong” ruling, be sanctioned with penalties including a reduction of pay, disqualification from promotion, or demotion of or removal from office.²⁰⁰

An additional deterrent to judicial independence is the relatively low pay for judges. Judges are paid like other government officials; they do not have a separate salary or benefit arrangement. Although judges and government officials have had their salaries increased several times in recent years, compared with other professions (e.g., employees of state owned enterprises, university teachers, governmental departments like industry, commerce, tax, and finance), their salaries are low.²⁰¹ This has made it difficult to attract quality judges. Excellent law students do not want to become judges; good judges tend to leave the judiciary. As a consequence, the remaining judges are subject to economic as well as political corruption.²⁰²

Judicial corruption is a recognized problem.²⁰³ A 2012 report, submitted to the People’s Congress and the Political Consultative Conference states that during 2011, “the various courts have investigated 519 personnel who violated the discipline or the law, among whom 77 people were prosecuted due to corruption, bribery or abuse of law during adjudication[.]” The general perception is that the actual number of judges involved in judicial corruption far exceeds the data release by the Chinese government.²⁰⁴

The Chinese Communist Party has declared that a “central [political] task” is to “rule the country by law, implement the law for the people, fair and just, [provide] service to the macro-society, and stick to the party’s leadership.” In December 2007, Hu Jintao, the secretary of the Communist Party, explained that judicial personnel should “stick to the supremacy of the Party’s cause, supremacy of the people’s interest, and supremacy of the constitution and law, so as to undertake the historical mission and political task of leading the vast judges, prosecutors

²⁰⁰ Judges Law, *supra* note 191, art. 83, 13; see also Li Xuli, *A Comparative Research on the Job Security System for Chinese and Foreign Judges*, CHINESE JURISPRUDENCE NET, <http://www.iolaw.org.cn/showNews.asp?id=16146>.

²⁰¹ See Zhou Changzhu, *Discussion on the Relationship between Judges’ Welfare Security and the Construction of Modern Country Ruled by Law*, RESEARCH CENTER FOR GOVERNMENT BY LAW, http://law.china.cn/book/txt/2007-12/17/content_1953060.htm.

²⁰² See Su Li, *Review of the Judges Selection System*, 3 JURISPRUDENCE (2004); Zhou Changzhu, *Discussion on the Relationship between Judges’ Welfare Security and the Construction of Modern Country Ruled by Law*, <http://law.china.cn>; Wang Liming, *Research on Judicial Reform*, LAW PRESS 478 (2001); Xiao Yang, *The System Construction and Improvement Is a Guaranty of the Judges’ Team Construction*, People’s Justice, 1998/5.

²⁰³ ERIC CHI-YEUNG IP, JUDICIAL CORRUPTION AND ITS THREATS TO NATIONAL GOVERNANCE IN CHINA, 7 J. ADMIN. & GOV. 80 (2012).

²⁰⁴ Yu Xiaopei, *Discussion on Prevention of Judicial Corruption* (Chinese), <http://srzy.chinacourt.org/public/detail.php?id=619>.

and other personnel to safeguard the scientific development and promote social harmony.”²⁰⁵

The President of the Supreme People’s Court, Wang Shengjun, has advanced the notion of “active adjudication.” While suggesting independence, the reality is that the interests of the Communist Party trump “the people’s interest.”²⁰⁶

In sum, notwithstanding China’s economic success, the country’s actual legal system provides no new lessons for countries in deciding how best to promote the rule of law. China’s economic success has been admirable but, if anything, its growth has been hampered by the general perception — inside and outside of China — that its judiciary presently has limited to no independence from the Communist Party.²⁰⁷

F. International Lessons

The central lesson from these other countries is the recognition that promoting a more effective operation of the rule of law is a goal for all of them, including China. Each nation has its peculiar cultural traditions and legal history that has produced the structure and actual operation of their respective legal systems. Few countries replicate the deference to authority and ancestry in Japan, the rigid discipline of the Germans or the fragmentation and pervasive societal corruption of Italy. That said, England’s willingness to undertake substantial, recent reforms in the interest of making its judicial system a more modern representation of the entire British populace is instructive. It demonstrates that other countries can and should consider their own efforts to enhance the operation of the rule of law through processes for the selection and appointment of more qualified, independent, impartial and societally diverse judges, committed to due process for all.

²⁰⁵ *Id.*

²⁰⁶ He Weifang, *Among the Three Supremacies, Which One Is Really Supreme*, http://blog.sina.com.cn/s/blog_488663200100atga.html; Theoretic Study on Further Deepening the Guiding Thinking of “Three Supremacies”, available at <http://old.chinacourt.org/html/article/200906/26/362750.shtml>.

²⁰⁷ WJP 2013, *supra* note 2, at 30.

IV. Conclusions

The overall well-being and happiness of a country's citizenry is directly affected by the degree to which the nation operates by the rule of law. That requires enforcement by an independent judiciary. How judges are selected and appointed is critical to achieving the judicial independence that is needed for the rule of law, with due process for all, to prevail over the inevitable efforts at political influence and economic corruption.

The quality and independence of the judges selected for and appointed to a nation's Supreme Court sets the tone for the overall quality and independence of a country's judicial system as a whole. Therefore, this paper has focused on how Supreme Court justices are selected and appointed in a representative cross-section of nations around the world and how the differing approaches have impacted the relative independence of their respective judiciaries and their willingness and ability to enforce the rule of law. Based on that analysis and as further detailed below, we recommend a transparent and merit-based system for the appointment of Supreme Court justices for all nations.

As explained above and further emphasized below, transparency can only be achieved through the evolution of an active free press and an interested citizenry. The press and the people must have the capacity and courage to demand freedom of speech and individual liberties, including the right to be governed by a legal system based on the rule of law, with due process for all, enforced by independent and impartial judges. That requires continuous education of the populace from an early age, on the importance to the nation and its citizens of the rule of law and the protection of everyone's human rights. The path to progress requires an active commitment by the press, educators and academics to carry the message to the public, so that the citizenry can be motivated to demand that the governing political powers accept the need themselves to commit (and submit) to the rule of law.

A. A Checks and Balances Process for Selection and Approval

The approach taken in the United States (and other nations)—of nomination by a democratically elected executive, with final approval by an elected legislature through hearings open to the press and public—has, in the United States, proven superior to the other alternatives of nominating committees, popular elections and executive/legislative or judiciary-only appointments. The states of California, New York, New Jersey, as well as England, have been gravitating towards the executive/legislative model.

The U.S. experience demonstrates that the time required for the executive/legislative, checks-and-balances approach allows an intense media focus on the selection and appointment processes, with a roadmap that can be readily explained to and understood by the general populace. The duration and recognized importance of the process promotes awareness, interest and transparency.

This method avoids the complexity of nominating committees, whether comprised of professional lawyers, other judges, or government officials, who themselves must be selected and appointed. In Arizona, nominating committees have been shown to diminish public and press interest in the process of selecting and approving Supreme Court justices because of the (too often false) appearance that “independent experts” are protecting the public’s interest. In Japan and England, allowing existing judges to select their successors has resulted in less dynamic and representative judiciaries.

Press and other media attention on the selection and appointment process enhances public awareness of the importance to a nation and its populace of who is allowed to serve on the country’s Supreme Court. Both the executive and the legislature can—and should—be encouraged to solicit the views of the nation’s bar association, legal scholars and others (as is done in the United States and elsewhere as shown above). Media and the critically necessary public interest in the process provide a potential discipline upon the decisionmakers, enhancing the likelihood that more competent, qualified, independent and impartial Supreme Court justices will be selected and appointed, or the decisionmakers may face an adverse reaction from the public, at the ballot box or otherwise.

In the U.S., the checks and balances approach applied in the selection of the U.S. Supreme Court has proven more effective in promoting public interest and media focus than the popular election of judges, as seen in Texas and Mississippi. Judicial elections may appear appealing as a nation moves from an authoritarian to a more democratic government, with popular elections. But as seen from the experience in those states in the U.S. which have experimented with (and in several, like California and New York, abandoned) popular elections, the elected-judiciary approach has proven ineffective in achieving the press and public attention that is critical to the success of the process. Furthermore, the need to raise money for elections has been a source of corruption and politicization. It has also diminished the likelihood that the most qualified and competent people are willing to serve as Supreme Court justices.

Solely executive (effectively China) or legislative appointments (South Carolina) of justices have similarly proven to be less effective to safeguard judicial independence and the quality of judges. Solitary control diminishes the likelihood of close press or public scrutiny, and it enhances the probability of the politicization of the justices. That diminishes the likelihood of judicial independence, particularly as to any review of executive or legislative action. An ability and willingness of the judiciary to act as a check on inappropriate, unfair or corrupt governmental action is an essential element of an effective rule of law system.

An important caveat is that the structure of the selection process cannot itself assure that a nation’s Supreme Court will have the type of qualified, competent, independent and impartial justices that will enforce the rule of law. As explained below, there are a number of other factors that are critical to having an effective judicial system, the most essential of which is public awareness of the importance to the nation’s success—and the well-being and happiness of its citizenry—of having the types of Supreme Court justices who can and will enforce the rule of law, with due process for all.

To that end, the people of a nation must be vocal—in public debate and at the ballot box—about their demand both for competent candidates, with the right qualities, and for transparency in the selection and appointment process. An active free press is essential to public awareness and interest. All of this is best promoted by education from an early age on the value to the nation and its citizenry of an independent judiciary.

In short, a bottom-up movement fostered by the press, educators and academics is the surest path to progress.

B. Life Tenure, with Mandatory Retirement and Circumscribed Rights of Removal

Experience has shown that independence, and the ability to attract and retain more qualified Supreme Court justices, is enhanced by lifetime appointments. Life tenure prevents the need for a justice to consider the implications of his or her present rulings on reappointment (or election), or the ability to obtain a legal or other position at the end of his or her term of office. Lifetime appointments have the additional benefit of assuring that the Court will have justices with greater judicial experience and, arguably, more competence in dealing with the types of important and complex issues that must routinely be resolved by a nation's highest court.

The criticism of the U.S. Supreme Court's lifetime appointment system—that allows potentially senile judges to stay on until a politically opportune time to resign—can be avoided by a mandatory retirement age. Many states in the U.S. and many nations have mandatory retirement ages. Given increased longevity and the desirability for longer tenures, a mandatory retirement age—of no more than 80 (as recently proposed for New York) and no less than 70—would be appropriate to balance the competing interests of competency and predictable turnover. A specific benefit of a mandatory retirement age is that it allows the press and public to focus attention on potential appointees (and their respective merits) in the time immediately before a justice is known to have to resign because of age.

Of course, there must always be a process for removal of a Supreme Court justice. But the threat of removal should be narrowly circumscribed to conduct detrimental to the independence and integrity of the Court itself, *e.g.*, evidence of corruption, mental incapacity, criminal misconduct, and the like. The process for removal should mirror the process for approval, meaning that a justice should not be removed without having the due process of open hearings before the legislative body that confirmed him or her, on any claimed grounds for removal. Impeachment should require a two-thirds majority vote, to deter ready resort to the removal process for political dissatisfaction.

C. Supreme Court Justices' Pay Should Be Meaningful and Protected

As seen in New York, a judicial salary of sufficient magnitude to attract qualified candidates should be guaranteed. There should be no ability of the executive or legislature to manipulate

(other than by periodic increases). Such protected pay has proven to be a further stimulus to the independence of the judiciary. The fact of life tenure and the societal stature of being a Supreme Court justice should mean that the pay can be well below what is obtainable in private practice.

Having the pay scale continue (like a pension) after retirement would have the further effect of allowing resignations, *e.g.*, for poor health, prior to the mandatory retirement age. The right to continued pay should cease if a retired justice enters private practice or some other government or regularly remunerative position.

D. A Reasonable, Uneven Number of Justices

It is important to allow the multiplicity of viewpoints in a Supreme Court. Experience has taught that this leads to the best quality of thoughtful decisionmaking. However, too large a number of justices make deliberations to decide a matter, cumbersome and inefficient. An uneven number is advisable to allow a majority decision in most cases. There is no “right” number but nine justices (like for the U.S. Supreme Court) has seemed to be a good balance.

E. Qualifications to Be a Supreme Court Justice

The quality of the justices appointed to a nation’s Supreme Court is the ultimate determinant of its independence and commitment to the rule of law. We believe that, in order to be appointed a justice, a candidate should have the following qualifications:

1. Independence and impartiality: a judicial temperament

The foundation for a successfully functioning Supreme Court is the impartiality and independence of its members. In other words, judges should not be influenced by interests beyond the law. This is an important guarantee that their decisions will be based solely on legal considerations. Impartiality and independence require a judicial temperament, the ability and willingness to engage in thoughtful, open-minded analysis and collegial deliberations before reaching a final determination.

Justices should not only *be* independent and impartial but should also *be seen* as being independent and impartial. Candidates should not have any political or economic commitments which may suggest that they lack this quality. To test the question of actual and likely future independence and impartiality, it is recommended that all candidates be required to furnish a sworn statement containing a comprehensive list of clients, contractors, former work and professional colleagues, as well as business and professional entities in which they have a stake or have been involved with in the past. That statement should be timely available to the press and public and should be assessed thoroughly in the open hearings about the candidate’s qualifications for approval as a justice.

2. Reputable conduct and spotless record of integrity

A spotless record of conduct and a reputation for personal integrity are important factors for

promoting respect for and confidence in a justice's commitment to the rule of law. Moreover, morally or ethically improper conduct, beyond discrediting a justice's personal reputation and that of the Court generally, could render a justice more vulnerable to improper influence.

As part of the overall assessment process, a candidate's work and other references should be checked thoroughly. The person should not have been sanctioned by a court or an ethics committee of a bar or other organization. The public hearing should examine these issues, as well as any observations or challenges made by citizens. All allegations of misconduct should be investigated and taken into account when assessing a candidate's appropriateness to be a justice.

3. Outstanding knowledge of the law and legal analysis

Another fundamental characteristic of a Supreme Court justice should be his or her legal knowledge and experience. The importance and complexity of cases coming before a Supreme Court means that its justices should have an excellent history of understanding and assessing legal issues. This suggests that the best candidates are judges on the nation's lower courts, with proven experience in making independent and impartial judgments on important and complex legal questions.

Consideration should also be given to:

- The academic education of the candidate;
- The publication of legal articles or books which have received positive peer reviews (*i.e.*, publications that have been recognized as being important contributions to legal debate);
- Academic or professional lectures on legal issues;
- Public recognition as a legal expert (*i.e.*, he or she has been a resource person for national and international entities);
- The candidate's experience and reputation amongst his or her peers in private practice or governmental service on legal issues; and
- If the candidate is a prior or current judge, his or her judicial decisions and reputation for independence and impartiality.

4. Excellent oral and written communication skills

Because of the important and often complex nature of the work undertaken by a Supreme Court, justices must not only be capable of properly analyzing the substance of an issue that is brought before the Court, they must also be able to communicate their ideas clearly, both orally and in writing. This means that candidates should possess advanced legal reasoning and analytical skills, both oral and written, and should be able to express their opinions clearly and properly to even a non-lawyer audience, *i.e.* the general citizenry of the nation.

To assess a candidate's oral and written skills, it is important that at least a representative sampling of briefs, decisions, and other documents prepared by the candidate during his or her career be investigated and reviewed in an open hearing. The candidate's reputation for presentations in professional forums and his or her performance at the open hearing should be considered as to the candidate's oral communication skills.

5. Highly developed creative intelligence and collaborative skills

Given the nature and inherent pressures of the work performed by a Supreme Court and the potential impact of its decisions, justices should be prepared to deal creatively with new situations and problems. It is therefore important that justices possess the following characteristics:

- A problem-solving orientation;
- A capacity to build consensus; and
- An ability to take into account other people's views.

In order to assess these capacities, the candidate could present examples of situations in which those skills were applied in the past. These experiences should be examined and evaluated at the public hearing.

6. Commitment to the judiciary as an independent institution

The Supreme Court is not only the highest court in a country, but it is also plays a leadership role in the administration and organization of the judiciary. Therefore, candidates should demonstrate an understanding of their responsibility for maintaining the judicial branch as a separate and independent public institution that acts as a counterbalance to the nation's executive and legislative branches of government.

7. Demonstrated commitment to the protection of human rights, democratic values, and transparency

Protection of individual human rights and democratic values are at the heart of modern democracies. Transparency of public administration is a critical element in assuring the effective operation of the rule of law and due process for all.

Given the importance of these principles, Supreme Court candidates should prove their commitment to such values through examples from past written documents and public statements. These matters should be examined during the open hearings on a candidate's nomination.

8. Ability to understand the social and legal consequences of one's decisions

Because Supreme Court decisions often have such a significant impact on the social and economic well-being of the country, justices must be aware of this responsibility and the need to act judiciously: a justice must have a judicial temperament.

If a candidate is a sitting judge, the open hearings should focus on his or her past judgments to assess this quality. Written material and public statements by the candidate should also be examined.

9. Ability to strike a sound balance between a high level of productivity and careful consideration of cases

The work of a justice, in addition to being critically important for the country, is extremely demanding. Experience shows that many cases heard by a Supreme Court are complex and sensitive. To ensure the timely delivery of justice—another fundamental human right that must be safeguarded by the judiciary—a Supreme Court works under great pressure. It is essential that the justices are able to find the right balance between maintaining a high level of productivity as well as ensuring high-quality decisions, based on a thorough analysis of the issues brought before them.

Candidates for Supreme Court vacancies should demonstrate their experience with and aptitude for working in such an environment, by providing examples of pressured performance. These issues should be addressed during the open hearing.

10. Diversity

Because of its importance in the overall fabric of a nation's government, the composition of a country's Supreme Court should reasonably reflect its demographics. Therefore, as shown in the discussion of the recent appointments to the U.S. Supreme Court, consideration should be given in the selection and approval process of the desire to see a fair representation of women as well as men. And there should be an effort to have justices from the various nationalities and ethnicities that are prevalent in the nation.

Diversity decidedly does not mean that there should be a focus on the political party affiliations of the candidates. The whole point is to select and appoint competent, independent, impartial persons, with a judicial temperament and a commitment to the rule of law. That is not to say that politics will not play any role in the selection of potential candidates. The discussion of the process in the United States for the selection and approval of its Supreme Court justices demonstrates that politics is always a factor. But protections like life tenure, with guaranteed pay, and assurances through the transparent process of the open hearings, that a candidate possesses the proper—non-political—qualification articulated above, are critical to achieving a Supreme Court that will rule on the basis of the law, not the prevailing political party's preferences.

F. Education of the Nation's Citizenry from an Early Age and Through Freedom of the Press and Speech

As we have emphasized throughout this paper, experience across the globe has shown that, to have a legal system that is governed by judicial independence starts with impartial Supreme Court justices who will enforce the rule of law, with due process for all. Early, ongoing education is the best stimulus to the nation's people becoming vocal about their demands for transparency in the selection and appointment process, and their expectation that justices with the right

qualities of independence and impartiality will be appointed. That requires courageous teachers and professors.

The commitment to this essential education begins with the teachers, but ultimately the demand must come from the people. That demand can be fostered by the press and other media which must be equally forceful and courageous. The press should be an active promoter of public awareness of the importance of who is appointed to the nation's Supreme Court and why.

IN CONCLUSION, while no judicial system will be a perfect fit for every country, we are hopeful that this discussion will aid each country's decisionmakers in tailoring a judicial system—and a selection and approval process for its Supreme Court justices and other judges—that promotes both the rule of law and respect for human rights.

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