

JUDICIAL APPOINTMENTS AND JUDICIAL INDEPENDENCE

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I. Introduction

Judicial independence is a central goal of most legal systems, and systems of appointment are seen as a crucial mechanism to achieve this goal. Judges who are dependent in some way on the person who appoints them may not be relied upon to deliver neutral, high-quality decisions, and so undermine the legitimacy of the legal system as a whole. While there is near-universal consensus on the importance of judicial independence as a matter of theory, legal systems utilize a wide range of selection mechanisms in practice, often reflecting slightly different conceptions of independence. The diversity of systems of judicial selection suggests that there is no consensus on the best manner to guarantee independence.

One reason for the diversity is that judicial appointment systems also implicate other values that may be in some tension with the ideal of judicial independence. For example, appointments must also ensure judicial accountability, the idea that the judiciary maintain some level of responsiveness to society. A related concern is the representativeness of the judiciary. In recent years, there has been concern in several societies about the composition of the judiciary on ethnic and gender lines. The underlying concern is that the judiciary should loosely mirror, to a certain degree, the diversity of the society in which it operates. Otherwise justice will be viewed as perpetuating dominance of one group over another. Several countries have revised their systems of appointing judges in recent years in order to ensure more diversity on the bench.

It is helpful to begin by considering the concept of judicial independence. Independence can be defined in a number of different ways, each with its own implications for systems of judicial appointment. These include:

1. independence of judges from the other branches of government or politicians;
2. independence from political ideology or public pressure more broadly defined (including ethnic or sectarian loyalties); and
3. independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires.

This report evaluates different systems of appointing judges in light of the need for an independent, accountable and diverse judiciary. It first considers the major systems for appointing judges. Next it briefly considers the questions of judicial discipline and removal, on the assumption that these systems can have significant effects on the

incentives of judges at the appointment stage. It concludes with some implications of the analysis for the Iraqi situation.

II. Systems of Appointment

Systems of judicial appointments come in four basic configurations:

1. appointment by political institutions;
2. appointment by the judiciary itself;
3. appointment by a judicial council (which may include non-judge members);
4. selection through an electoral system.

Countries can also use different systems for different levels of court. A common configuration for countries in the civil law tradition, which utilizes a bureaucratic model of the judiciary, is some version of appointment by a judicial council for lower level judges, with a more political process being used for the supreme or constitutional court. The US system uses election for some state judges but not at the Federal level. Internal variation is therefore possible.

We focus on the body with actual power or discretion to select judges. In many countries, the head of state appoints judges as a formal matter, but nomination or actual selection is done by another institution, such as the legislature, executive or the judiciary itself. For example, in Thailand, each judge is appointed by the King, but only after the candidate has passed a judicial exam run by the courts, and served a one-year term of apprenticeship. This type of system can be considered one in which the judiciary plays the primary role, notwithstanding *formal* appointment by the King.

A. *Appointment by political institutions:* There is a wide range of different models for political appointment mechanisms. Appointments to constitutional or supreme courts typically involve either a “representative” mechanism or a “cooperative” model. Other systems allow a single institution, either parliament or executive, to make appointments.

1. A representative system is one in which each of several political institutions will select a certain percentage of the court. For example, in many Eastern European countries, Italy and in South Korea, the constitutional court is formed by 1/3 of the members being appointed by the president, 1/3 by the legislature, and 1/3 by the supreme court. (One variant has 1/3 appointed by each of two houses of the legislature and 1/3 by the chief executive.) Representative systems are designed to ensure a mix of different types of professional and political backgrounds on the court, and to prevent any one institution from dominating. Since only one-third of the membership is appointed by any one body, each can be assured that it will be *unable* to dictate outcomes if each judge acts as a

pure agent. However, it is also possible that judges will be seen as the agents of those who appointed them. For example, justices appointed by the parliament might favor the parliament in disputes with the executive. This system focuses on the collective nature of the court to ensure independence and accountability.

2. In a cooperative system, two or more institutions must cooperate to appoint members of the court. Supreme or Constitutional Court Justices in the US, Brazil and Russia, for example, must be nominated by the president and approved by a house of the legislature by a majority vote. Multiple institutions function somewhat like a supermajority, and help to ensure that judges must have broad support (institutional or political) before appointment. This system probably leads to more moderate judges, less likely to act as agents of those who appoint them, because they must have a supermajority of support. The cooperative system, however, risks deadlock, since appointment requires the agreement of different institutions to go forward. It is possible that in circumstances of political conflict, appointments would not be made at all, and vacancies would persist.
3. In some systems, a single political institution dominates. The German Constitutional Court is effectively appointed by the parliament, with each house of the legislature appointing an equal number of members to the Constitutional Court. The German system uses supermajority requirements, so that a 2/3 vote is required. This has led to a norm of reciprocity that has established *de facto* permanent seats on the Constitutional Court held by the major parties. Each of the two largest parties has an equal number of seats. The norm produces a stable court that reflects broad political preferences without over-representing either of the two main factions. This version of the legislative-centered system is stable because the party system is stable: if the parties were less stable or if there were numerous small parties rather than a few large ones, the supermajority requirement might make appointments more difficult or even impossible.
4. Finally, in some cases (formerly the United Kingdom and several other common law jurisdictions) judges are appointed by a government minister (typically the Minister of Justice or Attorney General). Even though by convention the judges appointed under this system were not seen as explicitly political, there was a good deal of criticism in the United Kingdom that the judiciary did not adequately reflect the diversity of the society, with women and minorities highly under-represented. This system was recently replaced with a variant on a judicial council.
5. In short, political appointment systems lean toward accountability rather than independence. They have the virtue of ensuring political support for the judges, but risk politicization. Finally, the degree of

representativeness of the judiciary in these models seems to increase with the number of political actors involved in the appointment process. Where one institution has the exclusive role (as the executive formally had in the United Kingdom) diversity suffers. Supermajority requirements and cooperative systems involving multiple institutions, on the other hand, tend to lead toward moderation and more diversity, but can take longer to make appointments or result in gridlock.

- B. *Judicial self-appointment*: In some countries in the common law tradition, the judiciary has become effectively self-appointing.
1. For example, in India, the higher judiciary is appointed by the President after “consultation” with the Supreme Court and this has led the judiciary to be largely self-appointing in practice. Systems of judicial self-appointment also include those in which judicial councils (see below) are composed entirely of judges. The Iraqi Higher Judicial Council is such a body. Another example of a largely self-appointing judiciary is that of Japan. Although the Supreme Court is appointed through a political process, the Supreme Court Secretariat has total control over lower-level judicial appointments, training, promotion and discipline. Some have criticized this combination as allowing political control over the whole judiciary through the Supreme Court. Furthermore, individual judges have a great incentive to conform, and are thus less independent from higher level judges. Indeed, this may be a general feature of systems of judicial self-appointment.
 2. It is safe to say that systems of judicial self-appointment are on the decline. Clearly they provide maximum independence for the judiciary as a whole. But, as reflected in the criticism of the Japanese judiciary noted above, individual judges may be less independent. Furthermore the system is seen as providing very little accountability. Many of these judiciaries have become extensively involved in politics in ways that can undermine their own legitimacy.
- C. *Judicial councils*: Judicial councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline. Perhaps because they promise a happy medium between these extremes, judicial councils are very popular and roughly 60% of countries have adopted them in some form, including Iraq (in the Iraqi Higher Judicial Council).
1. There are a wide variety of models of councils, in which the composition and competences reflect the concern about the judiciary in a specific context, balancing between demands for accountability and independence.

In their initial design in France and Italy, judicial councils were designed to enhance independence after periods of undemocratic rule by removing judicial management from partisan politics. In other cases, such as Brazil in the 1970s, judicial councils have been established to reduce the level of independence. Most American states use a type of judicial council called a “merit commission,” which is a mixed body to nominate judges for appointment by politicians, and were created in reaction to systems of partisan judicial elections.

2. Some councils have only limited competences, with power to manage budgets and material resources of courts. Others have a role in performance evaluation, promotion and discipline, as well as appointments. The American state merit commissions *only* nominate judges.
3. Members of judicial councils can include judges from various levels of courts, members of other government bodies such as the ministry of justice, members of the bar association, and laymen. Roughly 15% of judicial councils around the world are composed entirely of judges; about 10% have *no* judges. The remainder have some mix of judges and non-judges, with the average fraction of judges being just under half.
4. Many believe that it is crucial that judges form the majority of the council so as to ensure maximum judicial independence. Although the empirical evidence on this point is limited, the judicial council system in principle seems superior to the simpler system of judicial self-appointment described in Section II.B above, in that it allows broader representation, including judges of lower level courts, to be included in the Council and also allows a little more transparency. Judicial councils with non-judicial members also insulate judges from accusations of self-dealing.
5. Judicial council roles in judicial appointments vary. In some systems the council makes the appointment itself. More commonly (as in the case of Iraq), the council nominates a candidate for formal appointment by a political body. American merit commissions usually provide a list of three candidates for each vacancy for the state governor to choose from. This still gives the council much power: because the council can control the list of three, it can sometimes bundle a strong candidate with two weak ones to increase the likelihood that a favored candidate will be appointed. In order to select judges for recommendation or appointment, councils may have a role in administering judicial examinations or interviewing candidates.

D. *Judicial Elections*: Each American state has its own state judiciary, with its own system of appointment. These systems have varied over time and many of them, though not all, involve elections of judges. Electoral systems gained popularity in the 19th century to enhance accountability of the judiciary, and because of a fear

that judges were too elitist. There are two basic dimensions on which these systems differ: whether the election is partisan or not, and whether elections are used for initial appointment or only for retention.

1. Partisan elections, as the name suggests, allows judges to run on a party ticket and so appear as republicans and democrats. Non-partisan elections do not allow party affiliation. Currently eight states have partisan elections, while thirteen states have non-partisan elections.
2. Retention election systems involve initial appointment through the merit plan, followed by an election roughly one year later in which the judge runs unopposed. The public decides whether to retain the judge or not on the basis of his or her judicial record. The judge will then be subject to periodic re-election thereafter. This system uses elections to promote accountability to the public, but does not involve the public in initial selection of judges.
3. Retention election can in theory be used even for judges appointed in other ways. In Japan, lower judges are appointed by the Supreme Court but are technically subject to recall elections every ten years. No judge has ever been recalled, however. In contrast, judges have been recalled in the United States as a punitive measure by the public. In one famous incident, three members of the California Supreme Court were recalled in 1986 because of their vocal opposition to the death penalty. One of them, Chief Justice Rose Bird, voted to overturn every penalty of death pronounced by a lower court. This led to the successful campaign to recall her and is an example of judicial accountability. However, it also shows that involvement of the public can reduce the ability of the judge to decide the case independently in accordance with her best view of the law.
4. In the United States, the judges' terms between elections are usually between 6 and 14 years. In most states using elections, if a vacancy occurs in between electoral cycles, the Governor will appoint a temporary candidate. Very frequently, this candidate then runs for office, so that in practice if not theory the "pure" electoral systems resemble those with only retention elections. No matter how they take initial appointment, the overwhelming number of judges run unopposed and are re-elected more or less automatically. This is because it is difficult for the uninformed public to know much about judicial performance and to distinguish one judge from the other. However, the retention election system does allow for removal of judges who are very bad.
5. There is a good deal of diversity and states change their systems periodically. Even within an individual state the selection process often differs by court. For example, in New York judges for the Court of Appeals are selected through a nominating commission, serve for 14 years, and then reapply to the nominating commission to compete with

other applicants for nomination by the governor. For the Appellate Division of the Supreme Court, the process is merit selection through a nominating commission with an initial term of office of only five years and a subsequent commission review with recommendation for or against reappointment by the governor. The Supreme Court, on the other hand, sits judges through a partisan election for terms of 14 years, while the county courts use partisan elections for ten-year terms.

6. There is a small set of empirical literature on the effects of different appointment mechanisms on judicial quality, decision-making and accountability in American states. Some believed that systems with judicial elections would allow more women and minorities to become judges. For the most part, studies do not find systematic differences among judges appointed using various mechanisms. There is some evidence, however, that elected judges become more punitive as re-election approaches. This is probably because crime is an issue of great popular salience.
7. Judicial elections are subject to much popular and scholarly criticism. The costs of judicial elections are increasing, and can run several million dollars for a supreme court seat in some states. This requires judges to raise money for their campaigns, which can lead to politicization of the judges. The donors can include lawyers who then appear before the successful judges. Interest groups are also increasing their contributions to judicial elections. This has led to concern about politicization. Many states responded to this concern by regulating judicial campaigns through codes of judicial ethics. In most states with judicial elections, candidates were prohibited from making statements on cases or issues likely to come before their courts. But these restrictions were challenged before the United States Supreme Court and declared to be unconstitutional limitations on free speech in 2002. This has led to an increase in spending on campaign advertising by judges, according to some scholars.
8. Judicial elections can also lead to instances in which relatively unqualified persons are able to win election because they have more money or name recognition. In one notable case in Washington State, a small town lawyer with very little experience who shared the same name as a popular judge ran for the State Supreme Court and won. He then won re-election twice. This shows that the public may not pay sufficient attention to judicial elections to make it an effective means of ensuring accountability, except in extreme cases.
9. In summary, electing judges does allow for some accountability, and was originally designed in the United States to ensure that judges were not simply appointed by elite politicians. But over time it has come to be seen as posing risks of politicization of the judiciary. There is no evidence that it leads to a more diverse judiciary. Nor does it lead to more turnover of

judges, because of near-automatic re-election. However, in very high profile cases, recall elections have been successfully utilized to ensure that judges remain accountable to the public.

III. Removing and Disciplining Judges

A key factor in ensuring judicial independence and accountability is a system to discipline and, in serious cases, remove judges who have engaged in misconduct. Elections, described above, clearly provide one means to remove judges who are misbehaving. In addition, there are two other models for removal: one involving some role for parliament and another involving a civil service model of internal discipline. The United Kingdom exemplifies the former while France and Italy are models of the latter.

Federal judges in the United States can be removed only through an impeachment process, which involves a judicial investigation and then a formal process by the legislature in which one house accuses the judge (“impeaches”) and the other house decides whether or not to remove the judge. Complaints about judges are sent initially to the chief judge of circuit, then a special committee of judges, the Judicial Conference of the United States, and finally, if appropriate, to the House for impeachment proceedings. This multi-stage process can lead to “encouraged” retirements before the impeachment process, and hence there have only been a handful of impeachment proceedings in US history.

In the civil law tradition (exemplified by France), the discipline procedure involves, initially, allegations of misconduct to the head of the court. In the event of a finding of misconduct, the court will forward allegations to the Ministry of Justice, who further investigates the allegation. The actual process of removal is handled by the judicial council.

Grounds for removing judges vary in different systems. Typically, the basis of removal is misbehavior or incapacity. Misbehavior can include: commission of a crime, serious or repeated violations of codes of judicial ethics, or corruption. In the United States, the Constitution allows impeachment for treason, bribery, or serious crimes. Removal is very rare, however, having occurred only six times. Currently, there are preliminary impeachment proceedings against a Louisiana judge who is alleged to have sat in a trial in which lawyers gave him money.

IV. Implications for Iraq

- A. Iraq has in place a Higher Judicial Council composed almost entirely of judges (and entirely so if one includes public advocates in the category.) In accordance with current global trends, this body has management responsibilities for the judiciary as well as a role in appointing judges. Iraq has thus rejected systems of executive or legislative dominated judicial appointments. The Higher Judicial Council is an important guarantor of judicial independence.

- B. There are various options for judicial council involvement in judicial appointments.
- a. The council could have the exclusive role in appointing judges without approval from any other body. Qualifications might be stated in the law to ensure quality. This model means there will be little improvement in accountability, however, particularly if the Higher Judicial Council remains exclusively comprised of members of the judiciary.
 - b. The council could nominate candidates for appointment by another body, either the president or parliament.
 - i. Under this system, the relationship between the council and the appointing body can be tailored. Nominations can either be binding so that the appointing body must follow them, or mere non-binding recommendations. Nominations can also take the form of a list of several candidates from which the appointing body must choose one candidate. Alternatively, nominations could be sent in groups, so that the appointer had to appoint the entire group or reject them all. A system should have rules as to whether a candidate who has been rejected can be re-nominated.
 - ii. The appointing authority can be the president, the parliament, or a single house, such as the Federation Council. One could also have the president appoint and the parliament confirm the appointment.
- C. Many countries seek to use judicial councils to enhance both independence *and* judicial accountability. These goals need not be in tension and it is possible to have both. Ensuring some non-judicial representation on the HJC would increase judicial accountability. Non-judges on other countries' judicial councils include lawyers, members of the public, and government officials. Having non-judges on the HJC may be appropriate regardless of whether the HJC appoints judges or nominates judges for appointment by another body.
- D. Another mechanism for increasing accountability is to facilitate judicial transparency. In many countries, civil society plays a role in monitoring judicial decisions and performance. This can involve bar associations, the media, and non-governmental organizations like "judicial watch" NGOs that have been effective in many countries. To make this work, the judicial appointment process should be open, with candidate names and qualifications being made public.
- E. Electoral systems have a mixed record. They do enhance accountability in principle, but in practice do not seem to be very effective except in extreme cases. However, a recall system or retention elections can provide some discipline on judges and enhance legitimacy and accountability.
- F. Iraq might consider a system of impeachment of judges by parliament in the event of severe misconduct, corruption or criminal activity. A supermajority

requirement would eliminate the threat of abuse and political attacks on the judiciary, while still allowing some accountability. Another alternative would be to incorporate public participation of citizens in the disciplinary proceedings in what has been termed “citizen review boards” to ensure transparency in the internal disciplinary proceedings of the judicial oversight commission.