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# JUDICIAL ELECTIONS AND AMERICAN EXCEPTIONALISM: A COMPARATIVE PERSPECTIVE

Mary L. Volcansek\*

## INTRODUCTION

“American exceptionalism,” a term coined by Seymour Martin Lipset, purports to explain why no socialist or other extreme labor movement took hold in the United States as it did in other industrialized countries,<sup>1</sup> but the notion that “Americanism” constitutes an ideology can explain why so many other trends—political, social, cultural, or economic—that can be found in other post-industrialized democracies do not hold for the United States. That applies most aptly to our mechanisms for naming judges to the bench. Only Bolivia<sup>2</sup> and some American states elect judges to office. Likewise, few nations allow judges to serve their “life” terms beyond a fixed retirement age, unlike the tenure of U.S. federal judges. Whereas the United States at the federal level has enshrined independence as the paramount value by giving judges life tenure, those states that retain elections have made accountability their primary concern.<sup>3</sup> If we look beyond American borders, however, we find that other nations have fashioned different systems, some that blend independence and accountability and others that focus solely on the training and qualifications of judges.

Kate Malleson proposed a typology for judicial selection mechanisms: executive appointment, career judiciary, elections (direct or indirect), judicial appointment commissions, and hybrid.<sup>4</sup> Since judicial elections are an American and now Bolivian peculiarity, this Article proposes a different four-fold typology: executive appointment, career

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1. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 13–14 (1996).

2. *See Bolivia: Double or Quits*, *THE ECONOMIST*, Dec. 15–21, 2007, at 44.

3. *See* PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 27–28 (1980).

4. Kate Malleson, *Introduction*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 3, 3–4 (Kate Malleson & Peter H. Russell eds., 2006).

or civil service judiciary, shared or parity appointments, and judicial appointment commissions. Parity schemes are ones in which seats on courts are apportioned on some basis, such as political party, geography, ethnicity, or gender.<sup>5</sup> Shared appointments, on the other hand, place the authority to name judges to the bench in different institutional hands, such as half named by the president and half by one house of the legislature.<sup>6</sup> Because of the ingenuity of those writing national constitutions, the variety and mix-and-match quality of many selection systems make some systems difficult to fit into any of these generic categories.

## II. EXECUTIVE APPOINTMENT

Where the executive appoints judges, judicial independence must be preserved through tenure in office. Some countries allow the executive unilaterally to name judges, but a number of variations on consultation, recommendation, and confirmation are often imposed. Executive appointment can probably be traced to early English practices when Henry II appointed judges, then called "commissioners," as early as 1178.<sup>7</sup> After the Magna Carta was signed in 1215, English monarchs appointed judges from among people who knew the law, and a professional judiciary emerged.<sup>8</sup> Appointment by the Crown eventually shifted to the hands of the lord chancellor and was often quite partisan in the nineteenth century.<sup>9</sup> From 1876 to 1972, legal and family status, along with political party, were the primary factors driving who would be selected for appellate court positions.<sup>10</sup> As a result, until the later part of the twentieth century, appellate judges in England were white males, and only 7% of them did not hold a prestigious law degree from Cambridge or Oxford.<sup>11</sup> Not surprisingly, this meant that in most of the cases decided, the government and other superior parties prevailed over individuals.<sup>12</sup> Judges serving on the

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5. Lee Epstein, Jack C. Knight, Jr. & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 12 (2001).

6. Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 377 (2007).

7. MARY L. VOLCANSEK ET AL., *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* 68 (1996).

8. *Id.*

9. See C. Neal Tate, *Recruitment to the British Appellate Judiciary, 1876-1972: Causal Models*, 13 INT'L POL. SCI. REV. 249, 256-57 (1992).

10. *Id.* at 265.

11. Burton Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577, 595 (1988).

12. *Id.* at 612.

courts of England and Wales had life tenure and “an adequate, if not opulent, salary.”<sup>13</sup>

The English model obviously traveled to British colonies, and with some variation it was adopted in the United States. Australia likewise adopted executive appointment of judges but placed the authority in the attorney general, who must “consult with the Attorneys-General of the States.”<sup>14</sup> Judges in Australia hold life tenure, but only until the age of 70 since 1977.<sup>15</sup> Australian judges may be removed by the governor-general upon the recommendation of both houses of parliament, but this has never happened.<sup>16</sup> Other similar minor modifications have been made, such as Canada’s placement of the appointment authority in the cabinet upon recommendation by the minister of justice for all but judges on the Canadian Supreme Court.<sup>17</sup> New Zealand follows the English model, with the attorney general recommending to the governor-general, who can independently make appointments.<sup>18</sup> The Indian cabinet could appoint judges with consultation only with the chief justice of the Indian Supreme Court until a 1993 decision by that court that placed authority to name all judges in a collegium of the supreme court.<sup>19</sup>

Use of executive appointment has traveled far from former British colonies and found a home in many nations of Latin America. In Mexico, for example, the Mexican Supreme Court has been named by the president, and although a confirmation process existed, because of one-party government and a strong executive, “virtually unchecked presidential appointments to the Supreme Court” were the norm until inter-party competition emerged in the late 1990s, and a 1994 reform

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13. Robert Stevens, *Judicial Independence in England: A Loss of Innocence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 155, 159–61 (Peter H. Russell & David M. O’Brien eds., 2001).

14. John M. Williams, *Judicial Independence in Australia*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 13, at 173, 176 (quoting High Court Act 1979, § 6 (Austl.)).

15. Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 *J. LEGAL STUD.* 223, 252 (2001).

16. Elizabeth Handsley, ‘*The Judicial Whisper Goes Around*’: *Appointment of Judicial Officers in Australia*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 122, 122.

17. F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 56, 65.

18. James Allan, *Judicial Appointments in New Zealand: If It Were Done When ‘Tis Done, Then ‘Twere Well It Were Done Openly and Directly*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 103, 105.

19. S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* 126, 295 (2002).

required confirmation by a two-thirds majority in the senate.<sup>20</sup> The president also appointed all judges to the Argentine Supreme Court until reforms in 1997,<sup>21</sup> but prior to a regime change, court-packing and forced resignations rendered so-called life tenure for judges to just over five years on average.<sup>22</sup>

The Egyptian Constitutional Court, established in 1979, is populated by life-tenured judges appointed by the President from between two nominees submitted by the chief justice and by the Egyptian Constitutional Court as a whole.<sup>23</sup> Appointments to the High Court of Kenya are supposedly made by the president after screening by the Judicial Service Commission, but “[t]he reality is that the Office of the President together with the Chief Justice . . . select the judges.”<sup>24</sup> Similarly, both Tanzania and Zambia delegate to the president the appointment of the chief judge and one new judge on the highest court at the beginning of the presidential term. In Tanzania, all other highest court judges are also named by the president but in consultation with the chief justice; whereas in Zambia, the president’s nominations must be approved by parliament.<sup>25</sup>

Executive appointment of judges also occurs in some Asian nations. The Council of Grand Justices in Taiwan has fifteen justices who serve non-renewable eight-year terms, which allows each president to appoint half of the justices.<sup>26</sup> The justices are recommended to the president by a nomination committee and must also be confirmed by the legislature.<sup>27</sup> Variations of executive appointment can also be found in the Philippines,<sup>28</sup> Russia,<sup>29</sup> Hungary, and the Czech Republic.<sup>30</sup>

20. Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LAT. AM. STUD. 705, 713–14 (2000).

21. See Rebecca Bill Chávez, *The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence*, 49 LAT. AM. POL. & SOC’Y 33, 35–36 (2007).

22. Gretchen Helmke, *The Logic of Strategic Defection: Court–Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292 (2002).

23. Mahmoud M. Hamad, *The Politics of Judicial Selection in Egypt*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 260, 264.

24. Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya*, 23 HUM. RTS. Q. 96, 104 (2001).

25. Siri Gloppen, *The Accountability Function of the Courts in Tanzania and Zambia*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 112, 124–25 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

26. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 120 (2003).

27. *Id.*

28. David M. O’Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 355, 363.

## III. SHARED AND PARITY APPOINTMENTS

Shared appointment is most often reserved for the highest or constitutional courts in a country and often overlaps with parity systems whereby, usually through informal agreement, different partisan interests or other groups are allocated a certain number of seats. Austria and Switzerland use a shared appointment system.<sup>31</sup> Italy and Germany, for example, both use blends of the two systems for appointments to their respective constitutional courts. In Germany, each of the two houses of parliament is allotted half of the seats to fill on the German Federal Constitutional Court.<sup>32</sup> Because a two-thirds majority is required in both houses, each of the two major parties agree to select half of the judges and avoid legislative stalemate; minor parties typically are delegated one seat by their larger coalition partner.<sup>33</sup> Italy, on the other hand, divides appointment responsibility among three different institutions: one-third is named by the head of state, one-third by parliament, and one-third by the judges sitting on the ordinary and administrative courts.<sup>34</sup> Because a three-fifths majority is required for the parliamentary appointees—something rarely achievable in the fragmented Italian political system—the parties are delegated a number of judgeships for both the parliamentary and presidential appointees.<sup>35</sup> Political upheaval in the 1990s altered that practice, but it was resumed in the early part of the twenty-first century.<sup>36</sup> The judges are divided into three colleges to name their allocation to the Constitutional Court of Italy, which assures that different elements in the broader judiciary are represented on the court.<sup>37</sup> Similar systems were adopted by Spain and Portugal when they returned to democratic governance in the last half of the twentieth century.<sup>38</sup>

Forms of shared appointment exist outside of Europe. The Salvadoran Supreme Court judges are elected by a two-thirds majority by

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29. Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 38 *LAW & SOC'Y REV.* 513, 517 (2004).

30. A. E. Dick Howard, *Judicial Independence in Post-Communist Central and Eastern Europe*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 13, at 89, 95.

31. Peter J. Van Koppen, *The Dutch Supreme Court and Parliament: Political Decisionmaking Versus Nonpolitical Appointments*, 24 *LAW & SOC'Y REV.* 745, 747, 750 (1990).

32. GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 83 (2005).

33. *Id.* at 83–85.

34. MARY L. VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT* 21 (2000).

35. *Id.* at 21–23.

36. *Id.* at 23.

37. *Id.* at 21.

38. *See* Volcansek, *supra* note 6, at 379.

the legislative assembly, but nominations can only come from the governing body of the judiciary.<sup>39</sup> The nine-member hybrid Mongolian *Tsets*, which is intended to be both political and judicial and exercises constitutional oversight, has one-third of its members nominated by the president, one-third by the upper house of the legislature, and one-third by the highest court; those nominations must all be confirmed by the upper legislative house.<sup>40</sup> Even the People's Republic of China employs a type of shared appointment in which all judges who pass an examination and have the requisite legal experience are recommended by the president of the court to which they aspire and confirmed by the People's Congress.<sup>41</sup>

#### IV. CAREER/CIVIL SERVICE MODEL

The career or civil service model for selecting judges can be traced to Napoleonic reforms in France in the early nineteenth century<sup>42</sup> and has served as the model for judiciaries in most civil law jurisdictions.<sup>43</sup> Potential judges take an examination upon completing their university studies, or after having practiced law for a specified period of time, and move over the course of their careers from the lowest courts to higher ones based on some blend of merit and seniority.<sup>44</sup> Thus, judges' entire socialization process and reference points are within the confines of the professional judiciary.<sup>45</sup> Variations on this model can be found across continental Europe, the new European democracies, much of Latin America, the Middle East, Africa, and Asia.

Even as the French system traveled elsewhere, it also underwent reform at home. Since 1958, students who complete their four-year university studies or lawyers and civil servants with at least five years of experience can take the examination for admission to the *École*

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39. J. Michael Dodson & Donald W. Jackson, *Judicial Independence and Instability in Central America*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 13, at 251, 257.

40. See GINSBURG, *supra* note 26, at 166-67.

41. Colin Hawes, *Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting, and Discharging Judges*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 395, 400-01.

42. See MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 111 (1988).

43. Accord Doris Marie Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 176, 177.

44. CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 34 (C.A. Thomas ed., 2002).

45. *Id.* at 18-20.

*nationale de la Magistrature* (ENM), or the National School for the Judiciary, where they study for almost three years.<sup>46</sup> During their time at the ENM, students are paid auditor judges, and the curriculum includes coursework and a series of internships.<sup>47</sup> After completion of the ENM, students once again take an examination that serves to place them on the court where they begin their careers.<sup>48</sup> Another feature of the French civil service system is the Superior Council of the Magistrature (CSM), which exercises authority over appointments, discipline, promotions, and transfers and consists of both prosecutors and judges, along with the minister of justice and laypeople appointed by parliament.<sup>49</sup>

Parallel civil service models can be found all over Europe, but each has modified the French version in some fashion. In Germany, for example, entering the ranks of the judiciary is more difficult, requiring an entrance exam to enter the judicial school and another one upon completion, but only those passing the second exam with high honors can obtain positions on the lowest rung of the judiciary.<sup>50</sup> The Netherlands uses a similar scheme in which new law graduates and those with six years of legal practice can enter a six-year training program to become judges and are assessed psychologically as well as by performance in interviews.<sup>51</sup> The Danes, on the other hand, require that aspiring judges complete a master's degree in law with high grades and then four years of training, followed by another eight to eleven years of service as a deputy judge; only then can a judge be permitted to work with two other judges for nine months, and if evaluated highly, apply to sit as a major trial court judge.<sup>52</sup> In France, Spain, Portugal, and Germany, promotion is based on merit,<sup>53</sup> but in Italy seniority is the sole criterion.<sup>54</sup>

The civil service model can be found far from its origins in Western Europe. Japan may have one of the most rigorous versions of it. All

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46. VOLCANSEK & LAFON, *supra* note 42, at 129–30.

47. Provine & Garapon, *supra* note 43, at 183.

48. *Id.*

49. *Id.* at 184.

50. Donald P. Kommers, *Autonomy Versus Accountability: The German Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 13, at 131, 143.

51. Leny E. de Groot-Van Leeuwen, *Merit Selection and Diversity in the Dutch Judiciary*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 145, 150.

52. Eva Smith, *Case Assignment in Danish Courts*, in THE RIGHT JUDGE FOR EACH CASE 85, 87 (Philip M. Langbroek & Marco Fabri eds., 2007).

53. See GUARNIERI & PEDERZOLI, *supra* note 44, at 46.

54. VOLCANSEK, *supra* note 34, at 21.

aspiring judges other than those on the Supreme Court of Japan take a rigorous multiple choice test that is passed by only about 700 of the approximately 20,000 who sit for it each year.<sup>55</sup> Those who pass must then submit a thesis and undergo an interview to be admitted into a two-year training program, followed by a ten-year probationary apprenticeship.<sup>56</sup> Even when that is successfully completed, Japanese judges must be re-appointed every ten years and promotions are based strictly on merit.<sup>57</sup> The Pakistani version of a civil service model shares many of the same elements of interviews and examinations, but members of the legal profession with at least ten years of experience can be appointed even to higher courts.<sup>58</sup> Thailand, Nepal, Singapore, Indonesia, and Bangladesh also all use variations on the civil service model, but codes of judicial ethics, for example, are so laxly enforced in Thailand that the judiciary there is regarded as “one of the most corrupt in South and Southeast Asia.”<sup>59</sup>

Because of earlier European domination, many parts of Africa and the Middle East follow the French civil code and mimic the French model of judicial recruitment combined with an overlay of local politics and Islamic culture.<sup>60</sup> In Egypt, for example, there exists the familiar course of attending a university followed by an examination and merit-based promotions through the ranks of the courts, but two additional requirements are imposed: first, that one come from a “suitable family background” and second, that no “immediate relatives should have been accused of anti-regime sentiments or activities.”<sup>61</sup>

## V. JUDICIAL APPOINTMENT COMMISSIONS

Kate Malleon remarked that judicial appointment commissions “look likely to become the most popular selection system of the twenty-first century” as a solution to the problem of balancing judicial independence and accountability.<sup>62</sup> Although Americans tie merit selection to the so-called Missouri Plan,<sup>63</sup> other nations have implemented the system, and some did so quite early. Most recently, merit

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55. David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 13, at 37, 45.

56. *Id.* at 46.

57. *Id.* at 45–46.

58. *See* O'Brien, *supra* note 28, at 358.

59. *Id.* at 363.

60. Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 *LAW & SOC'Y REV.* 103, 116–18 (1995).

61. Hamad, *supra* note 23, at 263.

62. Malleon, *supra* note 4, at 6.

63. DUBOIS, *supra* note 3, at 4–5.

selection has been adopted in England and Wales,<sup>64</sup> but it could be found in Israel since passage of the 1953 Judges Law.<sup>65</sup> A judicial elections committee in Israel, consisting of the president of the supreme court, two other members of the court, the minister of justice, another cabinet member, two members of the Knesset (one traditionally from the opposition party), and two representatives of the Israeli bar make all judicial appointments.<sup>66</sup> The members of the bar are elected by the council of the bar, and representatives from the legislature are elected by their fellow legislators.<sup>67</sup> Individuals may be nominated for consideration by the minister of justice, the president of the supreme court, or any three members of the committee; but in reality, the ones on whom the minister of justice and the president of the supreme court agree are those who win the appointments.<sup>68</sup> Notably, Israel alone allows the selection committee to actually make the appointment rather than recommend nominees to another person or institution, and all judges serve for life until the mandatory retirement age of seventy.<sup>69</sup>

The allure of judicial appointment commissions arises from their seemingly apolitical character and has, as a result, been transplanted in a number of countries that democratized or redemocratized at the end of the twentieth century. However, use of appointment commissions has not always insulated judges from threats to their independence. Bulgaria serves as an illustrative case. All judges except those on the constitutional court are selected through a commission system and granted life tenure until the mandatory retirement age,<sup>70</sup> but that has not prevented intrusive phone calls, physical threats, and even intimidation by prosecutors and the chairs of judges' own courts.<sup>71</sup> Appointment commissions are also used in Lithuania, Poland, and Romania, where the commissions provide a list of nominees to the executive for appointment.<sup>72</sup>

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64. See Constitutional Reform Act, 2005, c. 4, § 27 (Eng.).

65. See Martin Edelman, *The Judicial Elite of Israel*, 13 INT'L POL. SCI. REV. 235, 238 (1992).

66. Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism*, 8 ISRAEL AFF. 87, 92 (2002).

67. See *id.*

68. Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 241, 249.

69. Edelman, *supra* note 65, at 237.

70. Howard, *supra* note 30, at 95.

71. Bruno Schönfelder, *Judicial Independence in Bulgaria: A Tale of Splendour and Misery*, 57 EUROPE-ASIA STUD. 61, 65 (2005).

72. Howard, *supra* note 30, at 95.

Since the mid-1980s, judicial appointment systems have also existed in many parts of Latin America (Argentina, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, and Paraguay) but also have not served to de-politicize the judiciary; indeed, the commissions often become politicized themselves.<sup>73</sup> The Venezuelan commission that was instituted in 1969 became so politicized that it was finally eliminated in 2000.<sup>74</sup> As part of a constitutional reform in 1994, Argentina adopted a judicial appointments commission to name all judges except those on its highest court. The commission of twenty people was composed of representatives of the legislature (including the opposition party), executive, members of the judiciary, lawyers, and academics, who all screened candidates through examinations and interviews. The process was so slow and cumbersome, however, that in 2006 the membership was reduced to thirteen and the number of politicians relative to others increased.<sup>75</sup> Until the constitutional change initiated by Ivo Morales,<sup>76</sup> Bolivian commissions were composed of four members of the legislature and the chief justice of the highest court.<sup>77</sup>

Judicial appointment commissions have also been adopted in a number of African nations. The 1996 post-apartheid South African constitution uses an appointments commission that recommends a list of candidates to the executive, but allegedly the commission is quite partisan.<sup>78</sup> For the highest courts, the commission is merely advisory, and the executive can name whomever he chooses.<sup>79</sup> In Namibia, a similar arrangement is used, but ethnic diversity is a stated goal, along with legal credentials, for the selection.<sup>80</sup> Under the Robert Mugabe regime in Zimbabwe, the president consults with the judicial commission and always follows its recommendations, but that happens because the minister of justice only presents nominees to the

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73. See Chávez, *supra* note 21, at 34–35.

74. See *id.* at 35.

75. See *id.* at 40–42.

76. See *Bolivia: Double or Quits*, *supra* note 2, at 44.

77. Aníbal Pérez-Liñán, Barry Ames & Mitchell A. Seligson, *Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts*, 68 J. POL. 284, 287 (2006).

78. See Stacia L. Haynie, *Courts and Revolution: Independence and Legitimacy in the New Republic of South Africa*, 19 JUST. SYS. J. 167, 170–71 (1997).

79. Hugh Corder, *Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 13, at 194, 196–97.

80. Sufian Hemed Bukurura, *A Judiciary in Transition: Reflections on the Selection of Judges in Namibia*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 4, at 313, 318–22.

commission who are acceptable to the president, and the president directly appoints the majority of the commission.<sup>81</sup>

No Western European nation used a judicial appointments commission until Scotland adopted one in 2002,<sup>82</sup> but the judiciary of England and Wales followed suit in 2006.<sup>83</sup> The fifteen-member commission recommends to the lord chancellor who makes the appointments in the name of the Crown. Two judges serve on the commission with eleven lay members who are named through an open competition by an independent panel.<sup>84</sup> With this change, the nation that pioneered executive appointment of judges removed the appointing authority from the lord chancellor for the first time in more than 900 years.

## VI. THE ALLURES OF DIFFERENT SYSTEMS

Executive appointment of judges theoretically fixes political accountability for the quality of the judiciary. This supposes that the electorate will vote out an executive who appoints corrupt, incompetent, or otherwise flawed individuals to the bench. That supposition is tenuous at best, even where healthy two-party competition exists, and certainly is doubtful where one party dominates in elections. Judicial independence can, moreover, be jeopardized if the judge is not independent “from those to whom the judge owes his office.”<sup>85</sup> To counter allegations of judicial dependence in systems of executive appointment, tenure in office becomes paramount. Thus, in the United States, which uses executive appointment albeit with Senate confirmation, judges hold office for life. However, beyond U.S. shores, life tenure does not necessarily really mean life tenure. Indeed, many avenues exist to remove or neutralize judges who behave too independently.

Career or civil service models foster professionalism among judges. Judges are professionally trained and are insulated from political pressures. The entire socialization process of judges under this system is within the judicial corps and allegiance is to the judiciary. Even so, other influences or even corrupt motives can creep into the judicial ranks. More troublesome, though, is the lack of accountability that

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81. Derek Matyszak, *Creating a Compliant Judiciary in Zimbabwe, 2000–2003*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 331, 333–35.

82. Alan Paterson, *The Scottish Judicial Appointments Board: New Wine in Old Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 13, 14.

83. Constitutional Reform Act, 2005, c. 4, § 27, sch. 8 (Eng.).

84. *Id.*

85. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 20 (1981).

pervades civil service models of the judiciary. Judicial councils along the lines of the French Superior Council of the Magistrature typically hold the authority to discipline judges, but instances of actual removal are rare,<sup>86</sup> and appeals are the only avenue for correcting improper applications of the law.<sup>87</sup> Finally, civil service models as government bureaucracies typically lack attractive salaries and the prestige that tend to be associated with judgeships.

Shared and parity appointment systems are typically reserved for the highest courts in a nation, and judges selected in this manner typically serve for fixed terms ranging from six to twelve years. The virtue of parity appointment schemes lies in their ensuring a blend of ideological or political persuasions on a court by virtue of permitting different political parties or religious, ethnic, or linguistic groups representation on the judicial body. A political equilibrium can be guaranteed. Shared appointments, even when they do not overlap with parity systems, have a stronger likelihood of also bringing some measure of diversity in thought and political persuasion to the bench. Of course, political equilibrium and ideological balance in either system occur only if one party does not dominate all of the appointing bodies and if political compromise must be reached to avoid stalemate. In other words, healthy inter-party competition and alternation in power are central to the effectiveness of shared and parity appointment schemes.

The appeal of judicial appointment commissions is obvious: their use permits at least the veneer of being apolitical. Judges are, at least in theory, selected based on their merit as assessed by a commission representing diverse constituencies. Notably, though, only in Israel can the commission make the appointment as opposed to merely recommending nominees to someone—usually the executive—to make the final selection. Or, as was the case in Zimbabwe, the president can always follow the commission's recommendation because the president appoints the commission, and all candidates presented to the commission have already been vetted to assure that they would be acceptable to the president.<sup>88</sup> In Zimbabwe, in fact, should judges prove not to be sufficiently subservient to the executive, they can be removed by an investigating committee, also appointed by the president and acting in private.<sup>89</sup> Judicial appointment commissions, like

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86. See VOLCANSEK, *supra* note 7, at 40–41.

87. See DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE 22–23 (2010).

88. Matyszak, *supra* note 81, at 333–35.

89. *Id.*

those in some Latin American nations<sup>90</sup> and South Africa,<sup>91</sup> can themselves become politicized. Commission recommendations cease in those circumstances to recognize merit and instead reflect the pursuit of some other political agenda.

Judicial appointment commissions also offer appointing officials—usually the executive—political cover. Should a judge prove to be biased, incompetent, or otherwise undesirable, executives can explain that they merely followed the recommendations of the commission and are not responsible. Further, as was demonstrated in the case of Bulgaria in its first years of the democratization process, even meritorious judges appointed through commission systems may still be subjected to extra-legal influences once on the bench.<sup>92</sup>

## VII. LESSONS FOR THE UNITED STATES

No ideal judicial selection mechanism has been designed, and each model has flaws that can be exploited for partisan or other gains. Many states in the United States have adopted judicial appointment commissions to name judges for at least some levels of courts, and some retain executive or legislative appointment systems. However, judicial elections, whether partisan or nonpartisan, are used in thirty-one states.<sup>93</sup> This phenomenon, like true life tenure beyond a mandatory retirement age for U.S. federal judges, has not been widely imitated abroad. Interestingly, however, established democracies where judicial activism is perceived are seeking “to increase judicial accountability by strengthening the link to the electoral process while avoiding the creation, strengthening, or revival of partisan political control.”<sup>94</sup> In fact, a 2002 Canadian opinion poll indicated a preference for popular election of judges.<sup>95</sup> Judicial elections have been strongly criticized in the United States, however, as not attracting the best legal talent, interfering with judicial independence, and serving only as an ineffective means for popular control.<sup>96</sup> A recent study looking at elections for state supreme courts purports to “debunk” those assertions.<sup>97</sup>

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90. See Chávez, *supra* note 21, at 34.

91. See Haynie, *supra* note 78, at 170–71.

92. See Schönfelder, *supra* note 71, at 65.

93. LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 107 (6th ed. 2008).

94. Malleson, *supra* note 4, at 4.

95. See Morton, *supra* note 17, at 56.

96. DUBOIS, *supra* note 3, at 7–8.

97. See CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 128–39 (2009).

Part of the argument against judicial elections involves injecting politics into judicial selection and into judicial decisions. Yet politics of some sort is involved in each of the selection systems covered in this Article. “[O]ur choice is between a process in which the politics is open, acknowledged, and possesses some degree of balance,” according to Peter Russell, “or a system in which political power and influence is masked, unacknowledged, and unilateral.”<sup>98</sup> Executive appointments, parity and shared appointment systems, civil or career service models, and judicial appointment commissions all have the potential to be tainted by partisan politics.

Whereas the selection schemes adopted in American states attempt to balance accountability of those on the bench with judicial independence, other nations have focused more directly on the judicial-independence side of the scale. Career or civil service models probably achieve the greatest insulation of the judiciary from outside political forces, but the Japanese example of hierarchical tyranny to impose conformity in the judiciary reveals the potential flaw in that system.<sup>99</sup> Experiences in the Italian judicial corps suggest another potential failing of the career service model. The Italian “ordinary judiciary”<sup>100</sup> is unionized, as might be expected in a civil service model, but the national magistrates union also has four or more groupings within it that each reflect different ideological persuasions.<sup>101</sup>

Straight executive appointment elsewhere, as in the United States, permits overt partisan appointments and, where no confirmation process is involved (for example, in Mexico prior to the 1996 reform), appointments can be blatantly intended to strengthen a political party’s position or to insure judicial subservience to presidential policies. Shared and parity appointments, on the other hand, are intended to guarantee that more than one political viewpoint will be represented on the bench.

Other countries have found that means exist to hold judges accountable to entities other than the electorate. The appellate process and judicial review, where it is permitted, as well as the shared socialization of legal studies work to ensure legal accountability. Recruitment, selection, and promotion are only one component of obtaining judicial independence; judicial training, disciplinary control, and re-

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98. Peter H. Russell, *Conclusion*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 4, at 420, 420.

99. See DAVID M. O'BRIEN WITH YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* 71 (1996).

100. The “ordinary judiciary” refers to judges who handle normal civil and criminal cases; it is distinguishable from the administrative judiciary and the constitutional court.

101. See GUARNIERI & PEDERZOLI, *supra* note 44, at 56.

moval mechanisms offer accountability while at the same time fostering judicial independence. Professional accountability resides in judicial ethics, judicial training, and evaluations made by peers and practicing attorneys.<sup>102</sup> Judicial audiences for American judges—colleagues, the public, other branches of government, professional groups, policy groups, and the media—influence how judges behave and check excesses.<sup>103</sup> Accountability can be achieved separately from the ballot box.

Perhaps the most important lesson to be gleaned from judicial selection practices in other countries comes not from the design of a selection process but rather from the larger political context. Power relationships in the larger political regime that are determined by levels of inter-party political competition can exert the same influence on the composition of the judiciary as parity appointment arrangements do. Ideally, multiple political persuasions should be represented on the bench, particularly on collegial courts, and judicial independence must be protected from political influence. The Prisoner's Dilemma as conceived by Mark Ramseyer with regard to judicial independence illustrates this point. If rational politicians expect to play indefinitely, they may or may not keep a judiciary independent, and from the perspective of judicial selection, they will want partisan supporters on the bench. When politicians expect to win elections continuously, they have no incentive to honor judicial independence. However, if they anticipate losing future elections, they are more inclined to support judicial independence.<sup>104</sup>

Extrapolating from Ramseyer's Prisoner's Dilemma for judicial independence, whether judges are appointed, elected, or come to the bench through merit selection, greater political balance and equilibrium will be achieved when politicians and political parties must anticipate losing elections. The independence of judges depends, in other words, "primarily on electoral probabilities."<sup>105</sup> When political parties alternate in power, judicial independence will be more secure,<sup>106</sup> and the composition of the bench will be more balanced. That premise applies across the selection systems used elsewhere in the world, as well as to the U.S. federal system and the various schemes employed by the states. The key to having a meritorious, politically diverse judi-

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102. See PIANA, *supra* note 87, at 22.

103. See generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

104. J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994).

105. *Id.* at 743.

106. *Id.* at 747.

ciary depends less on the judicial selection system devised and more on the dispersal of political power.<sup>107</sup> Perhaps the United States is less “exceptional” than it appears at first glance.

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107. *Accord* REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 157 (2004).