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Judicial Selection

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Of all the difficult choices confronting societies in designing legal systems, among the most controversial are those pertaining to judicial selection and retention: how should a nation select its judges, and how long should jurists serve? Some of the most fervent constitutional debates on the institutional design of the judicial branch were not about power or competencies; instead, they focused on who would select and retain members of the judiciary. During the American Constitutional Convention, for example, the framers debated several methods of selection. Some delegates wanted Congress to appoint judges, and some wanted the chief executive to appoint them. Alexander Hamilton (1755–1804) proposed the compromise that the delegates ultimately accepted. The president nominates a federal judge, and the Senate offers its "advice and consent."

Over two hundred years later, similar debates emerged as societies that had been part of the Soviet Union begin to formulate constitutions. A few adopted the general approach used in the United States: presidential nomination followed by parliamentary appointment for constitutional court justices. However, the majority moved in a different direction, dividing the power among various actors (including the courts themselves). Moreover, many eschewed the American approach of bestowing life tenure, opting instead for fixed terms of office.

What these debates—whether in Philadelphia in 1787 or in Moscow in 1993—underscore, of course, is that political actors believe that institutions governing the selection and retention of judges "matter"; that they will affect the types of persons who will serve and, in turn, the choices that judges will make. Some commentators, for example, assert that countries that give judges life tenure will have a more independent judiciary, one that places itself above the fray of ordinary politics, while those subjecting judges to periodic checks conducted by the public or elected officials will have a more accountable judiciary. This debate underscores the fact that not only are the types of institutions that govern the selection of judges fundamental to discussions about judicial independence versus accountability (or interdependence), but also that they convey important information about the values that a society wishes to foster.

The possibilities for choice abound. To see this, one need look no further than the United States. At the federal level, of course, the president nominates and the Senate

confirms judges, who serve for life; these judges, in other words, need not obtain the direct approval of the public to attain or retain their jobs.

At the state level, 80 percent of judges, according to the American Bar Association, face election at some point in their careers. By the American Judicature Society's tally, in twenty-one states, judges serving on courts of last resort are initially elected to office either on a partisan ballot (in eight states) or a nonpartisan ballot (in thirteen states). In all twenty-one states, judges must appear on a ballot of one form or another to retain their positions. Six states enable the governor (four states) or the legislature (two states) to appoint high court judges, and, in many instances, to reappoint them. Of these six states, only New Hampshire gives its justices life tenure, and then only until they reach the age of 70 years. The remaining twenty-three states (along with the District of Columbia) employ some version of the *Missouri plan* (*merit plan).*

These merit plans differ from state to state—substantially, in some instances—but they usually call for a screening committee, which may be composed of the state's chief justice, attorneys elected by the state bar association, and lay people appointed by the governor, to nominate several candidates for each judicial vacancy. The governor makes the final selection, but typically is bound to choose from among the committee's candidates. At the time of the first **[p. 858 ↓]** scheduled election, usually after a judge has served for a year or two, citizens can vote on whether or not to retain each new judge in office. If voters reject an incumbent, another merit candidate replaces her. If retained, the judge serves a set term, at the end of which she is eligible for reelection. Several states depart from the retention scheme, most notably Massachusetts and Rhode Island. They bestow life tenure on justices, though in Massachusetts a justice may serve only until she reaches the age of 70 years.

Countless formal methods of judicial selection exist in various countries. Many nations, typically those using the civil law system, have developed similar methods for training and “choosing” ordinary judges. They depart from one another rather dramatically, however, when it comes to the selection of constitutional court justices. German justices are appointed by parliament, but six of the sixteen must be professional judges. Bulgarian judges are appointed by the president, the parliament, and sitting judges of other courts. In Turkmenistan, the president is able to nominate and appoint all judges. The South African president appoints justices only after consulting with the president of

the Constitutional Court and the party leaders of the National Assembly. Japanese high court judges are appointed by the cabinet; the emperor selects the chief judge.

Although it is important to understand formal mechanisms of judicial selection, scholars should not neglect informal norms, which also may play a key role. In the United States, for example, the norm of senatorial courtesy enables senators of the same political party as the president to have some influence over the nomination of a person who resides in the senator's home state. The norm of senatorial courtesy has passed to the state political party chairperson or other senior politician if a senator from a certain state is not affiliated with the president's political party. The norm does not appear in the U.S. Constitution; yet it would be difficult to understand the lower federal court appointment process without being aware of it.

Does knowledge of the rules, whether formal or informal, convey any information about the behavior one can expect of nominees once they are appointed? Do the rules, for example, affect the decisions of judges, as so many political actors seem to assume? Many scholars answer in the affirmative. They suggest that when judges have life tenure they are far freer to make decisions based on their own preferences, whether jurisprudential or political. Judges who are dependent on the public or elected officials to retain their positions, in contrast, seem to adapt their decisions to reflect the preferences of those to whom they are accountable. If they make decisions that do not reflect the desires of the voters, the public may well purge them from office.

Nonetheless, the debate continues. Some argue that the infrequency with which the electorate ousts U.S. state court judges means that judges need not concern themselves too much with losing their jobs. Robert Dahl claimed that under a system of executive nomination and senate confirmation, “the policy views dominant on the [c]ourt are never for long out of line with the policy views dominant among lawmaking majorities” (2001: 570). In other words, selection systems designed to increase judicial accountability may not fully achieve that goal any more than systems designed to induce independence meet their goal.

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See also

- American Political Science Association Law and Courts Section
- Constitutional Courts
- Courts, Lawmaking by
- Judges
- Judges, Associations of
- Judicial Activism
- Judicial Decision Making
- Judicial Independence
- Judicial Politicization

Further Readings

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