Exporting the Missouri Plan: Judicial Appointment Commissions

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I. INTRODUCTION

Debates over the best methods for selecting judges in the United States usually turn on finding an appropriate balance between independence and accountability for judges,¹ but elsewhere the tension between those two competing ends has been resolved in favor of judicial independence. According to Martin Shapiro, judges cannot, though, be truly independent, because they are dependent on those to whom they owe their office.² Or, as Jean Blondel sees it, the question becomes one of “from whom should judges be independent?”³ Judges are, in other words, dependent in some sense on those to whom they are accountable. New democracies and nations that have re-democratized after a period of authoritarian rule have posed the issue of judicial independence, then, quite differently from how it is viewed in the United States; indeed, the very connotations of independence and accountability abroad assume dimensions unknown in the United States. Notably, a version of the Missouri Plan, known elsewhere as judicial appointment commissions, “look[s] likely to become the most popular selection system of the twenty-first century.”⁴ This Article explores the twists and turns and the motivations and complications of judicial independence and judicial appointment commissions to suggest that perhaps American states might benefit from experiences elsewhere when choosing to modify, reform or improve judicial selection systems here.

Decisions about how judges are selected, compensated and retained are inextricably connected to determinations of how much independence can be safely allocated to judges. Politicians designing new constitutions when first

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¹. Philip L. Dubois, From Ballot To Bench: Judicial Elections and the Quest for Accountability 241 (1980).


creating a democratic system, when re-democratizing after a period of autocratic rule or even when reforming judicial systems do not necessarily consider judicial independence as the overriding consideration. Particularly when judicial review is part of the equation, why would politicians who hope to exercise power in the future want independent judges capable of trumping their policy choices as violating the constitution? Even in the absence of the power of judicial review, all judges potentially confront politically charged disputes. In either case, as Ramsmeyer and Rasmusen ask, “[W]ill real-world politicians keep judges independent from themselves?”

Ran Hirschl argues that constitutionalization and its corollary, judicial independence, occur because of hegemonic preservation. The interplay of threatened political elites, who are fearful of the fickle nature of democratic politics; economic elites, who want protection from government through protection of property rights; and judicial elites, who seek to increase their own power and influence, drives judicial reform, both in substance and in timing. Interactions among these three elites act to drive an effort to preserve the hegemony achieved under the previous rules. Ginsburg argues that configurations of judiciaries at the time constitutions are drafted are predicated upon the uncertainty of the politicians about their future political assets; therefore, by placing judicial review in the hands of judges and assuring their independence, the politicians “entrench the constitutional bargain” and buy insurance (risk aversion) to guarantee that political parties who lose at the polls can protect their interests nonetheless through the legal process. Similarly, Finkel explains that judicial reform, specifically in Mexico, Argentina and Peru in the 1990s, was driven by the ruling regime’s desire for “insurance against future political uncertainty.”

Outside of the United States, not only is judicial independence not a principle revered for itself, but also judicial accountability can be sought through direct, even seemingly perverse, tactics. The American goal of democratic accountability is rarely part of the calculus. Many examples prove this. For example, in 1975, Indian President Indira Gandhi declared a state of emergency and suspended the right of access to any court when alleging violations of fundamental rights.

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8. Id. at 31.
9. Id. at 33.
invalidated President Boris Yeltsin’s 1993 decree that closed the legislative branch of government, Yeltsin then issued a decree that closed the Constitutional Court. The President of Pakistan in 2007 declared a state of emergency, suspended the constitution and placed thirteen of the nation’s seventeen Supreme Court Justices under house arrest; the Chief Justice was not restored to his office until 2009 by another president who acted only when forced to do so by a vociferous opposition. The Argentine and Bolivian high courts have often been the object of purges, with the Bolivian Supreme Court having been totally replaced seventeen times since 1950. In Zimbabwe, court cases are simply reassigned so that major ones with significant political implications are transferred to judges who are inclined to sympathize with the government. A similar tactic was followed in El Salvador in the 1980s when embarrassing human rights cases were to be heard; the Supreme Court President simply rotated judges to war-torn regions to prevent them from hearing cases.

Intimidation limits judicial independence, but physical violence, or threats of it, can be even more stifling. In Colombia between 1979 and 1991, more than five hundred murders or attempted murders were committed against lawyers and judges, and one-third of the judges reported death threats against themselves or their families. The presiding regime in Kazakhstan abolished the Constitutional Court when it attempted to act independently, and the entire Constitutional Court was forced to resign in Belarus when it defied the government with some decisions.

Thus, the terms and conditions of judicial service and the mechanisms to best serve both independence and accountability stand as particularly important when crafting new constitutions or designing methods to name judges. Other than a short-lived experiment in revolutionary France, judicial elec-

17. PRILLAMAN, supra note 15, at 21.
18. Id.
tions have been found only in the United States and in Bolivia after passage of President Evo Morales’ 2008 constitution.  

II. JUDICIAL APPOINTMENT COMMISSIONS IN NEW DEMOCRACIES

Nations that have adopted judicial appointment commissions have incorporated only the first half of the Missouri Plan, merit selection, and rejected retention elections. That decision signals a clear preference for judicial independence and a secondary, perhaps non-existent, role for judicial accountability to the electorate. Moreover, often citing the U.S. experience with the early New Deal Court, nations have generally established mandatory retirement ages in lieu of life tenure or set term lengths, sometimes renewable but often not.  

One study of twenty-seven democracies in Europe circa 2001 found that twelve countries had mandatory retirement ages; fourteen had non-renewable terms and seven employed renewable ones. What is most notably different is that other nations have not adopted the committee formula of some combination of lawyers, judges and laypeople that characterizes selection committees in Missouri Plan schemes in the United States. Because of the so-called “democratic deficit” that often accompanies selection of judges, representatives of the politically accountable branches of government are frequently included in the selection committees.

Israel has the oldest judicial appointment commission that names judges to the civil courts and to the Supreme Court. The 1953 Judges Law “deliberately sought to create a judicial system insulated from an otherwise highly politicized society.” The nine-member commission that selects judges for all levels of courts in Israel consists of the President of the Supreme Court, two other Supreme Court Judges, the Minister of Justice (attorney general), another cabinet minister, two members of the legislature (one of whom has traditionally been selected from the opposition ranks) and two representatives of the Israeli bar. By tradition, if the three Supreme Court Judges do not concur on a candidate for the Supreme Court, that candidate will not be selected. Representatives of the bar are elected by the Council of the Bar and serve for three years, whereas the representatives from the legislature are

22. The final appointing authority in each nation usually determines whether to renew the judge for an additional term.
24. Id. at 31.
27. Id.
elected from within that body.\textsuperscript{28} Candidates may be nominated by the Minister of Justice, the President of the Supreme Court or any three members of the committee, but in practice nominees are people upon whom the Minister of Justice and the President of the Supreme Court agree. The commission screens and selects the judges; it does not nominate to the executive or another official.\textsuperscript{29} All judges at all levels serve for life, until the mandatory retirement age of seventy.\textsuperscript{30} The Israeli system has all of the marks of an apolitical system for appointing judges, but political considerations have entered into the process. On at least two occasions, laws making exceptions to the process have been passed for political purposes. In one case, a law was passed to accord legitimacy to one Supreme Court Judge who did not meet the legal requirements to serve; in another case, the mandatory retirement age was changed to ensure that one retiring judge could remain on the court to preside over the potentially tricky trial of Adolph Eichmann.\textsuperscript{31}

The Israeli judicial appointment commission was designed for a highly fragmented and divided society, and, not surprisingly, several of the new democracies in post-communist Europe also adopted the model. Most of these new democracies – Estonia is the exception – separate the regular judiciary from a separate constitutional court. Judges named to the constitutional courts serve seven-to-ten-year, nonrenewable terms and are appointed through some division of appointments between the executive and legislative branches.\textsuperscript{32} For example, Romania’s nine Constitutional Court Judges are named, one-third each, by the two chambers of the Parliament and the President, whereas in Bulgaria, the twelve Judges are named in equal numbers by Parliament, the President and judges on the regular courts.\textsuperscript{33}

For the regular judiciary, some of the post-communist nations have chosen to use a judicial appointment commission to select judges. Executive appointment is used in Hungary and the Czech Republic, but Bulgaria uses a judicial appointment commission.\textsuperscript{34} A judicial committee recommends to the executive in Lithuania, Poland and Romania.\textsuperscript{35} Generally, these judges’ terms are for life until judges reach a mandatory retirement age.\textsuperscript{36}


\textsuperscript{29} Id.

\textsuperscript{30} Edelman, supra note 25, at 237.


\textsuperscript{33} Schwartz, supra note 19, at 41.

\textsuperscript{34} Howard, supra note 32, at 95.

\textsuperscript{35} Id.

\textsuperscript{36} Id.
guarantees of life tenure, Bulgarian judges, for example, find their independence threatened by intrusive phone calls and even physical threats and, more importantly, by the judiciary itself, in which prosecutors and even the chairs of their respective courts attempt to intimidate the judges.  

Judicial appointment commissions have also become common in Latin America, where, since the mid-1980s, they have been found in Argentina, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama and Paraguay. However, they were not necessarily capable of blocking the will of a determined executive. The Venezuelan commission, created in 1969, was incapable of protecting judicial independence, and more restrictions were progressively placed on it; the commission ceased to function as of 2000. Argentina’s 1994 constitution provided for a judicial appointment commission, but the government of Carlos Menem that controlled the legislative branch delayed implementation of the commission until 1997. That commission is composed of eight legislators (only half of whom could be of the majority party), one executive representative, one Supreme Court Judge, two academics elected by their colleagues, four lawyers and four regular judges; it submits ranked names to the President for appointment to the lower courts. In 2006 the commission size was reduced to thirteen, and the number of politicians relative to the lawyers, academics and judges was increased, leaving the politicians in the majority. Across Latin America – despite guarantees of judicial tenure – court purges, high turnover rates and low average tenures suggest executive interference with judicial independence.

In the Andean region that includes Bolivia, Colombia, Ecuador and Peru, constitutions were reformed in the 1990s to facilitate appointment of lower court judges without political interference. In Bolivia, for example, a 1995 constitutional reform created a five-member judicial council, members of which were appointed by a two-thirds vote of Congress, to nominate candidates for the Supreme Court, the Constitutional Tribunal and the two levels of trial and appellate courts. Since the Congress named four of the council members and the fifth was the Chief Justice of the Supreme Court, the council might have acted with an eye toward political concerns. The judicial

39. Id. at 35.
40. Id.
41. Id. at 38-41.
42. Id. at 37-39.
council nominated judges for the Supreme Court and the Constitutional Tribunal, subject to appointment by a two-thirds vote of the Congress, whereas for the lower tiers of the judiciary the judicial council nominated, and the judges of the Supreme Court made the appointments.\footnote{Id. at 289.} This system was replaced in 2008 with popular election of judges at all levels.\footnote{Double or Quits, supra note 21, at 44.}

The fallacy of this plan laid in the tendency of lower court judges, who serve for four-year renewable terms, to be subservient to higher court judges.\footnote{See generally Pérez-Liñán, Ames & Seligson, supra note 43, at 288.} A similar trend has been found in Japan, where higher court judges exercise total control over assignments, transfers and promotions of lower court judges.\footnote{DAVID M. O’BRIEN, TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN 65-66 (1996); RAMSEYER & RASMUSEN, supra note 5, at 166-67 (2003).} Yet the 1988 constitution of Brazil attempted to strengthen judicial independence by giving judges life terms until retirement at age seventy, providing generous salaries and granting the judiciary total control over selection, nomination and promotion within its own ranks.\footnote{Carlos Santiso, Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability, 10 DEMOCRATIZATION 161, 165 (2003).} To ensure that Brazilian higher courts do not interfere with the actions of lower court judges, Supreme Court rulings in constitutional matters have no value as precedents for lower courts.\footnote{Id. at 165-66 (2003).}

Since 1980, Venezuela has used a judicial appointment commission, but candidates are required to have completed a training course at the Escuela de la Judicatura, or Judicial School, before applying. Selection is made through panel forums. For the highest courts, the panel is composed of two members of the Supreme Court in the branch of law for which the vacancy is available, a member of the judicial council and a scholar in the appropriate field of law. For all other courts, the panel consists of a judicial council member, an appeals court judge named by the President of the Supreme Court and a legal scholar. The panels first review the candidate’s credentials, then provide a written analysis of the candidate’s experience and, finally, orally evaluate the candidate’s theoretical dispositions. The process became tainted when prior agreements between the two major parties actually decided who would be appointed, and the panels were merely window dressing. Hugo Chávez’s 1999 constitution called for transferring those functions to the Supreme Tribunal of Justice.\footnote{MARK UNGAR, ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA 174-77 (2002).}

Mexico undertook judicial reform in 1994 and moved responsibility for appointment, promotion and discipline of judges from the Supreme Court and
placed it under a new federal judicial council.\textsuperscript{51} This seven-member body includes the Chief Justice of the Supreme Court, three lower level judges, two members named by the Senate and one member appointed by the President.\textsuperscript{52} This body also has administrative control of the judiciary, including budgetary authority.\textsuperscript{53} Similarly, the Peruvian 1993 constitution created a National Magistrate’s Council and the Judicial Academy.\textsuperscript{54} Attendance at the Judicial Academy was required prior to applying to the National Magistrate’s Council for a judicial position.\textsuperscript{55} President Alberto Fujimori fired most of the nation’s judges in 1992 and replaced them with “provisional” judges, all of whom he appointed.\textsuperscript{56} He then delayed implementation of the new system by not staffing the new Judicial Academy and, thereby, prevented anyone from achieving eligibility to apply for a judgeship.\textsuperscript{57} He also succeeded in having a law passed that created a judicial coordinating council but “suspended” operation of the council until the end of 1998.\textsuperscript{58} Ultimately, the council resigned en masse.\textsuperscript{59} In 2000, after winning a third presidential term, Fujimori was forced to resign over a corruption scandal, and only then did the National Magistrate’s Council and the Judicial Academy become operational.\textsuperscript{60}

Judicial appointment commissions have also appeared in Africa. The post-apartheid 1996 constitution of South Africa also instituted a judicial service commission to nominate judicial candidates, although the commission had actually begun working in 1994.\textsuperscript{61} The commission consists of twenty-three people: the Chief Justice of the appellate division, President of the Constitutional Court, President of the Supreme Court, the Minister of Justice, two practicing trial lawyers, two practicing attorneys, one law professor, six members of the legislature (half of whom must be from opposition parties), four representatives of the council of the provinces and a further four political members.\textsuperscript{62} For those appointments that have greater political implications, e.g., to the Constitutional Court, the High Court and the Supreme Court of Appeal, the President makes the appointment on the advice of the commis-

\textsuperscript{51} Finkel, supra note 10, at 94-95.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 71.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 73.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 77.
\textsuperscript{60} Id. at 81-82.
\textsuperscript{61} François Du Bois, Judicial Selection in Post-Apartheid South Africa, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, supra note 4, at 280, 283.
\textsuperscript{62} Id. at 283-84; see also Stacia L. Haynie, Courts and Revolution: Independence and Legitimacy in the New Republic of South Africa, 19 JUST. SYS. J. 167, 171 (1997).
In the case of the Constitutional Court, the commission must provide the President with a list of nominees—three more than the number of vacancies—but the President may ask the commission to amend its list if no candidates are acceptable. Therefore, the South African executive maintains a free hand in naming the highest judges, and the commission’s role is merely advisory. Interviews of candidates by the commission are public, a process that some say has turned the hearings into “inquisitions” of past apartheid judgments, while others say that the public interviews have enhanced the legitimacy of those selected. Use of the commission has significantly altered the demographics of the bench by increasing the number of black, Asian and female judges.

Namibia also instituted a judicial appointment commission in 1995 for the high court and Supreme Court, where the commission nominates and the President appoints. The President may refer nominations back to the commission with written concerns and request that the commission make new recommendations. The commission is comprised of the Chief Justice, a judge appointed by the President, the Attorney General and two people selected by the bar associations. Because of historical conditions, the implementing legislation for the judicial service commission specifically urges the commission to regard affirmative action. Even though greater racial diversity has resulted, women remain wholly under-represented among the higher rungs of the Namibian judiciary.

In neighboring Zimbabwe, a judicial appointment commission also operates, but since 1980 President Robert Mugabe has successfully subverted the process to maintain a subservient judiciary. The commission is composed of the Chief Justice of the Supreme Court or the most senior judge of that court, the chair of the Public Services Commission, the Attorney General and two or three other members appointed by the President. Therefore, the President is able to appoint three or possibly even four of the members of the commission. Candidates who reach the commission have been proposed by the Ministry of Justice, which attempts to locate people who will be accepta-

63. Du Bois, supra note 61, at 284.
65. Haynie, supra note 62, at 171.
68. Id. at 321.
69. Id. at 318.
70. Id. at 319.
71. Id. at 322.
72. Derek Matyszak, supra note 16, at 331.
73. Id. at 334.
ble to the President. Should an undesirable judge be appointed, the President can name people whom he appoints to investigate a too-independent judge; the tribunal meets privately and makes no public recommendation on removal.

The West African nation of Ghana also uses a judicial appointment commission, a permanent body created by the 1992 constitution that makes recommendations to the Chief Justice of the Supreme Court or to the President, depending on the court to which the appointment is made. Composition of the commission, which also has control over removals from judicial office, consists of a majority of lawyers. Zambia also requires that the President consult with a judicial appointment commission to name all judges, save those on the Supreme Court. After appointment, unless otherwise removed, judges serve until a mandatory retirement age.

III. JUDICIAL APPOINTMENT COMMISSIONS IN OLD DEMOCRACIES

Canada uses some judicial appointment commissions at the provincial level; Ontario led the way in 1988 through an informal process that was transformed into statutory law in 1994. Not coincidentally, the move toward use of commissions in Canada began coterminaly with passage of the Canadian Charter of Rights and Freedoms in 1982, which gave judges greater authority in the areas of human rights and public policy and, hence, caused the process of how judges are selected to come under the microscope.

The election of Tony Blair’s “New Labour” government in the United Kingdom in 1997 paved the way for more substantial institutional changes than had been witnessed in the island nation since at least the end of World War II. One of the early acts taken by the new government was the 1998 passage of the Scotland Act, which devolved power to a new Scottish Parliament and executive. Though Scotland remains part of the sovereign United Kingdom, the Scottish Parliament has considerable authority over more local concerns, making it roughly analogous to American state legislatures. In March of 2001, the Scottish Minister of Justice announced the creation of a

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74. Id.
75. Id. at 335-36.
78. Id.
80. Id. at 128.
judicial appointment board to fill vacancies in the Scottish judiciary. The board is not statutory, but rather a body established solely by the executive to replace the previous system whereby the highest legal officer, the Lord Advocate, could appoint judges without required consultation with anyone. The Scottish board consists of eleven people. Four judicial members are nominated by their judiciaries, but the five laypeople and two lawyers are chosen through an open selection system whereby the position is advertised and potential members submit references and have an interview. The board submits a ranked list of recommended candidates to the Scottish executive and Lord President, who may reject a name only in unusual circumstances and must explain their rationale for the rejection in writing. In the filling of forty-four vacancies during the first year of operation, none of the board’s names was rejected. The judicial appointment board does not, however, make recommendations for the naming of the two Scottish lords who serve on the Judiciary Committee of the House of Lords (the highest court in the United Kingdom until October 2009) or the two most senior judges serving on Scottish courts.

The Scottish judicial appointment board advertises judicial vacancies, and applicants complete detailed application forms and provide references. Once a short list is prepared, interviews are conducted with the applicants who make the first cut. The interview panels are divided equally between legal and lay board members, with a layperson serving as chair. During the first year of operation, the new Scottish system resulted in the appointment of more women than had been named in total under the earlier system for judicial selection.

The composition of the judiciary of England and Wales was noted in 1977 as being excessively white, male and upper middle class, with over seventy percent of those serving in judicial offices having graduated from Oxford or Cambridge. As recently as 1990, only two of the eighty-three High Court judges were women, and that ratio was similarly reflected in the ranks

82. Id.
84. Id. at 19. The interviews are conducted by a retired judge, a senior civil servant and a lay person. Id.
85. Id. at 18.
86. Id. The Judiciary Committee of the House of Lords will be replaced by a Supreme Court. See PETER LEYLAND, THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS 154-55 (2007); Constitutional Reform Act, 2005, c. 3 (Eng.).
87. Id. at 21.
88. Id. at 22.
89. Id. at 28-29.
of lower court judges. 91 Until 1991, no records were even maintained on the ethnic origins of British judges. 92 The number of cases that were politically relevant “appeared to reach their climax in Britain as the country reached the millennium,” 93 with the passage of the Human Rights Act of 1998 and several highly publicized trials, including extradition proceedings against former Chilean dictator, Augusto Pinochet. 94 Indeed, since British accession to the European Union (EU) in 1972, British judges have been called upon to decide the legitimacy of British laws under the treaties, regulations and directives of the EU, thus the media began to focus on the democratic deficit surrounding the appointment of judges and their elitist backgrounds. 95 The doctrine of parliamentary sovereignty denied judges the ability to invalidate any parliamentary act, whereas the requirements of EU membership demanded that British judges invalidate offending domestic statutes. 96 Similarly, the Human Rights Act of 1998 that incorporated the European Convention on Human Rights into domestic British law necessitated that judges who found legislation offensive to the Convention declare it “incompatible,” but not unconstitutional, as a signal to Parliament that the legislation needed reconsideration. 97

Thus, British judges became more obviously political actors, and the previous system for selecting judges to all levels of the bench was questioned. Until the Constitutional Reform Act of 2005 took force, 98 the Prime Minister, upon recommendation of the Lord Chancellor (attorney general), named all judges. 99 The English judicial system had evolved over the course of nine hundred years, with gradual shifts and modifications, and the clearest breaks in that system, until 2005, had been the change in the tenure of judges from judicial service during the king’s pleasure to tenure as long as the judge does well by the Act of Settlement in 1701. 100 Secure salaries and life tenure during good behavior were later codified during the reign of George III in the eighteenth century. 101

The system of appointment by the crown – though actually by the Prime Minister upon recommendation of the Lord Chancellor – worked well when

92. Id. at 85.
94. Id. at 156-57.
95. Id. at 169.
96. MARY L. VOLCANSEK, JUDICIAL POLITICS IN EUROPE 218 (1986).
98. LEYLAND, supra note 86, at 151 (2007).
99. MALLESON, supra note 79, at 79.
100. VOLCANSEK, JUDICIAL MISCONDUCT, supra note 91, at 67.
101. Id. at 74.
the judiciary was small, when the Lord Chancellor knew all of the barristers in the country and when only barristers, not solicitors, were eligible for appointment to the judiciary. At the pinnacle of the judiciary, the Judiciary Committee of the House of Lords, or simply Law Lords, consisted only of men, most of whom had attended private schools and graduated from Cambridge or Oxford. Nearly all of them had upper-middle class backgrounds and were comfortably well off. However, as David Robertson is quick to note, “[A]ll British institutions are so headed.” Indeed, there are only a few thousand practicing barristers, and only a few hundred of those have attained silk or the status of Queen’s Counsel. “These people have lived and worked together intimately, fought each other in court, judged each other in the various rungs of the court system for well over thirty years by the time they get to the Lords.” The same could easily have been said of all judges, since the entire three hundred of them were recruited from the ranks of the elite bar, the barristers.

Consequently, until the late 1970s, the Lord Chancellor was personally involved in the selection of all judges, but by 1997 the size of the judiciary had increased, some of its ranks opened to solicitors and approximately six hundred appointments were made annually. More ranks had been added to the lower levels of the judiciary, and in 1994 an informal system evolved in which a panel of three, including a judge, a representative of the Lord Chancellor’s Department and one layperson, interviewed all candidates for lower court judgeships. Vacancies for open judgeships, even at the level of the high court (roughly equivalent to a U.S. district court) were publicly advertised. Moreover, much of the work of lower criminal courts had shifted to part-time judges, recorders and assistant recorders, and, due to reforms in the 1980s and 1990s, annual rounds of applications were held for those positions.

Calls for a judicial appointment commission began as early as 1918, and use of judicial appointment commissions became a part of the Labour Party’s electoral platform in 1995. After Labour came to power in 1997, however, a decision was made not to proceed, but that decision was reversed in 2003

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102. Malleon, supra note 79, at 79.
104. Id.
105. Id. at 18-19.
106. Id. at 19.
107. Malleon, supra note 79, at 80.
108. Id. at 81.
109. Id. at 81-82.
110. Id. at 79.
111. Id. at 82.
112. Id. at 125-26.
113. Id. at 127.
Eventually Labour followed through, and the Constitutional Reform Act of 2005 not only instituted judicial appointment commissions but also stripped the Lord Chancellor of his role in the judiciary and in the House of Lords and replaced the position with a new cabinet office, Secretary of State for Constitutional Affairs. Now, after passage of the Constitutional Reform Act, a judicial appointment commission recommends a single name to the new Secretary of State for Constitutional Affairs for all judgeships on the high court and all lower courts. The judicial appointment commission is a fifteen-member independent body that includes five lay members who are selected through an open competition. In addition, there are five judges, three of whom are from the high court, or the Court of Appeal, plus one circuit and one district court judge. The bar is represented by one barrister and one solicitor, and one magistrate and one tribunal member represent the lower judicial ranks on the commission. Furthermore, only a lay member may serve as chair of the commission, and terms for all commissioners are three to five years. The Secretary of State for Constitutional Affairs notifies the commission when a vacancy arises, and the commission then screens applicants and conducts interviews. Once the commission has selected a single nominee, it submits that name and a written justification for the selection to the Secretary of State, who can ask the commission to reconsider if the offered justification is deemed not to support the nomination. The Secretary is restricted to requesting reconsideration only if the recommended candidate is not qualified for some reason or if the recommendation process was conducted improperly. The commission retains the prerogative to resubmit the same candidate or another one; the Secretary of State can reject the nominee but must give reasons in writing. After rejecting one candidate, the Secretary of State must accept the second one. Mechanisms for removing and disciplining judges on these courts are also included in the 2005 law, as well as processes for lodging complaints against judges overseen by a lay judicial appointment ombudsman.

The Constitutional Reform Act of 2005 also eliminates the Judicial Committee of the House of Lords and creates an independent supreme court outside of the legislative arena that becomes operative in October 2009.

115. Id. at 42.
116. Constitutional Reform Act, 2005, c. 4 (Eng.).
117. LEYLAND, supra note 86, at 152-53.
118. Id. at 153.
119. Id.
120. Id.
121. Id. at 152.
122. Constitutional Reform Act, 2005, pt. 3 (Eng.).
All currently sitting Law Lords will continue in their positions both on the new judicial body and in the House of Lords, but, when vacancies are filled, the new judges will not simultaneously serve in the upper legislative house.\textsuperscript{123} Notably, the Supreme Court of the United Kingdom will not have the power of American-style judicial review but will be the highest court of appeals for England, Wales, Scotland and Northern Ireland. Vacancies will be filled through a variation on the judicial appointment commission, but the screening body will include the President and Deputy President of the Supreme Court and representatives of the judicial appointment commissions for Scotland, Northern Ireland and England and Wales.\textsuperscript{124} The Supreme Court appointment commission is required to consult with specified officials in Wales, Scotland and Northern Ireland before recommending a single candidate to the Secretary of State for Constitutional Affairs.\textsuperscript{125} Similarly, the Secretary of State is also obliged to consult with senior judges and representatives of the constituent parts of the United Kingdom.\textsuperscript{126} The Secretary of State can reject a nominee or ask for reconsideration but cannot make a different selection. If the Secretary of State accepts the nomination, it is recommended to the Prime Minister.\textsuperscript{127} A parallel system will also be used to fill vacancies that arise on the Court of Appeal and division heads of the high court.\textsuperscript{128}

\section*{IV. Why the Popularity?}

That nations as disparate as those in Latin America, Europe, North America and Africa would adopt a version of the Missouri Plan might seem puzzling. What is the attraction? Kate Malleson offers five explanations: merit, apolitical appearance, representativeness, transparency and protection of judicial independence.\textsuperscript{129} Let me examine each of those claims in turn. No mechanism exists thus far that can measure whether more meritorious or even more qualified judges result from different selection systems. Even so, at least two plans, those in Venezuela\textsuperscript{130} and Peru,\textsuperscript{131} require that potential judges complete studies at a judicial school. An academic training program can at least assure that judges have the requisite skills to serve, even if it cannot guarantee that they have the temperament, integrity and good judgment required of judges.

Use of judicial appointment commissions is also extolled as a means to remove judicial selection from the political sphere. Indeed, that was likely

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\item \textsuperscript{123} LEYLAND, supra note 86, at 154.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} MALLESON, supra note 79, at 140-51.
\item \textsuperscript{130} ÚNGAR, supra note 50, at 153.
\item \textsuperscript{131} Finkel, supra note 10, at 71-73.
\end{itemize}
the driving motive for some Canadian provinces to establish judicial councils, some that serve only to screen and others that nominate judicial candidates.\(^\text{132}\) An attempt at transparency and depoliticization of judicial appointments – at least at the provincial level – was likely necessitated by the widespread displeasure with the political and ideological appointments at the federal level that led two-thirds of Canadians polled in 2002 to favor popular election of the Canadian Supreme Court.\(^\text{133}\) Yet, even with judicial appointment commissions, as the experience of Zimbabwe under Mugabe clearly indicates, merit selection can be subverted when the executive appoints a majority of the members of the commission and only candidates who will be acceptable to the executive are ever presented to the commission.\(^\text{134}\)

Further, representativeness or diversity is touted as more achievable through a commission-based appointment system. Indeed, under the judicial appointment commission in South Africa, more blacks, Asians and women have reached the bench.\(^\text{135}\) Namibia has even formally encouraged affirmative action to its judicial appointment commission,\(^\text{136}\) and an increase in the number of female judges appeared in just the first year of work by the Scottish judicial appointment commission.\(^\text{137}\) Yet, in Canada, where the executive appoints judges to the Supreme Court with no requirement of consultation or confirmation by any other body, one-third of the judges are by law chosen from French-speaking Quebec, and, by tradition, at least one-third of the judges are women.\(^\text{138}\)

Use of judicial appointment commissions is also assumed to better safeguard judicial independence by ensuring that judges are not beholden to the party who appointed them. In Israel, the judicial appointment commission that actually makes judicial appointments, rather than recommending candidates, has created a highly independent judiciary. Particularly, the Israeli Supreme Court acting in its capacity of High Court of Justice “is probably the only Supreme Court in the world that can influence any state action while it is taking place and in real time” and has created doctrines and strategies that enable it to have the practical capacity, as well as the formal power, to intervene in any public controversy.\(^\text{139}\) However, judicial appointment commis-

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133. Id. at 56.
137. Paterson, supra note 83, at 29.
139. Dotan, supra note 26, at 99.
sions have been incapable of securing judicial independence in Bulgaria, Venezuela, Zimbabwe and Argentina during the Menem presidency.

Judicial appointment commissions are also said to make the process of appointing judicial officers more transparent. Indeed, public interviews of judicial candidates are used in South Africa, which makes the process more open but has been criticized for deterring qualified people from applying because of potential public scrutiny of candidates’ apartheid-era activities. The new appointment commissions for Scotland and England and Wales are likely the most transparent since even the lay commissioners are chosen through a public competition and public advertisements are used to elicit potential judicial applications.

V. CONCLUSION

Though the virtues and vices of various selection schemes have been debated for decades, the bottom line is that “the qualifications and qualities essential to be a ‘good’ judge are vague and uncertain; needless to say, choosing the ‘best qualified’ individuals to sit on the judiciary is a problematic endeavor.” The varieties of schemes used in the United States and beyond our borders all claim to seek out and appoint the best judges, but all fall short in some instances. Overbearing executives can encourage early resignations; non-subservient judges can be purged, threatened, transferred, removed or prosecuted, and some judges even fall victim to physical violence. No appointment mechanism can protect judicial independence when the larger political system flaunts the rule of law or has been corrupted or tainted.

What judicial appointment commissions can lend is the appearance of selecting only meritorious individuals for judgeship, being above the partisan and ideological fray, creating a more representative and diverse bench, bolstering judicial independence and lending transparency to the process. Where the executive or a representative of the executive receives nominations from a judicial appointment commission and makes a final appointment (only in Israel does the commission actually make the final decision), judicial appointment commissions also provide political cover. Executive appointment

140. Schöpfeld, supra note 37, at 65.
141. Chávez, supra note 38, at 34.
143. Id. at 37.
144. Haynie, supra note 62, at 171.
145. Paterson, supra note 83.
146. LEYLAND, supra note 86, at 152-53.
147. See, for example, the table of studies on judicial selection procedures from 1965 to 1980, in Mary L. Volcansek, The Effects of Judicial-Selection Reform: What We Know and What We Do Not, in THE ANALYSIS OF JUDICIAL REFORM 81-84 (Philip L. Dubois ed., 1982).
148. Dubois, supra note 1, at 17.
provides, at least theoretically, indirect accountability for the performance of the judiciary, but judicial appointment commissions allow executives to hedge their bets. An unqualified, tyrannical or corrupt judge can always be blamed on the commission that recommended him or her to the executive.

Politicians who anticipate holding political power in the future write the rules for selection of judges, whether by statute or by constitutional provision. Politicians would only support independent judiciaries or ones with the power of judicial review as a means to preserve their prerogatives when they are out of power. Judicial appointment commissions are heralded as the most certain method for naming independent, qualified judges to the bench. Reality holds, however, that the most exalted virtues of judiciaries are appreciated by politicians most when they are in opposition. Judicial appointment commissions provide one form of insurance that judges will not always be in the corner of the parties in power. Therefore, the other side will have incentives to play by the rules when in power, and, if not, the opposition can turn to independent courts to enforce the rules. Judicial independence has been shown, however, to rely less on how judges are appointed than on the dispersal of political power. Likewise, reform of judicial selection depends on “electoral probabilities.” If a party believes that it will continue in power indefinitely, judicial independence and judicial reform are not in that party’s interest. The best means to ensure judicial independence or to secure judicial reform is to nurture a system of healthy inter-party competition that includes alternation in power. Similar conditions in the American states likely govern whether judicial selection reform occurs.

149. Id. at 239.
