

Why random selection is a better method for choosing independent High Court Judges

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What is the question?

How should high court judges be selected?

Why does it matter?

The recent debates about the replacement of Ruth Bader Ginsburg, former member of the US Supreme Court, a few days before the Presidential election have raised again the question of the best method for selecting supreme court or constitutional court judges. Is it desirable to have such a politicized designation process? Does it preserve the separation of powers?

This issue, which we examined in more detail in a [recent publication](#) summarized here, is part of a broader discussion on the legitimacy of an institution which has gained *political* power in many countries. As this institution gains power, normative questions about its legitimacy become increasingly pressing, and selection methods are one of the key aspects of this problem.

Besides, many countries are experiencing a shift of power to the executive, threatening the separation of powers. It is in this context that increasing the independence of courts could be considered as desirable, in order for them to be able to act as a check on the actions of overly powerful executives. And one way of fostering this independence is by reducing the politicization of the selection process.

What is the usual answer?

High court judges are usually nominated by political actors like the President or the Parliament. In the United States, judges are appointed for life by the President with the approval of the Senate. In Belgium, they are appointed for life by the King on the proposal of alternately the House of Representatives and the Senate. Yet in practice, seats are “reserved” for all major parties and it is party leaders who decide. Under the current Chilean constitution, members of the Supreme Court are appointed by the President based on a list of five candidates presented by the Court, with approval of the Senate. As high courts often have the power to declare laws unconstitutional, political actors usually want to maximize their chances to have courts on their side on controversial issues, and this is why they are usually involved in the selection.

In Australia, the practice is a bit different. The Constitution provides for the appointment to be made by the Governor-General, but in practical terms the Attorney-General makes the recommendation. It is argued that Australia has so far kept its head with regard to the politicisation of nominations, but that the process lacks transparency and heavily depends on informal norms to resist politicization.

One argument in favor of appointments by political actors is that judges are expected to be in line with majority preferences. According to this argument, the judiciary should not be reduced to a separated power checking the other two. It is also responsible for the application of democratically established rules. Accordingly, judges should be responsive to the views held by a majority of citizens.

It is also argued that the nomination by elected representatives confers legitimacy to the court. And some jurisdictions, such as in the United States, go as far as to directly elect judges to lower-level courts. This practice, however, has little support because of the observed impact elections have on judicial performance.

What is wrong with prevailing methods?

Our concerns with the prevailing practices of nomination by political actors are the following:

- They limit the political independence of judges and therefore harm the separation of powers. If we believe that constitutional judges matter, they must have the ability and freedom to intervene when needs be, even when their decision contradicts the will of those who appointed them, without any fear of sanction or loyalty considerations.
- They create perverse incentives for judges, who should leave aside political considerations and obligations, and focus on the issue of legality.
- They harm the legitimacy of courts. The more judges resemble elected representatives, the more courts deviate from their specific function, which consists in assessing the constitutionality of legislations.

What would be the alternative?

From our viewpoint, anchored in the ideal of clearly separated powers, the best method for selecting constitutional judges should be able a) to guarantee or maximize political independence, and b) to identify legal or constitutional expertise. Courts have a specific function, and if we want judges' perspective to be law-centered rather than political or partisan (the *raison d'être* of a separate power), expertise in law should be the only relevant selection criterion, and political independence should be fostered.

Compared to political nomination, the random selection of judges would foster political independence by maximizing judges' incentives to act based on legal considerations. However, because expertise also matters, we argue that they should not be selected among the whole citizenry, but among a set of constitutional "experts" – what has been called "focal random selection". The set of eligible candidates could include judges, law professors or even constitutional lawyers with a certain amount of years of experience. There should be public discussions about the appropriate threshold of competence before clear eligibility requirements are made public¹.

Why not directly empower an independent judicial body to identify the best candidate? Even if such method (here after called "certification") will likely be less politicized than political nominations, there are still risks of political intrigues. Besides, many people will usually be endowed with the relevant competencies. A national examination is unlikely to single out, without political bias, one candidate as clearly standing out, as *the right person* for the job. Some mechanism must therefore be found to choose judges from this pool of certified candidates.

¹ A point of attention should be to avoid self-selection biases and incentives for politically motivated lawyers to apply *en masse* to increase their odds of random selection.

This is where random selection enters the picture. Once a preliminary selection has been made through certification, a further selection still needs to be made to end up with the right number of judges or the one person replacing a former judge. While preserving the benefits of certification obtained in the pre-selection, random selection maximizes political independence in the remaining choice. The candidate selected by lot does not have to please anyone to be selected, to raise campaign funds, and does not have favors to return once selected. The random element also mitigates political conflicts by leaving a fair chance to competing political groups (especially if mandates are not life-long). In comparison, an exclusively certificatory procedure would likely increase political battles among the actors in charge of the process. Through the combination of these two logics (certification and random selection), we thus maximize the chances of having judges combining the virtues of competence and independence.

Objections to random selection

One objection against the random selection of judges is that it may weaken judicial accountability: randomly selected judges are neither accountable to a constituency, as is the case with elections, nor to elected representatives, as is the case with political nominations. The risk engendered by random selection is then the possibility of having judges making politically motivated decisions or sometimes even shaping policy without having to account for them, and without being vulnerable to sanctions.

However, it is possible to imagine other accountability mechanisms. For example, we could have a procedure allowing parliament or some judicial council to revoke judges in case of breach to their professional duties. Besides, accountability can also take a more deliberative form, such as an obligation to publicly provide reasons for one's actions or decisions.

A second objection questions the willingness to depoliticize the judiciary by pointing out the risk of simply hiding the use of political power to the public. We should assume, the objection goes, the political character of judicial practices. Accordingly, it is better if judges have a clear political identification than if we pretend that they are independent although they are not.

We admit that there will always be judges with political or partisan motivations, whatever the selection method. Yet, we reject the claim that it is better to have judges with a clear political identity than judges with hidden political biases. What we should want is judges incentivized to leave their political biases aside. And if that is impossible, then maybe we should not have constitutional review at all.

A last objection is that, since the procedure's reliability heavily depends on the trustworthiness of those running it, the random procedure is, in a way, less transparent than elections or nomination. It could easily be manipulated.

What could be done to meet this criticism is to ensure a balanced supervision of the random selection process. The latter could be supervised by a board composed of representatives of *all* parties having seats in Parliament, including the minority, and possibly ordinary citizens exerting external scrutiny. More fundamentally, it matters to create as much transparency as possible about the functioning of the selection process.

Is our proposal excessively elitist – or even antidemocratic?

Some people could be convinced by the virtues of random selection, but worried about the other part of our proposal: the preselection through certification. Why not enfranchising all adult citizens? Are we conceding too much to existing selection practices?

Although we see good reasons to include ordinary citizens in juries, as already practiced, and even in a new [popular legislative chamber selected by lot](#), it is hard to deny that the task requires some degree of legal expertise, at least on some constitutional matters. Judging the conformity of a given law with constitutional principles is not very accessible to the wider public. And it is probably less accessible than judging the *desirability* of a law (as would be the case in a randomly selected legislative chamber). The risk, then, is that without a sufficient knowledge and understanding of constitutional law, “judges” selected among the whole population would be inclined to merely assess the desirability of laws they would review, based on their political preferences. We believe that there is a place for that kind of citizen review, but it is not obvious that a constitutional court is the forum to do so.

This being said, there is a range of conceivable options between enfranchising all adult citizens or only a small set of constitutional experts – including enfranchising all of those who have some degree in law, or all of those who have been admitted to the state bar. And there are probably sound arguments – including diversity-based ones – for selecting among a large pool of candidates.

Some might insist that having a non-representative (and elite-biased) body reviewing democratic legislation is anti-democratic. Yet this is an argument against judicial review in general, not against our specific proposal.

Conclusion

We make no comment on the merits of High Courts being conferred with a lot of political power. Although strong courts can be seen as useful checks on powerful executives, there are also sound reasons to [doubt the desirability of strong judicial review](#). Our point is simply that *if* we have a constitutional or supreme court, we should maximize its independence while guaranteeing its competence – and the combination of random selection with certification seems the most promising way of doing so.

Area for further study

We laid the focus on High Courts, here, because their power raises strong legitimacy issues. Yet the argument could possibly apply to lower courts as well.

The same logic could also apply to senior public service appointments, as the politicization of the public service is a parallel problem eroding public trust.

The original article, including the full reference list, can be found [here](#) (official article) and [here](#) (open access authors' version).