The Process of Appointment and Accountability of Judges in Some Foreign Countries:

(1) The United States
(A) Federal and State Courts

The judicial system in the United States is known as dual court system, which means both state and federal governments have their own set of courts. Thus, there are 51 separate sets of courts in the United States, one for each state and one for the federal government.

(a) Supreme Court

There are three levels of federal courts: the Supreme Court, the Circuit Court of Appeals and the District Court. The Supreme Court is the highest court in the federal judiciary. The judges of Supreme Court comprise the Chief Justice and eight Associate Justices. Each year, the Supreme Court hears a limited number of appeal cases which begin in the federal or state courts.

(b) Circuit Courts of Appeals

There are one federal circuit and 12 regional circuits; each circuit has one circuit court of appeal (13 Circuit Courts of Appeals in total). The total number of authorized judgeships in the circuit courts is 179.

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1 Federal courts here refer to Supreme Court, Circuit Courts of Appeals and District Courts only.
2 US Code, Title 28, Chapter 1, Section 1. Copy of the United Sates Code is available from the website: http://www4.law.cornell.edu/uscode/.
4 US Code, Title 28, Chapter 1, Section 41 & 44.
The Circuit Courts of Appeals hear appeals from the district courts located within its circuit.¹⁵

(c) District Courts

Under the 12 regional circuits, there are 94 judicial districts. The total number of authorized judgeship in the District Courts is 646.⁶ Within limits set by Congress and Constitution, the District Courts hear nearly all categories of federal cases, including both civil and criminal cases.⁷

(B) Methods of Appointment

Section 2, Article II, the United States Constitution states:

"[The President] …shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…Judges of the Supreme Court and all other Officers of the United States…”

Justices of the Supreme Court, judges of the Circuit Courts of Appeals and the District Courts [i.e. included under “all other officers of the U.S.” referred to in the Constitution] all are appointed by the President of the United States with the advice and consent of the Senate. These justices and judges are appointed for life, and they can only be removed through impeachment by the Congress.⁸

(C) Qualifications of Federal Judges

There is no statutory qualification for judicial appointment to the Supreme Court or the lower federal courts.⁹

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⁶ US Code, Title 28, Chapter 1, Section 133.
⁸ Section 1, Article III, The US Constitution.
⁹ The US Constitution imposes no minimum age or other requirements on federal judges. As a matter of tradition, nominees usually need to have been admitted to the practice of law for at least ten years. Information provided by the US Department of Justice, 4 October 2000.
(D) The Process of Appointment of Judges

(a) Vacancy

The process of appointment of a federal judge starts from the occurrence of a judicial vacancy. The vacancy of a judgeship may arise from death, resignation, and retirement of a judge.\textsuperscript{10} Also, vacancies can arise from legislation creating new judicial position and impeachment by the Congress.\textsuperscript{11} The process of appointment of federal judges is summarized in Figure.

\textsuperscript{10} As set forth in Title 28 of the US Code, Section 371(c), federal judges may retire at the age of 65.

\textsuperscript{11} Section 1, Article III, The US Constitution.
(b) Selection and Nomination of Candidates by the President

The President nominates candidates for justices and judges to the Senate after he receives recommendations from the Department of Justice and his own White House staff.

(c) Department of Justice

The Department of Justice, which is supervised and directed by the Attorney General, is responsible for making recommendations to the President concerning appointments to federal judicial positions. Within the Department, the Office of Policy Development (OPD)\(^{12}\) has primary responsibility for the judicial selection process of all Article III\(^{13}\) judicial vacancies. The staff of the OPD interview a prospective nominee in person. They ask federal and state judges, prosecutors, and defenders as well as other attorneys and support staff about the candidate’s reputation and merit for the federal bench. They also examine any articles written by or about the candidate, and review all of the cases, news, writings, and websites mentioning the candidate, as well as financial disclosure statements and a physician’s evaluation of the candidate’s health. A questionnaire is sent to the potential candidate to collect his or her personal data. A sample of the questionnaire is in Appendix I.\(^{14}\) The OPD does not solicit the candidate’s personal views on constitutional interpretation or political issues. Instead, the candidate is asked whether he or she has any views that would prevent the candidate from following

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\(^{12}\) The head of the Office of Policy Development is Assistant Attorney General, information provided by the US Department of Justice, 4 October 2000.

\(^{13}\) Under the Article III of the United States Constitution, Justices of the Supreme Court, judges of the courts of appeals and the district courts, and judges of the Court of International Trade, are appointed for life, and can only be removed through the impeachment process, so they are also called “Article III judges”. “Understanding the Federal Courts,” Administrative Office of the U.S. Courts 1999.

the precedents of the higher courts or from being fair and impartial in all cases that might come before the court.\textsuperscript{15}

If the preliminary evaluation of a prospective nominee is positive, the candidate’s name will be transmitted to the Federal Bureau of Investigation for investigation and to the American Bar Association (ABA), an independent non-governmental organization, for evaluation.

(d) Federal Bureau of Investigation

The Federal Bureau of Investigation's (FBI) investigation of potential judicial nominees is focused on general background issues. FBI agents usually begin their investigation by interviewing the judicial candidate to confirm the accuracy of the candidate’s security questionnaire, which requires information to verify education, jobs, and residences, as well as any background issues since the candidate’s eighteenth birthday. FBI agents also interview federal and state judges and other government officials, as well as attorneys, business and civic leaders, religious and civil rights leaders, neighbours and doctors. They also check for arrests and convictions, civil lawsuits, and credit history. Additionally, a check on the candidate’s tax record is included in the file. The OPD has stated that the FBI investigation is a critical component of OPD’s evaluation of the candidate’s suitability for the federal bench.\textsuperscript{16}

(e) The American Bar Association

The American Bar Association interviews judges and lawyers in the candidate’s community about the candidate’s qualifications, including temperament and also interviews the candidate. At the end of the ABA

\textsuperscript{15} Information provided by the US Department of Justice, 4 October 2000.

\textsuperscript{16} Information provided by the US Department of Justice, 4 October 2000.
process, the ABA sends an informal piece of advice to the Department of Justice on its rating of the candidate as “well qualified,” “qualified,” or “not qualified” if the President were to nominate the candidate.\(^{17}\)

If the ABA rating is positive, the FBI report is satisfactory, and the Department of Justice’s evaluation is favourable overall, the Attorney General formally recommends the nomination to the President.

\textbf{(f) The White House}

The White House Counsel’s Office works closely with the Department of Justice in the selection of potential federal judges. Also, the Office works as closely as possible with Senators, and also considers recommendations by Members of the House of Representatives, state Governors, state judicial selection panels, bar associations, government officials and citizens.\(^{18}\)

\textbf{(g) President}

The papers sent by the Department of Justice to the President include:\(^{19}\)

1. A letter from the Attorney General to the President formally recommending the nomination;
2. A memorandum from the Deputy Attorney General to a "designated" White House Assistant "touching on matters not in the Attorney General's formal letter" (typically who recommended the candidate and what political clearances were obtained);
3. The candidate's resume or biographical sketch;

\(^{17}\) Ibid.
\(^{18}\) Ibid.
4. A summary of the FBI Report along with the complete report itself; and
5. All other file material on the candidate including the response to the personal data questionnaire.

If the President approves the nomination, he signs it and sends it to the Senate.

Following the nomination, the Department of Justice submits the FBI Questionnaire, the results of the FBI background investigation and the entire Senate Questionnaire to the Senate.20

(h) Confirmation by the Senate

The Senate acts in a unicameral capacity when it confirms federal judicial nominations. As the Constitution provides, only the Senate's "Advice and Consent" are necessary for the appointments of Judges of the Supreme Court and all other Officers of the United States. The House of Representatives is not involved in the process of appointment of federal judges. Within the Senate, the consideration of appointments to judicial positions is the responsibility of the Committee on the Judiciary.21

(i) The Committee on the Judiciary

The Senate Committee on the Judiciary or the Judiciary Committee consists of 18 members.22 Following the rule that majority party in the

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20 The Senate Judiciary Committee sets the Senate Questionnaire. The Department of Justice (DOJ) has a copy of it and sends it to the nominee. The nominee sends it back to DOJ and DOJ sends it to the Committee. The Nominations Clerk of the Senate Judiciary Committee replied that the Committee did not receive any completed questionnaires of nominees that had not been officially nominated by the President. The Public has access to a nominee's Senate Questionnaire (except Part IV questions which are confidential). Please refer to Appendix I "D. Involvement in Legal Proceedings/Tax Audits/Other Confidential" for the details of the question. Information provided by the Nominations Clerk of the Senate Judiciary Committee on 10, 16 and 19 October 2000.
21 Section (l), Senate Rule XXV stated “Committee on the Judiciary, to which committee shall be referred all proposed legislation, messages, petitions, memorial, and other matters relating to the following subjects;…(5) Federal courts and judges….”
22 Senate Rule XXV(2), Standing Rules of the Senate.
Senate controls a majority of committee seats,\(^23\) voting results on the Committee are generally representative of the voting preference in the full Senate.

**(j) Investigation**

The Senate Judiciary Committee has its own staff to examine the background of a judicial nominee. The bulk of the investigation is conducted by the staff of the Chairman and the minority party leader on the Committee.\(^24\) The investigation involves reviewing the FBI Questionnaire, the results of the FBI background investigation and the entire Senate Questionnaire. The Committee staffers ask the home state Senators of the nominee for their opinion and conduct phone interview with the nominee to clear up any ambiguity encountered in the file. Any information discovered by the staffers will be reported to the Committee members.\(^25\)

**(k) Confirmation Hearing**\(^26\)

When the nomination is referred by the Senate, the Judiciary Committee is authorized to hold confirmation hearing\(^27\) and to take testimony by requiring by subpoena the attendance of witnesses and the
production of correspondence, books, paper and documents.\textsuperscript{28} The confirmation hearings conducted by the Committee are open to the public and may be broadcast by radio or television.\textsuperscript{29}

The confirmation hearing of a Supreme Court Justice nominee starts by the Senate Judiciary Committee Chairman’s opening statement which is followed by endorsement of the nominee by prominent supporters, normally home state Senators. The nominee is invited to give an opening statement. Then, the hearing will proceed to the questioning time of the nominee by the Senators. After the nominee has given his testimony, other witnesses may follow and lend their support for or opposition to the nomination.\textsuperscript{30}

(I) Voting

After the confirmation hearing, Committee members will vote on the nomination. The quorum of the Judiciary Committee is ten; while vote by proxy is allowed, proxies are not counted for making a quorum.\textsuperscript{31} If a nomination gets a majority vote, it will go to the Full Senate.

If the Committee rejects a nomination with a majority vote, the nomination will be returned to the President.\textsuperscript{32} In effect, the nomination

\textsuperscript{28} Normally, a nominee is very willing to fully disclose all information relevant to his/her confirmation. It is very rare that the Senate Judiciary Committee would need to subpoena materials from a nominee because the Committee has the power to reject his/her nomination. Information from the Nominations Clerk of the Senate Judiciary Committee, 16 October 2000.

\textsuperscript{29} Senate Rule XXVI(1) and XXVI(5)(c), Standing Rules of the Senate.

\textsuperscript{30} Please refer to the following reports for the details of the procedure of Senate Committee Hearings: “Senate Committee Hearings: Scheduling and Notification,” “Senate Committee Hearings: Arranging Witness,” and “Senate Committee Hearings: Witness Testimony,” by Carol Hardy Vincent; “Hearings in the U.S. Senate: A Guide for Preparation and Procedure,” by Richard C. Sachs, Congressional Research Service, the Library of Congress. All these reports are available at the library of the Legislative Council.

\textsuperscript{31} Senate Rule XXVI 7(a)(1) and 7(a)(3), Standing Rules of the Senate.

\textsuperscript{32} To the question if a nomination is returned to the President by the Senate or the Senate Judiciary Committee, the Nominations Clerk of the Senate Judiciary Committee replied when a nomination being voted down by the Committee, it is returned to the President via the Senate technically, but in
dies. However, after rejecting a nominee, the Committee may, if it chooses, vote to report the nomination to the floor - but it will be with an unfavourable recommendation.

When the Committee adjourns at the end of a session, all of the nominations still pending in Committee stage will be returned to the President.

(m) Full Senate

All judicial nominations reported from the Senate Judiciary Committee are considered by the Senate in executive sessions. If a nominee is non-controversial, quite often the nomination will be passed by unanimous consent and no floor debate is necessary. Confirmation of a nomination requires a majority vote of the Senate. If a nominee is controversial there may be floor debate on the nomination (this is only by Senators and the nominee is not present in executive sessions). Historically, nominees who received an unfavourable recommendation by
the Senate Judiciary Committee have never been voted favourably by the Full Senate.40

The President is, from time to time, furnished with an authenticated transcript of the public executive records of the Senate with a list of all judicial appointments, confirmations and rejections.41

(n) Appointment by the President

When the Senate gives its advice and consent, the President signs the judicial commission which officially appoints the individual.

Historically, six judicial nominees declined the appointments despite the Senate's confirmation and the President's appointment and the last declination happened in 1882.42

(E) Recess Appointment

Under the US Constitution, Article II, Section 2, Clause 3, the President: "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

When the Senate is not in session and therefore unable to receive nominations, the President may make recess appointments. The Senate will then consider the nomination when it returns to session.43

40 Telephone interview with the Nominations Clerk of the Senate Judiciary Committee on 23 October 2000.
41 Senate Rule XXXII, Standing Rules of the Senate.
42 Among the six nominations, five were nominated by the President and confirmed by the Senate within two days. Elder Witt, Supreme Court A to Z, Congressional Quarterly Inc. 1994 and George Watson and John A. Stookey, “Shaping America: The Politics of Supreme Court Appointments,” Arizona State University, 1995, p.242.
43 The Constitution of the United States of America, Office of the Secretary of the Senate, p.20.
(F) Confirmation of Nominations

For years when there is a divided government with the President and the majority members in the Senate coming from two different parties, intentional delays may result in Senators refusing to bring controversial nominations to a vote, and instead using stall tactics to exhaust nominees and force their withdrawal. In 1999 and 2000 (updated to 11 August 2000), there were respectively 50 and 60 federal judiciary vacancies.\(^44\) According to a study,\(^45\) the Senate took an average of 201 days to confirm President Clinton's judicial nominees, as opposed to 144 days during President Bush's administration and 138 days during the Reagan administration.

(G) Selection Standards

(a) Judicial Selection Standards

Judicial appointments always draw the attention of the public and the legal profession. What constitutes the qualifying norms for a judge is an essential topic in the discussion of the judicial appointments. Unlike the nomination process, which is defined in terms of relatively concrete procedures, what qualifies one to be a judge or what are standards for judicial selection, are debatable. In July 2000, the American Bar Association adopted a report on "State Judicial Selection Standards" (Standards) which was prepared by its Commission on State Judicial Selection Standards (Commission).\(^46\) The Standards apply to state trial

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\(^{45}\) Study by the Citizen for Independent Courts, a non-partisan organization of scholars and legal practitioners, who seek to protect an independent judiciary. Homepage: http://www.constitutionproject.org/.

\(^{46}\) In 1999, the American Bar Association (ABA) Standing Committee on Judicial Independence established a Commission on State Judicial Selection Standards. The Commission was charged with drafting model standards for the selection of state court judges. Members of the Commission include representatives of various judicial professional bodies in the U.S. The Commission reviewed hundreds of documents and articles and heard testimony from senators and legal experts. Draft Standards were
and appellate judges in courts of general jurisdictions. The Standards aim to explore minimum standards for the qualifications of judicial nominees.

(H) Advantages and disadvantages of judicial elections

There is a growing consensus among legal academics and the majority of the judiciary that judicial elections are damaging to the concept of judicial independence: “The United States is almost the only nation in the world that selects judges at any level by popular election.”\(^{47}\) Nevertheless, polling suggests that citizens in the states that use elections are reluctant to change to a different system.

Sandra Day O’Connor, former Supreme Court Justice, has called for the abolition of judicial elections as “elected judges are susceptible to influence by political or ideological constituencies.”\(^{48}\) The counter argument to this is that elections bring a level of transparency to the process that merit selection systems do not. A specialist in judicial politics has commented: “(the American system) obviously (has) excesses in terms of politicization and the campaign finance system…but these other systems are also problematic. There’s greater transparency in the American system”. It was also argued that the selection of appointed judges can be influenced by political considerations and cronyism that are hidden from public view.\(^{49}\)

Other advantages of judicial elections include:

1. Democratic accountability: when judicial elections are used to select judges, they are likely to exercise their discretion in accordance with the preferences of the majority of the public.


2. Performance accountability: corrupt and incompetent judges can be more easily removed through elections.

3. Independence from other branches of government: elected judges are not beholden to the Governor or legislature. This enhances their ability to check and balance the executive and legislature

(I) Removal of Judges

(a) Federal Judges

Federal judges are typically appointed for life and hold office during good behavior but they can be removed by congressional impeachment proceedings.

(b) Removal of State Judges

According to the American Judicature Society:

A number of methods have been established to remove state judges. Removal methods available in a specific state are typically set forth in the state’s constitution. Most states employ some form of removal that involves the state’s highest court and the state’s judicial conduct organization. Other methods include impeachment, legislative address and recall election.

The methods can be summarised as follows:

(J) Impeachment

Nearly all fifty states have constitutional provisions for removal of state judges by impeachment. In most states, the impeachment procedure begins with the House of Representatives voting on whether a judge should be impeached. If the impeachment measure passes in the House, it then goes to the state Senate for a trial and the Senate will vote on

51 http://www.ajs.org/ethics/eth_impeachment.asp.
52 As above.
whether to convict. Grounds for impeachment often include terms such as “malfeasance,” “misfeasance,” “gross misconduct,” “gross immorality,” “high crimes,” “habitual intemperance” and “maladministration.”

(a) Legislative Address

Another method of removal is the bill of address, which allows the legislature, often with the governor’s consent, to vote for a judge’s removal. Approximately sixteen states have provisions for legislative address. Legislative address is a remnant of colonial times when, in English law, kings had the power to "address" judges from office with the consent of Parliament. Most states, when drafting their constitutions, discarded the bill of address and incorporated some form of the impeachment process. Unlike narrow impeachment provisions, legislative address is quite broad and allows a judge to be removed by the legislature for nearly any reason, including laziness or illness.

(b) Recall Election

A few states allow for judges to be removed from office by recall election. Judges may be subject to recall for serious offences, which may or may not be specified in recall provisions. The two-part process is initiated by a recall petition signed by voters and presented to election officials. If the required number of signatures is obtained and any challenges to the recall petition are unsuccessful, a date is set for a recall election and the judge is removed if a majority of voters vote for recall.

(c) Judicial Conduct Commissions

To bridge the gaps left by impeachment and legislative address provisions, judicial conduct commissions have been created by state constitutions, court rules, or statutes. First established in California in
1960, judicial conduct commissions are now a part of every state’s judicial disciplinary process. Commission members include judges, lawyers, and lay members. A confidential investigation by a judicial conduct commission is generally initiated by the filing of a complaint by a member of the public.

If a formal statement of charges is filed by a commission, a hearing (open to the public in most states) is held and members of the commission vote on whether the evidence supports the allegations in the complaint. Sanctions may be imposed on the judge and may include reprimand, admonishment, censure, fine, suspension, involuntary retirement, or removal. Depending on the state, the commission either makes a recommendation to the Supreme Court as to the appropriate sanction or imposes a sanction the judge can ask the Supreme Court to review.

(K) Judicial diversity at state level

In 2010 the Brennan Centre for Justice at the New York University School of Law carried out a study looking at judicial diversity at state level. It focused on racial and gender diversity in the state court system across 10 states. The report found that:

1. White males were over-represented on state appellate benches by almost two-to-one.
2. Almost every other demographic group was under-represented compared to their share of the population.
3. There were still fewer female than male judges, despite the fact that the majority of law students were female.
4. Both the elective and appointive systems were producing similarly poor outcomes in terms of diversity.

(2) Judicial Appointments in Germany

In Germany, appointments and decisions on promotions are made by the executive; however there is some involvement of the judiciary through participation in judicial electoral committees and advisory bodies.\(^5^4\) It should be noted that in the 1950s, there was some debate regarding the locus of decision making in relation to judges, particularly promotions to higher positions. The judiciary wanted to remove political interference from the process. However the legislature rejected this approach due to concerns that that judiciary would become a self-perpetuating elite profession that would be excessively insulated from the democratic concerns of the democratic authorities. Although there is democratic accountability, this does not mean there is political interference.\(^5^5\) According to a commentator, there are checks and balances that prevent one-sided political appointments including the expectation that the Minister will act on the basis of professional evaluations by judges. Furthermore there is the safeguard of judicial review.

(A) The Court System in Germany

Before considering issues of how judicial appointments are made in Germany, this section provides information on the court system in Germany.

\(^{5^4}\) J Bell (2006) Judiciaries within Europe, Cambridge University Press, United Kingdom, 17
Germany is a federal state and judicial authority is shared between the Federation (Bund) and the sixteen “Lander” which are states and provinces.\textsuperscript{56} Judicial power is exercised by:\textsuperscript{57}

1. The Federal Constitutional Court (Bundesverfassungsgericht);

2. The five federal courts which are courts of last instance and generally only hear appeals on points of law. They include:

a. the Federal Court of Justice in Karlsruhe (civil and criminal cases);

b. the Federal Labour Court in Erfurt (labour cases);

c. the Federal Administrative Court in Leipzig (Administrative Cases);

d. the Federal Social Court in Kassel (social security and social welfare cases); and

e. the Federal Finance Court in Munich (Tax cases).

Ordinary, (civil and criminal) courts, administrative courts, tax courts, labour courts and social courts are the responsibility of the Lander.

The management of the judiciary is split between the judges themselves and political authorities.\textsuperscript{58} For the most part, the Lander have responsibility for the management of the judiciary; the Land Ministry of Justice organises the recruitment, examinations and the number of posts available (this role is discharged by the Federal Minister of Justice in relation to the federal courts).\textsuperscript{59} The political and administrative

\textsuperscript{56} J Riedel, “Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany” in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain” p 69

\textsuperscript{57} Ibid, Pg 70: See also J Bell (2006) “Judiciaries within Europe”, Cambridge University Press, 110

\textsuperscript{58} J Bell (2006) “Judiciaries within Europe”, Cambridge University Press, 112

\textsuperscript{59} Ibid
authorities have considerable influence over the organisation of the courts.\textsuperscript{60}

(B) Qualifications and Entry to the Judiciary

Germany has a career judiciary; that is to say judges join the judicial hierarchy early in their working life and spend their career within it.\textsuperscript{61} The academic study of law is based on two “State Examinations”. To become a lawyer, one must take the First State Examination after 8 semesters of legal study. Successful candidates are given traineeships funded by the state. Students can then take the Second Stage examination and on the basis of rankings from the exams, students will apply for posts in a particular Land. According to academic research only 10\% of trainees become judges.\textsuperscript{62} Judges who are recruited will spend three years on probation and the German Judiciary Act enables probationary judges to be dismissed relatively easily within the first two years.\textsuperscript{63}

There are other routes into the judiciary. In particular it is possible for prosecutors, civil servants and professors to apply to become judges. For instance civil servants may apply to join the social law courts where they might have relevant expertise.\textsuperscript{64}

(C) Recruitment and appointments in ordinary courts

Although there are regional variations, the process generally starts with an application by the candidate. In most of the Lander, applicants will appear before a recruitment commission and present their application. These commissions vote on the application; this vote is then

\textsuperscript{60} Ibid
\textsuperscript{61} J Riedel “Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany” in G Di Federico “Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain” 71
\textsuperscript{62} John Bell “Judicial Appointments: Some European Experience” 4 October 2003, 8
\textsuperscript{63} J Bell (2006) “Judiciaries within Europe”, Cambridge University Press, 115
\textsuperscript{64} John Bell “Judicial Appointments: Some European Experience” 4 October 2003, 8
considered by the appointing authority who may be the Minister of Justice or the president of a court. Where these commissions do not exist it is the appointing authority who will make the decision usually on the basis of the written documentation and an interview. The exact procedure followed differs between the Lander and indeed from court to court. Unsuccessful candidates can in theory apply for a judicial review of the decision.

(D) Appointment of Federal Court Judges

The election of judges to the highest federal courts is the responsibility of federal authorities; the Federal electoral committee and relevant Minister are jointly responsible for making the decision. The Federal electoral committee comprises of the 16 Lander Ministers of Justice and 16 members of the Federal Parliament. The Federal Minister concerned acts as a non-voting chair of the sessions. There is no formal recruitment process as exists at the beginning of a judicial career; rather each individual member of the Committee has the right to present candidates. The judiciary can participate through a body representing judges known as the presidential council or Prasidialrat. This council gives an advisory opinion on the personality and aptitude of the candidates. Each court system has a Prasidialrat composed of the president of the court and other judges, at least half of whom are elected.

(E) Appointment of Constitutional Court Judges

The Federal Constitutional Court (the Bundesverfassungsgerichtshof) has 16 judges which sit in two divisions or senates. Half of these judges are elected by the upper chamber of Parliament (the Bundesrat)
and half by the lower chamber (the Bundestag). Constitutional Court judges are judges or professors qualified for judicial office. The Federal Minister of Justice draws up two lists of eligible candidates, one consisting of judges from the highest federal courts and the second consisting of persons suggested by the parties in the Federal Parliament or the various Lander governments.\textsuperscript{69} Constitutional Court judges are appointed for a fixed term of 12 years so there is no career; judges and professors return to their old posts.\textsuperscript{70}

The methods used to appoint Constitutional Court judges differ between the two chambers of Parliament. The Bundestag relies on a parliamentary committee of 12 members comprised of members of parties represented in the chamber. The committee deliberates in private on files concerning the candidate and makes its decisions by means of a two-thirds majority vote. The Bundesrat formally elects candidates in plenary session, on the basis of preparatory work done by a committee made up of Ministers of Justice of the different Lander.\textsuperscript{71}

**F) Removal of Judges**

Article 30 of the German Judiciary Act specifies that a judge for life can only be removed from office without his own written consent in a number of specified circumstances including: in judicial impeachment proceedings; in formal disciplinary proceedings; in the interests of the administration of justice and on changes being made in the organisation of the courts.\textsuperscript{72} The legislation requires that discharge from office on the

\textsuperscript{69} Ibid,9
\textsuperscript{70} Ibid.
\textsuperscript{71} JBell (2006) “Judiciaries within Europe”, 159
\textsuperscript{72} Art 30 (1) of the German Judiciary Act http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html.
first three grounds can only be ordered by a judicial decision. These decisions are made by the Judicial Service Court and proceedings can be lengthy as medical evidence is required. The Judicial Service Court may suspend a judge from office pending dismissal proceedings by an order known as an interlocutory order. However dismissal of a judge is rare.

In relation to federal judges, there is a specific chamber at the Federal Court of Justice that makes final decisions on disciplinary proceedings, transfer of judges, dismissals and retirements due to ill health.

There is a special provision in the Constitution which provides for removal of federal judges: if a federal judge breaches the constitutional order then the Bundestag may by a 2/3 majority request the Federal Constitutional Court to transfer, retire or dismiss the judge (Article 98).

3. United Kingdom

(A) The position prior to 2005

For the latter part of the 20th Century and the first few years of the new Millennium, the highest 'court' in the United Kingdom was the Appellate Committee of the House of Lords. The researcher uses inverted commas as, strictly speaking, it was not a court at all but a committee of the legislature, albeit one whose members had distinguished legal careers and, with rare exceptions, had held judicial office in one of the constituent parts of the United Kingdom. By convention, there were twelve members of the Appellate Committee (known as “Lords of Appeal

73 Article 30 (2) of the German Judiciary Act
74 Riedel, 111
75 J Bell (2006) Judiciaries within Europe. 124
in Ordinary” or colloquially as “Law Lords”), comprising nine from England & Wales, two from Scotland and one from Northern Ireland, although cases were normally heard before panels of five. On taking office, they were appointed to the House of Lords as Life Peers and they were entitled to participate in the business of the House, including debates, as they saw fit.

The head of the judiciary in England & Wales and Northern Ireland was the Lord High Chancellor (known ubiquitously as “Lord Chancellor” for short), who whilst not a full-time judge was entitled to and did sit on the Appellate Committee of the House of Lords from time to time. When he did so (I say “he” as to date all Lord Chancellors have been male), he would be the presiding member of the Committee. He was responsible for judicial appointments as well as a wider-ranging host of other functions. The Lord Chancellor also sat in Cabinet as a member of the Government and was the presiding officer (effectively the Speaker) of the House of Lords. Convention dictated that, notwithstanding his roles within the executive and legislature, his primary function was to provide an authoritative voice for the judiciary within Cabinet and stand up for their independence even (indeed particularly) when other ministers were engaged in public criticism of judges generally or a particular judgment.

Under this system, Law Lords, judges of the Court of Appeal in England & Wales and the Heads of Division in the High Court were appointed by the Queen on the recommendation of the Prime Minister, who in turn was presented with an informal shortlist by the Lord Chancellor.

All other full-time judges in England & Wales were appointed by the Queen on the direct recommendation of the Lord Chancellor, assisted
by around 140 civil servants. Vacancies were not advertised. The Lord Chancellor's Office would instead informally approach those individuals who had been identified as potentially suitable candidates to establish if they were interested in being appointed – known in the profession as the ‘tap on the shoulder’. The details of the selection process and the criteria used were not made known to the public.

Around the turn of the Millennium, a growing number of voices could be heard criticising the system which the researcher have just outlined. These included Lords Bingham and Steyn, two of the most prominent Law Lords of their generation. Concerns about the potential for perceived conflicts between the Law Lords' role as members of the legislature and their judicial functions resulted in a practice statement issued by Lord Bingham in June 2000 to the effect that Law Lords would not in future speak in debates involving “a strong element of party political controversy” or “express an opinion on a matter which might later be relevant to an appeal to the House”. The effect in practice was that the Law Lords ceased to play any meaningful role in legislative matters at all. This led some to suggest that the time had come for a bespoke Supreme Court, separate from the legislature. It was suggested that, in an era when the senior judiciary were increasingly being called upon to review matters of political controversy, particularly in the aftermath of the Human Rights Act 1998, which required judges to consider the proportionality of executive acts and legislation for the first time, there was a need for the country’s highest court to be more

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78 Hansard HL 22 June 2000, Col. 419.
conspicuous to the public than a subcommittee of the legislature ever could be.

Concerns were also expressed about the role of the Lord Chancellor as both a government minister on the one hand and the head of the judiciary and occasional Law Lord on the other hand. The domestication of the European Convention on Human Rights into English law by the Human Rights Act led some to question whether the Lord Chancellor sitting as a judge in litigation affecting the Government's interests would be contrary to the requirements of Article 6 ECHR, which requires proceedings to be determined by an “independent and impartial” tribunal. On more than one occasion, Lord Irvine, who was Lord Chancellor under Tony Blair from 1997 to 2003, withdrew at the last minute from hearing a case due to threats by the parties' lawyers of an Article 6 challenge. In April 2003, the Committee on Legal Affairs and Human Rights of the Council of Europe, the body which oversees the operation of the ECHR, passed a resolution recommending on Article 6 grounds that the United Kingdom should cease the Lord Chancellor's role as a judge. Even at common law, his dual responsibilities seemed precarious at a time when the Law Lords were still reeling from the Pinochet litigation.

The combination of these various pressures for change eventually resulted in the announcement by Mr. Blair on 12 June 2003 that the office of Lord Chancellor would be abolished, that a new process for appointing judges would be established, and that a new Supreme Court of the United


of the Kingdom would take the place of the Appellate Committee of the House of Lords. Much was made at the time of the sudden nature of this announcement, without prior consultation even in private with the senior judiciary. Once that controversy had died down, however, the focus shifted to the detail of the proposed reforms. The ancient office of Lord Chancellor ultimately obtained a reprieve from abolition and became a corollary title of the new ministerial post of Secretary of State for Constitutional Affairs (renamed Secretary of State for Justice in 2007), whose department later assumed responsibility from the Home Office for criminal justice and associated matters alongside the Lord Chancellor's previous responsibility for the courts and tribunals.

(B) The Constitutional Reform Act, 2005

The most widely reported feature of the Constitutional Reform Act was the establishment of the new UK Supreme Court by Part 3 of the Act, which came into force on 1 October 2009. Sections 23 and 38-39 provide that the Court shall consist of 12 Justices, together with a supplementary panel comprised primarily but not exclusively of retired Justices who may sit on an ad hoc basis. Section 23 also provides that the 12 Justices shall include a President and a Deputy President, who have certain specific functions under the Act. This put on a statutory footing the previous informal practice under the old regime of the Appellate Committee being led by a Senior Law Lord and a Second Senior Law Lord. Despite some calls for the new Court to sit as one fixed panel for all appeals (as the Supreme Court of the United States does), section 42 of the Act retained the previous practice of sitting in panels of five, seven or nine. However,

81 There is little analogy between the Supreme Court’s supplementary panel to the panel of Non-Permanent Judges of the Court of Final Appeal in Hong Kong. The use of judges from the supplementary panel is rare given that there are 12 full-time Justices and appeals are normally heard by a bench of 5 Justices.
the more expansive premises of the new Court building compared to the House of Lords committee rooms have made it easier for the Court to sit in panels of seven or nine in significant cases and this practice is becoming increasingly common.

The appointments process for all subsequent Supreme Court Justices is set out in sections 26-31 of the Act. It can be summarized as follows:

1. If there is a vacancy, or if it appears to the Lord Chancellor that there will soon be a vacancy, for the position of President, Deputy President or an ordinary Justice of the Supreme Court, the Lord Chancellor must convene an ad hoc selection commission: section 26(5).

2. The selection commission is chaired by the President of the Supreme Court and will also include the Deputy President, together with one member of the Judicial Appointments Commission for England and Wales, one member of the Judicial Appointments Board for Scotland and one member of the Northern Ireland Judicial Appointments Commission (schedule 8, paragraph 1). The Lord Chancellor is responsible for nominating the latter three, one of whom must be non-legally qualified. Where the position of President or Deputy President is vacant, the next most senior Supreme Court Justice will ordinarily take their place (schedule 8, paragraph 2). A Justice is disqualified from sitting on a commission for President or Deputy President if he or she fails to give the Lord Chancellor notice that he/she is not willing to be appointed to the current vacancy, in which case the next most senior Justice who has given such notice will sit on the commission instead. A member of the selection commission may not themselves be selected: section 27(7).
3. The selection commission must determine the selection process to be applied for the vacancy in question and must thereafter abide by that process: section 27(1). Interestingly, in a recent article one of the current Supreme Court Justices, Lord Clarke, has suggested that the analogous duty of the Judicial Appointments Commission to determine the selection process for High Court judges may in principle be justiciable in a claim for judicial review. In practice, every vacancy since the coming into force of the 2005 Act has been advertised widely in the legal and mainstream press and also on the Supreme Court’s website. Candidates have been required to provide a letter with evidence to support how they met the relevant criteria together with a short CV. Serving judges have been required to submit copies of three judgments which they believe demonstrate their judicial qualities, and to explain why those judges are of interest and importance. I am aware from personal communications that one recent selection round involved the short-listing of around five candidates, who were then invited to interview and were asked, inter alia, to make a presentation on their views as to the role of the Supreme Court over the forthcoming years.

4. As part of the selection process, the selection commission is obliged to consult the Lord Chancellor, the First Minister in Scotland, the Assembly First Secretary in Wales and the Secretary of State for Northern Ireland. Certain senior judges must also be consulted, including the current Supreme Court Justices and the presiding judges in England & Wales, Scotland and Northern Ireland: section 27(2) and section 60(1). This is

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subject to the proviso that a judge may not be consulted without having first confirmed that he or she does not wish to be considered for selection.

5. The selection commission must submit a report to the Lord Chancellor stating who has been selected, which senior judges have been consulted and “any other information required by the Lord Chancellor”: section 28(2).

6. When he receives the report, the Lord Chancellor is obliged himself to consult with the senior judges whom the selection commission has consulted, as well as the heads of the devolved administrations in Scotland and Wales and the Secretary of State for Northern Ireland.

7. The Lord Chancellor then has three options, which are set in sections 29-31. First, he may notify the selection to the Prime Minister, who is thereupon bound by section 26(3) to recommend the person selected to the Queen for appointment. Secondly, he may reject the selection. He must give reasons for doing so, and the power is exercisable only on the grounds that the person selected “is not suitable for the office concerned”: section 30(1) & (3). The commission must then select someone else. Thirdly, the Lord Chancellor may require the commission to reconsider their selection. Again, he must give reasons. He may only exercise this power on the grounds that “there is not enough evidence that the person is suitable for the office concerned”, “there is evidence that the person is not the best candidate on merit”, or “there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom” (a requirement to which I shall shortly return): see

83 The Prime Minister’s role as a conduit between the Lord Chancellor and the Queen is necessary because Supreme Court Justices are appointed by Letters Patent from the Queen, who by constitutional convention acts on the advice of her Prime Minister.
section 30(2). Upon being asked to reconsider, the selection commission may select the either same person or someone else.

8. When the Lord Chancellor rejects a selection and the commission proceeds to make a new selection, he cannot reject that person. He is able, however, to require the commission to reconsider that new selection. Once they have done so, the Lord Chancellor has no further power to reject or require reconsideration: section 29(4).

9. When the Lord Chancellor requires a reconsideration of the commission’s initial selection, and the commission proceeds to make a new selection (whether or not for their initial choice), he cannot reconsider them to reconsider that person again.

He can, however, reject that person’s selection and require the commission to select someone else. Thereafter the Lord Chancellor has no further power to reject or require reconsideration: section 29(4). In other words, the Lord Chancellor’s powers to reject a selection or to require its reconsideration may each be exercised one time but no more.

The rationale for the Lord Chancellor retaining an involvement in the appointment process, albeit to a much more limited extent than before, was that the appointment of Supreme Court Justices needed to have a degree of political accountability. The Lord Chancellor is thus answerable in Parliament for appointments. To date, no Lord Chancellor has exercised his power to reject a commission’s selection for appointment to the Supreme Court or required a commission to reconsider their selection. As I shall explain later, however, there is already one occasion where his similar power of veto in relation to the

84 See e.g. Department for Constitutional Affairs, Constitutional Reform : A new Supreme Court for the United Kingdom (July 2003), para. 39.
appointment of the Heads of Division has come very close to being exercised. This indicates that the Lord Chancellor’s role in the process is more than merely hypothetical.

Section 25 provides that the minimum qualification for appointment to the Supreme Court is to have held high judicial office for a period of two years or have been a legal practitioner for a period of at least 15 years. An alternative criterion was added in 2007 to allow for legally qualified candidates who whilst not in practice have been engaged in law-related activities such as legal academia for 15 years.\(^85\) Unsurprisingly, in practice all serious applicants have had considerably more experience than this. There has been one appointment to the Supreme Court directly from the Bar: that of Jonathan Sumption QC (now Lord Sumption) in January 2012 – the first practicing lawyer to be appointed straight to the top tier of the judiciary in the United Kingdom since Lord Reid in 1948. As some of you may know, Mr. Sumption’s pre-eminence at the English Bar attracted international fame and saw him appear in Hong Kong from time to time. The rationale for his appointment was that he was widely considered, including by several members of the Supreme Court, to be a once-in-a-generation legal mind. The selection commission evidently concluded that his application presented an opportunity not to be missed. It was not, however, without controversy. There were strong objections to Mr. Sumption’s candidacy in some quarters, in particular and perhaps unsurprisingly from the Court of Appeal, on the basis that he had not ‘done his time’ on the bench: his judicial experience was limited to a few weeks per year as an appeal

\(^{85}\) Tribunals, Courts and Enforcement Act 2007, sections 50-52.
judge in the Channel Islands. Indeed he had applied to the Supreme Court for an earlier vacancy in 2009 only to withdraw in the face of the hostile reaction from elements of the senior judiciary. To my mind these criticisms of his selection overlooked the wording of section 25, which stated in the clearest possible terms that anyone with 15 years’ experience in legal practice did not need to have held high judicial office in order to be eligible for appointment. If the selection commission were to reject an application on the ground that the candidate in question had not served his or her time progressing through the judicial ranks, it would be subverting the unambiguous intention of Parliament that this was not a mandatory criterion. In any event, the skills and experience required for a first instance judge whose primary job is to find facts and/or apply established law to the facts do not entirely coincide with the requirements for a second tier appellate judge whose function it is to determine points of law of general public importance. Accordingly a seasoned lawyer with a premier league appellate practice in front of his country’s top court may be better placed to contribute to that court’s jurisprudence than if he had spent a decade deciding commercial trials or judicial review claims at first instance. Ultimately, the proof of the pudding is in the eating: it is therefore telling that in the 12 months since Lord Sumption took office, there has been no significant criticism that any of his judgments have been found wanting as a result of his relatively limited previous judicial experience.

The only provision in the Constitutional Reform Act as to the criteria to be applied by the selection commission in considering eligible

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86 See e.g. Joshua Rozenberg, Likely appointment of Sumption to the Supreme Court is Controversial, Law Society Gazette 14 April 2011.
88 See Lord Clarke, supra, at para. 25.
candidates is section 27(5), which provides that “Selection must be on merit”. What is meant by “merit” is not defined and is a matter of some debate. In particular it has been suggested in certain quarters, including by some Justices of the Supreme Court, that a candidate’s ability to contribute to the diversity of the Court by redressing gender or ethnic imbalances can properly be considered as an element of “merit”. Despite the trendiness of this argument and the noble intentions of those advancing it, in my opinion it is misconceived for reasons I shall explain later when I come to deal with the issue of diversity in relation to judicial appointments. What is legitimate, however, is to select candidates with an eye to achieving an appropriate balance of legal expertise on the court. For example, if the Court’s main chancery specialist announces his or her retirement, a candidate with a chancery background might be considered more meritorious than a public lawyer whose appointment would leave the Court under-strength in chancery expertise.

In practice, the Supreme Court selection commissions which have been convened since the Act came into force have defined their own criteria for testing merit, presumably relying on their power under section 27 to determine their own process. The most recent advertisement for a vacancy, in October 2012, stated:

“The cases dealt with by the Supreme Court include the most complex in the courts of the United Kingdom and demand the deepest level of judicial knowledge and understanding, combined with the highest intellectual capacity. Successful candidates will have to demonstrate

89 See e.g. Lord Clarke, supra, at para. 28 and the discussion in the House of Lords Constitution Committee, Judicial Appointments (HL Paper 272, 28 March 2012) at paras. 89-94.
90 See Lord Sumption, Home Truths about Judicial Diversity, Bar Council Reform Lecture, 15 November 2012 (available on the Supreme Court website). It should be borne in mind that the Bar of England & Wales, which continues to be the primary pool from which judges in the jurisdiction are drawn, tends to be more specialised in their areas of practise than the Hong Kong Bar.
independence of mind and integrity and that they meet the criteria listed below to an exceptional degree.

1. Knowledge and experience of the law.
2. Intellectual ability and interest in the law, with a significant capacity for analyzing and exploring a range of legal problems creatively and flexibly.
3. Willingness and ability to learn about new areas of the law.
4. Clarity of thought and expression, reflected particularly in written work.
5. An ability to work under pressure and to produce work with reasonable expedition.
6. The successful candidates will also need to demonstrate the following qualities:
7. Social awareness and understanding of the contemporary world.
8. An ability to work with colleagues, respecting their views, but also being able to challenge and debate in a constructive way.
9. A willingness to participate in the wider representational role of a Supreme Court Justice, for example, delivering lectures, participating in conferences, and talking to students and other groups.

In considering these qualities, the commission will have regard to the background and experience of the candidates.”

A further consideration to which the selection commission must pay regard is the need for the Supreme Court Justices to have between them sufficient expertise of the three different jurisdictions from where the Court’s cases are drawn: England & Wales, Northern Ireland and
Scotland. This is made clear by section 27(8) provides that, in making selections for the appointment of Supreme Court Justices, “the commission must ensure that between them the judges will have knowledge of and experience of practice in, the law of each part of the United Kingdom”. This potentially allows for greater flexibility than the previous unwritten convention that two of the Law Lords would be from Scotland and one from Northern Ireland. In practice, however, that convention has been maintained to date. Recently, there have been calls for there also to be a dedicated Welsh judge in the future, which is a matter to which I shall turn later when looking at the current proposals for further reform.

Whereas Supreme Court appointments are dealt with by way of ad hoc selection commissions, for appointments to the High Court and Court of Appeal bench in England & Wales the Constitutional Reform Act established a new Judicial Appointments Commission (“JAC”). The JAC is a body corporate consisting of fifteen members appointed by the Queen on the recommendation of the Lord Chancellor. Six members, including the Chairman, must be non legally qualified. Of the remainder, five must be judges, one must be a tribunal member, one must be a lay Magistrate, and two must be practising lawyers: see schedule 13 to the Act. The rationale for the mix of judges, lay members and practitioners was that:

“Judicial representatives provide expert knowledge of the requirements of judicial posts, legal members provide representation from the pool from which candidates are drawn, and lay members provide

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91 Constitutional Reform Act 2005, section 61.
92 Department for Constitutional Affairs, Constitutional Reform: A new way of appointing judges (July 2003), para. 119.
input from outside the legal world and represent the community served by the courts.”

The process for the appointment of the Lord Chief Justice and Heads of Division can be summarized as follows. The JAC must convene a four-member selection panel, which sits as a committee of the JAC. The selection panel must include the most senior Supreme Court judge from England & Wales who is not willing to be considered for appointment or his nominee, the Lord Chief Justice or his nominee, the chairman of the JAC or his nominee and a lay member of the JAC. The selection panel passes its selection to the Lord Chancellor, who has the same power to reject the selection or require the Commission to reconsider as he does in relation to Supreme Court appointments. A similar process exists for the nomination of Court of Appeal Justices, except that that the four-member selection panel contains a Head of Division or Lord Justice instead of a Supreme Court judge.

For High Court judges and other positions such as tribunal judges, the Constitutional Reform Act leaves it to the JAC to determine the process to be applied, subject to a requirement to consult the Lord Chief Justice and one other person “who has held the office for which a selection is to be made or has other relevant experience”: section 88(3). Again, the Lord Chancellor has power to reject the selection or require the Commission to reconsider.

All vacancies are widely advertised by the JAC. Applications are submitted by means of an electronic application form which is bespoke to the particular vacancy in question. For the majority of selection exercises,

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93 Constitutional Reform Act 2005, section 72.
94 See sections 76-84.
95 See sections 89-94.
candidates are also required to undertake an online test, designed to assess their ability to perform in a judicial role by analyzing case studies, identifying issues and applying the law. There follows a process of shortlisting. Shortlisted candidates are then invited to an open day which normally involves interviews, role-plays simulating a court or tribunal environment and situation questioning testing how a candidate would respond in a particular situation. The selection panel will then decide upon its preferred candidate and report to the Lord Chancellor (having first undertaken the section 88 consultation where required). Currently, the average duration of selection exercises, from advertisement to appointment, is 44 weeks.\(^{96}\)

The Lord Chancellor is empowered by section 65 of the Constitutional Reform Act to issue guidance to the JAC about “procedures” for identifying candidates and assessing them. Before publishing guidance, the Lord Chancellor is required to consult the Lord Chief Justice and lay it before Parliament for approval. It seems reasonably clear from the statutory wording that the guidance may only be procedural in nature. It would certainly be contrary to the spirit of the Act if the executive were able to influence the independent JAC on issues of substance, such as the factors that they should and should not take into account in determining applications. Guidance which sought to do that would, in my view, be vulnerable to challenge in Court by way of judicial review.

As with Supreme Court appointments, section 63(2) provides that for all positions within the JAC’s remit “selection must solely be on merit”. Section 63(3) also provides that “a person must not be selected

\(^{96}\) JAC Annual Report 2011-12.
unless the selecting body is satisfied that he is of good character”. Curiously, there is no express requirement for Supreme Court Justices to be of good character, although it would be quite brave to argue that the principle *inclusio unius est exclusio alterius* applies here!

Section 64 provides that, subject to the merit and good character provisions, “the Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointment”. This is intended to redress the significant gender and ethnic imbalance at all levels of the judiciary, which I have described earlier. The JAC has taken a number of proactive steps to give effect to this requirement, including (but by no means limited to) undertaking regular outreach events (36 in 2009-10 and 25 in 2010-11) which seek to encourage people to consider a judicial career. For example, the JAC’s website is currently advertising an event entitled A career within the judiciary: courts and tribunals – a woman’s perspective, which will take place in Cardiff on 27 February and will include five keynote speakers, all women, from a range different levels of the judiciary.

The quality of the JAC’s website (http://jac.judiciary.gov.uk) cannot be praised highly enough. Its front page prominently displays a rotating series of vignettes written by judges and tribunal members from a wide range of demographic backgrounds as to why they applied to the bench, what the process involved and the highlights of their job. There are pages that help candidates to consider whether they are ready for a judicial appointment and if so at what level. You can watch a film of a mock interview. There are a series of “day in the life” case studies explaining what successful candidates can expect. A list of current and
anticipated selection competitions is also displayed on the front page together with information about the timescales and processes involved. Biographies of each member of the JAC are also provided. An indication of the website’s success is that from May 2011 until March 2012 it received over 122,000 unique visits.\textsuperscript{97}

Moreover, section 64(2) of the Act provides that the JAC’s duty to encourage diversity is expressed to be “subject to section 63”, which contains the overarching provision that selection must be “solely on merit”. This further supports the view that the Act treats merit as a concept distinct from diversity.

As you will have noted, whilst the Lord Chancellor’s role in judicial appointments has been reduced by the Constitutional Reform Act, it has not been extinguished. He retains some fairly significant powers, such as the right to veto a selection for appointment, the power to nominate certain members of the Supreme Court selection commission and the JAC, and the power to issue guidance to the JAC. At the same time, he is now a creature purely of the executive. He no longer has any ability to sit as a judge in Court, and his previous position as head of the judiciary in England & Wales and Northern Ireland was removed by sections 7 & 11 and transferred to the Lord Chief Justices of those two jurisdictions. And there is now a separate Lord Speaker of the House of Lords pursuant to s.18 and Schedule 6 of the Act. On the face of it, the exclusively executive nature of the Lord Chancellor’s new role might indicate a greater risk of political considerations influencing the exercise of his residual powers in relation to judicial appointments. The Act seeks to address this through three safeguards.

\textsuperscript{97} JAC Annual Report 2011-12, p.16.
First, section 2(1) provides that “a person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience”. In practice, however, it is questionable whether this is likely to prove a safeguard of any real substance. This is not least because section 2(2) goes on to define “experience” in broad terms: the Prime Minister may take into account experience as a Government minister, experience as a member of either House of Parliament, experience as a legal practitioner in any constituent part of the United Kingdom, experience as a teacher of law in a university and “other experience that the Prime Minister considers relevant”. Whilst the first three Lord Chancellors under the 2005 Act, Lord Falconer, Jack Straw and Kenneth Clarke, had considerable ministerial experience as well as previous careers in law (Falconer and Clarke had even reached silk prior to entering Parliament), the same cannot be said of the current incumbent, Chris Grayling. His appointment was the first time that a non-lawyer had held the office of Lord Chancellor since Lord Shaftesbury in 1673 (who ended up in the Tower of London – a fate which Mr. Grayling will doubtless hope to avoid!). Moreover, unlike his three predecessors, Mr Grayling was not a ‘greybeard’ nearing the end of his career with a host of Ministerial positions already under his belt. His sole Government position had been a two-year stint as a junior minister in the Department of Work and Pensions. The fact that someone so obviously on the make, and thus at least potentially keener to please the Prime Minister of the day, can be appointed without much fuss suggests that section 2 is unlikely to provide any meaningful protection against the risk of a Lord Chancellor being influenced by political considerations in exercising his functions relating to judicial appointments.
Of perhaps greater significance are the other two safeguards in the Act. These are the duties imposed upon the Lord Chancellor and the requirement upon each new incumbent of the office to swear an oath of allegiance to those duties. On the very first page of the Act, section 1 provides about the rule of law. Further it says that:

This Act does not adversely affect –

(a) The existing constitutional principle of the rule of law
(b) The Lord Chancellor’s existing constitutional role in relation to that principle.”

This provision is of interest to constitutional lawyers in the United Kingdom as the first express recognition in statute of the principle of the rule of law, but its significance for present purposes is that it seeks to preserve the Lord Chancellor’s previous responsibilities in this regard, for example to stand up for judicial independence even when its interests are divergent with those of the Government. Moreover, section 3(1) specifically states:98 “Guarantee of continued judicial independence

(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

(2) The following particular duties are imposed for the purposes of upholding that independence.

(3) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

98 Section 4 imposes similar duties on the Northern Ireland Government.
(4) The Lord Chancellor must have regard to –

(a) The need to defend that independence;

(b) The need for the judiciary to have the support necessary to enable them to exercise their functions;

(c) The need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters

(5) In this section, “the judiciary” includes the judiciary of any of the following –

(a) The Supreme Court;

(b) Any other court established under the law of any part of the United Kingdom;

(c) Any international court.”

Section 17 provides that every new incumbent as Lord Chancellor, upon accepting office, must swear an oath in the following terms:

“I [name] do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help my God.”

These statutory duties and the Lord Chancellor’s oath of allegiance to them might not be legally enforceable in Court, save perhaps in extreme cases, but their practical effect may still be quite significant since they leave a Lord Chancellor open to severe criticism if he is seen to
interfere with judicial independence or undermine the rule of law. Recent experience supports this view. This arises out of the judgment of the European Court of Human Rights that the current blanket ban on prisoners voting in elections is contrary to Article 3 of the First Protocol to the ECHR.99 In response to the Court’s judgment, draft legislation has been prepared which includes three options for consideration by Parliament, including the retention of the blanket ban. The Prime Minister has expressed a firm desire to see this option prevail, having said in the clearest terms: “No one should be under any doubt - prisoners are not getting the vote under this government”.100 Last month, however, Lord Chancellor Grayling stated that he is unlikely to be able to vote in support of a continued blanket ban because to do so would contravene his oath. He explained that this was because his duty to respect the rule of law extended to international legal obligations including the ECHR.101 The fact that even a relatively inexperienced Lord Chancellor felt compelled by his oath to dissent from the Prime Minister’s clear policy suggests that the oath and the associated statutory duties under the Constitutional Reform Act may play an important part in reducing the risk of a Lord Chancellor allowing the Government’s interests to influence the exercise of his remaining functions relating to the judiciary and judicial appointments.

(C) Judicial accountability

On a functional level, the arguments around the separation of powers theory above cannot, in and of themselves, be used to counter

100 <http://www.bbc.co.uk/news/uk-politics-20053244>
greater political involvement in the appointment process for the most senior judges. Countries, such as the United States, which have far greater regard for the theory nonetheless accept that introducing a political aspect into the appointments process does not impact on the subsequent independence of the judiciary.

Indeed, it could be argued that the very reforms themselves added further impetus for new methods of judicial accountability. The fact that the Lord Chancellor is no longer required to be a senior lawyer means that his ability to act as a “safety valve avoiding under tension between the judiciary and the government” has undoubtedly been compromised and curtailed.\textsuperscript{102} This combined with an increasing distance between judiciary and the other branches of government, may be one reason for the increased tensions.\textsuperscript{103}

Judges can have a dialogue with Parliament, both in public (by way of appearances before Select Committees) and privately (by, for example, meeting Select Committee Chairs).\textsuperscript{104} They can also be involved in law reform, through the Law Commission. Under Section 5 of the Constitutional Reform Act, the Lord Chief Justice\textsuperscript{105} is able to “lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice” – the so called “nuclear option”.\textsuperscript{106}

\textsuperscript{102} Lord Woolf, The Pursuit of Justice (Oxford University Press, 2008), p 135
\textsuperscript{103} See for example, Bradley, A.W. Judicial Independence under Attack [2003] Public Law 397.
\textsuperscript{104} Unless the existence of private meetings is recorded and some record is kept about their content, this does little to enhance transparency
\textsuperscript{105} Lord Chief Justice of Northern Ireland and the Lord President of the Court of Session in Scotland are also entitled to lay such representations
\textsuperscript{106} House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, Sixth Report of Session 2006–07, HL 151, para 114
Judges are also doing an unprecedented amount of public speaking, and speeches and lectures are now being broadcast and retained for posterity on various official websites.

The need for checks and balances does not only apply to an overreaching executive, a point recognised by both Lord Scarman and Lord Diplock in Duport Steel. If the judges are perceived to be acting as lawmakers, it becomes increasingly clear that it is worth reassessing the existing model.

The real issue to be addressed is to ensure that any new methods of accountability do not undermine the independence of the judiciary. Section 3(1) of the Constitutional Reform Act 2005 provides that the Lord Chancellor and Ministers of the Crown “must uphold the continued independence of the judiciary.” As has been noted elsewhere, the section does not impose a duty on the judges to be independent, or seek to define judicial independence (although it is “taken for granted” that they will be independent as a matter of common law and by virtue of Article 6 of the European Convention on Human Rights). The Act also clearly spells out that the Lord Chancellor and other Ministers of the Crown “must not seek to influence particular judicial decisions through any special access to the judiciary.”

Historically, Dicey had observed that:

Our judges are independent, in the sense of holding their office by permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to

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107 [1980] 1 All ER 529
109 Constitutional Reform Act, s 3(5)
stand on level with Parliament; its functions might be modified at any
time by an Act of Parliament; and such a statute would be no violation of
the law.\textsuperscript{110}

The responsibilities of judges in disputes between the citizen and
the state have increased together with the growth in governmental
functions over the last century. The responsibility of the judiciary to
protect citizens against unlawful acts of government has thus increased,
and with it the need for the judiciary to be independent of government.

There is a long list of statutory and other conventions which have
been established over many centuries to try to ensure the independence of
the judiciary. These include the provision of the Act of Settlement (now
the Senior Courts Act 1981 as amended by the Constitutional Reform Act
2005) providing that the senior judges\textsuperscript{111} hold office quamdiu se bene
gesserint\textsuperscript{112} and can only be removed on an address of both Houses of
Parliament; and that judicial salaries should be immune from
governmental interference. Judges are also given immunity from
prosecution for any acts that they carry out in performance of their
judicial function and benefit from immunity from being sued for
defamation for the things they say about parties or witnesses in the course
of hearing cases.

The procedure to remove a judge has only ever been used on one
occasion, when Sir Jonah Barrington was removed from the Irish High
Court in 1830, having been found guilty of embezzlement.\textsuperscript{113} Although it

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{110}] Dicey, A.V. Introduction to the Study of the Law of the Constitution, (Indianapolis, Liberty Fund,
from the text of the 8th Edition, 1915)
\item[\textsuperscript{111}] Judges at the lower levels can only be removed after disciplinary proceedings
\item[\textsuperscript{112}] During good behaviour
\item[\textsuperscript{113}] Masterman, R. The Separation of Powers in the Contemporary Constitution (Cambridge University
Press, 2011) p209. Although in his lecture Judicial Independence – Its history in England and Wales,
Lord Justice Brooke noted the case of Grantham J in 1906, where a debate was held in the House of
\end{itemize}
\end{footnotesize}
is worth highlighting Gordon Borrie’s observation that modern writers seem to have ignored the fact that “there have been many attempts at removal and consequently many debates in Parliament concerning the conduct of particular judges, mostly in the nineteenth century.”

It is also said that “judges have been ‘eased out’ from time to time.” Robert Stevens says, for example, that Lord Hailsham (Lord Chancellor under Edward Heath and Margaret Thatcher) “had to urge Lord Chief Justice Widgery and Lord Denning on their way.”

As Masterman has documented, the abovementioned provisions have been reinforced by the Appellate Jurisdiction Act 1876, the Supreme Court Act 1981 and the Constitutional Reform Act 2005, although again it is worth noting that the former President of the Supreme Court, Lord Phillips, has expressed concerns over funding arrangements for the Supreme Court and the residual levels of control that this allows the Lord Chancellor and the Ministry of Justice.

Whilst it seems likely that the judiciary might resent any additional political influence on appointments and contend that it threatens judicial independence, this approach might well risk the counter-argument that the judiciary was seeking to maintain its own interests. In that context, it may be worth considering the influence of the abovementioned bodies and the judicial hierarchy and its impact on the independence of

Commons on the judge’s conduct in connection with the trial of the Yarmouth Election Petition, where “very strong views were expressed during the debate about the judge’s political prejudices”. See also: O’Brien, P. When Judges Misbehave: The Strange Case of Jonah Barrington, UK Const. L. Blog (7th March 2013) (available at http://ukconstitutionallaw.org, last accessed 27 August 2013).


individual judges. It has also been suggested that the judiciary is not above simply resisting change that it dislikes by citing concerns around judicial independence. It is worth remembering that when Lord Mackay proposed ending barristers’ monopoly in respect of advocacy in the higher courts, the cry went up that this was “a gross threat to judicial independence and the rule of law.” Certainly, the senior judiciary has never explained how enhancing political accountability in the appointments process would “almost inevitably transform accountability into unacceptable influence and thereby undermine judicial independence.”

As regards the question of appointment hearings, or other political involvement in appointments, the issue is less the structural or institutional independence, but as Malleson has suggested, the need to ensure that the ability of a judge to impartially determine the cases that come before them is not impaired. Whilst Article 6(1) of the ECHR might require the courts to be impartial and avoid the appearance of bias, it is difficult to see how this, in itself, would preclude a political aspect to the appointments process particularly given the way that the judges of the Strasbourg court are themselves appointed. As mentioned above, the current domestic system still retains a role for the executive and this has been recognised by the judiciary.

4. Australia

The *International Covenant on Civil and Political Rights* identifies the three indispensable attributes of judicial office: competence, independence and impartiality. In the past, there were few

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119 Article 14.1. “All persons shall be equal before the courts and tribunals [and shall] be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
formal procedures in the appointment of judges to assure that they were accountable to the people whom they would serve. Appointment belonged wholly to the Executive Government. It was one of the inherited prerogatives of the Crown. In time, appointments of magistrates in Australia came to be advertised. Until very recently, the notion of appointing senior judicial officers by procedures of advertisement, interview and public accountability, was regarded as heretical.

The old system was not without merit. It produced judges of high quality who served the community well. The history of our judiciary generally denies the contrary of that proposition. With few exceptions, judges were appointed from the Bar. This was a small cadre of experienced advocates who knew each other and who normally had the measure of each other's strengths and weaknesses. The appointment of incompetent judges was generally avoided because of the professional pressures that existed to uphold the quality of the bench; the substantially monochrome character of the pool from whom recruits were selected; and the heavy demands made upon those who took the judgment seat.

When accountability at the point of selection or promotion was regarded as unnecessary, the declaratory theory of the judicial function reigned. Judges were regarded (and regarded themselves) as doing little more than finding and declaring the law. One of the strongest proponent of this thesis in Australia was Chief Justice Dixon.

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120 Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 33-34.
In some States of Australia, where it was constitutionally possible, the appointment of acting judges has not been uncommon. An acting judge may be subject to pressure, or the appearance of pressure, from the Executive Government, if only in the case of those acting judges who desire confirmation and permanent appointment. In countries where judges are elected, such answerability may not be regarded as a bad thing. But people our legal tradition generally considers that being open to influence, or even the appearance of patronage, weakens the manifest integrity of judicial office. That is why, in Australia, there has been increasing resistance to the appointment of acting judges, at least from amongst persons who are not already judges of another court or retired judges\textsuperscript{124}. Also, in recent times (at least in respect of federal judges in Australia) the trend of authority has been against the appointment of serving judges to advisory offices in the Executive Government\textsuperscript{125}. This trend is evident in respect of appointments beyond the traditional functions that judges have accepted (as I did) to serve in law reform agencies\textsuperscript{126}.

(A) Judicial performance

Judges have long been subject to requirements of accountability in the way they perform their duties. With very few exceptions, they are obliged to sit in public. This is so that they too can be judged as they perform their functions\textsuperscript{127}. Of course, some of the crucial parts of the judicial function are not performed in public but behind closed doors. I refer to the assignment of judges to sit in cases and the deliberation and

\textsuperscript{124} Noted (1998) 72 ALJ 653, 830, 851; (1999) 73 ALJ 471.
\textsuperscript{125} Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1997) 189 CLR 1; cf Grollo v Palmer (1995) 184 CLR 348.
\textsuperscript{126} eg Australian Law Reform Commission Act 1996 (Cth), s 7 provides for such an appointment.
\textsuperscript{127} For the history of open judicial proceedings see Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47 at 50-54.
decision-making process, particularly in collegiate courts. But even here, the processes are now more open. Many of the old mysteries have been interred.

In the High Court of Australia, for example, the Chief Justice "proposes" a roster of the Court for each sitting. In the Court of Appeal of New South Wales, this is done by the President, who also assigns primary responsibility for preparing a first draft of the Court's reasons in particular cases. In the High Court, because each Justice traces his or her commission to the Constitution, the Chief Justice's power of assignment is recommendatory, not determinative. In the 1930s, Justice Starke made this point by regularly pulling up his chair and sitting in cases in which he decided to participate, although his name was not included in the roster "proposal". According to contemporary records, Justice Starke gave Chief Justice Latham a very hard time.  

Judges are also controlled by the law on disqualification. Those in courts of the hierarchy below the High Court of Australia are answerable on appeal, and sometimes on judicial review, to allegations of bias, actual or imputed. Whereas such allegations were relatively uncommon in times gone by, they are now much more frequent. Australian judges are now more conscious of the complex problems of bias.

Imputed bias may rest upon the suspicion, or actuality, that a judge has a pecuniary interest in one of the parties. In England, this led to a specially stringent principle. It was established in a case in which the Lord Chancellor was held to have been disqualified from participating

because he had a parcel of shares in a company involved in the suit\textsuperscript{130}. Recently, in Australia, this principle has been subsumed within the general rule that disqualifies a judge where a reasonable person might suspect that the judge might be unable to bring a completely impartial mind to bear on the subject of the litigation\textsuperscript{131}. This broader principle is itself quite stringent, being expressed in terms of possibilities.

The strictness of the rule against bias has recently been upheld in England in a vivid way. It occurred in the second decision of the House of Lords in the \textit{Pinochet} litigation\textsuperscript{132}. There, a special panel of the House of Lords held that one of their number, Lord Hoffmann, had been disqualified from sitting in the first decision because of his association with a non-governmental organisation (Amnesty International) that had been permitted to intervene in the proceedings. Far from representing evidence of the weakness of judicial institutions in the United Kingdom, the \textit{Pinochet} decision indicates the insistence, including in the highest court, of the highest standards of manifest impartiality. By those standards, the judiciary is rendered accountable to the people through rules of law that the judges impose on themselves.

In Australia, we have had similar controversies. However, it has not yet been decided whether, in the event that one Justice of the High Court refused to disqualify himself or herself from sitting in a proceeding, the remaining members of the Court would have the authority under the Constitution to over-rule such a decision\textsuperscript{133}.

\textsuperscript{130} \textit{Dimes v Proprietors of the Grand Junction Canal} (1852) 3 HLC 759 [10 ER 301].
\textsuperscript{131} \textit{Ebner v Official Trustee in Bankruptcy} (2000) 75 ALJR 277 at 284-287 [42]-[58]; cf 296-297 [118]-[125], 306 [162]; \textit{Webb v The Queen} (1994) 181 CLR 41 at 75.
\textsuperscript{132} \textit{R v Bow Street Magistrate; Ex parte Pinochet Ugarte [No 2]} (2000) 1 AC 119.
\textsuperscript{133} \textit{Kartinyeri v The Commonwealth} (1998) 156 ALR 300 at 304 per Callinan J; cf \textit{Baxter v Commissioner of Taxation (NSW)} (1907) 4 CLR 1087 at 1090; \textit{The Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd} (1922) 31 CLR 421 at 456-457; Note
(B) Discipline and removal

Because they are not immune from the criminal law, there have been occasional prosecutions of judicial officers for breaches of that law. One notable prosecution, of Mr. Murray Farquhar, at the time Chief Magistrate of New South Wales, succeeded. When convicted he was sentenced more heavily because of the abuse of trust which his offence indicated. Justice Lionel Murphy, a judge of the High Court of Australia, was prosecuted for a criminal offence. He was convicted at his first trial; but that conviction was set aside for errors in the directions of the trial judge. At his second trial Justice Murphy was acquitted. Judge John Foord of the New South Wales District Court was also acquitted at his trial. Other judges have been prosecuted for crimes, generally for minor traffic offences, but sometimes more serious.

In one case, where an attempt had been made to bribe a judicial officer, the accused advanced a defense that the sentence should be reduced because there was no chance that the attempt to influence the victim would have succeeded. The argument, although ingenious, was rejected. The court emphasized that the gravity lay in the endeavour which, as a matter of principle, had to be nipped in the bud. In Australia,
judges are not (as they are in some countries) offered any form of immunity from the general operation of the criminal or civil law. They enjoy immunities provided by law, but only in respect of their activities as judges\(^\text{138}\).

The Australian constitutional procedures for the removal of judges have not resulted in a single case in removal of a member of the federal judiciary. Although an inquiry into allegations against Justice Murphy had been initiated, it was abandoned when it became clear that the judge was suffering from terminal cancer\(^\text{139}\). One State judge, Justice Angelo Vasta of the Supreme Court of Queensland, was removed from office by the Queensland Parliament following a report of a commission of inquiry chaired by the former Chief Justice of the High Court, Sir Harry Gibbs. Justice Vasta returned to practice at the Queensland Bar\(^\text{140}\) and has quite often appeared for disadvantaged litigants. In New South Wales, an attempt was made to remove a judge of the Supreme Court, Justice Vince Bruce, in connection with serious and repeated delays in the delivery of his decisions. In response, Justice Bruce addressed the Upper House of the New South Wales Parliament. By majority, the members rejected the motion for his removal. He resigned judicial office soon afterwards, having delivered his last judgments\(^\text{141}\).

These formal proceedings for the removal of judges do not tell the entire story of their accountability for serious defaults. In several cases, complaints against judicial officers have led to investigations and

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140 The Vasta case is described in Campbell and Lee, \textit{op cit} n 51, 105-106.

141 The background is told in \textit{Bruce v Cole} (1998) 45 NSWLR 163. See also Campbell and Lee, \textit{op cit} n 51, 106-108.
resignations by the judges concerned, rather than face formal procedures for removal. Such cases are exceptional. But instances are known to every judge. They demonstrate that, in appropriate cases, the machinery is in place to exact the ultimate accountability of a judge to the citizens and to remove the judge from office. Such a sanction is reserved to the extreme case. Indeed, this is one reason why consideration has been lately been given to procedures for more low key, flexible and appropriate sanctions where dismissal would be disproportional and therefore out of the question.

(C) New Accountability

(a) Appointment and promotion:

The growing recognition of the role of judges in a common law system to create new law, in the interpretation of the Constitution or legislation or the exposition of the common law, has led to increasing calls in recent years for improved procedures for appointment that would first elicit the values or philosophy of the judge.

In the United States of America, the requirement in many States, for judges to face election, confirmation or the possibility of citizen recall, has produced levels of "accountability" that would be regarded as unacceptable to most Australians. Similarly, the requirement of the United States Constitution for the consent of the Senate before confirmation of federal judicial nominees has led to two vices that most informed Australians would wish to avoid. One of these is the great delay in the confirmation of presidential nominees. Political trade-offs and sometimes a desire to embarrass a President, have led, in recent years, to gross delays in the filling of judicial vacancies. More importantly, the
media circus that surrounded the confirmation proceedings involved in the nominations to the Supreme Court of Judges Bork and Thomas, came as something of a shock to Australian sympathisers of a system of public scrutiny for important judicial appointments. Reducing serious issues of law and justice to superficial television jingles and exposing judges to pressure to afford commitments upon matters that might come before them in court, seemed to most Australian eyes an undesirable extreme of accountability.

Nevertheless, there is increasing recognition of the defects of the present system of judicial appointments. Critics point to the somewhat monochrome character of the judiciary of the past. It included few women, few judges of non-Anglo Celtic ethnicity, few (if any) openly homosexual judges, indeed few who did not fit the ordinary professional mould.

I know of no serious observer who contends that the judiciary should be representative of all the many minorities in society. But many informed judges now consider that it is desirable that "different voices" should be heard "in the marketplace of judicial ideas". Justice Keith Mason, President of the New South Wales Court of Appeal, has said:

"Feminist studies in recent decades have revealed the [largely unconscious] male biases and prejudices that have informed many legal rules and aspects of judicial method. Those biases are not necessarily wrong any more than countervailing 'feminist' responses to problems are necessarily right. Nevertheless, the legal system will be better informed, more acceptable and more just in its outcomes if the body of its principal

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142 Mason, above n 31, at 60.
143 Loc cit.
guardians has a fair infusion of people who may share some less conventional ideas”.

Years before my appointment to the High Court of Australia, it came to my ears that a leading politician, with power to veto the proposal that I be appointed, said that he would never have a homosexual on the High Court. In the end, my sexuality did not prove an obstacle after he had passed from influence over such matters. But if I had earlier abandoned the observance of a discreet silence on the matter, it is legitimate to ask whether I would I have been appointed to the Court. If there were a procedure for public or political vetting, would caution or responsiveness to irrational opposition have prevented my nomination? In the United States, there are virtually no openly homosexual judges. Institutional arrangements for accountability at appointment need to take into consideration the prejudices which, in any system, can be brought to bear to exclude particular individuals, or members of particular groups, from appointment to judicial office.

In many countries that have emerged from colonial rule, formal judicial appointment bodies have been established to select judges for appointment or promotion. In Australia, there have been supporters for this idea. One weakness of the proposal is that it could enhance the appearance of accountability at a cost of damaging the strength and ability of the institution. It might tend to opt for selecting those whose philosophy, personality and attitudes were completely unknown. One outcome of the Bork and Thomas confirmation hearings in the United
States was a marked reduction in the number of federal judges publishing articles in law reviews\textsuperscript{144}.

Somewhere between the present procedures observed in Australia, England and many countries of the Commonwealth and those of the United States may lie a happy mean. Already changes are occurring in Australia. In the case of the High Court, legislation requires the federal Attorney-General to consult his counterparts in all of the jurisdictions of Australia and to receive nominations which may or may not include the name of the person finally appointed\textsuperscript{145}. Advertisements now invite indications of interest for appointment as magistrates and, in some jurisdictions, as District Court judges. Few would doubt that the rigorous procedures now followed for the appointment of magistrates has produced a first instance bench of marked superiority over that which existed a few decades earlier.

In South Africa, procedures for nomination and public interview of candidates for judicial office are observed. They appear to work successfully. One distinguished judge, Edwin Cameron, was promoted to the Supreme Court of Appeal although he disclosed not only that he was homosexual but that he was living with HIV. Perhaps Australians, believing that there should be improved accountability at the entry of lawyers into the judiciary, might explore the operation of the South African model. In that country, after apartheid, it was essential to achieve a significant alteration in the composition of the bench. Any such alteration, to be successful, would need inbuilt guarantees that there was

\textsuperscript{144} S Gaille, “Publishing by US Court of Appeals Judges: Before and After the Bork Hearings” (1997) 26 J Legal Studies at 371. As to proposals for appointments bodies in Australia, see Campbell and H P Lee, above n 51, 83-86.

\textsuperscript{145} High Court of Australia Act 1979 (Cth) s 6.
no diminution in the qualities of legal experience, integrity, devotion to duty and character.

5. Canada

There is one key feature of note that is necessary for understanding any discussion of the regulation of judges in Canada. Canada is a federal state. The Canadian Constitution divides powers between the federal government and the ten provincial governments. The administration of justice is a shared federal-provincial responsibility. There are three types of courts in Canada: (1) those whose judges are appointed by the federal government and administered by the federal government (such as the Supreme Court of Canada, the Federal Court of Canada and other specialized courts); (2) those whose judges are appointed by the federal government and administered by the provincial governments (the highest courts of appeal in each province as well as the basic trial courts); and (3) wholly provincial courts whose judges are appointed by the provincial governments and administered by them (these courts deal primarily with criminal and family matters). Our discussion of regulating judges will generally focus on the first two categories whose judges share in common being appointed by the federal government. Not surprisingly, in Canada, they are generally known as “federally-appointed judges.” They number approximately 1,100.

(A) The Values of the Canadian Judiciary

1. Independence

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146 See Constitution Act, 1867, 30 & 31 Victoria, c. 3, ss. 90-95 (U.K.).
147 Compare Constitution Act, 1867, s. 91(27), 96-101 (federal powers) with Constitution Act, 1867, s. 92(14) (provincial powers over “[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.”).
148 There are approximately 1000 provincially appointed judges. We must note as well that in Canada, administrative tribunals are not a component of the judiciary; they are considered part of the executive.
2. Impartiality
3. Accountability
4. Transparency
5. Representativeness
6. Efficiency
7. Federalism

Judicial accountability is a controversial concept in Canada. We distinguish between “political accountability” and “public accountability”. Political accountability is the attempt to hold persons who exercise power accountable for the exercise of that power through the political process. But that is not the only way that those who exercise power may be held accountable. Public accountability is concerned with means outside of the formal political process. In this broader sense, accountability may be understood as “a means of making responsible the exercise of power.” As Canada’s former top civil servant explained, “where authority resides, so resides accountability and if one has authority to strike a decision, then one has an obligation to provide an account.”

There is implicit and growing explicit recognition of the value of public accountability. Thus, the Canadian Superior Court Judges Association – the body representing most of Canada’s federally-appointed judges – has explicitly acknowledged the importance of accountability. It states:

Despite their independence, judges are accountable for their actions and decisions. Hearings, trials and rulings are open to public scrutiny, so justice is seen to be done and citizens and the media can discuss and criticize the work of the courts. A judge's ruling can be appealed to a
higher court and, if an error has been made, a new trial will be ordered or the decision will be corrected.\textsuperscript{149}

The Supreme Court has also implicitly recognized the importance of accountability in its decisions on individual judges’ duty to give reasons for decisions: “At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. “More concisely: reasons for judgment “are the primary mechanism by which judges account to the parties and to the public for the decisions they render.” However, despite putting a high premium on the importance of reasons for decision, the Supreme Court of Canada has recently accepted [or even endorsed] the practice of “judicial copying” a practice that has been condemned in other jurisdictions.

Moreover, the discipline processes for judges established under both federal and provincial legislation explicitly recognize the value and the imperative of public accountability. Furthermore, Canadian courts and judicial councils expand accountability through providing more information about their operation via annual reports, publishing statistics, etc. There is thus a strong nexus between transparency and accountability; transparency helps promote accountability.

In contrast to “public accountability”, “political accountability” remains highly contested in Canada and the alignment of “accountability”

with political accountability has impaired the analysis of the value of accountability in the Canadian judiciary. The term is politically charged and is widely viewed as political attempts to rein in judges who are not responding to the democratic will. Here we will only provide two brief examples. First, in 2000, there was an aborted attempt in Ontario to introduce a “Judicial Accountability Act.” This act would have required the creation and publication of records for criminal sentences imposed by each individual judge. The motivation for the bill was the perception in certain political quarters that some judges were “soft on crime”. In introducing the bill in the legislature with the tacit support of the Attorney General, the sponsoring Member of Provincial Parliament explained: “This bill will require the Attorney General to table an annual report of the sentences that are handed out by judges in serious, non-plea bargained criminal cases compared to the maximum sentence under the law. This will let the government, law enforcement agencies and the public at large know which judges believe that stiff sentencing is an important way to protect law-abiding citizens and motivate lenient judges to give out tougher sentences.” The bill was strongly opposed on the grounds that it was an attempt by the executive and the legislative branch to put pressure on individual judges in violation of judicial independence. It passed second reading but died in committee. Such blatant attempts to hold judges “politically accountable” have been rare in Canada. However, a second example has been more successful. In [date] the Federal Government, again concerned about judges who were “soft on crime” introduced mandatory minimums for a series of offences. Despite the objections of many judges (some of which were very public) that this was
an attack on judicial independence this policy has been successfully implemented and judicial discretion had been reigned in. ¹⁵⁰

(B) Appointments processes

The process for federally-appointed judges is probably the most contentious process issue in the regulation of the judiciary in Canada. It raises issues of independence, impartiality and representativeness. ¹⁵¹

All federal judges are appointed by the executive. The Prime Minister selects Supreme Court justices and chief justices of federal courts, and provincial superior courts. The Minister of Justice selects all other justices. Both have tremendous discretion. The statutory qualifications are minimal: a federally-appointed judge must have a minimum of 10 years of legal experience. There are no criteria for promotion to higher courts or to administrative positions such as Regional Senior Justice, Associate Chief Justice or Chief Justice. For appointments of new justices to courts other than the Supreme Court, the Minister of Justice is aided by “Judicial Advisory Committees (JACs) whose role is to review candidates’ applications, check references and deem the

¹⁵⁰ See A. Seymour, “Judges vs. The Victim Surcharge” Ottawa Citizen Jan. 10, 2015 Section D.
¹⁵¹ The appointment process also raises issues of transparency and accountability, but for the political branch appointing judges, not for the judiciary as an institution. See generally Adam M. Dodek, “Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit” (2014) 67 Supreme Court Law Review (2nd Ser.) 111. Concerns about federalism have been raised in terms of the appointment process to the Supreme Court of Canada, but those have waned over the last decade. For analyses of the Supreme Court of Canada appointment process from a federalism perspective see e.g. Erin Crandall, “Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform” in Nadia Verrelli, ed., The Democratic Dilemma: Reforming Canada’s Supreme Court (Montreal & Kingston: Institute for Intergovernmental Relations, 2013) 71; F.C. DeCoste, “The Jurisprudence of ‘Canada’s Fundamental Values’ and Appointment to the Supreme Court of Canada” in Nadia Verrelli, ed., The Democratic Dilemma: Reforming Canada’s Supreme Court (Montreal & Kingston: Institute of Intergovernmental Relations, 2013) 87; and Eugénie Brouillet and Yves Tanguay, “The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada” Nadia Verrelli, ed., The Democratic Dilemma: Reforming Canada’s Supreme Court (Montreal & Kingston: Institute of Intergovernmental Relations, 2013) 126.
candidate either “recommended” or “unable to recommend.”

For decades, the judicial appointments process for federally-appointed courts below the Supreme Court has been criticized as highly partisan. The concern has been that candidates who have connections to the governing political party tend to be the ones who are appointed.

More specifically, the Supreme Court appointment process could hardly be described as a process. Until 2004, it was a completely unknown, closed process that allowed for unbridled executive fiat. However, despite the lack of transparency, it was generally viewed as producing relatively high quality appointments. Beginning 2004, the process has been reformed on an ad-hoc basis to involve parliamentarians to a greater extent. In the course of the following decade five nominees faced a parliamentary confirmation process. Then there was a retreat in 2014.

Some have argued that judicial independence requires a non-partisan appointments process. The argument is made that judicial independence demands that the judicial appointment process must be insulated from partisan politics in order to ensure public confidence in judicial impartiality. Moreover, it is further asserted that judicial independence requires that the judicial appointment process “leave no room for specific interests or for groups that are likely to defend a specific position in certain types of cases before the courts” because the public “will not perceive judges as impartial if their appointment process gives a particular voice to specific interest groups.” Such remarks were made in the context of the federal government’s change in 2006 to the

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153 This process is described and evaluated in detail in Adam M. Dodek, “Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit” (2014) 67 Supreme Court Law Review (2nd Ser.)
composition of the judicial advisory committees to include a law enforcement representative. The concern that the inclusion of a designated law enforcement offer on this committee would threaten judicial independence was echoed by the Canadian Bar Association and by the Canadian Judicial Council. Such a conception of judicial independence would significantly expand the current Canadian understanding. Taking the appointment power out of the hands of the executive may be good policy for many reasons, but we do not believe that current understandings of judicial independence require it. Indeed, the three central tenets of judicial independence - security of tenure, security of remuneration and administrative independence - exist precisely so that judges may exercise impartiality without concern of any past affiliations or sense of duty to those who appointed them. So while proper processes are important, we believe that the issue of who is appointed is far more acute in terms of judicial independence than how they are appointed.

Subsequent to the Nadon debacle (which we discussed in the previous section) the federal government did a volte face on parliamentary involvement in the appointments process. Whereas Justice Nadon had faced an (admittedly superficial) parliamentary interrogation process, the appointments of two subsequent candidates by the government in mid/late 2014, Justices Gasçon and Côte, were simply announced by the Prime Minister and sworn in without any parliamentary participation. The latter appointment in particular raised some questions because several years previously, while still a lawyer, Ms. Côte had been 154 See Canadian Judicial Council, Press Release, “Canadian Judicial Council calls on government to consult on proposed changes” November 6, 2006, online: https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2006_1109_en.asp;
involved in litigation with the Revenue Québec over her claimed “professional clothing and personal care” expenses, totaling more than $200,000 over a three year period. The dispute had been resolved by an out-of-court settlement in 2012. The matter only became public after Ms. Côte’s appointment. Others have also raised questions about Ms. Côte’s tactics as independent counsel in the discipline proceedings against Associate Chief Justice Lori Douglas (to be discussed in Part IV 6). These might be precisely the sort of issues that could be raised ex ante through a parliamentary process. Recent Supreme Court of Canada appointments have also sparked debates about the importance of representativeness in judicial appointments. Such discussions usually focus on gender but have also included discussion about the importance of having an Aboriginal justice, given the centrality and uniqueness of Canada’s Aboriginal population in the Canadian legal system. Canada has never had an Aboriginal justice on the Supreme Court of Canada. Similarly in the last few years a debate has broken out as to whether Supreme Court of Canada judges should be functionally bilingual and bijural.

By contrast to the SCC, some provinces explicitly recognize representativeness as important in the judiciary. Thus, in the statute that creates Ontario’s Judicial Appointments Advisory Committee, that committee is instructed to recognize “the desirability of reflecting the diversity of Ontario society in judicial appointments.” The policy of Ontario’s JAAC states: “The Judiciary of the Ontario Court of Justice should be reasonably representative of the population it serves. The Committee is sensitive to the issue of under-representation in the judicial

155 See e.g. S. Drummond “I can never be a judge” Winnipeg Free Press 29 November 2014.
156 See e.g. M. Shoemaker, “Bilingualism and Bijuralism at the Supreme Court of Canada” Parliamentary Review, (Summer 2012) 30.
complement of women, visible, cultural, and racial minorities and persons with a disability. This requires overcoming. However, professional excellence is still the paramount criterion in assessing judicial candidates.\footnote{Ontario Judicial Appointments Advisory Committee, Policy and Procedures, Policy 1.0 Criteria for Evaluating Candidates, online: http://www.ontariocourts.ca/ocj/jaac/policies-and-procedures/policies-and-process/} Similarly in the Yukon, legislation provides that the bench should be "demographically representative of the community it serves.” There is no parallel requirement for federally-appointment judges. In a review of 107 appointments made by the current government, one scholar has argued that there has been a “deliberate disregard for representativeness.” These concerns were intensified with the appointment of two white male academics with explicitly conservative ideologies to the Ontario Courts in late 2014.

In the chapter to follow, it is proposed to examine the constitutional aspect of appointment of the judges of higher judiciary in India.