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JUDICIAL APPOINTMENTS

A COMPARATIVE STUDY OF FOUR JUDICIAL APPOINTMENT
MODELS USED BY SOVEREIGNS AROUND THE WORLD

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I. Introduction¹

The United States Court system currently has 93 vacancies 11 of which are in the Third Circuit/District and 51 pending nominees nationwide.² To say that we have a vacancy problem is an understatement. The vacancies are straining the capacity of the federal court systems duty to administer justice in a timely and adequate manner. British politician and former Prime Minister William Ewart Gladstone famously said “justice delayed is justice denied”, one can’t help but conclude that the current state of affairs of the United States judicial system is not only a disservice to the principles of our government but a grave denial of justice to those awaiting their day in court.

Bipartisan disputes, constant disagreement as well as a general reluctance to work together in the United States Senate with each other and with the President has only added to fuel to the problem of judicial vacancies.³ The use of the filibuster rule to require a 60-vote supermajority to confirm nominees gained popularity by Senate Democrats in 2000 as a way to block nominations made by then Republican President George W. Bush.⁴ Filibuster rules are currently being used by Senate Republicans to block judicial and other nominees made by President Barack Obama.⁵ With this fighting one can’t help but wonder if a change to the rules needs to be made. Use of the current judicial appointment model along with its rules and exceptions are short

¹ I would like to thank Professor Riccio, Professor at Seton Hall Law School for all of his help and guidance in putting this paper together. Additionally, I would like to thank the Hon. Marcelo Aguinsky, Hon. Jorge Luis Ballasteros, Hon. Gaston M. Polo Olivera, Hon. Silvia Y. Tanzi, Dr. Pablo Manilli, Dra. Yanina De Lucca, and Professor Sylvia Faerman for all of their help and valuable insight into the Argentine legal system as well as other models used in Latin America. Without the help of everyone mentioned this paper would have not been possible.

² <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>.

³ Jackson, David. *GOP Blocks another Obama Judicial Nominee*. USA Today. Nov. 19, 2013. <http://www.usatoday.com/story/theoval/2013/11/19/obama-judges-mitch-mcconnell-robe>.

⁴ Savage, Charlie. *Despite Filibuster Limits, a Door Remains Open to Block Judge Nominees*. New York Times. Nov. 28, 2013.

⁵ *Id.*

of being abused by both ends of the appointment system.⁶ Is the problem being caused by the system or those in charge of the system? More importantly would reform and modification to the current system solve the problem of judicial vacancies. Republicans are refusing to confirm judicial nominees on the grounds that they are not qualified.⁷ If this is in fact the case would a modification to the current system in which we have a different method of finding qualified judges solve the problem. What modifications would result in more effective judicial appointments, especially in times of bipartisan reluctance to work together.

Scholars, politicians and judges have started to look at the judicial appointment models of certain states, among those the state of New Jersey as alternatives. As an adult I have spent a couple of years living abroad. This has allowed me to see firsthand how other governments function, some use systems very similar to ours and others do not. Nonetheless they provide great insight into what works and what doesn't. Many of these countries have been under democratic rule for the past couple of decades, their recentness as well as analyzing they have borrowed from the United States system as well as the reasons why provides great insight into the strengths and weaknesses of our government. Studying the methods and processes by which certain foreign countries handle the appointment of judges would provide us with valuable insight and perhaps even an alternative to the model we use.

Latin America is a beacon of new democracies. In the last 30 years democracy has sprouted in Chile, Argentina, Uruguay, Brazil and Venezuela. Attaining democracy was no easy feat; the 20th century Latin America was a time of war, military coups, dictatorships, political suppression, and grave human rights violations. I grew up hearing stories of *Los Desaparecidos* in Argentina and *El Estadio Nacional* in Chile, events like these created distrust and dislike any

⁶ *Id.*

⁷ Millhisser, Ian. *Why Senate Democrats Had to Invoke the 'Nuclear Option'*. ThinkProgress.org. Nov. 21, 2013. <http://thinkprogress.org/justice/2013/11/21/2972671/senate-democrats-invoke-nuclear-option/>

form of government.⁸ The path to democracy left people with little hope in government and its elected officials.⁹ At times even though on paper these countries were democracies, the way in which they were managed was not indicative of a democracy. Additionally, the underlying assumption that corruption was rooted and entrenched at all levels of “el gobierno” (the government) was so accepted and commonplace that there wasn’t a political scandal or development that surprised anyone.

One of the constant struggles in Latin America has been that of maintaining a true separation of powers between the government branches. A history of corruption and power grabs has only feed the problem however; in recent years many countries in Latin America have taken proactive efforts in one, prosecuting corruption within the government and two developing systems and procedures that seem to show a greater transparency to its people. Among these systems is an adoption of new models for judicial appointment. More specifically, most of these countries have adopted the use of the judicial council as safe-guard to protect judicial independence as well as creating a degree of accountability.

One of issues many countries in Latin American continue to struggle with is the hyper-presidencies.¹⁰ In fact, this power grab from the executive branch happens so often that hyper-presidencies are considered more the rule than the exception in Latin America. Countries like Chile, Mexico, Uruguay, Paraguay, and Argentina have come up with systems that try to dilute the hyper-presidency problem. The constant battle to maintain these procedures and systems

⁸ *Los Desaparecidos* or (The Vanished Ones) is the term used to reference the 9,000 to 30,000 Argentines that went missing during Argentina’s Dirty War between 1976-1983; *El Estadio Nacional de Chile* (Chile National Stadium) was used as detention, torture, and execution center during the military coup of 1973 for musicians, political dissidents and members of the clergy.

⁹ Crossette, Barbara. *Losing Faith in Democracy: A Warning from Latin America*. The Atlantic.com: U.N. Notebook. Apr. 26, 2004. <http://www.theatlantic.com/past/docs/foreign/unwire/crossette2004-04-26.htm>

¹⁰ Hyper-Presidency is a term used to refer to a President or any head of the executive branch that has sweeping powers to rule at his or her discretion. This concentration of power in the President throws off the balance required in a democracy in that there is no separation of powers or a system of checks and balances.

intact has at times exposed the fragility of democracy in Latin America. One of these safeguard systems is the use of judicial council for the appointment of judges.

When I clerked in Argentina the summer after my first year of law school I was fascinated by the method they used to appointing federal judges. El Consejo de la Magistratura de la República Argentina (Counsel of Magistrates of the Republic of Argentina), hereinafter “The Counsel”, is an integrated multispectral constitutional organ, responsible for making the shortlists of candidates to the judicial branch.¹¹ They are also responsible for the sanctioning and firing of judges as well as the administration of the judicial system.¹² Regulated by Article 114 of the National Constitution, it requires that The Counsel be integrated in such a way that all branches of the government are represented; it is therefore comprised of a thirteen-member council of judges, legislators, lawyers, and law professors.¹³

For years The Counsel has earned the respect of its citizens and elected officials, due to its reputation of being fair and just, in fact it was rare that the President would not appoint a member recommended by The Counsel. Despite its initial success, in recent years the reputation of The Counsel has received harsh criticism regarding its function and form.¹⁴ In March 2013, President Cristina Fernández de Kirchner presented to Congress a six-point initiative that called for the La Democratización de la Justicia (Democratization of Justice).¹⁵ The six-point initiative proposed reforming The Counsel or getting rid of it altogether by adopting a model of judicial

¹¹ Poder Judicial de La Nación: El Consejo de Magistratura. <http://www.consejomagistratura.gov.ar/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Dura crítica de Fayt al Consejo de la Magistratura.* lanacion.com: Política. July 27, 2009. <http://www.lanacion.com.ar/1155453-dura-critica-de-fayt-al-consejo-de-la-magistratura>.

¹⁵ Verón, Mariana. *Cristina Kirchner avanza con la idea de la democratización de la Justicia.* lanacion.com: Política. Feb. 5, 2013. <http://www.lanacion.com.ar/1551931-cristina-kirchner-avanza-con-la-idea-de-la-democratizacion-de-la-justicia>.

elections.¹⁶ The President reasoned that giving the judicial power to the people further legitimized its authority and power as well as rid it of possible corruption.¹⁷ This initiative has been widely criticized by judges, lawyers and academics as yet another attempt at a power grab from the executive branch.¹⁸ Currently the President's party is the majority in both the House and the Senate, allowing her party to take control of the Judiciary would result in a *de facto* hyper-presidency.

I saw The Counsel as an effective safeguard from the Hyper-Presidency problem as well as a great compromise and example of collaboration. The Counsel keeps the judicial branch – to a certain degree – away from the reach and control of the executive branch. Additionally, its appointment system allows for collaboration from all sectors of the government including the public. Absent its administration of the budget it conceptually feels like a model that could provide qualified judges that that independence as well as a degree of accountability to its people and not only a specific political institution.

In this paper I want to analyze the different models of judicial appointments systems in several parts of the world and come to a determination of which is the most effective model for new democracies. Part I will address the judicial system itself, its function and importance in the democratic system as well as the importance of judicial review and the elements that are necessary in order to have a judiciary that is able to do its duty effectively: that of interpreting what the law is. Part II I will discuss the four models seen around the world: appointment by a judiciary itself, appointment by a judicial council, appointment by political institution, and,

¹⁶ Casa Rosada – Presidencia de la Nación Argentina. Plan para la democratización de la Justicia: Palabras de la Presidenta. Mar. 1, 2013. <http://www.presidencia.gob.ar/discursos/26421-plan-para-la-democratizacion-de-la-justiciapalabras-de-al-presidenta>.

¹⁷ *Id.*

¹⁸ *La oposición denuncia que es un intento de controlar la Justicia.* Clarín.com – Política. Apr. 9, 2013. http://www.clarin.com/politica/oposicion-denuncia-intento-controlar-Justicia_0_898110227.html

selection through an electoral system. Part III will elaborate on the best model needed to maintain a stable democracy with a true balance between all the branches, specially an independent and accountable judiciary. Part IV will summarize my findings as well as provide a conclusion of my findings. I believe that a model such as the one Argentina has developed is an effective safeguard from the plague of Hyper-Presidencies, as well as a solution to bipartisan fighting and judicial vacancies. If other countries adopt such a model they are more likely to have a governmental system with a separate independent judiciary that is out of the grasp of both the executive and legislative branch.

II. The Judicial System

In an analysis of an appointment model we must first address what the judicial system is as well as its function and authority within a government. The judicial system is the organ in a government that is dedicated to interpretation of the law. At its highest level of jurisprudence court systems [more often than not], mirror in function and form the United States Supreme Court, whose duty is to interpret the law as they see fit in accordance to the Constitution. Chief Justice John Marshall famously reasoned in *Marbury v. Madison* that, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."¹⁹ Adding strength to this principle, in *McCulloch v. Maryland*, the court held that it was the judicial branch's duty to "expound" the Constitution and determine whether something is within the constitutional limits or not.²⁰ It can be safely said that the principles and application of judicial review and constitutional

¹⁹ *Marbury v. Madison*, 5 U.S. 137, at 177 (1803).

²⁰ It is also, in some degree, warranted; by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding. *McCulloch v. State*, 17 U.S. 316, 407, at 407 (1819).

interpretation have been universally accepted and engrained in American jurisprudence as well as the jurisprudence of other countries that have similar governmental systems.

Once we have established the power of judicial review we must address the judicial independence that is needed to have an effective, fair, and impartial judiciary. Judicial independence encompasses the view that interpretation of the law should be independent of pressure from both the political branches and the public.²¹ This independence aids in a fair and accurate interpretation of what the law is in accordance to the constitution. Judicial independence is the central goal in most if not all legal systems.²² The theory is that the method in which a judge is appointed is determinative of the independence he or she possesses in making their rulings.²³ Scholars, politicians, and even judges themselves disagree as to what the best method is in attaining this independence is; the lack of a uniform system begins to explain why so many different models exists.

The trouble begins in that judicial independence can be interpreted in a variety of ways. The different types of judicial independence that are needed begin to explain why governments have come up with so many different models of judicial appointments. Judicial independence includes independence from the other branches of government.²⁴ Judges should be free to tell the executive and legislative branch when they are surpassing their authority without fear of reprisal or repercussion.²⁵ Independence from political ideology or public pressure is another form of independence that is needed; this is known as the counter-majoritarian interest.²⁶ Lastly judges

²¹ Stephen G. Breyer, Judicial Independence in the United States, 40 St. Louis U. L.J. 989 (1996).

²² *Id.*

²³ Sanchez, Laura Patallo, The Role of the Judiciary in Post- Castro-Cuba: Recommendations for Change. Institute for Cuban and Cuban-American Studies University of Miami. ISBN: 0-9704916-7-0. Published in 2003.

²⁴ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

²⁵ *Id.*

²⁶ *Id.*

require individual independence, independence that protects them from their judicial superiors.²⁷ While the justice system is bound by the principles of *stare decisis* and precedent judges nonetheless require individual independence to assure them that they can make their decisions without any pressure and or reprisal from their superiors.²⁸ These different forms of independence are needed in order for a judicial system to meet its function that of an independent body dedicated to the interpretation of law.

I mentioned the counter-majoritarian interest above. One of the greatest duties of the judiciary is to protect the minority interest against the majority when the majority goes beyond the limits of the constitution, and or there is an insufficient reason to uphold it. American jurisprudence has relied on Justice Stone's famous footnote 4 in *US v. Carolene Products*, to reason that different levels of review can be applied depending on what is being interpreted higher levels of scrutiny should be applied when legislation is aimed at "discrete and insular minorities" who lack the normal protections of political process. It is in these circumstances that the judiciary must apply a heightened standard of review in order to protect those that will be adversely affected as result of being outside the majority interest.²⁹ The United States interpreted by developing a system of tiered review to be applied in determining the constitutionality of a piece of a legislation, the use and application tiered review granted the court a form of independence. Depending on the law being analyzed and whom or what it affects will determine the level of scrutiny that the court will apply in determining its constitutionality. The three levels of judicial review from "lowest" to "highest" are rational review, intermediate

²⁷ *Id.*

²⁸ *Id.*

²⁹ Footnote 4: "...Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious... or national... or racial minorities... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 82 L. Ed. 1234 (1938).

scrutiny and strict scrutiny. The uses of these tiers of review are what allow judges to rule against the counter-majoritarian interest.

Allowing judges the use of tiers of review is the procedural mechanism that gives judges the independence they need from the public in order to rule against laws that might harm minorities. Without such independence judges would be left without reference to a rule of law that would allow them to use their power and would therefore leave the minority unprotected from the status quo and legislation that is aimed at harming them.

Accountability from the court is another necessary element that is requires of a fair, just and qualified judiciary.³⁰ Just like the executive and legislative branches the judicial branch requires a level of accountability to the people as well as the other branches government. In the United States once a federal judge is appointed, he or she can keep their position so long as they have good behavior; this usually translates to a life-appointment.³¹ In fact, it is rare that a judicial system in which “good behavior” is the standard by which judges keep this position will result in anything other than a life appointment.³² While the counter-majoritarian interest is an important element, accountability is another important interest that is needs to be addressed. Accountability is needed to deter from having a judiciary that is too elitist and far removed from the society it lives in. Furthermore, others argue that in making accountability an important factor in appointing judges the result is a judiciary that is more representative of the society it lives in specifically with regards to race, gender and political and religious affiliation.³³ Accountability with regards to the political institutions is important in that it is needed to give the executive and

³⁰ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

³¹ U.S. Const. art. II, § 2, The Executive Branch.

³² My research revealed that all countries that have a similar clause in their constitution interpret like the United States into something that is a life-time appointment, absent of course extraordinary circumstance.

³³ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

legislative branches the authority [should the need arise] to take action with judicial branch should it extend or abuse its power.

Another highly indicative factor that plays into the type of judicial appointment model a country adopts is that of history.³⁴ Every country has its own unique and different history, a history that shaped the type of government it has today.³⁵ History plays a determinative role not only the type of government a country chooses but also the model of judicial appointments they adopt. As I stated earlier democracy in Latin America is a relatively new phenomenon its path to democracy was neither easy nor effortless. A long history of corruption, coups and violent suppression against the opposition resulted in not only a huge distrust in the government but the political system itself. As a result the governments of many of these countries value accountability over independence.³⁶ They want to demonstrate to the people that they have an active role in their government system and the people they appoint to it and not that their political system is full of foreign-educated elitists that are disconnected from the society they live in.³⁷ On the contrary other countries in Latin America are concerned with the protection of the counter-majoritarian interest and they are more likely to use judicial appointment models that ensure a higher amount independence.

Several characteristics encompass the ideal model, the ideal model of judicial appointments seems to be one in which judges are independent to interpret the law and protect against the counter-majoritarian interest yet are still subject to some sort of accountability mechanism that ensures that they do not go unchecked and are representation of the society they live in. Judicial

³⁴ Interview with the Hon. Jorge Luis Ballasteros, Federal Criminal Appellate Judge to Chamber N°2., Buenos Aires, Argentina.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

independence and accountability create a tension that looks like two arrows or magnets pulling against each other. This tension that is created between the two begins to explain why there is such a diversity of models around the world. A specific country's adoption of a judicial model is indicative of the characteristics that they value more. A perfect model would be one that would balance the reaching a moderate middle ground.

III. FOUR Models

My research has revealed four different models of judicial appointments: appointment by a judiciary itself, appointment by a judicial council, appointment by political institution, and, selection through an electoral system. The models range in application in each country nonetheless all the countries mentioned adopt a model. As it was explained in the introduction each country is unique in the circumstances that lead to the type of government it has. Some, like Mexico, have tried to adopt a government system that functions as closely as possible to the government of the United States, goes as far as having a constitution very similar to the one our framers made; and others like the China have created its own hybrid system that seems to encompass every type of model presented.

a. Appointment by the judiciary itself

A system of self-appointment is one which the judiciary itself appoints its judges, without the need for approval from any of the other political institutions or popular election.³⁸ Two countries follow a version of this model are China and Saudi Arabia. Proponents of this model argue that such a system guarantees the greatest amount of independence needed by judges.³⁹ They are not only independent from other political institutions but also independent from the public.⁴⁰ It goes without saying that the main criticism of this model is the lack of accountability it has.⁴¹ It is because of this concern of that such a model is in decline. Nonetheless it is worth mentioning due to the fact that it is the model that seems to provide the greatest amount of independence, an element that all models want to encompass to some degree or the other.

In China the Chief Justice is appointed by the People's National Congress to term 5-year term, limited to two consecutive 5-year terms. Other justices and judges are nominated by the chief justice and appointed by the Standing Committee of the People's National Congress.⁴² While the justices do the initial appointment a judge's retention is based on their ability to get elected via the popular vote.⁴³ China has delegated the appointment of judges to the legislative and judicial branches. The part that is confusing about China's model and makes it hard to place is that regardless of the system of retention elections all nominations are made by the judicial branch. Moreover, the nominees for potential judges are provided by an independent judicial council that is made up entirely of judges.

³⁸ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Greg R. Avino, China's Judiciary: An Instrument of Democratic Change?, 22 PENN. ST. INT'L L. REV. 369, 379.

⁴³ *Id.*

In Saudi Arabia the High Court chief and chiefs of the High Court Circuit are appointed by royal decree following the recommendation of the Supreme Judiciary Council, a 10-member body of high level judges and other judicial heads.⁴⁴ New judges and assistant judges serve 1- and 2- year probations, respectively, before permanent assignment.⁴⁵ While on its face it appears that the appointment is done by the executive branch (The King), the people that he appoints are based on the recommendation made to him by a judicial council that is entirely comprised of judges. The judges in this council ultimately select the individuals that the monarch will appoint. Moreover at the end of the probation period the judges are reviewed by yet another panel of judges.⁴⁶ Therefore, not only is the appointment of judges a power that is held by the judiciary but the power of retention is also one that is held by the judiciary. Taking into context the history of Saudi Arabia, in which historically this was a power solely delegated to the monarch, this is in essence a way in which the King is sharing with other branches of government. Nonetheless it is still not one that is in any degree given to the people or the legislature. Saudi Arabia seems to be making other proactive efforts at reforming and modernizing its judicial systems.⁴⁷ In addition to adopting more modern technology the Saudi government aims to appoint more judges as well as an intensive training programs and the introduction of electronic monitoring to ensure transparency.⁴⁸ Saudi Arabia is a special case considering that it is not only a secular country but also one that is governed by a monarch. It is therefore not surprising that it wouldn't hold the principle of accountability and impartiality and as a necessary element. Even then it seems to

⁴⁴ Saudi Arabia Const. Chapter 6, The Authorities of the State, art. 52: The appointment of judges and the termination of their duties are carried out by Royal decree by a proposal from the Higher Council of Justice in accordance with the provisions of the law.

⁴⁵ *Id.*

⁴⁶ Ansary, Abdullah Fakhry. Saudi Judicial Reform and the Principle of Independence. Carnegie Endowment for International Peace. May 5, 2009.

⁴⁷ *Id.*

⁴⁸ *New regulations to strengthen Kingdom's judicial system*. Arab News. Nov. 26, 2013. <http://www.arabnews.com/news/483346>

making efforts at modernizing and adopting a model that creates greater independence and accountability in the judicial branch.⁴⁹

This model is completely two-fold, it allows for complete independence while ridding itself of any accountability. In a self-appointing system judges are able to make ruling free from any pressures from political institutions and the public. However freedom comes with a complete lack of accountability which could lead to abuse of power and discretion. This is obviously the opposite extreme to a system in which all judges are elected both of which should be avoided due to the negative consequences they are likely to create. Historically, this model was commonly used however, with the increase of democracies around the world and as well as an increased demand for accountability that this model as well as any versions of it are largely in decline.⁵⁰

b. Appointment by a judicial council

The appointment by judicial council as was mentioned earlier in reference to Argentina, is model in which an independent council creates the shortlist of nominees for judgeship, those lists are then given to either of the political institutions (Legislative or Executive) designated with the authority to make an official nomination.⁵¹ Traditionally, the council is comprised of appointed officials from the legislative, executive, and judicial branches and academics.⁵² Modifications to this model exist such as the model used in China as explained above.⁵³

⁴⁹ Ansary, Abdullah Fakhry. Saudi Judicial Reform and the Principle of Independence. Carnegie Endowment for International Peace. May 5, 2009.

⁵⁰ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org

⁵¹ *Id.*

⁵² *Id.*

⁵³ China's judicial council is made up entirely of judges.

Appointment by judicial council is currently the most popular model used around the world; about 60% of the countries use this version of the model or a modification of it.⁵⁴

Incorporated into the constitutional reform of 1994, Argentina adopted the appointment by judicial council model.⁵⁵ El Consejo de la Magistratura de la República Argentina (Counsel of Magistrates of the Republic of Argentina) is an integrated multispectral constitutional organ, responsible for making the shortlists of candidates to the judicial branch, they are also responsible for the sanctioning and firing of judges.⁵⁶ Regulated by Article 114 of the National Constitution, it requires that The Counsel be integrated in such a way that all branches of the government are represented; it is therefore comprised of a thirteen-member council of judges, legislators, lawyers, and law professors.⁵⁷ The use of a council and the use of the Senate Judiciary Committee can confuse some in that they seem to have the same function. Upon the recommendation of the council, the President appoints the nominee to the bench with confirmation of two-thirds of the Senate.⁵⁸

⁵⁴ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

⁵⁵ Hidalgo, Dr. Enrique. Consejo de la Magistratura. Honorable Cámara de Diputados de la Nación: República Argentina. Instituto de Capacitación Parlamentaria. at 3.
<http://www.diputados.gov.ar/secparl/icap/publicaciones/glosario/C/consejoMagistratura.html>.

⁵⁶ Consejo de la Magistratura – Poder de la Nación. <http://www.consejomagistratura.gov.ar/index.php/features/ique-es-el-consejo>

⁵⁷ Arg. Const. Chapter III, § 114: The Council of the Magistracy, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and of the administration of the Judicial Power. The Council shall be periodically constituted so as to achieve the balance among the representation of the political bodies arising from popular election, of the judges of all instances, and of the lawyers with federal registration. It shall likewise be composed of such other scholars and scientists as indicated by law in number and form. It is empowered:

1. To select the candidates to the lower courts by public competition.
2. To issue proposals in binding lists of three candidates for the appointment of the judges of the lower courts.
3. To be in charge of the resources and to administer the budget assigned by law to the administration of justice.
4. To apply disciplinary measures to judges.
5. To decide the opening of the proceedings for the removal of judges, when appropriate to order their suspension, and to make the pertinent accusation.
6. To issue the rules about the judicial organization and all those necessary to ensure the independence of judges and the efficient administration of justice.

⁵⁸ Arg. Const. Chapter III, Powers of the Executive Branch, §99, ¶4.

The Counsel's function and administration in Argentina has been widely criticized in recent years, particularly with the power it has in the administration of the judicial budget.⁵⁹ Opponents of the counsel state that the power and control that the Counsel has over the judicial branch gives it too much unchecked power, something that is felt more at the municipal level than the federal, since it is these courts that are normally subject to the greatest budget cuts.⁶⁰ Additionally, in recent years the counsel has focused much of its time and energy in the administration of the budget practically ignoring its duties with regards to the nomination of judges.⁶¹ This has created several vacancies and a back-log in the judicial system.⁶² Criticism has led to discussion and even active efforts to get rid of the counsel altogether.⁶³ Opponents also argue that its process is slow and antidemocratic since those that are appointed to the council are not members elected by the public. In simplest terms the President argues that the counsel functions like a fourth branch of the government and the people have zero influence over it.⁶⁴

Paraguay also uses a judicial counsel.⁶⁵ However, in Paraguay in accordance with Article 251 are appointed by the Supreme Court itself in accordance with a recommendation by the Council of Magistrates, a 9-member independent body.⁶⁶ Like Argentina the designation of the

⁵⁹ Interview with the Dra. Yanina De Lucca, Pro-Secretary and Judiciary Intervener to the Buenos Aires Federal Court. Buenos Aires, Argentina.

⁶⁰ *Id.*

⁶¹ Interview with Hon. Gaston M. Polo Olivera, Federal Judge to the Civil Court of Buenos Aires. Buenos Aires, Argentina.

⁶² Interview with Hon. Silvia Y. Tanzi, National Civil Judge to Chamber N°51. Buenos Aires, Argentina

⁶³ Roming, Shane. *Argentine High Court Deals Kirchner a Blow*. Wall Street Journal. Jun 18, 2013. (World: Latin America News).

⁶⁴ *Id.*

⁶⁵ Consejo de la Magistratura de la Republica de Paraguay. – <http://www.consejodelamagistratura.gov.py/>

⁶⁶ Para. Const., Chapter III, § 1, Article 251, About Appointments: Members of appellate or lower courts of the Republic will be appointed by the Supreme Court of Justice from a list of three candidates proposed by the Council for Magistrates.

members of the council are specifically mandated in the constitution.⁶⁷ The difference between this system and Argentina's is that recommended justices are appointed by the President whereas in Paraguay the appointment is made by the members of the Supreme Court.⁶⁸ Also, unlike Argentina, they do not have the constitutional authority over the administration of the judicial system and its budget.

In Spain, a parliamentary democracy, the General Council of the Judiciary, a 20-member body chaired by the monarch and includes presidential appointees, lawyers and jurists elected by the National Assembly proposes the judges to be appointed by the King to the Supreme Court.⁶⁹ The General Council of the Judiciary is not a jurisdictional body and has a lot of the same duties that the Council in Argentina has, including overseeing and inspecting the activities of judges and courts.⁷⁰ The similarities between the council are obvious in the Argentina modeled its own council after the Spanish model.⁷¹

It is important to note that an identifying trait of this model is that while it is made up of appointed members, the council itself is independent and separate from any of the political branches. The Council's investigatory power is broad, and reviews materials in support and against potential nominees regardless of who submitted them. Its investigation phase works in a

⁶⁷ Para. Const., § III About the Council for Magistrates, Article 262 About Its Composition,(1) The Council for Magistrates consists of: (1.) A member of the Supreme Court of Justice who has been designated by this Court; (2.) A representative of the executive branch; (3.) A senator and a deputy, chosen by their respective chambers; (4.) Two practicing attorneys, chosen by their colleagues in a direct election; (5.) A law professor at the Law Faculty of the National University, chosen by his colleagues; and (6.) A law professor of a private law faculty that must have been functioning for at least 20 years, chosen by his colleagues.

⁶⁸ Consejo de la Magistratura de la Republica de Paraguay. – <http://www.consejodelamagistratura.gov.py/>

⁶⁹ Spain Const. art. 123, Supreme Court, ¶2: The President of the Supreme Court shall be appointed by the King at the proposal of the judicial branch in the manner determined by law.

⁷⁰ http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Consejo_General_del_Poder_Judicial.

⁷¹ Interview with Hon. Gaston M. Polo Olivera, Federal Judge to the Civil Court of Buenos Aires.

manner very similar to the United States Senate Judiciary Committee.⁷² Potential nominees can apply for judgeship or be brought to the attention of the council by an individual, themselves, one of the political institutions or a fellow member of the council.⁷³

The existence of an extensive investigation by an independent council is important to a lot of countries that have historically dealt with corruption, specifically corruption from judges that were known to take bribes and or prosecute people with little or no evidence.⁷⁴ This is particularly the case in Latin America and helps to explain why the model is popular in this region. Evidence showed that a strong correlation exists between the judicial appointments, and the state of judicial corruption.⁷⁵ Findings such as these, as well as a history of corruption lead aided in Latin America's path to democracy and the new established government systems that reform would occur.⁷⁶ The effect of that promise resulted in the widespread use of the judicial council.⁷⁷

The use of the judicial council, at least in theory, protects against giving too much power to a political institution more specifically the judiciary itself while still allowing for a great amount of judicial independence. Judicial council's made up entirely of members from one of the political institutions dilutes and its purpose and gives too much power to one branch of government. Likewise, giving the judicial council the task of administering and balancing the judicial budget dilutes its purpose, that of coming up with qualified potential nominees to the bench. The

⁷² Nominees are expected to complete a comprehensive questionnaire and professional and evaluations and qualifications are submitted in favor or opposing of the potential nominee. During their hearing, nominees engage in a question and answer session with members of the committee. Follow-up questions can be given to the potential nominee post-hearing.

⁷³ *Id.*

⁷⁴ Sienbentritt, Gretta K. (translation). *Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat it, Executive Summary and Regional Comparative Study*. Due Process of Law Foundation. 2007. ISBN 978-0-9801271-2-6.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

appointment by the judicial council sits somewhere in the middle of the independence accountability spectrum leaning towards independence.

c. Appointment by political institution

The appointment by political institution model, one of the branches of government [either the executive or legislative branch] or political institutions has the authority to appoint judges.⁷⁸ Appointments are typically made upon the recommendation of an organization like the American Bar Association (ABA) or other similar affiliated organization.⁷⁹ Once that recommendation is made either the executive or legislative branch, whichever has the authority, nominates the individual. Upon the confirmation or approval of the other political institution the individual is then officially appointed to the bench.⁸⁰ Appointments under this model are usually for life, absent of course, some extraordinary circumstance.⁸¹ Some of the countries that follow this model include the United States, South Africa, Australia, Belgium, Brazil and Mexico.

Article II Section 2 of the United States Constitution, grants the President the authority to nominate a judge with the advice and consent of the Senate.⁸² Upon the nomination of the President the Senate Judiciary Committee, a sub-committee of the Senate, holds a hearing in which the nominee has the opportunity to give their testimony as well as be questioned by the

⁷⁸ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

⁷⁹ *Id.*

⁸⁰ *Judicial Nominations and Confirmations*. United States Senate Committee on the Judiciary. <http://www.judiciary.senate.gov/nominations/judicial.cfm>

⁸¹ *Id.*

⁸² U.S. Const. art. II, § 2, The Executive Branch: He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

members of the committee.⁸³ Once approved by the Senate Judiciary Committee nominees are then referred to the Senate for full consideration.⁸⁴ If a majority of the Senate votes in favor of a nomination, the nomination is then confirmed by the President.⁸⁵ In accordance with Article III of the Constitution, judges “shall hold their Offices during good behavior”, which usually translates to a life-time term or self-mandated retirement.⁸⁶

Russia uses a system very similar to the United States in which potential members are nominated by the president and appointed by the Federation Council (Legislature); selected members are appointed for life.⁸⁷ Additionally, Mexico’s appointment model is very similar to that of the United States. Members of the Supreme Court are appointed by the President with the Senate’s approval.⁸⁸ District and other federal judges including magistrates are appointed by members of the Supreme Court for a 4 year term, upon the completion of the four year term they can either dismissed upon proof of bad behavior, elevated or moved to different district.⁸⁹

⁸³ *Judicial Nominations and Confirmations*. United States Senate Committee on the Judiciary. <http://www.judiciary.senate.gov/nominations/judicial.cfm>

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ U.S. Const. art. III, § 1, The Judicial Branch: The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

⁸⁷ Russ. Const. Chapter 7: Judicial Power, art. 128, § 1: The judges of the Constitution Court the Russian Federation of the Supreme Court of the Russian Federal, the Higher Arbitration Court of the Russian Federation shall be appointed by the Council of the Federation upon the proposals of the President of the Russian Federation.

⁸⁸ Mex. Const. Chapter 4 of the Judicial Power, art. 96: To name the ministers of the Supreme Court of Justice, the President of the Republic will submit a short list to the consideration of the Senate, which, after comparing the persons proposed, will designate the minister to fill the vacancy. The designation will be made by the vote of two thirds of the members of the Senate present, within the term of thirty days, which may not be prolonged. If the Senate does not act within this period, the office of minister will be occupied by the person who, from the list, is designated by the President of the Republic. In the case that the Chamber of Senators rejects the entire list, the President of the Republic will submit a new one, in the terms of the last paragraph. If this second list was rejected, the office will be occupied by the person who, from this list, the President of the Republic designates.

⁸⁹ Mex. Const. Chapter 4 of the Judicial Power, art. 97: Circuit magistrates and district judges will be named and given assignments by the Council of the Federal Judiciary, based on objective criteria, and according to the requisites and procedures that the law establishes. They will remain six years in the exercise of the office, at the end of which, if they are selected again or promoted to superior offices, they will be secure in their posts in the cases and according to the procedures that the law establishes.

While some countries like the United States and Mexico use life-time appointments other countries enforce mandatory retirement ages. Those that support mandatory retirement ages say are necessary to avoid having an aging court and more importantly open up seats for women and minorities to the bench.⁹⁰ Those that oppose it say that in enforcing a mandatory retirement age, takes away from judicial independence.⁹¹ This point is usually countered with the fact people are living longer, therefore judges are serving longer too, too long and this results in too much control and influence to one individual for an extended period of time.⁹²

South Africa is one of the countries that have imposed a mandatory retirement age. In South Africa the President and Vice-President of the Supreme Court of Appeals are appointed by the national president upon the consultation of the Joint Service Commission (JSC).⁹³ Additionally, Supreme Court judges are appointed by the national president after consultation with the Chief Justice and leaders of the National Assembly for 12-year non-renewable terms or until age 70.⁹⁴ In Brazil justices are appointed by the president and approved by the Federal Senate; upon appointment can serve until mandatory retirement at the age of 70.⁹⁵

Other countries bypass approval from another political institution and designate the power to appoint to only one of the political institutions.⁹⁶ Proponents of this model state that it allows for judicial independence in that the less other institutions are involved the more likely

⁹⁰ Scott Makar, In Praise of Older Judges: Raise the Mandatory Retirement Age?, Fla. B.J., APR. 1997, at 48.

⁹¹ *Id.*, Fla. B.J., APR. 1997, at 48.

⁹² LaFrance, Adrienne. *Down With Lifetime Appointments*. Slate.com. Nov. 11, 2013. http://www.slate.com/articles/technology/future_tense/2013/11/lifetime_appointments_don_t_make_sense_anymore.html

⁹³ The Supreme Court of Appeal of South Africa: The Joint Service Commission is a 22-member body of judicial and other government officials, and law academics. <http://www.justice.gov.za/sca/aboutsca.htm>.

⁹⁴ Francois Du Bois, Judicial Selection in Post-Apartheid South Africa, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 280, 281 (Kate Malleson and Peter H. Russel, eds., 2006).

⁹⁵ Braz. Const. Art. 101, 104, 111-A.

⁹⁶ Mary L. Volcansek, Judicial Selection: Looking at How Other Nations Name Their Judges, 53 *The Advoc.* (Texas) 95 (2010).

the judicial branch will feel it is accountable to them. Opponents counter that this modification gives too much power to one of the political institutions effectively making the judicial branch an extension of whichever institution has the power to appoint. In Australia appointment is solely the responsibility of the executive branch and does not require the approval of the legislative branch as is the case in the United States.⁹⁷ Justices in Australia are appointed by the governor-general in council for life with mandatory retirement at age 70.⁹⁸ Similarly in Canada judges are appointed by the Prime Minister (head of the Executive Branch) and can serve for life or until mandatory retirement at the age of 75.⁹⁹

Countries that have an active monarchy also frequent the appointment by political institution model. In Belgium the King appoints Justices of the Peace, judges of the superior courts, and judges of the court of Cassation.¹⁰⁰ Constitutional Court judges are appointed from the monarch from candidates submitted by parliament.¹⁰¹ Supreme Court judges are appointed by the monarch from candidates submitted by the High Council of Justice.¹⁰² Therefore in Belgium while the appointment is done by The King, the nomination is done by either the legislative or judicial branch depending on the judge.

The “advice and consent” clause as is used in the United States seems to work as a safeguard that neither branch overexerts its power, staying true to the principle of separation of powers. In Federalist 76, Hamilton explained that while the President had the power to nominate he is not given the absolute power of appointment: “.... every advantage would in substance, be

⁹⁷ *Id.*

⁹⁸ Austl. Const. Chapter III. Art. 72.

⁹⁹ F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 56, 57 (Kate Malleson and Peter H. Russel, eds., 2006).

¹⁰⁰ Belg. Const. Art. 151(1), ¶4.

¹⁰¹ *Id.*

¹⁰² Belg. Const. Art. 151(1), ¶1.

derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided.”¹⁰³ Additionally, Senate confirmation was viewed as a check on the partiality of the Executive as well as a check on the self-interest and impulsiveness of the president while protecting against appointment of unqualified candidates.¹⁰⁴

The single-institution appointment model seems to allow for a great amount of judicial independence. It bases itself on the theory that in being appointed, justices will not be afraid to go against public opinion and protecting minorities against the counter-majoritarian interest.¹⁰⁵ Arguments against this model is that it fundamentally antidemocratic and results in an elitist judiciary.¹⁰⁶

The anti-democratic argument bases itself on the fact that both the judicial council and those that are appointed under it have zero involvement from the people; the lack of accountability it creates is contrary to what many people of the countries that use it want in the judicial system.¹⁰⁷ Additionally, it is argued this it is highly elitist; in that on its face it appears that so long as someone knows the right people and is at the right place at the right time they will become a judge, and only those that are connected to the political machinery make it to the bench.¹⁰⁸ Such a model results in a judiciary that is entirely disconnected from society and makes their decisions based entirely too much on legal theory and not experience to real life situations. The practice of lifetime appointments can lead to an abuse of power and pushing of political agendas. As it was shown above many countries such as Australia, South Africa, and

¹⁰³ FEDERALIST NO. 76 (Alexander Hamilton).

¹⁰⁴ *Id.*

¹⁰⁵ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Brazil have addressed this concern by forcing imposing lifetime appointments coupled with a mandatory retirement age, usually ranging between 65 and 70 years of age.

Countries such as Bolivia have taken proactive efforts to address concerns of a disconnected elitist judiciary by adopting a model of judicial elections.¹⁰⁹ As it will be addressed below, in 2011; Bolivia adopted a model of judicial elections. Countries like China have taken a more modified pseudo hybrid approach that adopts both appointments by political institution as well as an election system. In China judges are appointed for by the judicial branch itself after two years on the bench should they want to retain their seat they then have to run for office based on their record and accomplishments.

The appointment by political institution model allows for a vast amount of independence yet the difficulty in removing someone from office absent “good behavior” rids it of needed accountability. While there are various arguments in favor of age cap as a safeguard I can’t say that agree with them with the need for them in the first place. I find that so long as a judge is in good behavior and does his or her job well, age should not be an impediment. An analysis of this model leads me to conclude that it lies somewhere towards the middle of the independence-accountability spectrum leaning towards more a model whose main goal is concern judicial independence versus accountability.

¹⁰⁹ Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, *Electoral Studies* (2012), doi:10.1016/j.electstud.2012.04.006. http://myweb.fsu.edu/adriscoll/CV_files/DriscollNelson2012ESBolivia.pdf.

d. Selection through an electoral system

Electoral systems gained popularity in the 19th century as a way to enhance accountability for judges that were considered to be too elitist and disconnected from society.¹¹⁰ There are two main types of election systems: popular election (partisan or non-partisan) and election by the legislature.¹¹¹ Election by the legislature is a model in which the legislative branch itself elects its judges; Cuba uses such a model. There is a third model of election that is worth mentioning, known as retention elections.¹¹² Retention elections involve initial appointment by a political institution for specified amount of time upon whose completion the judge must run in the general election in order to keep or retain his or her seat. China follows this model of initial appointment followed by election in order to retain his or her seat.¹¹³ The election of judges' model allows for the people to directly elect their judges. Proponents say it provides the greatest amount of accountability to the people, giving them the power into determining what kind of judiciary they want. Opponents say that such a model runs the risk politicizes the judicial branch and hampers the quality of judges that make it to the bench.

Recent changes in Bolivia as well as an amendment to its constitution resulted in the transition from a judicial council model to an election model. Article 182 Number I, of the Bolivian Constitution, grants the people of Bolivia the power to elect its judges.¹¹⁴ The election model is non-partisan as anyone who runs cannot be a part of any of the political parties.¹¹⁵ The amendment was made to the constitution was made after the successful referendum spear-headed

¹¹⁰ United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

¹¹¹ Akkas, Sarkar Ali. *Appointment of Judges: A Key Issue in Judicial Independence*. Bond Law Review. Vol. 16, Issue 2. Article 8. University of Rajshahi, Bangladesh.
<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1293andcontext=blr>.

¹¹² United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.

¹¹³ *Id.*

¹¹⁴ Bol. Const. art. 182 Number I: The Magistrates and Judges of the Supreme Court shall be chosen and elected by universal suffrage.

¹¹⁵ Bolivia Const. art. 182 Number IV.:

by Bolivian President, Evo Morales. As a result of this referendum Bolivia held its first judicial elections in 2011.¹¹⁶ Judges of the Supreme Court and the Plurinational Constitutional Tribunal are elected from a list of pre-selected candidates made by the Legislative Assembly, those that win serve 6 year-terms.¹¹⁷ Bolivia's move towards this model is a byproduct of the reconceptualization of democracy the country has gone through in the last ten years. As well as increased participation from the indigenous population of this country who has historically been marginalized.¹¹⁸ The election of the indigenous Evo Morales fueled a continued move towards the left as well as more participation from the people.¹¹⁹ The people of Bolivia have chosen accountability as an element they desire in their government. They want direct influence and control over all aspects of government not only the executive and legislative branches.

The successful referendum demonstrated that the people of Bolivia as well as its government hold accountability as a valuable asset. It is speculated that such an extreme approach is a consequence of decades of marginalization and suppression paired with Evo Morales' aim to "decolonize" Bolivia.¹²⁰ Thus far, the people of Bolivia as well as its government seem content with results that judicial elections have provided. For the most part it has met it has accomplished some of its biggest objectives those of having more women as well as individuals of indigenous decent on the bench.¹²¹ As explained in the appointment by judicial council section, earlier this year Argentina's Cristina Fernandez de Kirchner presented a

¹¹⁶ Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, Electoral Studies (2012), doi:10.1016/j.electstud.2012.04.006. http://myweb.fsu.edu/adriscoll/CV_files/DriscollNelson2012ESBolivia.pdf.

¹¹⁷ *Id.*

¹¹⁸ BBC News:Latin America and Caribbean, *Profile: Bolivia's President Evo Morales*. Jan. 12, 2011. <http://www.bbc.co.uk/news/world-latin-america-12166905>.

¹¹⁹ Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, Electoral Studies (2012),doi:10.1016/j.electstud.2012.04.006.at 1.

¹²⁰ BBC News:Latin America and Caribbean, *Profile: Bolivia's President Evo Morales*. Jan. 12, 2011. <http://www.bbc.co.uk/news/world-latin-america-12166905>.

¹²¹ Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, Electoral Studies (2012), doi:10.1016/j.electstud.2012.04.006.

proposal to the Argentine Assembly recommending that Argentina modify, or better yet, abandon the use of the judicial council and adopt a model of judicial elections. Kirchner's "Democratización de la Justicia" (Democratization of Justice) is an attempt to "democratize justice" by adopting a model similar to that of Bolivia.¹²² The referendum was approved by the legislature however; the Supreme Court found the referendum to be unconstitutional reasoning that: "it is not possible to invoke the defense of the popular will in order to ignore the judicial order".¹²³ Despite its declared unconstitutionality the executive branch of Argentina continues to advocate for this change even reaching the point of suggesting a constitutional amendment in lieu of its failed attempt at changing the model via referendum.¹²⁴ While Kirchner has recently lost support in the polls she continues to have a strong support base among the poor and lower middle class citizens of Argentina, additionally her party currently has control of both houses of the Senate. It is yet to be seen if her continued efforts to modify they system will yield any results in her favor.

Cuba, a country with a one-party system also used a form of judicial election, in a model in which the legislative branch elects judges.¹²⁵ Article 75 (o) of the Cuban Constitution grants the Asamblea Nacional del Poder Popular (National Assembly of People's Power) the power to elect judges to serve 2.5-year terms.¹²⁶ Lay judges are nominated workplace collectives and

¹²² Rodriguez, J.C. *Aprobada la reforma de Kirchner para 'democratizar' la justicia*. La Gaceta. Apr. 25, 2013. <http://www.intereconomia.com/noticias-gaceta/internacional/aprobada-reforma-kirchner-para-democratizar-justicia-20130425>.

¹²³ La Nacion. *Consejo de la Magistratura: los puntos más destacados del fallo de la Corte Suprema*. Jun 18, 2013. <http://www.lanacion.com.ar/1593259-corte-suprema-declaro-inconstitucional-la-reforma-del-consejo-de-la-magistratura-puntos-salientes>.

¹²⁴ Perfil.com. *El oficialismo clama por una reforma constitucional tras el fallo de la Corte*. June 20, 2013. <http://www.perfil.com/politica/El-oficialismo-clama-por-una-reforma-constitucional-tras-el-fallo-de-la-Corte-20130620-0033.html>

¹²⁵ Gerard J. Clark, *The Legal Profession in Cuba*, 23 SUFFOLK TRANSNAT'L L. REV. 413, 424 (2000).

¹²⁶ Cuba Const. art. 75: The National Assembly of People's Power is invested with the following powers: (o) electing the president, vice presidents and other judges of the People's Supreme Court;

neighborhood association and elected by municipal and provincial assemblies.¹²⁷ The Cuban constitution affirmatively grants judges the power of judicial review as well their independence from other political institutions, while also adding that judges can only be removed by the body which elected them.¹²⁸ Article 122 specifically gives judges the power of judicial review and well as their independence from other political institutions.¹²⁹

The biggest argument in favor of this model is that, like any other election system it a true indication of the popular will. The key and most prominent element of this model is the accountability it creates. It therefore makes sense that countries that have adopted this model have done so after a history of vast corruption in its government and more specifically the judiciary. Elections directly address the concerns against elitists' judiciaries that are disconnected from society and are therefore not a true representation of the society they live in. Opponents also argue that such a system can open up the possibility of having more minorities as well as women on the bench.¹³⁰

The major concern with the election of judges is the politicization of the judicial system.¹³¹ Concerns in politicizing the judiciary are the same those that come up with elections in the executive and legislative branches. Running for office requires money, and a lot of it, increasingly its costing more and more money to run for office. This need for capital rids the system of the accountability it claims to have, over concerns that judges will lose impartiality

¹²⁷ Lay Judges are citizens who are chosen to serve as judges; they are not trained jurists with law degrees. Requirements to be a lay judge are appropriate education level, good moral character, good reputation in the community and a good attitude toward employment or any work done in matters of social interest.

¹²⁸ Cuba Const. art. 122: The judges, in their function of administering justice, are independent and only owe obedience to the law.

¹²⁹ Cuba Const. art. 126. Judges can only be recalled by the body which elected them.

¹³⁰ Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, *Electoral Studies* (2012), doi:10.1016/j.electstud.2012.04.006.

¹³¹ *Id.*

towards their biggest contributors or even worse their biggest opponents.¹³² What degree of accountability can a judge be held to when of the lawyers or a party before him happens to be one of his biggest contributors.¹³³ Many states have responded to this concern by regulating judicial campaigns through codes of judicial ethics.¹³⁴ As we saw Bolivia has addressed some of these concerns in mandating that those that run are not a part of political party.

Another concern with judicial elections is that the best qualified candidate does not win always only the one that received the most votes.¹³⁵ Election results are not based on merit and qualifications, they are more indicative of likeability and popularity. This brings into question the quality of the bench and the accuracy of the rulings they make. This does not in any sense translate to accountability, rather is mirrors something more similar to that of winning a race. Evidence also suggests that judges become more putative in election-years, rationalizing that in being viewed as harsher on crime they are more likely to be re-elected.¹³⁶ While it may appear that this model provides for the greatest amount of accountability, research shows that accountability is achieved at the cost of impartiality and on occasion quality of judges.

As it was explained above in the appointment by political institution section, the initial appointment of judges in China and is done by the Executive branch for a defined amount of time (2 years) and upon the completion of that term they must win in the general election in order to hold their seat.¹³⁷ The amount of independence and impartiality provided by this model

¹³² Huber, Gregory A. and Sanford C. Gordon. 2004. "Accountability and Coercion: Is Justice Blind when It Runs for Office?" *American Journal of Political Science* 48 (2 Apr.): 247-263.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ China Const. art. 79: The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet. The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first

is highly questionable, while the initial appointment indicates that judicial independence is possible the fact that judges will be subject to election can make the 2-year term something short of a resume builder. This could lead to extremely putative judges as well as impartial judges that only rule in accordance with the goal of being elected and not applying the law in an unbiased and fair way.

The election of judges does not satisfy the goals it aims to meet. It does not allow for accountability nor rid it of the elitist aspect that those that came up with this model aimed to battle. Quite the contrary it creates a system in which only the most popular person running wins which is not always the best judge bringing into question the quality of the bench. Politicization of the judicial system is essence the least preferred model that a government should use. It does not stick true to the principles and spirit of a judiciary, that of a fair, qualified, independent judicial system that freedom to interpret the law in a fair and just manner.

IV. Best Model - Hybrid

When I first found out about the use of judicial councils it felt like I had stumbled upon conceptual legal gold mine. Needless to say while the way in which judicial councils have carried out in many are not exactly those that I would suggest the United States attempt to emulate. An analysis of what and why certain things happened in some of these countries provides us with great insight as to what works and what does not. I have stated time and time again I stated that an ideal judicial system is one that balances independence and accountability. My goal was to find a model that would provide that. My research revealed that none of these models provide that balance. At this point I would like to suggest a fifth model: a hybrid of the

general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter. In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

use of the judicial council with appointment by a political institution; more specifically appointment by the executive branch with the advice and consent of the Senate. In practice a shortlist of candidates would be submitted by an independent council of appointed members by to the President who would then appoint a nominee with the consent and advice of the Senate. Essentially a hybrid of the models used in the United States and judicial council similar to that of Argentina and Spain.

Members of the judicial council would be made up of appointed members from the executive, legislative and judicial branch as well as law professors and a law student. The range of members would provide a range of points of view from all aspects of the legal field. I considered the idea of suggesting that one of the members of the council be one that is elected by the people. However, the practicality of how such an election would pan out, as well as the potential cost it would require would outweigh any benefit or essence it might provide. Additionally, those that would opt to run would very likely be members of the Senate or judiciary de facto throwing off the representational the balance between the branches. It would be in the council's best interest as well as the judicial system itself that any form of election system be excluded. A student in lieu of an elected member would be able to provide a somewhat heightened layman perspective and be able to understand the complexity and intricacies of the council as well as the depth required in the investigation process required to come up with potential nominees.

The appointment method by the executive legislative and judicial branch would be entirely left up to them. In order to maintain a balance between the branches of government the council should be comprised of the following. Appointed members of the judicial branch should be a federal judge and a state judge. Additionally a member of the Democratic and Republic

party should be appointed by the legislative branch. Law professors should be appointed from a public school and private school, special attention should be made that not only members of Ivy League schools be continuously appointed. The Executive branch would also get to appoint two members preferably both of whom would have a law degree or are practicing attorneys. With regards to the student, his or her appointment would be decided by the judicial council itself, it would be their responsibility to hire a student for a one-year term from applications received. Since this would be considered a federal job the student would have to be a U.S. citizen. Aside from the one-year term for the student all other appointments would serve a single 2-year term. The exception to this would be the student on the council, who would qualify for appointment by any of the political institutions should the situation arise. Additionally, once an individual is appointed, they would not qualify for appointment by either the branch who initially appointed them or any other branch. For example, if a member of the executive branch was appointed and then he or she ran for public office he or she would not be able to be appointed as a member of the legislative branch. In all this would create a 9-member council representing all facets of the legal world.

In adopting the use of the judicial council there are things that need to be avoided. The two that are most significant are: not giving the judicial council the authority to administer and manage the budget of the judicial branch, and not allowing an imbalance of members to the council from any of the political institutions. These two should be avoided, as evidence has shown these two practices are what seem to be creating the greatest critique and concern of judicial councils in the countries that use them. In Argentina for example, The Counsel's ability to administer and manage the budget of the judicial system has sidetracked them from their superior goal: that of coming up with shortlists. This practice has tarnished its reputation and

credibility as among the public as well as given the executive branch the ammunition it needs to attempt to get control of The Counsel. With regards to an imbalance of members to the council, we would want to avoid situations like China and Saudi Arabia, in which the councils are solely comprised of members of the judicial branch. This should be avoided for varying reasons. In allowing for the council to be compromised of too many members from one branch we run the risk of giving too much power to one branch of government, throwing off the balance needed in a true separation of powers. While a model like the one in China would provide the greatest amount of judicial independence, in only having deal with judges, the lack of accountability the model would provide would create the same effect as that of a council with the power to administer and manage the judiciary budget.

The United States and the Argentina are currently dealing with the issue of judicial vacancies. Both for different reasons however, it is my theory that effective and specifically tailored use of the judicial council would alleviate this problem. The best way to address such a problem would be have the council continuously work on finding potential nominees to be added to the shortlist. Going as far as giving the judicial council quotas with regards to potential nominees would be too much and run the risk of decreasing the quality of individuals recommended. What should not be allowed is waiting for vacancies to come up. Instead a proactive system in which qualified nominees are constantly being investigated would aid in the judicial vacancy problem. In establishing this practice the United States would be to more efficiently fill a vacant seat in that shortlist of qualified judges would be readily available for the President.

Finding balance between independence and accountability has been a constant theme in this paper. History and a country's path to democracy have also been established as a detrimental

element that shapes the model that is ultimately adopted. We are a blessed country in that we haven't had to deal with judicial corruption, coups, and hyper-presidencies the way other countries have. To me that has translated into a country the values independence in its judicial system versus accountability. However, something that we do value is efficiency. We like things done well, and like them to be done in a timely manner. A model such as the one I have suggested would provide this much desired efficiency.

In addition to adopting the use of the judicial council I would suggest one change to the advice and consent clause. While I support the use of the filibuster, I believe when it is used a reason for its use must be provided. A reluctance to work with members of the opposing party should not be enough reason to filibuster. Instead when used a valid good faith reason for it must be given. In turn the adoption of the judicial council and its investigatory process would preempt any valid good faith reasons that might be provided. Being that the nominees would have already gone through a rigorous investigation and testimony hearing the Senate Judiciary Committee's process would be streamlined as well as the confirmation hearing.

The benefit of this model is that it includes and gets all branches of government involved. While the general public would be kept out of the process of appointment members to the council, any election type system would overcomplicate the system and be too costly. The same arguments that are made against the election of judges would apply in this context. I stand by my decision that an adaptation of the judicial council model into our current appointment process is beneficial. This model creates a compromise of the principles our judicial system needs: independence, accountability, and efficiency.

V. Conclusion

The single most important factor needed in a judicial system is that of an independent judiciary. As we have seen this can be achieved in a variety of ways all of which place a different principle at the forefront of its system. A country that wants direct accountability will adopt a system of judicial elections however, they run the politicizing their judicial system. Should your priority be judicial independence over accountability a model with a judicial council that nominates candidates that are then to be appointed by the either the legislature or executive is likely the best option. Some countries have reasoned that a system of self-appointment provides the greatest amount of judicial independence. Ultimately what every country needs is are fair, effective, and independent judges that have a clear grasp of what the law is and will interpret it accordingly. The manner in which governments achieve this is directly related to the form of government it has, its history and path to democracy, and lastly what they prioritize more: accountability or independence. In a perfect world we would be able to create a perfect system. We do not have such a luxury, it is therefore a balancing of factors and open and candid discussion of the above mentioned items that will provide a country with a blue of the type of model they adopt.

A collaborative system is many ways in the most appropriate method of appointment of judges. The ideal system is one that allows judges to be independent and not worry about the repercussions their holding might have on their careers. At the same time the ideal system needs to provide a level of accountability which would allow for recourse should judges overexert their power. Any system that relies too heavily on one branch of government, is self-appointing, or allows for the citizenry to elect its judges tarnishes the purity of the judiciary. We need an

appointment process that is open and transparent while adhering to objective criteria not only in accord with the court and political institutions but also with the general public itself.¹³⁸

The role of a well-functioning judiciary is one that aids in the protection of human and property rights while enforcing the legal frameworks that support optimal market function.¹³⁹ A well-functioning judiciary is one that has the capacity to work in a just and impartial manner. It should therefore be as independent as possible with specifically defined scope and authority to interpret the law.

This paper was written with the purpose of finding the best model for judicial appointments. So what is the best model? At the risk of sounding too much like a law student, it depends. Yes, it depends on what values and principles we value and want in our judicial system.

¹³⁸ Sanchez, Laura Patallo, The Role of the Judiciary in Post- Castro-Cuba: Recommendations for Change. Institute for Cuban and Cuban-American Studies University of Miami. ISBN: 0-9704916-7-0. Published in 2003.

¹³⁹ *Id.*