

Independence or accountability?

How judges are appointed

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Introduction

Where are we?

Courts are political actors because their decisions have political consequences

- ▶ regulate political activity
- ▶ distribute competences
- ▶ **make policies** by performing judicial review
 - ▶ inadvertently
 - ▶ intentionally

⇒ *what is the source of judges' motivations?*

Last week

Politics thrive in legal uncertainty (which is why we have peak courts in the first place)

- ▶ who fills the legal gaps?
- ▶ what are their motivations?
 - ▶ attitudes and bargaining among judges
 - ▶ pressures/judicial accountability

⇒ *judicial selection may define judges' preferences and (career) goals*

Your turn

What “stuck with you” the most in the readings for today?

To answer, go to www.menti.com and enter the code 17991 2878

Two forms of influence

Two forms of influence

Judicial selection may impact judges' behavior in two ways

- ▶ **selection:** defines the preferences (ideology) of judges (Fearon 1999)
→ judges are independent
- ▶ **accountability:** incentivizes certain behavior (Ferejohn et al. 1999)
→ judges are strategic/not independent

⇒ *when do we want independent judges?*

Why it matters

- ▶ **selection** is about representation
 - ▶ of member states/governments (for ICs) (Pérez 2015)
 - ▶ of the population (for domestic courts) (Not another politics podcast)
- ▶ **accountability** is about checks and balances (Pérez 2015; Dunoff and Pollack 2017)
 - ▶ protect individuals against government influence

⇒ *questions of institutional design*

Necessary ingredients

Some elements have to be present for selection/accountability to be effective

▶ **selection:**

- ▶ information about judges background

▶ **accountability:**

- ▶ information about judges behavior during tenure
- ▶ possibility of a sanction

⇒ *“judicial trilemma” is about political accountability (Dunoff and Pollack 2017)*

What kind of accountability / selection types?

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type	selection (pre-tenure)	accountability (during tenure)
political	preferences	voting/direction of decisions
skills/quality	education, experience	quality/quantity of decisions

Selection on merits?

Pérez (2015) focuses on selection procedures to international courts

type	selection (pre-tenure)	accountability (during tenure)
political	preferences	voting/direction of decisions
skills/quality	education, experience	quality/quantity of decisions

⇒ *does legal competence really preclude selection on preferences?*

Reselection on behavior

Dunoff and Pollack (2017) focus on political accountability on international courts

ECJ is classified as a highly independent, non-transparent court

type	selection (pre-tenure)	accountability (during tenure)
political	preferences	voting/direction of decisions
skills/quality	education, experience	quality/quantity of decisions

⇒ *how independent/accountable should judges be?*

Behavior given reselection

Cheruvu (2024) tests empirically the proposition that ECJ judges are independent

type	selection (pre-tenure)	accountability (during tenure)
political	preferences	voting/direction of decisions
skills/quality	education, experience	quality/quantity of decisions

⇒ *overturn in government does not cause a change in judges behavior*

Reselection given behavior and preferences

Hermansen and Naurin (2019) investigate the reselection criteria at the ECJ

type	selection (pre-tenure)	accountability (during tenure)
political	preferences	voting/direction of decisions
skills/quality	education, experience	quality/quantity of decisions

⇒ *judges are selected for their impact on policy: preferences and influential case portfolio*

Literature

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