



Northern Ireland  
Assembly

# Research and Information Service Research Paper

---

March 2012

**Fiona O'Connell & Ray McCaffrey**

## Judicial Appointments in Germany and the United States

**NIAR 175-12**

This paper provides information for the Committee for Justice on judicial appointments in Germany and the United States



## Key Points

- The models of judicial appointment in the US and Germany are subject to political involvement at various levels.
- These models are interlinked with other elements of the legal system and traditions of these countries.
- The models include
- Germany:
  - Role of Minister of Justice in appointments in the states
  - Electoral committees comprised of judicial members and political representatives for example in Germany (state level);
  - Electoral Committee at Federal level comprised of political representatives of the Federal and Lander Parliaments;
  - At Constitutional Court level, judges are elected by the upper and lower chamber of Parliament
- United States
  - Presidential appointment with advice and consent of the senate (Federal level)
  - Commission based appointments, also known as merit selection; usually involving an election at some point;
  - Judicial elections;
  - Gubernatorial appointment (appointed by the Governor); this is similar to the Federal system.
  - Legislative appointment or election

## Executive Summary

### Germany

- Germany has a career judiciary, judges join the judiciary early in their working life and spend their career working in it;
- Although the judicial appointments process begins with an application, there are regional variations in recruitment procedures;
- There is political involvement in appointments procedures however there is some judicial involvement in the appointments process either through judicial electoral committees or advisory bodies;
- The Minister of Justice makes decision on promotions: in Lander, judicial electoral committees are involved in making recommendations and at federal level, the Prasadialrat which is composed of judicial members provides advice.
- Promotion opportunities can be limited in Germany. Judges can seek secondment opportunities in other areas for example as court clerks in higher courts or in Ministries of Justice;
- Legislation requires that the removal of a judge from judicial office without consent is made by a judicial decision. There is also special provision for removal of Constitutional judges for acting against the constitutional order.

### United States

- There is both a federal and state court system in the United States;
- All federal judges are appointed by the President with the advice and consent of the Senate. These judges hold office during good behaviour;
- No two state court systems are exactly alike;
- Most state court judges are not appointed for life but are either elected or appointed for a certain number of years;
- There are five basic methods for selecting judges at the state level: merit selection, non-partisan election (party affiliation not designated on the ballot paper), partisan election (party affiliation listed on the ballot paper), gubernatorial appointment and legislative appointment/election;
- At federal level, judges can be removed in Congressional impeachment proceedings. A variety of removal systems are used at state level, including

impeachment, legislative address, judicial conduct commissions and recall elections.



# Contents

- Key Points .....3
- Executive Summary.....4
- Contents.....7
- 1 Introduction .....9
- 2 Judicial Appointments in Germany .....9
  - 2.1 The Court System in Germany .....9
  - 2.2 Judicial appointments in Germany .....11
    - 2.2.1 Qualifications and Entry to the Judiciary .....11
    - 2.2.2 Recruitment and appointments in ordinary courts .....11
    - 2.2.4 Appointment of Constitutional Court Judges .....16
  - 2.3 Career Path and Promotions .....16
  - 2.4 Removal of Judges .....17
  - 2.5 Judicial Diversity .....18
- 3 The court system in the United States .....19
  - 3.1 Overview of the federal and state court structures .....19
  - 3.2 Selection of Judges .....22
  - 3.3 Removal of Judges .....29
  - 3.4 Judicial diversity at state level.....31
- 4 Conclusions.....31





## 1 Introduction

This research paper has been prepared to inform the Committee for Justice's inquiry on Judicial Appointments. The Committee is tasked with reviewing the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009. The review is required by Section 29C of the Northern Ireland Act 1998 as amended by Schedule 6 of the Northern Ireland Act 2009 and as set out in Standing Order 49A of the Northern Ireland Assembly.

The paper provides information on the process of judicial appointments, promotions and removal from judicial office in Germany and the United States. It should be noted that these appointment systems are rooted in the traditions of these countries and are often interlinked with wider parts of the system (eg the law examination system and notion of a judicial career in Germany; the strong emphasis on direct democracy in some US states).

## 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.<sup>1</sup> It should be noted that in the 1950s that 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.<sup>2</sup> 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.<sup>3</sup>

### 2.1 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.

---

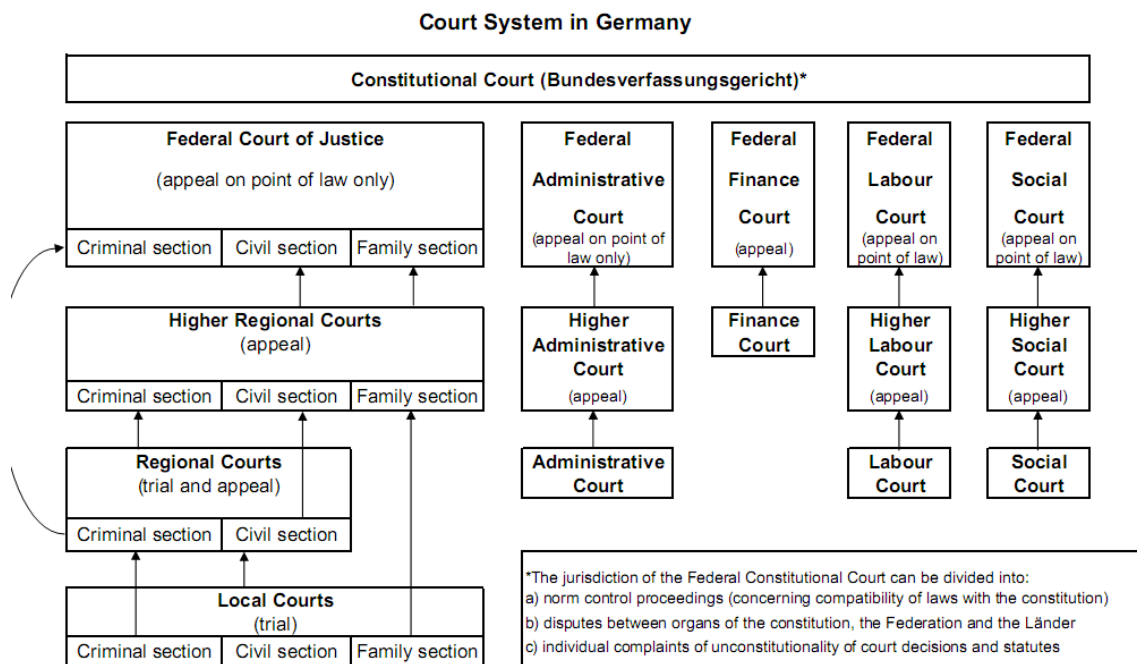
<sup>1</sup> J Bell (2006) *Judiciaries within Europe*, Cambridge University Press, United Kingdom, 17

<sup>2</sup> C Guarnieri "Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self Government" *Legal Studies* [2004]Vol 24, 175

Germany is a federal state and judicial authority is shared between the Federation (Bund) and the sixteen “Länder” which are states and provinces.<sup>4</sup> Judicial power is exercised by:<sup>5</sup>

- The Federal Constitutional Court (Bundesverfassungsgericht);
- The five federal courts which are courts of last instance and generally only hear appeals on points of law. They include:
  - the Federal Court of Justice in Karlsruhe (civil and criminal cases);
  - the Federal Labour Court in Erfurt (labour cases);
  - the Federal Administrative Court in Leipzig (Administrative Cases);
  - the Federal Social Court in Kassel (social security and social welfare cases); and
  - the Federal Finance Court in Munich (Tax cases).
- Ordinary (civil and criminal) courts, administrative courts, tax courts, labour courts and social courts and are the responsibility of the Länder.

The diagram below sets out the structure of the court system.<sup>6</sup>



<sup>4</sup> 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

<sup>5</sup> Ibid, Pg 70: See also J Bell (2006) “Judiciaries within Europe”, Cambridge University Press, 110

<sup>6</sup> <http://www.coe.int/t/dghl/cooperation/cepej/profiles/CourtSystemGermany.pdf>

The management of the judiciary is split between the judges themselves and political authorities.<sup>7</sup> 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).<sup>8</sup> The political and administrative authorities have considerable influence over the organisation of the courts.<sup>9</sup>

## 2.2 Judicial appointments in Germany

### 2.2.1 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

### 2.2.2 Recruitment and appointments in ordinary courts

A judge will usually begin their career at a court of first instance in the employment of one of the Lander, therefore the Lander administrations has responsibility for organising recruitment.<sup>14</sup> Within the Lander the Ministry of Justice usually organises this process, however in some of the Lander appointments for the social and labour courts come within the scope of the Ministry of Labour and Social Affairs.<sup>15</sup>

---

<sup>7</sup> J Bell (2006) "Judiciaries within Europe", Cambridge University Press, 112

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> 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

<sup>11</sup> John Bell "Judicial Appointments: Some European Experience" 4 October 2003, 8

<sup>12</sup> J Bell (2006) "Judiciaries within Europe", Cambridge University Press, 115

<sup>13</sup> John Bell "Judicial Appointments: Some European Experience" 4 October 2003, 8

<sup>14</sup> J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Careers of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain" Research Institute on Judicial Systems and National Research Council, 71

<sup>15</sup> Ibid.

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 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.<sup>16</sup> 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.<sup>17</sup>

The table below (**Table 1**) sets out the recruitment process as summarised by one research report.

**Table 1: Recruitment Procedures for Judicial Appointments** <sup>18</sup>

Lander	Recruitment Procedure
<b>Baden- Wurttemberg</b>	The decision is reached on the basis of documents supplied by the candidate, the result of a final exam including all assessments during the two years practical training and an interview with the head of the Personnel Department of the Ministry
<b>Bayern</b>	The decision is reached on the basis of documents supplied by the candidate, the result of a final exam and an interview with the head of the Personnel Department of the Court
<b>Berlin</b>	Extensive interviews are conducted by the president of the regional Higher Court and the court's head of personnel department. The court then reports on these interviews to the Ministry of Justice which passes the proposal to the Judicial Electoral Committee.
<b>Brandenburg</b>	Extensive interviews are conducted by the president of the regional Higher Court and the court's head of personnel department. The court then reports on these interviews to the Ministry of Justice which then passes the proposal to the Judicial Electoral Committee.
<b>Bremen</b>	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam and interviews. An electoral Committee is also involved.

<sup>16</sup> 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" 80.

<sup>17</sup> Ibid,84

<sup>18</sup> Ibid, 80-84

<b>Hamburg</b>	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam and interviews. An electoral Committee is also involved.
<b>Hessen</b>	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral Committee is also involved.
<b>Mecklenburg-Vorpommern</b>	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.
<b>Niedersachsen</b>	The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview in the Ministry of Justice.
<b>Nordrhein –Westfalen</b>	<p>All higher regional courts in Nordrhein- Westfalen have commissions which usually consist of the president of the higher regional court usually where the vacancy has to be filled and the person responsible for equality matters. However proceedings differs in courts:</p> <p><b>Dusseldorf-</b> recruitment is based on interviews, role play and group discussion</p> <p><b>Cologne-</b> candidates give a speech, undertake a working test where they are given 10 files and are interviewed.</p> <p><b>Hamm-</b> has the most elaborate system and takes a full working day. Candidates participate in a group discussion and assess in writing their situation during the group discussion, undertake interviews and a working test. Each member of the committee individually assesses the performance of candidates. The individual assessments are presented to the commission; the results of the working test are considered by a judge and presented to the commission: the commission will made a decision based on the candidates performance throughout the day</p>
<b>Rheinland-Pfalz</b>	The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews with the Presidents of the higher court and head of the personnel department in the Ministry of Justice. Results are considered satisfactory therefore assessment centres are not used
<b>Saarland</b>	The decision is based on the basis of documents supplied by the

	candidate, the result of the final exam and extensive interviews with the Secretary of State in the Ministry of Justice , the head of the personnel department of the Ministry and representatives of the staff council
<b>Sachsen</b>	The decision is based on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews
<b>Sachsen-Anhalt</b>	The decision is based on the basis of documents supplied by the candidate and the result of the final exam.
<b>Schleswig- Holstein</b>	The decision is based on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is also involved
<b>Thuringen</b>	The decision is based on the basis of documents supplied by the candidate, the result of the final exam including the assessments during practical training and an extensive interviews

### Judicial Electoral Committees

In eight Lander 'judicial electoral committees' are involved in the process.<sup>19</sup> They are elected by a parliamentary vote, sometimes on the basis of nominations by representatives of legal professionals; they are chaired by a Minister and may include legal professionals as well as parliamentarians.<sup>20</sup> Membership varies between 11 and 15 members. Where they exist, their concurrence is required for a recruitment decision.<sup>21</sup>

**Table 2** below sets out information as summarised in a research paper on the membership of the judicial electoral committees in where they have been established.

**Table 2: Membership of Judicial Electoral Committees<sup>22</sup>**

<b>Lander</b>	<b>Membership</b>
<b>Baden- Wurttemberg</b>	<b>15 members</b> ,6 members of the Land Parliament  6 Judges (Permanent Members),2 Judges of the jurisdiction concerned,1 Lawyer, Chairperson: Minister (No voting right)

<sup>19</sup> Ibid, 71

<sup>20</sup> Ibid, 78

<sup>21</sup> Ibid, 78

<sup>22</sup> Ibid, 78 and 79

<b>Berlin</b>	<b>12 Members</b> ,6 Members of the Land Parliament (Senat),5 Judges,1 Lawyer, Chairperson: Minister
<b>Brandenburg</b>	<b>12 Members</b> ,8 Members of the Land Parliament,2 Judges,1 Judge of the jurisdiction concerned,1 Lawyer, Chairperson: Minister (No voting right)
<b>Bremen</b>	<b>11 Members</b> 5 Members of the Land Parliament (Burgerschaft),3 Ministers: Minister of Justice and 2 other Ministers,3 Judges  Chairperson: Minister competent for the court concerned
<b>Hamburg</b>	<b>15 members</b> ,6 Members of the Land Parliament (Burgerschaft),3 Ministers (Minister of Justice and 2 other Ministers),3 Judges,2 Lawyers, Chairperson: Minister appointed by The Land Parliament
<b>Hessen</b>	<b>13 Members</b> ,7 Members commissioned by the Land Parliament,5 Judges,1 President of the Bar  Chairperson: Minister of Justice (No voting right)
<b>Schleswig-Holstein</b>	<b>12 Members</b> ,8 Members of the Land Parliament,2 Judges (permanent members),1 Judge of the jurisdiction concerned,1 Lawyer  Chairperson: Minister of Justice (No voting right)  However where there is recruitment for social or labour courts there are 4 more members of the Land Parliament, 1 representative of employers and 1 representative of employees.
<b>Thuringen-</b> Committee only involved in appointments for life or promotions, not in cases of first recruitment.	<b>12 members</b> , 8 members of the Land Parliament, 3 Judges, 1 president of the Bar, Chairperson: Minister of Justice (No voting right)

### 2.2.3 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 Präsidierrat. This council gives an advisory opinion on the personality and aptitude of the candidates.<sup>23</sup> Each court system has a Präsidierrat composed of the president of the court and other judges, at least half of whom are elected.<sup>24</sup>

#### 2.2.4 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.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

### 2.3 Career Path and Promotions

While the judiciary is a career, it is not possible for every or even most judges to be promoted to the highest levels.<sup>28</sup> To compensate for the limited promotion opportunities, judicial salaries rise automatically for lower grade judges until the judge reaches the age of 49.<sup>29</sup>

There is no minimum age requirement for promotion to higher judicial office.<sup>30</sup> The judicial career commences with appointment as a junior judge, followed by a promotion for life at a court of first instance. There are possibilities for promotion above this:

<sup>23</sup> 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" 86.

<sup>24</sup> John Bell "Judicial Appointments: Some European Experiences" October 2003,8

<sup>25</sup> Ibid,9

<sup>26</sup> Ibid

<sup>27</sup> JBell (2006) "Judiciaries within Europe", 159

<sup>28</sup> Ibid 120

<sup>29</sup> Ibid,121

<sup>30</sup> 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" 101



- **First level of promotion-** judge in the higher regional court or judge in the regional court presiding over a panel or senior judge in the local court;
- **Second level of promotion-** judge in the higher regional court presiding over a panel or judge or vice-president of a regional court;
- **Higher Levels of Promotion-** Presidents of regional and higher regional courts<sup>31</sup>

Judges may apply for vacant posts when these are advertised. The decision is made by the Minister of Justice, though in many of the Lander this is preceded by a recommendation of a judicial selection committee, on which sit representatives of the judges and the legislature.<sup>32</sup> The Lander have introduced a requirement for at least the first level of promotion to undertake a “trial period” in the higher regional court which is used to assess a judge’s suitability for higher judicial office.<sup>33</sup>

There are possibilities for judges to gain experience outside of their normal judicial assignment. Some judges may seek secondment as a court clerk in one of the Federal Supreme Courts or Constitutional Court. Other judges may seek a secondment in the Lander or Federal Ministries of Justice.<sup>34</sup>

At federal level, the judicial selection committee (see above) does not advise on promotions, however there is advice from the Präsidentsrat (see above).<sup>35</sup>

Compulsory retirement for judges is 65 years both in the federal judiciary and for judges of the Lander. On retirement, the majority of judges will have reached at least the first level of promotion.<sup>36</sup>

## 2.4 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.<sup>37</sup> The legislation requires that discharge from office on the first three grounds can only be

<sup>31</sup> 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” 99

<sup>32</sup> J Bell (2006) “Judiciaries within Europe”, 120

<sup>33</sup> 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” 101

<sup>34</sup> J Bell (2003) “Judicial Appointments: Some European Experiences”, 8; J Bell (2006) “Judiciaries within Europe”, 120, 121, 123

<sup>35</sup> Ibid, 8

<sup>36</sup> 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” 95.

<sup>37</sup> Art 30 (1) of the German Judiciary Act [http://www.gesetze-im-internet.de/englisch\\_drjg/englisch\\_drjg.html](http://www.gesetze-im-internet.de/englisch_drjg/englisch_drjg.html)

ordered by a judicial decision.<sup>38</sup> 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.<sup>39</sup> However dismissal of a judge is rare.<sup>40</sup>

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.<sup>41</sup>

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).

## 2.5 Judicial Diversity

The numbers of women who have become judges has significantly increased in recent years. In 1970 6% of the judiciary were women. In 2002, just over 30% of the judiciary were women.<sup>42</sup> However research has highlighted that there are difficulties for women in gaining promotion as candidates would have to seek trial periods of secondment which can be far from home and consequently many women do not consider promotion.<sup>43</sup> Ethnic minority judges are a rarity in the judiciary in Germany as there is a minimum condition for those who hold judicial office to be a German national.<sup>44</sup>

---

<sup>38</sup> Article 30 (2) of the German Judiciary Act

<sup>39</sup> Riedel, 111

<sup>40</sup> J Bell (2006) *Judiciaries within Europe*. 124

<sup>41</sup> A Seibert- Fohr "Constitutional Guarantees of Judicial Independence in Germany" [http://www.mpil.de/shared/data/pdf/constquarantjudindep\\_germany.pdf](http://www.mpil.de/shared/data/pdf/constquarantjudindep_germany.pdf)

<sup>42</sup> J Bell (2006) *Judiciaries in Europe*, 118

<sup>43</sup> *Ibid* at 120

<sup>44</sup> *Ibid*.

### 3 The court system in the United States

This section provides information on the court system in the United States. It contains an overview of the federal and state court structures; it then highlights the various methods used for judicial selection at both levels of the judicial system; a final section notes the methods for removal of judges at federal and state levels.

#### 3.1 Overview of the federal and state court structures

##### Federal courts

There are two types of federal courts. The first type are known as Article 3 courts by virtue that they derive their power from Article 3 of the United States Constitution. These courts include:

- the U.S. District Courts
- the U.S. Circuit Courts of Appeal
- the U.S. Supreme Court
- the U.S. Court of Claims
- the U.S. Court of International Trade<sup>45</sup>

All judges of Article III courts are appointed by the President of the United States with the advice and consent of the Senate. These judges hold office during good behaviour. The Constitution does not require that federal judges have law degrees, although, as a practical matter in the modern era, this is considered to be a minimum requirement<sup>46</sup>.

The second type of federal court is those established by Congress:

- magistrate courts
- bankruptcy courts
- the U.S. Court of Military Appeals
- the U.S. Tax Court
- the U.S. Court of Veterans' Appeals

The U.S. Court of Military Appeals, U.S. Tax Court and U.S. Court of Veterans' Appeals are called Article I or legislative courts. The judges of these courts are also appointed by the

---

<sup>45</sup> The Court of Claims and Court of International Trade are deemed 'special' courts because they are not courts of general jurisdiction.

<sup>46</sup> American Constitution Society, 'Path to the Federal Bench', May 2011

President with the advice and consent of the Senate but hold office for a set number of years, usually about 15<sup>47</sup>.

### **US District Courts**

There are 94 U.S. District Courts in the United States. Every state has at least one district court, and some large states, such as California, have as many as four. Each district court has between 2 and 28 judges. The U.S. District Courts are trial courts, or courts of original jurisdiction. This means that most federal cases begin here. U.S. District Courts hear both civil and criminal cases<sup>48</sup>.

### **U.S. Circuit Courts of Appeal**

There are 13 U.S. Circuit Courts of Appeal in the United States. These courts are divided into 12 regional circuits and sit in various cities throughout the country. The U.S. Court of Appeals for the Federal Circuit (the 13th Court) sits in Washington<sup>49</sup>.

### **U.S. Supreme Court**

The Supreme Court of the United States is the highest court in the land. It is made up of nine judges, known as justices, and is presided over by the Chief Justice. Parties who are not satisfied with the decision of a U.S. Circuit Court of Appeal (or, in rare cases, of a U.S. District Court) or a state supreme court can petition the U.S. Supreme Court to hear their case. This is done mainly by a legal procedure known as a Petition for a Writ of Certiorari. The Court decides whether to accept such cases<sup>50</sup>.

## **State courts**

Although no two state court systems are exactly alike, there are sufficient similarities to draw broad comparisons. Most state court systems are made up of:

- two sets of trial courts: trial courts of limited jurisdiction (probate, family, traffic etc.) and trial courts of general jurisdiction (main-level trial courts)
- intermediate appellate courts (in many, but not all, states)
- highest state courts (called by various names)

Unlike federal judges, most state judges are not appointed for life but are either elected or appointed (or a combination of both) for a certain number of years<sup>51</sup>.

The following table provides an overview of the federal and state court systems.

---

<sup>47</sup> <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>

<sup>48</sup> As above

<sup>49</sup> <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>

X

<sup>50</sup> As above

<sup>51</sup> <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>

**Table 3: Overview of federal and state courts systems**<sup>52</sup>

Federal Court System	State Court system
<b>Structure</b>	
Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts	The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts.
Congress has used this power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.	States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc
Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.	Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals
A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.	Parties have the option to ask the highest state court to hear the case.
	Only certain cases are eligible for review by the U.S. Supreme Court.
<b>Selection of judges</b>	
The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behaviour, typically, for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehaviour.	State court judges are selected in a variety of ways, including election appointment for a given number of year appointment for life combinations of these methods, e.g., appointment followed by election.
<b>Types of cases heard</b>	
<ul style="list-style-type: none"> <li>• Cases that deal with the constitutionality of a law;</li> <li>• Cases involving the laws and treaties of the U.S.;</li> <li>• Ambassadors and public ministers;</li> <li>• Disputes between two or more states;</li> <li>• Admiralty law, and</li> <li>• Bankruptcy</li> </ul>	<ul style="list-style-type: none"> <li>• Most criminal cases, probate (involving wills and estates),</li> <li>• Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc.</li> </ul> <p>State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.</p>
<b>Article I Courts</b>	
<b>Congress has created several Article I or legislative courts that do not have full judicial power.</b> Judicial power is the authority to be the final decider in all questions of Constitutional law, all questions of federal law and to hear claims at the core of habeas corpus issues.	N/A

<sup>52</sup> <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx>

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>Article I courts are U.S. Court of Veterans' Appeals, the U.S. Court of Military Appeals, and the U.S. Tax Court.</li> </ul> |  |
|---|--|

## 3.2 Selection of Judges

### Judicial nominations and confirmations at the federal level

Article 2, section 2 of the United States Constitution gives the President the power to appoint judges to the Supreme Court:

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<sup>53</sup>.

Therefore “Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate, as stated in the Constitution. The names of potential nominees are often recommended by senators or sometimes by members of the House who are of the President's political party. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee. Article III of the Constitution states that these judicial officers are appointed for a life term”<sup>54</sup>.

### Role of Home State Senators in the selection of lower Federal Court Judges

There is a long-standing custom that Senators of the President's party play the primary role in selecting candidates for the President to nominate to federal district court judgeships in their states<sup>55</sup>. They may also influence the choice of candidate for federal circuit court judgeships associated with their states. If the Senators are not members of the President's party they may still communicate their views about candidates under consideration for judgeships in their states:

By custom, when neither of a state's Senators is of the President's party, the primary role in recommending candidates for district court judgeships is assumed by officials in the state who are of the President's party. Historically, in the absence of a Senator of the President's party, the state official or officials who most frequently have exercised the judicial “patronage”

<sup>53</sup> <http://www.usconstitution.net/const.html#Article3>

<sup>54</sup> <http://www.uscourts.gov/Common/FAQS.aspx>

<sup>55</sup> <http://www.fas.org/sqp/crs/misc/RL34405.pdf>

function have been the most senior member, or one of the most senior members, of the party's House of Representatives delegation, the House party delegation as a whole, the governor, or state party officials<sup>56</sup>.

### **Criteria used by the President to select candidates**

Research carried out on behalf of the US Congress addressed the issue of the criteria used by Presidents to appoint federal judges. The following is a summary of the paper:

In recent decades, various Presidents have issued guidelines or made public statements regarding the qualification standards that their judicial nominees must meet. Virtually every President has emphasized the importance of a nominee meeting high professional standards and having the ability to be impartial as a judge. At the same time, each President has underscored that judicial nominees must conform with the basic values or ideals that the President believes are inherent in the Constitution, as well as with the President's views of what a judge's fundamental role and priorities should be in the US's constitutional system.

A President may state the importance of a judiciary reflecting gender and ethnic balance. A Senator will probably take such statements into account when putting forward a candidate.

The starting point for any nomination will usually be that the candidate is suitably qualified in respect of his or her professional qualifications and integrity, reflected in the "custom to appoint lawyers who have distinguished themselves professionally – or at least not to appoint those obviously without merit. Therefore, a candidate can usually expect to be evaluated by a local or state bar association or an informal or formal panel of lawyers. Once recommended to the White House, the candidate can expect to be subject to further rigorous scrutiny, including an exhaustive examination of their legal qualifications by the American Bar Association's Standing Committee on the Federal Judiciary<sup>57</sup>. This Committee "believes that a prospective nominee to the federal bench ordinarily should have at least 12 years' experience in the practice of law"<sup>58</sup>.

In recent years, debate has arisen about the extent to which home state Senators should have a role in determining successful candidates for judicial positions:

- Do Presidential Administrations engage seriously with home state Senators?
- Should home state Senators always have the opportunity to offer their opinion on a judicial candidate before he or she is appointed?
- How differently should Administrations treat the views of home state Senators, depending on their party affiliation?

Should the Policy of the Judiciary Committee Allow a Home State Senator to Block Committee Consideration of a Judicial Nominee?

---

<sup>56</sup> As above

<sup>57</sup> <http://www.fas.org/sgp/crs/misc/RL34405.pdf>

<sup>58</sup> American Bar Association Standing Committee on the Federal Judiciary: What it is and how it works: [http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal\\_judiciary09.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf)

## Senate Committee on the Judiciary

The website of the Committee provides an overview of the appointments process for 'Article 3' courts (those courts defined in Article 3 of the US Constitution):

- Judicial nominations for all Article III courts that are sent to the Senate for consideration by the President are referred to the Senate Judiciary Committee. These include nominations for the U.S. Supreme Court, the U.S. Courts of Appeals, U.S. District Courts, and the Court of International Trade
- Pursuant to the Constitution, nominations for the Supreme Court, Courts of Appeals and District Courts are made by the President and confirmed by the Senate
- Potential nominees are sometimes identified and recommended by members of Congress. Nominees confirmed by the Senate are appointed for lifetime terms
- After a nomination is received by the Senate and referred to the Judiciary Committee, the Committee typically conducts a confirmation hearing for each nominee. Before a hearing can be scheduled in the Committee, however, nominees are expected to complete a comprehensive questionnaire
- The American Bar Association's Standing Committee on the Federal Judiciary also provides an evaluation of the professional qualifications of a judicial nominee. These ratings provide an evaluation of a nominee's integrity, professional competence and judicial temperament. They are not an evaluation of a nominee's philosophy or ideology
- During a hearing, judicial nominees engage in a question and answer session with members of the Judiciary Committee. After the hearing, Committee members may send written follow-up questions to the nominee. After the completion of any follow-up questions, a nomination can then be listed for Committee consideration during an Executive Business Meeting
- Should the Committee order a nomination reported, the nomination is placed on the Senate's Executive Calendar where it would await consideration by the full Senate. If a majority of the Senate votes in favour of a nomination, the President is notified of the Senate's action, and the nomination is confirmed

The President can also make what are known as 'recess appointments', "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<sup>59</sup>."

The Senate usually confirms Presidential appointees to the Supreme Court:

---

<sup>59</sup> Article 2, Section 2, Clause 3 of the United States Constitution



Since the appointment of the first Justices in 1789, the Senate has confirmed 123 Supreme Court nominations out of 159 received. Of the 36 nominations which were not confirmed, 11 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate. Six of the unconfirmed nominations, however, involved individuals who subsequently were re-nominated and confirmed<sup>60</sup>.

The contemporary Senate's inclination to proceed more slowly with Supreme Court nominations has been due at least in part to several developments:

Starting with the "Warren Court" in the 1950s (under then-Chief Justice Earl Warren), the Supreme Court became an ongoing focal point of controversy, as it handed down a succession of rulings ushering in profound changes in American society and politics. By the late 1960s, the perceived potency of the Court as a catalyst for change underscored to many Senators, especially those on the Judiciary Committee, the importance of closely evaluating the attitudes and values of persons nominated to serve on the Court.

A general trend among Senate committees, beginning in the 1970s and 1980s, was to intensify their scrutiny of presidential nominations and to augment their investigative staffs for this purpose. Thorough and unhurried examination was regarded as especially justified in the case of Supreme Court nominations. Accordingly, close scrutiny by the Senate Judiciary Committee became the norm, even if a nominee were highly distinguished and untouched by controversy.

Many, if not most, of the nominees in recent decades proved to be controversial because of questions raised concerning their backgrounds, qualifications, or ideological orientation.

It has become increasingly common for Presidents to state the philosophical or ideological values that they look for in a Supreme Court nominee—a practice which may immediately raise concerns about the nominee on the part of Senators who do not share the President's philosophical preferences or vision for the Court<sup>61</sup>.

### **The creation of new judgeships at the federal level**

Court of appeals and district court judgeships are created by legislation that must be enacted by Congress. The Judicial Conference (through its Judicial Resources Committee) surveys the judgeship needs of the courts every other year. A threshold for the number of weighted filings per judgeship is the key factor in determining when an additional judgeship will be requested. Other factors may include geography, number of senior judges, and mix of cases. The Judicial Conference presents its judgeship recommendations to Congress.

---

<sup>60</sup> <http://www.fas.org/sgp/crs/misc/RL31989.pdf>

<sup>61</sup> As above

## Appointment of chief judges

A judge is not nominated or appointed to the position of chief judge (except for the Chief Justice of the United States); they assume the position based on seniority. The same criteria exists for circuit and district chiefs. The chief judge is the judge in regular active service who is senior in commission of those judges who are (1) 64 years of age or under; (2) have served for one year or more as a judge; and (3) have not previously served as chief judge<sup>62</sup>.

## Selection of judges at state level

According to the Institute for the Advancement of the American Legal System (University of Denver) there are five basic methods that states use to select judges and “no two states use exactly the same selection method”. Furthermore, “In many states more than one method of selection is used – for judges at different levels of the court system and even among judges serving at the same level. And when the same method is used, there are still variations in how the process works in practice”. The five methods can be summarised as follows<sup>63</sup>:

- **Commission-based appointment (also known as ‘merit selection’, the ‘Missouri Plan’, or the ‘Nonpartisan Court Plan’):** process by which judicial applicants are evaluated by a nominating commission, which then sends the names of the best qualified candidates to the Governor. The Governor appoints one of the nominees submitted by the commission. A judge appointed using this method will at some point be subject to a referendum asking voters whether they want him or her to continue.
- **Contested election:** an election in which multiple candidates may seek the same judicial position. Voters cast ballots for judicial candidates as they do for other public officials
  - **Non-partisan election:** an election in which a judicial candidate’s party affiliation, if any, is not designated on the ballot
  - **Partisan election:** an election in which candidates run for a judicial position with the official endorsement of a political party. The candidate’s party affiliation is listed on the ballot.
- **Gubernatorial appointment:** the process by which a judge is appointed by the Governor (without a judicial nominating commission). The appointment may require confirmation by the legislature or an executive council
- **Legislative appointment/election:** the process by which judges are nominated and appointed or elected by legislative vote only

### Merit selection (The Missouri Plan)

<sup>62</sup> <http://www.uscourts.gov/Common/FAQS.aspx>

<sup>63</sup> [http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail\\_A2E54457CD359.pdf](http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf)

The Nonpartisan Selection of Judges Court Plan (the Missouri Plan) was adopted by Missouri in 1940 to overcome the control of judicial selection by political machines and party bosses. It has served as a model for the thirty-four other states that use merit selection to fill some or all judicial vacancies<sup>64</sup>. The Plan:

involves the creation of a nominating commission that screens judicial candidates and submits to the appointing authority (such as the governor) a limited number of names of individuals considered to be qualified. The appointing authority chooses from the list, and any one so chosen assumes the judgeship for a probationary period. After this period the judge stands for popular election for a much longer term, not competing against other candidates but basing his candidacy on previous judgments. Under the Missouri Plan, voters decide whether or not to retain the judge in office<sup>65</sup>.

There are five basic steps in the appointive process:

- Advertising the judicial vacancy
- Receiving applications by interested candidates
- Vetting and interviewing prospective candidates by the nominating Commission
- Formulating a shortlist of recommended names to the Governor
- Nomination by the Governor of a person from the list to fill the vacancy<sup>66</sup>

However, there is no uniformity within this approach:

- in some states, every applicant is entitled to an interview whereas in other states only those applicants who are likely to make it to the final shortlist are called
- in some states, the Governor's choice is final. In others, the legislature must consent to the appointment<sup>67</sup>

### **Who chooses the Commissioners?**

Commissioners are usually chosen by “panels of public officials, attorneys, and private citizens. The panels may include the governor, the attorney general, judges of the state’s highest court, bar association officers, private citizens, and in some instances, members of the state legislature”...Currently “two-thirds of the states and the District of Columbia select some or all of their judges under the merit system”<sup>68</sup>.

The following are some advantages and disadvantages of merit selection<sup>69</sup>:

<sup>64</sup> [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=MO](http://www.judicialselection.us/judicial_selection/index.cfm?state=MO)

<sup>65</sup> <http://www.britannica.com/EBchecked/topic/385765/Missouri-Plan>

<sup>66</sup> [http://brennan.3cdn.net/31e6c0fa3c2e920910\\_ppm6ibehe.pdf](http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf)

<sup>67</sup> As above

<sup>68</sup> [http://www.judicialselection.us/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf)

<sup>69</sup> Inside ALEC, Journal of the American Legislative Exchange Council, March 2011

### **Advantages**

- lawyers who sit on merit selection panels are better equipped to assess the qualifications of judges than voters because they know more about the law
- judges are not reliant on the executive, legislature or the public to keep their job
- judges do not have to compromise themselves by running for election and seeking campaign contributions

### **Disadvantages**

- lawyers are not representative of the public, and the judges they select will reflect the preferences of lawyers rather than the public. There is a belief that as lawyers are generally more liberal than the wider public, this will be reflected in their judicial selections
- merit selection panels may nominate friends or colleagues over people they know to be more qualified

### **Elections**

Previous research has found that:

Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns<sup>70</sup>.

### **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"<sup>71</sup>. Nevertheless, polling suggests that citizens in the states that use elections are reluctant to change to a different system.

As of 2010:

- 32 states use contested elections (either partisan or non-partisan) to pick judges for at least some level of their courts
- 21 states elect all judges
- 25 additional states use the merit selection system

---

<sup>70</sup> [http://www.fjc.gov/public/pdf.nsf/lookup/Judlndep.pdf/\\$file/Judlndep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Judlndep.pdf/$file/Judlndep.pdf)

<sup>71</sup> Trends in Judicial Selection in the States, McGeorge Law Review, Vol 42, 2010

- A handful of states have adopted some form of the federal system, whereby judges are selected by the Governor and are subject to a confirmation hearing in the state senate
- In two states, Virginia and South Carolina, the legislature selects the judiciary<sup>72</sup>

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"<sup>73</sup>. 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<sup>74</sup>.

Other advantages of judicial elections include:

- **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
- **Performance accountability:** corrupt and incompetent judges can be more easily removed through elections
- **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<sup>75</sup>

## Cost

Reports have shown that spending on state high court elections has more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009<sup>76</sup>.

## 3.3 Removal of Judges

### Federal Judges

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

<sup>72</sup> As above

<sup>73</sup> <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>

<sup>74</sup> [http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=2&\\_r=2](http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=2&_r=2)

<sup>75</sup> Inside ALEC, Journal of the American Legislative Exchange Council, March 2011

<sup>76</sup> [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/report\\_interest\\_groups\\_dominate\\_judicialection\\_spending?show=news&newsID=11949](http://www.justiceatstake.org/newsroom/press_releases.cfm/report_interest_groups_dominate_judicialection_spending?show=news&newsID=11949)

## 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<sup>77</sup>.

The methods can be summarised as follows<sup>78</sup>:

### 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 whether to convict. Grounds for impeachment often include terms such as "malfeasance," "misfeasance," "gross misconduct," "gross immorality," "high crimes," "habitual intemperance," and "maladministration."

### 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.

### Recall Election

A few states allow for judges to be removed from office by recall election. Judges may be subject to recall for serious offenses, 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.

### 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.

---

<sup>77</sup> [http://www.ajs.org/ethics/eth\\_impeachment.asp](http://www.ajs.org/ethics/eth_impeachment.asp)

<sup>78</sup> As above

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.

### 3.4 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<sup>79</sup>. The report found that:

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

## 4 Conclusions

This paper provides information in the process of judicial appointments, promotions and removals in Germany and the United States. Both are federal states but have different approaches to the appointment of judges. In Germany, the majority of judges are career judges who join the judiciary early in their career and spend their entire working life in it. Somebody who has completed the Second State Examination in Law can apply to become a judge. The decision on appointment is made by an executive Minister; in about half the Lander there are judicial selection committees that also participate in the decision on recruitment. There are different procedures in place for the selection of judges; judges on the federal constitutional court are elected by the members of the Federal Parliament.

---

<sup>79</sup> [http://www.brennancenter.org/content/resource/diversity\\_report/](http://www.brennancenter.org/content/resource/diversity_report/) Arizona, Colorado, Florida, Maryland, Missouri, New Hampshire, New Mexico, Rhode Island, Tennessee and Utah. The states were chosen to reflect different demographics and various legal environments.

Members of the career judiciary can apply for a promotion when a suitable vacancy is advertised. The decision on promotion is made by the relevant Executive Minister, though there is often provision for a judicial selection committee to make a recommendation to the Minister. Decisions on discipline and removal are tightly regulated and any decision on discipline and removal is made by a judicial body.

In the United States, there are two types of courts: Federal and State courts. Federal court judges are appointed by the President of the United States with the advice and consent of the senate. There is great variation as to how state court judges are appointed. In many states some form of election is used. In other states, there are merit appointments based on the work of a nominating commission;. Some states use a version of the federal appointments system, while there are a couple of states in which the legislature elects the judges.

Federal judges are appointed for life subject to the possibility of Congressional impeachment for misbehaviour. The vast majority of state judges are not appointed for life, but for a term. There are different methods in the states for removing judges from office. These include: impeachment proceedings, recall elections, legislative address and judicial conduct commissions.