



**The 6th Asian Roundtable on Corporate
Governance**

***Implementation and Enforcement in
Corporate Governance***

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The views expressed in this paper are those of the author and do not necessarily represent the opinions of the OECD or its Member countries or the World Bank

Introduction

It is my pleasure and honor to be here, and I thank the organizers at for putting together such a valuable and interesting program. In my remarks, about the selection and training of judges, I will give a brief overview of our court system in the United States, then discuss, again very briefly, the jurisdiction of courts over matters relating to corporate governance. After that, I will describe in somewhat greater detail the selection processes for judges, and training systems for them.

The court system of the United States consists, basically, of federal courts and state courts. Not counting other bodies and agencies that exercise adjudicatory functions of some kind,¹ there are fifty-one court systems in the United States: the federal courts and courts in each of the fifty states.² While the structure varies, generally, these systems consist of a high court (the Supreme Court in the federal system), courts of appeals (Circuit Courts of Appeals in the federal system), and courts of first instance or (“District Courts” in the federal system).

In the federal court system the district, or trial level, courts are courts of general jurisdiction. Judges on these courts do not specialize in any particular field of law or litigation. Cases are randomly assigned and each judge is expected to, and does, handle the full range of cases, from criminal trials to civil suits concerning torts, contracts, property – and corporate governance. Many areas of law are left to the states – that is, “federal law” is not involved. This is true, for example, of most crimes, contracts and torts. This allocation of responsibility is reflected in the number of judges in each system: there are fewer than 2000 federal judges, while there are about 30,000 state judges. In some state courts judges do specialize; for example, some state court judges hear nothing but criminal cases, or family law cases. I should also note that federal courts occasionally hear what are normally matters of state law – when, for example, the parties are from different states.

As I will discuss below, the states differ from the federal government, and from each other, in the processes by which judges are selected, and in the systems under which they may be trained. Advantages and disadvantages accrue to each of the different approaches. I will discuss some of these, and I’m sure you will conceive of others on your own. My point is not to suggest that any one way is superior, but to present these alternatives for your consideration and analysis.

¹ For purposes of brevity, I have omitted any discussion of other courts (for example, military courts and Native American courts) in the federal government, and of various administrative courts that exercise judicial functions in the federal and state governments but which are usually part of the executive branch.

² For simplicity’s sake, I have also omitted the courts of the District of Columbia, which are technically part of the federal system, but also have attributes more like those of state courts.

A key point to be made here at the outset is this: judges in both the federal and state courts do not usually have significant experience or training in legal issues relating to corporate governance.

The Jurisdiction and Role of Courts in Corporate Governance

Corporate governance is a matter of both federal and state law. Almost all corporations in the United States are incorporated under the laws of one of the states. Although the rules are fundamentally similar, specific requirements for incorporation and for the operation of the company vary from state to state. Moreover, corporations (like all businesses) are subject to the general laws (criminal, contract, tort, property, etc.) of a state and are liable to suit in any state in which they do business – and the threshold for “doing business” is fairly low. So a corporation may, and often does, find itself a party in states other than its state of incorporation. Such suits may be, and often are, filed in or transferred to a federal court where they involve “diversity of (state) citizenship,” that is, where the litigating parties are each from different states. In addition, a substantial body of federal law, particularly “securities” law, and also more general laws, such as fraud statutes, applies to corporate governance.

Corporations are subject to regulation and oversight by administrative agencies at both the state and federal level. The federal Securities and Exchange Commission (SEC) is one of the best-known examples of this. In some cases, such agencies have their own administrative adjudicatory procedures, but as a general rule enforcement actions must be brought in state or federal court.

State or federal prosecutors, depending on which laws have been violated, may bring criminal prosecutions. In many cases involving alleged corporate malfeasance, both federal and state law is alleged to have been violated, in which case, either or both the federal and state government may elect to prosecute. In some recent well-known cases, for example, several of the officers of the Enron Corporation are being prosecuted in federal courts for fraud and securities violations, while the Attorney General of the State of New York has prosecuted several Wall Street brokerage houses in state court.

Federal or state administrative agencies, such as the SEC, may bring civil enforcement actions against corporations. Private parties may also sue corporations in state or federal court. These private parties may be current shareholders, or persons who previously bought or sold a company’s stock, for example. Corporate employees, sometimes called “whistleblowers” also bring suits – some provisions in U.S. law encourage them to do so and protect them from retaliation by the company.

In sum, matters relating to corporate governance are subject to litigation in both federal and state courts, under a wide variety of causes of action. With rare exceptions, such cases are tried in courts of general jurisdiction, and not in courts that specialize in corporate governance.

The Selection Process for Judges

The appointment process for federal judges is established in the U.S. Constitution. The President nominates, and with the “Advice and Consent” of the Senate appoints, judges. Under Article III of the Constitution, these judges hold their offices during “good behavior,” that is, for life, unless they voluntarily step down or are removed by impeachment.³ Other than these basic Constitutional provisions, the details of the nomination process are not prescribed by law. There is no prescribed course of study, no qualifying examination, and no established career ladder as a prerequisite to appointment. The standards and the process that exist are products of precedent and habit, not law.

In practice, all persons appointed to be federal judges have a law degree and have practiced or taught law for a substantial period before becoming judges. In fact, almost invariably persons appointed to the federal bench have had distinguished legal careers as teachers, lawyers, and, in some cases, as judges in other courts. The average age at appointment is about fifty years old.

Before nomination, the President typically receives suggestions from the Senators in the state where a vacancy occurs. Many Senators have established their own screening committees for this purpose. The President’s office of legal counsel usually investigates potential nominees, including an interview with the potential nominee. The Federal Bureau of Investigations is tasked to do a background investigation on each potential nominee. Once the President nominates someone, the Senate conducts its own inquiry. This will include an appearance by the nominee before the Senate Judiciary Committee. During the same period, the American Bar Association is asked to review the nominee’s qualifications.

The appointment process for federal judges is not apolitical. Presidents usually nominate persons who are members of their own political party, and many judges have been active participants in the political process prior to appointment. The Senators from each state have a substantial voice in who gets nominated – at least those Senators who are of the same political party as the President. Moreover, because of parliamentary practices in the U.S. Senate, each Senator can effectively prevent a nominee from his or her state from being confirmed.

The nomination and confirmation process has become even more political in recent years. Political and social trends in the U.S., including increasingly active “special

³ In the history of the United States, seven judges have been removed by impeachment. I should note that, in addition to the Supreme Court Justices, and judges of the circuit courts of appeals and district courts, who all serve “on good behavior,” Congress has also provided for bankruptcy and magistrate judges. Bankruptcy judges are appointed by the circuit courts of appeals to fourteen-year terms, and preside over bankruptcy cases under the authority of the district court. Magistrate judges are appointed by the district court to eight-year terms and preside over a variety of pretrial matters in civil and criminal cases; they may not try criminal cases (except for very minor infractions) and may try civil cases only with the consent of the parties. The discussion in the text refers only to court of appeals and district judges, unless otherwise specifically noted.

interest groups,” as well as a nearly even split in political party representation in the Senate, have resulted in contention and even stalemate over a number of nominations, especially to the courts of appeals. One reason interest groups have paid increased attention to the judicial selection process has been the courts’ tendency to decide cases with broad social policy implications about which there are substantial divisions in public opinion. Examples include abortion rights, the death penalty, the rights of certain groups, such as gays and lesbians, and church-state issues such as prayer in school. The important role that courts have played in shaping the law in areas like these has led supporters and opponents of various causes to pay more careful attention to potential nominees, and to consider not only the potential nominee’s legal ability but his or her likely position on matters of concern to that group.

As I mentioned earlier, most persons appointed to the federal bench have had distinguished careers in the practice or teaching of law, or as judges in other courts. As a consequence, most judges arrive on the bench with extensive knowledge of one or a few areas of law, but with little or no experience in most of the areas of law to which they will be exposed. Moreover, many will have litigation experience in criminal or civil cases but not both, and some have little or no litigation experience at all. This becomes important when considering training for new judges, which will be discussed below.

In contrast to federal judges who are appointed to what is, essentially, life tenure, most states rely on elections to select judges, and service is for a term of years. Only a few states use appointments exclusively. In some states, the governor appoints judges initially, but the judges must then stand for election after a few years. In other states, judges must be elected initially, and stand for reelection periodically. In some cases, sitting judges run unopposed in “retention” elections. Even in such cases there have been instances of judges being not retained – including several highly publicized cases in which judges had taken unpopular positions. In some states, elections are “non-partisan,” that is, no political party affiliation is involved; in other states, judicial elections are partisan, like elections to any other office.

Just as the nomination and confirmation process for selecting federal judges has become more political in recent years, so has the process for selecting state judges. In those states in which judges are elected, political parties and special interest groups have taken a more active interest in judicial elections, and judicial candidates have found it necessary to actively campaign, and to raise money for doing so. Furthermore, in some states judicial candidates have been bolder in staking out positions on matters that may be litigated before them.

In 2002, this process was accelerated when the U.S. Supreme Court held unconstitutional state laws restricting what candidates for judicial office could say about controversial issues that might come before them.⁴ The Supreme Court found that such

⁴ Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

restrictions, although designed to preserve judicial impartiality and independence, violated the free speech rights of the candidates under the Constitution.

Federal and state judges are governed by ethical rules. One purpose of these rules is to separate and insulate judges from the political process through which they attained the office. The federal courts and each state court system have their own set of rules. These contain many similarities – most are based on model codes developed by the American Bar Association – but there are differences as well. Some important differences derive from the selection process, that is, in states where judges are elected, the rules may permit some degree of political activity. By contrast, the federal rules (and those of some states) prohibit judges from any participation in political activities (except exercising the right to vote). Some of the rules have been prescribed by legislation, but the judicial branches on their own have adopted most.

In addition to rules prohibiting, or at least restricting, political activity, the judicial ethics codes include requirements designed to foster the appearance, as well as the reality, of impartiality. For example, the Code of Conduct for federal judges prohibits a judge from hearing a case in which he or she has a financial interest. Consequently, if a judge owns a single share of stock in a company that is a party, the judge may not sit on the case.

Enforcement of these ethical rules is usually an internal matter within the judicial branch. In the federal courts, the chief judge of each circuit receives any complaints or allegations of ethical violations by a judge in that circuit. The chief judge may refer serious allegations to the circuit judicial council – a body of appellate and district judges that varies in size from circuit to circuit. The council may gather evidence and recommend appropriate action. Sanctions for a violation may include an admonition or reprimand, and, in some severe cases, temporary suspension from hearing some or all cases. Removal from the bench can only occur through the impeachment process in the federal system. Usually, the embarrassment of being cited for an ethical violation is adequate punishment. Possible ethical violations may also be the source of appellate litigation where they are alleged to have had an effect on the fairness of the proceedings. Most state courts systems have similar processes for enforcing ethical rules. Of course, where judges must seek reappointment or reelection, a record of one or more ethical violations can be a serious handicap.

I won't go into the history of how we reached these two very different selection procedures – appointment for life in the federal courts, election for a term of years in most state courts. Suffice to mention here that there remains considerable debate about the merits of the two systems. Basically, the argument comes down to priorities – independence or accountability.

Proponents of judicial elections argue that in a democracy, judges should be accountable to the public. In other words, they say it is undemocratic to give the final say over important policy matters to unelected officials. They say there should be a way,

short of the extreme step of impeachment, to remove an incompetent judge. They also contend that elected judges enjoy substantial independence during their terms in office and observe that judges are subject to ethical rules that oblige them to be fair and impartial. Those who favor judicial elections observe that there is little empirical data to suggest that judges are unduly influenced by the prospect of elections.

Proponents of appointment for life (or, at the very least, extremely lengthy) tenure counter that the role of the judge differs from that of the legislator or executive: judges must apply the law even when it is unpopular to do so. For that to happen, judges must be independent, that is, institutionally insulated from public opinion, at least in the short term. Those who favor appointment also place great emphasis on the appearance of impartiality. They say that while elected judges may in fact make decisions without regard to their reelection prospects, the appearance of concern about reelection prospects (and currying favor with past or potential donors of campaign funds) cannot help but erode confidence in judicial impartiality. With regard to the “incompetent” judge, proponents of appointment for life say that determining who is “incompetent” is very subjective and susceptible to abuse. As to accountability, proponents of appointment for life also point out that even life tenured judges are not completely insulated from public opinion. Elected legislators can change the laws that judges interpret. Even the Constitution can be amended, although in the U.S. that is an intentionally difficult process that has been used sparingly in our history. Moreover, because the public elects the officials who will nominate and confirm the judges, over time the make up of the bench is affected by electoral trends.

It’s interesting to note that proponents of both views tend to accept the basic proposition that courts play a critical role in protecting individual rights and are a critical check on the power of the other two branches. Further, neither side seems to quarrel with the idea that judicial authority depends on the respect of the public. Fortunately, in the United States there seems to be a large measure of respect and appreciation for the role of the judiciary, notwithstanding occasional vehement criticism of individual judges and their decisions. The debate has focused on which selection method is most conducive to maintaining that respect, not on whether it is needed.

Personally, I favor appointment for life, but there is little sign that either system will change soon. The American Bar Association – the largest national association of lawyers in the U.S. – has recently argued for abolition, or at least reform, of the electoral process for judges. These efforts have met with little success.

To sum up about the selection and appointment process for judges, let me make several points. First, the federal and state governments use different systems – appointment for life in the federal government, election for a term of years in most states. Each approach has advantages and disadvantages. Second, in neither system are there formal prerequisites to becoming a judge. Third, in practice persons elected or selected to be judges are almost always lawyers who have practiced or taught law; usually such persons have had distinguished careers in the law. Fourth, although judges reach their

office through some kind of a political process, ethical rules require judges to be, and to endeavor to appear to be, fair and impartial; among other things, these ethical rules prohibit or restrict judges from engaging in political activities. Finally, the vagaries of the processes are such that most judges are likely to come to the bench with an extensive background in no more than one or two major areas of law; few judges are likely to have had an extensive background in legal issues relating to corporate governance.

Judicial Education

Judicial education or training is a matter of relatively recent vintage in the U.S. Until the last half of the Twentieth Century, little thought was given to training specifically aimed at judges. During the last fifty years the federal government and many states have developed institutions and programs for the education of judges and, in many cases, for court staff as well.⁵

For the federal judiciary, the agency for education and research is the Federal Judicial Center, where I work. Most states have their own judicial education organizations and programs. These vary greatly in resources and scope; the differences are driven largely by limited funding. A variety of other public, semi-public, and private organizations provide education aimed entirely or primarily at judges and court employees. For example, the National Judicial College in Nevada is a privately funded national institution providing judicial education to judges from across the country. In addition, bar associations, such as the American Bar Association, and some law schools have developed educational programs that are exclusively or predominantly designed for judges.

I will focus on the education of federal judges by the Federal Judicial Center (FJC). Much of what I say is generally applicable to state programs with the important proviso that, unfortunately, few of them have the resources to offer programs as extensive as the FJC. That's especially unfortunate because we feel our own resources are much more limited than we'd like them to be.

I've described earlier the training and experience that new appointees bring to the bench. Typically, they are distinguished lawyers who have focused their practice and study of law to a relatively narrow area.

Each new judge is filling an existing vacancy. He or she probably has several hundred cases waiting on the day of appointment. They don't have the luxury to attend a lengthy training program.

⁵ I would be remiss if I did not note that the FJC is also responsible for training nearly 30,000 non-judge employees in the judicial branch – staff who support the judges in a wide range of ways. While not the subject of the discussion for this conference, the role and training of court staff is a key element to fostering and preserving the independence and effective functioning of the courts.

We offer each new district (trial) judge two weeks of training in a two-phased orientation during his or her first year on the bench. That's in addition to a large box of books and videotapes we send them as soon as they are confirmed.

The first week of orientation, usually attended during the judge's first three months on the bench, includes segments on civil and criminal pretrial and trial procedure, rules of evidence, criminal sentencing policies and procedures, and ethics. The program includes a visit to a federal prison so the new judges can view firsthand and learn about the conditions and programs that defendants they sentence will confront.

The second week of orientation includes additional sessions on the subjects above, and also has an overview of several areas of law that judges are most likely to confront or that judges find most challenging: employment discrimination law; civil rights litigation; prisoner litigation; intellectual property.

You will notice from this brief description that most of the curriculum is devoted to the judicial process and the role of the judge: ethical duties and how to employ procedures to try cases fairly and efficiently. Very little attention is devoted to substantive issues, that is, to areas of law likely to arise in cases before the judge. This is for two reasons. First, the range of substantive legal issues is so broad it is impossible to cover more than a few in a relatively short period. Second, we believe that if judges can master the process of handling cases efficiently, they will find it relatively easy to learn the substantive law as they need to— with the help of briefs and arguments from the parties and research by their law clerks. The judges' demonstrated abilities as lawyers supports the theory that they can master new legal subjects. If, on the other hand, a judge can't efficiently move the process along, no amount of substantive expertise is likely to be of great benefit.

This curriculum and the principles it is based on weren't developed by just a few of us in my office. We rely on advisory committees of judges to help us construct our programs and select our topics. These committees meet periodically, review the curriculum and participant evaluations, and suggest changes. The Center's Director, who serves a four-year term and is, by tradition, a judge, also reviews the curriculum and assists us in keeping it current. Based on the advice of experienced judges and the feedback we get from the new judges, we believe we have made the curriculum the most useful and effective it can be.

There are far fewer appellate judges, and the number of new appellate judges at any given time is insufficient to make a program solely for them cost effective. New appellate judges are invited to the first week of our orientation for new district judges, and about one-third of them take advantage of this. In addition, the FJC funds new appellate judges to attend a week long seminar for new state and federal appellate judges produced by New York University Law School.

These FJC orientation programs, like all our programs and services for judges, are voluntary. Federal judges are not required to meet any introductory or continuing education requirements. In practice, virtually all new judges attend the FJC orientation programs, and most take advantage of continuing education programs, described below.

The FJC offers a wide range of continuing education programs and other information services. District judges are invited to attend a three-day general purpose workshop annually. These programs include updates on major areas of law and judicial practice, with small group sessions in which judges can exchange views with colleagues from across the country. Appellate judges are invited to similar programs about every two years. Judges also have opportunities to attend smaller seminars, usually two or three days long, that focus on particular areas of law, such as intellectual property, employment law, and civil rights litigation, or other fields, such as scientific developments. In some cases, rather than bringing judges to one location, the FJC sends faculty to the courts.

In all our programs and materials, our role, as we see it, is to give judges information and tools so that they can decide issues, and not to try to tell them what their decisions should be. Thus our curriculum is designed, and our faculty selected, so as to present competing views on controversial matters. We strive to identify and secure the services of faculty who can present matters in a balanced, objective way. This restricts our pool of potential faculty, and sometimes causes us not to cover a topic that we don't feel can be adequately addressed in the means and time available. The FJC has only a few "in-house" experts, so almost all our instruction is by outside people – judges, law professors and academics from other disciplines make up most of our faculty. We occasionally use practicing lawyers, but only subject to great care and usually in panels of more than one.

How do we select the topics to be covered at general purpose continuing education programs, and the subjects for more extended treatment at seminars? We use a combination of five factors. First, we review statistics gathered annually on the types of cases, criminal and civil, filed in the federal courts. Obviously, those which appear in the highest frequency, or which appear to be growing rapidly are the likeliest candidates for coverage. Second, we periodically survey all judges for their input on issues or topics that they would like to see covered. Third, we routinely get informal input from judges with whom we interact regularly. Fourth, program evaluations provide feedback on whether some topics should be repeated and also contain suggestions for new topics. Fifth, we meet periodically with advisory committees of judges, who are appointed by the Chief Justice. We review the foregoing information with these committees and solicit their advice on future programming.

Many areas of law arise for each individual judge relatively infrequently; most judges have no interest in them unless and until they have a case on that subject. The number of such judges at any given time is too low to generate sufficient demand to make

an in-person program on that topic cost-effective. Corporate governance issues have fallen into that category.

We haven't ignored corporate governance. For example, a topic in one session of a two-day program last year was "What Judges Should Know about Corporate Trends in America." And, until recently, the FJC offered a three-day program entitled "Financial Statements in the Courtroom." This program was taught primarily by accountants and helped judges to understand basic accounting and how to evaluate accounting documents that are frequently used in litigation. In light of litigation that involves recent accounting scandals, we are considering reinstating such a course.

Where in-person educational programs are not cost effective, the FJC often relies on other resources to assist judges. Publications, in paper and electronic format, are our primary means for doing so. The FJC library has an extensive resource catalog, available on the judiciary's intranet site, which judges and other court employees can use to find information.

In 2003, the FJC published the second edition of "Federal Securities Law." This 150-page book contains a concise overview of the major federal statutes and regulatory regimes governing securities. It, like other publications we produce, focuses on the issues that a judge needs to understand in order to begin dealing with litigation involving securities. It does not purport to be an exhaustive text, and avoids lengthy discursions on theory. It is intended to help a judge with little or no background in the subject get familiar with the basic rules and principles at the outset of the case.

The FJC also has television production capabilities that we use to produce programs for broadcast to the courts via a satellite network dedicated to the courts, and videotapes that courts may borrow. As we move from analog to digital technology, we are slowly shifting to transmitting programs directly to users' computers and to storing them on discs (DVDs) rather than tape. In general, nonjudicial employees take advantage of these media far more than judges do. Judges are becoming more proficient technologically, but still seem to prefer "old-fashioned" platforms – in-person training and hard-copy publications.

Conclusion

The processes by which we select judges in the United States vary significantly between the federal government and the states, with the federal government using appointment for life and most of the states using elections to a term of years. There are reasonable arguments for each approach.

In any event, one more or less common feature of each approach is that persons who become judges usually must have considerable experience and proven ability as lawyers or legal educators. This factor, in turn, has a major impact on the nature of judicial training. Rather than focus on substantive areas of law, much initial judicial

training is devoted the judicial role and the judicial process. Thus, the emphasis is on ethical requirements and on case management and administration. Continuing education tends to focus on areas that arise most frequently in the day-to-day work of most judges.

Legal issues relating to corporate governance have not been a subject of great attention in judicial education. Sadly, if they do become a major topic, it will reflect a substantial increase in the number of such cases that judges are hearing – and that would be a reflection of even more serious problems than we are seeing today. We can all hope that that does not come to pass.