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CHAPTER

Judicial Tenure and Retirements

Aníbal Pérez-Liñán, Andrea Castagnola

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Abstract

Judicial tenure is often perceived as the most important institutional protection for judicial independence because it can promote the impartiality of court rulings. This chapter analyses different tenure models and their ability to protect judges effectively. Although life tenure is considered the gold standard to protect judges, and therefore embraced by a large number of constitutions worldwide, this arrangement is not free from problems. The first part of the chapter analyses the advantages and disadvantages of the life tenure system along with its two most frequent alternatives: judicial appointments with a mandatory retirement age, and appointments for a fixed term. The most common problems identified with life tenure are the ageing of judges on the bench, strategic retirements, and the potential disconnection of judges from society. Long, fixed terms without reappointment appear to be a better arrangement for promoting judicial independence. However, because formal tenure protections are not respected in many parts of the world, in the second part of the chapter we analyse how political actors disrupt judicial tenure. The authors create a novel typology that identifies four types of judicial exits: natural exits, strategic retirements, formal removals, and induced departures. The chapter offers illustrations for these patterns around the world, paying special attention to formal removals and induced departures. These examples underscore that chief executives are the most common actors threatening judges—but not the only ones—and that politicians employ formal removal procedures, as well as informal pressures, to purge the courts.

Keywords: judicial tenure, life terms, fixed terms, purges, removals, retirements

Subject: Legal System and Practice, Comparative Law, Law

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1. Introduction

Are constitutional protections for tenure an effective way of preserving judicial independence? Do models of judicial tenure affect judicial performance? Scholars understand that norms regulating tenure and retirements are crucial 'to secure a steady, upright, and impartial administration of the laws' (as noted by Alexander Hamilton, Hamilton 1788), but they show little agreement when trying to answer those questions.

Albeit strong norms protecting judicial tenure are necessary to secure an independent judiciary, those norms confront two intrinsic trade-offs. The first one is a potential trade-off between tenure protection and judicial performance. Norms allowing judges to retire on their own schedule protect their autonomy, but they do not guarantee that judges will use this prerogative wisely. The second one is the trade-off between tenure protection and accountability. Norms allowing other branches of government to exercise oversight over the judiciary are necessary to secure judicial accountability, but they do not guarantee that politicians will use their powers to dismiss judges wisely.

In the first part of this chapter, we analyse three institutional models for judicial careers: life tenure, mandatory retirement ages, and fixed terms in office. Although life tenure is traditionally considered as the strongest protection for judicial independence, this arrangement creates problems. After reviewing the debate on this issue, we conclude that—at least for high court justices—long fixed terms without reappointment may be a better option than life tenure. In the second part of the chapter, we analyse the political mechanisms that disrupt tenure. We introduce a test to identify four types of exits: natural exits, strategic retirements, formal removals, and induced departures. While removals and induced departures typically undermine judicial independence, we identify two boundary situations: cases of lustration, in which a purge of the judiciary appears to be justified, and extreme cases of judicial instability, in which the effective absence of tenure protections actually induces judicial independence. The conclusions discuss those situations and identify novel lines of research.

2. Institutional Frameworks for Tenure and Retirement

In this section we assess alternative models of judicial tenure and retirement. Scholars agree on the nature of these models, although they outline slightly different taxonomies. Bulmer (2017) compares systems that grant tenure during 'good behaviour' against those that appoint judges for fixed terms in office. Opeskin (2015) introduces a trichotomous distinction between systems of tenure ended by life limits, age limits, and term limits. Lara-Borges, Castagnola, and Pérez-Liñán (2012) compare four models: life tenure, fixed terms with reappointment, fixed terms without re-appointment, and indefinite terms. Despite these nuances, the central concerns of these authors are quite similar.

Life tenure—or more precisely, permanence in office during 'good behaviour'—is considered a core protection for the judiciary. However, the literature has identified several problems that undermine its advantages. Older judges experience declining health, and they may drift away from society's preferences. Moreover, judges may choose the timing of their retirement strategically to facilitate the nomination of like-minded colleagues, raising the stakes for new judicial appointments. Longer tenures also increase the value of each court seat and therefore create incentives for political purges. For this reason, there are some doubts, addressed in the second part of this chapter, on whether life tenure is an effective mechanism to secure judicial independence.

As alternatives to life tenure, mandatory retirement rules and fixed terms also present advantages and disadvantages. Retirement rules set the maximum age for judges and improve court performance. However,

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rigid rules force the departure of experienced judges and impose discrimination based on age. Moreover, manipulation of retirement ages, as shown later in this chapter, is a common instrument employed by politicians to remove senior judges. Fixed terms in office, in turn, can be designed in ways that strengthen or undermine judicial independence. Short terms with the possibility of reappointment create incentives for judges with static ambitions to serve the interests of politicians in charge of (re)nomination. In contrast, long terms without reappointment are more likely to produce an independent judiciary without the pitfalls of life-tenure arrangements.

Models of tenure tend to vary across types of courts, with supreme courts and lower courts usually relying on life tenure (or a mandatory retirement age) and separate constitutional courts relying on fixed terms in office. The Comparative Constitutions Project identified clear tenure rules for the supreme court of ninety-one countries in 2020. Of those, 42 per cent explicitly protected life tenure, 27 per cent established ages for mandatory retirement, and only 31 per cent set fixed terms in office (with a majority of the terms longer than six years). For lower courts (data available for forty-seven countries), life tenure is the most frequent system, present in 66 per cent of the cases. In contrast, constitutional courts (data available for sixty-nine countries) typically appoint justices for fixed-terms, with only 9 per cent adopting life tenure.

2.1 Life Tenure and Its Critics

There is a general consensus that life tenure protects judicial independence. Life terms free judges from the need to curry favour with political actors (Brinks and Blass 2018, 27). Judges with life tenure are less susceptible to political pressure, and also less likely to have been selected by the incumbent government (La Porta, Lpezdesilanes, Popeleches, and Shleifer 2004). Jackson (2007) underscores that tenure and salary protections granted by the US constitution promote independence not only from the political branches, but also from public opinion. The formal length of tenure is often taken to be a proxy for *de jure* judicial independence (Clark 1975; Feld and Voigt 2003; La Porta, Lpezdesilanes, Popeleches, and Shleifer 2004).

Unfortunately, the literature has identified three problems with this arrangement: ageing, strategic retirement, and preference drift. If judges refuse to retire in a timely manner, they will age in office, undermining court performance and drifting away from the preferences of society. Conversely, if they decide to retire in a timely manner, they will choose a convenient political moment to influence the nomination of their successors. Thus, because retirements under life-tenure regimes are rare and controlled by the outgoing judges, politicians operating in weak institutional environments will have strong incentives to purge the courts. This may ultimately undermine the effectiveness of life-tenure regimes where they are most needed.

The effects of ageing have been at the centre of institutional debates about tenure in the US Supreme Court. Garrow (2000) documents at least twenty instances in which Supreme Court justices were mentally or physically impaired prior to the twenty-first century. In several instances, their fellow justices were in the unenviable position of convincing them to resign. In late 1869, acting on behalf of the Court, Justices Chase and Nelson convinced Robert Grier (appointed in 1846) to step down the following year. For about five years, Grier's physical and mental abilities had been visibly in decline. Appointed in 1863, Stephen J. Field served on the US Supreme Court for more than thirty-four years. By the 1890s, 'Field's mental condition was noticeably on decline' (Atkinson 1999, 69). At a private meeting, John Marshall Harlan tactfully reminded Field of Grier's resignation in 1870, but Field abruptly rejected the insinuation. He eventually resigned in 1897. In the 1920s, the Court had to confront the case of Joseph McKenna who, at eighty-one years, 'was no longer capable of sustained mental effort and had shown gross signs of senility for several years' (Bloom 1963, 72). In late 1924, the justices agreed to avoid any decisions in which McKenna's vote was pivotal. After this agreement, Chief Justice Taft convinced McKenna to retire within three months (Atkinson 1999, 69). In 1932, the Court urged Oliver Wendell Holmes (aged ninety) to retire. Holmes graciously agreed to leave after

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almost three decades on the Court. In contrast, after William O. Douglas suffered a stroke in 1974, he refused to resign. Other Court members decided to postpone any decision in which his vote was pivotal and stopped assigning him any opinions. Douglas finally announced his retirement in late 1975, yet he attempted to participate in some cases before his replacement joined the Court. The other justices simply ignored him.

Franklin Delano Roosevelt justified his 1936 'Court packing plan' based on ageing considerations. Attorney General Homer Cummings had proposed a constitutional amendment for mandatory retirement at the age of seventy. But because the amendment's ratification would be a cumbersome process, Roosevelt introduced a bill allowing the president to nominate an extra justice for each sitting justice over the age of seventy. As the plan failed to gain traction, senators in the Democratic Party introduced several constitutional amendments requiring the retirement of federal justices at the age of seventy-five, but the President failed to support these initiatives. In 1947–1950, the American Bar Association (ABA) debated, and eventually embraced, a proposal to fix the number of Supreme Court members at nine and order mandatory retirements at seventy-five years, as a pre-emptive plan to protect the Court from future political attacks. Congress debated the proposal in 1952–1954, but after the Court decided *Brown v Board of Education* in 1954, the conservative coalition that initially supported the protective measures abandoned the plan (Garrow 2000).

Atkinson (1999, 69) notes that problems of decrepitude observed in the Supreme Court in the nineteenth century were less common in the twentieth century, in part because retirement benefits improved after 1937. Although medical advances in the late twentieth century enhanced health conditions, they also expanded longevity, and justices now serve for long periods (Crowe and Karpowitz 2007). Thus, the empirical debate on the effects of ageing on productivity remains open. Posner (1995, Chapter 8) and Teitelbaum (2006) offer empirical evidence to argue that productivity in the US courts does not really decline until a very advanced age. In contrast, empirical studies of the Australian High Court and Federal Court suggest that judges achieve peak productivity much earlier, between their early sixties and early seventies (Bhattacharya and Smyth 2001; Smyth and Bhattacharya 2003).

While the problem of *ageing* results from judges who refuse to retire voluntarily, the problem of *strategic retirement* results from judges who agree to leave on their own timing. A strand of scholarship on the US Supreme Court argues that retirement-age justices select the moment to leave the bench in time for the president to nominate a like-minded successor. If the president is ideologically close, judges will have an incentive to retire, but if the president is ideologically distant, they will postpone their departure hoping for alteration in power (Calabresi and Lindgren 2006; King 1987; Hagle 1993; Ward 2003; Zorn and Van Winkle 2000). This behaviour is a source of normative concern because it implies that justices reproduce their preferences in the Court (Jackson 2007).

The idea of strategic retirement is contested by some empirical studies analysing the US Supreme Court (Brenner 1999; Squire 1988; Yoon 2006) and by studies of high courts elsewhere (Smyth and Maitra 2005; Kerby and Banfield 2014; Massie, Randazzo, and Songer 2014; Pérez-Liñán and Arana Araya 2017). Brenner (1999) documents that between 1937 and 1998, only two elderly justices in good health retired at a time when the president was ideologically aligned. He concludes strategic retirement is a 'myth'. Bailey and Yoon (2011) argue that strategic retirements, even if they occur, should cancel each other out and thus have limited implications for the US Supreme Court. Adding nuance to the debate, Stolzenberg and Lindgren (2022) find that strategic retirement is stronger among Republican Supreme Court appointees than Democratic appointees. Partisan differences in retirement strategies remains a topic open for exploration.

A third concern with life-tenure regimes involves the potential disconnection of judges from society, as a result of preference drift. Mueller (1996, 1999) warns that lifetime appointments protect the judiciary, but they do not guarantee that the judiciary will act in the interest of the citizens. Secure tenure over long periods potentially leads to a disconnection from society's preferences. However, other scholars argue that

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judges are unlikely to drift away from society because elected politicians are involved in their nomination and appointment (Dahl 1957) and because Congress can engage in court curbing (Epstein, Knight, and Martin 2001). Burbank similarly dismisses concerns about disconnection from society, noting that the US Supreme Court remains more popular than Congress (Burbank 2006, 1533).

Concerns about performance, strategic retirement, and preference drift are heightened in weak institutional environments where, as explained in the second part of this chapter, powerful politicians have the ability to induce judicial retirements (Pérez-Liñán and Castagnola 2016; Rios-Figueroa 2006). Helmke and Staton (2011) infer that longer tenures increase the value of a court seat by extending the salary stream, the span of professional prestige, and the opportunities to hear on important cases associated with the position. The greater value of court seats also makes politicians more willing to pay the costs of a purge to appoint their co-partisans. Bulmer (2017) similarly notices that, under life tenure systems, turnover can be slow and vacancies irregular, a situation that raises the stakes of each appointment. Those studies raise serious doubts on whether life tenure rules protect judicial independence in contexts where this protection is most needed. In an empirical study of 192 countries, Melton and Ginsburg (2014) find no significant association between life tenure and *de facto* judicial independence. A study of Latin America similarly documents that justices with life tenure have not served in the high courts any longer than other justices appointed for fixed terms (Lara-Borges, Castagnola, and Pérez-Liñán 2012). However, Hayo and Voigt (2007) find that *de jure* independence generally supports *de facto* independence. Cameron (2002) ultimately admits that formal rules may not guarantee independence, but they provide bright lines and incentives to protect judges.

2.2 Alternatives to Life Tenure: Mandatory Retirement and Fixed Terms

A first institutional solution for the problem of ageing is the establishment of a mandatory retirement age. For instance, an amendment to the Brazilian constitution has established mandatory retirement for justices at the age of 75 (Article 40.II). Mandatory retirement ages, however, are not free of challenges. Next door, the Argentine constitutional reform of 1994 included a similar provision (Article 99.4), but the Supreme Court—ruling in favour of one of their own—declared this clause unconstitutional in the *Fayt* case (1999), arguing procedural flaws in the amendment process.

Bulmer (2017) notes that a mandatory retirement age is in any case difficult to set. If the retirement age is too high, the arrangement creates problems—such as preference drift and declining intellectual capacity—similar to those under life tenure; if the retirement age is too low, the judges need to move into private practice after leaving office, creating incentives for influence peddling and corruption. Opeskin (2015) agrees that setting parameters is difficult, but concludes that the age at which retirement is compulsory is not nearly as important as the proposition that there must be an age at which retirement is expected. Discussing the Australian case, Blackham (2016) argues instead that mandatory retirement is no longer valid in a modern society. It is discriminatory, deprives the judiciary of skilled adjudicators, and imposes undue expenses to taxpayers.

In the United States, institutional variation across state supreme courts offers an opportunity to test the effects of mandatory retirement. Ash and MacLeod (2020) find that mandatory retirement rules reduce the age of working judges and improve their performance, measured through the number of published opinions and the number of citations. At the same time, Hall (2014) finds that mandatory retirement provisions remove incentives for elected judges to align with voter preferences during their last term in office. Constitutionally unable to impose a mandatory retirement age, the US allows federal judges to opt for 'senior status' after reaching the age of sixty-five and fifteen years of service. Senior judges retain a caseload and salary, but a new vacancy is opened in the court. Some states have adopted this procedure as well.

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As a protection for judicial independence, mandatory retirement is similar to service during 'good behaviour'. In both instances, judges are expected to serve until an advanced age, and they do not depend on political parties to retain office. Comparative studies occasionally lump together mandatory retirement and 'good behaviour' protections as 'life tenure' arrangements (Lara-Borges, Castagnola, and Pérez-Liñán 2012). However, mandatory retirement procedures can be more easily manipulated. As discussed in the next section, several governments (e.g. in El Salvador, Hungary, and Poland) have lowered mandatory retirement ages as a way of forcing the exit of senior judges in their high courts.

A second alternative to tenure during 'good behaviour' is the appointment of judges for a fixed term in office. This practice is common for constitutional courts worldwide, but it is rarely adopted for lower-level judges (aside from initial probation periods), and it is less common for high courts of appeals (i.e. supreme tribunals or supreme courts of cassation). Fixed terms can pose important challenges to judicial independence, but they also offer an effective solution to the critical issues identified above.

Opeskin (2015) notes that all provisions relating to tenure, including fixed terms, can be crafted in ways that support a greater or lesser degree of independence. With respect to fixed terms, Rios-Figueroa (2011) underscores that the key factor is whether the term of judges is longer than the term of those who appoint them. Thus, there is a crucial distinction between short terms (typically lasting four or five years and allowing for reappointment) and long terms (which usually range between nine and fifteen years and are non-renewable).

Bulmer (2017) and Stiansen (2022) argue that judges serving for short, renewable terms are likely to remain dependent on the appointing authorities. For example, Ecuador's 1998 Constitution established four-year terms for members of the Constitutional Tribunal. Grijalva (2010) offers empirical evidence to argue that justices were sensitive to the needs of legislative parties that controlled nominations and reappointments (constitutional terms were ultimately extended to nine years in 2009). Similarly, the Guatemalan Constitution establishes five-year terms for members of the Constitutional Court and the Supreme Court. Brinks and Blass (2018, 129) surmise that this 'choice of extremely short tenures for both Supreme Court and Constitutional Court justices responds to a perception that, in Guatemala, the coalition of control needed to keep a shorter rein … on people in positions of power'. Rachel Bowen further notices that short terms make corruption more attractive to Guatemalan justices, because 'this law makes potential lame ducks of all of the magistrates. They have incentives to engage in corruption in order to secure their own futures' (Bowen 2017, 177).

In contrast, long terms combined with limits on reappointment will produce a more independent judiciary (Bulmer 2017). In Spain, Constitutional judges serve for nine years without the possibility of immediate re-election. They are required to retire at the age of seventy, with the possibility of a two-year extension. In Germany, judges of the Federal Constitutional Court serve for twelve years without reappointment, and they are required to retire at the age of sixty-eight years. In Mexico, members of the Supreme Court serve for a fifteen-year non-renewable term. These arrangements combine the advantages of life tenure regimes—periods in office that transcend the terms of the politicians who nominated the judges, and that make judges independent of political favours—and minimize their disadvantages in terms of ageing and infirmity.

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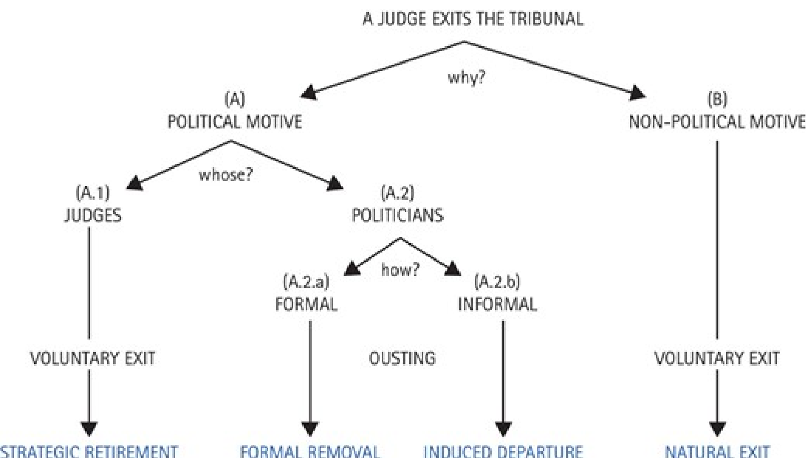
3. Judicial Tenure Interrupted

Rules about tenure and retirement are effective to protect judicial independence only to the extent that they constrain the behaviour of political actors. Unfortunately, there are multiple situations in which powerful actors are able to circumvent or manipulate formal protections, and therefore find ways to purge the judiciary. Politicians have multiple motivations to force new vacancies in the courts: they seek to appoint judges aligned with their policies, to avoid prosecution in corruption cases, and to secure carte blanche as they undermine the rights of the opposition, among other goals (Pérez-Liñán and Castagnola 2009). There are also situations in which purges appear to be justified from a normative perspective, as when newly democratic regimes engage in the lustration of judges who served the prior dictatorship. Irrespective of their diverse motivations, the strategies followed by politicians to force the exit of judges formally protected by law are equally varied.

Figure 1 outlines a typology of judicial exits that allows us to place the interruption of tenure in context. The figure identifies four types of exits—non-political exits, strategic retirements, formal removals, and informally induced departures—based on a three-question test:

1. Are the reasons that motivate the judge's departure (A) political or (B) non-political?
2. In the first case, are political motivations hosted by (A.1) judges or (A.2) politicians?
3. If the latter, are politicians forcing the judge's departure through (A.2.a) formal removal procedures or (A.2.b) informal pressures?

Figure 1



A typology of judicial exits.

Empirical answers to these questions, as we illustrate below, are often elusive. However, the three nodes in the figure offer an analytical test to summarize the complex literature on judicial exits. The first question is *why* judges exit the court. 'Natural' (non-political) reasons result from health conditions (death in office being the most extreme example), from reaching the end of a fixed term or a mandatory retirement age, or from personal motivations such as the desire to go back to private practice or work fatigue. As scholars documented in the cases of Argentina and the United States, 'natural' departures follow a uniform distribution (King 1987; Hagle 1993; Ward 2003; Zorn and Van Winkle 2000; Castagnola 2018). Unless judges serve for fixed, concurrent terms, individual exits tend to be randomly scattered over time, as individuals die or decide to retire for reasons unrelated to the political context. In contrast, political reasons account for

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instances in which judges act strategically or in which politicians seek to displace unsympathetic judges, in order to influence the preferences of the court.

The second question of the test is *whose* political interests motivate the departure. When the decision to quit reflects the judge's own desire, judicial exits are depicted as strategic retirements—a form of voluntary, yet political exit discussed in the first part of this chapter.[1] When political motivations emanate from other actors, judicial exits are depicted by a broad range of labels: purges, induced retirements, lustration, informal interference, (un)constitutional capture, and judicial crises, among others (Llanos et al. 2016; Dressel, Sanchez-Urribarri, and Stroh 2018; Koncewicz 2017; Castagnola 2018; Helmke, Jeong, and Kim 2022). Each label conveys specific nuances about the process forcing judges off the bench, but they all share a common counterfactual assumption: that judges would depart at a later date in the absence of political pressures. Thus, the second question introduces the fundamental distinction between *voluntary* and *involuntary* exits, which is central to this literature. Voluntary exits include strategic retirements (A.1) as well as non-political exits (B). The latter are voluntary to the extent that judges agree to retire for health reasons, decide to stay in office until the end of their lives, or accept the position knowing the duration of their terms in advance. In contrast, involuntary exits are driven by the preferences of outside actors who oust judges from their positions. Involuntary exits have received considerable attention among judicial comparative scholars, and are the focus of this section.

If judicial tenure is protected by law, *how* can political actors displace judges from office? The last question of the test introduces a distinction between formal (A.2.a) and informal (A.2.b) strategies to oust judges. National constitutions and organic laws establish formal mechanisms by which judges can be legally removed from the bench, impeachment being the most common procedure. In addition, politicians employ informal strategies to induce the retirement of judges, including rewards (such as nominations to political office) and intimidation (like smear campaigns or impeachment *threats*). We illustrate formal and informal procedures, and clarify the meaning of the term 'politicians'—used so far with deliberate ambiguity—in the following sections.

Notice that the involuntary path presented in Figure 1 does not involve any assumption about the legitimacy of the motivations driving the process. Because formal removals and induced departures are motivated by political reasons—including, perhaps, some politicians' desire to serve the public interest—there is always controversy on whether those exits are justified. Although we are highly suspicious of any ousters along path A.2, we acknowledge that there are circumstances in which removal is appropriate: judicial corruption, abuse of the office, lustration of judges who collaborated with authoritarian regimes, and so on. Unfortunately, there is no consensus in the literature on how to distinguish legitimate from illegitimate removals. Some scholars argue that any debate about the fairness of dismissals must be resolved by analysing the driving political motivations and the context in which the process takes place (Chowdhury 2015; Mollah 2012). Even though politicians' 'true' intentions are unobservable, two operational principles are key to assess the fairness of dismissals: due process and legality. Judicial ousters are questionable when removals do not follow a well-established legal procedure, or when accusers fail to prove that judges violated a 'good behaviour' standard that predated the process. The establishment of systematic criteria to assess involuntary exits is an important area of research that requires further work connecting normative and empirical analysis.

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3.1 Who Threatens Judicial Tenure?

It is not surprising that political scientists have focused their attention on path (A), seeking to understand the political drivers of judicial exits. We discussed the literature on strategic retirements briefly in the first part of the chapter. In the following sections, we cover the literature on involuntary retirements, identifying the actors that threaten judicial tenure, as well as the formal and informal mechanisms they use to disrupt it.

Figure 1 employs the term 'politicians' as shorthand to identify the set of actors with sufficient political clout to undermine judicial tenure. Even though the executive branch is the most likely source of removals, opposition legislators sometimes lead the charge against sitting judges. Moreover, it is not uncommon that powerful politicians will rely on civil society allies, such as friendly media outlets, to back their attacks against the judiciary. In some contexts, non-state actors such as professional bar associations, powerful oligarchs, and even organized crime have played a prominent role in the process.

Executives: Presidents and prime ministers are the most common initiators of judicial purges. The comparative literature has documented this pattern for national and subnational executives in Latin America (Verner 1984; Pérez-Liñán and Castagnola 2009; Castagnola 2018; Leiras, Tuñón, and Giraudy 2015), and multiple case studies illustrate the role played by executives across regions, regime types, and historical periods. In Ukraine, presidents Yushchenko, Poroshenko, and Zelensky all oversaw attempts to remove Constitutional Court judges with varying degrees of success (Barrett 2021; Cherviatsova 2021). In Zimbabwe, President Mugabe used informal threats and pressures to purge 'disloyal' judges (IBAHRI 2011). In Turkey, Tayyip Erdoğan purged several members of the Turkish Constitutional Court and thousands of judges and prosecutors following the 2016 failed military coup (Perilli 2021). In Bangladesh, the executive invoked martial law to remove Supreme Court members from 1982 to 1986, and retained considerable power over judicial careers in later years (Chowdhury 2015; Mollah 2012).

Legislatures: Legislative bodies play an important role in judicial removals in at least three ways. First, when executives are strong, they may enrol the support of pliant legislatures to legitimize judicial purges. In an extreme example, the German Reichstag granted Chancellor Adolf Hitler emergency powers in 1933 through the Enabling Act, which allowed him to reshape the legal system and allowed the Nazi party to purge the judiciary (Fountaine 2020). Second, when executives are weak, the legislature may be tempted to reshuffle the courts unilaterally. In 1984, the Ecuadorian Congress dismissed all members of the Supreme Court and appointed new ones, triggering a confrontation with President León Febres Cordero. The reluctance of sitting justices to accept this decision resulted in the abnormal situation of having two Supreme Courts operating concomitantly for a brief period. After this episode, Ecuadorian legislators bargained over repeated judicial purges for more than two decades (Basabe-Serrano and Polga-Hecimovich 2017; Basabe-Serrano and Llanos Escobar 2014). Third, when executive-legislative balance is contested, minority presidents who anticipate major confrontations with Congress may purge the courts pre-emptively to secure a supportive constitutional interpretation in the likely case of policy deadlock or presidential impeachment (Helmke 2018; Helmke, Jeong, and Kim 2022).

Judiciary: Occasionally, judicial authorities themselves threaten tenure. In countries with corporatist judicial structures, the Supreme Court exercises control over the judiciary and can disrupt the tenure of lower court judges. For example, after Chile's military coup in 1973, decree-laws 169 and 170 allowed the Chilean Supreme Court to dismiss judicial employees based on poor performance reviews. This framework enabled the Supreme Court to carry out an internal purge by forcing 12 per cent of judicial employees, forty of whom were judges, into retirement (Hilbink 2008).

Non-state actors: In other instances, non-state actors may play a role in the political removal of judges. For example, in post-communist Slovakia, where politicians had traditionally influenced the Chief Justice,

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prominent oligarchs and judicial associations increasingly gained significant leverage over this position (Kosař and Spáč 2021). Political actors not holding office may also take part in 'irresponsible criticism', defined by Bright (1997) as criticism for the purpose of intimidation or undue influence over the judiciary. In the United States, State Supreme Court justices have suffered this type of attack, like the electoral campaign to 'vote off' (or not re-elect) Justice Robertson from the Mississippi Supreme Court after a contested decision on a criminal case in 1992, or the public campaign by a Republican presidential candidate for the removal of Judge Harold Baer from New York in 1996 (Bright 1997).

3.2 How Political Actors Disrupt Judicial Tenure

Political actors can disrupt judicial tenure by deploying formal institutional powers to remove judges from office (e.g. via impeachment) or by deploying leverage to induce resignations from the bench (e.g. via *threats* of impeachment). In this section, we outline some of the most common mechanisms.

Formal removal: The formal removal of judges requires legal proceedings triggered by political actors in control of other institutions. Formal removals can take place as a result of a parliamentary decision, as in India and Malta; as a result of a judicial disciplinary process, as in the Netherlands and Denmark; or as a result of impeachment, the most common procedure for removing judges in separation-of-powers systems (Bulmer 2017). The conventional impeachment model, inspired by the US Constitution, entails two different proceedings: the lower house of the legislature is responsible for evaluating allegations of wrongdoing or misconduct against a judge. If the house approves the charges, the process moves to the Senate, which conducts the trial and votes to remove the judge. The share of votes required to impeach judges differs across countries, but a two-thirds majority is typically required for conviction.

In the United States, an impeachment process failed to remove the controversial justice Samuel Chase in 1805, and no other Supreme Court justice has been impeached ever since. However, fourteen federal judges serving in lower courts were impeached between 1803 and 2017, and only four of them were acquitted by the Senate (Radnofsky 2017). Argentina was one of the first countries in Latin America where a massive judicial impeachment took place. In 1946, four days after President Juan Perón took office, four of the five justices and the Solicitor General were impeached. The purge secured Perón's control of the Court and opened a recurrent history of judicial purges in Argentina (Helmke 2005; Castagnola 2020). A similar—and more contemporary—episode took place in El Salvador in 2021. Just few weeks after an election in which President Bukele's party captured a two-thirds majority in the legislature, the Assembly impeached all five justices in the Constitutional Chamber of the Supreme Court and the Prosecutor General. Almost every country in Latin America has witnessed the use of impeachment as a politicized tool for removing judges from the bench. In the twenty-first century, cases involving judges from Argentina, Ecuador, El Salvador, Honduras, Paraguay, Peru, and Venezuela have reached the Inter-American Court of Human Rights, prompting a regional jurisprudence about judicial removals.[2]

Even though impeachment is the best-known mechanism for removing judges, executives and legislatures employ many other formal—yet controversial—procedures for ousting judges. For example, in Ukraine President Zelensky revoked the decrees signed by the former president that had appointed two Constitutional Court justices (Barrett 2021; Cherviatsova 2021). In Croatia, the 1990 Constitution established that judges appointed by the newly created State Judicial Council would have life tenure rather than serve for an eight-year term. The previous legislation regulating judicial tenure was abrogated, and thousands of active judges were placed in a constitutional limbo. In the end, some judges remained on the bench while others received a decree terminating their terms or were simply notified to leave due to the 'new situation' (Uzelac 2001).

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An alternative means for disrupting judicial tenure has been reducing the mandatory retirement age. In 2012, a new Hungarian Constitution reduced the retirement age for judges from seventy to sixty-two years, forcing about 274 judges into early retirement, including twenty of the seventy-four Supreme Court justices (Halmai 2017). A similar situation occurred in Poland when Parliament passed Law No 17 in July 2017 to lower the age of judges from sixty-seven to sixty-five years for men and sixty years for women, affecting 40 per cent of the members of the Supreme Court (including its Chief Justice). In both cases, the European Court of Justice ruled against those reforms (Bard and Sledzinska-Simon 2020). In 2021, El Salvador's legislative assembly approved a Judicial Career Act that forced all judges older than sixty years or with three decades of service—a third of the judges in the country—into retirement.

Induced departures: This label describes instances in which judges are persuaded to step down from the bench through selective incentives. Political actors 'persuade' judges by offering positive (e.g. rewards and benefits) or negative inducements (e.g. harassment, physical or verbal attacks, disruptive career transfers, etc.).[3]

Positive incentives encourage early departures through 'friendly' means, avoiding an open confrontation. Judges are amicably convinced by political actors to leave their positions in exchange for benefits. These informal departures often presuppose a 'loyal act' from the judge, since a voluntary resignation allows political leaders to fulfil political agreements or realign forces within the government. For example, in 1993, President Carlos Menem offered Justices Barra and Cavagna the Ministry of Justice and the Argentine ambassadorship to Italy as compensation for stepping off the bench (Castagnola 2018). These two vacancies were part of a larger political agreement package that would allow Menem to run for re-election (Finkel 2004; Helmke 2005).

Informal departures via negative incentives are more frequent—and more coercive. Political actors usually employ three forms of punishment to induce resignations: (i) physical attacks against judges, (ii) rhetorical or verbal attacks against judges, and (iii) infringements on judicial privilege. The first form of punishment constitutes the most extreme one, since it affects the physical integrity of the judge. For instance, in 1985 Honduran President Roberto Suazo Cordova ordered the arrest of Chief Justice Ramón Valladares due to his denunciations of corruption and wrongdoing of the government (Castagnola 2010). Violence may also result in exile, as occurred in Georgia when elected President Saakashvili forced Chief Justice Lado Chanturia into exile in Germany (Trochev 2013; Barrett 2021).

Rhetorical, verbal attacks, or smear campaigns on judges are a very common strategy employed by political actors. These informal strategies are powerful tools for inducing early departures since many judges do not outlast persecutions, moral attrition, and coercion, and end up stepping off the bench. Smear campaigns can target an individual judge or the institution as a whole, and their main goal is to publicly discredit judges in order to wear them out emotionally and psychologically. The most common defamation campaigns involve the participation of bar associations, members of Judicial Councils, or the president (Garoupa and Maldonado 2011). For example, in Pakistan, President Pervez Musharraf requested the resignation of Chief Justice Iftikhar Chaudhry in 2007, following a political confrontation. The justice was physically restrained from leaving the president's office for several hours until he presented his resignation. In Zimbabwe, the Supreme Court consistently ruled against the controversial land reform of President Mugabe in 2000. By December 2000, the ZANU-PF ruling party was promoting political slogans and calling for judges to be killed, and the President described judges as guardians of 'White racist commercial farmers' (IBAHRI 2011). In Bolivia, the extensive defamatory presidential campaign against Justice José A. Rivera Santivañez resulted in his resignation from the bench in 2006 (Castagnola and Pérez-Liñán 2011).

The last form of harassment is not associated with verbal or physical violence, but with a violation of professional rights. Examples of this practice include the transfer of judges to inconvenient locations, or purposefully stagnating their wages to force resignations. For example, in Turkey the forced relocation of

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politically dissident judges and prosecutors to remote areas of the country often made them resign to their position in protest (Perilli 2021). Even though these strategies involve the (mis)use of legal instruments, they do not qualify as removals because the legal tools employed to harass judges do not authorize politicians to dismiss them.

The use of positive or negative incentives does not guarantee that judges will be persuaded to depart from the bench. In some cases, an incentive will have the intended consequence on some judges but not on others, as occurred in Ukraine in 2007 (Barrett 2021; Cherviatsova 2021). President Yushchenko dismissed three justices from the Constitutional Court in order to guarantee the dissolution of the Parliament. After a political deal, two of those justices (Volodymyr Ivaschenko and Valerii Pshenychnyi) agreed to retire 'voluntarily,' retaining all retirement benefits. A third justice (Suzanna Stanik) did not. Although the Supreme Court sided with the justice and ordered her reinstatement to the Constitutional Court, President Yushchenko annulled the decree which had appointed her as a judge in 2004.

4. Conclusion

This chapter has underscored two trade-offs created by the norms designed to protect judicial tenure. The first one is a potential tension between tenure protections and judicial performance. Norms that guarantee *de jure* life tenure, allowing judges to retire according to their preferences, protect judicial autonomy but create other problems, including an over-aged judicial body, incentives for judges to engage in strategic retirement, and incentives for politicians to disrupt tenure arrangements. These challenges invite further research. For example, more comparative work will be necessary to establish the effect of different tenure regimes on judicial performance, while more work on the US case will be necessary to understand partisan differences in strategic retirement (Stolzenberg and Lindgren 2022).

Although life tenure is traditionally envisaged to be the most secure arrangement to ensure judicial independence, it has proven to be controversial. Long, fixed terms without reappointment are more likely to produce an independent judiciary and to have fewer problems than life tenure arrangements.

The second trade-off involves a tension between tenure protections and accountability. Because, to secure judicial accountability, other branches need to exercise oversight, politicians can exploit accountability mechanisms to undermine judicial careers and capture the courts. Political actors are *de facto* able to circumvent formal protections of tenure to purge the judiciary.

Judicial tenure interruption has become a widespread practice among democracies and non-democracies. Executives, legislatures, judicial authorities, and non-state actors such as bar associations and the mass media play important roles in the ousting of judges. We introduced a three-question test that allows us to identify four types of judicial exits: natural exits, strategic retirements, formal removals, and induced departures. The existing literature exposes a repertoire of tactics used by political actors in different countries. However, important patterns of variation, in the speed of the ousters as well as the type of judges targeted, still call for systematic explanation. Judicial purges have occurred at different paces, abruptly in some cases (e.g. massive judicial impeachments) and gradually in others (i.e. targeting one justice at a time) (Helmke 2005; Chowdhury 2015; Halmai 2017; Barrett 2021; Cherviatsova 2021). In addition, political actors have targeted different types of courts, in different sequences, to capture the judiciary. In top-down capture processes, higher court justices were targeted first to rapidly limit any potential resistance to the actions undertaken by political actors and to generate a facade of legality around the regime (Koncewicz 2018). In bottom-up processes, lower court judges were targeted first to subtly undermine the judiciary as purges escalated into higher courts (Perilli 2021).

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While these practices systematically undermine judicial independence, we note two intriguing situations that call for investigation. One is a paradoxical situation in which the repeated violation of tenure protections ultimately induces judicial autonomy. In contexts like Ecuador in the 1990s, where judges anticipate that they will be ousted with every new political realignment, their dominant strategy is to rule sincerely because politicians cannot credibly commit to respect their tenure if political coalitions change (Basabe-Serrano 2012).

The other complex situation corresponds to cases of lustration, in which a purge of the judiciary is justified. The literature does not provide a conclusive test to distinguish undesirable purges from desirable episodes of lustration. We have argued that future analyses of this problem should consider two criteria: due process and legality. Legitimate ousters must follow a well-established legal procedure, and they must prove the violation of 'good behaviour' standards that predate the accusation against the judges.

The two trade-offs addressed in this chapter lead us to conclude that life tenure, the most common tenure arrangement to protect judicial independence, may not be as effective as previously thought. It carries negative side-effects, and there are better institutional alternatives. It is not a self-enforcing rule, and it protects judicial independence only to the extent that political actors are willing to respect it. The literature is full of cases in which tenure protections were parchment barriers, and politicians carried out judicial purges without difficulty. Further research should aim to understand why politicians are able to infringe judicial tenure and whether conventional theories of judicial independence help explain the frequency of tenure violations.

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Notes

1 Stolzenberg and Lindgren (2022) refer to strategic retirements as 'politicized departures', but this terminology is ambiguous with respect to the source of political motivation.

2 For instance, *Rico v Argentina*, 2 September 2019; *Constitutional Tribunal (Camba Campos and others) v Ecuador*, 28 August 2013; *Colindres Schonenberg v El Salvador*, 4 February 2019; *López Lone et al. v Honduras*, 5 October 2015; *Ríos Avalos and others v Paraguay*, 19 August 2021; *Constitutional Tribunal v Peru*, 31 January 2001; *Reverón Trujillo v Venezuela*, 30 June 2009; *Chocrón Chocrón v Venezuela*, 25 November 2009.

3 Llanos et al. (2016) study informal interferences in six new democracies: Senegal, Benin, Madagascar, Argentina, Chile, and Paraguay. The authors classify interferences in two categories: direct (rhetorical attacks or the use of physical violence) or subtle (unofficial communications or bribery).

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