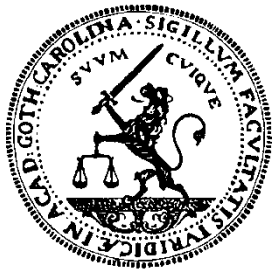

JURIDISKA FAKULTETEN

vid Lunds universitet

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Nominating the Justices of the Supreme Court-

A Comparative Study of the United States and Sweden

LAGF03 Rättsvetenskaplig uppsats

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Summary

This thesis compares the process for selecting Supreme Court justices in the United States and Sweden from the time their Supreme Courts were established to the present. Both courts were established in 1789 and both were designed to function within broader governments generally organized in accordance with Charles-Louis de Secondat, Baron de La Bréde et de Montesquie's theory on separation of powers. First, this thesis chronologically analyzes how the Supreme Court justices are selected and appointed in the United States and Sweden. In the United States, the President nominates the Judges of the Supreme Court with the advice and consent of the Senate. Initially, that process was confidential; today, the Senate hearings are televised across the country and interest groups contribute to the politicization of American Supreme Court nominations. In Sweden, the King confidentially notified and appointed the Justices of the Supreme Court based on the Instrument of Government 1809. Even though the Swedish Government took over Supreme Court appointments in 1975, a confidential notification process continued until the adoption of the Appointing Permanent Judges Act (2010:1390) in 2011. Now the Judges Proposals Board administers the recruitment of the Swedish Supreme Court justices with open applications and provides the Government with recommendations.

After analyzing each country's development of appointing Supreme Court justices, a comparative analysis reveals the observed similarities and differences between the two countries. The main similarities identified include that the executive power appoints the Supreme Court justices, impartial committees evaluate the nominees qualifications, and public insight increases over the selection process. On the other hand, the magnitude of power the executive branch maintains over the Supreme Court justices selection process differs between the two countries. Ultimately, this thesis finds that the Judges Proposals Board equates to the functions performed by the Senate Judiciary Committee and the Standing Committee on the Federal Judiciary of the American Bar Association.

Sammanfattning

I denna uppsats jämförs utvecklingen av rekryteringsprocessen av justitieråd till de respektive högsta domstolarna i USA och Sverige. Båda domstolarna inrättades 1789 under starkt inflytande av Charles-Louis de Secondats, Baron de La Bréde et de Montesquies teorier om maktdelning. Först analyseras i kronologisk ordning hur justitieråd väljs och tillsätts i USA respektive Sverige. USA:s president nominerar justitieråden som senaten därefter godkännander. Från början var tillsättningen inte offentlig, men numera TV-sänds senatensförhör och påtryckningar från intressegrupper har lett till en politisering av nomineringsprocessen. Den svenska regeringsformen från 1809 gav kungen ensamrätt att tillsätta justitieråd. Regeringen tog formellt över tillsättningen av justitieråd så sent som 1975, men fortsätt att rekrytera justitieråd med ett kallelseförfarande till 2011 när lagen om utnämning av ordinarie domare (2010:1390) tillkom. Numera administrerar Domarnämnden rekryteringsförfarande genom öppna ansökningar och rekommendationer till regeringen.

Genom en komparativ studie har likheter och skillnader av rekryteringen av domare till de högsta domstolarna i USA och Sverige analyserats. Processen är lika till vissa delar: den verkställande makten tillsätter justitieråd, självständiga nämnder utvärderar justitierådens meriter och i båda länderna syns en framväxande offentlig inblick över hela processen. Å andra sidan, hur mycket inflytande den verkställandemakten har bibehållit över tillsättningsprocessen skiljer sig mellan de två länderna. Slutligen upptäcker denna uppsats att domarnämndens uppgifter anses korrenspondera till senatens och den amerikanska advokatsamfunds kommitté för domstolsväsende.

Preface

I would like to express my gratitude to my thesis advisor Associate Professor Per Nilsén, Faculty of Law Lund University, for his ideas, support and guidance during the research and writing process. Furthermore, I would like to thank my family and friends for believing in me and supporting me throughout my law studies. Finally, I would like to give my sincerest thanks to my father, David Krumholz and Mr. Eric Jorgensen for proofreading this thesis and for interesting discussions.

Lund, January 2015
Elise Krumholz

Abbreviations

JPB	Judges Proposals Board
Judiciary Committee	Senate Judiciary Committee
IG 1809	Instrument of Government 1809
IG 1974	Instrument of Government 1974
Prop.	Government bill
Standing Committee	The Standing Committee on the Federal Judiciary of the American Bar Association
SFS	Swedish Code of Statutes
SOU	Swedish Government Official Reports
U.S.	United States
U.S. Constitution	United States Constitution
Working Committee	The Working Committee on Constitutional Reform

1 Introduction

1.1 Background

This year is the two hundred and twenty-fifth anniversary of the establishment of the United States Supreme Court and the Swedish Supreme Court. Coincidentally, the appointment of Supreme Court justices has had a long tradition of secrecy in both countries. The United States Constitution entrusts the President with the power of appointing Supreme Court justices, while the Government expedites this duty in Sweden. In other words, the populace does not elect who will become the next Supreme Court justice and has to trust that those in power will select the best candidate. It was not until 2011 that Sweden adopted an open application process for Supreme Court justices. In the United States the Senate began opening it's hearings to the public in 1929, yet why or how the President selects nominees remains largely discretionary. Consequently, the appointment of Supreme Court justices evolved from a closed to a more transparent procedure at different points in time in each country.

1.2 Purpose and Research Question

The purpose of this essay is to examine the appointment of the Supreme Court justices in the United States and Sweden, as well as analyze the similarities and differences between the country's selection procedures. In order to achieve this purpose, the thesis will answer the following questions:

-How are the appointment of the Supreme Court justices constructed in the United States and how does this compare with the Swedish system?

-What controls exist to guarantee that the President will not abuse his/her appointment power in the United States? Does Sweden utilize similar or different forms of control?

-In what aspects has the Supreme Court justice's appointment process become more open in the United States and Sweden?

-What are the formal requirements in order to be a Supreme Court justice in the United States and who assesses these qualifications? How does this compare with Sweden?

1.3 Method and Material

In order to answer the research questions, a comparative legal method has been selected. The comparative legal method is based on a comparison of the similarities and differences between two legal systems, in this case the United States and Sweden.[1] Professor of Law, Michael Bogdan at Lund University, stresses that when comparing how different countries regulate a specific situation that the applied legal rules need to regulate the same matter. It is not the outcome of the rules that are essential nor should a comparison focus on the labels of the legal rules; instead, the comparatist should focus on the conflicts that the rules are intended to regulate. This functionalism approach is advocated, since different societies tend to encumber similar problems that need to be addressed.[2] Even though the United States belongs to the common law legal family[3] and Sweden belongs to the Nordic legal systems[4], the appointment of Supreme Court justices can be compared between the two countries. Both countries also have a form of a written constitution, which permits a constitutional comparison. Charles-Louis de Secondat, Baron de La Bréde et de Montesquie's book, *Spirit of the laws*, provides a common basis for the constitutional comparison and explains the legal systems setup. Coincidentally, comparative constitutional law originated from the drafters of the United States Constitution who analyzed constitutional practices in other nations when they formed a new constitution.[5]

Since the United States and Sweden originate from different legal traditions, it is appropriate to analyze the legal sources separately in the context of the relevant legal system.[6] The analysis of the appointment of the United States Supreme Court justices consists of the following documents: the United States Constitution, legal doctrine and publications from the American Bar Association. In the Swedish section, the applied legal sources are: laws, legislative history (*förarbeten*), and legal doctrine. In addition, webpages from official authorities were utilized to access documents and attain the most recent information.

[1] Valguarnera 2013, p. 141.
[2] Bogdan 2013, pp. 47-49.
[3] Valguarnera 2013, p. 149.
[4] Some scholars believe that Nordic law should be treated as an independent family, while others classify Nordic law within the Continental European family of law. See Bogdan 2013, p. 76.
[5] Tushnet 2006, pp. 1226 & 1253.
[6] Vogenauer 2006, p. 872.

The "Glossary for the Courts of Sweden" and the English translation of the Instrument of Government[7] were readily utilized to translate the Swedish documents. At times the Swedish translation of official authorities and laws are provided in parenthesis in order to maintain the authenticity of the terminology. In both countries, the former selection process of Supreme Court justices was confidential, which explains why there is a lack of information from that era. However, this confidentiality emphasizes the magnitude of change that has occurred. Moreover, the majority of the Swedish sources of law are in Swedish and therefore there is a need to shed some light on the subject in English.

1.4 Limitations

This thesis only compares the appointment of the Supreme Court justices in the United States and Sweden. Accordingly, the jurisdiction of the Supreme Courts, the composition of justices, as well as information about the specific justices are beyond the scope of this thesis. With the intention of keeping the thesis as impartial as possible, political parties, race, gender and media scandals are not examined. Furthermore, the essay focuses on the most significant changes; therefore, the historical and political complexity of the selection process extends beyond this thesis. I found it intriguing that the American and Swedish Supreme Court were established in 1789 and therefore only these two countries will be compared. I also have dual citizenship in the United States and Sweden and this thesis is an opportunity for me to reconnect with my American heritage during my present endeavors.

1.5 Disposition

Chapter 1 provides an introduction to the subject, presents the purpose of this thesis, and explains the methodology and materials utilized. *Chapter 2* examines the theoretical and historical background related to the establishment of the American and Swedish Supreme Court. *Chapter 3* observes how the nomination of Supreme Court justices has evolved in the American legal system and is divided into three time periods that mirror the major transitions towards a more visible process. The next chapter, *Chapter 4*, presents the development of the appointment procedure in Sweden and is divided into three time periods that correspond to changes of the Instrument of Government. Finally, *Chapter 5* answers the research questions through a comparative analysis.

[7] The Instrument of Government, http://www.riksdagen.se/en/Documents-and-laws/

2 Theoretical and Historical Background

This section begins with a Montesquieu perspective on the separation of powers within a state. This transcends into a deeper analysis of the original constitutional framework in both countries with an emphasis on the appointment of the Supreme Court justices. As a final point, a brief historical description of the inauguration of the Supreme Courts will be provided.

2.1 Separation of Powers

A theoretical background on the separation of powers within a state is crucial in order to better understand the importance of the Supreme Court justices in the analyzed legal systems. In his book, *The Spirit of the Laws*, Montesquieu discusses that a state has three divisions of power: legislative, executive, and judicial. The legislative power makes the laws, the executive power establishes security, and the judicial power adjudicates disagreements. These three powers must be kept separate, otherwise it would threaten the life and liberty of the people. For instance, if the judicial power was intervened with the executive power, then the judge would act as an autocrat. At the same time, the powers should regulate each other so that they do not become obsolete. For example, if the legislative power is not checked by the executive power, then the legislators will implement laws that make the executive power obsolete.[8]

Notably, Montesquieu's perception of judges is still readily seen in both legal systems today. He accentuates that judges should not adjudicate based upon their personal opinion; instead, judgments should reciprocate the laws.[9] In an essence, the judicial branch seems less impactful, since according to Montesquieu they are, "…only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."[10] Montesquieu's statement neglects the complexity of applying the law to disputes in a constantly changing society and that judges must interpret the law as well.[11]

[8] Montesquieu 1989, pp. 156-157 & 162.
[9] Montesquieu 1989, p. 158.
[10] Montesquieu 1989, p. 163.
[11] For example, in NJA 2010 s. 467 the Swedish Supreme Court acknowledged that a direct application of the Debt Instrument Act (1936:81) (*Skuldebrevslagen*) was insufficient, since the method of payment at banks had changed since the adoption of the Act in 1936. In the United States, the Supreme Court reinterprets the Constitution through constitutional litigation (for further reading see Bogdan 2013, p. 125).

2.2 Constitutional Framework

2.2.1 The United States Constitution

The United States Constitution (U.S. Constitution) stands as the core of the United States (U.S.) legal system.[12] The U.S. Constitution's first three articles strictly follow Montesquieu's separation of power: Article I regulates the legislative powers of the Congress[13], Article II regulates the executive powers of the President, and Article III regulates the judicial powers of the Courts. Each branch of government has certain powers that functionally belong to the other branches, which creates checks and balances between the powers.[14] For example, the President oversees the Supreme Court by nominating the Supreme Court justices, while the Senate advises and consents with the President's decision.[15]

To guarantee judiciary independence, the justices received lifetime tenure to protect them from electoral pressures as well as no reduction in salary. Judicial independence was further emphasized in the case *Marbury vs. Madison*[16], when Chief Justice John Marshall formulated the doctrine of judicial review, which enabled the Supreme Court to declare an action of the other branches of government as unconstitutional. Judicial review has possibly given the Supreme Court more power than what was originally intended by the U.S. Constitution and the concept of judicial supremacy is controversial. On the other hand, the judicial branch can be perceived as the balance of power between the executive and legislative branches in the American system.[17]

[12] Bogdan 2013, p. 124.
[13] Congress consists of the Senate and House of Representatives.
[14] Segal & Spaeth 1993, p. 12.
[15] U.S. Const. art. II, § 2.
[16] 1 Cranch, 137, 1803.
[17] Segal & Spaeth 1993, pp. 13-17.

2.2.2 The Swedish Instrument of Government 1809

The Instrument of Government 1809 (*regeringsform*) [IG 1809] diverged from Montesquieu's separation of power in various aspects. Instead of three divisions of power, the IG 1809 was based on five functions: legislative, executive, judicial, tax, and regulatory.[18] These functions were not distinct from each other; for example, both the King and the Riksdag[19] exerted legislative power.[20] The Swedish Supreme Court performed the judiciary function and adjudicated according to the laws.[21] The King formally had two votes and judgments were expedited in the King's name and certified with either his signature or secretion.[22] Furthermore, the title Justice of the Supreme Court (*justitieråd*) dissociated the members from the powers of the monarch. In order to accentuate judiciary independence, the justices were irremovable and could not be transferred to another post.[23] According to § 5 of the IG 1809 the Prime Minister of Justice (*justitiestatsminister*) was always a member of the Swedish Supreme Court, which meant that administrative and judicial functions were mixed.[24] Instead of judicial review, the Swedish system incorporated judicial preview; thus, the Court reviewed laws beforehand in order to guarantee their compliance with the IG 1809.[25]

Scholars debate about whether the IG 1809 was more of a formalization of Swedish history rather than a reception from Montesquieu and other international models of government. Professor of History, Sten Carlsson from Uppsala University, emphasizes that the judicial power in the IG 1809 was more than likely a reception from Montesquieu due to the more distinguished status the justices received.[26] On the other hand, Professor of Political Science, Fredrik Lagerroth from Lund University, identifies that the King's roll as the Chief Justice of the Swedish Supreme Court reflects the Swedish tradition of the monarch participating in adjudication from the Middle Ages.[27]

[18] Modéer 2010, p. 141.
[19] The Swedish Parliament.
[20] § 87 of the Instrument of Government 1809.
[21] § 17 & § 47 of the Instrument of Government 1809.
[22] § 21 & § 23 of the Instrument of Government 1809.
[23] Lagerbjelke 1996, pp. 40-41.
[24] Carlsson 1990, p. 126.
[25] § 87 of the Instrument of Government 1809.
[26] Carlsson 1990, p. 124-127.
[27] Lagerroth 1940, p. 526.

2.3 The Inauguration of the Supreme Courts

Even though the U.S. and Sweden have different legal structures and are geographically disperse, the implementation of the Supreme Court occurred in both countries in 1789.

2.3.1 The U.S. Judiciary Act of 1789

Article III, Section I of the U.S. Constitution states that: *The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish*.[28] Yet, it was not until the Judiciary Act of 1789 that Congress established the federal court organization and gave the Supreme Court the original jurisdiction described in the U.S. Constitution.[29]

2.3.2 The Swedish Act of Union and Security of 1789

The Swedish Supreme Court was inaugurated May 15, 1789 by King Gustav III through the Act of Union and Security (*Förenings–och säkerhetsakten*). In retrospect, the establishment of the Swedish Supreme Court was more about Gustav III gaining more power and a consequence of the termination of the Council of State (*Riksrådet*). For instance, the members of the Supreme Court were only appointed limited terms of office and Gustav III did not issue specific instructions for the court. Consequently, it was not until the IG 1809 that the Swedish Supreme Court gained judiciary independence.[30]

[28] U.S. Const. art. III, § 1.
[29] Marcus 1990, pp. 93-94.
[30] Metcalf 1990, pp. 5 & 15-16.

3 The Selection of the American Supreme Court Justices

This chapter reviews the development of the President's appointment of the U.S. Supreme Court justices and is divided into three time periods that reflect the increasing visibility and public accountability of appointments. The first section describes the time period when the appointment process was confidential and explains the President's and Senate's role more thoroughly. In the next section, transparency over the selection process breaks through as a result of the Senate Judiciary Committee (Judiciary Committee) opening their hearings and the American Bar Association's evaluation of the nominees' qualifications. The last section discusses the increasing politicization of the appointment procedure.

3.1 Closed Sessions (1789-1928)

The delegates at the Constitutional Convention debated over how the judges should be appointed. Some delegates argued that the Senate should appoint the Supreme Court justices, while others argued that the President should solely authorize appointments.[31] The delegates felt that if the power of appointment was vested in one person, then it would be easier to hold them accountable for their acts. At the same time, they feared giving the President a monopoly over the process.[32] In the end, the delegates decided that the President shall nominate and appoint the Justices of the Supreme Court with the advice and consent of the Senate.[33]

Neither the U.S. Constitution nor the Judiciary Act of 1789 specified qualifications for the federal judges. The first President, George Washington, chose individuals he felt were well-qualified, but during the nineteenth century political party loyalty became the most important criteria.[34] Indeed, the Presidents relied more on party loyalty, political experience and position in the upper social strata than good character, legal competence and congenial political philosophy when selecting a nominee. Presidents were less concerned with the candidate's judicial opinions and were more focused on what impact the Supreme Court would have in

[31] Surrency 1987, pp. 13-14.
[32] Strauss & Sunstein 1992, p. 1495.
[33] U.S. Const. art II, § 2.
[34] Surrency 1987, pp. 286-287.

the political, economical, and social realm. As a result, political affiliation gave the President confidence that the appointee at least shared his values, beliefs, and opinions. Political experience was also considered a better gauge for expected behavior than judicial experience.[35]

3.1.1 The Senate

The Senate has an independent role in the nomination process and serves two functions: advice and consent. Accordingly, the President can ask for the senators' advice before making an appointment and the senators can reject the President's nomination.[36] During this time period, Supreme Court nominations took place in secrecy; in other words, there were no public hearings and floor debates were in closed executive sessions. Throughout the nineteenth century there were twenty failed nominations, which is more than triple the amount of rejections compared to the twentieth century. This suggests that the Senate had more power during the nineteenth century and can be explained by the fact that the Senate was still chosen by the Legislature.[37] Senators became accountable for their actions after the Seventeenth Amendment of the U.S. Constitution was ratified in 1913, which entailed that the Senators from each State would be elected by popular vote.[38] Furthermore, in 1916 the Senate started to have hearings on the qualifications of Supreme Court nominees.[39]

3.2 More Transparency (1929-1980)

3.2.1 The Senate Judiciary Committee

In 1929, the Senate went from meeting in closed executive sessions, unless there was a two-thirds vote, to having open debates on nominations. Then in 1939, the Judiciary Committee began calling on nominees to appear at their own confirmation hearings and posed questions to the nominee.[40] As a consequence the public opinion held the Senate accountable and interest groups started to gain power.[41]

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[35] Halper 1976, pp. 564-580.
[36] Dorsen 2006, p. 657.
[37] U.S. Const. art. I, § 3.
[38] Selecting Supreme Court Justices: a dialogue, p. 5.
http://www.americanbar.org/content/dam/aba/publishing/focus_on_law_studies/publiced_focus_spring05.authcheckdam.pdf
[39] Dorsen 2006, p. 658.
[40] Freund 1988, pp. 1157-1158.
[41] Selecting Supreme Court Justices: a dialogue 2005, p. 5.

3.2.2 The Standing Committee on the Federal Judiciary of the American Bar Association

As mentioned in Section 3.1, there are no constitutional requirements for federal judges; nevertheless, all justices have been U.S. citizens with law degrees.[42] The Standing Committee on the Federal Judiciary of the American Bar Association (Standing Committee) was established in 1945 and began evaluating the professional qualifications of Supreme Court nominees in 1956.[43] They provide impartial peer-review evaluations of the nominee's integrity, professional competence and judicial temperament and disregards the nominee's philosophy, political affiliation, and ideology. It is important to clarify that the Standing Committee does not propose or recommend nominees. Instead, they complement the selection process by acting as an independent, neutral actor that rates the U.S. Supreme Court nominee's into three categories: "Well Qualified," "Qualified," and "Not Qualified".[44] The different ratings are explained accordingly:

> **Well Qualified** - a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience and meet the very highest standards of integrity, professional competence and judicial temperament.
>
> **Qualified** - the nominee satisfies the Committee's high standards with respect to integrity, professional competence and judicial temperament, and that the Committee believes the nominee is qualified to perform satisfactorily all of the duties and responsibilities required of the distinguished office of a Supreme Court Justice.
>
> **Not Qualified** - the Committee has determined that the nominee does not meet the Committee's high standards with respect to one or more of its evaluation criteria – integrity, professional competence, or judicial temperament.[45]

After the President makes a nomination, all members of the Standing Committee participate in the evaluation process. In order to evaluate the nominee's professional qualifications, confidential interviews are conducted nationwide. The nominee's legal writings are examined by a separate team of law school professors and another separate team of practicing lawyers. Then each team submits their analysis to the primary evaluator who then conducts a personal interview with the nominee. In addition, the primary evaluator prepares a Formal Report which the voting members review to determine the nominee's rating. Eventually the Chair of the Standing Committee submits a letter with the nominee's official rating to the: White House, U.S. Department of Justice, each member of the Judiciary Committee, and the

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[42] Dorsen 2006, pp. 653-654.
[43] Bloch & Krattenmaker, 1994, pp. 67-68.
[44] Standing Committee on the Federal Judiciary: what it is and how it works, pp. 1-2 & 11. http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf
[45] Standing Committee on the Federal Judiciary: what it is and how it works, pp. 11-12.

nominee. If requested by the Judiciary Committee, then the Chair of the Standing Committee and the primary evaluator will testify at the nominee's confirmation hearing. Lastly, the Standing Committee displays their ratings on their website for the public record.[46]

3.3 Modern Appointment Process (1981-2014)

In the initial phase, the President often delegates the selection process to the Attorney General, Chief of Staff or other top advisors. The Justice Department's Office of Legal Policy screens recommendations from politicians, legal professionals and interest groups. Then the names of the top candidates are given to the Federal Bureau of Investigation for background checks. The President still places weight on the ideology and partisanship of potential nominees and tries to avoid a power struggle with the Senate. Even though the final choice is the President's, influences from others play a significant role. After the President's nomination, the Standing Committee rates the nominee before the Judiciary Committee holds hearings and listens to testimonies from the legal community, interest groups and the nominee.[47]

3.3.1 Politicization

The support or opposition of certain interest groups reveals the ideologies of the nominee to the public and sends signals to the political community. By suggesting questions to the Senators, interest groups take advantage of the confirmation hearings in order to drive issues that are important for their members.[48] The questions at the Judiciary Committee's hearings have become more of an interrogation process of the nominee's constitutional philosophy and ideological views rather than a verification of their professional competence. Since the U.S. Supreme Court interprets the U.S. Constitution, learning about a nominee's constitutional commitments deems desirable. Still, a fine line exists between questions that undermine the independence of the Supreme Court and questions that contribute to the democratic legitimacy of the confirmation hearings.[49]

[46] Standing Committee on the Federal Judiciary: what it is and how it works, pp. 6-7 & 10-11.
[47] Segal & Spaeth 1993, pp. 126-132.
[48] Selecting Supreme Court Justices: a dialogue 2005, p. 9.
[49] Post & Siegel, 2006, pp. 40-45.

Since the judicial selection process was becoming more political, a Task Force[50] was composed in order to evaluate the way candidates were selected, nominated and confirmed to the Supreme Court. The Task Force postulates that the magnitude of visibility over the confirmation process for Supreme Court nominees exacerbates the procedures politicization. Indeed, the confirmation hearings have been televised since 1981, which attracts publicity. The Task Force reiterates that the confirmation procedure has become politicized to the extent that the general public questions the processes legitimacy. In order to depoliticize the judicial selection process:

> The Task Force recommends that Supreme Court nominees should no longer be expected to appear as witnesses during the Senate Judiciary Committee's hearings on their confirmation […] But if nominees continue to appear before the committee, then the Task Force recommends that senators should not put questions to nominees that call for answers that would indicate how they would deal with specific issues if they were confirmed […] The Task Force further recommends that the Judiciary Committee and the Senate base confirmation decisions on a nominee's written record and the testimony of legal experts as to his competence.[51]

Finally, the Task Force acknowledges that the appointment process is controversial, but they reiterate the importance of selecting competent and impartial judges as well as having the public's fidelity.[52]

[50] The Task Force is a group of experts who could knowledgeably examine a system of judicial selection. (See Report of the twentieth century fund Task Force on judicial selection, 1994, p. 311).
[51] Report of the twentieth century fund Task Force on judicial selection, 1994, p. 313.
[52] Report of the twentieth century fund Task Force on judicial selection, 1994, pp. 311-314.

4 The Selection of the Swedish Supreme Court Justices

This chapter analyzes how the appointment of the Swedish Supreme Court justices has gone from a confidential notification process (*kallelseförfarande*) to an open application procedure. The first section analyzes the King's decreasing control over and power within the Swedish Supreme Court. The next section presents the legislative history that led to an open application process and the establishment of the Judges Proposals Board (*domarnämnden*) [JPB]. The last section explains the functions of the JPB as they are solely responsible for making recommendations to the Government (*regeringen*).

4.1 Appointed by the King (1809-1974)

The King held the power within the Ministry (*statsråd*) to appoint all the public officials and governmental positions; this included the Swedish Supreme Court justices.[53] During the 1800s the personal contact between the monarch and the Justices of the Swedish Supreme Court illuminated a political tone, since the Court manifested the King's judiciary power. For instance, the Prime Minister of Justice coordinated the executive and judicial power and was often recruited from the Swedish Supreme Court justices. However, a political crisis in 1840 removed this executive and judicial connection. Over time the King's selection received attention in the newspapers and political debates questioned the validity of the appointee. A tradition developed where the King asked the Justices of the Supreme Court about who should be appointed. Another established custom entailed transferring the head of office from the Justice Department (*justitiedepartementet*) to the Swedish Supreme Court. As a result, the Swedish Supreme Court controlled the composition of their members and rejected suitable prospects based on their ideologies and political views.[54]

[53] § 17 and § 28 of the Instrument of Government 1809.
[54] Jägerskiöld 1989, pp. 247-250.

The IG 1809 specified the following qualifications for the Supreme Court justices: a strong intuition, experience, and judicial integrity.[55] In addition, only Swedish born men of evangelical descent were allowed to be Supreme Court justices.[56] Throughout the 1900s there were few and minor amendments to § 17 and § 28 of the IG 1809. The most significant being in 1949 when these regulations became gender neutral and it sufficed if justices were a Swedish citizen rather than being born in Sweden.[57]

4.1.1 Development of Parliamentarianism

Structural changes in the Swedish Supreme Court system in 1909 resulted in the King losing his constitutional right to participate in the functions of the Supreme Court as well as his two votes. In retrospect, the King had only used his vote once and this was at the hundred year anniversary of the Supreme Court's establishment.[58] After 1918, Parliamentarianism became officially recognized in Sweden.[59] JD. Martin Sunnqvist reflects in his doctoral thesis at Lund University that the division of functions based on the IG 1809 ceased to mirror reality. The Riksdag withheld more control and although the King's power was more or less nonexistent, he continued to formally appoint the Justices of the Supreme Court.[60]

4.2 Confidential Notification Process (1975-2010)

In 1975 a new Instrument of Government (1974:152) [IG 1974] came into effect and § 1 of chapter 1 declared that: *All public power in Sweden proceeds from the people*. The Government officially exerted the executive power, while the King or Queen denoted the Head of State.[61] The Government became responsible for appointing the judges and appointments were based on objective factors, such as merit and competence.[62] According to the IG 1974 legislative history, merit should be based on the acquired experience from previous positions and competence should be based on the candidate's theoretical and practical training as well as suitability for the position.[63]

[55] § 17 of the Instrument of Government 1809.
[56] § 28 of the Instrument of Government 1809.
[57] SFS 1949:111.
[58] Modéer 2010, pp. 204-205.
[59] Herlitz 1958, p. 96.
[60] Sunnqvist 2014, p. 282.
[61] § 4 and § 5 of chapter 1 of the Instrument of Government 1974.
[62] § 9 of chapter 11 of the Instrument of Government 1974.
[63] Prop. 1973:90, pp. 405-406.

The Official Proposals Board (*tjänsteförslagsnämnden*) for the judicial system was also established in 1975 and they were primarily responsible for giving the Government proposals for ordinary judges.[64] However, this did not apply for the Swedish Supreme Court justices whom were appointed directly by the Government through a confidential notification process.[65] During the 1980s and 90s the confidential notification process was extensively criticized for its' lack of transparency and threat against judiciary independence.[66] This led to a series of reports and in 2000 the Commission on the Swedish National Courts Leadership and Appointment of Supreme Court Justices (*Kommittén om domstolschefens roll och utnämningen av högre domare*) proposed that the Supreme Court justices be selected through an open application process. This entailed that available positions would be publically announced and all eligible candidates would have the opportunity to apply. In addition, the Commission recommended that an independent organization prepare the applications and then submit the best three candidates along with a motivation to the Government. There were no changes implemented at the time, due to a disagreement over if the Government wanted to appoint a justice that the organization did not recommend.[67]

The confidential notification process remained in force even when the JPB replaced the Official Proposals Board in 2008.[68] Since the Swedish National Court administration (*domstolsverket*) expedited the JPB administrative duties, the JPB was not considered an independent authority.[69]

4.2.1 The Working Committee on Constitutional Reform

The Working Committee on Constitutional Reform (*grundlagsutredningen kommittén*) [Working Committee] published a report in 2008 that also suggested an open application procedure and considered alternatives to the Government's appointment power of the Supreme Court justices. The first alternative encompassed that the Courts would select their own judges, but this was considered undemocratic. Another alternative proposed that the Riksdag appoint judges; however, the Working Committee feared that politics would

[64] Prop. 2007/08:113, p. 26.
[65] Due to confidentiality, I was unable to attain more specific material about how the Government assessed candidates and if there was a standard protocol. I hypothesize that the Swedish Supreme Court justices were personally involved in the process as they were before.
[66] Brandber & Knutson 2012, p. 33.
[67] SOU 2000:99, pp. 11-13.
[68] SFS 2008:427 replaced SFS 2007:1080.
[69] § 4 of the Ordinance Containing Terms of Reference for the Judges Proposals Board (2008:427).

convolute appointments as seen in the American system. The Working Committee's last alternative suggested the establishment of a separate appointment authority; however, this felt too foreign for the Swedish constitutional traditions. Thus, the Working Committee concluded that the Government should continue appointing judges.[70]

The Working Committee also reinforced the need for a form of control so the Government does not abuse their appointment power. They rejected implementing the Riksdag's consent as a form of control, due to the politicization within the American system. Instead, the Working Committee proposed that a committee, who is independent from both the Riksdag and Government, recommend candidates for appointment. They concluded that even though the Government should not be bounded by the committee's recommendations, the Government's alternative proposed appointee must always be controlled by the committee before being appointed.[71]

Furthermore, the Working Committee believed that the appointment process needs to be transparent for the populace and independent from other governmental procedures. Indeed, this was considered another reason why a separate organization should act as an advisory board for the Government. There were apprehensions to the process being public, since lawyers in the private sector felt that it was controversial to publically announce that they were applying for a judicial position. In order to settle these apprehensions, the report suggested implementing general interest applications; thereby, encouraging lawyers to apply even if there was not an open position. Overall, the arguments for openness and transparency bared precedence; in fact, an open application process would further guarantee insight from society as well as constitutional legitimacy.[72] The Working Committee was part of a larger reform process of the IG 1974[73] and consequently it was not until 2011 that these suggestions were implemented.

[70] SOU 2008:125, pp. 326 & 328.
[71] SOU 2008:125 pp.330-336.
[72] SOU 2008:125 pp. 327-329.
[73] See Prop. 2009/10:80.

4.3 Open Recruitment (2011-2014)

Amendments to the Instrument of Government (2010:1408) also meant changes for the JPB[74] in addition to an Appointing Permanent Judges Act (2010:1390), all of which were implemented in 2011. The new Act implemented the Working Committee's recommendations and therefore even the Justices of the Swedish Supreme Court are now selected through open applications. Thus, the JPB became completely responsible for administrating applications, giving nominee recommendations to the Government, and providing motivations for their selection.[75] In order to emphasize the JPB's autonomy, the Swedish National Court Administration ceased to be responsible for the JPB's internal affairs.[76]

4.3.1 The Judges Proposals Board

The JPB consists of nine members: five permanent judges, one lawyer (*advokat*) from the Swedish Bar Association, one legal professional (*jurist*) from outside the judicial system and two representatives from the general public.[77] The diversity in composition permits the JPB to better assess legal professionals from outside the judicial system.[78] Historically, Swedish Supreme Court justices have been appointed from within the judicial system and out of the roughly 300 Swedish Supreme Court appointments only eleven have been members of the Swedish Bar Association.[79] Indeed, the goal is to attain a wider recruitment spectrum that attracts the best legal professionals in Sweden.[80] According to the JPB's Annual Report from 2013, there were ten applicants for one available position as Justice of the Supreme Court and two were recommended to the Government for appointment during 2013.[81]

[74] SFS 2010:1793 replaced SFS 2008:427.
[75] §§ 1, 2, 3, 9 of the Appointing Permanent Judges Act (2010:1390).
[76] Prop. 2009/10:181 p. 72.
[77] § 4 of the Appointing Permanent Judges Act (2010:1390).
[78] Prop. 2009/10:181 s. 74.
[79] Brandber & Knutson 2012, p. 29.
[80] Prop. 2009/10:181 s. 68.
[81] Domarnämnden Årsredovisning 2013, p. 11.
http://www.domstol.se/upload/domarnamnden/%c3%85rsredovisning%20f%c3%b6r%202013.pdf

The JPB also has stipulated guidelines[82] for the organizations affairs. For example, the JPB shall invoke and follow a specific interview method when the JPB evaluates applicants.[83] In order to be eligible, the candidate must be a Swedish citizen, have a law degree, and cannot be in bankruptcy.[84] As stated in the IG 1974, selections must be made by objective factors, such as merit and competence.[85] According to the JPB job requirement specification, competence is based on: legal knowledge, critical thinking skills, integrity, personal character, conduct, good speaking and writing skills, ability to handle stressful situations and to work cooperatively. Merit is based on previous work experience and other objective criteria can also be considered.[86]

[82] Arbetsordning för domarnämnden.
http://www.domstol.se/upload/domarnamnden/Arbetsordning%20DNN%202013-07-01.pdf
[83] § 15 of the Arbetsordning för domarnämnden.
[84] § 1 of chapter 4 of the Code of Judicial Procedure.
[85] § 6 of chapter 11 of the Instrument of Government.
[86] Kravprofil för ordinarie domare.
http://www.domstol.se/upload/domarnamnden/Kravprofil%20f%C3%B6r%20ordinarie%20domare.pdf

5 Analysis

To summarize, in the U.S., the President selects a candidate who is then evaluated by the Standing Committee. Then the Judiciary Committee conducts a hearing with witnesses and the nominee is asked to make a statement and respond to the Senate's questions. The President can only appoint a nominee after the Senate has confirmed him/her. Thus, the President holds the ultimate power of appointment, but the Senate limits the President's discretion.

In Sweden, the JPB first publically announces an available Supreme Court justice position and then all eligible candidates are encouraged to submit an application. Then the JPB evaluates the applications, conducts interviews and finally makes a recommendation to the Government. If the Government chooses to appoint a candidate that was not recommended by the JPB, the JPB still must evaluate the Government's selection prior to appointment. Thus, the Government formally appoints the Supreme Court justices, but the JPB actually selects them.

5.1 The Appointment Procedure of the Supreme Court Justices

The U.S. and Sweden have different systems of government and the appointment of the Supreme Court justices involves different steps, yet the ideologies behind the appointment methods are similar. For instance, the executive power appoints the Supreme Court justices in both countries and this is regulated constitutionally. The President's and Government's appointment power represents a form of control over the Supreme Court, which reflects a Montesquieu scheme on separation of power. Since the populace votes for the President and the Government, they manifest the populace interest when selecting justices. In addition, an independent committee evaluates the candidate's qualifications, which will be commented on in more detail in section 5.4. Both countries also struggle with maintaining judiciary independence. In the U.S., the politicization of the appointment process underscores the validity and legitimacy of the Supreme Court appointments. In contrast, the intention of extending the JPB's authority in Sweden was to eliminate political connotations and this explains why the JPB stands autonomous from the Government, Riksdag, and National Court administration.

There are several differences between the evolvement of the appointment procedures in the U.S. and Sweden. The President has always appointed the Supreme Court justices in the U.S., while in Sweden it was not until 1975 that the Government assumed this responsibility from the King. Furthermore, the Senate has an independent role in the American process; whereas, the Riksdag remains outside of the Swedish appointment process. Consequently, the American model reflects a more traditional Montesquieu division of power, while in Sweden there was a fear that the Riksdag's involvement would politicize the process. Another observed difference can be seen by the Government's more passive role in the Swedish nomination process. The Government receives appointment recommendations from the JPB that have already been evaluated. In contrast, the President nominates an individual prior to an evaluation and consequently selects from a broader spectrum.

5.2 Control Over the Executive Power

Both countries protect against leaders potentially abusing their power to appoint Supreme Court justices by maintaining mechanisms of control. The Senate's consent serves as a constitutional safe guard, but even the American Bar Association and interest groups have gained significance in the American system. More specifically, the Standing Committee regulates the competence of the President's selection and interest groups place pressure on the President. Unlike the U.S., Sweden does not have constitutional measures that oversee the Government's selection. Historically, the Government selected justices through a confidential notification process and possibly the largest form of control was the Supreme Court justices themselves. Since the adoption of the Appointing Permanent Judges Act, the Government's appointment of the Swedish Supreme Court justices has been minimized to more of a formality. Indeed, the Government is now confined by the JPB's recommendations. Even though both systems integrated an independent body that controls the qualifications of the candidates, the two countries diverge on how candidates are assessed and, ultimately, confirmed. The President selects nominees first in the American system; whereas, in Sweden the JPB recruits applicants in the first step.

5.3 From a Confidential to an Open Process

Historically, the appointment procedure was confidential in both countries, but now public accountability represents a vital aspect. The American process has become more visible in smaller increments, in contrast to Sweden who sustained a confidential notification process until recently. Prior to amendments, the Swedish appointment process was criticized for undermining judiciary independence and democracy. The Swedish Supreme Court appeared to be a self-contained regime, but now the JPB instills greater transparency over the process. Through utilizing open applications, there should be more variation in the future Swedish Supreme Court justices' legal backgrounds. In other words, the Swedish process has become more open due to a broader spectrum of applicants. In the U.S., televised Senate hearings allow the public to partake in the American Supreme Court justice procedure. The American system tolerates that interest groups increase the politicization of the process, since they also increase public accountability. Based on the analyzed materials, the American public attains a greater opportunity to influence the appointment of Supreme Court justices on a larger scale; while the JPB's two representatives from the general public symbolize a form of public participation in the Swedish system.

5.4 Formal Qualifications and Assessment

In contrast to Sweden, the U.S. does not have any legal requirements in order to be a Supreme Court justice, still all the justices have been U.S. citizens with law degrees. When selecting nominees both countries look for similar attributes, such as professional competence and breadth experience. Another parallel can be seen between the JPB and the Standing Committee, since they are independent bodies that conduct impartial evaluations of the candidate's qualifications. As mentioned before, there is no equivalent to the Senate's assessment of a nominee in the Swedish system. Although the Senate appears to be less concerned with the nominee's formal qualifications and more focused on the nominee's ideologies as well as the balance within the Supreme Court.

5.5 Conclusion

Though the U.S. and Sweden have different legal systems, the process by which they identify, appoint, and confirm their Supreme Court Justices is surprisingly similar. The U.S. has gradually transcended from a confidential to a public process, but the amount of visibility may undermine the original foundation of appointing Supreme Court justices. Sweden has also adopted a more open selection process and although the American model was considered, Sweden implemented open applications along with the JPB. In an essence, the JPB's administration over the selection of Supreme Court justices can be perceived as a combination of the Judiciary Committee's and the Standing Committee's function in the American system.

As both countries stride through the twenty-first century, I predict that the President and the Government will continue appointing the Supreme Court justices in their respective countries, but, beyond that, the selection process will continue to evolve. In the U.S., the Senate hearings will become more political due to fear that the Supreme Court will attain more power. The JPB is relatively new in Sweden and adjustments will be made in order to secure a broader recruitment. Both countries will continue to strive after maintaining judiciary independence and ensuring that Supreme Court justices are the most qualified judges. To conclude, the selection of the Supreme Court justices is complicated and controversial and it should be, since the Supreme Court holds the highest level of judiciary responsibility.

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