

# Judging Judicial Appointment Procedures

*S.I. Strong\**

## ABSTRACT

*Over the last several years, judicial appointment procedures in the United States have become increasingly intractable. Members of both parties are seen to engage in political gamesmanship, calling the legitimacy of the appointment process into question and decreasing public confidence in both the legislature and the judiciary. Questions are even beginning to arise about whether and to what extent the United States is complying with the rule of law.*

*Although numerous solutions have been proposed, one alternative has not yet been considered: international law. As paradoxical as it may seem, the best and perhaps only feasible solution to quintessentially domestic concerns about the appointment of judges may require parties to go outside the national legal system itself.*

*This Article takes its inspiration from the recent decision of the European Court of Human Rights in Case of Gudmundur Andri Ástráðsson v. Iceland and applies certain principles and practices reflected in that case to the United States via the American Convention on Human Rights. In so doing, the analysis offers a useful and tangible means of addressing improprieties associated with the appointment of judges in the United States, thereby providing a new perspective on a very important problem.*

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\* D.Phil. (University of Oxford); Ph.D. (University of Cambridge); J.D. (Duke University); Associate Professor of Law, University of Sydney; Adjunct Professor, Georgetown University Law Center; U.S. Supreme Court Fellow (2012-2013).

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## I. INTRODUCTION

Although concerns have long been raised in the United States about the politicization of judicial appointment procedures, the situation has become untenable in the last few years.<sup>1</sup> For example, in 2016, the Republican-led Senate refused to even hold hearings to consider Judge Merrick Garland’s nomination to the U.S. Supreme Court, a move that has been called “unprecedented,”<sup>2</sup> while in 2018, the same body proceeded to both hear and confirm the nomination of Judge Brett Kavanaugh, despite significant concerns enunciated by numerous individuals and institutions, including the American Bar Association, about his honesty, temperament, and ability to be fair.<sup>3</sup> In 2019, beleaguered Senate Majority Leader Mitch McConnell was poised to move forward with his so-called nuclear option to change Senate rules to speed up confirmation of judicial appointees from a

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1. See Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 470 (2011); Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35 (2012); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2183–99 (2006).

2. Such delays have occurred in the past, but in very different social and political circumstances, leading commentators to agree that the 2016 action was an unprecedented violation of the Senate’s procedural norms. See Erick Trickey, *The History of “Stolen” Supreme Court Seats*, SMITHSONIAN MAG. (Mar. 20, 2017), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/> [<https://perma.cc/B48U-KY9Q>] (archived Nov. 9, 2019).

3. See Adam Liptak, *Bar Association Questioned Kavanaugh’s Temperament and Honesty in 2006*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/kavanaugh-bar-association-aba.html> [<https://perma.cc/V4TT-2W2Y>] (archived Nov. 9, 2019); *The Latest: ABA Urges Senate to Slow Down on Kavanaugh Votes*, ASSOCIATED PRESS (Sept. 28, 2018), <https://www.apnews.com/203cde2444124d6d92504c3a81686fa1> [<https://perma.cc/K2Y9-VM3P>] (archived Nov. 9, 2019).

president of his own party,<sup>4</sup> mirroring efforts undertaken in 2013 by then-Senate Majority Leader Harry Reid to facilitate confirmation of judicial nominees from President Obama.<sup>5</sup>

Though some individuals believe these and similar actions to be both proper and necessary, this type of behavior threatens democratic values in the United States by reducing respect for Congress and casting shadows on the independence and impartiality of the judiciary.<sup>6</sup> Not only have numerous studies shown that public perception of the legitimacy of the courts decreases as politicization of the judicial appointment process increases,<sup>7</sup> but indiscretions in judicial appointment procedures also raise serious questions about whether and to what extent the United States is continuing to adhere to the rule of law.<sup>8</sup>

Up until recently, the only possible responses to improprieties in the judicial appointment process appeared to be political in nature, a somewhat unsatisfying option given that the problems themselves stem from political gamesmanship.<sup>9</sup> However, the recent decision of the European Court of Human Rights (ECtHR) in *Case of Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18 (Ástráðsson), provides useful and tangible proposals into how concerns relating to the appointment of federal judges in the United States might be addressed through an entirely new approach: international law.<sup>10</sup>

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4. See Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722> [<https://perma.cc/YR2A-TU2B>] (archived Nov. 9, 2019).

5. See Michael S. Greve, *Bloc Party Federalism*, 42 HARV. J.L. & PUB. POL'Y 279, 300 (2019).

6. See Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1629–30 (2010).

7. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008).

8. See Wardlaw, *supra* note 6, at 1630.

9. Numerous politically-based solutions have been proposed. See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008) (reviewing various proposals contained in BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006), and JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 303 (2012) (proposing a fast-track approach); Clark, *supra* note 1, at 480–83 (looking to an English model); Nash, *supra* note 1, at 2200–05 (looking to judicial elections).

10. See *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, HUDOC (2019), <https://hudoc.echr.coe.int> [<https://perma.cc/345T-SGPY>] (archived Feb. 14, 2020). The judgment is final as of March 12, 2019, but may be subject to editorial revision. The matter was referred to the Grand Chamber on September 9, 2019, although that does not affect the analysis herein. See *id.*

The Article begins in Part II with a short discussion of the legal backdrop to the *Ástráðsson* case before continuing to *Ástráðsson* itself in Part III. The analysis then considers in Part IV whether the American Convention on Human Rights (American Convention)<sup>11</sup> triggers duties similar to those established by the ECtHR in *Ástráðsson* under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).<sup>12</sup> The Article combines these various strands of thought in Part V to determine whether and to what extent the lessons of *Ástráðsson* can and should be applied to US judicial selection procedures before concluding in Part VI with a number of forward-looking proposals.

Before proceeding, it is important to note that this Article does not intend to identify specific individuals whose appointment procedures can or should be challenged. Instead, the focus here is on proposing a means of remedying egregious breaches of national and international law.

## II. LEGAL BACKDROP TO *ÁSTRÁÐSSON*: ACTIONS IN AND INVOLVING ICELANDIC NATIONAL COURTS

The events underlying the *Ástráðsson* case date back to 2016, when Iceland adopted Judiciary Act No. 50/2016 (2016 Act), establishing a new Court of Appeal and the method by which fifteen judges were to be appointed initially to that court.<sup>13</sup> According to the 2016 Act, a committee of experts (Committee) was to assess candidates and deliver a report to the Minister of Justice (Minister), who was not permitted to appoint any candidate who was not considered “most qualified” by the Committee.<sup>14</sup> The one exception to the “most qualified” rule required Althingi (Parliament) to accept an alternative proposal from the Minister was if the candidate in question fulfilled the minimum requirements laid down by domestic law.<sup>15</sup> Once Parliament approved the candidates, the names were to be sent to the President of Iceland to be formally appointed.<sup>16</sup>

After considering the credentials of various individuals who had applied for positions on the new Court of Appeal, the Committee provided the Minister with the list of the fifteen most qualified

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11. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

12. See Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocols nos. 11 & 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

13. *Ástráðsson*, ¶ 5.

14. *Id.* ¶ 6.

15. *Id.*

16. *Id.*

candidates.<sup>17</sup> Upon the Minister's request, the Committee subsequently provided a ranked list of all thirty-three candidates.<sup>18</sup> Ultimately, the Minister submitted fifteen names to the Parliament for approval, but included four judges who were not among the Committee's top fifteen.<sup>19</sup>

The fifteen candidates submitted by the Minister were approved by a majority of the Constitutional and Supervisory Committee of Parliament.<sup>20</sup> The vote was split along party lines,<sup>21</sup> with members of the minority party "express[ing] serious reservations regarding the Minister's compliance with principles of administrative law, including the requirement of sufficient investigation and the rule of national law that only the most qualified candidates should be selected."<sup>22</sup> The next day, the full Parliament approved the fifteen candidates submitted by the Minister, with the vote again splitting along party lines.<sup>23</sup> Although the President of Iceland initially questioned the legality of the process in Parliament, he subsequently appointed the fifteen candidates put forward by the Minister and approved by Parliament.<sup>24</sup>

Immediately after the appointments were made by the President, two of the candidates who were on the Committee's list of fifteen but not on the list forwarded by the Minister to Parliament (J.R.J. and A.H.) brought an action in Iceland's national courts.<sup>25</sup> The matter went up to the Supreme Court of Iceland on two occasions.<sup>26</sup> Although the candidates asked for the appointments of the Minister's fifteen individuals to be annulled, the Supreme Court did not grant their request but did allow J.R.J. and A.H. to bring an action for damages.<sup>27</sup>

In its judgments, the Supreme Court of Iceland held that the Minister had violated various provisions of national law regarding the appointment of judges to the new Court of Appeal.<sup>28</sup> The Supreme Court also indicated the critical need to uphold laws relating to judicial selection, since those provisions do not involve the

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17. *Id.* ¶¶ 7–8.

18. *Id.* ¶¶ 7, 11–13.

19. *Id.* ¶ 16.

20. *Id.* ¶ 20.

21. *Id.* ¶ 19.

22. *Id.* ¶ 20.

23. Additional questions arose regarding the propriety of this vote. *See id.* ¶ 24.

24. *Id.* ¶ 25.

25. *Id.* ¶ 27.

26. *Id.* ¶¶ 29–35 (noting that the first Supreme Court decision addressed the question of the type of relief (if any) that was warranted while the second considered the question of the quantum and type of damages allowed).

27. *Id.* ¶¶ 29, 35. Of course, if any breach of proper appointment procedures could be addressed merely through an award of damages, states would have little or no incentive to abide by their own rules, so long as the cost of paying for the breach was less than the benefit associated with improper appointment.

28. *Id.* ¶¶ 32–34.

appointment of “persons to offices that are accountable to the Minister, but rather members of another branch of government which has a monitoring role vis-à-vis the other branches and is guaranteed independence” under Iceland’s Constitution.<sup>29</sup> Ultimately, J.R.J. and A.H. were each granted ISK 700,000 (approximately €5,700) as compensation for nonpecuniary damages.<sup>30</sup>

Following the initial actions by J.R.J. and A.H., the two other candidates who were on the Committee’s list but who were not on the Minister’s list brought actions of their own for similar claims.<sup>31</sup> Those matters were still pending on appeal at the time the ECtHR handed down its decision in *Ástráðsson* in March 2019.<sup>32</sup>

### III. *ÁSTRÁÐSSON* ITSELF: THE ACTION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Incidents involving Guðmundur Andri Ástráðsson—the applicant who initiated the case heard by the ECtHR—arose in 2017.<sup>33</sup> After Ástráðsson was convicted in Icelandic national court for driving without a valid driver’s license and under the influence of narcotics, he appealed the decision to the new Court of Appeal.<sup>34</sup> The panel that was set to hear the matter included one of the judges (A.E.) who had not appeared on the Committee’s initial list of fifteen candidates.<sup>35</sup>

Before the matter was heard, Ástráðsson’s counsel submitted a request asking for A.E. to withdraw from the panel, based on the claim that A.E.’s presence would deny Ástráðsson a fair trial conducted by an impartial and independent tribunal established by law.<sup>36</sup> When making the request, Ástráðsson’s counsel relied on Articles 59 and 70(1) of the Icelandic Constitution and Article 6(1) of the European Convention, in addition to various provisions of national law.<sup>37</sup> The Court of Appeal rejected the request, and Ástráðsson brought the matter to the Supreme Court of Iceland.<sup>38</sup> The Supreme Court indicated that the matter was untimely but did

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29. *Id.* ¶ 32.

30. *Id.* ¶ 31.

31. *Id.* ¶ 52.

32. *Id.* ¶ 54.

33. *Id.* ¶ 37.

34. *Id.* ¶¶ 37–39.

35. *Id.* ¶¶ 40.

36. *Id.* ¶¶ 41–42.

37. See European Convention, *supra* note 12, art. 6(1); *Ástráðsson*, ¶ 42; see *infra* notes 42, 69 and accompanying text (quoting relevant language from the Icelandic Constitution and Charter of Fundamental Rights of the European Union).

38. *Ástráðsson*, ¶¶ 43–44.

agree to hear the matter if Ástráðsson's action in the Court of Appeal failed, which it subsequently did.<sup>39</sup>

When Ástráðsson brought his second application to the Supreme Court, he included a number of additional allegations about improprieties associated with the appointment of A.E.<sup>40</sup> Chief among these was the fact that her husband had given up a preferential position on the party's constituency list in favor of the Minister after the Minister decided to include A.E. among the fifteen candidates whose names were forwarded to Parliament, thereby doing "the Minister 'a huge political favour' which had secured her political future."<sup>41</sup>

When the Supreme Court of Iceland refused to overturn Ástráðsson's conviction, Ástráðsson brought his case to the ECtHR, claiming a violation of both national and international law.<sup>42</sup> When evaluating Ástráðsson's allegations, the ECtHR considered Article 59 of the Icelandic Constitution, which states that "[t]he organization of the judiciary can only be established by law," and Article 70(1) of the Constitution, which indicates, in part, that "[e]veryone shall, for the determination of his rights and obligations or in the event of criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law."<sup>43</sup> The ECtHR also considered "the unwritten rule of Icelandic law that administrative authorities should appoint the most competent candidate," a principle that had been reaffirmed in the Supreme Court of Iceland's judgments involving Ástráðsson,<sup>44</sup> and gave "significant weight" to matters discussed by the Supreme Court of Iceland in cases brought by J.R.J. and A.H.<sup>45</sup> The ECtHR also relied heavily on Article 6(1) of the European Convention, which states, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>46</sup>

Although the United States does not tie the concept of a fair trial to judicial appointment procedures in the precisely same way that Iceland does, there are some analogies to be found. For example, Article 59 of the Iceland Constitution can be compared to Article II,

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39. *Id.* ¶¶ 44–48.

40. *Id.* ¶ 76; *see also id.* ¶ 49.

41. *Id.* ¶ 76; *see also id.* ¶ 49.

42. The ECtHR also considered a number of relevant statutory and regulatory provisions, including Section 4a of Iceland's Judiciary Act No. 15/1998 as well as Sections 21 and IV of the Judiciary Act No. 50/2016. *See id.* ¶¶ 56–64.

43. *Ástráðsson*, ¶ 55 (quoting STJÓRNARSKRÁ LYÐVELDISINS ISLANDS [CONSTITUTION] June 17, 1944, arts. 59, 70(1) (Ice.)).

44. *Ástráðsson*, ¶ 78.

45. *Id.* ¶¶ 79, 107.

46. *Id.* ¶ 82; *see also* European Convention, *supra* note 12, at art. 6(1).

Section 2, of the U.S. Constitution, which indicates that “[t]he President . . . by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”<sup>47</sup> Article 70 of the Iceland Constitution is somewhat similar to the Fifth Amendment of the U.S. Constitution, which indicates that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>48</sup> Furthermore, the United States has a significant number of Senate and Senate Judicial Committee rules affecting judicial selection procedures as well as a variety of unwritten but potentially enforceable norms associated with judicial appointments that not only resemble similar aspects of Icelandic law but that would appear to establish sufficiently distinct standards against which to assess a cause of action for breach of those principles.<sup>49</sup>

Finally, the United States is subject to various provisions of international law that are very similar to those applicable to Iceland. Critically, Article 8(1) of the American Convention contains language very similar to Article 6(1) of the European Convention, indicating that

[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.<sup>50</sup>

Similarities between US and Icelandic constitutional, statutory, and treaty-based provisions bode well for applying the lessons of

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47. U.S. CONST., art. II, §2.

48. *Id.* at amend. V. The due process provisions of the Fourteenth Amendment might give rise to interesting questions about the propriety of elected state court judges, but that issue is beyond the scope of the current Article. *See id.* at amend. XIV.

49. *See Ástráðsson*, ¶¶ 55, 78; MATTHEW MCGOWAN, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 1-113 (2014) [hereinafter SENATE MANUAL]; AKHIL REED AKMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY ix (2012); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411–12 (2007) (arguing for unwritten constitutional principles in the United States based on analogies to principles and practices relating to England's unwritten constitution); Committee on Rules and Administration, *Rules of Procedure Unites States Committee on the Judiciary*, U.S. SENATE (2019), <https://www.judiciary.senate.gov/about/rules> [https://perma.cc/W4S8-95M7] (archived Nov. 18, 2019) [hereinafter *Senate Rules*]; Clark, *supra* note 1, at 467–70 (describing unwritten norms regarding judicial appointments utilized by the Senate since the adoption of the Constitution); Trickey, *supra* note 2 (noting recent violations of unwritten norms in judicial appointment procedures); *see also supra* notes 47–48 and accompanying text (citing relevant aspects of the U.S. Constitution).

50. American Convention, *supra* note 11, art. 8(1); *see also* European Convention, *supra* note 12, at art. 6(1).

*Ástráðsson* to the United States.<sup>51</sup> However, it is possible to conduct an even more nuanced analysis by considering the ECtHR's discussion of European case law and authorities. These references can be analyzed pursuant to three separate criteria: procedure, substance, and structure.

### A. Procedural Considerations

In *Ástráðsson*, the ECtHR considered a number of procedural issues that provide courts and commentators with a useful framework for analyzing the propriety of judicial selection procedures. In so doing, the ECtHR relied on a rich array of binding and persuasive authority developed by European bodies considering challenges to judicial appointments.

The ECtHR began by citing the Judgment of the General Court of the European Union (General Court) in Case No. T-639/16 P, another case involving flawed judicial appointment procedures, to support the notion that claims relating to irregularities in the composition of a judicial panel trigger fundamental questions of public policy.<sup>52</sup> According to this decision, courts, particularly those at the appellate level, must address issues relating to judicial appointment *sua sponte* if the parties do not raise the question themselves.<sup>53</sup> If the United States were to follow this approach, courts would not only be permitted but required to insert themselves into the judicial selection process. While US courts are currently loath to undertake this type of analysis due to concerns about the separation of powers,<sup>54</sup> it is possible to read this duty as reinforcing, rather than undermining, a constitutional system of checks and balances.<sup>55</sup>

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51. Other constitutional provisions might also be relevant to such a suit, although it is unnecessary to consider those possibilities here. *See, e.g.*, U.S. CONST. amend. I (concerning the right to petition the government for redress of grievances); U.S. CONST. amend. VI (concerning speedy and public trials in criminal matters); U.S. CONST. amend. IX (concerning unenumerated rights retained by the people); U.S. CONST. amend. XIV (concerning equal protection under the law and raising questions about selection of state court judges).

52. Case T-639/16 P, *FV v. Council*, ¶ 66, EU:T:2018:22 (2018); *Ástráðsson*, ¶ 67; *see also* Marco Borraccetti, *Fair Trial, Due Process and Rights of Defense in the EU Legal Order*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: FROM DECLARATION TO BINDING INSTRUMENT* 95, 96 (Giacomo di Federico ed., 2011) (discussing the relationship between the jurisprudence of EU courts and the European Court of Human Rights).

53. *See Ástráðsson*, ¶ 69 (quoting *FV*, ¶ 66).

54. *See McClure v. Carter*, 513 F. Supp. 265, 268 (D. Idaho 1981).

55. *See, e.g.*, Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 723–24, 771–72 (2012) (discussing the purpose and effects of constitutional separation of powers); *see also infra* notes 76–93 and accompanying text (regarding structural concerns).

Another important element of *Ástráðsson* involves the ECtHR's determination that, because "a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6§1" of the European Convention, the court need not undertake "a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair."<sup>56</sup> Instead, the focus is solely on the propriety of the appointment procedure itself.<sup>57</sup> This technique is particularly useful because it shifts the inquiry away from the fairness of the individual proceeding (which is usually addressed through the appellate procedure) and back to the allegedly improper appointment, thereby underscoring the systemic (rather than individual) nature of the legal injury.<sup>58</sup>

Finally, *Ástráðsson* considers important questions about the magnitude of the impropriety as part of its discussion of the principle of subsidiarity. According to longstanding principles of European law, the ECtHR must give national courts a margin of appreciation on certain matters and cannot question their interpretation of national law "unless there has been a flagrant violation of domestic law."<sup>59</sup> Interestingly, this standard has also been recognized in US courts in cases involving the selection of state court judges.<sup>60</sup> In *Ástráðsson*, the ECtHR extended this test to instances "where, as in the present case, the breach is attributable to another branch of Government and has been acknowledged by the domestic courts."<sup>61</sup>

According to the ECtHR, a "flagrant" violation of national law involves "only those breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system."<sup>62</sup> Furthermore, when considering whether a "flagrant" violation of national law exists, "the Court will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the national law."<sup>63</sup>

While this test arises out of European law, it may prove useful to courts in other jurisdictions, particularly with respect to the structural issues involving the relationship between the different

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56. *Ástráðsson*, ¶ 100 (citation omitted).

57. *See id.*

58. This may assist with standing issues. *See infra* notes 135–36 and accompanying text.

59. *Ástráðsson*, ¶ 100.

60. *Cf. Miller v. Carpeneti*, No. 3:09-cv-00136-JWS, 2009 WL 10695976, at \*8–9 (D. Ala. Sept. 15, 2009) (noting those who voted in judicial elections may challenge an appointment under Alaskan state law if the state acts in an arbitrary, capricious, or invidious manner in devising an appointment plan).

61. *Ástráðsson*, ¶ 101.

62. *Id.* ¶ 102 (citation omitted).

63. *Id.*

branches of government.<sup>64</sup> In particular, this feature may assist US courts in overcoming real or perceived obstacles associated with the political question doctrine.<sup>65</sup>

### B. Substantive Considerations

The ECtHR decision in *Ástráðsson* also addressed a number of substantive considerations. Interestingly, many of the court's observations aligned closely with contemporary scholarship about the connection between judicial appointment procedures, on the one hand, and judicial independence and legitimacy, on the other.<sup>66</sup>

When analyzing this issue, the ECtHR drew on a variety of European authorities. For example, the ECtHR noted that, when considering the legality of the appointment of one of its judges in Case E-21/16, the Court of Justice of the European Free Trade Association (EFTA)<sup>67</sup> held that

[a]ny assessment of the lawfulness of the Court's composition, particularly concerning its independence and impartiality, requires that due account is taken of several important factors. First, the principle of judicial independence is one of the fundamental values of the administration of justice. . . . Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointment . . . must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality.<sup>68</sup>

The ECtHR also cited Case No. T-639/16 P from the General Court, which noted that “one of the requirements concerning the composition of the Chamber is that courts must be independent,

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64. See *infra* notes 76–93 and accompanying text (regarding structural concerns).

65. See *id.* (regarding structural concerns).

66. See, e.g., Kate Malleson, *Creating A Judicial Appointments Commission: Which Model Works Best?*, 1 PUB. L. 102, 118 (2004); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2281 (2018). Notably, a number of European jurisdictions have adopted these norms as reflective of “best practices.” See Anne Sanders & Luc von Danwitz, *Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, 19 GERMAN L.J. 769, 812–13 (2018); Clark, *supra* note 1, at 480.

67. The Court of Justice of the EFTA addresses matters involving Iceland, Liechtenstein and Norway, which are members of both EFTA and the European Economic Area. See EFTA COURT, <https://www.efta.int/eea/eea-institutions/efta-court> (last visited Feb. 14, 2020) [<https://perma.cc/BUP6-Q2HY>] (archived Feb. 14, 2020).

68. *Ástráðsson*, ¶ 65; see also Case E-21/16, *Pascal Nobile v. DAS Rechtsschutz-Versicherungs*, Decision, EFTA Court, ¶ 16 (Feb. 14, 2017); Carl Baudenbacher, *The EFTA Court: An Actor in the European Judicial Dialogue*, 28 FORDHAM INT'L L.J. 353, 386–87 (2005) (discussing the relationship between the Court of Justice of the European Free Trade Association and the European Court of Human Rights).

impartial and previously established by law,”<sup>69</sup> as reflected in Article 47 of the Charter of Fundamental Rights of the European Union.<sup>70</sup> The ECtHR also cited its own extensive case law under Article 6(1) of the European Convention,<sup>71</sup> indicating not only that the concept of the “lawful judge” was inextricably tied to the notion of the rule of law, but also recognizing the connection between the principle of the lawfully appointed judge and judicial independence from the executive branch.<sup>72</sup> Under this line of jurisprudence, “the composition of the court and its jurisdiction must be regulated beforehand by legal provisions”<sup>73</sup> and those procedures “must be strictly adhered to” if the litigants and the public are to retain their confidence in the judiciary.<sup>74</sup> Furthermore, according to the General Court, “it is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so.”<sup>75</sup> All of these principles are relevant to the consideration of recent US practices involving judicial appointments.<sup>76</sup>

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69. *Ástráðsson*, ¶ 69 (quoting Case T-639/16 P, *FV v. Council*, ¶ 67, EU:T:2018:22 (2018)).

70. Article 47 indicates, in relevant part, that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.” Charter of Fundamental Rights of the European Union, art. 47, 2007 O.J. (C 303) 1 [hereinafter Charter of Fundamental Rights].

71. European Convention, *supra* note 12, at art. 6(1); *see also* *Ástráðsson*, ¶ 72. Although the jurisprudence of the ECtHR varies somewhat between the criminal and civil limbs of Article 6(1), the parties in this case agreed that the criminal limb applied. *See id.* ¶ 96; *see also* *Guide on Article 6 of the European Convention on Human Rights: Civil Limb*, EUROPEAN COURT OF HUMAN RIGHTS (2019), [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf) [https://perma.cc/N7BM-552D] (archived Feb. 14, 2020) [hereinafter ECtHR, Civil Limb Guide]; *Guide on Article 6 of the European Convention on Human Rights: Criminal Limb*, EUROPEAN COURT OF HUMAN RIGHTS (2019), [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf) [https://perma.cc/MV3R-B83B] (archived Feb. 14, 2020) [hereinafter ECtHR, Criminal Limb Guide].

72. *Ástráðsson*, ¶ 75 (quoting *id.* ¶¶ 68, 72). When discussing Article 6(1) of the European Convention, the ECtHR noted that: “[T]he requirement that a tribunal be established by law is closely connected to the other general requirements of Article 6§1, on the independence and impartiality of the judiciary, both also being an integral part of the fundamental principle of the rule of law in a democratic society. In short, ‘what is at stake is the confidence which the courts in a democratic society must inspire in the public.’” *Id.* ¶ 99.

73. *Ástráðsson*, ¶ 69 (quoting *FV*, ¶ 68).

74. *Id.* ¶ 69 (citing *FV*, ¶¶ 74–75).

75. *Id.*

76. *See infra* notes 126–47 and accompanying text.

### C. Structural Considerations

Perhaps the most interesting aspect of *Ástráðsson* for US audiences is the discussion of structural issues, meaning the proper roles of different branches of government in the appointment of judges.<sup>77</sup> Indeed, the United States has struggled with these matters in the past.<sup>78</sup> In *Ástráðsson*, the ECtHR relied heavily on materials generated by the Council of Europe, including Opinion No. 18/2015 (Opinion), which discussed the relationship and position of the judiciary with respect to other state entities in modern democracies.<sup>79</sup> After recognizing the connection between the judicial power and the rule of law,<sup>80</sup> the Opinion recognized that “appointment by vote of Parliament and, to a lesser degree, by the executive can be seen to give . . . democratic legitimacy” to the judiciary, in contrast to “constitutional or formal legitimacy,” which is conferred by compliance with the mechanisms set forth in the constitution and other national laws.<sup>81</sup> However, the Opinion highlighted the “risk of politicization” that arises when the legislative and executive branches are involved in judicial appointment processes.<sup>82</sup>

The solution, according to the ECtHR, could be found in Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe (Recommendation), which suggested that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers.”<sup>83</sup> In contrast to the approach adopted by Iceland and other countries (including the United States), the ECtHR took the view that “[d]ecisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”<sup>84</sup>

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77. See Chafetz, *supra* note 55, at 723–24, 771–72.

78. See *McClure v. Carter*, 513 F. Supp. 265, 268 (D. Idaho 1981); Renan, *supra* note 66, at 2281.

79. See generally Consultative Council of European Judges, Opinion No. 18 on the Position of the Judiciary and Its Relation With the Other Powers of State in a Modern Democracy (Oct. 16, 2015), <https://rm.coe.int/16807481a1> [<https://perma.cc/3463-SYG7>] (archived Feb. 14, 2020) [hereinafter Judges’ Opinion]; see also *Ástráðsson*, ¶ 70.

80. *Ástráðsson*, ¶ 70 (quoting Judges’ Opinion, *supra* note 79, ¶ 13).

81. *Id.* (quoting Judges’ Opinion, *supra* note 79, ¶ 15).

82. Judges’ Opinion, *supra* note 79, ¶ 15.

83. Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, *Judges: independence, efficiency, and responsibility* (adopted Nov. 17, 2010), ¶ 46, <https://rm.coe.int/16807096c1> [<https://perma.cc/QG9S-WUC8>] (archived Feb. 20, 2020) [hereinafter Recommendation].

84. See U.S. CONST., art. II, §2 (setting forth the Senate’s power to provide “advice and consent” regarding appointment of federal judges in the United States);

The concept of merit-based appointments is not in any way foreign to the United States, but has instead been discussed for years.<sup>85</sup> However, this conversation has not typically been undertaken in the context of international human rights obligations, as posited by this Article.

When contemplating these issues, the ECtHR recognized the need to respect the separation of powers, particularly between the executive and the judiciary, but also highlighted the fundamental need to protect the independence of the judiciary.<sup>86</sup> As a result, the ECtHR held that it

must look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time.<sup>87</sup>

After setting forth the applicable legal standard, the ECtHR then applied the various principles to the case of *Ástráðsson*, holding that the process by which A.E. was appointed “amounted to a flagrant breach of the applicable rules at the material time” and failed to “secure an adequate balance between the executive and legislative branches in the appointment process,” as contemplated by preexisting rules and norms, including those that were unwritten but nevertheless well established.<sup>88</sup> Furthermore, the actions were taken “in manifest disregard of the applicable rules,” creating a process that was “to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law.”<sup>89</sup> In so holding, the ECtHR “emphasise[d] that a contrary finding . . . would be tantamount to holding that this fundamental guarantee provided by Article 6§1 of the [European] Convention would be devoid of meaningful protection. Therefore, the Court conclude[d] that there has been a violation of Article 6§1 in the present case.”<sup>90</sup>

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*Ástráðsson*, ¶¶ 6, 57, 58, 71 (outlining the process in Iceland) (quoting Recommendation, *supra* note 83, ¶ 44).

85. See Lauren C. Bell, *Federal Judicial Selection in History and Scholarship*, 96 JUDICATURE 296, 301–03 (2013) (discussing merit selection in the federal judicial appointment process); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 675 (2009) (discussing merit selection in state-level judicial appointment processes, often referred to as the “Missouri Plan”).

86. *Ástráðsson*, ¶ 103 (citations omitted).

87. *Id.*

88. *Id.* ¶ 123; see also *id.* ¶¶ 113–19 (providing five reasons why the Government’s arguments were not adopted). Two of the seven judges of the ECtHR dissented from the outcome, although they agreed in the admissibility of the action. See *id.* ¶ 135.

89. *Id.* ¶ 123.

90. *Id.*

Although the ECtHR held that Iceland had violated Article 6(1) of the European Convention, the Court did not indicate how Iceland should remedy that situation.<sup>91</sup> Instead, “it is for the respondent State to choose . . . the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation or violations found by the Court and to redress as far as possible the effects.”<sup>92</sup> In other words, although the ECtHR clearly approved of the merits-based system of judicial appointment outlined in the Recommendation, the ECtHR did not go so far as to mandate that approach.<sup>93</sup>

#### D. Implications for European Parties

Although the ECtHR and other European courts have adjudicated a range of matters dealing with the appointment of judges in the past, *Ástráðsson* provides a number of new insights that are important to parties subject to the European Convention.<sup>94</sup> For example, this decision adds to the already impressive understanding of the concept of a fair trial under Article 6(1) of the European Convention and underscores the fact that fairness relates not only to the procedures used in a particular trial but also to the legitimacy of the tribunal and the individual decision-makers.<sup>95</sup> In this context, the concept of legitimacy includes both democratic and constitutional elements and is directly linked to the concept of the rule of law.<sup>96</sup> Furthermore, *Ástráðsson* demonstrates that suits seeking to enforce judicial appointment procedures can be brought not only by judges and judicial candidates who have been directly affected by improper appointment mechanisms but also by individual litigants whose matters are to be heard by improperly appointed judges. This approach reinforces the idea that violations of established appointment procedures do more than injure individual judges;

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91. See *id.* ¶ 131. *Ástráðsson* was awarded €5,000 in non-pecuniary damages. See *id.* ¶ 128.

92. *Id.* ¶ 131.

93. *Id.* ¶ 71 (quoting Recommendation, *supra* note 83, ¶ 44).

94. The European Convention applies to nations who are members of the Council of Europe. See European Convention, *supra* note 12, at pblm. (“The governments signatory hereto, being members of the Council of Europe . . .”).

95. See European Convention, *supra* note 12, at art. 6(1); ECtHR Civil Limb Guide, *supra* note 71; ECtHR Criminal Limb Guide, *supra* note 71.

96. Legitimacy can be defined in a variety of ways, as can the rule of law. See Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weakness of Consequentialism*, 60 BUFF. L. REV. 69, 112–19 (2012) (discussing various features of the rule of law in the context of judicial selection); S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 542–48 (2018) (describing common concepts of legitimacy in dispute resolution).

instead, the damage is systemic, suggesting a broad public interest in judicial appointments.<sup>97</sup>

The pervasive importance of judicial legitimacy justifies an equally expansive means of enforcing the relevant norms. Allowing an individual litigant to challenge the appointment of a particular judge, as was the case in *Ástráðsson*, is particularly effective, since a judicial candidate who is improperly overlooked for a position may not want to bring suit lest that ruin his or her future chances for advancement.

*Ástráðsson* also assists European parties by illuminating certain structural issues not only between the European Convention and national law but also between different branches of government in democratic societies. To some extent, the ECtHR is in a difficult position, both practically and philosophically, because it is somewhat removed from the unique constitutional and political issues that motivate a particular country. However, that type of distance also provides the ECtHR with opportunities that might not otherwise exist. For example, being one step removed from Iceland's domestic dilemma allowed the ECtHR to rise above partisan politics to set forth certain fundamental expectations about how judges in democratic states are to be appointed. As a result, the ECtHR was able to produce substantive guidelines that should be helpful to nations that both are and are not subject to the European Convention, while also demonstrating a potential detour around domestic roadblocks to reform.

#### IV. US OBLIGATIONS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

Because *Ástráðsson* was decided by the ECtHR, the decision does not apply directly to judicial appointment proceedings in the United States, since the United States is not a state party to the European Convention.<sup>98</sup> However, the United States is a signatory of the American Convention, which is similar to the European Convention in several key regards, particularly with respect to the right to a fair trial and respect for the rule of law.<sup>99</sup> The question therefore is whether and to what extent a party can rely on an *Ástráðsson*-style

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97. See Pettys, *supra* note 96, at 104–05 (noting broad public interest in appointment of US federal judges).

98. See Simplified Chart of Signatures and Ratifications, COUNCIL OF EUROPE (2019), <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> [<https://perma.cc/J3UZ-NTG4>] (archived Jan. 8, 2020); see also *supra* note 95 and accompanying text.

99. See American Convention, *supra* note 11, at arts. 8–9; European Convention, *supra* note 12, at arts. 6–7; *supra* note 50 and accompanying text (quoting art. 8(1) of the American Convention).

analysis under the American Convention to challenge recent or future actions involving judicial appointments in the United States.

The first issue to consider is whether an injured party—either a judge (like J.R.J. or A.H.) who was inappropriately passed over or a private party (like Ástráðsson) who had a criminal or civil matter heard by a judge who was improperly appointed to the bench—could rely on the American Convention in a domestic US proceeding.<sup>100</sup> At this point, the answer is clearly no, since the United States has signed but not yet ratified the American Convention, which means that the instrument is not directly applicable in US courts.<sup>101</sup> However, even though it is unratified, the American Convention is still binding on the United States as a matter of international law pursuant to Article 18 of the Vienna Convention on the Interpretation of Treaties.<sup>102</sup> Therefore, it may be possible to address concerns relating to judicial appointment procedures in the United States through one of the two enforcement mechanisms reflected in the American Convention itself.<sup>103</sup>

The first process to consider involves the Inter-American Court of Human Rights (IACtHR), which may initially appear analogous to the ECtHR.<sup>104</sup> However, individuals may not bring a suit in their own capacity in the IACtHR, as they can in the ECtHR.<sup>105</sup> Instead, an

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100. See American Convention, *supra* note 11. Some commentators have suggested litigation as a way out of the current dilemma regarding judicial appointment procedures. See, e.g., Karl A. Schweitzer, *Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process*, 12 U. PA. J. CONST. L 909, 923 (2010).

101. See *Garza v. Lappin*, 253 F.3d 918, 925–26 (7th Cir. 2001). However, some US courts have cited the jurisprudence of the IACtHR with approval. See *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1049 (D.C. Cir. 2014).

102. According to Article 18, “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.” Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980) [hereinafter Vienna Convention]. See also David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 600–01 (2012); see also *id.* at 650–51 (citation omitted) (noting that although some experts at one time considered the interstate obligation of states that had not yet ratified a treaty to be moral rather than legal in nature, “the United States has since emphasized ‘that whatever doubt may have existed in the past, the rule expressed in Article 18 of the Vienna Convention has become a legal obligation binding upon all states.’”).

103. See American Convention, *supra* note 11, at art. 33.

104. See *id.* at art. 52.

105. See *id.* at art. 61(1). As a result, there are far fewer decisions from the IACtHR than from the ECtHR. See Case Law Database, EUROPEAN COURT OF HUMAN RIGHTS <https://hudoc.echr.coe.int/eng> (listing over 54,000 decisions in total); Decision and Judgements, INTER-AM. COURT OF HUMAN RIGHTS, [http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda\\_casos\\_contenciosos.cfm?lang=en](http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en)

action in the IACtHR may only be brought by the Inter-American Commission on Human Rights (Commission) or a state party to the American Convention.<sup>106</sup> Even more problematically, the failure of the United States to ratify the American Convention means that the United States is not subject to the compulsory jurisdiction of the IACtHR.<sup>107</sup> Instead, the IACtHR can only obtain jurisdiction over the United States by special agreement.<sup>108</sup>

Given the current US stance on human rights and the political nature of the acts in question, it appears unlikely that the United States would consent to the jurisdiction of the IACtHR in matters involving appointment of domestic judges. Even if the United States did provide the necessary consent, it is doubtful that the commission or another state party would actually bring suit against the United States in the IACtHR, since that would not be politically expedient, particularly given the current administration's penchant for acts of personal and political retribution.<sup>109</sup> Indeed, the most likely response to an action brought by the Commission or another state party against the United States would be for the current administration to reduce funding for the Organization of American States (OAS), the body responsible for promulgating and giving effect to the American Convention.<sup>110</sup> However, events over the last two years suggest that the current administration will not limit itself to established norms of

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[<https://perma.cc/J3RR-6TQT>] (archived Nov. 18, 2019) (listing only 385 decisions in total).

106. See American Convention, *supra* note 11, at art. 61(1).

107. See *id.* at art. 62(1) ("A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.")

108. See *id.* at art. 62(3).

109. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 838 (2017).

110. The United States currently pays sixty percent of the organization's annual budget. See Organization of American States, General Assembly AG/RES. 1 (LII-E/17), *Program-Budget of the Organization for 2018*, at 1 (Nov. 10, 2017) (adopting the scale of quota assessments reflected in Committee on Administrative and Budgetary Affairs, Permanent Council of the Organization of American States, Doc. No. OEA/Ser.G CP/CAAP-2673/03 rev. 1 (Feb. 25, 2005)). The current Administration has threatened funding of other international organizations, most notably the United Nations. See Laura Hillard & Amanda Shendruk, *Funding the United Nations: What Impact Do U.S. Contributions Have on UN Agencies and Programs?*, COUNCIL ON FOREIGN RELATIONS (Apr. 2, 2019), <https://www.cfr.org/article/funding-united-nations-what-impact-do-us-contributions-have-un-agencies-and-programs> [<https://perma.cc/L63W-R4ZA>] (archived Nov. 18, 2019). The OAS is doubtless particularly cautious at this time, given recent political attacks on the OAS from member states that are unhappy with being investigated for human rights abuses. See Ángel R. Oquendo, *The Politicization of Human Rights: Within the Inter-American System and Beyond*, 50 N.Y.U. J. INT'L L. & POL'Y 1, 2 (2017).

statecraft, which suggests states could face other types of punitive action from the United States.<sup>111</sup>

The second enforcement mechanism to consider involves the Commission itself.<sup>112</sup> According to Article 41 of the American Convention, the Commission is responsible for a variety of functions, including the promotion of “respect for and defense of human rights” by “develop[ing] an awareness of human rights among the peoples of America,” “mak[ing] recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights,” and similar tasks.<sup>113</sup>

However, the Commission also has an investigative-adjudicative function under Article 41(f), which indicates that the Commission may “take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention.”<sup>114</sup> Notably, the ability to lodge a petition relating to an alleged violation of the American Convention by a state party is held not only by nongovernmental organizations recognized in one or more member states of the OAS but also by an individual or group of individuals, which is very similar to the standing approach reflected in *Ástráðsson*.<sup>115</sup>

If the Commission finds that a violation of the American Convention has occurred, it issues a merits report that

includes recommendations to the State, which may be designed to: bring an end to the actions that violate human rights; clarify the facts and carry out an investigation and punishment; make reparation for the damages caused; introduce changes to the legal system; and/or require the adoption of other

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111. The current Trump administration has a history of seeking political retribution. See, e.g., Jessica Taylor & Sasha Ingber, *Trump Threatens to Send Detained Immigrants to ‘Sanctuary Cities’ as Retaliation*, NAT’L PUB. RADIO (Apr. 12, 2019), <https://www.npr.org/2019/04/12/712760676/trump-threatens-to-send-detained-immigrants-to-sanctuary-cities> [<https://perma.cc/MXB3-88BQ>] (archived Nov. 18, 2019).

112. See American Convention, *supra* note 11, at art. 33.

113. *Id.* at art. 41.

114. *Id.* at art. 41(f).

115. See *id.* at art. 44; Guðmundur Andri Ástráðsson v. Iceland, App. No. 26374/18, HUDOC (2019). Article 45 of the American Convention states that: “[a]ny State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.” American Convention, *supra* note 11, at art. 45. Although the United States has not made this latter declaration, it remains bound by the obligations set forth in Article 41 and subject to the provisions described in Article 44. See *id.* at arts. 41, 44.

measures or State actions to prevent similar violations from occurring in the future.<sup>116</sup>

Merits reports are typically provided only to the states parties pursuant to the rule of confidentiality reflected in Article 50 of the American Convention, although a limited number of reports are subsequently published by the Commission pursuant to the procedure described in Article 51.<sup>117</sup> In either case, this remedy appears very similar to that adopted in *Ástráðsson*.<sup>118</sup>

Although it may seem unusual to bring a suit against the United States in an international venue, there are numerous precedents. Indeed, between 2014 and 2017, the Commission received 365 petitions regarding potential violations of the American Convention by the United States and initiated 110 merits-based investigations under Article 44 and associated provisions.<sup>119</sup> During that same four-year period, seven merits reports regarding the United States were published.<sup>120</sup> The most recent report involving the United States was issued in March 2019 and discussed police violence against Black individuals.<sup>121</sup> This particular report is especially significant to the current analysis, since the Commission found itself competent to compile factual information and issue clear recommendations about how the United States can and should proceed in the future despite the highly politicized nature of the events in question.<sup>122</sup>

Although the Commission has not yet addressed issues involving the selection and appointment of judges in the United States, it has considered concerns regarding judicial appointments in other countries. For example, in 2005, three Venezuelan judges filed a complaint with the Commission alleging that Articles 8 (the right to a fair trial), 23 (the right to participate in government), 24 (the right to equal protection), 25 (the right to judicial protection), and 29(c) (other

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116. See Statistical Data on the Activities of the Inter-American Commission on Human Rights, INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES (Dec. 2016), <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> [https://perma.cc/35K4-G3YY] (archived Nov. 18, 2019) [hereinafter IACHR Statistics] (this language appears under "Merits Report" within the glossary).

117. See American Convention, *supra* note 11, at arts. 50–51.

118. See *Ástráðsson*, ¶ 72.

119. See IACHR Statistics, *supra* note 116 (select "United States"). The Commission did not report on these types of proceedings prior to 2014. See *id.* (under the glossary, see "Cases at the Merit Stage").

120. See *id.* (select "United States").

121. See *IACHR Releases New Report on Police Violence Against Afro-descendants in the United States*, INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES (Mar. 18, 2019), [http://www.oas.org/en/iachr/media\\_center/PReleases/2019/069.asp](http://www.oas.org/en/iachr/media_center/PReleases/2019/069.asp) [https://perma.cc/3WYM-7MPQ] (archived Nov. 18, 2019).

122. See *Police Violence Against Afro-descendants in the United States*, INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES (Nov. 26, 2018), <http://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf> [https://perma.cc/QX2J-6ENF] (archived Nov. 11, 2019).

rights inherent in human personality or deriving from democratic norms) of the American Convention had been violated when the Venezuelan government removed the judges from the bench after the judges ruled against the government in several matters.<sup>123</sup> These types of claims are similar in certain key regards to those asserted by J.R.J. and A.E. in Icelandic national courts as well as those asserted by *Ástráðsson* at the national and international levels.<sup>124</sup>

Given the willingness of the Commission to initiate investigations involving the United States, even in politically sensitive matters such as police misconduct, and the history of the Commission in addressing matters involving judicial appointments in other jurisdictions, it appears that the Commission could very well decide that it has jurisdiction over alleged improprieties in US judicial appointment procedures. Furthermore, fears of political or other forms of retribution may be diminished if the Commission is seen as simply responding to a request for investigation rather than initiating a proceeding.<sup>125</sup> However, the matter must first be brought either by a nongovernmental organization recognized in an OAS member state or an individual or group of individuals with an interest in the actions under investigation. This latter issue is where *Ástráðsson* is most useful, as discussed in the following Part.

## V. *ÁSTRÁÐSSON* AND THE US EXPERIENCE: ANALOGIES AND ARGUMENTS

Although *Ástráðsson* was rendered by the ECtHR, and not the IACtHR or Commission, the decision nevertheless provides useful guidance on how issues involving judicial appointments in the United States might be addressed as a matter of international law.<sup>126</sup> The following analysis considers both procedural and substantive concerns.

### A. *Procedural Matters*

*Ástráðsson* offers important insights into a number of procedural matters that might be relevant to a Commission investigation into judicial appointments in the United States.<sup>127</sup> First, the decision

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123. See *Cova v. Venezuela*, Petition 282/04, Inter-Am. Comm'n. H.R., Report No. 24/05 (2005) [hereinafter *Cova Report*]; Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477, 488–89 (2006).

124. See *Gudmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, ¶¶ 27–34, 41–54, 72, HUDOC (2019).

125. See *supra* notes 105, 113–14 and accompanying text.

126. See generally *Ástráðsson*.

127. The case also suggests some interesting routes that may be available in domestic courts, given the statement that courts can and should investigate problems

indicates that concerns about judicial selection procedures can not only be raised by a judge (as was the case when the Commission considered potential violations of the American Convention by Venezuela)<sup>128</sup> but can also be raised by individuals who are scheduled to appear in front of improperly appointed judges.<sup>129</sup> *Ástráðsson* further suggests that the best tactical approach in cases brought by private individuals may involve persons subject to criminal charges, since procedural protections regarding criminal defendants tend to be more robust and well-developed than similar protections in civil matters.<sup>130</sup>

Some aspects of *Ástráðsson* may be more challenging. For example, the decision suggests that an applicant may need to exhaust domestic remedies before bringing a matter to the attention of the Commission.<sup>131</sup> This type of requirement is standard practice in international proceedings and is reflected in Articles 46 and 47 of the American Convention, which discuss admissibility of petitions.<sup>132</sup> However, Article 47 indicates that exhaustion of domestic remedies may not be necessary if “the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated” or “the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.”<sup>133</sup> This raises questions not only about whether the inapplicability of the American Convention in domestic US courts would allow an applicant to bypass the exhaustion requirement but also whether courts’ likely reliance on the political question doctrine—which serves to bar review of certain politically sensitive acts before the matter proceeds to a hearing on the substance of the dispute and provides

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with judicial selection *sua sponte* as a matter of public policy. *See id.* ¶ 69; *see also* Case No. T-639/16 P, *FV v. Council*, ¶ 66 EU:T:2018:22, (Jan. 25, 2018). While the American Convention is not directly applicable in US courts, some courts consider the instrument persuasive. *See American Convention, supra* note 11; *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1049 (D.C. Cir. 2014); *Garza v. Lappin*, 253 F.3d 918, 925–26 (7th Cir. 2001). Furthermore, parties in US courts may also be able to build a case based solely on US law. *See Schweitzer, supra* note 100, at 923; *see also supra* note 49 and accompanying text (noting possible violations of US law).

128. *See Cova Report, supra* note 123.

129. *See Ástráðsson*, ¶ 72.

130. *See* S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN ST. L. REV. 347, 357 (2018). However, the developing concept of “procedural *jus cogens*,” which would doubtless include the need to have a matter adjudicated by a judge appointed in accordance with the rule of law, applies to civil as well as criminal matters. *See id.*

131. *See Ástráðsson*, ¶¶ 100–01; *see also infra* note 145 (noting possible means of advancing a cause of action in US national courts).

132. Admissibility criteria for petitions to the Commission are outlined in Articles 46 and 47 of the American Convention, with the relevant procedures described in Articles 30–36. *See American Convention, supra* note 11, at arts. 30–36, 46–47; *see also European Convention, supra* note 12, at art. 35(1).

133. American Convention, *supra* note 11, at art. 47.

defendants with an absolute shield from review, regardless of the strength of the plaintiff's claim—would render recourse to domestic courts futile.<sup>134</sup>

Standing requirements for challenges to judicial appointment procedures in the United States may also make it difficult for a case to proceed in US domestic court.<sup>135</sup> However, there have been instances where an individual party (notably, a criminal defendant) has been found to have standing to contest the appointment of a judge who presided over that person's case.<sup>136</sup> As a result, the Commission may very well require an applicant to proceed through the domestic process, even if it is unlikely that the US courts will ever reach the merits of the claim, since that will minimize charges that the Commission is overreaching itself should it deem an action regarding US judicial appointment procedures admissible.<sup>137</sup>

### B. *Substantive Matters*

*Ástráðsson* also offers useful guidance on various substantive concerns. For example, regardless of whether an applicant must begin in the national courts, persuasive arguments can be made, as per

134. Under the political question doctrine, US courts refuse to intervene in a particular matter on the grounds that the issue is more appropriately decided by the political branches of government. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (ruling partisan gerrymandering to be nonjusticiable); *Garza v. Lappin*, 253 F.3d 918, 925–26 (7th Cir. 2001); *Baker v. Carr*, 369 U.S. 186, 210 (1962); Margit Cohn, *Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675, 677 (2011) (discussing the effect of the application of the political question doctrine); John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 459 (2017); Teter, *supra* note 9, at 327–30 (discussing how the political question doctrine could operate to protect judicial selection procedures); *see also supra* notes 99–100 and accompanying text.

135. While it is beyond the scope of the current Article to explore standing considerations under US law, the “case or controversy” requirement of the U.S. Constitution may make it difficult for a challenge to be brought concerning appointment of a federal judge. *See, e.g., Gill v. Whitford*, 139 S. Ct. 1916, 1929 (2018) (finding lack of standing in a case on partisan gerrymandering); *McClure v. Carter*, 513 F. Supp. 265, 269, 271 (D. Idaho 1981) (“[W]e conclude that a United States Senator, suing in either his individual capacity or his official capacity as a senator, lacks standing to challenge the validity of the appointment of a federal judge,” even with the aid of a special jurisdictional statute); *Baker*, 369 U.S. at 204. Individual states have identified their own standing requirements vis-à-vis challenges to judicial appointments. *See, e.g., Miller v. Carpeneti*, No. 3:09-cv-00136-JWS, 2009 WL 10695976, at \*8–9 (D. Ala. Sept. 15, 2009) (noting those who voted in judicial elections may challenge an appointment under Alaskan state law if the state acts in an arbitrary, capricious or invidious manner or distinguishes between citizens and voters).

136. *See infra* note 174 and accompanying text (noting a criminal defendant may be better situated than a civil litigant to bring a challenge to a judicial appointment).

137. *See* *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962) (considering questions relating to an interim appointment of a federal judge); American Convention, *supra* note 11, at arts. 46–47 (regarding admissibility).

*Ástráðsson*, that actions concerning judicial appointments in the United States have run afoul of the American Convention, not only with respect to Article 8(1) (the right to a fair trial), but also perhaps with respect to Article 24 (the right to equal protection), Article 25 (the right to judicial protection), and Article 29(c) (other rights inherent in human personality or deriving from democratic norms).<sup>138</sup> Concerns also exist, as in *Ástráðsson*, about potential violations of national law, including various provisions of the U.S. Constitution as well as Senate and Senate Judicial Committee rules affecting judicial selection procedures, and about breaches of certain unwritten but potentially enforceable norms associated with judicial appointments.<sup>139</sup>

*Ástráðsson* also provides assistance on how the Commission might distinguish between actionable and nonactionable matters.<sup>140</sup> For example, *Ástráðsson* suggests that only those violations of national or international law that “are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system” can provide a basis for international intervention.<sup>141</sup> However, *Ástráðsson* also underscores the need to observe judicial appointment norms strictly in order to avoid undermining judicial independence and public confidence in the judiciary.<sup>142</sup> Behavior that is deliberate or taken in manifest disregard of the controlling norms may be of particular interest to the Commission.<sup>143</sup>

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138. See American Convention, *supra* note 11, at arts. 8, 24–25, 29; see also Cova Report, *supra* note 123.

139. See U.S. CONST., art II, §2, cl. 2 (concerning appointment of judges); U.S. CONST. amend. I (concerning the right to petition the government for redress of grievances); U.S. CONST. amends. V (concerning due process of law), VI (concerning speedy and public trials in criminal matters), IX (concerning unenumerated rights retained by the people), and XIV (concerning due process and equal protection); *Gudmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, ¶¶ 55, 78, HUDOC (2019); SENATE MANUAL, *supra* note 49; AKMAR, *supra* note 49, at ix; *Senate Rules*, *supra* note 49; Clark, *supra* note 1, at 567–70 (describing unwritten norms regarding judicial appointments utilized by the Senate since the adoption of the Constitution); Trickey, *supra* note 2 (noting recent violations of unwritten norms in judicial appointment procedures); Young, *supra* note 49, at 411–12 (arguing for unwritten constitutional principles in the United States based on analogies to principles and practices relating to England’s unwritten constitution); see also *supra* notes 47–48 and accompanying text (citing relevant aspects of the U.S. Constitution).

140. See *Ástráðsson*, ¶¶ 102, 123.

141. *Id.* ¶ 102.

142. See *id.* ¶¶ 42, 65, 99; see also Case E-21/16, *Pascal Nobile v. DAS Rechtsschutz-Versicherungs*, Decision, EFTA Court, ¶ 16 (Feb. 14, 2017), [http://www.eftacourt.int/uploads/tx\\_nvcases/21\\_16\\_Decision\\_of\\_the\\_Court.pdf](http://www.eftacourt.int/uploads/tx_nvcases/21_16_Decision_of_the_Court.pdf); Case No. T-639/16 P, *FV v. Council*, ¶¶ 74–75 EU:T:2018:22, (Jan. 25, 2018).

143. See *Ástráðsson*, ¶¶ 102, 123.

Although the Commission cannot act *sua sponte*, as national courts may in cases of this nature,<sup>144</sup> *Ástráðsson* indicates that the Commission can and should be quite rigorous in its investigation,

look[ing] behind appearances and ascertain[ing] whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time.<sup>145</sup>

During the investigation, it would not be necessary for the claimant to demonstrate unfairness in a particular proceeding, since the injury is systemic in nature.<sup>146</sup> In fact, *Ástráðsson* specifically acknowledges that breaches of established norms relating to judicial appointments act “to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravene[] the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law.”<sup>147</sup>

## VI. MOVING FORWARD

*Ástráðsson* shows that international law can play an important role in both recognizing and redressing problems that arise internally within a particular nation, even in areas as sensitive as judicial appointments. Indeed, international law may be the only means of addressing what David Landau has referred to as “abusive constitutionalism,” meaning the increasingly prevalent “use of constitutional tools to create authoritarian and semi-authoritarian regimes.”<sup>148</sup> In jurisdictions subject to this phenomenon,

[p]owerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power. The resulting constitutions still look democratic from a distance and contain many elements that are no different from those found in liberal democratic constitutions. But from close up they have been substantially reworked to undermine the democratic order.<sup>149</sup>

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144. *See id.* ¶ 69; *see also* FV v. Council, ¶ 66; *supra* note 99 (regarding actions in domestic court).

145. *Ástráðsson*, ¶ 103.

146. *See id.* ¶ 100.

147. *Id.* ¶ 123; *see also id.* ¶ 69; FV v. Council, ¶ 72.

148. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013).

149. *Id.*

While Landau and other commentators writing on this phenomenon have focused primarily on jurisdictions other than the United States, many of these types of behaviors have arguably become part of the contemporary US legal and political scene.<sup>150</sup> Indeed, recent events regarding the appointment of federal judges demonstrate the increasing urgency of reform relating in this field.<sup>151</sup> Given the disinclination of the U.S. Supreme Court to address fundamental challenges to democracy in America<sup>152</sup> and the sharp rise in political divisiveness in the United States,<sup>153</sup> the best—if not only—chance for forward motion may come from outside the domestic sphere.

This Article has focused on how one recent decision from the ECtHR—*Case of Gudmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18—can help address concerns relating to the appointment of federal judges in the United States.<sup>154</sup> Although the case is not binding on US courts or the Commission, this is an area of significant interest for the Commission. Indeed, in 2013, the Commission issued an official guidance note indicating that it was “troubled by the fact that some processes to select and appoint justice operators [in the Americas] are not aimed at ensuring that the candidates selected are the most meritorious and with the best professional qualifications” but are instead “driven by political considerations.”<sup>155</sup> Historically, the Commission has accepted petitions relating to irregularities concerning judicial appointments,

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150. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (ruling partisan gerrymandering to be nonjusticiable); Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence From the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854, 859 (2011) (discussing lessons to be learned from Venezuela); Landau, *supra* note 148, at 191 (focusing on Hungary, Colombia and Venezuela); see also *supra* notes 1–8 and accompanying text.

151. See *supra* notes 1–8 and accompanying text.

152. See, e.g., *Gill v. Whitford*, 139 S. Ct. 1916, 1929 (2018) (finding lack of standing in a case on partisan gerrymandering even though the Supreme Court was arguably “the ‘only institution in the United States’ capable of ‘solv[ing] this problem’”); *Rucho*, 139 S. Ct. at 2507 (2019) (ruling partisan gerrymandering to be nonjusticiable).

153. See Bruce Drake & Jocelyn Kelly, *Americans Say the Nation’s Political Debate Has Grown More Toxic and “Heated” Rhetoric Could Lead to Violence*, PEW RESEARCH CTR. FACT TANK (July 28, 2019), <https://www.pewresearch.org/fact-tank/2019/07/18/americans-say-the-nations-political-debate-has-grown-more-toxic-and-heated-rhetoric-could-lead-to-violence/> [https://perma.cc/Q8ND-4WLK] (archived Nov. 18, 2019).

154. See *Ástráðsson*, ¶¶ 55, 78.

155. *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, INTER-AM. COMM’N ON HUMAN RIGHTS, ORG. OF AM. STATES ¶ 77 (Dec. 5, 2013), <https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf> [https://perma.cc/7LYR-9QLY] (archived Jan. 8, 2019) [hereinafter *Guarantees for Independence*].

which suggests it may be open to hearing a similar petition relating to US judicial selection procedures.<sup>156</sup>

As a practical matter, an *Ástráðsson*-style action proceeding under the American Convention would need to be filed with the Commission by a nongovernmental organization or an interested individual or group of individuals.<sup>157</sup> This is much more expansive than the standard approach for standing to challenge a judicial appointment in a US court.<sup>158</sup> Furthermore, the action will likely need to allege a “flagrant violation” of national law regarding the appointment of one or more judges.<sup>159</sup>

Whether a successful action can be made out as a factual matter remains to be seen, and it is not the goal of this Article to argue that particular examples of recent Congressional behavior regarding judicial appointments do or do not meet the standard described in *Ástráðsson*.<sup>160</sup> However, even if this question is not currently ripe, it may soon need to be asked given the problematic nature of the US appointment process and the likely escalation of the issue in the coming years as the US political culture deteriorates due to the disruption of fundamental and longstanding norms involving political give-and-take between political rivals who are nonetheless viewed as inherently legitimate and the Congressional failure to curb presidential excesses and violations of longstanding political norms.<sup>161</sup>

In many ways, this phenomenon may be the result of the increasingly popular view in the United States that the law does not constitute a system of binding norms that operate in accordance with the rule of law but is instead simply a tool (or indeed a weapon) to be manipulated to achieve some substantive outcome.<sup>162</sup> However,

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156. See Cova Report, *supra* note 123; Castaldi, *supra* note 123, at 488–89.

157. See American Convention, *supra* note 11, at art. 44.

158. See *supra* notes 134–35 and accompanying text.

159. *Ástráðsson*, ¶¶ 100–01.

160. See *supra* notes 1–5, 13–19.

161. See Murray Tobias QC, *Judicial Appointments in the United States and Australia: A Comparison*, 20 U. NOTRE DAME AUSTRALIAN L. REV. 1, 6 (2018) (providing an Australian perspective); Renan, *supra* note 66, at 2281 (noting that Article I and Article III norms are currently under threat in the United States as a result of “heightened [political] polarization and the ‘fight to the finish’ mentality that it promotes, for example, in judicial appointments”). These types of actions threaten the perception of judicial independence in a variety of ways. See Renan, *supra* note 66, at 2281.

162. See Brian Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 470 (2007) (referring to the latter as an “instrumental” view of law); see also Susan S. Silbey, *The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere*, 2 PERSP. ON POL. 785, 789 (2004) (noting that an instrumental view of judicial appointments leads judges to be assessed not for their craft, but as a result of their positions on certain issues and suggesting that allowing judicial decisions to become understood only as “wins and losses . . . feed[s] the politicization and gaming of judicial appointments that have become ever more systematic in an effort to predict, and control, the decisions of appointees”).

diminishing the respect for the law and the judiciary at the same time that circumstances are increasing the role and importance of the bench as a means of safeguarding constitutional checks and balances appears to be a recipe for disaster.<sup>163</sup>

If reform cannot or will not come from within, then it perhaps will have to come from without, via international law. For example, if the Commission were to find for the applicant in an *Ástráðsson*-style petition regarding US judicial selection procedures, the merits report issued by the Commission might provide the United States with useful recommendations to remedy the situation.<sup>164</sup> While the report would not contain any mandatory obligations, it would perhaps trigger an appropriate sense of urgency within the United States about the severity of these concerns. This approach would be consistent with that adopted by the ECtHR in *Ástráðsson*.<sup>165</sup>

Although it is impossible to anticipate precisely what would be contained in a merits report relating to US judicial selection procedures, the Commission, along with the ECtHR and other European bodies, has indicated support for merits-based appointment procedures, which are believed to improve the quality and objectivity of the judiciary while also reducing politicization of the process.<sup>166</sup> This approach has been regularly discussed and debated within the United States, so it is not entirely foreign to the US mindset.<sup>167</sup>

Of course, there is no mechanism within the American Convention to force a country to comply with the recommendations contained in a merits report, which means that the United States might simply ignore the Commission. Indeed, the United States is often characterized as somewhat hostile to the notion that it is subject to international legal obligations.<sup>168</sup> However, the fact

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163. See Renan, *supra* note 66, at 2281.

164. See IACHR Statistics, *supra* note 116, (scroll down to glossary, look for “Merits Report”); see also *supra* note 116 and accompanying text.

165. See Guðmundur Andri Ástráðsson v. Iceland, App. No. 26374/18, ¶ 131, HUDOC (2019). Although *Ástráðsson* also included an award for damages, damages by themselves are not enough to safeguard judicial appointment procedures. See *id.* at ¶¶ 29, 35; see also *supra* note 27.

166. See *Ástráðsson*, ¶ 71; *Guidelines for a Transparent and Merit-Based System for the Appointment of High-Level Judges*, DUE PROCESS OF LAW FOUND. (2014), [http://www.dplf.org/sites/default/files/guidelines\\_selection\\_of\\_highlevel\\_judges.pdf](http://www.dplf.org/sites/default/files/guidelines_selection_of_highlevel_judges.pdf) [<https://perma.cc/6KVK-XV2T>] (archived Feb. 14, 2020); Recommendation, *supra* note 83, ¶ 44; *Guarantees for Independence*, *supra* note 155, at 101.

167. See Bell, *supra* note 85, at 301–03 (discussing merit selection in the federal judicial appointment process); Fitzpatrick, *supra* note 85, at 675 (discussing merit selection in state-level judicial appointment processes, often referred to as the “Missouri Plan”).

168. See ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 1 (2003) (“[T]he United States remains mired in . . . an anarchic Hobbesian world where international laws and rules are unreliable.”); Ashley Deeks, *Statutory International Law*, 57 VA. J. INT’L L. 263, 265 (2018) (“Congress sees international law as infringing on U.S. sovereignty, running contrary to U.S. national interests, and challenging concepts of American exceptionalism.”); Diane Desierto,

remains that international legal obligations are enforceable against state signatories of international treaties like the American Convention.<sup>169</sup> Although a Commission proceeding would likely be the best first alternative for injured parties—not the least of which because the likely result (a merits report) would not seek to impose a particular solution on the United States for the problems currently associated with judicial appointment procedures—states may adopt other, more robust responses to violations of international law, including the use of certain nonjudicial mechanisms known as countermeasures.<sup>170</sup>

While a detailed discussion about countermeasures is beyond the scope of the current analysis, it is enough for present purposes to note that countermeasures involve various actions (other than force) that are “unilateral in character, taken for a coercive purpose by a State (the ‘reacting State’) in response to an internationally wrongful act committed by the State against whom the countermeasures are addressed (the ‘target State’) and which, under normal circumstances, would themselves be unlawful.”<sup>171</sup> Countermeasures are only available to states (not individuals) and are only adopted rarely, such as when a state experiences a direct injury as a result of the violation of international law.<sup>172</sup> One way that a state might experience a direct injury as a result of the violation of international legal principles involving the appointment of US judges would involve the home state of an immigrant or refugee whose case was heard by a judge who was improperly appointed.<sup>173</sup> Because countermeasures need not be reciprocal in nature (i.e., they need not relate to the particular harm suffered, so long as the response is proportional),

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*Economic Nationalism in a New Age for International Economic Law: Recalling Warnings of Ludwig von Mises and the Austrian School*, EJIL: TALK! (Jan. 30, 2017), <http://www.ejiltalk.org/economic-nationalism-in-a-new-age-for-international-economic-law-recalling-warnings-of-ludwig-von-mises-and-the-austrian-school/> [<https://perma.cc/GU42-CM7Z>] (archived Nov. 18, 2019) (arguing that the upsurge in economic nationalism in the United States may be tied to sovereigntist resistance to international law).

169. See Vienna Convention, *supra* note 102, at art. 18; Moore, *supra* note 102, at 600–01, 665–61.

170. See G.A. Res 56/83, annex, Responsibility of States for Intentionally Wrongful Acts, at arts. 26, 49–54 (Dec. 12, 2001).

171. N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 GEO. J. INT’L L. 233, 242 (2011); see also *id.* at 242–44 (discussing authorities on countermeasures).

172. See Responsibility of States for Intentionally Wrongful Acts, *supra* note 170, at arts. 26, 49–54. Third states can also occasionally take countermeasures, although it would be difficult to envision such an approach in the current case. See Christian Hillgruber, *The Right of Third States to Take Countermeasures*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 265, 265 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

173. See S.I. Strong, *Can International Law Trump Trump’s Immigration Agenda? Protecting Individual Rights Through Procedural Jus Cogens*, 2019 U. ILL. L. REV. 272, 272–73, 280–82 (2019).

they could appropriately be invoked in situations involving improper appointment of judges.<sup>174</sup>

States' willingness to undertake countermeasures is often affected by political considerations similar to those discussed previously with respect to Commission actions, which suggests that the United States is unlikely to be faced with this type of action, at least in the foreseeable future.<sup>175</sup> However, it is useful to know that international law provides several options for those seeking to remedy the injuries caused by improper judicial appointments. Perhaps, by outlining these various alternatives, the United States will finally come to grips with the severity of the problems arising out of current appointment mechanisms. Surely that is an outcome that everyone in the United States can support, regardless of his or her political affiliation.

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174. See Calamita, *supra* note 171, at 242–44.

175. See *supra* note 109 and accompanying text.