

3-28-2022

Overview of Bicameral Legislatures' Potential Impact on the Executive Selection Process

Kyle Kopchak

Indiana University Maurer School of Law, kkopchak@iu.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ijcd>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [European Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [President/Executive Department Commons](#), [Public Law and Legal Theory Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Kopchak, Kyle (2022) "Overview of Bicameral Legislatures' Potential Impact on the Executive Selection Process," *Indiana Journal of Constitutional Design*: Vol. 9, Article 2.

Available at: <https://www.repository.law.indiana.edu/ijcd/vol9/iss1/2>

This Article is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Journal of Constitutional Design* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Overview of Bicameral Legislatures' Potential Impact on the Executive Selection Process

Cover Page Footnote

Juris Doctor Candidate, 2022, Indiana University Maurer School of Law; Bachelor of Arts, 2019, DePauw University.

Overview of Bicameral Legislatures' Potential Impact on the Executive Selection Process

KYLE KOPCHAK*

INTRODUCTION

Bicameral legislature is a common constitutional design model, with bicameral legislatures making up roughly 41 percent of all legislatures worldwide.¹ As of April 2014, 79 bicameral and 113 unicameral systems were recorded in the database of the Inter-Parliamentary Union.² In general, “bicameralism is more common in federal, large, and presidential states, while unicameralism is more common in unitary, small, parliamentary ones”.³ Bicameral systems operate two legislative chambers, both of which play a role in drafting and passing national legislation.⁴ However, each house often fulfills a unique role in the legislative process and is usually elected by different methods.⁵ Proponents of bicameral legislatures argue that a second chamber aids the separation of power by avoiding the risk of abuse that can occur by concentrating power in a single body while simultaneously enhancing democracy by drawing on a broader and more diversified base.⁶

Most bicameral legislatures are created to operate outside of the executive branch as a function of the separation of power, but some have influence over selecting a state's executives.

* Juris Doctor Candidate, 2022, Indiana University Maurer School of Law; Bachelor of Arts, 2019, DePauw University.

¹ Betty Drexhage, *Bicameral Legislatures: An International Comparison*, The Hague: Ministry of the Interior and Kingdom Relations, at 3 (Oct. 2015), <https://www.government.nl/documents/reports/2015/10/01/bicameral-legislatures-an-international-comparison>.

² *Id.*

³ Elliot Bulmer, *Bicameralism*, INTERNATIONAL IDEA, at 1 (2017), <https://www.idea.int/sites/default/files/publications/bicameralism-primer.pdf>.

⁴ Di Maria Romaniello, *Bicameralism: A Concept in Search of a Theory* 1 (Sep. 20, 2016), https://www.academia.edu/29170631/Bicameralism_a_concept_in_search_of_a_theory.

⁵ ANDREW REYNOLDS ET AL., *ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK* 8 (2008), <http://www.eods.eu/library/IDEA.Electoral%20Systems%20Design%20EN.pdf>.

⁶ Meg Russell, *What are Second Chambers for?*, 10 PERSPECTIVES ON FEDERALISM 1, 1 (2001).

This paper will evaluate several bicameral legislatures to determine how the upper chamber and lower chamber can contribute to choosing a nation's executive. Very few countries operate systems that allow both chambers significant influence in selecting a nation's executive, and currently, there is no country that solely allows its upper chamber to select an executive. Moreover, most systems of government limit their upper chamber's ability to select their nation's head of government. Ideally, by incorporating the upper chamber into the executive appointment process, a nation could benefit from the increased representation and experience of an upper chamber's legislators.

Moreover, as scholars such as Juan Linz point out, politically, ethnically, or religiously divided societies that operate winner-take-all executive selection processes often leave vulnerable minority groups mostly unrepresented in the executive branch.⁷ While parliamentary elections can create multi-party coalition governments, parliamentary elections are just as likely to result in one dominant party winning an absolute majority, which remains problematic for minority groups within the country. By allowing each chamber to appoint an executive, the effects of the winner-take-all executive election may be mitigated by providing minority groups additional opportunities to win executive representation and ultimately forcing cooperation between opposing political parties in power.

This paper will first briefly examine bicameral chambers and address the benefits of allowing an upper chamber to select an executive. Next, it will highlight several countries that allow the upper house input in selecting executives to demonstrate how these upper chambers contribute to that process. I organized each of my sample countries into five categories; 1) The U.S. Contingent Election Model; 2) the German model; 3) the National-Regional model; 4) the

⁷ Juan Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 63 (1990), <https://scholar.harvard.edu/files/levitsky/files/1.1linz.pdf>.

Federal Chambers Model; 5) and the Swiss Bicameral Model. Finally, the paper will conclude by discussing several benefits of allowing upper chambers to participate in the executive selection process while simultaneously addressing the structural challenges that may limit their beneficial impact on the selection process.

I. WHY BICAMERAL SYSTEMS

Bicameral systems operate two legislative chambers, both of which play a role in drafting and passing national legislation.⁸ Historically, the upper chamber in bicameral legislatures has not played a significant role in appointing a state's executive. In most parliamentary systems, a nation's lower chamber, or popularly elected chamber, retains the authority to appoint the prime minister or cast a vote of no confidence. In contrast, upper chambers, which are often appointed or elected indirectly, have little to no influence in appointing national executives. Upper chambers provide representation to communities of interest that receive less representation in the lower chamber. Each house often fulfills a unique role in the legislative process and is usually elected by different methods.⁹ Proponents of bicameral legislatures argue that a second chamber aids the separation of power by avoiding the risk of abuse that can occur by concentrating power into a single body while simultaneously enhancing democracy by drawing on a broader and more diversified base.¹⁰

In order to successfully check each chamber's power, and often other branches of government, each chamber in a bicameral legislature serves a different purpose. Thus, there must be "a degree of difference between [each chambers'] roles and ... powers," otherwise one chamber is likely to "reinforce the majority power that controls the lower chamber".¹¹ In most bicameral

⁸ Romaniello, *supra* note 4, at 1.

⁹ *Id.*

¹⁰ Russell, *supra* note 6, at 1.

¹¹ Reynolds, *supra* note 5, at 8.

systems, the lower chamber is popularly elected and primarily represents a state's population while simultaneously serving as the primary mechanism in making legislative decisions¹² such as "taxation ... and votes of confidence".¹³ In contrast, the upper chamber, which has representatives that are "usually appointed or elected indirectly- [has] fewer ... legislative powers."¹⁴ Still, the upper chamber plays a vital role in providing additional representation and political checks.

"First, the second (or upper) [chamber] of a federal legislature" often represents specific regions or populations of the country, "and each state often receives equal representation regardless of population or territory size."¹⁵ This concept is illustrated by institutions such as the United States Senate or South Africa's National Council of Provinces.¹⁶ Additionally, some countries have used their upper chamber to represent certain ethnic, linguistic, religious, cultural groups or civil societies.¹⁷ Malawi serves as an example of an ethnic-centric upper house. Malawi's constitution provides for thirty-two of the eighty senators to be chosen by elected senators from a list of candidates nominated by ethnic minorities. By integrating ethnic group representation into the upper chamber, state legislatures can ensure adequate representation of minority interests and viewpoints.¹⁸ Outside of ethnic representation, upper chambers can provide representation for regional interests. For example, the German *Bundesrat*, the upper chamber, allows all seventeen of Germany's federal states to participate directly in the federal government's decisions, allowing for increased levels of regional representation.¹⁹

¹² Romaniello, *supra* note 4, at 2.

¹³ *Id.*, quoting Uhr.

¹⁴ Romaniello, *supra* note 4, at 2.

¹⁵ Reynolds, *supra* note 5, at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 138-9.

¹⁸ Bulmer, *supra* note 3, at 138.

¹⁹ *A Constitutional Body within a Federal System*, Bundesrat (2020), <https://www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html>.

Bicameral legislatures often improve the quality of legislation and the overall stability of the legislative process.²⁰ Specifically, the upper chamber serves as a chamber of review by slowing down decisions made in the lower chamber.²¹ The presence of an upper chamber delays the legislative procedure and allows the expression of public sentiments on policy issues.²² In countries such as the United States and Australia, legislation must pass both chambers before it can be signed into law. Moreover, Australia demonstrates that by incorporating a proportional representation system of voting to elect senators, the upper chamber will likely elect a high number of non-government senators that can “use their combined voting power to reject... government legislation” or “scrutinise the way laws and policies are administered by ministers and public servants.”²³

It is important to reemphasize the need for the upper chamber to be elected or appointed differently from the lower chamber because a different appointment process allows the upper chamber to represent additional interests. For example, lower chambers often represent the electorate’s will, but if a piece of legislation is derived from a populist agenda, it is useful to have a second chamber evaluate the legislation from a different perspective. Moreover, upper chambers often contain individuals with specific policy expertise who are better positioned to analyze potential legislation and its impact on various groups throughout the country. Thus, by providing a second opinion on proposed legislation, upper chambers work to check the lower chamber’s power, which supports the overall purpose of creating a bicameral legislature.

²⁰ Jeannette Money and George Tsebelis, *Cicero’s Puzzle: Upper House Power in Comparative Perspective*, 13 Int’l Pol. Sci. Rev., 25, 27 (1992), https://sites.lsa.umich.edu/webbkeane/wp-content/uploads/sites/246/2015/03/cicero_s_puzzle_1992_ipsr.pdf.

²¹ Bulmer, *supra* note 3, at 138.

²² Romaniello, *supra* note 4, at 8

²³ Director of Research, *About the Senate*, Parliament of Australia, https://www.aph.gov.au/about_parliament/senate/about_the_senate.

Finally, the upper chamber is in a strong position to scrutinize the executive. The executive and legislative branches in parliamentary systems are placed in constant tension, with each branch able to dispose of the other through a vote of no confidence or new elections.²⁴ However, the upper chamber typically exists as its own entity in that the prime minister cannot disband it. Therefore, the upper chambers are more likely to act independently from the executive, and they “therefore provide an important forum for parliamentary scrutiny and strengthening parliament’s overall control over the government.”²⁵ For example, through the practice of question time, upper chambers in states such as the United Kingdom can question policy decisions made by the prime minister and her cabinet.²⁶

In a presidential system, an upper chamber such as the United States Senate can put political pressure on the president through the chambers’ ability to approve or block judicial and executive appointments. The U.S. Constitution also tasks the Senate with holding impeachment trials and voting whether to impeach the president.²⁷ Similarly, in Germany, the *Bundesrat* holds the authority to impeach the president for a violation of the Basic Law.²⁸ However, the practical influence and impact of an upper house depend less on its formal legislative powers and “more on the substance of public support for its role in the national legislative system, reflecting the broader political and public legitimacy attached to its distinctive scheme of representation.”²⁹ Thus, upper chambers that are viewed as illegitimate or that lack public support will find it more challenging to check proposed legislation or executives.

II. BICAMERAL LEGISLATURES THAT ASSIST IN SELECTING AN EXECUTIVE

²⁴ MICHAEL GALLAGHER ET AL, REPRESENTATIVE GOVERNMENT IN MODERN EUROPE, 42-43 (McGraw-Hill, Inc. 2d. ed.) (1995).

²⁵ Romaniello, *supra* note 4, at 11 (quoting Russel).

²⁶ *Question Time*, UK Parliament (2021), <https://www.parliament.uk/about/how/business/questions/>.

²⁷ U.S. CONST. art. I, § 3, cl. 6.

²⁸ GRUNDGESETZ [GG] [BASIC LAW] 2014, art. 61 (Ger.), *translation at* https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en.

²⁹ Romaniello, *supra* note 4, at 8, quoting Uhr.

Next, this paper will examine several bicameral legislatures that allow upper chambers to influence the selection of their executives. There is no current constitutional system that allows a nation's upper and lower houses to select an executive. There is also no system that vests the upper chamber with the sole authority to select the nation's head of state. Systems that grant their nation's upper chamber influence in choosing an executive often require both the upper and lower chamber to sit for a joint session or use an electoral college method.

For this paper, I created five categories to distinguish different systems that allow the upper chamber to influence the executive selection process. These categories are 1) The U.S. Contingent Election Model; 2) the German model; 3) the National-Regional model; 4) and the Federal Chambers Model; 5) and the Swiss Bicameral Model. Each of these categories operate in their own unique manner. However, one common theme across each of these categories is that the head of State, which the upper chamber has some influence in electing, remains relatively weak compared to the head of government. In most cases, the head of state places a ceremonial role, while the head of government wields a majority of the governing power.

In all of these countries, the president plays a ceremonial role. Despite the limitations on executive power, the five categories to distinguish different systems that allow the upper chamber to influence the executive selection process could play a salient role in future constitutions.

The first category is the U.S. Contingent Election Model, which only occurs in the event of a tie in the American electoral college, but it is the closest system to an upper and lower chamber each choosing an executive. The German model is the next category, and it is unique because the upper chamber and regional representative's make-up the presidential electoral college. The next category is the National-Regional model, which allows both federal chambers and regional representational bodies to participate in the presidential electoral college. The final category is the

Federal Chambers Model, which requires both national chambers to sit in a joint session and elect a president.

A. *The U.S. Contingent Election Model*

While no countries currently operate a system in which the upper chamber selects the head of state and the lower chamber elects the head of government, the drafters of the United States presidential selection processes incorporated a similar system for selecting the President and Vice President. Initially, under Article Two of the U.S. Constitution, presidential electors cast votes for two different candidates. A candidate would win the presidency by receiving a majority of the electoral votes, and the candidate receiving the second highest number of votes would become the vice-president.³⁰

However, a problem occurred in the presidential election of 1800. Aaron Burr and Thomas Jefferson received the same number of electoral votes, resulting in a contingent election.³¹ A contingent election is the procedure used to elect the president in the event that no candidate wins an absolute majority of votes in the Electoral College.³² Thus, under Article Two, Section 1, Clause 3 of the United States Constitution, the United States House of Representatives was required to decide the election by a special vote. In a contingent election, the House doesn't cast its votes in its traditional manner. Rather, each state delegation must cast its vote *en bloc*, with each state receiving just a single vote, allotted to the candidate who receives majority support in the delegation. Thus, a candidate must receive an absolute majority of state-delegation votes to win the election. As the U.S. has fifty states, a candidate must receive votes from at least twenty-six

³⁰ Thomas H. Neale, CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, 1 (Cong. Research Serv. Oct. 6, 2020) <https://sgp.fas.org/crs/misc/R40504.pdf>.

³¹ *Id.* at 2.

³² *Id.* at 1.

state delegations.³³ With the help of Alexander Hamilton, Jefferson won the contingent election on the 36th ballot seven days later.³⁴

In response to the turmoil caused by the election of 1800, Congress passed the Twelfth Amendment, requiring electors to cast two distinct votes: one for the president and another for the vice president.³⁵ In the event of an electoral tie for the president, the House selects and votes for one of the three candidates who received the most electoral votes. In the event of an electoral tie for the vice president, the Senate selects one of the two candidates who received the most electoral votes.³⁶ By instituting this framework, Congress aimed to check the power of the popularly elected house of representatives and prevent further conflicted elections. The Twelfth Amendment has only been used twice since its implementation. First, the election of 1824 led to a special congressional election victory of John Quincy Adams, despite Andrew Jackson carrying the popular vote and a plurality of the electoral votes.³⁷ In contrast, the Senate has only exercised its power to appoint a vice president once.³⁸ In the election of 1836, Martin Van Buren was elected president, but Kentucky's former Democratic senator Richard M. Johnson fell one electoral vote short of a majority among four vice-presidential candidates. Johnson successfully won the Senate's special election, and broke fourteen tied votes while serving as the president of the Senate.

The contemporary United States is composed of an array of political beliefs that stretch across the political spectrum. While the United States has historically experienced lower levels of political violence, recent events have illustrated that the country's democracy may not be as stable

³³ Alexandra Desantis, *What Happens If Neither Trump nor Biden Wins the Electoral College?*, NATIONAL REVIEW (Sept. 9, 2020), <https://www.nationalreview.com/2020/09/what-happens-if-neither-trump-nor-biden-wins-the-electoral-college/>.

³⁴ Neale, *supra* note 30, at 3.

³⁵ U.S. CONST. amend. XII.

³⁶ Neale, *supra* note 30, at 4.

³⁷ Sanford Levinson, *The Twelfth Amendment*, INTERACTIVE CONSTITUTION, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xii/interps/171>.

³⁸ *The Senate Elects a Vice President*, United States Senate (updated through 2021).

as once thought. Moreover, the concept of contingent voting creates a small but real opportunity that the U.S. House of Representatives and Senate could select executives for opposing political parties. Thus, this raises question of how the U.S. executive branch would function in a scenario that would resemble something similar to political cohabitation. Cohabitation occurs typically in a semi-presidential system when the president is from a different political party than the prime minister.³⁹ In other words, two opposing political parties hold the top two executive positions.⁴⁰ While the U.S. President is clearly vested with executive authority in the American system, a Vice President from an opposing political party would be in a position to actively undermine the President's ability to implement his legislative agenda.

The U.S. contingent election model demonstrates the efforts of the American founding fathers to incorporate elements of bicameralism into the executive selection process. For example, by allowing the Senate to select the Vice President, the Twelfth Amendment further embraces the bicameral principle of providing a further democratic check on the power of the lower house. Moreover, the U.S. Senate was created to protect the rights of individual states and safeguard minority opinion.⁴¹ Specially, the Senate provides strong geographical representation through its equal number of seats distributed per state. Thus, the Twelfth Amendment enables different principles of representation to be applied to the Vice President selection process through geographic representation. Ultimately, the American system of contingent voting demonstrates a structural system in which the upper and lower chamber of a bicameral system could elect a

³⁹ Vlad Perju, *The Romanian Double Executive and the 2012 Constitutional Crisis*, 13 INT'L J. CONST. L. 246, 247 (2015).

⁴⁰ Robert Elgie & Iain McMenamin, *Explaining the Onset of Cohabitation Under Semi-Presidentialism*, 59 POL. SCI. ASS'N (2011), <https://core.ac.uk/download/pdf/192458958.pdf>.

⁴¹ *United States Senate, Origins and Dev.* (2021), https://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm.

nation's leading executives. Going forward, I will evaluate several hybrid structures that provide upper chambers with some level of influence in electing one of their nation's executives.

B. Germanic Model

Under the German model, a nation elects its president by forming an election convention consisting of members of the federal legislature or parliament and representatives from all the state parliaments. Thus, this approach allows national and local politicians to select the president. In Germany, the Federal Chancellor is elected by the Bundestag, and the Federal Convention elects the Federal President. The Federal Convention consists of the Bundestag and an equal number of members elected by the parliaments of the Länder.⁴² The Länder consists of representatives from the state parliament. The election's details are governed by the Presidential Election Act, which is based on Article 54 (7) of the Basic Law.⁴³ Each state's population determines the number of representatives each Länder is allowed to send to the convention.⁴⁴ The Land parliaments elect the representatives of the Länder in line with the principles of proportional representation.⁴⁵ Typically, the members of the Federal Convention are members of the parliaments of the Länder, but local politicians and figures from other areas of public life may also be elected.⁴⁶

Germany's Federal Presidential election process is unique because the German Federal upper chamber members, the Bundesrat, do not participate in the presidential appointment processes. However, Germany's 16 states are still represented in the election process through the appointment of representatives of the state parliament. Each state delegation in the Bundesrat

⁴² Director of Research, *Election of the Federal President*, The Office of the Fed. President (2021), <https://www.bundespraesident.de/EN/Role-and-Functions/ConstitutionalBasis/Election-of-the-Federal-President/Elections-node.html>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Election of the Federal President*, GERMAN BUNDESTAG (2021), https://www.bundestag.de/en/parliament/function/federal_convention.

⁴⁶ Director of Research, *supra* note 42.

represents its regional government, reflecting the political makeup of the ruling majority or plurality of each state legislature.⁴⁷ Since the German state legislatures are responsible for appointing each states' representatives to participate in the Federal Convention, the ideology of the representatives should mirror those of the states' representatives in the Bundesrat. While the Bundesrat does not elect the Federal President, it can impeach the President under Article 61 of the German constitution.⁴⁸ If the Federal President is incapacitated, the Federal President's powers are assumed by the Bundesrat's President.⁴⁹

Similar to most upper chambers in a bicameral system, the Bundesrat serves to check the lower house and the executive's power. Evidence of the Bundesrat's ability to impeach the Federal President demonstrates the power granted to a bicameral chamber to check an executive's actions. Additionally, members of the Bundesrat tend to be state government ministers who spend most of their time in their state capitals and are experienced bureaucrats.⁵⁰ As a result, the Bundesrat protects states' rights to participate within the framework laid out in the constitution while simultaneously allowing Germany's federal government to draw on the political-administrative experience of the states.⁵¹ By allowing state legislatures to contribute to the Presidential appointment processes, the state legislatures can use their unique political and administrative experience to select a capable President. Finally, by allowing members of the Länder's to participate in choosing a Federal President, the German constitution provides local representatives influence on the federal level. State legislatures appointing members of the general public to represent their state in the Federal Convention encourages the idea that the public at large has some

⁴⁷ Eric Solsten, ed. *Germany: A Country Study*, WASH.: GPO FOR THE LIBRARY OF CONGRESS (1995).

⁴⁸ GRUNDGESETZ [GG] [CONSTITUTION] 1949, art. 61, *translation at* https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en

⁴⁹ *Id.* at art. 57.

⁵⁰ Solsten, *supra* note 47.

⁵¹ *Id.*

say in the process. Ultimately, by including appointed representatives from the German states, the German constitution increases the Länder's willingness to work with the federal legislature because the states have legislative input in the federal government.

C. National-Regional Model

Countries that fall under the National-Regional Model are bicameral legislature that use their upper chamber representatives to aid in appointing one of the nation's executives. Under the National-Regional Model, both chambers of the federal legislature aid in selecting the president, as well as state legislatures or regional councils. Thus, the National-Regional Model incorporates a multitude of perspectives from different regional, ethnic, or religious groups. Ideally, the diversity of perspectives will result in the election of an executive who governs with the interests of all a nation's minority groups.

D. Indian Model

India's presidential appointment process serves as a contemporary example of a bicameral legislature that uses its upper chamber representatives to aid in appointing one of the nation's executives. It is similar to the German presidential process in that members of the state legislatures participate in the process, but it differs in that members of the Indian upper federal chamber also cast a vote for the President. The Indian President is elected for a five-year term by an electoral college consisting of the elected members of both houses of parliament and the elected members of the states and territories' legislative assemblies.⁵² Once the office of the President becomes vacant, the new President is chosen by an electoral college consisting of the elected members of both houses of parliament (M.P.s), the elected members of the State Legislative Assemblies (Vidhan Sabha) of all States, and the elected members of the legislative assemblies (MLAs) of

⁵²INDIA CONST. art. 55, https://www.constitutionofindia.net/constitution_of_india/the_union/articles/Article%2055.

union territories with legislatures, i.e., National Capital Territory (NCT) of Delhi, Jammu and Kashmir, and Puducherry.⁵³

The election is held according to proportional representation (PR) through the single transferable vote (STV) method.⁵⁴ In 2017, the electoral college comprised 776 MPs and 4,120 MLAs.⁵⁵ The electoral college is created so that the total weight of MPs and those of MLAs is roughly equal and that the voting power of states and territories are proportional to their population. Thus, members of the electoral college could cast 1,098,903 votes, with the winning candidate needing 549,452 votes to win.⁵⁶

It is challenging to analyze the qualities of bicameralism that may contribute to India's upper house, the Rajya Sabha, selecting the country's President because of the involvement of the state legislatures. The presidential election process is a more extensive process than electing the prime minister, who is also elected indirectly by the federal parliament (Lok Sabha) members only. In contrast, the President is the constitutional head of state with duties to protect, defend, and preserve the constitution and the rule of law. The participation of state and territory assemblies in the presidential election is designed to ensure that the President is selected as the head of the nation and not merely a direct representative of the majority party in parliament, thereby placing the office above politics and making the incumbent a symbol of national unity.⁵⁷ India is one of the most diverse nations globally, so it is critical that there is universal acceptance of the appointment of the Indian President.

⁵³ Dev Goswami, *How Does India Elect its President? An in-Depth Guide*, INDIA TODAY (July 13, 2017, 2:43 PM), <https://www.indiatoday.in/fyi/story/how-india-elects-its-president-1021847-2017-07-01>.

⁵⁴ Trina Roy, *Road to Raisina: How the President of India Will be Elected*, PRS LEGIS. RSCH. (June 20, 2017), <https://www.prsindia.org/theprsblog/road-raisina-how-president-india-will-be-elected>.

⁵⁵ Sandeep Phukan, *How BJP's UP Win Will Impact Presidential Election. Numbers Explained*, NDTV (March 13, 2017), <https://www.ndtv.com/india-news/how-bjps-up-win-will-impact-presidential-election-numbers-explained-1669025>.

⁵⁶ *Id.*

⁵⁷ INDIA: A COUNTRY STUDY (James Heitzman & Robert L. Worden, eds., 1995).

While India's electoral college composition does not mirror a traditional bicameral legislature, including the upper federal chamber and lower state legislatures, the electoral college attempts to protect the same principles that traditional bicameralism does. For example, by incorporating local legislatures into the appointment process, the Indian constitution limits the power of the federal lower chamber to elect both of India's executives. The perception of allowing state legislatures to participate in the presidential appointment process likely increases overall public trust in the process because a coalition of national parties is not appointing the president. Instead, the nation as a whole has some influence over who becomes the nation's next president. Moreover, the representatives of the Indian upper chamber are elected by the state and union territories, which further increases the diversity of the upper chamber and gives certain minority groups additional representation.⁵⁸

E. Italian Model

The Italian Presidential appointment process is another example of how upper chambers can influence a nation's executive appointment procedure. The Italian presidential election is similar to the Indian election in that the electoral college consists of both houses of the national legislature and some members of regional councils. The electoral college consists of 630 deputies, 315 Senators, and 58 regional representatives.⁵⁹ In total, the electoral college is made-up of 1,000 members.⁶⁰ The election is held by a secret ballot, with a two-thirds vote required to elect the President within the first three rounds and a simple majority after any additional rounds.⁶¹ The

⁵⁸ *Rajya Sabha: An Introduction, Parliament of India*, RAJYA SABHA SECRETARIAT (2021), https://rajyasabha.gov.in/rsnew/about_parliament/rajya_sabha_introduction.asp.

⁵⁹ Silvia Donati, *Understanding How Italy Elects the President in Five Points*, IT. MAG. (Jan. 1, 2015), <https://www.italymagazine.com/featured-story/understanding-how-italy-elects-president-five-points>.

⁶⁰ IT. CONST. art. 83*t*. https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁶¹ Donati, *supra* note 59.

President's term lasts seven years, which prevents any President from being reelected by the same houses, which hold elections every five years.⁶²

The Italian Senate was created to represent the different regions of the country, but in practice, the only real difference between the two chambers is the age recruitment to be a candidate and electorate. The 630 deputies, who must be at least 25 years of age, are elected by all Italian citizens over 18 years of age, and the 315 elected senators must be at least 40 years of age, and their electors must be over 25.⁶³ One could argue that the Senate better represents the concerns of an older electorate, but six years does not appear to be a significant difference. Moreover, both chambers are elected in a similar manner, defeating one of the primary purposes of operating a bicameral system. Thus, while the Italian upper chamber does have influence in selecting the President, the nature of Italy's bicameral legislature does not allow the benefits of an upper chamber to be utilized in the selection of an executive.

F. Nepalese Model

The Nepalis Monarchy was abolished on May 28, 2008, by the country's first Constituent Assembly.⁶⁴ The country has since transitioned to a Federal Parliamentary Republic. The President of Nepal is indirectly elected every five years by an electoral college comprised of the two houses of the Federal Parliament of Nepal and the provincial assemblies of each of Nepal's seven provinces, who themselves are all directly elected.⁶⁵ Article 70 of the Nepalis constitution states that the election of the President and Vice President should be conducted in a manner to represent different genders and/or communities to increase representation for minority groups.⁶⁶

⁶² IT. CONST., art. 60.

⁶³ *Parliament*, IT. SENATE (2021), <https://www.senato.it/3801>.

⁶⁴ *Nepal Votes to Abolish Monarchy*, BBC NEWS (May 28, 2008), http://news.bbc.co.uk/2/hi/south_asia/7424302.stm.

⁶⁵ Saif Khalid & Alia Chughtai, *Nepal Elections Explained*, ALJAZEERA (Dec. 7, 2017), <https://www.aljazeera.com/news/2017/12/7/nepal-elections-explained>.

⁶⁶ NEPAL CONSTIT. art.70, https://www.constituteproject.org/constitution/Nepal_2015.pdf.

Each chamber of the Federal Parliament and provincial assemblies receives a difference of weightage in voting. In 2018, there were 884 members, including 275 members of the House of Representatives (Lower House), 59 members of the National Assembly (Upper House), and 550 members of seven state assemblies voting to determine who would become President.⁶⁷ The Ministry of Law set that a vote cast by a member of the federal Parliament, including both upper and lower houses, will have the weight of 79 votes, whereas the vote cast by a member of the state assembly will have the weight of 48 votes. Thus, the electoral college will have 52,786 electoral votes.⁶⁸ Finally, the candidate that receives the most electoral votes becomes President.

The primary function of Nepal's National Assembly brings state issues to the attention of the national government.⁶⁹ In general, the National Assembly has a limited role in financial bills, and the chamber lacks numbers to display strength in a joint sitting vote.⁷⁰ The strength of the chamber is the representation it provides to regional states and minority groups, similar to the positive traits of bicameralism. The upper chamber's strong state representation stems from the chamber's composition of eight members from each state.⁷¹ Each state's delegation is elected by an electoral college comprised of members from the state's Provincial Assembly and chairpersons and vice-chairpersons of Village councils and Mayors and Deputy Mayors of Municipal councils.⁷² Moreover, Nepal's constitution increases the diversity of each regional delegation by requiring states to include at least three women, one Dalit, one person with a disability, or a member of a minority group.⁷³ Thus, by incorporating Nepal's National Assembly into the presidential selection

⁶⁷ Kathmandu, *How Will Nepal Elect its President, Vice-President From Now On?*, ONLINE KHABAR (Sept. 13, 2017), <https://english.onlinekhabar.com/how-will-nepal-elect-its-president-vice-president-from-now-on.html>.

⁶⁸ *Id.*

⁶⁹ Jai Venaik, *The National Assembly and its Significance*, ECONITY (May 31, 2018), <https://econitynepal.com/the-national-assembly-and-its-significance/>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² NEPAL CONSTIT., art. 86(2)a.

⁷³ *Id.*

process, the country has increased the overall gender and ethnic diversity of those whose input helps select the nation's two executives, which tracks with one of the overall goals of bicameralism.

G. Pakistani Model

An electoral college indirectly elects the Pakistani President for a five-year term.⁷⁴ Similar to the presidential election processes in India, Italy, and Nepal, the Pakistani President election allows for both federal chambers and regional chambers to participate in the electoral process. Under Article 41 of the Pakistani constitution, the President of Pakistan is elected in a special session of the Parliament, consisting of both houses of Parliament (the Senate and National Assembly) and the four provincial assemblies.⁷⁵ In Pakistan's 2018 presidential election, the electoral college consisted of 706 voting lawmakers, including 104 national senators, 342 members of the national assembly, and 260 members of the provincial assembly.⁷⁶ In order to ensure equal representation, all provincial assemblies are given 65 votes each in the electoral college.⁷⁷

The Pakistani Senate was created to give equal representation to each of the country's states since the membership of the National Assembly was based on the population of each province.⁷⁸ Thus, similar to most bicameral chambers, the hope was that equal provincial membership in the Senate would balance the provincial inequality in the National Assembly.⁷⁹ Pakistan's Senate consists of one hundred and four members elected indirectly by the Members of the National Assembly and the Provincial Assemblies. Each of the nation's four Provincial

⁷⁴ PAK. CONSTIT., art. XLI, § 3, https://www.constituteproject.org/constitution/Pakistan_2015.pdf?lang=en.

⁷⁵ *Id.*

⁷⁶ Benazir Shah & Majid Nizami, *How is Pakistan's President Elected?*, GEO.TV (2018), <https://www.geo.tv/latest/209337-how-is-pakistans-president-elected>.

⁷⁷ *Id.*

⁷⁸ Senate of Pakistan, INT'L FOUNDATION FOR ELECTORAL SYSTEMS (Mar. 3, 2015), https://www.ifes.org/sites/default/files/the_senate_of_pakistan.pdf.

⁷⁹ *Id.*

Assemblies elects fourteen Senators on general seats, four women, four technocrats, and one seat reserved for non-Muslims.

Moreover, the members of the National Assembly from Federally Administered Tribal Areas (FATA) elects eight Senators to represent FATAs, and all Members of National Assembly elect two Senators on general seats, one woman and one technocrat to represent the Federal Capital.⁸⁰ Similar to Nepal, the Pakistani Senate's diverse nature allows for an array of input from minority groups throughout the country. By reserving seats for religious and gender minorities, the constitution allows these groups to influence the presidential election.

The Pakistani Senate has the authority to scrutinize or check the president's power through impeachment. Under Article 47 of the Pakistani Constitution, either chamber of parliament can initiate the impeachment process by charging the president of violating the constitution or gross misconduct.⁸¹ The power to impeach the president serves as a unique power that many upper houses do not have the authority to accomplish while simultaneously illustrating one benefit that a bicameral system can have when implemented into an executive selection process.

H. Federal Chambers Model

Under the Federal Chambers Model, the executive election process does not incorporate input from regional bodies. Instead, the upper and lower chamber select the president. This selection process may occur by both chambers sitting in a joint session or forming an election convention with members of both chambers. Ultimately, the defining characteristic is that regional representative bodies are not included in the process.

I. Trinidadian and Tobagonian Model

⁸⁰ *Id.*, at 1.

⁸¹ Pak. CONST. art. XLVII, sec. 2, *translation at* https://www.constituteproject.org/constitution/Pakistan_2015.pdf?lang=en.

In 1976 Trinidad and Tobago transitioned to a republic and replaced their sovereign Queen Elizabeth II with a president who wields nominal power. The President is elected every five years by an electoral college, which is made up of the members of the Senate and House of Representatives.⁸² The Senate consists of 31 members, 16 appointed by the President on the advice of the Prime Minister, six on the opposition party leader's advice, and nine are chosen amongst individuals prominent in economic or social affairs, under the President's discretion.⁸³ In contrast, the House of Representatives consists of forty-one members elected by a simple majority from single-member districts.⁸⁴

Examining Trinidad and Tobago through the context of bicameralism raises an interesting question about the role of the second chamber. The chamber does not represent any regional or minority interest. Instead, it appears that the Senate was created with the idea that the President, prime minister, and opposition leader can use the upper house to appoint individuals with unique skills or expertise. These individuals likely use their personal knowledge to draft more effective legislation or scrutinize bills proposed by the lower chamber. Considering the role of the Senate in selecting the President through the context of bicameralism, ideally, senators will utilize their political or professional experience to elect a president that they find competent to lead their nation.

J. Ethiopian Model

The appointment of the Ethiopian president demonstrates how bicameral principles can be adopted into a state's executive selection process. Under article 70 of the Ethiopian Constitution,

⁸² *Trinidad and Tobago*, Caribbean Elections (Mar. 6, 2021), http://www.caribbeanelections.com/knowledge/country_browser/tt_profile.asp.

⁸³ *Trinidad and Tobago Electoral System*, Political Database of the Americas (June 23, 2011), <https://pdba.georgetown.edu/ElecSys/Tri/tri.html>.

⁸⁴ *Id.*

the nation's lower chamber nominates the presidential candidate.⁸⁵ Once the candidate is nominated, the upper and lower chamber come together to approve the nominee's candidacy.⁸⁶ The Ethiopian House of Representatives consists of 547 members, while the House of the Federation (upper chamber) has 110 members. The candidate must win two-thirds of the joint chamber's votes to become president.⁸⁷

The Ethiopian House of the Federation comprises representatives from all of country's different "Nations, Nationalities, and Peoples."⁸⁸ State councils elect members of the upper chamber.⁸⁹ At first glance, it appears that the Ethiopian upper chamber is in a strong position to influence the executive position with its diverse representation. For example, while the chamber has no legislative powers, the House of Federation has broad constitutional powers. Specifically, the upper chamber has authority over the Council of Constitutional Inquiry, an organization designed to enforce the rights entrenched in the Ethiopian constitution.⁹⁰ The diverse representation of the upper chamber makes it a fair and equitable space to protect constitutional rights. Ideally, by incorporating the Ethiopian upper chamber into the president's selection process, the chamber's electors will select a candidate who believes in protecting constitutional rights. However, by allowing the lower chamber of the Ethiopian parliament to choose the presidential candidates, the upper chamber is severely limited in its ability to provide minority representation to the executive selection process.

K. The Swiss Bicameral Model

⁸⁵ CONST. OF THE FED, DEM. REP. OF ETHIOPIA, art. 70, sec. 1, *translation at* <https://www.refworld.org/docid/3ae6b5a84.html>.

⁸⁶ *Id.* at art. 70, sec. 2.

⁸⁷ *Yehizb Tewokayoch Mekir Bete (House of Peoples' Representatives)*, Inter-Parliamentary Union (Oct. 6, 2015), <http://archive.ipu.org/parline-e/reports/2107.htm>; *See also, Yefedereshein Mekir Bete (House of the Federation)*, Inter-Parliamentary Union (May 2, 2018), http://archive.ipu.org/parline-e/reports/2108_A.htm.

⁸⁸ CONST. OF THE FED, DEM. REP. OF ETHIOPIA, art. 61, sec. 1, *translation at* <https://www.refworld.org/docid/3ae6b5a84.html>.

⁸⁹ *Id.* at art. 61 sec. 3.

⁹⁰ *Id.* at art. 21, sec. 1-2.

The creation of the Swiss federal state resulted in a bicameral legislature, which serves as the national legislature for the nation's 26 cantons or states. Switzerland's federal upper chamber's influence in appointing the nation's executives serves as a unique example of bicameralism at work. What makes the Swiss model unique is that the two chambers in the Swiss parliament "debate items of business on an equal footing and have the same competences and roles," so the upper and lower chamber fall outside the traditional definition of a bicameral legislature.⁹¹

Switzerland's bicameral parliament is called the Federal Assembly, which is composed of two chambers. The upper chamber is called the Council of States (46 seats, two seats per canton, except for six cantons, which only have 1), and the National Council, which consists of 200 seats, split between the cantons based on population, is known as the lower chamber.⁹² Switzerland's executive branch, known as the Federal Council, consists of seven members that head the federal administration, which operates as a cabinet or collective presidency.⁹³

Every four years, the United Federal Assembly comes together in a joint session with both houses to elect the Federal Council. The election takes place by secret ballot in several rounds, with severing members of the Federal Council standing for re-election in the order of their length of time in office.⁹⁴ After the third round, no new Council applications are accepted, and only candidates who receive votes in the first two rounds can receive votes. If no candidate gets an absolute majority (that is to say, more than half of the valid votes cast), the person with the fewest votes is eliminated in the next round.⁹⁵ This process is repeated until seven representatives receive

⁹¹ Director of Public Relations, *The Swiss Parliament*, Parliament Services (2021), <https://www.parlament.ch/centers/documents/en/broschuere-bundesversammlung-e.pdf>.

⁹² *Federal Council Election*, The Federal Council (June 6, 2017), <https://www.admin.ch/gov/en/start/federal-council/election-federal-council.html>.

⁹³ SWITZ. CONST. ART. 175 Abs. 1 BV, translation at <https://www.fedlex.admin.ch/eli/cc/1999/404/en>.

⁹⁴ Federal Council Election, *supra* note 92.

⁹⁵ *Id.*

an absolute majority of votes. Additionally, every December, the Federal Assembly meets in a joint session to elect a new president and vice president of the confederation.⁹⁶

The Federal Assembly also elects a vice president. By convention, the positions of president and vice president rotate annually, each councilor thus becoming vice president and then president while in office.⁹⁷ Despite receiving the title of federal president, the chief executive has no powers over and above his or her six colleagues but rather represents the country in international affairs as a president might.⁹⁸ Thus, under the Federal Constitution (Art. 177), the principle of collegiality applies, in that the Federal Council reaches its decisions as a collegial body.⁹⁹

As a result, the Swiss executive is one of the world's most stable executives. Over the past 60 years, the Federal Council has been composed of the same political parties, with Switzerland's four main parties dividing the seven cabinet seats according to a set formula determined by their strength at the ballot box.¹⁰⁰ Changes to the council typically only occur when a representative retires, and the member is almost always replaced by someone from their same party and often the same linguistic group. Similar to how Switzerland's regional and cultural groups have the ability to influence federal legislation through the Council of States, these same states have the unique ability to influence the appointment of federal executives. Ultimately, the Swiss model encapsulates the ability of bicameral systems to provide a diverse array of ethnic and regional groups influence over selecting a nation's executive.

III. MAJOR TAKEAWAYS

⁹⁶ *Switzerland: Main Executive and Legislative Bodies*, European Union (Dec. 2, 2020), https://eacea.ec.europa.eu/national-policies/eurydice/content/main-executive-and-legislative-bodies-115_en.

⁹⁷ Federal Council Election, *supra* note 92.

⁹⁸ Switzerland, *supra* note 96.

⁹⁹ *Id.*

¹⁰⁰ *Politics in Switzerland: How Switzerland's Cabinet Works*, SwissInfo (2021); <https://www.justlanded.com/english/Switzerland/Articles/Culture/How-Switzerland-s-cabinet-works>.

Ultimately, examining the extent of bicameral legislatures' influence on the executive selection process indicates several takeaways. First, while there is no contemporary example of a lower and upper chamber selecting an executive, the U.S. contingent election model demonstrates how the process might operate. However, the U.S. model is yet to demonstrate this process take place within the last 200 years, which limits the usefulness of this example. Furthermore, few nations operate an electoral system where both chambers contribute to the executive selection process, so it is challenging to study this concept in various cultural and political contexts.

Moreover, the countries examined in this paper indicate that states that have incorporated the upper chamber into their executive selection process have successfully increased the input of regional and ethnic group representation in the appointment procedure. From Germany to Nepal, it appears that almost every country that allowed their upper chamber influence in selecting one or both executives wanted to provide additional geographical representation. The constitutions in Germany, India, Italy, Nepal, and Pakistan incorporate state or regional legislative bodies, which directly influence the presidential selection process.

The upper chambers in these nations have the opportunity to check the power of the lower house through their limited ability to vote for one candidate and lobby against another during the selection process.

Another benefit of incorporating the upper chamber into the executive selection process is that countries such as Pakistan, Nepal, and Ethiopia have included additional representation for minority ethnic groups and women by mandating that these groups have reserved seats in their respective upper chambers. Mandatory seats for ethnic minority groups provide additional representation for sections of the population that have historically been ignored. Finally, Trinidad and Tobago serves as a prime example of an upper chamber that reserves seats for a handful of

economic and policy experts to contribute to the political process. In bicameral legislatures, representatives of upper chambers typically have unique skills or expertise to assist in drafting laws. Ideally, by allowing upper chambers to select one or both of their executives, these economic and policy experts will use their professional experience to select a competent president.

Despite the potential benefits of incorporating the upper chamber into the executive selection process, there are significant limitations that may prevent the upper chamber from strongly influencing the selection process. First, in every country evaluated, the president is significantly weaker than the other executives, and in most cases, the president plays a ceremonial role at best. In all of these countries, the lower chamber alone retains the authority to select the prime minister, who retains most political power. Switzerland serves as the only example of an upper chamber with some say in choosing the nation's president. However, there is no real difference in the function of the Swiss upper chamber from the lower chamber, other than geographical representation, which raises concerns about the role of the upper chamber. Thus, only allowing a state's upper chamber to participate in selecting the nation's weaker executive is unlikely to increase representation for minority groups in the executive branch because the primary decision-maker will not need the support of members of the upper house to rise or stay in power.

Furthermore, the composition of the electoral college in all of these countries limits the influence of the second chamber. For example, in Italy, the electoral college consists of 630 deputies, 315 senators, and 58 regional representatives.¹⁰¹[\[1\]](#) In order for a president to secure victory, she only needs to secure two-thirds or 660 electoral votes. Thus, in a country where one or two political parties dominate, minority representation in the upper chamber contributing to electing a president will likely be diluted by the popularly elected lower chamber. Moreover, in

¹⁰¹ Donati, *supra* note 59.

countries that sit in a joint session to vote for the president, the lower chamber has enough votes to ignore the influence of the second chamber. For example, when the Swiss legislature sits in joint session, the lower chamber outnumbers the upper chamber 200 to 46 seats. If the lower chamber is dominated by one party, the upper chamber is rendered useless in the executive selection process.

The Ethiopian presidential appointment process further limits the upper chamber's influence by requiring the lower chamber to select potential candidates for the electoral college to vote on. By doing this, the lower chamber eliminates the risk of the upper chamber nominating a candidate they find politically unpopular. Thus, the Ethiopian upper chamber has no say in picking a presidential candidate and is left to vote for which candidate they dislike the least.

Ultimately, allowing bicameral legislatures to select one or more executives can increase regional representation and provide skilled politicians the opportunity to choose a qualified executive that appeals to a large portion of a state's minority groups. However, to see the benefits of a bicameral legislature in the executive selection process, a state must design its constitution to allow the upper chamber meaningful influence in selecting an actual decision-maker. One characteristic of a bicameral system that might indicate an upper chamber does have the necessary influence to impact an executive selection is the ability for an upper chamber to scrutinize a lower chambers pick, similar to how an upper chamber carefully examines proposed legislation from the lower chamber.

During legislative drafting, the upper chamber serves as a chamber of review by slowing down decisions made in the lower chamber. The presence of an upper chamber delays the legislative procedure and allows the expression of public sentiments on policy issues. Thus, the upper chamber assists in creating high-quality legislation. Applying the bicameral principle of

review to the executive selection process would hopefully result in a higher quality of executive. In practice, this may look like an upper house veto to the lower chamber's executive selection or a dual executive system that allows the upper chamber to select its own executive whose power rivals that of the lower chamber's executive. Therefore, granting the upper chamber in a bicameral legislature influence in selecting one or more executives can increase minority groups' representation in the executive branch. However, the constitutional system must be designed to provide the upper chamber with actual influence in the executive selection process.