



# A Critical Analysis of Appointment of Federal Supreme Court Judges in United States of America

Rangin Pallav Tripathy\*

## Abstract

This research article focuses on a critical analysis of the process by which federal Supreme Court judges in United States of America are appointed. As one of the oldest democracies in the world, the process of judicial appointment in USA has been shaped by centuries of history. The article explores the unique process of judicial appointments in federal Supreme Court of United States where the President and the Senate share the power conjointly, but independently of each other. It looks into the factors which have assumed relevance in the decision making process of both the President and the Senate. The author argues that though the theoretical structure for the appointment of judges in USA is sound, the greatest achievement has been the processes which have developed beyond a direct mandate of law. The conventional practices associated with the process of judicial appointment have brought in a degree of transparency which is elusive in many other countries. The author acknowledges the obvious political flavor in

---

\*Assistant Professor, National Law University, Odisha;  
rangin.tripathy@gmail.com.

the entire process, but argues that the degree of transparency provides a substantial benefit.

**Keywords:** Confirmation hearings, Federal Supreme Court, Judicial philosophy, Presidential nomination, Transparency.

## I. Introduction

The judicial structure in United States is a hierarchy of two parallel structures of judicial bodies co-existing at the same time.<sup>1</sup> At one level, is the judicial hierarchy in each State according to its own laws and constitutions, including Courts of First Instance, Courts of Appeal and a State Supreme Court. The States are free to determine the hierarchical designations of the courts in each state and the scope and ambit of their jurisdictions. At the other level, is the federal court structure for dealing with federal matters established by the United States Congress.<sup>2</sup> Though, closely similar to the judicial structure of Australia, the distribution of judicial power in United States is different in one vital aspect. Unlike in Australia,<sup>3</sup> the Highest Court in the Federal Hierarchy (Federal Supreme Court) does not have jurisdiction to hear any kind of appeal from State Supreme Courts not involving a federal element. Though, the position of the Supreme Court as the highest court of the country is undisputed, with its decisions being binding on all courts, both at the federal and the state level, it can hear only such cases which involve a substantial federal element.<sup>4</sup> Thus, in such matters which do not involve a federal element, the decision of the State Supreme Courts' is final in their respective jurisdictions.<sup>5</sup>

Initially established under the Judiciary Act of 1789, the Federal Supreme Court of United States is the highest court in the federal

---

<sup>1</sup>Mark C Miller, *A Comparison of the Judicial Role in the United States and in Canada*, 1 Suffolk Transnational Law Review 22 (1998).

<sup>2</sup>Miller, *Supra* note 1 at 1.

<sup>3</sup>AR BLACKSHIELD AND G WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS* 586 (The Federation Press 5<sup>th</sup> ed. 2010).

<sup>4</sup>Miller, *Supra* note 1 at 1.

<sup>5</sup>*Ibid.*

structure and has historically been regarded as one of the most powerful and influential judicial institutions of the world.<sup>6</sup> It is established pursuant to Article III of the Constitution of the United States, which stipulates the judicial power of USA to be vested in the Supreme Court and other courts established by the Congress. The hierarchy of the federal courts in United States consists of four tiers, with the Supreme Court as the apex authority.<sup>7</sup> The first tier in the federal hierarchy is occupied by the Magistrate Judges and the next two tiers are constituted by Federal District Courts and Circuit Courts (Federal Courts of Appeal).<sup>8</sup>

## II. Appointing Authority

The President and the Senate operate in conjunction in the matter of appointing judges to the Supreme Court. In this method, the power of appointment is shared between two separate agencies of the state and it is not possible for one agency to finalize the appointment of a judge without the cooperation of the other. Under the constitutional scheme,<sup>9</sup> the initiation of the selection process is done by the President and the process culminates with the decision of the Senate.<sup>10</sup> The power of nominating a person for the judgeship of the Supreme Court is the exclusive authority of the President. No other authority apart from the President can exercise the power of nomination. However nomination by the President is itself not sufficient for appointment as a judge. The nominated candidates by the President must then be confirmed by the Senate after a process known as 'confirmation hearings' or 'senate hearings'.<sup>11</sup> It is important to note that, though the Senate may not confirm the appointment of any candidate nominated by the President, it cannot recommend or nominate any alternative

---

<sup>6</sup>US CONST. art. 3 sec. 1.

<sup>7</sup> Mark Tushnet, *Judicial Selection, Removal and Discipline in the United States*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 135 (Cambridge University Press, 2011).

<sup>8</sup>*Ibid.* at 134-135.

<sup>9</sup>U. S. CONST. art. 2 sec. 2.

<sup>10</sup>*Supra* note 7 at 2.

<sup>11</sup> *Supra* note 9 at 3.

candidate. The Senate must either accept or reject a candidate nominated by the President.<sup>12</sup> It does not have the power to control the list of nominations that are referred for confirmation.

### III. Qualification

One peculiarity of the constitutional scheme of the United States concerning the appointment of Supreme Court judges is that, the Constitution prescribes no qualification for a person to be appointed as a judge of the Supreme Court, or for that matter, of any federal court.<sup>13</sup> There is no constitutional or statutory requirement which must be fulfilled for a person to be appointed as a judge of the Supreme Court. Thus, the appointment process of a Supreme Court judge requires only the procedural mandate of nomination by the President and confirmation by the Senate for its constitutional validity. The flexibility offered by the Constitution in this regard has meant that, the composition of the Supreme Court has had considerable variety with individuals of different backgrounds serving as judges. Thus, persons having a variety of prior positions such as Governors, Senators, Circuit Court Judges and even a former President have been appointed as judges of the Supreme Court.<sup>14</sup> Though, there is no constitutional requirement of a Supreme Court judge to be a lawyer, there has never been an appointment to the Supreme Court, of a person who is or was not a lawyer.<sup>15</sup> It is also not necessary that a person to be appointed as a judge of the Supreme Court must have held judicial office. Although in recent years, the pattern of appointment has favored those having held judicial office, it is at no point of time considered as a pre-requisite for appointment.<sup>16</sup> There have been sufficient

---

<sup>12</sup>MARK TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS* 127 (Hart Publishing, 2009).

<sup>13</sup> *Supra* note 7 at 2.

<sup>14</sup>Mark Tushnet, *Judicial Selection, Removal and Discipline in the United States*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 149 (Cambridge University Press, 2011).

<sup>15</sup>Congressional Research Report for Congress, <http://fpc.state.gov/documents/organization/50146.pdf> (last visited December 25, 2014).

<sup>16</sup>*Supra* note 12 at 130.

instances, where individuals not having held judicial office, have been appointed as judges of the Supreme Court; some prominent names being Hugo L Black and Earl Warren.<sup>17</sup>

#### **IV. Procedure of Appointment**

The appointment process of the judges of the Supreme Court is a subject matter of deep political scrutiny. As a judicial institution of considerable influence, the process by which judges are selected to the Supreme Court is of substantial interest to most stakeholders of the judicial process. The entire process by which a judge of the Supreme Court is appointed can be thematically discussed in two distinct phases. Firstly, the process by which the President determines his nominations and secondly, the process by which the Senate considers the nomination so made.

##### **A. Nomination by the President**

As the only authority having the authority to make nominations for appointment as Supreme Court Judges, the President occupies a vital position in the entire process. Though, it is not necessary for each nomination of the President to result in a judicial appointment, it is impossible for a person to become a judge of the Supreme Court, unless the President nominates the person. In other words, though the President is not the final authority on who can become a judge in the Supreme Court, he definitely can ensure that someone in particular is not made a judge of the Supreme Court.

There is no legal requirement for the President to consult any authority or person before finalizing his nominations. However, the conventional practices and the reality of political compulsions mean that, the President is extremely unlikely to exercise his power of nomination without consulting the involved stakeholders. Usually, the President would normally seek the opinion of the

---

<sup>17</sup>*Ibid.*

senators of the identified candidate's home state.<sup>18</sup> As the Senate is the confirming authority, not having the senators of the candidates own state on board, would compromise the confirmation procedure.<sup>19</sup> Historically, there have been known instances of the nomination not being confirmed, as the rest of the Senate chose to support the senators from the home state of the candidate, as per the conventional practice of 'Senatorial Courtesy'.<sup>20</sup>

It is also a tradition for the President to seek the opinion of the members of the Senate Judiciary Committee on a prospective nominee to test the waters on the feasibility of the nominee's candidature.<sup>21</sup> It is not uncommon for the President to consult the existing judges in the federal judicial hierarchy, with special emphasis on the opinion of the Chief Justice.<sup>22</sup> Apart from the above, the President himself may consult or may receive inputs regarding prospective nominees from a variety of sources, including house members, party leaders, interest groups etc.

Apart from the staff at the White House and the office of the Attorney-General, the Department of Justice is intrinsically connected with the process of nomination by the President<sup>23</sup> and provides logistical and value support to the President, in making his choices.<sup>24</sup> The Federal Bureau of Investigation also plays a major role in establishing and verifying the general credentials of a prospective nominee<sup>25</sup> and the verification by the Federal Bureau of Investigation is a major component of any report forwarded by the Department of Justice to the President. The Presidents are also known to have consulted private lawyers, scholars and also the

---

<sup>18</sup>Michelle Borchanian, *A Comparison of the Judicial Systems of England and the United States* 13 UNIVERSITY OF DETROIT MERCY INTERNATIONAL LAW FORUM 4 (1993).

<sup>19</sup>*Ibid.*

<sup>20</sup>*Supra* note 15 at 4.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Supra* note 18 at 5.

<sup>23</sup> *Supra* note 12 at 3.

<sup>24</sup>Cheung Wai-lam, *The Process of Appointment of Judges in Some Foreign Countries: The United States* (Nov. 22, 2000), <http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf>

<sup>25</sup>*Ibid.*

American Bar Association, in order to gain a rounded view on the credentials of a prospective nominee.<sup>26</sup>

After a proper verification procedure as discussed above, spearheaded by the Department of Justice, the President finalizes his nominations for the appointment of judges to the Supreme Court.<sup>27</sup> Though, there are no established and consistent parameters around which the nomination by the President revolves, it is believed that the President generally takes into consideration the professional skills and background of the candidate, along with the political and ideological inclinations. Presidents are known to prefer candidates who share similar or compatible political philosophy.<sup>28</sup> The President is also likely to take into consideration issues of gender,<sup>29</sup> race,<sup>30</sup> and other such demographic concerns while assessing the nomination.<sup>31</sup>

## **B. Confirmation by the Senate**

It needs to be noted that the role of the Senate in the appointment process of federal judges is not merely a nominal one. It is a co-equal agency without whose cooperation, no President can ever ensure the appointment of his chosen nominees. The Constitution of the United States requires the President to act with the advice and consent of the Senate, in relation to the appointment of Supreme Court Judges.<sup>32</sup> While considering the confirmation of the nominations made by the President, the Senate acts in its singular institutional capacity, with the House of Representatives having no role, whatsoever. Within the Senate, major role is played by the Senate Judiciary Committee, which consists of 18 members, with the majority of the committee members coming from the majority party in the Senate. The procedural scheme of the Senate Judicial Committee consists of an investigative process followed by public

---

<sup>26</sup>*Supra* note 15 at 4.

<sup>27</sup>*Supra* note 24 at 6.

<sup>28</sup>RALPH A ROSSUM AND G ALAN TARR, AMERICAN CONSTITUTIONAL LAW VOL. 1 25 (Thomson Learning 2003).

<sup>29</sup>*Ibid* at 26.

<sup>30</sup>*Ibid*.

<sup>31</sup>*Supra* note 18 at 5.

<sup>32</sup>U S CONST. art. 2 sec. 2.

hearings of the nominees and then a final decision on the nature of the recommendation to be made to the full senate.<sup>33</sup> The Committee conducts an intensive investigation on the background and credentials of the nominee, with support from other agencies like FBI. The Committee also collects information directly from the nominee, by filling up a questionnaire.

The other agency whose input plays a vital role in the decision making process concerning judicial appointments, is the American Bar Association.<sup>34</sup> The American Bar Association's Committee on Federal Judiciary is crucial to the process, as it verifies the credentials of the nominee on various parameters, including qualifications, integrity, professional competence and temperament<sup>35</sup> and advises on the suitability of the candidate for being a judge of the Supreme Court. It lists the prospective appointee as 'well qualified', 'qualified' and 'not qualified' based on its assessment and the rating is reported to the Senate Judiciary Committee.<sup>36</sup>

Though conducted in private in the earlier times, the confirmation hearings have for long been open to the public. The nominees are required to be present in person and are questioned by the committee members on various issues including their professional qualifications, background, earlier stints in public office, political opinions, views on important rulings, views on prevailing constitutional and social controversies and also on the nominee's judicial philosophy and the approach likely to be adopted by him/her in deciding cases.<sup>37</sup> The process of questioning is structured with a fixed order and pre-determined allotment of time for all committee members. After the questioning of the nominee, the Committee also hears testimony from public witnesses on each nominee, as to the suitability of the nominee as a judge in the Supreme Court. The Chairman of the American Bar Association's Federal Judiciary Committee has been one of the first witnesses in all nominations since the last three decades. Witnesses, both in

---

<sup>33</sup>*Supra* note 15 at 4..

<sup>34</sup>*Supra* note 18 at 5.

<sup>35</sup>*Supra* note 24 at 6.

<sup>36</sup>*Ibid* at 33.

<sup>37</sup>*Supra* note 15 at 4.

support of, or in opposition thereof, of the nominee, may come from various quarters including interest groups, advocacy groups etc.

After the 'confirmation hearings', the members of the Committee deliberate on the nature of recommendation, which will be forwarded to the full Senate in relation to individual nominees. The Committee has three options in this regard; to recommend favorably, negatively or to give no recommendation at all. Though, theoretically the Committee can stall a nomination by not reporting any recommendation to the Senate and thereby ensure that the Senate would not be able to consider the candidature of the nominee, it has been the tradition of the Committee for over centuries to report each nomination to the Senate, regardless of the view of the majority of Committee members.<sup>38</sup> The recommendation of the Judiciary Committee carries great weight, as an unfavorable recommendation by the Committee will make it extremely difficult for the nomination to be confirmed by the full Senate. However, a favorable recommendation in itself is also not an assurance of a confirmation, as the Senate on a number of occasions, has not confirmed nominations even after favorable recommendation from the Committee.<sup>39</sup>

After the recommendation of the Judiciary Committee of the Senate, the nomination is put to vote before the full senate where, upon a favorable vote of the simple majority, the appointment of the nominee is confirmed. The vote may be preceded by extensive debates and in case the nomination is without any objection, the Senate may straightway vote on the nomination. The debates in the Senate concerning the confirmation of nominations are not centered on any identifiable consistent parameters. Individual senators may support or oppose a particular nomination depending on a variety of factors, including the professional qualifications and political ideology of the nominee.<sup>40</sup> Over a period of time, the political philosophy and judicial ideology of the nominee and his/her views on sensitive legal issues have gained greater importance as a

---

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid* at 37.

<sup>40</sup>*Ibid.*

subject matter of considerable attention and debate in the Senate floor.<sup>41</sup>

It needs to be noted that though generally the Senate does not reject the nominations of the President, there have been substantial exceptions to this rule<sup>42</sup> and on many occasions, the Senate has refused to confirm nominations made by the President.<sup>43</sup> The reasons for the rejection are not necessarily based on any objective notion of merit and in fact are on many occasions politically motivated as was evidenced in the non-confirmation of Ebenezer Hoar.<sup>44</sup> On other occasions, the Senate has resisted the confirmation of a nominee on other grounds reflecting on the personal character of the nominee.<sup>45</sup> The members of the Senate also adopt a modality where instead of rejecting a nomination directly, they convey their displeasure in relation to a certain nominee, through informal means. This usually has an effect on the candidature of the nominee being withdrawn since it becomes clear that the nomination would not pass a confirmation vote in the Senate.<sup>46</sup>

## **V. Problems with the Process of Appointment**

The appointment of Judges in the United States is wrought with an overwhelming number of issues. At times, it tends to be a hindrance when a particular candidate who may be a better bet may not be given a chance and preference may be given to a candidate, who in comparison should not have been the first choice.

### **A. Politicized Process of Appointment**

The fundamental problem with the appointment of Supreme Court judges in the United States, is the excessively political nature of the entire process. The pervasive involvement of the President and the

---

<sup>41</sup>*Ibid.*

<sup>42</sup>*Supra* note 28 at 6.

<sup>43</sup>OTIS H STEPHENS JR AND JOHN M SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 54 (Thomson Learning 3<sup>rd</sup>ed. 2003).

<sup>44</sup>*Supra* note 7 at 2.

<sup>45</sup>*Supra* note 28 at 6.

<sup>46</sup>*Supra* note 7 at 2.

Senate, along with no clear constitutional criterion on which the appointments are based, has resulted in a much politicized selection process for members of the federal judiciary in general, with even greater stakes in relation to the selection process for the Federal Supreme Court than other Federal Courts. Both the President and the Senate base their decisions primarily on political considerations. For long phases, the entire appointment process to the Supreme Court was nothing but a scheme of political patronage wherein political supporters and loyalists were either rewarded or given allurements.<sup>47</sup> Even when merit has played a part in the selection process, it has hardly ever been considered as the primary consideration. In fact, the appointment of Justice Benjamin Cardozo is often cited as the only judicial selection in the 20<sup>th</sup> century, which was based purely on merit, without political considerations playing any role in the process. Otherwise, political affiliations and electoral considerations play a predominant role in the nomination by the President.<sup>48</sup> This can be understood by throwing light on the cases of Ebenezer Hoar<sup>49</sup>, Abe Fortas and Robert Broke. These decisions of the Senate have been heavily influenced by political considerations.<sup>50</sup> Ensuring an even geographical distribution in the composition of the court was a priority for a considerable period of time.<sup>51</sup> As noted earlier,<sup>52</sup> issues concerning religion<sup>53</sup> race<sup>54</sup> and gender<sup>55</sup>, have in the past, substantially influenced the selection of judges to the Supreme Court.

## **B. Influencing the approach of the judiciary through strategic appointments**

Though, it is generally believed that the professional competence of the candidate is a major consideration in the selection process, the

---

<sup>47</sup>*Ibid.*

<sup>48</sup>*Supra* note 12 at 3.

<sup>49</sup>*Supra* note 44 at 9.

<sup>50</sup>*Supra* note 12 at 3.

<sup>51</sup>*Supra* note 7 at 2.

<sup>52</sup>*Supra* note 29 at 6.

<sup>53</sup>*Supra* note 12 at 3.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*

heavily political nature of the process means that there is no clear understanding of how the professional competence is assessed. With the passage of time, great emphasis is placed on the political views and ideological inclinations of a candidate, during the selection process.<sup>56</sup> The pervasive nature of political involvement and political considerations in the selection process, raises concern regarding inclination of judges when they assume office. As the political views of the candidates are an inherent facet in the selection process, it is possible for the President to impact the collective judicial approach of the judiciary, through their appointment policy.<sup>57</sup> The most glaring example of this control is exemplified by President Franklin D. Roosevelt's attempt<sup>58</sup> to 'pack the court' with justices who would decide favorably in relation to his socio-economic policies. President Roosevelt was deeply dissatisfied with the judicial approach in invalidating a number of his legislative initiatives designed to deal with the recession.<sup>59</sup> He had planned to increase the strength of the Supreme Court<sup>60</sup> and fill it with appointees who would hold favorable views towards the government's policies.<sup>61</sup> Interventions by the then Chief Justice, Charles Evans Hughes,<sup>62</sup> the stance of the Senate Judiciary Committee<sup>63</sup> and the revised approach of the Supreme Court<sup>64</sup>, resulted in the plan being shelved. The incident however, highlights the crucial role played by political factors in the inter-relationships between the executive and the judiciary, in the United States. In subsequent years, President Roosevelt was able to achieve his target of a favorable Supreme Court, due to vacancies which arose naturally due to either retirement or death of the incumbent judges. He did so with calculated appointments of individuals who he knew were in favor of his socio-political ideals.<sup>65</sup>At times, a

---

<sup>56</sup>*Supra* note 7 at 2.

<sup>57</sup>*Supra* note 28 at 6.

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*

<sup>61</sup>*Supra* note 43 at 9

<sup>62</sup>*Ibid.*

<sup>63</sup>*Ibid.*

<sup>64</sup>*Supra* note 43 at 9.

<sup>65</sup>*Supra* note 12 at 3.

President may also select appointees to counter a specific judicial decision or a set of decisions. The most obvious example of the same was the nomination made by President Ulysses S. Grant, after the resignation of Justice Robert Grier, so that the decision in the *Legal Tender* case could be reversed.<sup>66</sup> This increased emphasis on judicial and political philosophy has had an impact on the composition of the Supreme Court.

## **VI. Implications of the appointment process on judicial behavior**

The extent to which political affiliation plays a part in the selection process also has an impact on the judicial behavior of judges on the bench. It has been found that on many occasions and in respect of many contentious matters, the judges appointed by a certain President reflect the views of the President or the political party of the President.<sup>67</sup> However, it is to be noted that, this is not a result of direct political interference in the judicial decision making process. Such patterns are in fact, the result of the tendency on the part of both the Presidents and the Senate to appoint candidates having deep and clear political views on subject matters which are naturally oriented towards certain ideologies and conclusions.<sup>68</sup> It also needs to be noted that despite extensive efforts in seeking to ensure the selection of a compatible candidate, it is not always necessary for judges to decide and behave in a manner expected by the President or the Senate. The views of the concerned judge might change, or it may also happen that his views were perceived wrongly by the President and the Senate. The protection offered to the judges is so secured that even if a judge does not rule in a manner that was expected of him, there is nothing that the President can do in regard to the same.<sup>69</sup>

---

<sup>66</sup>*Ibid.*

<sup>67</sup>*Supra* note 7 at 2.

<sup>68</sup>*Ibid.*

<sup>69</sup>*Supra* note 28 at 6.

## VII. Conclusion

Despite the obvious drawbacks in terms of the absence of clear qualification or other criteria for selection of judges, the appointment process of the federal Supreme Court judges in United States is the triumph of a largely transparent process. As has been noted repeatedly,<sup>70</sup> the entire process of appointment is heavily influenced by political considerations. However, the fact that the only major point of dispute is the political ideology of prospective judges, shows how the process does not allow incompetence or lack of integrity to even be a matter of discussion. The convergence of two organs of the state in the appointment process on equal footing with each other and the very public nature of the confirmation hearings has meant that compromise on the personal integrity or efficiency of the proposed candidates shall not take place. The transparency inherent in the process makes it untenable for either the President or the Senate to go ahead with the appointment of a judge whose efficiency or integrity can be called into question.

Transparency in the process ensures a minimum standard of decision making, even without the prevalence of strict guidelines. When the decision makers are aware that the factors which are involved in their decision making is open to public scrutiny, it becomes more unlikely for them to make certain compromises. Thus, it would be correct to state that, the appointment process of federal Supreme Court judges in United States of America is a vindication of the virtue of transparency.

---

<sup>70</sup>*Supra* note 28 at 6.