

## The Dark Sides of the US Model of Judicial Selection

by

**Fabian Zhillia<sup>1</sup>**

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<sup>1</sup> Fabian Zhillia is a final year PhD students at King's College, University of London, researching on the nexus between judicial corruption and organised crime in the Western Balkans. Fabian's research interest also includes corruption, financial crime and financial market fraud. Fabian is also a visiting lecturer at London Metropolitan University lecturing on LLM Financial Crime. He can be contacted at [fabian.zhillia@kcl.ac.uk](mailto:fabian.zhillia@kcl.ac.uk) .

## Introduction

Each society should be based on justice. Justice in turn, needs to be protected by strong and fair public institutions. In order to maintain social justice, every society should institutionalise the judiciary in a fair and balanced power with other institutions. All these concepts such as social justice and the rule of law are constantly seen as tools for a workable democracy (Walker, 1998). Contemporary discourse usually targets developing countries as ‘havens’ of lack of judicial independence (Helmke and Rosenbluth, 2009; Buscaglia, 1999). However, literature suggests that issues of judicial independence are present even in sound democracies (Guarnieri 2007).<sup>2</sup> Some of them have a very complex structure of judicial appointments and thus judicial independence appears to be questionably there (Garoupa and Ginsburg 2009). The aim of this paper is to illustrate such a concern. The case at hand is the US system of judicial selection. The paper starts with a short background of the problem. In the first part, it explains the operating system of judicial appointment of both federal and state judges. In the second part, it focuses on the politicisation of judicial appointments. And finally, in the conclusion, this paper highlights that judicial independence remains a challenge even for countries with a consolidated rule of law such as the US.

## Background

The US system considers judicial independence fundamental to a fair trial. American academics historically have strongly supported judicial independence, mainly due to their concern regarding the fear of political interference into the judiciary, which is considered a watchdog of democracy (Clark, 2011). The impact of *de facto* judicial independence has a significant implication for democratic societies in both political and

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<sup>2</sup> The latest EU report on measuring the efficiency of the courts in the EU member states finds out that ‘more than half of the European states or entities commit more budgetary resources in other areas of justice than for the operation of courts. For more see ‘European Commission for the Efficiency of Justice (CEPEJ) - Evaluation report of European judicial systems - Edition 2010 (2008 data): Efficiency and quality of justice p. 20. Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2010\)Evaluation&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2010)Evaluation&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

economical terms (Hayo and Voigt, 2007). In this respect, undue political influence on the courts would put at risk the balancing role of the judiciary in a liberal democracy (Entin, 2002). In fact, judicial independence and models of judicial selections are often subjects of hot debates among scholars in the US. Their approaches are not uniform (Rose-Ackerman, 2007). In this respect we briefly explain in the following section how the US model of judicial selections operates.

### **Election v. Selection**

In the US there is a mixture of elected and appointed judges. There are federal or constitutional court judges who as per Article III, Section 1 and 2 of the US Constitution are appointed by the President for life-tenure. Every state has its own way of selecting judges. In general, American states use different methods for different courts or different jurisdictions. In eleven states judges are appointed-- in nineteen others, some judges are appointed but then face 'retention' elections in which voters decide whether the judge continues on the bench. At least 60% of appellate judges and 80% of trial judges at state level are elected. The number of federal judges is 867 and therefore relatively small compared to 10,886 state appellate and general-jurisdiction trial judges (Schotland, 2007). The election of judges is made through non-partisan and partisan ballot or a variation of both (Baum 2003). This combination involves another body which serves as the initial stage of selection before candidate judges go to the election process.<sup>3</sup>

It should be emphasised that the idea to move from the appointment to the election structure was asserted by the so called moderate lawyers in the American constitution convention history. They mainly supported the election method as a better safeguard for judicial independence (Schotland, 2007: 27).

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<sup>3</sup> In New Mexico candidates are elected by a partisan ballot after initial appointment by an Appellate Judges Nominating Commission.

It is difficult to determine whether appointed judges are less prone to political corruption than those elected. In general, both ways prove to have their weaknesses. The American experience of elections is associated with the raising of campaign funds, a very costly process, entailing many administrative components. Candidates need financial support in order to keep running successfully. In this respect, organisers raise funds through special campaigns where the number of contributors is large. This method can place judges in a very uncomfortable situation in terms of impartiality. If, for instance, one of the litigated parties has been a key contributor to the election of the judge who presides his case would this fact cause the impartiality of the judge to be called into question? As Thomas *at al* (2003: p. 36) notes:

“And for a candidate that an interest group supports with major promotional campaigns, the question of conflict of interest may arise as to the payoff that the group will receive once that candidate is on the bench”

There are other equally important questions that may arise in terms of elected judges, such as, whether the judge is ‘morally’ or ‘financially’ obliged to any campaign contributor. What happens if the contributor to the campaign is a friend of the candidate judge and not a donor? What is the difference between someone contributing 100\$ to another that donates 5000\$ in terms of the judge’s ‘financial obligation’ to donation? If the election form was perceived by moderate lawyers as a protection shield for the judge’s independence, is this not merely a shift from dependence on politicians to dependence on campaign contributors or lobbyists?

The diversity of the American system makes it difficult to answer these questions from an academic prospective. For instance, even the threshold of donations for election of judges varies from state to state.<sup>4</sup> Many analysts criticise the US system because of this

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<sup>4</sup> In some states every donation over 50\$ need to be itemised. The states of Arkansas, North Carolina, Texas and West Virginia put limits for the donated amounts. Texas is the only states which stipulates limits for financial contribution in respect of the judges election. Here the donation limit for an individual lawyer is not more than 50\$ and for a law firm it should not exceed the amount of 30,000\$ in aggregate for wide-state election. For more see International Commission of Jurists (2001), ‘USA Attack on Justice 2000-USA’, Independent Justice& Lawyers document, , 13 August 2001. Available at [http://www.ici.org/news.php3?id\\_article=2597&lang=en](http://www.ici.org/news.php3?id_article=2597&lang=en).

mechanism (i.e. fund raising and lobbying).<sup>5</sup> Improper lobbying might put the candidate judge in a 'do ut des' situation (exchange of favors). When lobbying is meant to support a particular judge in order for him to implement his ideas in practice, this on the other hand might undermine his integrity (Susman, 2006). In addition, even the voting system of state judges is very ambiguous and it is not clear how informed is the voter for the qualities of the candidate judges (Baum 2003: p.20). The election system leaves judges very exposed to both voters and lobbying groups (Geyh, 2003).

As far as the judicial election is concerned this might critically question even the engagement of lobbying in this process at all. This could be perceived by society as a 'patronising' mechanism of judges or 'rent seeking'. In this respect, the misconception of lobbying risks to return judges into an object of interest groups. The business-oriented way of thinking typical of lobbyists is likely to transform the election process in a bid tender. It discharges judges from their professional and ethical components. Judges thus might be tendered by lobbyist in terms of the best-access offer to the justice system and not for their expertise and future strategies to better improve the justice system. Lobbying is not the only concern with the American model of judicial appointment. Even the selection process of the federal judges has some blurred areas. In the following we explain them in a nutshell.

## **Politicisations of Judicial Appointment**

Article III of the US Constitution does not require any specific criteria for selection of judges. It implies that only professional judges are those eligible to get appointed. The nomination power of the President and vague 'advice and consent' authority of the Senate are the border lines of the political fluidity in the nominating process of judges. However, political ideologies or particular affiliations of the candidate has been seen by American Presidents and Senate as informal criteria to appoint or exclude judges for nomination. As early as 1835 the candidacy of the Chief Justice Taney's was blocked for his ideological

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<sup>5</sup> American Bar Association (2003). 'Justice in Jeopardy', Report of The American Bar Association Commission on 21<sup>st</sup> Century Judiciary', Available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

disputes of the Jacksonian period. Nomination of Judge Parker failed in 1930 because his name was opposed by civil rights and labour organisations. Chief Justice Abe Fortas failed to be nominated partly because of the opposition made to his decision at the Warren Court (Jackson, 2007). In the last thirty years the political stake at judicial selection in the US has been extensive. There is a trend that selection of judges be centralised to the White House and taken away from the Department of Justice (Law, 2005).

Even safeguards provided by the US Constitution are considered by many academics as undermined by executives for political purposes. Law (2005) characterises the life tenure given to Federal Judges as the most politicised moment of the government during the judges' selection. He notes that 'Whereas regular political appointees face replacement by subsequent presidents, federal judges continue to make or break policy long after the presidents who appointed them have lapsed into history' (Law 2005: p.485).

The assumption that the judiciary is merely a legal institution is also challenged in the academic realm. The renowned scholar Robert Dahl not only supports the fact that the Supreme Court is not strictly a legal institution but he characterises it as a political institution 'for arriving at decision on controversial decision of national policy'. He argues that the Supreme Court plays an important role in policymaking when it goes beyond the 'legal' criteria of precedent, statute and constitution. The reason of appointing judges based on political background by US Presidents shows that the Supreme Court has played an influential role in American politics.

Every President uses his momentum to act in increasing his political stake by appointing 'his' Supreme Court judges.<sup>6</sup> Many of them have been openly looking to nominate judges with the same political background (Ashenfelter *at al* 1995). Slotnick (2003) goes even further when it comes to the power of the US President in selecting lower court federal judges stating that it 'has been a relatively routine activity of American presidents, who have accentuated patronage, but not necessarily "policy," in their

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<sup>6</sup> Several famous American presidents have appointed more than two judges in the Supreme Court: Hoover had made three appointments, Roosevelt nine and Truman four.

appointment behaviour' (Slotnick, 2003: p.587). Therefore, it is unclear whether the executive tendency to keep federal judges under political 'control' is justified on the policymaking ground. On the other hand, it is also hard to sustain the argument that the US judiciary is fully independent from political influence (Rosenberg 2001).

It seems to be a common thread in American judicial selection, for Presidents to pick judges looking at their political preferences. As Chemerinsky (2003: p.624) notes 'Presidents, of course, always have done so. Every President has appointed primarily, if not almost exclusively, individuals from the President's political party. Ever since President George Washington, Presidents have looked to ideology in making judicial picks'.

## **Conclusion**

This article showed that judicial independence is not only a concern of developing countries but also of states with a consolidated tradition of the rule of law. The US models of judicial appointment, such as election and selection, also leave gaps open for political influence to play a part. In this respect the US judicial system appears not to be very different from other countries where the selection and appointment of judges is controlled by both political and business elites. This suggests that even models of judicial appointment in developed countries should be taken with caution and assessed in the light of their legal context.

**Fabian Zhilla**

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