JUDICIAL APPOINTMENTS AT CONSTITUTIONAL COURTS IN INDIA ANDUNITED STATES OF AMERICA:A LEGAL STUDY OF SUSCEPTIBILITY TO POLITICAL INTERFERENCE IN CONTEMPORARY AGE

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Abstract

Judicial appointments at constitutional courts are pivotal for ensuring judicial independence, for these courts are entrusted with the task of interpreting and upholding the Constitution. However, judicial appointment processes adopted by the countries' constitutions vary significantly, often sparking controversy. India and United States of America ('United States') represent two extremes in this spectrum. In India, the Collegium – comprising exclusively of judges – holds primacy; while in United States, the process for federal courts is led by the President's nomination and followed by the Senate's confirmation. However, despite the polarisation, the complexities governing these mechanisms have significant commonalities, for both the mechanisms have been subjected to similar controversies– the allegations being *inter alia.* The appointment of judges with favourable ideological inclinations and political predispositions. This bias is, in some cases, also evident in these judges' pronouncements. Consequently, not only is the judiciary itself compromised but also the sanctity of its rulings making them susceptible to political interference. Therefore, it becomes imperative to understand whether these approaches, albeit antithetical, safeguard judicial independence and protect Montesquieu separation of powers. The focus of the paper is to detail the convoluted history of appointment in judiciary in United States and India and rely upon contemporary developments to buttress the conclusion that the mechanism of judicial appointments is susceptible to external political interference irrespective of the judicial appointment mechanism adopted by these countries.

Keywords: Separation of Powers, Judicial Appointments, Judicial Independence, Political Interference, India, United States

I Introduction

IN THE world's largest democracies, India and the United States, the judiciary stands as a cornerstone of constitutional governance. Both nations, built on democratic principles and federal structures, have established judiciaries that besides preserving the rule of

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law also act as crucial arbiters in maintaining the delicate balance between central and regional powers. Resultantly, the appointment mechanism for judges at constitutional courts becomes pivotal in shaping the course of legal thought and protecting citizens' rights. Judicial institutions within these nations have significant ramifications for the legal landscape. Both India, with its immense population, and the United States, with its cosmopolitan diversity, have made substantial contributions to global jurisprudence. These nations have been responsible for spearheading important public law doctrines that are widely respected and discussed by jurists. Whether through the concept of judicial review,[1] doctrine of basic structure,[2]or evolution of common law in general, these countries- through their powerful judiciaries, have contributed immensely to jurisprudence and legal scholarship. Any landmark judgment they delivered has been looked up to as a constitutional movement and opened pathways for rest of the world to follow.

Given the monumental role these judiciaries play, judges at the constitutional courts have a critical responsibility. In a democracy, judges play a crucial role not only in protecting the Constitution,[3] but they also bridge the gap between law and society by understanding the purpose of law in society and helping the law achieve its purpose.[4] Therefore, the mechanisms by which these judges are appointed attract significant attention and scrutiny. Articles 124(2) and 217(1) of the Constitution of India provide that every judge [of the apex court or High Court, as the case may be] shall be "appointed by the President after consultation with" essentially the Chief Justice of India.[5]*Per contra,* article II section 2 of the U.S. Constitution vests in President the executive power to nominate, and by aid and with advice and consent of the Senate appoint the Supreme Court Judges.

Though, the constitutional provisions guiding judicial appointments are worded unambiguously, the United States as well as India have had their judicial

[1]*Marbury*v. *Madison,* 5 U.S. 137 (1803).
[2]*KesavanandaBharati*v. *State of Kerala*, (1973) 4 SCC 225.
[3]Arjan K. Sikri, *Constitutionalism and the Rule of Law* 11 (Eastern Book Company, Lucknow, 2023).
[4]*Id.,* at 16.
[5]Although art.124(2) mentions the words "such of the Judges of the Supreme Court", the practice established through various Supreme Court judgments adorns the Chief Justice of India with a crucial role in the judicial appointment. The Chief Justice of India, along with the coterie of senior-most judges of the Supreme Court, forms part of a collegium that is responsible for nominating candidates for appointments to constitutional courts in India. Furthermore, the words "after consultation with" have come to be read as concurrence and not mere consultation, which is where the primacy of the collegium becomes apparent.

appointments and judicial pronouncements muddled up in controversies. In his attitudinal theory of judicial behaviour, Richard Posner comprehensively dealt with the correlation between decisions of the United States Supreme Court having political consequences and political preferences that the justices pronouncing the judgment bring to their cases.[6] In Indian context, Rajeev Dhavan[7] and Abhinav Chandrachud[8] have elaborately described the role of political or ideological inclination in the judicial appointments to the Supreme Court. The period of consideration in those works of literature is, unfortunately, dated back to the twentieth century and the results may or may not extrapolate to contemporary times. Efforts have also been undertaken to extensively quantify the selection criteria for appointment of judges at the High Courts and Supreme Court of India by various scholars, *inter alia,* Rangin P. Tripathy,[9]Abhinav Chandrachud (again),[10] and Aparna Chandra[11] in modern times. Although these analyses provide valuable insights, they fail to address a more critical question with regards to the collegium system and safeguarding the judicial appointments from political interference. This gap in contemporary scholarship becomes particularly important given the increasingly frequent use of 'soft veto' by India's Union Ministry of Law and Justice in recent years. Consequently, the paper will address the pertinent question – whether judicial appointments in United States and India are vulnerable to political interference in the contemporary age?

In furtherance to this, the paper will examine the evolving role of political influence in appointment of judges under collegium system prevailing in India vis-à-vis the executive appointment system prevailing in United States. Accordingly, the paper will begin with a brief explainer of Montesquieu's separation of power theory, wherein an attempt will be made to emphasise the importance of judicial pronouncements – tantamount to law itself – and the need for safeguarding the judges from external interference. Subsequently, a comparative analysis of the judicial appointment

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[6] Richard A. Posner, *How Judges Think*20 (Harvard University Press, London, 2008).
[7]Rajeev Dhavan, *Justice on Trial: The Supreme Court Today* (A.H. Wheeler and Company Ltd., Allahabad, 1980).
[8]AbhinavChandrachud, *Supreme Whispers: Conversations with Judges of the Supreme Court of India* 190 (Penguin Random House India, 2018).
[9]Rangin P. Tripathy, "An Empirical Assessment of the Collegium's Impact on the Composition of the Indian Supreme Court" 32 *National Law School of India Review*118(2020).
[10]AbhinavChandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press, New Delhi, 2014).
[11]Aparna Chandra, SitalKalantry, *et. al.,* "Court on Trial: A Data-Driven Account of the Supreme Court of India" (Penguin Random House India, 2023).

mechanisms in United States and India will be performed. This study will examine the appointment process, the evolution of judicial appointments over time, and contemporary developments that are observed in these jurisdictions. The comparative analysis would aim to highlight the stark differences in the appointment processes and yet the prevalence of certain commonalities, such as murky involvement of politics in judicial appointments.

II Separation of Powers and Judicial Appointments: A Prologue

Judicial appointments along with the principles of separation of powers are fundamental for the operation of democratic governance. Judicial appointments refer to the process through which judges are selected for courts, a system designed to ensure an independent and impartial judiciary. The doctrine of separation of powers divides the functions of government into three branches: legislature, executive, and judiciary.[12] Each branch operates independently to prevent the concentration of power, ensuring checks and balances within the system. Within this trinity, the role of judiciary is paramount, for interpretation of law is fundamental to resolving disputes – be it demarcating the limitation of each governmental institution.[13]

Initially, in book XI chapter 6 of his *Magna Carta*, Montesquieu confined the role of judiciary to "punish criminals, or determine the disputes that arise between individuals."[14] However, if an expansive reading is given to this statement, the bigger role of interpreting the laws can also be considered as resolving any ambiguity in the law is central to the determination of a dispute between two individuals. Per Montesquieu, "There is no liberty, if the judiciary power be not separated from the legislative and executive…Were it joined to the executive power, the judge might behave with violence and oppression…there would be an end of everything."[15] Furthermore, subtly referring to the tenure of judicial body, it is stated that the tribunal shall last only so long as necessity requires, for the power then becomes invisible and people fear the office and not the magistrate.[16] However, unlike the tribunals, judgments ought to be fixed and should be elevated to the stature of law itself, as

[12] John A. Fairlie, "The Separation of Powers" 21(4) *Michigan Law Review* 393 (1923); *See also* Robert Stevens, "A Loss of Innocence? Judicial Independence and the Separation of Powers" 19(3) *Oxford Journal of Legal Studies* 365 (1999).
[13] Irving R. Kaufman, "The Essence of Judicial Independence" 80(4) *Columbia Law Review* 671(1980).
[14] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* 173 (Batoche, Kitchener, 2001).
[15] *Ibid.*
[16] *Id.,* at 175

people cannot live in a society without exactly knowing the nature of their obligations.[17]

Therefore, given the equivalence of a judgment's stature with that of a law confers an important designation upon the giver of these judgments i.e., judiciary. Consequently, it follows that the protection of the judiciary from external interference is important, for any violation thereto would lead to a collapse of the 'Separation of Powers' as was envisaged by Montesquieu. The philosophy of judicial independence entails that dominance or over-representation of certain groups on the bench can skew the decisions and compromise the neutrality of judiciary to decide on matters affecting the underprivileged people or people from categories which are under or unrepresented on the bench.[18]

The 'Separation of Powers' doctrine is central to maintaining judicial independence. In both India and United States, this doctrine serves to prevent any one branch of government from accumulating excessive power. By separating judiciary from executive and legislative branches, the constitution of both countries ensures that the judiciary remains an impartial arbiter of the law, free from political coercion. Judicial appointments, as an extension of this separation, have a pivotal role in maintaining the court's autonomy. A politically influenced appointment process threatens this balance, risking the judiciary's ability to act as a neutral interpreter of the Constitution and guardian of fundamental rights.

Consequently, an analysis of the judicial appointment mechanism against the pedestal of separation of powers is imperative. Furthermore, it is stressed that, given the variety of mechanisms at disposal, it is essential to analyse if the lack of independence is limited to certain jurisdictions or if the malaise permeates through a variety of appointment mechanisms. In this regard, a comparative legal analysis of the mechanism of judicial appointment, the historical progression of these appointments, and the contemporary developments concerning judicial appointments and judicial pronouncements is expedient. As a result, the paper will aim to study the judicial appointments in India (Section III) and United States (Section IV). Later, in Section V of the paper, a comparative analysis of the two countries would be undertaken.

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[17] *Ibid.*

[18] Elliot Bulmer, *Judicial Appointments* (International IDEA, Stockholm, 2017)*available at*https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf (last visited on March 20, 2025).

III Judicial Appointments in India: Premise and Progress

In a democracy as diverse and dynamic as India, judiciary serves as guardian of the Indian Constitution and final arbiter of justice, safeguarding the rule of law. It plays a significant role in safeguarding the fundamental principles of equality, justice, and fairness. Over time, it has evolved into a powerful institution that actively shapes public policies through judicial activism. Therefore, understanding the process of appointment of judges is essential for assessing the judiciary's effectiveness.

Appointment Process and Kumaramangalam's "committed" judiciary theory

The Constitution prescribes the following procedure for appointing judges. President appoints a High Court judge "after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court",[19] and the President appoints all the Supreme Court judges "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose."[20] However, it is stipulated that for the appointment of a judge other than the Chief Justice, consultation with the Chief Justice of India is mandatory.[21]

Since the enforcement of Constitution of India, judges' appointment was made by the President on the "aid and advice of the council of ministers", and the process of appointment of judges was considered to be an internal matter of judiciary.[22] However, the tide began to turn after the Supreme Court embarked on a series and declared numerous legislative actions as unconstitutional through a catena of judgments.[23] Subsequently, two days after the decision in the *Fundamental Rights Case*,[24] the central government, led by Mrs. Indira Gandhi, decided to deviate from the convention that had existed since the Supreme Court's inception. On April 26, 1973, Mrs. Gandhi superseded the senior-most judge of the apex Court i.e., Justice

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[19] The Constitution of India, art. 217(1).
[20] *Id.,* art. 124(2).
[21] *Id.,* art. 124(2) proviso.
[22] S.P. Sathe, "Appointment of Judges: The Issues" 33(32) *EPW* 2155 (1998).
[23] In the 1967 case of *Golaknath*v. *State of Punjab,* AIR 1967 SC 1643, the Supreme Court, with a 6:5 majority, ruled that Parliament lacked the authority to amend the Constitution in a manner that would diminish or eliminate the fundamental rights outlined in Part III of the Indian Constitution. Subsequently, the court invalidated the ordinance that provided for bank nationalisation (in *RustomCavasjee Cooper* v. *Union of India,* AIR 1970 SC 564)and the executive order carrying derecognition of the princes causing the abolition of their privy purses (in *H.H. MaharajadhirajaMadhav Rao JiwajiRaoscindia Bahadur* v. *Union of India,* AIR 1971 SC 530).
[24] *Supra* note 2.

K.S. Hegde, and Justice A.N. Ray was appointed as the Chief Justice of India. This in practice also bypassed Justice J.M. Shelat and Justice A.N. Grover, who were the second and third senior most judges and were slated to become the Chief Justice in due time. Anguished from this unfortunate paradigm shift, the three superseded judges tendered their resignation.[25] Mohan Kumaramangalam, a noted lawyer and a cabinet minister in the Indira Gandhi government in 1973, defended the government action and remarked that independent India must appoint judges who are "committed" to the social philosophy of the Constitution and the social and economic philosophy of government.[26]

The tug-of-war between executive and judiciary

During the term of Chief Justice A.N. Ray, a seven-judge bench of the apex court in the *Samsher Singh Case*[27]was tasked with interpreting the word "consultation" in context of termination of the services of subordinate judges. The majority opinion delivered by Chief Justice Ray reinforced the significance of the Chief Justice and held that the executive may not deviate from the opinion of the Chief Justice of India. Moreover, it was recognized that the constitutional requirement of consulting the CJI before appointing judges safeguarded judicial independence.

After the 1980 general elections when Mrs. Gandhi came back to power, it was speculated that the intention of the government was to appoint Chief Justices of High Courts from outside their respective jurisdictions. The rumour was subsequently confirmed by the then Union Law Minister Shiv Shankar in Lok Sabha. Amidst this development, Justice Ramesh C. Srivastava, once a lawyer successfully representing Raj Narain in the *Elections Case*[28] and elevated in the capacity of an additional judge of the Allahabad High Court later, tendered his resignation to the Governor following the rumours that the ruling regime would not have approved his tenure extension.[29]

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[25]Swapnil Tripathi, "Supersession of Judges: The Disastrous Sequel to KesavanandaBharati Verdict",*LiveLaw*(April 26, 2020), *available at* https://www.livelaw.in/columns/supersession-of-judges-the-disastrous-sequel-to-kesavananda-bharati-verdict-155770?infinitescroll=1(last visited on October 18, 2024).

[26]Rajeev Dhavan and Alice Jacob, *Selection and Appointment of Supreme Court Judges: A Case Study* 4 (N.M. Tripathi, Bombay, 1978).

[27]*Samsher Singh* v. *State of Punjab,* (1974) 2 SCC 831.

[28]*Indira Gandhi Nehru* v. *Raj Narain,* AIR 1975 SC 865.

[29]Prabhu Chawla, "Government does not want an independent judiciary: Ramesh Chandra Srivastava",*India Today*(December 05, 2014), *available at* https://www.indiatoday.in/magazine/nation/story/19800831-govt-does-not-want-an-independent-judiciary-ramesh-chandra-srivastava-821378-2014-01-15 (last visited on October 18, 2024).

Somewhere else, several High Court judges were transferred to other states in the garb of "contributing to national integration through fostering uniformity".[30] These developments, along with the controversy regarding tenure made S.P. Gupta file a writ petition concerning the permanent appointments thereat. This case, clubbed with other similarly-placed petitions, became known as the *First Judges' Case* and started a tussle for power between the judiciary and the executive vis-à-vis judicial appointments.

In the landmark *First Judges' Case*,[31] it was determined that consultation under article 124(2) did not imply concurrence, giving the Union Government primacy over the opinion of the Chief Justice of India. Consequently, judges were appointed disregarding the Chief Justice's advice. The *Second Judges' Case*,[32] with a 7-2 majority, overturned the landmark *First Judges Case* and deemed the consultation under articles 124(2) and 217(1) mandatory, emphasizing significant weight given to the Chief Justice's opinion. The *Third Judges' Case*[33] unanimously upheld the key principles of the Second Judges' Case, expanding the collegium from two to four senior-most judges. It clarified that if two judges held a dissenting view, Chief Justice could not forward the recommendation to the President. Additionally, if the collegium's opinion diverged from the Chief Justice's, no recommendation should be made.

Fourth Judges' Case – NJAC's short stint

On August 11, 2014, then Union Minister for Law and Justice, Ravi Shankar Prasad, introduced in the House of the People the contentious National Judicial Appointments Commission ('NJAC') Bill, 2014. The NJAC, as laid down in article 124A of the Constitution of India, was to consist of the Chief Justice of India, two apex court judges 'next in seniority to the CJI', the Union Law Minister and two eminent persons.[34] However, it was argued that NJAC too, surprisingly, did not address a major flaw of the collegium system i.e., lack of transparency in its functioning and lack of reasons for its decisions. Moreover, there was no assurance that the spectre of

[30]Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 521 (Oxford University Press, 2003).
[31]*S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87.
[32]*Supreme Court Advocates-on-Record Association* v. *Union of India,* (1993) 3 SCC 441.
[33]*Special Reference No. 1 of 1998, Re*, (1998) 7 SCC 739.
[34] These two eminent persons were to be further appointed by a three-member committee consisting ofthe Prime Minister of India, the Chief Justice of India, and the Leader of Opposition in the Lok Sabha.

nepotism and trade-offs that was seen in several collegium appointments would not be replicated in the NJAC.[35]

Strong scepticism was expressed by jurists on the constitutional validity of the NJAC. The potential for misuse, as appointments to the higher judiciary were intended to be overseen by the executive branch; arbitrariness due to the lack of a clear definition for 'eminent person'; the provision of veto power to any two members; and the compromise on judicial independence were just some of the dangers that were highlighted.[36]Consequently, a writ petition was filed in the top-most court challenging the *vires* of the Constitution (Ninety-Ninth Amendment) Act and the NJAC Act, and the apex court in the landmark *Fourth Judges Case*[37]declared both legislations as "unconstitutional and void."[38] In this landmark case, the Supreme Court underscored the paramount importance of safeguarding the independence of judiciary as a fundamental constitutional principle. The Court, invoking the doctrine of basic structure, invalidated NJAC Act and emphasized the indispensability of existing collegium system for judicial appointments. While recognizing the need for reforms, the court maintained that any changes must not compromise the foundational tenets of judicial independence. This case exemplified a notable instance of judicial activism, wherein the court proactively upheld constitutional values to safeguard the integrity of judicial process.

However, unfortunately, the political interference in the judicial appointments to the constitutional courts of India was not exclusive to the bygone era. The ghost of the past came back to haunt the independence of judicial system after the change of government in 2014. As would be evident from contemporary developments, executive's meddling with judicial appointments has remained unaffected despite the rulings in *Four Judges' Cases*.

When reality strikes – ignoring the collegium resolutions

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[35]EPW Editorial, "No Cure for the Malaise: A law passed in haste will replace the flawed judicial collegium with yet another flawed system" 49(34) *Economic and Political Weekly*7 (2014).

[36] C. Raj Kumar and KhageshGautam, "Questions of Constitutionality: The National Judicial Appointments Commission" 50(26/27) *Economic and PoliticlaWeekly*46 (2015); Indira Jaising, "National Judicial Appointments Commission: A Critique" 49(35) *Economic and Political Weekly* 16 (2014).

[37]*Supreme Court Advocate-on-Record Association* v. *Union of India*, (2016) 5 SCC 1.

[38]KrishnadasRajagopal, "SC Bench strikes down NJAC Act as 'unconstitutional and void',*The Hindu* December 04, 2021, *available at* https://www.thehindu.com/news/national/Supreme-Court-verdict-on-NJAC-and-Collegium-system/article60384480.ece(last visited on October 18, 2024).

In the early 2010s, Mr. Gopal Subramanium's recommendation for appointment as the Indian Supreme Court's judge was marred with controversy. As Solicitor General of India during the pre-2014 government, he had represented many important institutions in the country and had enjoyed the repute of being appointed an *amicus curia* in many cases. However, his past involvement in the Sohrabuddin fake encounter case came to haunt him when the succeeding government, led by a different political party, came to power. Subramanium had persuaded the Supreme Court to order that Amit Shah, an influential personality in the political party that took charge in 2014, would not be allowed to be in Gujarat.[39]

Furthermore, it has been observed that Union government has exerted its prerogative and protracted judicial transfers/appointments to the point where it coerced the apex Court Collegiums to amend its earlier resolutions – aligned with the government's requirements. One such victim was Justice Akil Kureshi, who even though was the second senior-most High Court Chief Justice in India at one time, failed to find his name in the list of the then newly-appointed Supreme Court judges. Coincidentally, it would be later realised that Justice Akil Kureshi was the judge of Gujarat High Court who had, in 2010, sent Amit Shah to police custody in the Sohrabuddin fake encounter case.[40] Later in 2018, Justice Kureshi was transferred to Bombay High Court[41] as a puisne judge (as per the norms, being the senior-most puisne judge, he was to automatically become the Acting Chief Justice of Gujarat High Court) "in the interest of better administration of justice."[42] Subsequently, in May 2019, the Collegium recommended the appointment of Justice Kureshi as the

[39]Prashant Bhushan, "Scuttling Inconvenient Judicial Appointments" 49(28) *Economic and Political Weekly*12 (2014).

[40]"Sohrabuddin fake encounter: CBI takes Amit Shah into custody" *The Times of India* August 07, 2010, *available at*https://timesofindia.indiatimes.com/india/sohrabuddin-fake-encounter-cbi-takes-amit-shah-into-custody/articleshow/6270026.cms(last visited on October 18, 2024).

[41]"Gujarat HC Bar Association protests Justice Kureshi's transfer to Bombay HC",*The Hindu*(November 02, 2018), *available at* https://www.thehindu.com/news/national/other-states/gujarat-hc-bar-association-protests-justice-kureshis-transfer-to-bombay-hc/article25395979.ece(last visited on October 18, 2024).

[42] Supreme Court Collegium, "Re: Proposal for transfer of Mr. Justice A.A. Kureshi, Judge, Gujarat High Court", (October 29, 2018)*available at*https://images.assettype.com/barandbench/import/2018/10/Judge-Tansfer-SC-Collegium-Resolution-Oct-29-2018.pdf (last visited on March 20, 2025); The Gujarat High Court Bar Association unanimously opposed the transfer and held collegium's transfer recommendation unjustifiable. Subsequently, they also decided to challenge the transfer by filing a writ petition and go on an indefinite strike.

Chief Justice of Madhya Pradesh High Court;[43] however, the central government sat on the recommendation for a while before sending the file back two months later for reconsideration. Accordingly, the Collegium modified its earlier resolution and decided to appoint Justice Kureshi as the Chief Justice of Tripura High Court instead.[44] However, the indifferent attitude of the apex Court Collegium meant that, despite being a meritorious judge respected by the members of bar, Justice Kureshi never got the privilege of adorning the bench at the apex court.[45]

In a similar turn of events, another meritorious judge, Justice (Dr) S. Muralidhar's elevation to apex Court was stalled and left the noted legal minds bewildered.[46] The judge, who was a part of the bench that delivered the famous *Naz Foundation*[47] judgment in 2009, became the centre of attention when the President transferred Justice Muralidhar from High Court of Delhi to High Court of Punjab and Haryana.[48] The Presidential order came on the very same day when a bench headed by Justice Muralidhar expressed "anguish" over the Delhi Police's failure to file FIRs against three leaders of the ruling party for alleged hate speeches, including the then Minister of State for Finance and Corporate Affairs, Anurag Thakur.[49] Later on September 28, 2022, the apex Court collegium recommended transfer of Justice Muralidhar from the Orissa High Court to Madras High Court and Justice Pankaj Mithal to High Court of Rajasthan. However, government did not approve of the

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[43] Supreme Court Collegium, "Re: Appointment of Mr. Justice A.A. Kureshi as Chief Justice in Madhya Pradesh High Court", (May 10, 2019)*available at*https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/2._2019.05.10-m.p..pdf(last visited on March 20, 2025).

[44] Supreme Court Collegium, "Re: Reconsideration of proposal for appointment of Mr. Justice A.A. Kureshi as Chief Justice of Madhya Pradesh High Court", (September 05, 2019)*available at*https://images.assettype.com/barandbench/import/2019/09/Justice-Akil-Kureshi-recommendation.pdf(last visited on March 20, 2025).

[45]Bhadra Sinha, "Why Justice Kureshi, who ruled against Shah, could lose out on SC stint despite seniority"*The Print* (August 24, 2021), *available at* https://theprint.in/judiciary/why-justice-kureshi-who-ruled-against-shah-could-lose-out-on-sc-stint-despite-seniority/720446/(last visited on October 18, 2024).

[46] Fali S. Nariman, "A question for the collegium: Why was Justice S Muralidhar not brought to the Supreme Court?", *The Indian Express* (August 19, 2023), *available at* https://indianexpress.com/article/opinion/columns/a-question-for-supreme-court-8894242/(last visited on October 18, 2024).

[47]*Naz Foundation* v. *Govt. of NCT of Delhi,* 2009 SCC OnLine Del 1762.

[48]LiveLaw News Network, "Centre Notifies Transfer of Justice Muralidhar From Delhi HC to P&H HC",*Live Law* (February 26, 2020), *available at* https://www.livelaw.in/top-stories/centre-notifies-transfer-of-justice-muralidhar-from-delhi-hc-to-ph-hc-153184?infinitescroll=1(last visited on October 18, 2024).

[49]SamanwayaRautray, "Justice Muralidhar's transfer timing eyebrows",*Economic Times*(February 28, 2020), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/justice-muralidhars-transfer-timing-raises-eyebrows/articleshow/74367002.cms(last visited on October 18, 2024).

formers' transfer,[50] and accordingly, citing delay by central government, Supreme Court recalled Justice Muralidhar's transfer proposal.[51] Ultimately, his quest for a seat at the Supreme Court came to an end. The entire saga stirred controversy and questions were raised by legal scholars about the legitimacy of the collegium resolutions.

Interestingly, the executive's indirect control over judicial appointments has elicited controversy not just for prospective Supreme Court appointees. The power has been often exercised to affect the collegium recommendations for the prospective High Court appointees, too. A famous case study in this regard is the repeated rejection of the Supreme Court collegium's recommendation for appointment of Saurabh Kirpal, a senior advocate at the Delhi High Court, as a judge there. The adamant attitude of the government was countered with equal intensity from the collegium when it made public the government's concerns over Kirpal's sexual orientation and rebuffed the same.[52] However, despite reiteration, the appointment has not been made hitherto. Furthermore, the year-long delay in elevation of Dr. Aditya Sondhi, a Senior Advocate practising at the Karnataka High Court forced him to withdraw his consent. Allegedly, his name was kept pending because of a speech he had delivered against the constitutionality of the Citizenship (Amendment) Act, 2019.[53] In another instance, elevation of Ms. Lekshmana Chandra Victoria Gowri as a judge of Madras High Court, despite her affiliation with the ruling political party and controversial remarks against religious minorities, sparked controversy.[54] A representation by Madras High Court Bar Association challenging her appointment

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[50]Arvind Gunasekar, "No Central Nod for Transfer of Judge Who Made Headlines During Delhi Riots", *NDTV* (October 11, 2022), *available at* https://www.ndtv.com/india-news/no-central-nod-for-transfer-of-judge-who-made-headlines-during-delhi-riots-3422900(last visited on October 18, 2024).

[51]Scroll Staff, "Citing delay by Centre, SC recalls proposal to transfer Justice S Muralidhar to Madras HC", *Scroll* (April 20, 2023), *available at* https://scroll.in/latest/1047682/citing-delay-by-centre-sc-recalls-proposal-to-transfer-justice-s-muralidhar-to-madras-hc(last visited on October 18, 2024).

[52]Firstpost Explainers, "Why India's first openly gay advocate SaurabhKirpal has not yet been appointed HC judge",*Firstpost*(January 20, 2023), *available at* https://www.firstpost.com/explainers/saurabh-kirpal-first-openly-gay-lawyer-delhi-high-court-judge-supreme-court-centre-12018162.html(last visited on October 18, 2024).

[53]Mustafa Plumber, "Senior Advocate Aditya Sondhi Withdraws Consent for Elevation as Karnataka HC Judge",*LiveLaw*(February 09, 2022), *available at* https://www.livelaw.in/news-updates/senior-advocate-aditya-sondhi-withdraws-consent-elevation-judge-karnataka-hc-191584 (last visited on October 18, 2024).

[54]Saurav Das, "Problem of Christian, Love Jihad: A Future Judge's Bias Reveals Supreme Court Collegium's Enduring Opacity", *Article 14* (January 30, 2023), *available at* https://article-14.com/post/-problem-of-christian-love-jihad-a-future-judge-s-bias-reveals-supreme-court-collegium-s-enduring-opacity-63d73360b1296 (last visited on October 18, 2024).

failed, as Supreme Court ruled that a judge's suitability cannot be judicially reviewed.[55] The issue gained attention when the government overlooked the elevation of Mr. R. John Sathyan, whose name was recommended earlier but withheld, disturbing his seniority. This segregated appointment was admonished by the Supreme Court.[56] Similarly, during proceedings in *Barun Mitra,*[57]the division bench of Justices Sanjay K. Kaul and Sudhanshu Dhulia deprecated "selective" appointments of judges and slammed the central government's 'pick and choose' approach in the appointments wherein the collegium did not accept a name the government wanted.[58] Such reluctance from the central government has recently elicited a response from the state governments too. In a recent contempt petition filed by the State of Jharkhand against the central government,[59] the former alleged non-compliance by the latter of the Supreme Court's judgment in the *Mahanadi Coalfields Ltd. case*[60] prescribing three-four weeks as the period for processing the collegium recommendations. The contempt petition prompted the full bench presided by the Chief Justice of India (Dr.) D.Y. Chandrachud to observe that "The Supreme Court Collegium is not a search committee (for judges) whose recommendations can be stalled" and call for government to place on record every pending name reiterated by the Collegium.[61]

In India, the secrecy surrounding judicial appointments to constitutional courts fosters speculation about candidate selection. In contrast, the United States' process is highly publicised, with Senatorial Confirmation hearings (outlined in Section IV) being televised. This raises an intriguing question: does this transparency influence the extent of political interference in judicial appointments?

IV Judicial Appointments in United States: Legal Foundation and Development

[55] *Anna Mathews* v. *Supreme Court of India,* 2023 LiveLaw (SC) 93.

[56] The Hindu Bureau, "Supreme Court flays Centre over delay in notifying John Sathyan as judge in Madras High Court",*The Hindu*(March 23, 2023), *available at* https://www.thehindu.com/news/national/supreme-court-flays-centre-over-delay-in-notifying-john-sathyan-as-judge-in-madras-high-court/article66649557.ece (last visited on October 18, 2024).

[57] *The Advocates Association Bengaluru* v. *BarunMitra,* Conmt. Pet. (C) No. 867/2021 (Supreme Court).

[58] Debayan Roy, "Judge elevations can't be blocked because Collegium does not accept a name Centre wants: Supreme Court", *Bar &*Bench (November 07, 2023), *available at* https://www.barandbench.com/news/judge-elevations-cant-be-blocked-collegium-centre-supreme-court(last visited on October 18, 2024).

[59] *State of Jharkhand* v. *Rajiv Mani, Secretary (Ministry of Law and Justice)*, Contempt Petition (Civil) Diary No. 42846 of 2024 (Supreme Court).

[60] *M/s PLR Projects Pvt. Ltd.* v. *Mahanadi Coalfields Limited*, (2020) 20 SCC 795.

[61] KrishnadasRajagopal, "Supreme Court asks government to explain delay in appointment of judges",*The Hindu*(September 20, 2024), *available at* https://www.thehindu.com/news/national/sc-seeks-info-from-centre-on-non-appointment-of-judges-despite-collegiums-reiteration/article68663273.ece (last visited on October 18, 2024).

At the core of United States' legal framework lies an independent judiciary tasked with safeguarding civil liberties and ensuring governmental accountability. Beyond adjudicating disputes, it plays a pivotal role in shaping jurisprudence through judicial review and establishing binding precedents. The judiciary in United States ensures the preservation of constitutional principles and acts as a vital check on the powers exercised by each organ by reviewing the legality of their actions. The undeniable significance of an independent and efficient judiciary invites critical inquiry into how United States fares in upholding these principles in its judicial system.

The Appointment Process

The responsibility for judicial appointments in federal court system is shared between the President and Senate. Solely vested in the President is the prerogative to nominate individuals for judgeships in the Supreme Court. Subsequently, the Senate, through "confirmation hearings" or "Senate hearings", either accepts or rejects the nominee.[62] Importantly, the Senate is precluded from proposing alternative nominations, for its role is limited to that of "an excellent check" against presidential corruption and incompetence. Although Constitution does not mandate that a judge of Supreme Court must be a lawyer, every appointment hitherto has been of a legal professional. Serving in a judicial capacity is not obligatory either for a Supreme Court appointment, but recent tendencies lean towards candidates with such experience.[63] Although the President is not legally obligated to consult any specific entity during the nomination process, conventional practices often involve consultations with stakeholders like Senators from the nominee's state (termed 'Senatorial Courtesy'),[64] the Federal Bureau of Investigation, the Senate Judiciary Committee, the Department of Justice, the American Bar Association, and incumbent judges in the Federal Judiciary.

Crucially, cooperation from the Senate is required for the confirmation of any nomination. It is believed that requiring their agreement would effectively counteract presidential favouritism and prevent the appointment of unsuitable individuals based on state prejudice, family ties, personal connections, or popularity considerations. This provision serves as a robust check on such tendencies, ensuring administrative

[62]The Constitution of the United States, art. II s. 2.
[63] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* 131 (Bloomsbury, 2008).
[64] Harold W. Chase, *Federal Judges: Appointing Process* 7 (University of Minnesota, Minnesota, 1972).

stability.[65] The Senate Judiciary Committee assumes a pivotal role, by conducting investigative processes and public hearings on nominees, and subsequently making recommendations to the Senate.[66] The Committee is vested with three options: a favourable recommendation, an unfavourable recommendation, or no recommendation. However, a favourable recommendation does not guarantee the appointment, as the final decision rests with the Senate. Following the Committee's recommendation, a vote is cast before the full Senate, and confirmation requires a favourable vote by a simple majority.

Packing the Court – turning majority in favour

The Judiciary Act, 1789 signed into law by President George Washington, initially established Supreme Court with six justices. After a shift in political dynamics after the 1800 election, the lame-duck legislation reduced the number to five, purportedly to impede President Thomas Jefferson from making appointments.[67] The subsequent Congress, however, reinstated the original count of six. In 1807, Congress further augmented the Court to seven justices.[68] The year 1837 witnessed the expansion of the Supreme Court to nine justices, providing President Andrew Jackson with the opportunity to appoint two justices.[69] Amidst the backdrop of the Civil War, the Court's composition increased to 10 justices to secure a pro-Union majority. Following the presidency of Andrew Johnson, the Republican-controlled Congress, in 1866, enacted legislation diminishing the Court's size to seven.[70] In 1869, an act to amend the judicial system was passed, restoring the number of justices to nine.[71]

Sixty-seven years later, in 1936, President Franklin D. Roosevelt confronted resistance from the Supreme Court against his New Deal initiatives. Labelled "the Four Horsemen", Justices Butler, McReynolds, Sutherland, and Van Devanter opposed Roosevelt's programs. A conservative majority emerged in 1935 when Justice Owen Roberts aligned with them, leading to the Court striking down key New

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[65] J.R. Pole (ed.), *The Federalist* 405 (Hackett, Indianapolis, 2005).
[66] Denis Steven Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee and Senate" in Betsy Palmer (ed.), *Supreme Court Nominations* 19 (Nova Science, 2009).
[67] Judiciary Act of 1801, s. 1; *See also* Erwin C. Surrency, "The Judiciary Act of 1801" 2(1) *The American Journal of Legal History* 53 (1958).
[68] Seventh Circuit Act of 1807, s. 5.
[69] Kermit L. Hall, James W. Ely, Jr., *et al.* (eds.), *The Oxford Companion to the Supreme Court of the United States* 547 (Oxford University Press, New York, 2005).
[70] Judiciary Act of 1866.
[71] *Supra* note70 at 548.

Deal legislations.[72] In response, on February 5, 1937, President Roosevelt proposed the Judicial Procedures Reform Bill, intending to expand the Supreme Court to as many as 15 justices. The plan included retirement at full pay for justices aged 70 or older. Critics from both political spectrums accused Roosevelt of attempting to neutralize judge's hostile to the New Deal legislations. However, before the bill reached a vote, Supreme Court upheld the constitutionality of the National Labor Relations Act and the Social Security Act – a move that finds its genesis in the "green light" theory of administrative law. Consequently, Roosevelt's court-packing initiative became redundant, and in July 1937, the Senate overwhelmingly rejected the proposal.[73]

Presidential executive's prerogative in selection – Clothed with politics?

Casting a long-lasting impression in the history books has been the foremost consideration of any President. Consequently, while nominating nominees for the Federal Supreme Court, most Presidents have been driven by the way history will perceive them in terms of their impact on policy. They view appointments to Supreme Court as an opportunity to place their "distinctive stamp" on the shaping of the law.[74] Therefore, the ideological inclinations of the nominee with that of the nominating president and his partisanship assume significance.[75]

Concerning the partisanship of the federal court judges, some scholars have empirically tested and proved that there exist notable splits between Republican and Democratic appointees on great legal issues and the possibility of group polarization.[76] Additionally, with reference to selection criteria, it has been noted that when a President seemingly deviated from traditional factors like philosophy, age, geography, and religion, they often ended up selecting judges who excelled compared to their peers.[77] Another criterion for appointment is representativeness, which

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[72] William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 133 (Oxford University Press, New York, 1995).

[73] William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan", *The Supreme Court Review* 347 (1966).

[74]Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* 41 (Oxford University Press, New York, 2005).

[75]James B. Cottrill and Terri J. Peretti, The Partisan Dynamics of Supreme Court Confirmation Voting34(1) *The Justice System Journal* 15, 29 (2013).

[76] Cass R. Sunstein, David Schkade, *et. al., Are Judges Political? An Empirical Analysis of the Federal Judiciary*148 (Brookings Institution Press, Washington, 2006).

[77]William E. Hulbary Thomas G. Walker, "The Supreme Court Selection Process: Presidential Motivations and Judicial Performance", 33(2) *The Western Political Quarterly* 185 (1980).

encapsulates factors like regional balance,[78] religion, race,[79] ethnicity, or gender.[80] It is believed a judiciary that descriptively reflects the diversity of its community promotes institutional legitimacy and communicates office accessibility to the population it serves. However, representativeness is a crucial factor in presidential selection because the demands for representation from various groups may affect electoral politics. The nomination is used as a proxy by the President to appease the minority group in the upcoming presidential campaign and gain nearly an automatic support for a nominee from selected groups.[81]

In 1987, President Ronald Reagan got the opportunity to appoint the third Supreme Court justice of his presidency. After the retirement of a long-time "swing" vote, Justice Lewis F. Powell Jr., Reagan nominated Robert Bork, a judge on U.S. Court of Appeals for the D.C. Circuit. However, as fate would have it, Bork's predilection for constitutional originalism and past controversial opinions and writings elicited the fear that he would decisively shift the Supreme Court to the extreme right. Consequently, this motivated the liberals in Congress to launch a vicious campaign against his confirmation. Subsequently, the Democrats' control over the Senate meant that it ended up voting against Bork's confirmation by a vote of 58-42.[82]

Soon after the liberal Justice Thurgood Marshall (un)surprisingly announced his retirement on July 1, 1991, President Bush chose Clarence Thomas, an African-American judge with very strong conservative credentials.[83] The confirmation attracted immediate criticism from civil rights groups, as Thomas's views on civil rights and racial justice issues were antithetical to those of his predecessor Marshall.

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[78] Prior to the American Civil War, regional balance was an important factor for the President to consider while nominating a candidate to the US Supreme Court, particularly because of increased tensions over the constitutionality of slavery and insistence on equal representation in the highest court.

[79] Race was first introduced as a selection factor when President Johnson tapped Thurgood Marshall for the Court in 1967. Subsequently, George H.W. Bush continued the seat by appointing Clarence Thomas as Marshall's successor in 1990. Consequently, African-American representation would be a standard expectation on the Court in contemporary times.

[80] Christina L. Boyd, Paul M. Collins, Jr., *et. al., Supreme Bias: Gender and Race in U.S. Supreme Court Confirmation Hearings* (StandfordUniversity Press, Stanford, 2023).

[81] An example of this can be the nomination of Clarence Thomas by President Bush in 1991. Hitherto, African-American groups would have normally opposed any appointment under the presidency of Bush; however, Thomas' nomination divided blacks and weakened civil rights groups' opposition to confirmation.

[82] Sarah Pruitt, "How Robert Bork's Failed Nomination Led to a Changed Supreme Court", *History* (October 29, 2018), *available at* https://www.history.com/news/robert-bork-ronald-reagan-supreme-court-nominations (last visited on October 18, 2024).

[83] This nomination was deemed an astute political move, for, "If Democratic Senators had blocked Thomas's nomination, they might have run the risk that Republicans would disclaim culpability for re-creating an all-white Supreme Court if Bush were to have followed Thomas with a white nominee."

Consequently, he was carefully coached by the Bush administration for months preceding the confirmation hearings. However, when the hearings commenced and Thomas was grilled on contentious social issues, he was elusive in his answers and distinguished between his work in the executive branch and his service on the bench.[84] Subsequently, despite the split vote on the Judiciary Committee and serious opposition by other senators as well, Thomas was confirmed after the second round of hearings by a vote of 52-48, the closest Supreme Court confirmation vote in more than a century. Unsurprisingly, the recent judgment of the Supreme Court in the *College Admissions Case*[85] declaring affirmative action as unconstitutional saw an individualist concurrence from Justice Thomas. He focused on an originalist defence of the Constitution and explained that all forms of discrimination based on race, regardless of their intent, including affirmative action, are prohibited under the Fourteenth Amendment.[86]

However, after the appointment of Justice Stephen G. Breyer in 1994 by President Bill Clinton to the highest court, there was over a decade-long hiatus in judicial vacancies at the Supreme Court. Then, rapidly in 2005, Chief Justice William Rehnquist passed away and Associate Justice Sandra Day O'Connor also announced her retirement, paving the way for two judicial nominations by President George W. Bush. Consequently, he nominated Judge Roberts to succeed Rehnquist and Judge Samuel Alito to succeed O'Connor. Both the nominations generated a flurry of activity in the confirmation contests. The senators endured some tension in appraising the nominees' professional qualifications and their ideological identity – referred to as the "legalist" and the "political" approaches – as both men were widely regarded as deeply conservative but well qualified professionally.[87] It was the latter consideration that weighed on the minds of the senators, and the nominations were accordingly confirmed. The appointments indirectly affected Bush's federal personnel policy as the conservatism of the new appointees favoured strict construction, broad executive

[84]Joyce A. Baugh, *Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance* 43 (Peter Lang, New York, 2002).

[85]*Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S.181 (2023)together with *Students for Fair Admissions, Inc.* v. *Univ. of North Carolina*, No. 21-707.

[86]Carol R. Ashley, Laura A. Ahrens, *et. al.,* "US Supreme Court Holds Use of Race in Admissions by College, University is Unconstitutional",*JacksonLewis*, (June 29, 2023), *available at* https://www.jacksonlewis.com/insights/us-supreme-court-holds-use-race-admissions-college-university-unconstitutional (last visited on October 18, 2024).

[87]Norman Dorsen, "The selection of U.S. Supreme Court justices", 4(4) *International Journal of Constitutional Law* 661 (2006).

power, and personnel policies that did not employ racial and ethnic preferences.[88] The conservatism is evident even after a decade-and-a-half through the Supreme Court's controversial decision in *Dobbs* v. *Jackson*,[89] which overturned *Roe* v. *Wade*[90] and declared that the Constitution does not confer a right to abortion.

The highly transparent nature of judicial appointments in United States prompted a query regarding the role of politics in the process. The legal developments would indicate that the Presidents have exercised their prerogative to ensure that, though their own political party might not be in power, their ideology stays in judiciary for longer.

V Comparative Analysis of United States and India: Commonality and Differences

India and United States were chosen for this comparative analysis due to their status as the world's largest democracies, each with a deep commitment to constitutional governance. The United States, with its centuries-old judicial appointment process, reflects a refined system that has evolved alongside its federal structure. India, though a younger democracy, has adapted its appointment process to address unique political, social, and legal challenges while drawing inspiration from diverse legal frameworks, including that of the United States. A comparative study of these two nations provides valuable insights into how both countries strive to maintain the judiciary's independence amidst political dynamics, making them apt subjects for this research.

It is contended that the models for judicial appointments around the globe can broadly be categorised into three groups as identified by Tom Ginsburg: professional appointments, cooperative mechanisms, and representative mechanisms.[91] Though there could be a slight deviation in terms of terminology and an eclectic mix of these mechanisms could be incorporated in a country, the genesis of the appointment process could still be traced to either of these mechanisms. In India, the Constitution provides for 'professional appointments', for the collegium of Supreme Court (and

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[88] David H. Rosenbloom, "George W. Bush, the Supreme Court, and the Pursuit of "Big Government Conservatism" in Federal Personnel Management", 30(4) *Review of Public Personnel Administration* 478 (2010).

[89] *Dobbs* v. *Jackson Women's Health Organization,* No. 19-1392, 2022 U.S. LEXIS 3057.

[90] *Jane Roe* v. *Henry Wade, District Attorney of Dallas County,* 410 U.S. 113 (1973): 1973 U.S. LEXIS 159.

[91] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 43 (Cambridge University Press, New York, 2003).

High Court for appointments to High Courts) judges is responsible for nominating the names of candidates for appointments to these courts. The names are then submitted to the Union Ministry of Law and Justice for background checks, and the candidates are accordingly appointed with order of the President. However, an antithetical approach is presented in the United States, for it involves nomination for federal judges by the executive head, that is, the President, and subsequently confirmation by the political institutions, that is, the Senate. This mechanism, in Ginsburg's classification, is the paragon of 'cooperative mechanism'.

In India, the government in 2014 brought forth the NJAC Act with a lot of hope for overhauling the judicial appointments in India. However, the exuberance was short-lived, as the apex court's judgment in the Fourth Judges Case championed the independence of the judiciary. For the Supreme Court, the appointment procedure determined the (in) dependence of an institution and accordingly any unwarranted intervention in the same by the executive would be unconstitutional. However, after the collegium forwards a recommendation to the central government, the ball is in the Union Ministry's court. Considering the contemporary developments and numerous controversies in appointments at constitutional courts, this in effect means that the executive can (and it does) resort to dilatory methods and ultimately coerce either the collegium into altering the resolution altogether or the prospective appointee into withdrawing their consent.

Similarly, with regards to the United States, the history of judicial appointments is wrought with incidents of using legislative prerogative and threatening to overturn the majority in favour by packing the court. Although one could contend that providing federal judges with a life tenure ensures their operational independence, what it does in effect is to ensure that the ideological inclinations and political predispositions that initially got a nominee through the door continue to pervade the hallowed halls of the Supreme Court of the United States even decades later. However, despite all the criticism that the appointment process of United States federal judges has endured, it is interestingly noted that the process is transparent – something that is missing in the Indian judiciary, wherein the collegium resolutions and their rationale are critiqued for being shrouded in secrecy.

VI Conclusion

The separation of powers principle is vital for the unhindered operation of democracies. This principle, as devised by Montesquieu, provided for a trifecta in which none of the branch intervened in the functioning of another. In furtherance to this, the principle fostered the doctrine of checks and balance, and ensured provision of safeguards against capricious exercise of powers by one organ. However, with the course of time and changing nature of political institutions, the principle stands diluted. Furthermore, not only the structure of government, but also the judicial appointment processes have evolved. Tom Ginsburg's conception of professional, cooperative, or representative mechanisms were indicative of that evolution. Consequently, taking two democracies – India and the United States – having polar opposite judicial appointment mechanisms as the subjects, the paper aimed to identify *if the judicial appointments at constitutional courts were susceptible to political interference.*

In this regard, the paper analysed the legal foundation of judicial appointment mechanisms in these countries, traced the historical evolution, and compiled the recent developments with respect to judicial appointments. Subsequently, it is concluded that, despite the differences, there is presence of political interference in judicial appointments. The commonalities that were observed in both the countries were, firstly, the presence of executive at some stage in appointment process of judges, as initiator in United States and confirmer in India; and secondly, appointment of candidates favouring the political and sociological ideology of the executive and rejection of candidates disfavouring the same.

However, the present research restricts itself from making any general observation, as the experiences of the two common law nations may not extrapolate to every jurisdiction. Furthermore, though the NJAC was an endeavour to shift from professional mechanism to a diluted version of representative mechanism – in form of two eminent persons, the same stands untested in Indian legal system and its efficacy remains unanswered. Therefore, suggesting one appointment system over other would be hyperbolic and beyond the research question of the paper. Lastly, the findings of the paper pave the way for further inquiry into other various aspects of constitutional courts including, but not limited to, quantifiable impact of judicial appointments on case backlog, judicial philosophy in India *vis-à-vis* changing appointment processes, and the treatment of legal challenges mounted against the governmental action by the courts.