TRANSPARENCY, INDEPENDENCE AND DIVERSITY: DOES THE UNITED STATES HAVE IT BETTER? – A COMPARATIVE ANALYSIS OF THE PROCESS OF APPOINTMENT OF JUDGES TO THE SUPREME COURT IN THE UNITED STATES AND INDIA

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ABSTRACT

The rise of legal realism has made it manifestly clear that the background and worldview of judges influence cases[1]*. This is evidenced in the United States where the appointment of judges to the higher judiciary is believed to be, at least in some measure, predicated upon the proximity of the political ideology of the judge with that of the appointing party*[2]*. This influence is acknowledged, questioned and somewhat mitigated against by the process of appointment wherein the Senate ratifies the*

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[1]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, THE JOURNAL OF LEGAL STUDIES Vol. 24, No. 2, 257-281 (1995).
[2]Judith Resnik, *Managerial Judges*, HARVARD LAW REVIEW, Vol. 96, No. 2, 374-448 (1982).

president's choice.[3] *However the lack of acknowledgement of this influence and its consequent securitization, in the appointment of judges is where the difference lies between India and the U.S. This article will compare the appointment procedures of judges in the US as well as in India and demonstrate the comparative lack of transparency in India.*

I. INTRODUCTION

How should a democracy appoint the members of its higher judiciary and more specifically the judges of its Supreme or Apex Court? Keeping pace with India's often disparaged but now institutionalised tradition of learning from processes employed by other states particularly western ones, the author too proceeds to answer this question through a look at another judicial system, which is at least perceived to be proficient, namely that of the United States (US). The appropriateness of such a choice is reinforced by the fact that both India and the US are federal nations with written constitutions recognizing the importance of an independent judiciary.[4] With regards to judges, the power of appointment in both countries has been conferred upon the President in exercise of his executive function, the only difference being that, while in India the appointments are made in 'consultation with judges of the Supreme Court (SC)'[5], in the US they are made after 'Senate Consent'.[6] In this

[3]Timothy B. Tomasi, *All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals*, COLUMBIA LAW REVIEW , Vol. 87, No. 4, 766-793 (1987).

[4]H. Gupta, *The Process Of Appointment of Judges In India And U.S.A- A Comparative Study* (Jun. 28, 2012), http://www.scribd.com/doc/13244382/Process-of-Appointment-of-Judges-in-India-and-USAA-Comparative-Study.

[5]Constitution of India, 1950, art. 124(2).

article I do not attempt to provide a comprehensive review of the judicial systems of both the Countries, nor do I canvass the broad and varied powers of the SC and how they exercise them or ought to exercise them. Instead, I will discuss in brief how conducive the processes of judicial appointments in the two states are in furthering the ends of diversity, independence and transparency.[7]

It is understood that the significance attached to diversity, transparency in appointment and operational independence of the SC is to some extent allied with the importance of the role conferred upon it or more importantly expected by society to be performed by it.[8] Therefore a discussion as regards the method of appointment of judges to the SC in both these countries must naturally proceed on the role played by them.[9]

Whether or not Justice Felix Frankfurter's aphorism that the "Court is the Constitution"[10] still holds true today the role of a constitutional court was well summarized when he stated:

In a democratic society, courts best perform their institutional role as partners in a larger dialogue: They respond to popular visions of the Constitution's values and help to translate these values into law. Constitutional values come from political mobilizations; Courts do not lead these mobilizations, though they can give them new and distinctive articulation.[11]

[6]U.S. Constitution, art. II (2).

[7]The process of appointment referred to here deals specifically with appointments to the Supreme Courts of the two states.

[8]John W. Whitehead, *A Dysfunctional Supreme Court: Remedies and A Comparative Analysis*, 4 CHARLESTON L. REV. 174-180, 181, 186 (2009); Judge Stephen Reinhardt , *Life To Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391-380 (2010).

[9]Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, And Life Tenure*, 26 CARDOZO L. REV. 591-597 (2005).

[10]*The SC: The Passionate Restrainer*, TIME (Mar. 5, 1965), http://www.time.com/time/magazine/article/0,9171,839325,00.html.

[11]J. M. BALKIN, INTRODUCTION TO THE CONSTITUTION IN 2020 5 (Oxford University Press, 2009).

Although the roles originally bestowed upon the two SCs were in essence similar, their eventual embodiments were starkly different. Though both courts, through their decisions, in their capacity as the guardians and interpreters of the constitution, can and significantly do determine broad societal policy and consciousness, the SC of India, has allowed for its jurisdiction to be invoked liberally for cases of inconsequence not requiring it to do so.[12] Though such an action might be attributed to the political realities of a country, where the SC has had to adjust its role from a clarificatory one to one which requires it to also compensate for governance lapses,[13] halt unrestrained government behaviour, and cater to the evident distrust of verdicts of the lower judiciary.[14]

India's politico-judicial reality and constitutional provisions such as Article 136[15] are in stark opposition to the fact that an appeal to the US SC lies only through a writ of certiorari in the case of federal court[16] and only if a questions of federal statutory or constitutional law are to be decided as regards the judgement of the highest court of a state.[17] Therefore one is hardly surprised to learn the fact that the Indian SC has a difficulty in arranging larger benches for constitutional cases ensuring that the Indian SC decides far fewer

[12]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (Oxford University Press, 2002); See also, Constitution of India, 1950, art. 136.

[13]*Id.* It does so through methods such as Public Interest Litigation.

[14]Such a change in roles is facilitated by the existence of Indian Constitution, Art. 136; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (Oxford University Press, 2002); N. Robinson, *Too many cases*, 26 FRONTLINE 1 (2009), http://www.hindu.com/fline/fl2601/stories/20090116260108100.htm.

[15]Constitution of India, 1950,art. 136 allows the Supreme Court to grant special leave of appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

[16]U.S. Code title 28, § 1254.

[17]U.S. code Title 28, § 1257.

cases of constitutional significance as compared to the US SC.[18] Such a difference in the constitutional significance of what the court usually decides upon plays a significant role in the attention given to the process of appointment.[19] Only when the realization of an axiomatic existence of legal realism is coupled with the knowledge that critical decisions of constitutional policy are being delivered by the SC, a desire to know the background and worldview of judges which may well influence case outcomes is developed.[20] Such a desire even if existent in India is conspicuous by its absence in its appointment process.

II. INDEPENDENCE

Judges of the SC of India are appointed pursuant to Article 124[21] of the Constitution and the directives formulated by the SC in the case of *SC Advocates on Record Association* v. *Union of India* (Second Judges case)[22] and through its advisory opinion - *In re Special Reference* (Third Judges case).[23] Until 1993 the Presidents power to

[18]With an admission policy of 12 per cent as opposed to the US's 1 per cent the US SC hears only 100 cases a year, whereas the Indian SC admits 6,900 fresh cases each year; TIME, *supra* note 10.

[19]In 2007 the Indian SC disposed of only 13 five-judge-bench matters and one nine-judge-bench matter in 2007.

[20]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24(2) THE JOURNAL OF LEGAL STUDIES 257-281 (1995); B.N. Cordozo, *The Nature of the Judicial Process* (1941); H.J. ABRAHAM, THE JUDICIAL PROCESS 213 (7th ed. 1998); T. FREYER & T. DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE 261, 263 (1995).

[21]Constitution of India, 1950, art. 124(2) "Every Judge of the SC shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the SC and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

[22]Supreme Court Advocates-on- Record and Ors. v. Union of India, A.I.R. 1994 SC 268.

[23]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.

appoint SC judges was purely of a formal nature, for he would act in this matter, as in other matters, on the advice of the concerned minister, in this case the law minister.[24] The Final power to appoint SC judges rested with the political executive and the views expressed by the Chief Justice were not regarded as binding on them. The *S.P. Gupta case*[25] reaffirmed this supremacy.[26] Nevertheless through the *Second Judges Case*, supremacy was bestowed in turn upon the Chief Justice, with seniority being emphasised as the pre-eminent norm for selection.[27] Clarifying this position, the SC in the *Third Judges Case*[28] finally conferred supremacy of appointments on a Judicial Collegium comprised of the Chief Justice and the four senior most judges of the SC.

In the US, independence is linked not to the process of appointment but to the tenure of service during which no interference by the President or the Legislature is possible.[29] In India, however, judicial independence is linked to the process of appointment, wherein the judiciary has retained supremacy in order to assert its independence.[30] One must realize that, though there should be no interference by the other organs of the government in the functioning of the judiciary, they should share power when it comes to appointment of judges, in a bid to enhance direct answerability, which won't be the case if the

[24]M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 210 (2003).
[25]S.P. Gupta v. Union of India, 1981 Supp SCC 87 (*First Judges Case*).
[26]Justice Bhagwati opined that the expression 'consultation' used in Art 124 (2) did not mean 'concurrence', and that the Executive could appoint a judge, even if the Chief Justice was opposed to such an opposition; M.P. Singh , "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1.
[27]M.P.JAIN, INDIAN CONSTITUTIONAL LAW, 210 (Oxford University Press, 2003). This case reiterated the importance of Inter se seniority amongst Judges in their respective High Courts and their combined seniority on all India basis, as the primary basis for appointment to the SC, stating that unless there are strong and cogent reasons to justify a departure, the order of seniority must be maintained.
[28]Third Judges Case, A.I.R. 1999 SC 1.
[29]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.
[30]S.P. Sathe, *Appointment of Judges: The Issues*, EPW (August 8, 1998), http://www.jstor.org/stable/4407068.

judiciary is supreme in making appointments.[31] Though the promulgators of both systems decided against the popular election of judges to the SC, the US accounted for some restricted measure of populist representation by allotting the power of appointment between the president and the Senate which is directly representative of the people, even if it is the less populist house of congress.[32] It must be realized that accountability in appointments in no manner takes away from independence either internally or externally.[33]

With respect to independence of the Judiciary, Justice Boggs of the Sixth Circuit Court of Appeals in the US, was straightforward in stating that there existed two categories of the same- internal and external.[34] Internal it is believed is what judges do and external is what could be done to them.[35] It is further believed that independence is not an end but a means to impartial adjudication.[36] US SC judges once nominated by the President and confirmed by the Senate, hold office "during good Behaviour", their salary cannot be reduced once in office and removal is possible only by the process of impeachment in the House of Representatives and conviction in the Senate, by a two-thirds vote, for "Treason, Bribery, or other high Crimes and Misdemeanours."[37] Though the salaries of the judges of the Indian SC are determined by Parliament, their allowances and privileges cannot be taken away once they are in office.[38] Article 124(2) and 124(4) of

[31]Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges*, 95 GEO. L.J. 974-977 (2007).
[32]JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 188 (1845). Objecting to appointment "by the whole legislature" because they "are incompetent judges of the requisite qualifications" and would favour those to whom favours were owed but who lacked "any of the essential qualifications for an expositor of the laws".
[33]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (2002).
[34]Danny J. Boggs, *Judicial Independence*, 11 CHAP. L. REV. 393 (2006).
[35]*Id*.
[36]*Id*.
[37]U.S. Constitution, art. III, §1.; U.S. Constitution, art. II, §4.
[38]Constitution of India, 1950,art. 125(2), ¶2.

the Constitution ensures that they serve till the age of 65 and are removed only by order of the president upon receiving an address from both houses of Parliament, passed by two third majority of the members present and voting on the ground of proved misbehaviour or incapacity. Hence the SC of both India as well as the US, are per Justice Boggs uncomplicated understanding of what others might do to them, are moderately externally independent.

The question which then needs to be asked is whether processes of appointment to the SC in the two countries affect internally the independence of the Higher Judiciary. The US Constitution does not mandate a self replicating professionally guarded selection process as is the case in India with the Judicial Collegium maintaining supremacy.[39] SC Judges in the US undertake no responsibility in the nomination or confirmation of other SC Judges and assume no consultative role either.[40] The process of nomination and subsequent confirmation to a bench which is tenured for life doesn't vest with either the President or the Senate alone, but is shared between two alternate branches of the government, who must collaborate within a framework which necessitates checks on the authority exercised by either one.[41] Integral to this process then, is the Senate Confirmation Hearing (SCH), wherein presidential judicial nominees are questioned on their merit and ideology, before the candidate is appointed.[42] On

[39]Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739; Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges*, 95 GEO. L.J. 974-977 (2007).

[40]U.S. Constitution, art. II provides generally for appointments of federal officers, including federal judges. It states that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the SC, and all other Officers of the US, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

[41]S.P. Sathe, *supra* note 30.

[42]CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE, 12, 17-26 (Denis Steven Rutkus Ed.), http://fpc.state.gov/documents/organization/50146.pdf; RESEARCH AND LIBRARY SERVICES DIVISION LEGISLATIVE COUNCIL SECRETARIAT, THE

the contrary, integral to India's process is the pre-eminence of an entirely judicial collegium, not directly representative of the people.[43] How these facets integral to the appointment processes, namely the Senate Hearings and the Supremacy of the Collegium, affect the internal independence of the Higher Judiciary must be questioned.

Knowing that the Judicial Collegium conscripts typically from amongst High Court judges,[44] one becomes conscious of the fact that judges in India are first and foremost employed in the service of a unified judiciary, with aspirations of advancement to the SC.[45] This understanding permeates the consciousness of judges as well, and hence decisions made by and during the tenure of a High Court judge are made under its shadow, furthering stricter conformity with the views SC and hindering independence for want of advancement.[46] Unlike in India, where one criterion for determination is being the Judge of a High Court, the President of the US is not constitutionally required to nominate judges from either the State or Federal courts, and has a free hand in the matter, avoiding fetters to the internal independence of lower courts.[47]

PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED STATES, 2-10 (Cheung Wai-lam eds.), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf; Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).

[43]H. Gupta, *The Process Of Appointment of Judges In India And U.S.A- A Comparative Study* (Jun. 28, 2012), http://www.scribd.com/doc/13244382/Process-of-Appointment-of-Judges-in-India-and-USAA-Comparative-Study; S.P. Sathe, *Appointment of Judges: The Issues*, EPW (Aug 8, 1998), http://www.jstor.org/stable/4407068.

[44]See, Constitution of India, 1950, art. 124(3).

[45]S. G. MISHRA, DEOMOCRACY IN INDIA, 532-540 (Eastern Book Corporation, 2000); See also J.S.Verma, *Judicial Independence: Is It Threatened?* (Jun 28, 2012), http://www.hcmadras.tn.nic.in/jacademy/articles/Judicial%20IndependenceIs%20It%20Threatened-JS%20VERMA.pdf.

[46]*Id*.

[47]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006); Research and Library Services Division Legislative Council Secretariat, *The Process of Appointment of Judges in Some Foreign Countries: The*

Regardless, the internal independence of the SC of the US too is affected because of the working of the SCH. Many a times during a SCH, judicial nominees are asked how they would rule as regards crucial constitutional questions of the day.[48] From the standpoint of internal independence, judges having indicated their position beforehand cannot then be reasonably expected to maintain an appearance or actuality of neutrality in the resolution of cases.[49] In addition the existence of no selection criteria, leads to a situation where Presidents ordinarily seek justices who will implement their legal or political philosophy.[50] The legitimacy and internal independence of the SC takes a beating through this partisan selection process, where Judges are nominated specifically for their ideological underpinnings and might be burdened with the expectation to rule in accordance with the same.[51] Therefore as regards the internal independence of the lower courts, India may be at a disadvantage, but as regards the internal independence of the Supreme Court, its appointment process affords greater internal independence.

United States (Jun. 28, 2012), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

[48]Norman Dorsen,The *Strange Case of Justice Alito: An Exchange*, THE SELECTION OF U.S. SUPREME COURT JUSTICES, 4 INT'L J. CONST. L. 652-59 (2006).

[49]Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges*, 95 GEO. L.J. 974-977 (2007); See generally Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2171 (2006); Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 (2) THE JOURNAL OF LEGAL STUDIES257-281 (1995).

[50]Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 871 (2005); Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges*, 95 GEO. L.J. 974-977 (2007); Timothy B. Tomasi, *All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals*, 87 COLUM. L. REV., 766-793 (1987).

[51]S. G. MISHRA, *supra* note 45.

III. DIVERSITY

Though not by way of reservation, Sathe is a strong advocate of pluralism in the composition of the SC.[52] Even though the Constitution of Indian is silent upon the SC being representative of any diversity, its importance is recognised by him when he asserts that the legitimacy of a constitutional court is predicated upon its reflection of such Indian pluralism.[53] With the judiciary assuming supremacy in appointments, there exists upon them a greater burden to appear reflective of society and not be perceived as a closed group perpetuating their own clique.[54] With gradual consensus building around the thought that both diversity and professional competence are significant considerations in making appointments to the higher judiciary, the importance of flexibility in the process of appointment, ensuring that various sections of society receive representation, is being understood.[55]

Though the *Second*[56] and *Third judges Cases*,[57] have conferred supremacy upon the Collegium, they have also fettered its discretion in so far as they reinforce the convention of viewing seniority amongst the High Court Judges as an important consideration for appointment to the SC.[58] In comparison the absence of a selection

[52]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 304-307 (2002).
[53]*Id.*
[54]M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1; B. MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 243(Cambridge University Press, 1997).
[55] M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1.
[56]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739; [1998] 7 SCC 766. Seniority is to be maintained and not to be derogated from except for cogent reasons.
[57]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.
[58]M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (2002).Even though the *Third Judges Case* settled the law in so far as it stated that merit is the predominant consideration and meritorious persons can

criteria in the US constitution does render the appointment process more amenable to furtherance of diversity, as opposed to one which fetters the choice of nominees to judges of High Courts, advocates practicing in High Courts or eminent jurists, coupled with additional restrictions of seniority. A cogent example is the 1980 campaign pledge made by President Reagan to appoint the first female judge the US SC which was eventually carried through in September 1981 when Sandra O'Connor was confirmed by the US Senate.[59]

IV. TRANSPARENCY AS REGARDS IDEOLOGY AND MERIT

It can be argued that a demand for transparency in the appointment of judges is uncalled for when the founding fathers themselves decided not to express its significance in the constitution. This argument holds true for the US as well, whose constitution too is silent on the subject. However even though the founding fathers may not have found transparency in appointments as intrinsically critical, warranting an articulation in the text of the constitutions of either countries, it must be born in mind that the role of the Courts too has changed since the framing of the constitution.[60] The growing acceptance of the SC as an institution not devoid of political consideration, has justified transparency in the appointment of its judges, much like it's

be appointed without regard to their seniority, what exactly is merit, is yet to be decided. Sathe further recognizes that merit in an unequal society is a dubious concept and he along with M.P. Singh are of the firm opinion that recruitment to the Apex court should never be made on the basis of merit along and considerations of diversity should also factor in the selection process.

[59]More recently President Obama in 2009 successfully nominated to the SC Sonia Maria Sotomayor who is the Court's 111th justice, its first Hispanic justice, and its third female justice. He has also appointed a number of Asian Americans to the Federal Judiciary; See Jonathan Jew-Lim, *A Brief Overview Of President Obama's Asian American Judicial Nominees In 2010,* 17 ASIAN AM. L.J. 227 (2010).

[60]*Judith Resnik, Judicial Selection and Democratic Theory: Demand, Supply, And Life Tenure,* 26 CARDOZO L. REV. 591-597 (2005).

demanded of members of a legislature who shape the policy of a country.[61]

In the US the "Appointments Clause"[62] states that the President "*shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court."* Unlike the constitution of many countries including ours, neither the US Constitution nor any particular statutory law establishes any requirement of age, educational qualifications, experience, or even citizenship for the position of SC justice.[63] Once appointed Judges of the SC are tenured for life.[64] As a consequence of the constitution prescribing no base requirements, the president is bestowed with wide discretion as regards to who he nominates, and such discretion often results in the nomination of close aides or people to whom political favours are owed.[65] However the absence of express selection criteria does not mean that there are none. The convention as evidenced through the SCH has being to regard the merit and underlying ideology of the nominee as important basis for appointment.[66]

[61]*Id.*
[62]U.S. Constitution, art. II, §2.
[63]U.S. Constitution, art. III, §1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts at the Congress may from time to time ordain and establish.; CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf.
[64]U.S. Constitution. art. III provides that Judges, both of the Supreme and Inferior Courts, shall hold their Offices during good Behaviour; See also John W. Whitehead, *A Dysfunctional Supreme Court: Remedies And A Comparative Analysis*, 4 CHARLESTON L. REV. 174-180, 181, 186 (2009).
[65]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).
[66]*Id.*; RESEARCH AND LIBRARY SERVICES DIVISION LEGISLATIVE COUNCIL SECRETARIAT, THE PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED STATES 2-10 (Cheung Wai-lam eds.), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

V. MERIT

Mere evidence of merit does not suffice and this is also vigorously tested by the Senate. The efficacy of this testing was evidenced in the *Case of Harriet Miers*.[67] Even though Miers was a distinguished lawyer, having served as the President of the Texas Bar Association, she was found by the Senate to not be adequately familiar with the nuanced field of constitutional law in order to serve on the Supreme Court, leading to her eventual withdrawal.[68]In India however, seniority is the rule with merit superseding seniority being the exception.[69] There exists no criterion as to what constitutes merit and certainly no process to test it even though it may be evidenced on paper.[70] On the contrary there exists a belief evidenced even in the text of the constitution that experience accounts for a measure of merit.[71]

VI. IDEOLOGY

Since the rise of legalism, it has been axiomatic that the background and worldview of judges influence cases and the appointment process in US also does not evidence a denial of such fact.[72] Presidents have in the past sought justices who would implement their legal or

[67]Former White House Counsel and close aide of George W. Bush, who was nominated by him to replace of Sandra O'Conner in the Supreme Court upon her retirement.

[68]Judith Resnik,*supra* note 60;Dan Coats, *Anatomy Of A Nomination: A Year Later, What Went Wrong, What Went Right And What We Can Learn From The Battles Over Alito And Miers*, 28 HAMLINE J. PUB. L. & POL'Y 415 (2007).

[69]S.P. SATHE, *supra* note 52.

[70]*Id.*

[71]As is required by art. 124 (3)(a) and (b) of the constitution i.e. Judge of a High Court of 5 years standing or advocate practicing in the High Court for 10 years.

[72]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 (2) THE JOURNAL OF LEGAL STUDIES 257-281 (1995); See generally Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2171 (2006).

political philosophy.[73] Hence in addition to merit, ideology of the nominee is also tested in order to ensure the absence of overtly partisan beliefs, which could lead to a reduction in the ostensible legitimacy of the court as an impartial institution.[74] This desire to know the judges ideology is further advanced with the knowledge that a US SC judge sits En Banc with nine other judges as opposed to in a panel as is the case in India, and hence the opinion of one judge could swing an important decision of constitutional policy one way or the other.[75] Ergo specific questions regarding the views of nominees on civil liberties, gay rights, abortion etc. are asked during the SCH and collaborated with their previous decisions and extrajudicial writings if any.[76] A case in point is the dissatisfaction which arose with President Reagan's nominee Robert Bork in the Senate because of his extremely conservative record, and in particular, the fear that he would be the fifth and deciding vote to overrule *Roe* v. *Wade*[77] which lead to his nomination being defeated.[78] Hence the SCH acts not just a check on the power of the president in the absence of specific criteria, but also operates in a manner that provides transparency[79] and representation of community outlook.

[73]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).This was witnessed in the 1930's where the implicit test for nomination was loyalty to President Franklin Roosevelt's New Deal Program to combat the Great Depression.

[74]*Id.*

[75]*Id.*

[76]Senators ask nominees to discuss their judicial philosophies, how they would rule on forthcoming cases or would have ruled landmark cases constitutional significance, such as Roe v. Wade; S.P. SATHE, *supra* note 52.

[77]Roe v. Wade, [1973] 410 U.S. 113.

[78]The American Civil Liberties Union fought his nomination to the Supreme Court on the ground that Bork was fundamentally opposed to civil liberties and prevailed with Bork's nomination being eventually defeated. Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006); Timothy B. Tomasi, "*All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals"*, 87 COLUM. L. REV., 766-793 (1987).

[79]Process of accounts for transparency in that regard especially because hearings are televised; CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS:

The process is not tidy, and the line between proper and inappropriate questioning is often unclear, however when the true significance of the court in shaping constitutional policy is understood coupled with the knowledge that its judges are appointed for life, it felt desirable that the Senate and hence the public have access to as much information about a candidate as can be learned without impropriety.[80] India, is either in denial of the power of the SC to shape constitutional policy or perceives a difference in the roles performed by it as compared to the US SC on the basis of its liberal admission policy. Whatever may be the case its appointment process does not warrant any attempt of inquiring into the background and ideology of the judge so as to avoid the possibility of subjective adjudication.

VII. CONCLUSION

It has, hence, been demonstrated that, the manner in which the appointment process has developed in the US as compared to India, probably as a natural result of the non-availability of any selection criteria in the constitution, has led to greater transparency as regards the background and worldview of judges. It is also more conducive to the furthering diversity and is less likely to affect the internal independence of its judiciary. The fact that even before the SCH, Presidential nominees are required to fill out a Senate Questionnaire

ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf; Research and Library Services Division Legislative Council Secretariat, *The Process of Appointment of Judges in Some Foreign Countries: The United States*, 2-10 (Jun. 28, 2012), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

[80]Justice McLachlin's of the Canadian SC aptly observes: Yes, candidates for the US SC, unlike nominees in other countries are questioned on their beliefs, their views on the law and their previous decisions. It is a deeply political process, but it reflects the vast authority of the Court on many constitutional issues that are regarded as 'political'. Clifford Krauss, *Canada: New Justices Will Face Public Hearings*, N.Y. TIMES, Feb. 21, 2006; S.P. SATHE, *supra* note 52.

which requires them to list details ranging from Marital Status, taxes paid, to participation in Political Campaigns etc. lends credence to the fact that the US system of appointments is definitely more scrupulous if not more transparent.[81] India would hence do well to take a leaf out of its book and endeavour a little more to judge its judges before they are appointed.

[81]Potential Judicial nominees are also required to undergo FBI Background check, to avoid an untoward revelation that could embarrass the office of the president once a nominee is finalized; See CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf.
Such a check would definitely not be unwarranted in the Indian context, and could save the institution of the Judiciary from the embarrassment it faced in the Justice Dinakaran's inceident where allegations of corruption surfaced after the announcement that he would be elevated to the Supreme Court.