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The Systems of Selecting State Judges in the USA

Abstract: The article aims to introduce the selection of systems used throughout the United States of America to appoint or elect state judges. It opens with a brief overview of the federal specifics of the courts structure in the USA. The federal system of judicial appointment is subsequently described to provide comparative perspective to the state system. Evolution of the state judge selection methods follow, which provides readers with background on the historical development of the subject with emphasis on the political circumstances in particular periods. Next, currently used selection methods are described including the appointment procedures as well as unique partisan and non-partisan judicial elections, and the Missouri Plan based on merit selection. The penultimate section contains statistical analysis embracing all fifty states and the District of Columbia. Finally, the fifth part focuses on two key problems concerning the partisan election method and the response to those problems provided by the United States Supreme Court.
Keywords: judicial selection, partisan election, non-partisan election, judge appointment, Missouri Plan
Słowa kluczowe: wybory sędziów stanowych, sędziowskie wybory partyjne, mianowanie sędziów stanowych, Plan Missouri

1. Introduction

The federal system of the United States of America is reflected in the structure of the judiciary. Outside of federal courts there are, in different states, over 50 separate court systems. Individually constructed judiciary systems carry with them significant differences not just in their structures but also in the way judges are selected, including the possible use of general elections, where citizens of a given district can themselves decide into whose hands they entrust decision making in disputes arising from the premise of state law.

It is worth highlighting that American judges are not required to undergo any additional training through, e.g. an application, because the graduation certificate

from a school of law and passing a bar exam in the USA gives them the right to practice in any legal profession[1].

The aim of this article is to make the reader acquainted with methods of selecting state judges in the United States, with particular references to the general elections method used, as well as select key issues that had been, more than once, subject to a decision by the Supreme Court of the United States.

2. Federal judiciary and state judiciary – introduction

The United States Constitution, passed in 1787 by the 13 original states, passed the judicial power at the level of the newly established federation to the Supreme Court, and to 'such inferior courts as the Congress may from time to time ordain and establish'. (Art. III cl.1). The Congress passed the *Judiciary Act* as early as 1789, thereby establishing federal courts at lower levels. These courts are known as "Article III courts"[2], and judges presiding over those courts enjoy a life-long term of office and a permanent salary, guaranteed by the provision of the Constitution itself[3].

At the state level the judiciary system is defined under appropriate state provisions. A State Constitution usually indicates a basic framework for the functioning of the judicial power and defines its structure (as well as general methods for choosing judges), with specific measures adopted by state legislature in separate acts[4].

The American *common law* system gives judges wide ranging powers. As a judiciary power, they have control over legislative authority and the executive as

1 What's more, training in law is not even a legal requirement for a nomination for a federal judge. A judiciary career in the United States does not have the character of a gradual progression to the courts of a higher instance; a High Court Judge (or even a Supreme Court Judge) may be (and has been) an attorney who had never tried a case in any court. See: W. Burnham, Introduction to the Law and Legal System of the United States, St. Paul 2006, pp. 176-177.

2 This list includes the Court of International Trade whose 9 judges preside over civil cases concerning international trade agreements, in which the United States are a party. See The United States Court for International Trade: http://www.cit.uscourts.gov/ (accessed on: 11.09.2014).

3 Additionally at the federal level there are 'Article I Courts' established to manage cases concerning authority delegated by the states to the federal authority under Article I of the American Constitution. These are specialised courts, such as the *U.S. Court of Federal Claims*, *U.S. Tax Court* or bankruptcy courts, as bankruptcy falls under a federal law as uniform for the whole of the USA territories. Judges of those courts are appointed for a fixed term and do not enjoy the unconditional guarantees of Art. III of the Constitution. More on these courts in A. Ludwikowska, R.R. Ludwikowski, Sądy w Stanach Zjednoczonych. Struktura i Jurysdykcja, Toruń 2008, pp. 25-26.

4 Generally, it can be assumed that most states have courts of the first instance (*trial courts*) and *courts of appeals* – usually, though not always, with a state level supreme court at the top of the structure. See more in: I. Kraśnicka, A. Ludwikowska, Wprowadzenie do systemu prawa Stanów Zjednoczonych, Toruń 2012, p. 197 onwards.

part of the system of checks and balances. They have also an opportunity to modify or amplify existing laws and case law, based on legal precedents, is an important source of law in the United States.

3. Appointment of federal judges

The method of appointing the majority of federal judges (Article III judges) is defined in the very Constitution of the United States, which delegates this authority to the executive and legislative powers. Under Art. II sec. 2, judges of the Supreme Court of the United States and all lower instance federal courts are appointed by the President of the United States with the advice and the agreement of the Senate. It is worth highlighting that the very same Constitution establishes the life-long term of office for federal judges (Art. III sec.1), with the sole available procedure for re-calling a federal judge being through impeachment – a procedure reserved for re-calling the President of the USA and federal officials (Art. II sec. 4).

Appointment to the office of a federal judge is the most prestigious nomination in USA judiciary. Federal courts are presided over by just under 900 judges[5]. The pinnacle of the judiciary career is, of course, the office of a judge of the U.S. Supreme Court, which has nine judges deciding, usually with a lot of media interest, on key issues for American citizens (that is on constitutionality of the provisions of federal and state law), such as single sex marriages[6], the right to possess weapons[7] or constitutionality of the mandate for a compulsory health insurance[8].

4. Evolution of the methods of appointing and electing state judges

Before independence from the British Crown was declared, judges of the American colonies were crown officials, imposed from above and, as such, they symbolised dependency and subjugation to the King. In the revolutionary Declaration of Independence of 1776, one of many grievances and symptoms of the tyranny of the King towards the Colony was the judges' full dependence on the royal will (for holding their office and receiving a salary and its amount)[9]. Therefore after passing the Constitution, in the first period of functioning of the United States of America, state judges were mostly appointed by the state's executive authorities and/

5 According to the data of *United States Courts* on 31.12.2014: http://www.uscourts.gov/JudgesAndJudgeships/FederalJud- geships.aspx (accessed on 09.09.2014).

6 Np. *United States v. Windsor*, 570 U.S. (2013).

7 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8 *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012).

9 The Declaration of Independence of the United States, proclaimed on 4 July 1776. The original text is available on the USA National Archives website: http://www.archives.gov/exhibits/charters/declaration_transcript.html (accessed on: 09.09.2014).

or legislative bodies, similar to federal judges. Very quickly, however, individual states introduced elements of citizen elections of judges. Georgia, in 1812 and Indiana, in 1816, introduced such measures as part of their state constitutions[10]. During the presidency of Andrew Jackson (1829-1837), a grass roots demand for the "voice of the people" to be heard in the process of selecting judges appeared in pretty much all states[11]. In 1832, Mississippi, as the first state, introduced common elections of judges of all levels as the method of appointment to office. New York joined it in 1846[12]. During the following decades all then existing states and all new states incorporated into the Union, elected their judges, if not altogether than at least in part, through general elections[13].

Parallel to the introduction of this method of choosing judges was the emergence of critical voices which, in time, became much amplified and bolstered by real abuses by judges, contributing to the return of the system of judges being nominated by the executive authority. The main reason for the criticism was that the elections were being politicised. In the pioneering states of Mississippi and New York judicial candidates stated their political leanings on the ballot papers, therefore becoming a cog in the political machine which, in turn, meant that they were dependent on political parties and under their supervision. As the result another method appeared – judges being appointed to office following elections, but elections that were apolitical, without political affiliations stated on the ballot papers[14]. Already at the beginning of the 20th century, many lawyers, including the former US president William Howard Taft, strongly voiced the need for changes and categorically regarded partisan election of judges as a mark of disrespect for the justice system. In 1913 Albert M. Kales of Northwestern University founded the American Judicature Society and began working on a new method of selecting state judges, which was to include elements of electoral procedure, nomination and a competency-based assessment of individual candidates by independent commissions. Templates for this method for selecting judges were modified over the years, until in 1937 the American Bar Association presented the final version of non-partisan, competence based method for the selection of state judges, the so called *merit-selection plan*[15].

10 L. M. Friedman, A history of American law, New York 2005, p. 81.

11 A. Champagne, K. Cheek, The cycle of judicial elections: Texas as a case study, 29 Fordham Urb. L. J. 907 (2002), p. 907.

12 L. M. Friedman, A history…, *op. cit*., p. 81.

13 A. Champagne, K. Cheek, The cycle…, *op. cit*., p. 907.

14 A. Champagne, K. Cheek, The cycle…, *op. cit*, p. 908 and also L. C. Berkson, Judicial selection in the United States: a special report, (in:) E.E. Slotnick (ed.), Judicial Politics, Readings from Judicature, Chicago 1999, p. 44.

15 K. Tokarz, Women Judges and Merit Selection under the Missouri Plan, 64 Wash. U. L. Q. 903 (1986), pp. 910-911.

The first state to deploy this method in practice was Missouri, where in 1940 a constitutional amendment was adopted, introducing the *Nonpartisan Court Plan*. According to the new legislation, the selection of judges was subject to extraordinary procedure in several phases. First, an independent commission composed of citizens – lawyers and laymen – assessed potential candidates for judges, selecting the winners of this stage and presenting them to the state governor. The governor would make the final choice of a judge and appoint them to a specific post, usually for the period on one year. After that time the so called retention elections took place where local voters in general elections decided on whether the judge should retain or leave his post[16].

Such method of choosing judges proved hugely successful and soon the *Missouri Plan* was being implemented in other states in a more or less modified format. Nowadays this system is statistically the most frequently used selection method for judges in the majority of US states (see data in the later part of this article).

5. Contemporary methods of appointing and electing state judges

Nowadays state judges are elected or nominated in a variety of ways, in different states. Along with those representing the American doctrine, it is possible to surmise that the 50 states and the District of Columbia apply a curious patchwork of election and appointment methods for selecting state judges[17].

Generally, three methods are used, shaped by the process described above:

1. The procedure of appointing judges, which includes an executive appointment by the state governor, and the procedure of appointment by the legislative authority, that is through voting by the state legislature.
2. General elections, with two electoral systems: *partisan elections* where judges are elected in party political elections (in order to stand, candidates need to win in *primary elections*), where the electorate for a given area has a vote; and *non-partisan election*s, where judges are voted in by the electorate of a given area but their names on the ballot papers are not accompanied by the information on their political affiliation (in this system, candidates for judges also go through party primary elections, but in the end voters are not made aware of their political party membership).
3. *Merit Selection* also known as the *Missouri Plan*, or committee nomination, is, generally speaking, based on candidates for judges being chosen through a special procedure (with a number of potential variants) by legislative committees based on their track record and competency criteria. The final

16 S. O'Connor, The Essentials and Expendables of the Missouri Plan, 74 "Missouri Law Review" (2009), pp. 485-486.

17 K. Tokarz, Women…, *op. cit*., p. 907.

> appointment is usually made by the state governor from among three to five candidates presented by the Committee. In some states the governor's appointment needs to be confirmed by the state legislature. After a fixed period of time voters answer a simple question: should judge XY continue in office Yes or No?[18].

Statistically the most frequently used method for choosing state judges is the *Missouri Plan*. In 15 states and in the District of Columbia the plan is used to select judges to all courts. In 9 other states Merit Selection is used to choose judges of the courts of appeal, with judges of the lower instance courts being chosen through general elections (partisan or non-partisan). In total, 24 states deploy this method and in nine others the *Missouri Plan* is used to a symbolic degree (but it is still used) in the case of by-elections on some judiciary levels. The next largest group (15) are states where the choice of judges is through general non-partisan elections. Partisan elections of judges take place in only six states. In the smallest group, of only five states, judges are appointed by the governor (three states), or the state legislature (two states)[19].

When the above statistics are overlaid on the map of the United States, strong divisions are not difficult to spot. All the northern states, from Michigan to Washington and even Oregon, have adopted the method of non-partisan elections of judges to office. They were joined by some south eastern states – Arkansas, Georgia or Mississippi, faithful to its original objectives). Partisan elections are the dominant method of selecting judges in three states in the middle east of the country (Illinois, Ohio, Pennsylvania) and in the three typically southern states (Texas, Louisiana and Alabama). The middle states (from Wyoming, Utah and Arizona as far as Iowa and Tennessee) have adopted the *Missouri Plan* – wholly or partially. It is worth adding that the Missouri Plan nowadays uses a mixed system, with partisan elections used to fill judges' offices in some courts. This group of states was joined by geographically distant New York, Florida, the majority of the small states of the east coast (e.g. Massachusetts, Vermont, Rhode Island) and the District of Columbia, as well as Hawaii and Alaska. Governor appointment was maintained in two opposite states – California in the west and Maine in the east and in New Jersey. Virginia and South Carolina are the only states where judges are elected by legislative authorities (the final vote is taken by the

18 See e.g. L.C. Berkson, *Judicial…*, *op. cit.*, p. 45 or Road Maps. Judicial Selection: The Process of Choosing Judges, American Bar Association 2008, pp. 5-7.

19 Based on: Road Maps. Judicial Selection: The Process of Choosing Judges, American Bar Association 2008, p. 7. The divisions suggested here are generalised, on closer scrutiny the process of selecting judges at various levels, the combination of election methods are very varied. Even in the case of judges being voted in by the state legislature in South Carolina and Virginia there is an element of preparing candidates by special commissions used as part of the procedure.

joint chambers of the state parliament)[20]. What is interesting is that this division does not exactly correlate with the traditional divisions between Republican and Democrat states in terms of electoral preferences of their residents. Partisan elections of judges are used in the three traditionally Republican states – Texas, Louisiana and Alabama – and three Democratic states – Illinois, Ohio or Pennsylvania. The common political denomination is only present in those states who retained the executive appointment of judges or appointment by the legislature, although even here, among the 'blue' Democrat-voting states, there is the splinter state of the republican South Carolina.

6. Controversies surrounding elections to the office of judge in the United States in the case law of the Supreme Court of the United States

The deployment of the general elections method, especially partisan elections, either as the basic method of or as part of the Merit Selection, fuels the discussion (from the very start) over the dangers of such mechanisms and the exchange of arguments between its vehement critics and staunch supporters. The key issues here reached the Supreme Court of the United States, whose judges have the final say about compatibility of American law with the Federal Constitution.

The issue of politicising the elections campaign and its financing seems to encompass most controversies over the general elections to judicial offices.

Making the political sympathies or the convictions of the judicial candidates public is, on one hand, treated as the right of society to have access to information on the fundamental values the candidates subscribe to; on the other hand, it seems to contravene the idea of independence of the judicial authority. Mounting regular election campaigns by judicial candidates (including top level offices within the state authority, such as the president of the state supreme court) requires significant funds which can amount to huge expenditure sums of several million dollars in the course of one campaign[21]. Qualitative and quantitative studies carried out by independent bodies and academics indicate that the majority of voters (76%), and almost half the judges (46%) think that financial contributions of different interest groups have

20 Detailed information on systems for choosing judges in different states and references to appropriate legal provisions are based on the database of the still functioning *American Judicature Society* available on their web page under the following address: http://www.judicialselection.us/judicial_selection/ methods/selection_of_judges.cfm?state=VA (accessed on 31.08.2014).

21 Candidates in elections to state supreme courts managed to collect the sum of around 211 million dollars in campaigns between 2000 and 2009, two and a half times more than in the previous decade. The largest sums were accumulated in those states where partisan general elections take place. See e.g. the report American Progress: B. Corriher, Partisan Judicial Elections and the Distorting Influence of Campaign Cash, October 25, 2012. The on-line version is available here: https://cdn.ame-ricanprogress.org/wp-content/uploads/2012/10/NonpartisanElections-3.pdf.

a bearing on decisions made by judges selected through such mode; the analysis of over 2300 decisions by state supreme courts seem to confirm these concerns[22].

During the last few years the Supreme Court of the United States has addressed these problems on several occasions.

In 2002 in the case of *Republican Party of Minnesota v. White*[23] the judges decided with a 5:4 majority, that the state legislation in force in Minnesota, which prevents judicial candidates from disclosing their political preferences, is incompatible with the United States Constitution as it contravenes the First Amendment and the right to free speech contained therein. This has strengthened the free hand of candidates to make use of political emotion in campaigns for judicial offices. The financing of judicial campaigns was significantly impacted by the last of well publicised decrees in 2010, where (with a 5:4 majority) the Supreme Court found that in the context of elections, there is no difference in the freedoms arising from the First Amendment between physical persons and companies, and the latter have a right to unlimited political and campaign expenditure, which do not amount to an element of corruption[24]. The judges of the Supreme Court had also spoken on the matter of the interrelationship between a donor financing a judiciary elections campaign (for a record amount of over $3 million) and the judge taking part in a case where the benefactor is one of the parties. With a 5:4 decision, the Supreme Court declared that such support may lead to an extreme partiality[25].

The latest decree in the above area was issued in April 2015 in the case of *Williams-Yulee v. The Florida Bar*. With another 5:4 decision, the Florida State legislation, which prohibited candidates from personally applying for campaign funding, was upheld as not contrary to the First Amendment[26].

It needs to be highlighted that in all the above cases the decisions were made with the majority of just one vote, therefore the 'supreme' judges themselves did not have a uniform stance on the issue. What is interesting, winners in campaigns for top state judiciary offices (for example the first woman to lead the Supreme Court of Alabama in history – Sue Bell Cobb), as well as the retired judge of the Supreme Court itself – Sandra O'Connor – have consistently argued over the years for a reform necessary to prevent such abuses and proposed abandoning the general elections method (especially partisan) for filling judiciary offices, which in turn has been met with staunch opposition from their supporters[27].

22 J. Shepherd, Justice at Risk. An Empirical Analysis of Campaign Contributions and Judicial Decisions, „American Constitution Society for Law and Policy" 2013, pp. 1 and 15.

23 *Republican Party of Minnesota v. White* 536 U.S. 765 (2002).

24 *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

25 *Caperton v. A. T. Massey Coal Co.* 556 U.S. 868 (2009).

26 *Williams-Yulee v. The Florida Bar* 575 U.S. (2015).

27 *C.f* S. O'Connor, The Essentials…, *op. cit.*, p. 486 onwards., J. Shepherd, Justice…, *op. cit.*, Introduction by Sue Bell Cobb. In response e.g.: Ch.W. Bonneau, In Defense of Judicial Elections, New York 2009.

The use of general elections (and, what follows with the elections campaign with all its controversies and potential threats to independence of judges) is a specific aspect of American judiciary system, not encountered in any other country in the world[28].

That the controversy remains current is confirmed very much by subsequent decisions of the Supreme Court of the United States. The issues highlighted in this article (only briefly, due to the limited length of text) put a huge question mark over the appropriateness of this method in choosing representatives of the judicial authority. A decision by the Supreme Court that this method is not constitutional seems the only effective way to remove these problematic procedures. However, considering the historic factors behind the election of judges, American society's involvement in political life and elections, and the simple fact that most states regard this method as the best, such a decision by the Supreme Court at this stage would seem impossible.

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28 The New York Times has prepared a worldwide comparison of methods of chosing judges indicating that general elections are used only in smaller Swiss cantons and as an element in the selection of the Supreme Court judges in Japan. See: Judicial Selection in Other Countries. New York Times, May 25, 2008. On-line version available on: http://graphics8.nytimes.com/packages/pdf/national/20080525_judicial_ selection.pdf (accessed on: 31.08.2014).