

4-1-1976

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Recommended Citation

Borowiec, Walter A. (1976) "Pathways to the Top: The Political Careers of State Supreme Court Justices," *North Carolina Central Law Review*: Vol. 7 : No. 2 , Article 4.
Available at: <https://archives.law.nccu.edu/nclcr/vol7/iss2/4>

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**PATHWAYS TO THE TOP:
THE POLITICAL CAREERS
OF
STATE SUPREME COURT JUSTICES**

WALTER A. BOROWIEC*

INTRODUCTION

An important difference between the judicial systems of the United States and those of many other democratic nations is the manner in which judges are selected, trained and promoted. The judiciary in other countries is a professional avocation.¹ Promotion from trial courts to higher appellate courts is contingent on demonstrated ability. In some nations, such as France, the judicial rule is modeled upon norms that are more similar to those of the civil service rather than the judiciary of this country.² In short, recruitment and retention of judicial personnel, in particular the continental democracies, emphasizes professionalism rather than partisanship.

Several institutional methods are used to select judges in the United States. Some states utilize partisan elections to staff both trial and appellate courts. The judiciary of other states, as well as federal judges, are appointed. This method of selection may eliminate the vagaries of the electoral process, but may still emphasize partisan party loyalties. Finally, the Missouri Plan, which intends to combine the advantages of both appointment and election, is supposedly the best mechanism for the nonpartisan selection of the best qualified judges.³ Neither the states or the federal government require a specialized professional education in the duties of a judge. Indeed, most scholars who have studied the recruitment of judges in America have concluded that it is one of the most political or partisan aspects of our judicial system. This conclusion holds true even with regard to those attempts to keep partisanship

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1. H.J. Abraham, *THE JUDICIAL PROCESS*, Ch. 6 (1962); P.A. Allum, *ITALY—REPUBLIC WITHOUT GOVERNMENT*, Ch. 8 (1973); A.N. Dragnich and J. Rasmussen, *MAJOR EUROPEAN GOVERNMENTS*, Chs. 17 and 26 (4th Ed., 1974).

2. Abraham, at 46.

3. For an analysis of the actual effects of the Missouri Plan in operation, see R. Watson and R. Downing, *THE POLITICS OF THE BENCH AND THE BAR* (1969).

to a minimum, *i.e.* the Missouri Plan.⁴ Jacob, for example, found that while interstate differences in the manner of recruiting judges may be related to differences in the pre-judicial careers of judges, nearly all judges come to the bench with some experience in public life.⁵ Glick and Vines discovered that 72.5 percent of all appellate judges serving in the United States, in 1967, had held at least one non-judicial public office.⁶ Various studies of specific state court systems are summarized by Eisenstein's recent book. This author also concludes that politics so permeate judicial selection in America that a political career is an essential prerequisite to a judicial office in this country.⁷

THE FOCUS AND METHOD OF THIS STUDY

Assuming that the pathway to the nation's courts is political, several questions may be posed with regard to the highest state appellate courts. What is the nature of the political background of a state supreme court judge? Do these individuals have extensive prior judicial experience as trial judges? Or do they come to the bench directly from more overtly political positions in the legislative or executive branches of government? Do interstate differences in the formal means of selection account for any differences in the political career of these judges? For example, are Missouri Plan judges more likely to have prior judicial experience? In summary, if our system considers a political career to be the means for training or preparing a lawyer for a high judicial office, what is the nature of that political training?

In order to answer these questions the author analyzed the political background of 185 justices⁸ who served on the highest tribunals in 25 states, during the period 1968-1973. Several sources of information were consulted in order to discover the precise political career pattern of each judge. State manuals, regional and national editions of *Who's Who*, newspapers and various Martindale Hubell law directories enabled the author to compile reasonably accurate information on these justices.

The specific states from which the judges were selected were intended to insure a representation of both geographic region and different means of judicial recruitment. Table One lists the specific states utilized in the

4. *Id.*

5. T. Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, XIII *Journal of Public Law* 104-19 (1964).

6. H. Glick and K. Vines, *STATE COURT SYSTEMS*, 48-50 (1973).

7. J. Eisenstein, *POLITICS AND THE LEGAL PROCESS*, 58 and Ch. 3 *passim* (1973).

8. Initial tabulation indicated 196 justices as incumbents of the courts chosen for this study. It proved impossible to get complete information on eleven of these individuals. Thus, the total number of justices was reduced to the figure of 185. It is not likely that information concerning those eleven justices would change the general findings of this study.

study, grouped by method of recruitment. This table also indicates the total number of judges in each category of appointment (for example, a total of 29 Missouri Plan judges were studied).

FINDINGS

The most striking characteristic of the political careers of these state appellate judges was the extent to which they possessed prior judicial experience. Table Two indicates that slightly more than two-thirds of the 185 judges studied had served on other courts prior to assuming their positions on the highest state court. It is obvious that, at least in the states under consideration, a large majority of judges on the highest courts arrive there by "promotion" from the lower courts.

It is somewhat surprising that a smaller proportion of Missouri Plan justices have prior judicial experience, as compared to the elected or appointed group. The figures in Table Two indicate that the appointive plans are the most likely to result in prior judicial experience. For example, over three quarters of the judges appointed by governors had held a prior judicial position. Based upon these data, those who consider prior judicial service an essential, if not mandatory, qualification for appellate justices, would be well advised to support the appointive mode of judicial recruitment.

However, these interesting interstate differences should not obscure the significance of the overall pattern. The extent of prior judicial experience of those studied is greater than that of federal judges. Of the 100 justices who have served on the United States Supreme Court, only 41 individuals had some prior judicial experience.⁹ Richardson and Vines report that only 31 percent of all federal District Court judges and 38.7 percent of all federal appeals judges, holding office in 1963, had prior judicial experience.¹⁰ As a group, the justices in our study clearly possessed more extensive judicial experience than federal district, appellate or Supreme Court judges.

In fact, the extent of prior judicial service of state supreme court judges may be increasing over the years. In 1933, Mott and his colleagues calculated the 53.8 percent of all state supreme court judges, serving from 1920-1929, had prior judicial experience.¹¹ This would

9. Abraham, *supra*, at 50-2. Reports on the judicial experience of United States Supreme Court Justices up to 1958. The author was able to determine the existence of judicial experience for the balance of justices who were appointed since that date.

10. R. Richardson and K. Vines, *THE POLITICS OF FEDERAL COURTS* 75 (1970).

11. R. Mott, S. Albright and H. Semmerling, *JUDICIAL PERSONNEL*, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 143-55 (1933) reprinted in Glendon Schubert, ed., *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* 204 (1964). However, Jacob, *supra* note 5, at 115, reports that only 50.7% of the state supreme court judges which he studied in 1964 had prior judicial experience. This

indicate that most of the highest state court judges, in contrast to those of the federal courts, have served *de-facto* apprenticeships on a lower trial court.

Inspection of Table Two reveals several other interesting aspects of the political careers of these judges. A large majority of these men had experiences in what may be termed a "public legal" political office. This category embraces a wide range of offices, both elective and appointive. It includes offices such as district attorney, state attorney general, municipal or corporation council, deputy or assistant state attorney and various other titles which convey a legal function.¹² Eighty of the judges began their political careers with this sort of position. Moreover, after prior judicial experience, prior public legal experience typifies the careers of a majority of judges. With one important exception, which we shall discuss below, the career pattern of these judges is more likely to involve a public legal office rather than a state legislative, state executive, or any sort of federal office.

Partisan election of judges is most likely to be linked to a public legal office. One is likely to conclude that those individuals who have success in running a political campaign, for an office like local prosecutor, are thereby furnished invaluable experience for a campaign for judicial office, later in their careers. However, the proportion of Missouri Plan judges who were public attorneys is equally high and even a significant proportion of the group of appointees possesses this type of experience. Once again, the overall pattern is more worthy of note. Our figures indicate that a career in a state or federal¹³ bureaucracy, or regulatory agency, or in a legislature, is less likely to lead to the highest state benches than a political career in public law positions.

A rather notable exception to this pattern is apparent in Table Two. Those few states which utilize the method of allowing the state legislature to appoint its highest judges appear to have an unusually high number of ex-state legislators on the bench. In these five states, prior legislative experience appears to be an important political asset. These findings are particularly striking given the rather infrequent occurrence of a legislative career in the background of judges from states using other means of selection. The political implications of this finding are obvious. Apparently when the legislature selects the judges, it is in-

figure, which is lower than that reported by Mott, may be attributable to the fact that Jacob only studied twelve courts.

12. The most common office in this category was that of public prosecutor. Well over half of the individuals who had held a public legal office were in fact, at one time or another, public prosecutors.

13. Service in a federal office of any sort—judicial, legislative or executive—was a rare occurrence in the careers of these judges. For example, only fifteen had held a federal legal office and only four had held federal legislative office.

clined to favor ex-legislators who are perhaps well-known and influential among their ex-colleagues.

SUMMARY AND CONCLUSION

This study has established that the dominant political career pattern of state supreme court justices is characterized by prior judicial and/or public legal service. At present, the typical career of a state supreme court judge involves initial service as a district attorney, state attorney, assistant attorney general, *etc.*, as a starting point. These offices lead to a trial court judgeship, which in turn leads to the state's highest court, either indirectly by way of an intermediate appellate court (34 of the 185 served on such a bench), or directly. Where the state legislature appoints judges, prior legislative service is an important path to the lower court appointment which in turn leads to the supreme court. However, this career route as well as other sorts of political service, at both the state and federal levels, is relatively infrequent in other states.

Over forty years ago, Professor Rodney Mott and his associates concluded their analysis of the background of appellate judges in the United States with the following observation:

There is considerable evidence that we are gradually developing a judicial profession within the legal profession . . . an increasing tendency to promote prosecuting attorneys to judgeships and trial judges to appellate posts have slowly increased the opportunity of the bench as a career.¹⁴

Our study confirms that the trends which Mott observed have continued and intensified. It is the case, as noted at the outset of this article, that United States judges are not professionally trained as in some continental democracies. However, our analysis indicates that, at least in the case of the highest state courts, the beginnings of a *de-facto* professional career pattern may be developing. This pattern involves an "apprenticeship" in a public law position and demonstrated competence as a trial judge. Other factors, such as the increasing terms of office of appellate judges and joint political party endorsement of incumbent judges, reinforce this pattern of increased professionalization of the judiciary.

We do not deny that the political nature of the recruitment process of judges continues to be a significant distinguishing characteristic of our system. Political offices are still the stepping stones to the bench. Success in attaining these "stepping stone offices" is undoubtedly affected by political constraints. However, our analysis indicates that these stepping stones, while political, are usually also legal/judicial in their

14. Mott, *et. al.*, *supra* note 11, as quoted in Schubert at 205.

nature and function. As such, they may involve the individual in a form of apprentice training or socialization in the norms and values of that state's judicial/legal systems. That is, the function of professional training which is performed in other countries by institutional mechanisms explicitly designed for this purpose, may be a latent function in the prior public legal/judicial pattern uncovered by our data.

The design of our study precluded systematic examination of this idea. However, future analysis involving judicial interviews might fruitfully examine this possibility in some detail. Such a study might fully confirm what Mott hypothesized several decades ago and the suggestions of this present study—that our recruitment systems, though political in format, provide *de-facto* professionalized training.¹⁵

TABLE ONE

Variations in Formal Means of Selection
(Total No. of Judges = 193, total No. of states = 25)

	Elected		Appointed		Missouri Plan (N=38)
	Partisan (N=45)	Non Partisan (N=42)	By Governor (N=32)	By Legislature (N=36)	
Florida		Arizona	Delaware	Connecticut	California
Illinois		Michigan	Maine	Rhode Island	Kansas
Kentucky		Minnesota	Massachusetts	South Carolina	Maryland
New York		Nebraska	New Hampshire	Vermont	Missouri
North Carolina		Wisconsin	New Jersey	Virginia	
Pennsylvania					

Source: BOOK OF THE STATES, (Chicago; 1964).

TABLE TWO

Formal Means of Selection

	Partisan Election (n=59)	Non- Partisan Election (n=40)	Gov't. Appt. (n=26)	Legis. Appt. (n=35)	Missouri (n=29)	Overall (n=185)
% Held Judicial Office	63.6	62.5	76.9	77.1	58.6	67.0
% Held Legislative Office	16.6	15.0	19.2	57.1	10.7	67.0
% Held State Administrative Office	7.4	10.0	15.3	8.5	10.7	9.7
% Held Public Legal Office	68.5	52.5	46.1	45.7	65.5	58.6

15. The author wishes to disavow in advance the contention that the present system, in possibly providing experiential training for the highest appellate judges, is thus in little need of reform. On the contrary the author's biases in this regard are oriented toward reform in the direction of institutionalized formal training mechanisms for judges at both the trial and appellate levels. The legal profession must soon recognize what its brethren in medicine and higher education have come to realize—that rapid advances in learning and increased emphasis on vocational specialization require periodic retraining if one is to remain abreast of developments in one's profession.