A STUDY OF SELECTED ASPECTS OF BEHAVIOR OF THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Thesis for the Degree of M. A.

MICHIGAN STATE UNIVERSITY

Alvin Dozeman

1960

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By

ALVIN DOZEMAN

AN ABSTRACT

Submitted to the College of Business and Public Service of
Michigan State University of Agriculture and
Applied Science in partial fulfillment
of the requirements for the
degree of

MASTER OF ARTS

Department of Political Science

1960

Approved S. Sidney Ulmer

Alvin Dozeman

ABSTRACT

This thesis is a study of selected aspects of behavior of the judges of the United States Court of Appeals for the Tenth Circuit from 1929 to 1959. The basic data used are the vote of the circuit judges. Hypotheses are formulated about prior judicial service, seniority, age, political party affiliation, appointing president and geographic location of the court and their influence on the votes. The extent to which the hypotheses are supported is measured by chi-square and rank correlation tests.

Lack of judicial experience before appointment and type of prior judicial service seem to have a significant influence. The seniority and age of the judge and the geographic location of the court do not seem to have a significant influence. The appointing president seems to exert some influence but not a significant amount. Generally, political party affiliation has not significant influence but there seem to be some exceptions.

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A word of thanks is due the members of the committee, Professors Ferguson, Schlesinger and Ulmer. As adviser, Professor Ulmer was of special assistance throughout the writing of this thesis and to him is owed an intellectual debt far above the levels of significance.

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I

It is the purpose of this study to examine certain aspects of the behavior of judges in the Tenth Circuit. To accomplish this, empirically testable hypotheses are formulated about the behavior of judges and data collected from the law reports is used to test the hypotheses. Where possible, explanations for deviations from expected findings are attempted.

The need for empirical analysis of judicial behavior has been well put by Professor Schubert in his recent book on the subject (1). He points out that the current narrow scope of public law is due to the fact that the overwhelming majority of those who teach it show "a monumental lack of concern for any quest for uniformities in the behavior of judges. . . . In particular, there has been no consideration of questions of methodology and research technique. . . . (2)"

The need for study of judges on the lower federal courts has been pointed out by Professor Peltason (3) who says "there is a tendency to consider the justices of the Supreme Court the only judges worthy of serious attention by students of politics (4)." He feels this is unfortunate as lower court judges "are actively engaged in making public policy (5)."

This study, it is hoped, will in some small way aid in satisfying both needs by empirically examining certain behavior of judges in the Tenth Circuit.

II

The hypotheses tested in this study are not pure creations. Some of them are drawn from a general, though limited, knowledge of judges and the judicial process. Some of them are vaguely stated in various legal

commentaries. Some of them have been formulated and tested in studies of the Supreme Court and, by analogy, are used here because it is possible to establish similarities between the Supreme Court and some of the lower federal courts.

The specific similarity we wish to establish is that between the function of the Supreme Court as it relates to the circuit courts and the function of the circuit court as it relates to the district courts. That this can be established must now be determined.

III

One of the functions of the Supreme Court is to insure uniformity of decisions among the courts of appeals so the law will be uniform throughout the federal court system. This was pointed out by the late Chief Justice Vinson in a speech to the American Bar Association.

> The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights and uniformity of Judgments." The function of the Supreme Court, is, therefore, to resolve conflicts of opinions on federal questions that have arisen among lower courts. . . . (6)

The Court usually resolves such conflicts by use of its certiorari power. Rule 19 states that among the reasons considered by the Court when passing on a petition for certiorari are "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been but should be settled by the Court . . . . (7)" Stern and Gressman state that when there is a conflict among the circuits the Supreme Court will <u>usually</u> grant certiorari (8). Robertson and Kirkham state the Court will grant certiorari "as of course and irrespective

of the importance of the question of law involved (9)." After granting certiorari, the Supreme Court usually renders an opinion which then becomes binding precedent for the courts of appeals.

The precedent setting function of the Supreme Court on the national level is performed by the appeals courts on the circuit level. Although the courts do not have a special certiorari power, by affirming and reversing the district courts they too can set precedents. Once set, the precedents of an appeals court are binding on the district courts in that circuit although there may be contrary precedents in other circuits which the district courts would prefer to follow (10).

Related to the precedent setting function is the administrative function. In the federal system, the chief justice of the Supreme Court and the chief judges of the courts of appeals make temporary assignments of judges to other courts (11). The chief justice calls the Judicial Conference of the United States (12), and the chief judges call the circuit conferences (13). Thus there is ample justification for drawing analogies between the Supreme Court and the circuit courts and further discussions of the similarities will be presented with each hypothesis as necessary.

IV

The specific circuit selected for study is the Court of Appeals for the Tenth Circuit. The Tenth Circuit was created in February, 1929, by dividing the Eighth Circuit, and since then has remained geographically stable. The states included in the Tenth are Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Except for Oklahoma, each state has a single district court; Oklahoma has three. The circuit and district judges who

were serving in the Eighth Circuit were assigned to the Tenth if they resided in the area included in the Tenth. Two circuit judges and eight district judges were so transferred. However, three of these had served less than a year before transferring. Since its formation, eleven circuit judges have sat on the Tenth Circuit and twenty-eight district judges have served the districts within it.

V

The necessary information on the voting of the judges was culled from the Federal Reporter, Federal Reporter Second Series, and the Federal Supplement, published by West Publishing Company. The publications are not "official" in the same sense as are the reports of Supreme Court decisions published by the Government Printing Office; however, West Publications are used extensively by lawyers and judges in all levels of courts. Because the action in both the district and appeals courts must be reported to supply the necessary information, not every case in the Tenth Circuit can be used as every case is not reported. The procedure used in gathering the data is as follows. The Federal Reporter and the Federal Reporter Second Series (F. and F.2d) were used to obtain a list of the appealed cases in the Tenth Circuit. These cases are grouped by circuit in an index in each volume. The information on each case for the action in the court of appeals was placed on a three-by-five card; this information consisted of the citation, date, action of the court of appeals, how each judge voted and the citation for the action in the lower court. The citation for the action in the lower court was checked in the Federal Supplement (F. Supp.) to obtain the name of the district judge, the date, and the court and this was also placed on the card.

Because the period under study spans thirty years, not every circuit judge had an opportunity to pass upon every district judge, or in some instances, only a few opportunities. That is, some circuit judges may have left the bench before some district judges were appointed and vice versa. Obviously, unless there is some overlap in their periods of service, we cannot speak of a relationship between judges. Since the actions of judges are shown almost exclusively in percentages in this study, it is necessary to set a minimum number about which relatively meaningful statements could be made in percentage figures; this is set at fifteen (14).

Some of the information is shown by quarters of service for the judges. In forming the quarters, the length of service of the judge was calculated to begin with his appointment and, except for those whose service actually ended before, to end in 1959, the end of the period under study. Exceptions were made in instances where the judge had served for less than five years; any judge who served for this short a period was considered as having served only one quarter.

Since hypotheses are here formed with expectations of having them supported or refuted, some measure must be used to determine the extent to which this occurs. The measure used here is the probability that the findings have of occurring by chance. The two tests used are the chi-square and rank correlation, both as given in Sidney Siegel: NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES. The results of these tests are translated into levels of significance and shown on each table. The level of significance which must be met to claim support for a hypothesis is set here at .05. However, all data, regardless of significance is shown and discussed.

VI

"Judicial ability" and "judicial capability" are used interchangeably and, as here used, are defined as the success a lower court judge has in getting approval of his decisions by a higher court judge. Thus if we find a lower court judge with a higher percentage of his actions approved, we will say that in the opinion of the higher court judge, this judge has a high degree of judicial ability. The rate at which a lower court judge has his actions approved may be called the "approval rate" or "rate of deference" because the approval of a decision by a higher court judge can be considered as an act of deference by the judge to the action of the lower court judge. Higher court judges also have approving rates: the rate at which they approve the actions of the lower court judges. "Decision," "action" or "case" may be used to refer to the same thing.

NOTES

1. Schubert, Glendon A. QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR. East Lansing (Mich.): 1959.

2. Id. P. 4.

3. Peltason, Jack W. FEDERAL COURTS IN THE POLITICAL PROCESS. Garden City (N.Y.): 1955.

4. Id. P. 13.

5. Id. P. 15.

6. Vinson, Fred W. Address Before the American Bar Association. 69 SUP. CT. v-xiii (1949).

7. Stern, Robert L. and Eugene Gressman. SUPREME COURT PRACTICE (2d ed.). Washington, D. C.: 1954. P. 462.

8. Id. P. 111.

9. Robertson, Reynolds and F. R. Kirkham. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES. (2d ed. R. Wolfson & P. Kurland). New York: 1951. P. 629. But see Stern, Robert L. Denial of Certiorari Despite a Conflict. 66 HARV. L. REV. 465 (1953) and Harper, Fowler V. and Arnold Leibowitz. What the Supreme Court did not do during the 1952 Term. 102 U. PA. L. REV. 427 (1954). Pp. 442-45.

10. 28 U.S.C.A. § 46, n. 3 (1949).

11. 28 U.S.C.A. §§ 291-292 (Supp. 1959).

12. 28 U.S.C.A. § 331 (Supp. 1959).

13. 28 U.S.C.A. § 333 (Supp. 1959).

14. By setting the level at fifteen, it is possible to include a number of judges who had just above fifteen cases, i.e., from fifteen to twenty. There were almost no judges who had just below fifteen cases; generally the drop was to below ten.

II

We have noted above that the Supreme Court brings about uniformity by reversing some circuit judges and affirming others. We would hardly expect this reversing and affirming to be done at random. Rather, we would expect that some circuit judges would have more cases affirmed than others. This tends to be confirmed by a study of Chief Judge Edgerton of the Court of Appeals for the District of Columbia (1). This study showed that there was a sixty percent chance of getting a grant of certiorari when Judge Edgerton dissented but only a thirteen percent chance when he wrote the majority opinion. In seventeen out of twenty-two cases in which he dissented, the Supreme Court reversed.

There is other evidence, less objective, that Supreme Court Justices take note of the circuit judges. We are told that the late Chief Justice Vinson always asked his law clerks the name of the lower court judge (2). In one of the important cases in which Vinson wrote the opinion, he stated that he was adopting the language of the lower court judge. The judge in this case was Judge Learned Hand, one of the better known judges on the federal bench (3).

Justice Frankfurter, writing on the retirement of Judge Magruder of the First Circuit, wrote,

> Naturally enough, an important factor in the exercise of the Court's discretionary judgment is the weight of the opinion below . . . . When petitions for certiorari from decisions in which Judge Magruder wrote have come before the Court, such has been the quality of his opinions, the persuasiveness of his reasoning, and the confinement of decision to its proper scope, that on more than one occasion one has been led to say to his brethern, "Were we to bring the case here, could we improve on Magruder? (4)"

With this, as a circuit judge who reviews district court actions, Judge Magruder agrees: ". . . if the district court has written a careful and

full opinion, with which we agree, and which we feel unable to improve upon, we should affirm on the opinion of the court below (5)."

So we see that the reviewing judge takes into consideration who the judge in the lower court was and that some lower court judges are more successful than others in getting their actions approved. Or, as we are using the terms, they have more ability and higher approval rates. The point of interest here is whether the difference in approval rates is such that it is not merely a chance occurrence. To determine this, a hypothesis is stated in manner so as to make empirical testing possible. So stated, it is: There will be a significant difference in the approval rates of judges in the Tenth Circuit.

That the difference is significant and that it is not a chance occurrence can be seen from the tables which follow. In six out of nine tables the level of significance is above .05. Table 1 gives the approval rates of district judges who had the necessary number of actions; the range here is from 87.5 to 54.2; the level of significance is .02.

TABLE 1

APPROVAL RATES OF DISTRICT JUDGES WITH NECESSARY NUMBER OF CASES IN PERIOD STUDIED

District Judge	Approval Rate
Kennedy	79.4
Symes	54.8
Kennamer	75.5
Vaught	54.2
Hopkins	64.7
Rice	87.5
Mellott	72.7
Wallace	62.2
Average	65.1

X^2: 16.63 df: 7 p.: .02

This means that for some reason, the circuit judges in the Tenth Circuit approve the actions of these district judges in a manner such that only two times out of a hundred could it occur by chance.

Tables 2 to 5 present data on one circuit judge and his approving rate for three or more district judges. Tables 6 to 9 give the approval rates of one district judge from three or more circuit judges. Only one circuit judge and two district judges have non-significant differences in their rates.

TABLE 2

APPROVING RATE OF CIRCUIT JUDGE PHILLIPS

District Judge	Approving Rate
Kennedy	84.3
Symes	52.0
Kennamer	79.0
Vaught	57.6
Hopkins	81.2
Mellott	68.7
Wallace	59.2
Phillips Average	66.5

X^2: 15.87 df: 6 p.: .02

TABLE 3

APPROVING RATE OF CIRCUIT JUDGE BRATTON

District Judge	Approving Rate
Kennedy	84.6
Symes	56.5
Kennamer	71.4
Vaught	63.0
Wallace	60.6
Bratton Average	68.1

X^2: 7.32 df: 4 p.: .20

TABLE 4

APPROVING RATE OF CIRCUIT JUDGE HUXMAN

District Judge	Approving Rate
Kennedy	91.3
Vaught	34.2
Wallace	47.8
Huxman Average	59.0

X^2: 30.38 df: 2 p.: .001

TABLE 5

APPROVING RATE OF CIRCUIT JUDGE MURRAH

District Judge	Approving Rate
Vaught	37.5
Mellott	72.2
Wallace	82.3
Murrah Average	61.3

X^2: 18.65 df: 2 p.: .001

TABLE 6

APPROVAL RATE OF DISTRICT JUDGE KENNEDY

Circuit Judge	Approval Rate
Phillips	84.3
Bratton	84.6
Huxman	91.3
Kennedy Average	79.4

X^2: 2.45 df: 2 p.: .30

TABLE 7

APPROVAL RATE OF DISTRICT JUDGE KENNAMER

Circuit Judge	Approval Rate
Lewis, R. E.	71.4
Cotterall	80.0
McDermott	76.1
Phillips	79.0
Bratton	71.4
Kennamer Average	75.5

X^2: .98 df: 4 p.: .98

TABLE 8

APPROVAL RATE OF DISTRICT JUDGE VAUGHT

Circuit Judge	Approval Rate
Phillips	57.6
Bratton	63.0
Huxman	34.2
Murrah	37.5
Pickett	52.9
Vaught Average	54.2

X^2: 14.50 df: 4 p.: .01

TABLE 9

APPROVAL RATE OF DISTRICT JUDGE WALLACE

Circuit Judge	Approval Rate
Phillips	59.2
Bratton	60.6
Huxman	47.8
Murrah	82.3
Pickett	62.5
Wallace Average	62.2

X^2: 10.29 df: 4 p.: .05

The hypothesis that there will be a significant difference in the approval rates of judges in the Tenth Circuit finds support in the data from the Tenth Circuit. In the sections which follow, the data will be viewed in various ways to determine whether some suggestions can be offered to explain this difference in rates.

NOTES

1. Rosenzweiz, Simon. The Opinions of Judge Edgerton--A Study in the Judicial Process. 37 CORNELL L.Q. 149 (1952). Pp. 165-66.

2. Harper, Fowler V. and Arnold Leibowitz. What the Supreme Court Did Not Do During the 1952 Term. 102 U. PA. L. REV. 427 (1954). P. 440, n. 60.

3. Dennis v. United States 341 U.S. 494 (1951). P. 510.

4. Frankfurter, Felix. Calvert Magruder. 72 HARV. L. REV. 1201 (1959). P. 1202. See also Frankfurter, Felix. Judge Henry Edgerton. 43 CORNELL L. Q. 161 (1957).

5. Magruder, Calvert. The Trials and Tribulations of an Intermediate Appellate Court. 44 CORNELL L. Q. 1 (1958-59). P. 3.

III

Not all circuit judges begin their careers with the same personal background and experiences and we would expect that this would have some effect on their approving rates. The specific aspect of background which we will investigate in this section is that dealing with prior judicial service or lack of such service.

There are some rather vague assumptions in this area explication of which may aid us somewhat in forming the hypothesis. One of these is that prior service as a district judge will give a circuit judge more sympathy and knowledge of the problems faced by the district judge. This was well stated by a district judge in a recent tribute to a retiring circuit judge. The author is the Chief Judge of the District of Minnesota; the retiring judge served on the Court of Appeals which reviewed cases from Minnesota.

> During his long tenure, his opinions cover the entire gamut of federal litigation. Among the many contributions he has made to that field, however, it is interesting to note that, as a former trial judge, he always has recognized the wide discretion which must necessarily rest with the trial court . . . . When he came to the court of appeals in 1932, he was a seasoned trial judge. He fully recognized and appreciated the many daily problems which come across the trial court's threshold . . . . (1)

However, as is so often the case evidence contrary to the assumption can also be found. In this instance it is a very sympathetic view of the position of the district judge expressed by a circuit judge who did not serve as a district judge. The following is from an article by Judge Magruder of the Court of Appeals for the First Circuit.

> As to trial judges, we must always bear in mind that they may be as good lawyers as we are, or better. They are under the disadvantage of often having to make rulings off the cuff, so to speak, in the press and urgency of a trial proceeding, and the main reason we on appeal may have a better chance of being right is that we have

> more time for reflection and study. Hence, we should approach our task of judicial review with a certain genuine humility.(2).

Although a sympathetic view of the district judge and his problems is not necessarily limited to former district judges, it would seem that common sense gives great weight to former service as a district judge and the hypothesis is so worded. Circuit judges who have served as district judges will, during the first three years of service as circuit judges, have approving rates significantly higher than circuit judges who did not so serve and no significant difference after three years (3).

The data from the Tenth Circuit does not support the hypothesis. In Table 10 the approving rates of former district judges are compared with all other circuit judges for the first and the second three year periods of service. For both periods, former district judges have slightly lower approving rates. The hypothesis must therefore be rejected.

TABLE 10

COMPARISON OF APPROVING RATES OF CIRCUIT JUDGES

Period of Service	Average Rate	Former District Judges	All Others
1-3 years	66.3	64.5	68.8
4-6 years	54.7	53.7	56.0

However, our investigation of the effect of prior judicial service should not stop here. Among the circuit judges who were not district judges are some who were state judges and some who had no prior experience as judges. This gives us three categories of circuit judges for comparison and this comparison is shown in Table 11.

TABLE 11

COMPARISON OF APPROVING RATES OF CIRCUIT JUDGES

Period of Service	Average Rate	Former District Judges	Former State Judges	No Prior Experience
1-3 years	66.3	64.5	65.0	71.6
4-6 years	54.7	53.7	85.0	43.4

Here we see that the approving rates for the first six years vary widely. All circuit judges with prior experience begin with approximately the same rate but then their rates go in opposite directions. The circuit judges with no prior experience do not have approving rates closely equal to those of either of the other two categories.

We have noted above the amount of fluctuation in the approving rates for the first six years of service. The question is raised as to whether this continues. In Table 12, Table 11 is continued for another three years. It can be seen that all three categories of circuit judges have fairly equal approving rates and that all are near the average for the third three-year period.

TABLE 12

COMPARISON OF APPROVING RATES OF CIRCUIT JUDGES

Period of Service	Average Rate	Former District Judges	Former State Judges	No Prior Experience
1-3 years	66.3	64.5	65.0	71.6
4-6 years	54.7	53.7	85.0	43.4
7-9 years	66.2	69.0	64.4	65.5

Only one circuit judge without prior judicial experience served longer than ten years. Two former state judges served longer than ten years

but one of these transferred from the Eighth Circuit and after his eleventh year of service heard only from one to six cases a year, in effect leaving only one former state judge who served longer than ten years. After the tenth year of service the Court of Appeals for the Tenth Circuit was really composed of all former district judges except for the one former state judge and the one man with no prior judicial experience. Because of this limitation, it is not possible to continue a comparison beyond ten years; only the average approving rates for all circuit judges will be shown as in Table 13.

TABLE 13

AVERAGE APPROVING RATE OF ALL CIRCUIT JUDGES
BY THREE-YEAR PERIODS

Period of Service	Average Approving Rate
1-3	66.3
4-6	54.7
7-9	66.2
10-12	68.5
13-15	66.1
16-18	66.0
19-21	60.9
22-24	65.6

We see that the approving rates never fluctuate as much as they did in the first ten years. This suggests that upon coming to the court, circuit judges have a less fixed position or are less confident of their role and that they adapt through time and experience. This process could be somewhat similar to that of Supreme Court Justices as discussed by Professor Snyder (4). In her study of cliques on the Supreme Court, Professor Snyder found that newly appointed Justices tended to begin in a neutral

or pivotal clique and later join a clique that was less neutral. She suggests this may be because the Justices gain an "in-group" feeling for one of the less neutral cliques. Although we are not dealing here with cliques as Professor Snyder uses the term, we could consider the panel of judges sitting in each case a clique. The acquired "in-group" feeling would then be for the particular panel of judges. That these panels tend to be cohesive is supported by the rate of dissent in this data: only 53 out of 1127 votes, or 4.7 percent, were cast in dissent.

Looking again at Table 12, it is interesting to note the amount of fluctuation in approving rate by each category of circuit judge. These amounts are presented in Table 14.

TABLE 14

COMPARISON OF AMOUNT OF FLUCTUATION IN APPROVING RATES OF CIRCUIT JUDGES

Between 3-Year Periods	Average Amount	Former District Judges	Former State Judges	No Prior Experience
1-2	11.6	10.3	20.0	28.2
2-3	11.5	15.3	20.6	22.1

Former district judges have the least amount of fluctuation in their approving rates; this suggests that either they have less difficulty in finding a position, or that they may have had a partially determined one before coming to the court of appeals. Both would be possible as the district judges would have more knowledge of the types of actions brought in federal courts and some knowledge of the judicial process in those courts. Since former district judges seem to be more stable, this might help account for the stability in the approving rates after the tenth year

of service for, as we have noted, former district judges are in the majority after this time. Former state judges have an intermediate amount of approving rate fluctuation. A suggested reason for this is that while they would have less knowledge of federal types of litigation, they would at least have some knowledge of the judicial process. Circuit judges with no prior experience would probably have little knowledge of the judicial process or of federal litigation. This may be the reason for their having the greatest amount of approving rate fluctuation for both periods.

In this section the background of circuit judges in so far as it related to prior judicial service was investigated. The original hypothesis was not confirmed. However, a difference in background was reflected in approving rates. It was found that the amount of fluctuation in approving rates seemed to be related to the type of judicial service experienced before coming to the circuit court; former district judges had the least amount of approving rate fluctuation, former state judges an intermediate amount, and circuit judges with no prior judicial experience had the greatest amount of approving rate fluctuation.

NOTES

1. Nordbye, Gunnar H. A Tribute to Judge John B. Sanborn. 44 MINN. L. REV. 200 (1959). P. 203.

2. Magruder, Calvert. The Trials and Tribulations of an Intermediate Appellate Court. 44 CORNELL L.Q. 1 (1958-59). P. 3.

3. A three-year period is used because this ensures the necessary number of cases for comparison for the periods before and after the cut-off date.

4. Snyder, Eloise C. The Supreme Court as a Small Group. 36 SOCIAL FORCES 232 (1958). P. 238.

IV

The effect of seniority on judges has been rather widely studied by persons in the field of law and political science. These studies have tended to concentrate on the relation of seniority and judicial attitudes and philosophy. This study, however, will attempt to discover whether seniority has a significant effect on the approving and approval rates of judges without discussing its relation to judicial philosophy.

We have noted previously that the approving rates of circuit judges tended to fluctuate during the early period of service and then stabilize. This, it was suggested, might indicate less self-confidence in the early period of service and that self-confidence was gained through service on the bench.

When deciding whether to approve or disapprove the actions of a district judge, the circuit judge is in a position of being able to express an opinion opposed to that of the district judge. As a circuit judge gains experience through seniority, we could expect him to hesitate less to overrule the district judge. Stated in hypothetical form, this is

As the circuit judge gains seniority, his approving rate will decrease.

To test this hypothesis, the approving rates of the circuit judges were computed by quarters of service; these are shown in Table 15.

TABLE 15

APPROVING RATES FOR CIRCUIT JUDGES BY QUARTERS OF SERVICE

Quarter	Approving Rate
1	65.2
2	64.5
3	65.2
4	60.6

r_s .416

The hypothesis is not supported. The level of significance does not meet that set. The date is presented in another form in Table 13 in which the approving rates are given by three-year periods; the r_s is .619. Arranged by five-year periods (not shown) the r_s is -.400. Using the data presented here as a guide, we could not say that increasing seniority causes the circuit judge to defer less to the district judge.

Turning now to the district judge, we might again expect that as the district judge gains seniority he would have a higher approval rate. This might be because the circuit judge would consider him as having gained ability through service. The hypothesis stated here is:

As the district judge gains seniority, his approval rate will increase.

The approval rates by quarters of service for the district judges are given in Table 16. Again the hypothesis is not supported.

TABLE 16

APPROVAL RATES FOR DISTRICT JUDGES BY QUARTERS OF SERVICE

Quarter	Approval Rate
1	64.6
2	62.6
3	70.9
4	61.5

r_s .400

In this section, the effect of seniority upon the approving and approval rates of judges was investigated. The two hypotheses were not supported. From the data used here, it would not be possible to say that seniority has a significant effect on the approving and approval rates of of judges.

V

The data on the age of a judge at the time of his appointment and its effect on his subsequent behavior is placed here because the same considerations are applicable to age and seniority as factors in judicial behavior as studied here. The available literature on both is actually more concerned with their effect on judicial attitudes, not of concern here. Thus, in attempting to form the hypothesis, "guesstimates" play a large role.

We could assume, for instance, that a young, newly appointed circuit judge would feel less inclined to substitute his opinion for that of the district judge than would an old, newly appointed circuit judge. Or, we could assume that a circuit judge would feel more inclined to approve the actions of an old, newly appointed district judge than the actions of a young, newly appointed district judge. However, for all cases, we could also assume the opposite as there is no evidence either way. For this reason, the hypothesis is formed as follows:

The age at which a judge is appointed will not significantly affect his approving or approval rate.

This hypothesis is supported by the data in Tables 17 and 18.

In Table 17, the circuit judges with the necessary number of actions are listed by the age at which they were appointed, the oldest at the top and the youngest at the bottom; their approving rates for the first quarter of service are also given. The correlation is only .383 and does not meet the level of significance set.

TABLE 17

CORRELATION BETWEEN AGE AT APPOINTMENT AND APPROVING RATE OF CIRCUIT JUDGES

Circuit Judge	Appointed At Age	Approval Rate For First Quarter Of Service
Williams	69	73.9
Cotterall	64	65.7
Huxman	52	55.1
Bratton	45	77.3
Lewis, D. T.	44	67.8
Phillips	44	61.1
McDermott	43	73.6
Murrah	36	47.3

Omitted is Lewis, R. E. because he did not serve his first quarter on the Tenth Circuit.

r_s .383

The information for district judges is given in Table 18; the district judges are grouped by age at which appointed. Again, the correlation does not meet the level of significance set.

TABLE 18

CORRELATION BETWEEN AGE AT APPOINTMENT AND APPROVAL RATE OF DISTRICT JUDGES

Appointed At Age	Approval Rate For First One-Half of Service
60 or over (1)	67.6
50-60 (2)	56.7
50 or under (3)	65.6

1. Hatch, Helvering, Kennamer, Knous, Rizley and Wallace.

2. Arraj, Hopkins, Kerr, Mellott, Ritter and Vaught.

3. Chandler, Christenson, Kennedy, McDermott, Murrah, Rice, Rogers, Savage and Symes.

r_s .556

From the data presented here, we cannot say that the age at which a judge is appointed significantly affects his approving or approval rate.

VI

The subject of "judges and politics" is one of great interest to both student and layman. Very often, the interest centers on political party affiliation as an indicator of judicial philosophy or as an aid in the explanation of judicial behavior.

An early examination of judicial behavior from a more or less empirical view is Professor Pritchett's work on the Supreme Court (1). In it, Justices are grouped into blocs based upon dissenting and assenting votes. When this is done, it is found that the consistent blocs on the Court are not based upon political party affiliation. One example of the disagreement among Justices of the same party is that of Justices Brandeis and McReynolds. These two men, both Democrats and both appointed by President Wilson (Pritchett calls them Wilson's "woefully mismated pair of representatives)" (2), were never in the same bloc.

Applying a modified bloc analysis to the Supreme Court, Professor Schubert also concludes that "the partisan political affiliations of the justices appear to have been irrelevant to the group behavior of the United States Supreme Court . . . . (3)" Finding, however, that it is of primary importance in the Michigan Supreme Court, Professor Schubert suggests that the life tenure of federal judges may allow for more independence (4). In her study of clique membership on the Supreme Court, Professor Snyder found no relation between political party affiliation and clique membership (5).

Professor Ulmer's study of judicial lawmaking found no conclusive evidence that attitude toward change was related to the political affiliation of a Supreme Court Justice (6). The importance of this finding in a legal system in which "stare decisis is at least the everyday working rule of our

law" (7) should perhaps be underscored. In such a legal system, the attitude towards change or towards the proper role of stare decisis is an important, if not the most important, part of a judicial philosophy. It would no doubt create quite a stir should a study show a definite relation between the political party of a judge and his attitude toward change. If we are to judge from the sample statements which follow, it would be difficult to establish relation between the politics and attitudes of a judge.

In each case, the "change" discussed is the one which ranks perhaps uppermost in the considerations of the circuit judges in their own decision-making: a change by the Supreme Court of the precedent which controls the case being considered. As noted earlier, these precedents are considered binding on all lower federal courts. However, among the judges on the federal courts, there seems to be considerable disagreement as to the degree to which the precedents must be followed. For some judges, a precedent is a precedent is a precedent; for others, there are precedents and then there are precedents.

Speaking for those to whom precedents are precedents, Circuit Judge Magruder (8) cites with approval his own First Circuit (he not sitting) and the opinion of Judge Mahoney:

> It is true that [the precedents] were by a divided court but until they are overruled by the court itself or Congress enacts legislation . . . contrary to the interpretation placed upon it by the court, we are bound to accept the law as promulgated by [them] (9).

Dissenting from this view was Chief Judge Woodbury:

> . . . on rare occasions . . . situations arise when in the exercise of the duty to prophesy thrust upon us by our position in the federal judicial system we must conclude that dissenting opinions of the past express the law of today (10).

Of the "duty to prophesy," Chief Judge Hutcheson has written:

> We cannot agree . . . that it is any part of our duty to consult crystal ball gazers or diviners or to do the gazing and divining for ourselves in order to base a decision on a prophesy (11).

And Judge Harrison:

> It is not my function to disregard [a precedent] because it is old. If the Supreme Court was in error in its former opinion or changed conditions warrant a different approach, it should be the court to correct the error. Trial courts . . . should not devote their efforts to guessing what reviewing courts may do with prior holdings because of lapse of time or change of personnel in such courts (12).

Among those who agree with Judge Woodbury that the duty to prophesy is a real one we have Judge L. Hand:

> . . . I conceive that the [court's] duty is to divine, as best it can, what would be the event of an appeal in the case before it (13).

And Judge J. Frank:

> Legal doctrines . . . often prove to be inadequate . . . and when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty . . . to follow it not to resist it (14).

A Judge skilled in perceiving trends in the Supreme Court was the late Chief Judge Parker who engaged in what Judge Magruder called "nose-counting" in the second Flag Salute Case:

> Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court . . . . The developments with respect to the [precedent] , however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound (15).

Since Judge Parker was upheld by the Supreme Court (16), it casts some doubt on the oft-repeated "counters can't think."

If we attach party labels to the judges who authored the statements, we see that judges in both political parties disagree with each other and that the party label will not help to indicate or explain the attitude towards change expressed by these judges. Judges Magruder, Mahoney and

Woodbury were all on the First Circuit; all were Democrats appointed by President F. D. Roosevelt; they split as to the role of precedent 2-1. Judge Hutcheson, a Democrat appointed by a Republican president, disagreed with Judges Parker and Hand, Republicans appointed by Republican presidents. Judge Frank, a Democrat from New York, disagreed with Judge Harrison, a Democrat from California, both appointees of President F. D. Roosevelt (17). Thus it seems quite clear that the party label does not help identify that important part of a judicial philosophy which relates to change. We have next to determine whether we can correlate political affiliation with particular patterns of behavior of judges under study here. To do this, a rather broad hypothesis is formulated.

Political party affiliation will not significantly influence the approving and approval rates of judges in the Tenth Circuit.

We will first determine whether the approval rates generally are significantly influenced by political party. That is, by approval rate alone, could we expect to separate the Republicans from the Democrats; or, stated in another manner, could we expect to find a typically Republican or a typically Democratic approval rate. In Table 19, the circuit judges are grouped by party and their over-all approving rate given. No significant difference between the parties appears. In Table 20 the district judges with the requisite number of cases are grouped by party and their over-all approval rates given. Again no significant difference between the parties appears. In fact, the differences among the district judges of each party are greater than the differences between the parties. It thus seems safe to say that the general approval rate of a judge is not significantly influenced by political party.

TABLE 19

POLITICAL AFFILIATION AND AFPROVING RATE OF CIRCUIT JUDGES

Republican Circuit Judges	
Lewis, R. E.	62.0
Cotterall	65.7
Phillips	66.5
McDermott	69.6
Lewis, D. T.	67.8
X^2: .67 df: 4 p.: .98	
Democratic Circuit Judges	
Bratton	68.1
Williams	67.7
Huxman	59.0
Murrah	61.3
Pickett	58.9
X^2: 1.48 df: 4 p.: .90	
Republican Average	65.6
Democratic Average	63.1
X^2: .03 df: 1 p.: .90	
Average of All Circuit Judges	64.2

TABLE 20

POLITICAL AFFILIATION AND APPROVAL RATE OF DISTRICT JUDGES

<u>Republican District Judges</u>	
Hopkins	64.7
Kennamer	75.5
Kennedy	79.4
Symes	54.8
Vaught	54.2
X^2: 11.23 df: 4 p.: .05	
<u>Democratic District Judges</u>	
Mellott	72.7
Rice	87.5
Wallace	62.2
X^2: 7.46 df: 2 p.: .05	
Republican Average	60.3
Democratic Average	66.8
X^2: .40 df: 1 p.: .70	
Average of All District Judges	65.1

Next we determine whether the approving rate of a circuit judge for any district judge is significantly influenced by political party; the evidence here is less conclusive. In Table 21 the approving rates of the circuit judges of both parties are given for the district judges of both parties.

TABLE 21

POLITICAL AFFILIATION AND RATES OF CIRCUIT AND DISTRICT JUDGES

Approval Rate of All Republican Circuit Judges When Reviewing	
All Republican District Judges	65.4
All Democratic District Judges	67.0
.60 df: 1 p.:	.50

Approval Rate of All Democratic Circuit Judges When Reviewing	
All Republican District Judges	60.1
All Democratic District Judges	66.7
.28 df: 1 p.:	.70

The Republican circuit judges approve decisions of Democratic district judges more than decisions of Republican district judges and both above the average approving rate of all circuit judges. The approval rate of Republican district judges is practically (.2 less) the same as the average of all Republican circuit judges. Democratic circuit judges approve decisions of Democratic district judges above the average approving rates of all circuit judges and all Democratic circuit judges while decisions of Republican district judges are approved less than both averages. Thus there is a small, but not significant, difference in the party approving rates.

Among the Democratic circuit judges, however, are some who do vary their approving rates with the political party of the district judge. In Table 22 the approving rates of three Democratic circuit judges for the district judges of both parties are given. The level of significance is such that the difference in approving rates for the parties could hardly have happened by chance so other explanations should be offered.

TABLE 22

POLITICAL AFFILIATION AND APPROVING RATE OF THREE DEMOCRATIC CIRCUIT JUDGES

Circuit Judge	Approval Rate When District Judge is Republican	Democratic	Difference Between Parties
Huxman	54.3	64.5	10.2
Murrah	50.6	73.5	22.9
Pickett	54.1	61.1	7.0
55.44	df: 2		p.: .001

The simplest explanation would be that some Democratic judges are partisan and show it in their approving rates. This, however, is less explanation than description and something more complex will be attempted.

The three judges in Table 22 were all appointed in the period 1939-1949; since the only judges appointed since then, two Republicans by President Eisenhower, do not have enough actions to make comparisons, these three are the most recent judges for which comparisons can be made. Looking at Table 22, we see that the "Difference Between Parties" increases going from Huxman (1939) to Murrah (1940) and decreases going from Murrah to Pickett (1947). If we picture the "Difference" as a line on a chart, it will resemble a slightly lopsided tent.

One speculation which could be made is that since 1939, circuit judges have shown greater or lesser degrees of partisanship in their approval rates. The usefulness of this speculation cannot be conclusively shown until the judges appointed by President Eisenhower have enough actions to make comparisons. If it is correct we will expect to find them distinguishing between parties at about the same rate as the judges in Table 22.

We could also speculate that generally judges are uninfluenced by political party affiliations and that these three are an exception to the rule. If this speculation is correct, we will expect that the judges appointed by President Eisenhower will show little or no difference in approval rates of the district judges of different parties.

Thus the original hypothesis that political party affiliation would not influence approval rate is generally supported but there are some exceptions.

NOTES

1. Pritchett, C. Herman. THE ROOSEVELT COURT. New York: 1948.

2. Id. P. 2.

3. Schubert, Glendon A. QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR. East Lansing (Mich.): 1959. P. 142.

4. Ibid.

5. Snyder, Eloise C. The Supreme Court as a Small Group. 36 SOCIAL FORCES 232 (1958). P. 435.

6. Ulmer, S. Sidney. An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court. 8 J. PUB. L. 414 (1959). P. 435.

7. Cardozo, Benjamin N. THE NATURE OF THE JUDICIAL PROCESS. New Haven: 1921. P. 20.

8. Magruder, Calvert. The Trials and Tribulations of an Intermediate Appellate Court. 44 CORNELL L. Q. 1 (1958-59). P. 4.

9. United States v. Girouard 149 F.2d 760 (1st Cir. 1945). P. 763.

10. 149 F.2d 760. P. 765, (dissenting).

11. RD-DR Corporation v. Smith 183 F.2d 562 (5th Cir. 1950). P. 565.

12. Toolson v. New York Yankees, Inc. 101 F. Supp. 93 (S.D. Calif. 1951). Pp. 94-95.

13. Spector Motor Service v. Walsh 139 F.2d 809 (2d Cir. 1943). P. 823, (dissenting).

14. Perkins v. Endicott Johnson Corp. 128 F.2d 208 (2d Cir. 1942). P. 217.

15. Barnette v. West Virginia State Bd. of Education 47 F. Supp. 251 (S.D. W.Va. 1942). Pp. 252-53.

16. West Virginia State Bd. of Education v. Barnette 319 U. S. 624 (1943).

17. Staff of Sen. Comm. on the Judiciary, 85th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND THE JUDGES WHO SERVED DURING THE PERIOD 1801 THROUGH MARCH 1958 (Comm. Print 1958). 30 WHO'S WHO IN AMERICA. Chicago: 1958.

VII

We have seen that political party affiliation in general is not a factor influencing the approving rate of judges. In this section the influence of the appointing president on the approving rates will be investigated.

There are two general assumptions in this area which have influenced the formulation of the hypothesis. The first is that the appointing president considers the judicial philosophy of men he appoints; although this is usually in a relatively general manner, the president may have specific issues in mind when he appoints a judge. The second is that, while the president may not always predict correctly, the men he appoints will share a judicial philosophy with each other to a greater degree than with the appointees of any other president. The literature on the first assumption is abundant and almost unanimous; on the second less abundant and less unanimous.

A good picture of the way in which a president examines the general judicial philosophy of his appointees is given in Professor McHargue's article on President Taft and his appointments to the Supreme Court (1). President Taft's concern with his judicial nominees "was consequent upon his awareness that institutions are inseparable from the men who make them up (2)." For Taft, "a close correlation of the political, social, and economic views of appointer and appointee was a controlling factor, while co-membership in a political party was a subsidiary consideration (3)." The president was interested in his nominees' "real," not "nominal" politics.

That a president can also be interested in a man's views on a specific

issue is best illustrated in Professor Ratner's article on President Grant and his Court appointments (4). In it, the author shows how President Grant was able to have a decision of the Supreme Court changed to conform to his views. He did this by appointing two men; one of them had already passed on the issue as a judge, the other was believed to think the correct way on the issue. These two men joined the previous three-man minority to form a five-man majority to produce the decision President Grant desired.

The literature on the second assumption is somewhat conflicting. Professor Pritchett shows that, when first appointed, President Roosevelt's appointees to the Supreme Court had high rates of agreement. However, when they constituted a majority, they began to split (5). As their majority began to dwindle with the arrival of President Truman's appointees, the Roosevelt appointees tended to coalesce, although not to the degree they did when first appointed (6). President Truman's four appointees, short of a majority, were able to dominate the Court only with the help of Justice Reed, one of President Roosevelt's appointees. Perhaps the fact that the Truman appointees lacked a majority explains their continued cohesiveness.

Professor Schubert has discussed cohesiveness along political party lines on the Michigan Supreme Court (7). It is true, of course, that the Justices on the Michigan Supreme Court are not appointed by the governor, but elected. However, through his ability to control interim appointments and nominations during his tenure, Governor Williams has had virtual powers of appointment of Democratic Justices. While a minority, Governor Williams' Justices were highly cohesive. Now, however, they are a majority and a recent commentator (8) has noted that this newly constituted majority is showing signs of splitting in much the same manner as did the Roosevelt Justices on the Supreme Court.

Another article dealing with the behavior of Supreme Court Justices is Professor Snyder's study of clique membership (9). She found little relationship between appointing president and clique membership.

Thus, as was noted above, there are conflicting views on the relationship of the appointing president and the behavior of his appointees. With this in mind, the hypothesis for this subject is as follows: Circuit judges appointed by one president will have a significantly higher approving rate for district judges appointed by the same president.

Unfortunately, the results of the study do not really resolve the conflict in the literature; this is partly due to the lack of data for comparison. The only president who had enough appointees to make comparisons possible was President F. Roosevelt.

In Table 23, the circuit judges appointed by President Roosevelt are listed with their approving rates for four groups of district judges; "Rep." district judges are those appointed by all Republican presidents prior to President F. Roosevelt; "FDR," "HST," and "DDE" district judges need no explanation.

TABLE 23

APPROVING RATES OF FDR CIRCUIT JUDGES

District Judges	FDR Circuit Judges' Approving Rates
Rep.	59.6
FDR	79.7
HST	61.2
DDE	71.4
Average	63.6

X^2: 5.39 df: 3 p.: .20

Note: The approving rate of Rep. circuit judges for Rep. district judges is 67.8

There is a decided tendency for FDR circuit judges to favor FDR district judges; the approving rates for the Rep. and HST district judges is almost the same and much lower; what seems surprising is the rate at which FDR circuit judges approve DDE district judges; this rate is considerably above those for Rep. and HST district judges but does not reach that for FDR district judges. The level of significance, however, does not meet that set so the hypothesis must be rejected.

In the note to Table 23, the approving rate of all Rep. circuit judges for all Rep. district judges is given; this shows that FDR circuit judges approve FDR district judges at a higher rate than Rep. circuit judges approve Rep. district judges. However, since no other comparisons are possible for the Rep. circuit judges, it cannot be said that they are or are not influenced by the appointing president as there is no evidence either way.

In this section the effect of the appointing president on the approving rates of his appointees was investigated. Although a tendency existed for circuit judges appointed by one president to favor his district judges appointed by him, the tendency was not of great enough significance to support the hypotheses.

NOTES

1. McHargue, Daniel S. President Taft's Appointments to the Supreme Court. 12 J. OF POLITICS 478 (1950).

2. Id. P. 47.

3. Id. P. 482.

4. Ratner, Sidney, Was the Supreme Court Packed by President Grant? 50 POL. SCI. Q. 343 (1935).

5. Pritchett, C. Herman. THE ROOSEVELT COURT. New York: 1948. P. 40.

6. Pritchett, C. Herman. CIVIL LIBERTIES AND THE VINSON COURT. Chicago: 1954. Pp. 183-84.

7. Schubert, Glendon A. QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR. East Lansing (Mich.): 1959. Pp. 129-42.

8. Downing, George L. Workmen's Compensation, 1959 Survey of Michigan Law. 6 WAYNE L. REV. 144 (1959).

9. Snyder, Eloise C. The Supreme Court as a Small Group. 36 SOCIAL FORCES 232 (1958).

VIII

The relationship of geography to judicial behavior has not been investigated to any great extent. Those studies of judges which touch on geography do so only as an aspect in the appointment of judges; they deal only with the justices of the Supreme Court.

One of these studies is Professor Schmidhauser's collective portrait of the justices (1). He briefly mentions the "environmental factors of place of birth and the setting for the formative years of the justices (2)." The emphasis is on the population size of birthplace and childhood; there is no attempt to relate this to the behavior of the justices.

Another study is Professor Ewing's book on the Supreme Court (3). This book contains a chapter on the representation of states and sections. There is no discussion of the behavior of judges from these sections. At one time, Professor Ewing thought this could be done, i.e., that some clue to a judge's rationalizations could be found in his geographic origin and residence. (This was in his Frederick Jackson Turner period.) Of this Professor Ewing now says:

> Unhappily, each general geographical section embraces men of almost every shade of political conviction. One cannot assume, therefore, that a southern-derived judge represents the South any more than that he reflects the ideas of New England or the Pacific Coast (4).

The problem of a judge's views and whether they are representative or not is somewhat lessened when only a single circuit is studied. In its present form, the law provides that a circuit judge must reside in the circuit from which appointed and remain a resident (5). District judges must reside in the district from which appointed (6). This means that in a relatively homogeneous circuit such as the Tenth, there should be less

conflict of sectional views than in the Eighth, which contains such unlike states as Minnesota and Arkansas. An example of sectional conflict within the Eighth is the fact that Judge Davies, from North Dakota but sitting by assignment in Arkansas, heard the segregation case dealing with Central High School in Little Rock. After denying motions to delay integration, Judge Davies returned to North Dakota. The motions which followed were heard by Judge Lemley, who was from another district in Arkansas (7). This type of assignment within a circuit is not unusual for, it will be recalled, the Chief Judge of the circuit can assign any judge within the circuit to any court within the circuit (8).

Since the available literature is meager, and Professor Ewing's doubts loom large, the hypothesis is formulated as a null hypothesis with the expectation that it will not be rejected.

The geographic location of a district court will not significantly affect the approval rates of its judges.

To test the hypothesis we turn to the data from the Tenth Circuit. In Table 24 the district courts are listed with the approval rates for all cases from that court regardless of which judge heard the case. Since the level of significance is not met, the null hypothesis is not rejected.

TABLE 24

APPROVAL RATES FOR DISTRICT COURTS: ALL JUDGES

District Court	Approval Rate
Colorado	66.6
Kansas	63.9
Oklahoma	
Eastern	84.3
Northern	77.0
Western	59.2
Utah	54.5
Wyoming	66.6
Average	66.0

X^2: 9.80 df: 6 p: .20

In Table 25 the data is presented in another way. Only those cases were used in which judges assigned to the court on a permanent basis sat; all cases in which a visiting judge sat were omitted. While the level of significance rises, by comparing the two tables, it can be seen that there is no pattern of increase or decrease in approval rates. The level of significance is still such that the null hypothesis is not rejected.

TABLE 25

APPROVAL RATES FOR DISTRICT COURTS: ALL ASSIGNED JUDGES

District Court	Approval Rate
Colorado	61.7
Kansas	66.0
Oklahoma	
Eastern	80.6
Northern	79.3
Western	58.0
Utah	47.6
Wyoming	66.6
Average	65.5

X^2: 12.49 df: 6 p.: .10

In this section, the effect of the geographic location of the district court on the approval rates of the judges who sat in it was investigated. Since the level of significance did not meet that specified, the null hypothesis is not rejected. The conclusion which is drawn is that geographic location of the district court does not significantly affect the approval rates of its judges.

NOTES

1. Schmidhauser, John R. The Justices of the Supreme Court: A Collective Portrait. 3 MIDWEST J. OF POLI. SCI. 1 (1959).

2. Id. P. 16.

3. Ewing, Cortez A. M. THE JUDGES OF THE SUPREME COURT, 1789-1937. Minneapolis (Minn.): 1938.

4. Id. P. 7.

5. 28 U.S.C.A. $^{s}_{s}$ 44 (c) (1949).

6. 28 U.S.C.A. $^{s}_{s}$ 134 (b) (Supp. 1959).

7. N.Y. TIMES, Apr. 10, 1958, p. 20, col. 2; id., Apr. 17, 1958, p. 16, col. 3.

8. 28 U.S.C.A. $^{s}_{s}$ 292 (b) (Supp. 1959).

IX

This study has attempted to discover patterns in the behavior of judges on the Court of Appeals for the Tenth Circuit. The basic data used was the vote of the circuit judge in cases before him on appeal. These votes were translated into approving rates for the circuit judges and approval rates for the district judges.

It was found that there was a significant difference in the approval rates of judges in the Tenth Circuit. Significant relations between the rates and the factors of prior judicial service, seniority, age, political party affiliation, appointing president and geography were then investigated. Whether the circuit judge had had prior judicial service was found to have an effect on the fluctuation of the approving rates. Neither seniority nor age had a significant effect on the rates of judges. Political party affiliation generally did not affect the rates but there were some exceptions. There was a tendency for circuit judges appointed by one president to favor district judges appointed by him but this did not reach levels of significance. The geographic location of a district court did not significantly influence the rates of its judges.

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