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Pennsylvania's Appellate Judges, 1969-1994

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Pennsylvania's Appellate Judges, 1969-1994

*Jonathan P. Nase**

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I. INTRODUCTION

Pennsylvania's judges¹ wield considerable power. For example, Pennsylvania Supreme Court justices adjudicate cases, administer the Judicial Branch,² regulate the legal profession,³ appoint public officials,⁴ and may even reapportion state legislative districts.⁵ Yet, to date, little has been written about the men and women who sit on the bench in the Keystone State.⁶

1. The term "judge" is sometimes used in this article to refer to Pennsylvania Supreme Court justices as well as intermediate appellate and trial court judges.

2. See PA. CONST. art. V, § 10(a).

3. See PA. CONST. art. V, § 10(c).

4. For example, the Court appoints persons to the Judicial Conduct Board and the Court of Judicial Discipline. See PA. CONST. art. V, §§ 18(a)(2), (b)(1).

5. See PA. CONST. art. II, § 17(g).

6. In contrast, scholars have written a great deal about federal judges. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993) [hereinafter Goldman I]; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136 (1987); Elliot E. Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317 (1988) [hereinafter Slotnick I]; Elliot E. Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 371 (1984) [hereinafter Slotnick II].

Scholars have also published nationwide studies of state court judges. See Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979);

How do judges get on the bench in Pennsylvania? What type of person is elected or appointed? How long do judges remain on the bench? Why do they leave? The answers to these questions have far-reaching implications for both judicial administration and substantive law.

This article studies Pennsylvania's judges by examining the appellate bench between January 1, 1969⁷ and August 1, 1994.⁸ Section II identifies the individual members of Pennsylvania's three appellate courts during that period, and Section III presents a host of statistics about these individuals.

Section IV discusses four general themes that emerge from the data and discussion presented here. Those themes are: (1) Pennsylvania has had many career judges; (2) an overwhelming percentage of Pennsylvania's appellate judges have had certain common characteristics; (3) there have been some significant differences between judges initially appointed to the appellate bench and judges initially elected to that bench; and (4) there have been some significant differences between judges selected to the different appellate courts.

II. CHRONOLOGY OF JUDGES

Pennsylvania has three appellate courts with statewide jurisdiction: a Supreme Court and two intermediate appellate courts (the Superior and Commonwealth Courts).⁹ This section lists

Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987); Barbara Luck Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28 (1990).

Finally, scholars have published studies of state judges in a few individual states. See L. Douglas Kiel et al., *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290 (1994); Ralph Schneider & Ralph Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California*, 5 JUST. SYS. J. 45 (1979). To date, however, little has been published about Pennsylvania's judges.

7. This date was selected because the Judiciary Article of the 1968 Constitution took effect on January 1, 1969. See PA. CONST., art. V, Schedule to Judiciary Article, prmb1.

8. This article is limited to a discussion of those persons who were either elected by the people or appointed by the governor. The reader should be aware, however, that there is a third way to the appellate bench in Pennsylvania: the Supreme Court can appoint senior justices and judges. See PA. CONST. art. V, § 16(c); 201 PA. CODE, Rule of Judicial Administration 701 (1990).

9. According to the organizational chart for the unified judicial system, the Superior Court and Commonwealth Court are equals in the judicial hierarchy. 1994 PA. RULES OF COURT—STATE ix. The general public, however, may not perceive them as equals. See, e.g., *Bowman Heads Commonwealth Court*, THE PATRIOT (Harrisburg), March 18, 1970 (stating that the Commonwealth Court ranks below the Supreme and Superior Courts).

the members of each court in chronological order.

A. *Supreme Court*

The Pennsylvania Supreme Court is the highest court in the Commonwealth.¹⁰ It is comprised of seven members, including a chief justice,¹¹ who is the justice with the longest continuous service on the Supreme Court.¹²

1. *Members of the Court*

Exhibit 1 shows the men and women who served on the Pennsylvania Supreme Court between January 1, 1969 and August 1, 1994. Each justice is listed in the year in which he or she joined the court, even though a predecessor may have occupied the same seat for a portion of that year. The vertical line from each justice's name indicates that he or she remained on the court during that period. If a justice left the court and no one filled the position by December 31, the seat is listed as "vacant" for that year.

10. PA. CONST. art. V, § 2(a).

11. *Id.* § 2(b).

12. *Id.* § 10(d).

Exhibit 1. Supreme Court Justices, 1969-1994

YEAR	JUSTICES									
	Bell	Jones	Cohen Vacant Barbieri Manderino	Eagen	O'Brien	Roberts	Pomeroy			
1969										
1970										
1971										
1972	Nix									
1973										
1974										
1975										
1976										
1977										
1978		Packel Larsen*								Vacant Flaherty
1979			Vacant Kauffman							
1980				Vacant Wilkinson McDermott						
1981										
1982			Hutchinson							
1983										
1984					Zappala					
1985										
1986						Papadakos				
1987										
1988			Vacant Slout							
1989			Vacant Cappy							
1990										
1991										
1992				Montemuro						
1993				Castille						
1994										

* Justice Larsen was suspended from the Pennsylvania Supreme Court from October 1993 to June 1994, when he was removed from office.

Six of the justices sitting on the Court in 1969 (Chief Justice John C. Bell, Jr., and Justices Benjamin R. Jones, Herbert B. Cohen, Michael J. Eagen, Henry X. O'Brien and Samuel J. Roberts) were selected under the Constitution of 1874.¹³ They continued to serve after the 1968 Constitution became effective because the Schedule to the Judicial Article permitted all sitting justices and judges to complete their terms of office.¹⁴

The seventh justice on the bench in January 1969 was Thomas W. Pomeroy. He was appointed in late 1968 to fill the vacancy caused by the death of Justice Michael A. Musmanno.¹⁵ Justice Pomeroy's appointive term expired in January 1970, but he remained on the Court because he successfully ran for the seat in 1969.¹⁶

Justice Cohen died on December 3, 1970,¹⁷ enabling Governor Raymond P. Shafer to appoint Judge Alexander F. Barbieri of the Commonwealth Court to fill the vacancy.¹⁸ Justice Barbieri joined the Court on January 4, 1971,¹⁹ but his appointment was challenged because the Senate did not confirm him.²⁰ A unanimous Supreme Court determined that the appointment was valid.²¹

Justice Barbieri ran for a ten-year term on the Court in 1971

13. Justices selected under the Constitution of 1874 served a single twenty-one year term. See PA. CONST. of 1874 art. V, § 2.

14. PA. CONST., art. V, Schedule to Judiciary Article, § 8.

15. Justice Musmanno passed away on October 12, 1968. 99 THE PENNSYLVANIA MANUAL 494 (1969). Justice Pomeroy was commissioned in December of 1968. *Id.*

16. *Democratic Candidates Lose Across Most of State*, THE PATRIOT (Harrisburg), November 6, 1969, at 3. This meant that Justice Pomeroy's term of office was ten years rather than twenty-one. It also meant that Justice Pomeroy, unlike the other justices on the bench on January 1, 1969, was subject to mandatory retirement upon reaching the age of seventy. See PA. CONST. art. V, § 16.

The requirement that judges retire upon reaching age seventy was one of the innovations included in the Constitution of 1968. See *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); *Gondelman v. Commonwealth*, 554 A.2d 896 (Pa.), *cert. denied*, 493 U.S. 849 (1989).

17. 439 Pa. iii n.1 (Lindenheim 1970).

18. See *Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57, 58 (Pa. 1971).

19. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

20. *Creamer*, 281 A.2d at 58. The constitution at that time provided:

A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. If the vacancy occurs during the session of the Senate, the appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace, which shall be by a majority. If the vacancy occurs during the sine die adjournment of the Senate such appointment shall not require the advice and consent of the Senate.

PA. CONST. art. V, § 13(b) (amended 1975). This provision was amended in 1975 to require Senate confirmation for all judicial appointees. 1975 Pa. Laws 619, 620.

21. *Creamer*, 281 A.2d at 58.

but lost to one of his former colleagues on the Commonwealth Court — Judge Louis L. Manderino.²² A second Supreme Court justice was elected in 1971 because Chief Justice Bell's term of office was due to expire in January 1972.²³ Robert N. C. Nix, Jr., a judge on the Philadelphia Court of Common Pleas, was elected to fill that position.²⁴ Justice Nix was the first African-American to be elected to the Pennsylvania Supreme Court,²⁵ and later became the first African-American in the nation to serve as chief justice of a supreme court.²⁶

No one left or joined the court during the next five years. Chief Justice Jones' term was due to expire in January 1978,²⁷ but he resigned effective February 28, 1977 to return to private practice.²⁸ Governor Milton S. Shapp attempted to use a merit selection committee to fill the vacancy, but before the committee could give Governor Shapp a list of potential nominees, the two major political parties began selecting candidates to campaign for the seat.²⁹ Governor Shapp ultimately nominated someone who would not be able to run for the post at the conclusion of his appointed term: sixty-nine year-old former Attorney General Israel Packel.³⁰ Justice Packel took the bench in June 1977,³¹ but reached mandatory retirement age in December of that year.³² He was succeeded by Rolf Larsen, a judge on the Allegheny County Court of Common Pleas, who was elected to the Supreme Court in November 1977.³³

Justice Pomeroy left the Court in November 1978 when he reached the mandatory retirement age of seventy.³⁴ Richard Thornburgh had just been elected to succeed Milton Shapp as

22. *Manderino, Nix Lead Court Race*, THE PATRIOT (Harrisburg), November 3, 1971, at 1.

23. 99 THE PENNSYLVANIA MANUAL 482 (1969).

24. *Manderino, Nix Lead Court Race*, cited at note 22, at 1.

25. *Shapp Savors Post-Election Unity*, THE EVENING NEWS, November 3, 1971, at 1.

26. *Nix is First Black Chief Justice*, PA. LAW., January 15, 1984, at 14.

27. 99 THE PENNSYLVANIA MANUAL 482 (1969).

28. *Politics 'Will Play No Part' in Selecting New Justice*, THE PATRIOT (Harrisburg), January 6, 1977, at 2.

29. *Blatt Takes Name Off List For High Court Vacancy*, THE PATRIOT (Harrisburg), January 28, 1977, at 4; *Justice Jones Quits Nomination Panel*, THE PATRIOT (Harrisburg), January 27, 1977, at 1.

30. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 161st Gen. Assem., 1977 Sess., at 407 (June 1, 1977).

31. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

32. Letter from Thomas B. Darr, Administrative Office of Pennsylvania Courts, to the author, July 1994 [hereinafter Darr letter].

33. *Rolf Larsen Wins Supreme Court Seat*, PA. L.J., November 14, 1977, at 1.

34. *Appellate Court Elections: Your Guide to Choosing*, PA. L.J., May 7, 1979, at 7.

governor, and the new Governor wasted little time making a nomination.³⁵ He nominated Bruce W. Kauffman to the Supreme Court in February 1979.³⁶ The Senate, however, refused to act on the nomination, so Justice Pomeroy's seat remained vacant for several months.³⁷

In May 1979, Judge John P. Flaherty of the Allegheny County Court of Common Pleas captured both the Republican and Democratic nominations for the Supreme Court.³⁸ Governor Thornburgh subsequently withdrew Kauffman's nomination and instead nominated Judge Flaherty for a term to expire on the first Monday in January 1980.³⁹ The Senate confirmed Flaherty, and he was sworn in on June 15, 1979.⁴⁰ In November of the same year, Justice Flaherty was elected to a ten-year term on the Court.⁴¹

Governor Thornburgh soon had another opportunity to name a Supreme Court justice, as Justice Manderino passed away in November of 1979.⁴² The Governor again nominated Bruce W. Kauffman, and this time the nomination was confirmed by the Senate.⁴³ Justice Kauffman took the bench on Leap Day of 1980.⁴⁴

Chief Justice Eagen's term was due to expire in January, 1981,⁴⁵ but he resigned effective September 23, 1980⁴⁶ to expedite the selection of a successor and allow that person to join the Court at the beginning of its working year.⁴⁷ Unfortunately, the

35. 106 THE PENNSYLVANIA MANUAL 290 (1983).

36. Nancy L. Hebble, *Kauffman Appointed to Supreme Ct. Vacancy*, PA. L.J., February 26, 1979, at 1.

37. *Appellate Court Elections: Your Guide to Choosing*, cited at note 34.

38. Frank Christopher, *Judiciary Election Results; Superior Court Expanding*, PA. L.J., November 12, 1979, at 1. Candidates for statewide judicial offices could cross-file in the primaries until a 1986 act put an end to the practice. See 1986 Pa. Laws 29, 37.

39. *PBA Supports Four Judges for Election*, PA. LAW., June 1, 1979, at 10.

40. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

41. *Cavanaugh Clinches Court Seat*, THE PATRIOT (Harrisburg), November 7, 1979, at 1.

42. 485 Pa. v n.1 (1978-79).

43. *Senate Confirms Kauffman for the High Court*, PHILADELPHIA INQUIRER, February 27, 1980, at B3.

44. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

45. 99 THE PENNSYLVANIA MANUAL 482 (1969). In 1979, the Court Administrator of Pennsylvania filed suit to determine how this seat should be filled. See *Barbieri v. Thornburgh*, 400 A.2d 653 (Pa. Commw. Ct. 1979). The Commonwealth Court ordered an election to be held in 1981 to select a successor for a ten-year term. *Barbieri*, 400 A.2d at 656.

46. *State of Judiciary Message — C.J. Eagen Stepping Down*, PA. L.J., May 19, 1980, at 1.

47. *State of Judiciary Message*, cited at note 46.

post remained vacant until March 1981, when Commonwealth Court Judge Roy W. Wilkinson, Jr. was nominated and confirmed to fill the position.⁴⁸

In order to remain on the Court, Justices Wilkinson and Kauffman would have had to run for office in 1981, but neither did.⁴⁹ James T. McDermott (a Philadelphia Court of Common Pleas judge) and William D. Hutchinson (a state representative) were elected in November 1981.⁵⁰ They took office in January 1982.⁵¹

Later in 1982, a Superior Court judge filed suit seeking a Supreme Court election to choose a successor to Chief Justice O'Brien, whose term of office was due to expire in January 1983.⁵² The Pennsylvania Supreme Court determined that judges elected on a statewide basis were ordinarily to be elected in odd-numbered years, but could be elected in even-numbered years if circumstances required.⁵³ As a result, an election was held in 1982, and Judge Stephen A. Zappala of the Allegheny County Court of Common Pleas won a seat on the Supreme Court.⁵⁴

Another Supreme Court election was held in the following year because Chief Justice Roberts' term of office was due to expire in January of 1984.⁵⁵ Judge Nicholas P. Papadakos of the Allegheny County Court of Common Pleas was elected to the High Court in November 1983,⁵⁶ and he took office in January 1984.⁵⁷

The induction of Justice Papadakos ended a period of considerable turnover on the Supreme Court. Between 1977 and 1984,

48. *Two Justices Take Seats*, PA. LAW., March 1, 1982, at 21.

49. In accepting his nomination to the Supreme Court, Justice Wilkinson announced he would not run for a ten-year term in the 1981 election. This helped in the confirmation process. Frank Christopher, *Building Up State Bench: New Judges and Nominees*, PA. L.J., January 12, 1981, at 1. Justice Kauffman announced that he would not run unless he received the endorsement of both major political parties. He did not, and withdrew from the race. Bruce W. Kauffman, *Judicial Selection in Pennsylvania: A Proposal*, 27 VILL. L. REV. 1163, 1173-74 n.49 (1982); 23 *Seek Court Seats*, PA. LAW., April 15, 1981, at 24.

50. *Nix Headed to Another Court Term*, THE PATRIOT (Harrisburg), November 4, 1981, at 1.

51. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

52. *See Cavanaugh v. Davis*, 440 A.2d 1380, 1381 (Pa. 1982).

53. *Cavanaugh*, 440 A.2d at 1382.

54. *Zappala Joins Supreme Court*, PA. LAW., December 1, 1982, at 11. A later decision shortened Zappala's term so his retention election would be held in an odd-numbered year. *Retention Vote Shifted*, PA. LAW., December 19, 1989, at 5.

55. 99 THE PENNSYLVANIA MANUAL 482 (1969).

56. *Democrats Lead Court Races*, THE PATRIOT (Harrisburg), November 9, 1983, at 1.

57. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

nine men had been appointed or elected to six seats. The next decade was a period of comparative stability on the Court; no personnel changes took place between January 1984 and October 1987, and only four persons were appointed or elected to fill two seats between 1984 and 1994.

In October of 1987, Justice Hutchinson resigned from the Supreme Court to take a seat on the federal appellate bench.⁵⁸ Governor Robert P. Casey nominated Philadelphia County Court of Common Pleas Judge Juanita Kidd Stout to fill the vacancy, and the Senate confirmed the nomination.⁵⁹ Justice Stout was the second woman, and the first African-American woman, to sit on the Pennsylvania Supreme Court.⁶⁰

An election was scheduled for 1988 to choose a permanent successor for Justice Hutchinson, but a lawsuit challenged that election.⁶¹ In late September 1988, the Supreme Court ordered all appellate judgeships stricken from the November ballot.⁶² The Court held that all judicial elections would henceforth be held in odd-numbered years.⁶³ As a result, Justice Stout's term was extended to January 1990.

Justice Stout reached mandatory retirement age in March 1989.⁶⁴ At that time, she stopped participating in cases until the Court ruled on her status as a justice. In May, the Court found that the mandatory retirement provisions in the 1968 Constitution applied to appointed as well as to elected jurists, and declared her post vacant as of March 6, 1989.⁶⁵ Judge Ralph J. Cappy of the Allegheny County Court of Common Pleas was elected⁶⁶ in November 1989, and joined the Court in January 1990.

Another vacancy occurred in June 1992 due to the death of Justice McDermott.⁶⁷ Governor Casey nominated Superior

58. *In re Stout*, 559 A.2d 489, 491 (Pa. 1989). Justice Hutchinson accepted an appointment to the Court of Appeals for the Third Circuit. *Stout*, 559 A.2d at 491.

59. *Stout*, 559 A.2d at 491.

60. Letter from Morris L. Forer to the editor, PA. LAW., April 4, 1988, at 6.

61. See *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988).

62. *Sprague*, 550 A.2d at 184; see also Don Sarvey, *The Election that Isn't*, PA. LAW., October 28, 1988, at 16.

63. *Sprague*, 550 A.2d at 194. For a discussion of this case, see Mark Rahdert, *Sprague v. Casey and Its Seven Deadly Sins*, 62 TEMP. L. REV. 625 (1989); Christine M. Dolfi, Comment, *The Scheduling of Judicial Elections in Odd-Numbered Years: Has Sprague Resolved the Issue?*, 27 DUQ. L. REV. 557 (1989).

64. *Stout*, 559 A.2d at 491.

65. *Id.* at 498.

66. *Cappy Leads Voting for Supreme Court*, THE PATRIOT (Harrisburg), November 8, 1989, at 1.

67. 1991 Annual Report of the Administrative Office of Pennsylvania Courts 85.

Court Judge Frank J. Montemuro, Jr. for the post.⁶⁸ Judge Montemuro pledged not to run for the Court in the election of 1993, which helped him gain confirmation by the Senate.⁶⁹ He joined the High Court in November 1992.⁷⁰

The election of 1993 was unusual in that it featured three major candidates for the Supreme Court: a Republican, a Democrat, and a candidate of the new Patriot Party.⁷¹ Former Philadelphia District Attorney Ronald D. Castille won the election⁷² and assumed the bench in January of 1994.⁷³

A cloud hung over the Supreme Court in late 1993 and early 1994 because of proceedings against Justice Larsen. The justice had been suspended from the Court in October 1993 pending the outcome of a criminal case against him.⁷⁴ In April 1994, he was convicted of conspiracy for having tranquilizers and other drugs prescribed in his employees' names rather than his own.⁷⁵ An Allegheny County Court of Common Pleas judge concluded that this conviction was a conviction of an infamous crime,⁷⁶ and Justice Larsen was removed from the bench.⁷⁷ He was subsequently impeached by the House of Representatives and convicted by the Senate.⁷⁸ His position had not been filled as of early March 1995.⁷⁹

68. *Nominee for State Supreme Ct. Announced*, PA. L.J., September 28, 1992, at 20.

69. *Nominee for State Supreme Ct.*, cited at note 68.

70. 111 THE PENNSYLVANIA MANUAL 5-101 (1993).

71. Nick Jesdanun, *Candidates for Supreme Court Calling for Change*, PA. L.J., October 4, 1993, at 20.

72. *Dems' Winning Streak in Judicial Elections Ends*, PA. L.J., November 8, 1993, at 8.

73. *Newly Elected Castille Calls for Change*, PA. L.J., November 8, 1993, at 8.

74. *Chronology of Case*, THE PATRIOT (Harrisburg), November 8, 1993, at B1.

75. Alyssa Gabbay, *Judge Ousts Larsen from State Court*, THE PATRIOT (Harrisburg), June 14, 1994, at A1.

76. See *Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 697 (Pa. Commw. Ct. 1994) (citing Order of Court, Court of Common Pleas of Allegheny County, No. CC9313844, June 13, 1994).

77. *Larsen*, 646 A.2d at 697.

78. *Ex-justice Guilty on 1 of 7 Charges*, THE PATRIOT (Harrisburg), October 5, 1994, at A1.

79. In September 1994, Governor Casey nominated Bernard Sherer, a judge on the Westmoreland County Court of Common Pleas, to fill the post. *Judge Sherer Nominated to High Court*, PA. L. WKLY., September 19, 1994, at 1. The Senate did not confirm this nominee.

2. Chief Justices

The Constitution of 1968, like the Constitution of 1874, provides that the chief justice of Pennsylvania is the justice with the longest continuous service on the Court.⁸⁰ Exhibit 2 lists the persons who have served as chief justice since the 1968 Constitution took effect.

Exhibit 2. Chief Justices of the Pennsylvania Supreme Court, 1969-1994

Year	Chief Justice
1969	John C. Bell, Jr.*
1970	
1971	
1972	Benjamin R. Jones
1973	
1974	
1975	
1976	
1977	Michael J. Eagen
1978	
1979	
1980	Henry X. O'Brien
1981	
1982	
1983	Samuel J. Roberts
1984	Robert N.C. Nix, Jr.
1985	
1986	
1987	
1988	
1989	
1990	
1991	
1992	
1993	
1994	

* Chief Justice Bell became Chief Justice on July 31, 1961.

Only one person who was initially elected or appointed to the Supreme Court under the 1968 Constitution has served as chief justice of Pennsylvania — Chief Justice Robert N. C. Nix, Jr. Chief Justice Nix has served in that capacity for more than a decade. His predecessors, however, served far shorter terms. For

80. Compare PA. CONST. of 1874 art. V, § 2 with PA. CONST. art. V, § 10(d). For rules on determining the seniority of judges, see 201 PA. CODE, Rule of Judicial Administration 705 (1991).

example, Samuel J. Roberts served as chief justice for one year, and Henry X. O'Brien served as chief justice for just over two years. The length of a chief justice's tenure is a matter of chance, determined in part by the age at which that individual becomes the most senior justice on the Court.

B. *Superior Court*

The Superior Court was created by statute in 1895⁸¹ and became a constitutional court in 1968.⁸² The court consists of a fixed number of judges, including the president judge,⁸³ who is selected from among the judges on the court.⁸⁴ This subsection lists the judges and the president judges of the Superior Court.

1. *Members of the Court*

Exhibit 3 lists the men and women who served on the Superior Court between January 1, 1969 and August 1, 1994.

81. 1895 Pa. Laws 212.

82. PA. CONST. art. V, § 3.

83. *Id.*

84. See notes 161-62 and accompanying text for a discussion of the election of the president judge.

Exhibit 3. Superior Court Judges, 1969-1994

YEAR	JUDGES														
	Wright	Watkins	Montgometry	Jacobs	Hoffman	Spaulding	Cercione*	Shertz	Montemuro	Wieand	Popovich	DiSalle	Johnson	Beck	McEwen
1969															
1970															
1971			Vacant												
1972			Packel												
1973			Spaeth												
1974			Van der Voort			Spaeth									
1975															
1976															
1977															
1978															
1979															
1980															
1981															
1982															
1983															
1984															
1985															
1986															
1987															
1988															
1989															
1990															
1991															
1992															
1993															
1994															

* John B. Hannum occupied this seat on January 1, 1969. Judge Cercione, however, joined the court on January 6, 1969.

President Judge J. Colvin Wright and Judges G. Harold Watkins, Harry M. Montgomery, Robert L. Jacobs, J. Sydney Hoffman, Theodore O. Spaulding and John B. Hannum were selected under the Constitution of 1874. Like the justices on the Supreme Court on January 1, 1969, these jurists could complete their terms.⁸⁵ Unlike those justices, however, the Superior Court judges could run for new terms in retention elections.⁸⁶

Judge Hannum left the bench only days after the 1968 Constitution took effect.⁸⁷ He had been appointed in January 1968⁸⁸ and ran for a ten-year term on the court, but lost to William F. Cercone.⁸⁹ Judge Cercone took the bench on January 6, 1969.⁹⁰

Judge Montgomery was retained for a ten-year term in November 1969,⁹¹ but reached mandatory retirement age in June of 1971.⁹² Governor Shapp named his attorney, Israel Packel, who would later become a Supreme Court Justice and Attorney General, to the post.⁹³ Senate confirmation of this appointment was not necessary under the constitution at that time.⁹⁴

Judge Packel took office on January 1, 1972,⁹⁵ but resigned

85. See PA. CONST., art. V, Schedule to Judiciary Article, § 8.

86. The retention election was one of the innovations included in the 1968 Constitution. The Pennsylvania Constitution provides that judges who have completed an elective term may file a declaration of candidacy for retention election:

If a justice or judge files a declaration, his name shall be submitted to the electors without party designation, on a separate judicial ballot or in a separate column on voting machines, at the municipal election immediately preceding the expiration of the term of office of the justice or judge, to determine only the question whether he shall be retained in office. If a majority is against retention, a vacancy shall exist upon the expiration of his term of office If a majority favors retention, the justice or judge shall serve for the regular term of office provided herein, unless sooner removed or retired.

PA. CONST. art. V, § 15(b). For a discussion of the rationale behind, and the history of, retention elections, see Susan B. Carbon, *Judicial Retention Elections: Are they serving their intended purpose?*, 64 JUDICATURE 210 (1980).

87. 435 Pa. iv n.1 (Lindenheim 1969).

88. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

89. *Casey, Sloan, Cercone Win*, THE PATRIOT (Harrisburg), November 6, 1968, at 1. William F. Cercone is a nephew of the late Justice Michael Musmanno. Scott D. Cessar, *The Powerful Penman: A Sample of the Writings of Justice Michael Musmanno*, PA. LAW., June 1987, at 27.

90. 111 THE PENNSYLVANIA MANUAL 5-102 (1993). Judge Cercone's term was originally scheduled to expire in January of 1979, but was extended until January of 1980 by a Pennsylvania Supreme Court decision. See *Barbieri v. Shapp*, 368 A.2d 721, 725 (Pa. 1977).

91. *Tabor Trounced; D.A. Specter Wins*, THE PATRIOT (Harrisburg), November 5, 1969, at 1, 15.

92. Darr letter, cited at note 32.

93. *Miss Blatt, Packel Given Judgeships*, THE PATRIOT (Harrisburg), January 1, 1972, at 1.

94. See PA. CONST. art. V, § 13(b) (amended 1975).

95. 221 Pa. Super. iii n.1 (Lindenheim 1972).

on December 31, 1972⁹⁶ to become Attorney General of Pennsylvania.⁹⁷ Edmund B. Spaeth, Jr., a judge on the Philadelphia Court of Common Pleas, was named to fill the seat.⁹⁸

Two Superior Court judges were elected in 1973. One judge was elected because of Judge Montgomery's retirement. Another was elected to replace President Judge Wright, whose term was due to expire in January 1974.⁹⁹ Judge Spaeth ran for one of these positions, but lost in the primary.¹⁰⁰ The eventual winners were two judges from the Allegheny County Court of Common Pleas: Gwilym A. Price, Jr., and Robert Van der Voort.¹⁰¹ These men took the bench in January 1974.¹⁰²

Judge Spaeth's appointive term expired on January 6, 1974,¹⁰³ but he began a new appointive term the next day.¹⁰⁴ Judge Spaulding (the first African-American elected to a statewide office in Pennsylvania,¹⁰⁵ and the only African-American on the court in 1973) retired voluntarily in December 1973,¹⁰⁶ and Governor Shapp appointed Judge Spaeth to fill the vacancy.¹⁰⁷ Judge Spaeth's second appointive term ran from January 7, 1974 to January 1976.¹⁰⁸ In 1975, however, he successfully ran for a ten-year term on the court.¹⁰⁹

There were no further personnel changes on the court until 1978, when several changes took place. First, President Judge Watkins left the court in January because his term expired.¹¹⁰

96. 223 Pa. Super. iii n.1 (Lindenheim 1972-73).

97. 101 THE PENNSYLVANIA MANUAL 411 (1974).

98. William Ecenbarger, *The Judge Who Wouldn't Run*, PA. LAW., October 15, 1985, at 23, 25.

99. 99 THE PENNSYLVANIA MANUAL 482 (1969). Judge Wright could complete the term to which he was elected even though he reached age seventy during that term. See PA. CONST., art. V, Schedule to Judiciary Article, § 8. However, he could not run for retention because he was older than the mandatory retirement age.

100. Ecenbarger, cited at note 98, at 25.

101. 1973 Annual Report of the Administrative Office of Pennsylvania Courts A-1. Judge Price won both the Republican and Democratic nominations, so he was virtually assured of winning in the general election.

102. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

103. Darr letter, cited at note 32.

104. 1973 Annual Report of the Administrative Office of Pennsylvania Courts A-1.

105. *G.O.P. Judges, 1 Negro, Elected*, THE PATRIOT (Harrisburg), November 10, 1966, at 10.

106. *Spaeth Appointed to the Superior Court*, THE PATRIOT (Harrisburg), December 31, 1973, at 13.

107. *Spaeth Appointed to the Superior Court*, cited at note 106.

108. *Id.*

109. Ecenbarger, cited at note 98, at 25.

110. 99 THE PENNSYLVANIA MANUAL 482 (1969). Judge Watkins could finish the term to which he was elected even though he reached age seventy during that term. See PA. CONST., art. V, Schedule to Judiciary Article, § 8. He could not run for

He was succeeded by Allegheny County Court of Common Pleas Judge John P. Hester.¹¹¹

Second, Judge Hoffman left the court in July 1978 because he reached mandatory retirement age.¹¹² Governor Shapp nominated Donald Wieand, a judge on the Lehigh County Court of Common Pleas, to replace him. The Senate confirmed the nomination¹¹³ and Judge Wieand joined the court in October 1978.¹¹⁴

Third, President Judge Jacobs resigned effective December 31, 1978 — just days before Governor Thornburgh's inauguration.¹¹⁵ The new governor nominated James R. Cavanaugh (a judge on the Philadelphia Court of Common Pleas) to fill the position.¹¹⁶ The Senate did not act on the nomination until Judge Cavanaugh won both the Republican and Democratic nominations for the court in the May 1979 primary.¹¹⁷ Because he was virtually assured of winning the election in November, the Senate confirmed his nomination and he took office in July of 1979.¹¹⁸

Three Superior Court judges were elected in 1979, one to replace Judge Hoffman, one to replace President Judge Jacobs, and one to replace Judge Van der Voort who reached mandatory retirement age in April 1979.¹¹⁹ The three successful candidates were Judge Cavanaugh, Richard B. Wickersham (a Dauphin County Court of Common Pleas judge) and John G. Brosky (an Allegheny County Court of Common Pleas judge).¹²⁰

The voters, however, did more than just elect three Superior Court judges in 1979; they also approved a constitutional amendment concerning the Superior Court. The 1968 Constitution originally stated that the Superior Court was to consist of seven members.¹²¹ The amended constitution provided that the court "shall consist of the number of judges, which shall not be

retention, however, because he was older than the mandatory retirement age.

111. *Larsen, Hester Win in State Court Races*, PITTSBURGH POST GAZETTE, November 9, 1972, at 1.

112. *Donald E. Wieand Confirmed for Superior Court Judgeship*, PA. L.J., October 9, 1978, at 1.

113. *Donald E. Wieand Confirmed*, cited at note 112.

114. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

115. *Judge Jacobs, President of Superior Court, Will Resign*, PA. L.J., October 9, 1978, at 1.

116. Christopher, cited at note 38.

117. *Id.*

118. 111 THE PENNSYLVANIA MANUAL 5-102 (1993). Judges Wieand and Cavanaugh ran for ten-year terms in 1979.

119. *Appellate Court Elections: Your Guide to Choosing*, cited at note 34.

120. Christopher, cited at note 38.

121. PA. CONST. art. V, § 3 (amended 1979).

less than seven judges, and have such jurisdiction as shall be provided by this Constitution or by the General Assembly."¹²² The General Assembly subsequently passed legislation expanding the court from seven to fifteen members.¹²³

Governor Thornburgh nominated eight persons to fill the new seats on the court, and six were confirmed in 1980. They were Richard DiSalle (a former Commonwealth Court judge), Justin M. Johnson (a Pittsburgh lawyer and member of the Pennsylvania Crime Commission), Frank J. Montemuro, Jr. (a Philadelphia Court of Common Pleas judge and a future Supreme Court justice), Zoran Popovich (an Allegheny County Court of Common Pleas judge), Perry J. Shertz (a Luzerne County lawyer) and Donald Wieand (the former Superior Court judge).¹²⁴ These six men joined the court in December 1980.¹²⁵

Governor Thornburgh's other two nominees were Phyllis Beck (a vice dean at Temple Law School) and Stephen J. McEwen¹²⁶ (a former Delaware County district attorney).¹²⁷ These nominations were blocked by the Senate Rules and Executive Nominations Committee during the 1979-80 session of the General Assembly.¹²⁸ Governor Thornburgh nominated Beck and McEwen again in January 1981.¹²⁹ McEwen's nomination was defeated,¹³⁰ but the Senate reconsidered the vote and later confirmed his nomination.¹³¹ Beck's nomination was also confirmed,¹³²

122. PA. CONST. art. V, § 3.

123. 1980 Pa. Laws 213. Pennsylvania's appellate courts faced a crushing workload at that time. A November 1978 report of the American Judicature Society found that the Pennsylvania Superior Court was one of the most overworked appellate courts in America. *Pa. Superior Court: Struggling to Stay in Step with the Times*, PA. L.J., April 2, 1979, at 1; see also *Pennsylvania Courts: Recommendations*, PA. L.J., December 4, 1978, at 1; *Pennsylvania's Legal Crisis*, PA. LAW., March 15, 1979, at 6. One response was to expand the size of both intermediate appellate courts. See note 191 and accompanying text noting the concurrent expansion of the Commonwealth Court.

124. *Thornburgh Names Eight to Superior Court Posts*, PA. L.J., September 29, 1980, at 3.

125. *6 New Judges Take Superior Court Seats*, PA. LAW., January 15, 1981, at 21.

126. Some persons claimed that the McEwen nomination was part of a political deal. See *Ex-D.A. Gets Judgeship*, DAILY TIMES, September 10, 1980, at 1. Critics claimed that McEwen was nominated to repay the Delaware County Republican organization for its support of the Governor's candidate for the United States Senate. *Id.*

127. *Thornburgh Names Eight to Superior Court Posts*, cited at note 124, at 3.

128. Frank Christopher, *Two Thornburgh Nominees Blocked by Rules Committee*, PA. L.J., November 24, 1980, at 1.

129. *New Superior Court Judges Face Elections Already*, PA. L.J., February 23, 1981, at 1.

130. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 165th Gen. Assem., 1981 Sess., at 60 (January 8, 1981).

131. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 165th Gen. Assem.,

and she became the first woman to serve on the Superior Court.¹³³

The eight new judges served staggered terms, with the shortest terms ending in January 1982 and the longest terms ending in January 1986.¹³⁴ At the end of their appointive terms, the eight new judges had to run in partisan elections to keep their seats. Consequently, the next few years saw many Superior Court positions on the ballot.

Four seats were on the ballot in 1981. Judges Wieand and McEwen won ten-year terms on the court, while Judges Shertz and DiSalle were defeated.¹³⁵ Vincent A. Cirillo (a judge on the Montgomery County Court of Common Pleas) and James E. Rowley (a judge on the Beaver County Court of Common Pleas) won the two remaining seats on the court.¹³⁶

In January 1983, Judge Price passed away.¹³⁷ Governor Thornburgh nominated Ward F. Clark of Doylestown to take the seat,¹³⁸ but he later recalled that nomination¹³⁹ and the post remained vacant until January 1984. Two other vacancies occurred during 1983. Judge Hester and Judge Cercone reached mandatory retirement age in July¹⁴⁰ and August respectively.¹⁴¹ These vacancies combined with the vacancy resulting from the death of Judge Price, left the Superior Court with only twelve active judges in late 1983.

These three positions were filled by the election of 1983, when five Superior Court seats were on the ballot. Judges Beck and Montemuro successfully ran for ten-year terms on the court.¹⁴² The other winners were Patrick R. Tamilia (a judge on the Allegheny County Court of Common Pleas), Joseph A. Del Sole (also

1981 Sess., at 511-12 (April 28, 1981).

132. *Id.* at 512.

133. Judge Beck was the first woman appointed to the Superior Court, and later became the first woman elected to the Superior Court. *9 Appellate Judges Are Selected*, PA. LAW., December 1, 1983, at 14.

134. 1980 Pa. Laws 213, § 2.

135. *Wieand, Others Take Court Seats*, PA. LAW., January 15, 1982, at 23.

136. *Nix Retained, 3 Incumbents Lose*, PA. LAW., December 15, 1981, at 12.

137. 1983 Annual Report of the Administrative Office of Pennsylvania Courts 75.

138. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 367-68 (April 19, 1983).

139. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 757 (June 27, 1983).

140. 1983 Annual Report of the Administrative Office of Pennsylvania Courts 75.

141. Judge Cercone was born on August 13, 1913. 99 THE PENNSYLVANIA MANUAL 469 (1969). He retired on August 10, 1983. 499 Pa. vi n.1 (West 1982).

142. *9 Appellate Judges Are Selected*, cited at note 133, at 14.

a judge on the Allegheny County Court of Common Pleas), and Peter Paul Olszewski (a Luzerne County Court of Common Pleas judge).¹⁴³

There were no personnel changes on the court for two years. In 1985, three Superior Court judgeships were on the ballot. Two positions were on the ballot because the appointive terms of Judges Johnson and Popovich were due to expire.¹⁴⁴ An additional position was on the ballot because President Judge Spaeth did not run for retention.¹⁴⁵ Judges Johnson and Popovich won ten-year terms on the court, as did John T. J. Kelly, Jr., a former deputy secretary in the Department of Labor and Industry.¹⁴⁶

Judge Wickersham resigned to go into private practice in March 1988.¹⁴⁷ Governor Casey nominated Levan Gordon (a Philadelphia County Court of Common Pleas judge) to succeed him, but the Senate defeated that nomination.¹⁴⁸ Governor Casey then nominated another Philadelphian, James R. Melinson, who was subsequently confirmed.¹⁴⁹ Judge Melinson began serving on the court in February 1988.¹⁵⁰

In 1989, two Superior Court judgeships were on the ballot. One position was on the ballot because of Judge Wickersham's resignation. The other position was on the ballot because Judge Brosky did not run for retention. Judge Melinson lost his bid for a ten-year term on the court.¹⁵¹ The two successful candidates were Kate Ford Elliot (a former Superior Court staff attorney) and Joseph A. Hudock (a Court of Common Pleas Judge from Westmoreland County).¹⁵² Judges Ford Elliot and Hudock joined the court in January of 1990.¹⁵³

143. *Id.*

144. 105 THE PENNSYLVANIA MANUAL 400 (1981).

145. Ecenbarger, cited at note 98, at 23.

146. *Appellate Seats Filled*, PA. LAW., December 1, 1985, at 8. Mr. Kelly and Judge Johnson captured the nominations of both major parties, so they were virtually assured of winning in the November election. *2 Top-Rated Candidates Win*, PA. LAW., June 15, 1985, at 10.

147. *Ballot Fills Up for Special Election*, PA. LAW., March, 1988, at 5.

148. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 1222-23 (October 20, 1987).

149. *The Pennsylvania Lawyer's Candidates Guide*, PA. LAW., October 1989, at 23, 26-27.

150. 111 THE PENNSYLVANIA MANUAL 5-102 (1993). His term was to expire in January 1989, but was extended until January of 1990 as a result of the *Sprague* decision. See notes 61-63 and accompanying text for a discussion of *Sprague*.

151. *Cappy Leads Democratic Sweep of Court Races*, PA. LAW., December, 1989, at 33.

152. *Cappy Leads Voting for Supreme Court*, cited at note 66.

153. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

There was no further turnover on the court until late 1992, when Judge Montemuro resigned to join the Supreme Court.¹⁵⁴ Robert D. Mariani of Scranton was nominated for the position, but Governor Casey recalled the nomination.¹⁵⁵ Acting Governor Mark Singel¹⁵⁶ nominated John Pushinsky of Pittsburgh to fill the vacancy,¹⁵⁷ but that nomination was also recalled.¹⁵⁸ The position was finally filled after the 1993 election. Thomas Saylor won that election¹⁵⁹ and joined the court in January of 1994.¹⁶⁰

2. *President Judges*

Exhibit 4 lists the president judges of the Superior Court between January 1, 1969 and August 1, 1994.

154. *Pittsburgh Lawyer Tapped for Superior Court Vacancy*, PHILADELPHIA INQUIRER, July 20, 1993, at B2.

155. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 177th Gen. Assem., 1993 Sess., at 504 (April 20, 1993).

156. Lieutenant Governor Singel served as acting governor for approximately six months in 1993 when Governor Casey was ill.

157. *Pittsburgh Lawyer Tapped for Superior Court Vacancy*, cited at note 154, at B2. Mr. Pushinsky was the Democratic nominee for the Superior Court in the 1993 election. *Id.*

158. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 177th Gen. Assem., 1993 Sess., at 1397-98 (December 6, 1993).

159. *Dems' Winning Streak in Judicial Elections Ends*, cited at note 72. Saylor was a law partner of former Pennsylvania Attorney General Leroy Zimmerman. Serach, *Saylor Sworn in as Judge*, THE PATRIOT (Harrisburg), January 8, 1994, at B1.

160. Serach, cited at note 159, at B1.

Exhibit 4. President Judges of the Pennsylvania Superior Court,
1969-1994

Year	President Judge
1969	J. Colvin Wright*
1970	
1971	
1972	
1973	
1974	G. Harold Watkins
1975	
1976	
1977	
1978	Robert L. Jacobs
1979	William F. Cercone
1980	
1981	
1982	
1983	Edmund B. Spaeth, Jr.
1984	
1985	
1986	Vincent A. Cirillo
1987	
1988	
1989	
1990	
1991	James E. Rowley
1992	
1993	
1994	

* President Judge Wright became President Judge on January 1, 1968.

President Judge Wright was originally selected as president judge under the 1874 Constitution and continued to serve in that capacity after the effective date of the 1968 Constitution.

The 1968 Constitution provides that the president judge of a court with seven or fewer judges is the judge with the longest continuous service on the court.¹⁶¹ The president judge of a court with more than seven judges, however, is selected for a five-year term by the members of the court.¹⁶²

President Judges Watkins, Jacobs and Cercone were selected on the basis of seniority. President Judge Spaeth was also selected on the basis of seniority because of a transitional provision in the 1979 constitutional amendment expanding the size of the court. According to that provision, the president judge was the judge with the longest continuous service on the Superior

161. PA. CONST. art. V, § 10(d).

162. *Id.*

Court if the judge was a member of that court on the first Monday of January of 1977.¹⁶³ If there was no judge eligible to serve as the president judge, then the president judge was to be selected by the members of the court.¹⁶⁴

President Judge Cirillo was elected president judge of the Superior Court in 1986.¹⁶⁵ He could not be reelected because the Rules of Judicial Administration, as amended in 1990, prohibited a president judge from being reelected until a full term after the end of his term.¹⁶⁶ President Judge Rowley was elected the next president judge of the Superior Court.¹⁶⁷

When the president judge was selected on the basis of seniority, the terms of office were generally short; the combined tenure of President Judges Watkins, Jacobs, Cercone and Spaeth spanned twelve years. Elected president judges are chosen for longer terms, and both of the elected president judges have in fact served four years or more.¹⁶⁸

C. Commonwealth Court

Prior to 1968, the Dauphin County Court of Common Pleas sat as the Commonwealth Court.¹⁶⁹ The 1968 Constitution, however, created the Commonwealth Court as a separate entity.¹⁷⁰ The court was to come into existence on January 1, 1970,¹⁷¹ but members were not installed until April of that year.¹⁷² Finally, in September of 1970, the governor proclaimed the court ready to conduct business.¹⁷³

Like the Supreme Court and the Superior Court, the Commonwealth Court consists of a fixed number of judges, including a president judge.¹⁷⁴ The first president judge was the only

163. PA. CONST., art. V, Schedule to Judiciary Article, § 11(b).

164. *Id.*

165. *An Interview with President Judge Vincent A. Cirillo of Superior Court*, PA. LAW., September 1, 1986, at 12.

166. 201 PA. CODE, Rule of Judicial Administration 706(b) (1991).

167. *Pa. Superior Court Picks Top Judge*, PHILADELPHIA INQUIRER, December 19, 1990, at B2.

168. The first elected president judge of the Superior Court served a complete term. The term of the second elected president judge had not expired as of the end of the period studied.

169. 1870 Pa. Laws 57.

170. PA. CONST. art. V, § 4.

171. PA. CONST., art. V, Schedule to Judiciary Article, § 3.

172. Marvin Comisky, *Commonwealth Court Investiture*, PA. B. ASS'N Q., October 1970, at 25.

173. Philip W. Amram & Sidney Schulman, *The New Judicial Article and Its Implementation*, PA. B. ASS'N Q., October 1970, at 16.

174. *See* PA. CONST. art. V, § 4.

person appointed to the court to be president judge; the other president judges were selected from among the members of the court. This subsection lists the Commonwealth Court's judges and president judges, respectively.

1. *Members of the Court*

Exhibit 5 lists the men and women who served on the Commonwealth Court between January 1, 1970 and August 1, 1994.

Exhibit 5. Commonwealth Court Judges, 1970-1994

YEAR	JUDGES									
	Bowman	Crumlish	Kramer	Wilkinson	Manderino	Mencer	Barbieri Rogers	MacPhail	Craig	
1970										
1971										
1972					Blatt					
1973										
1974										
1975										
1976			DiSalle							
1977										
1978										
1979										
1980	Palladino									
1981			Williams	Vacant						
1982	Doyle			Barry	Vacant Colins	Vacant				
1983										
1984										
1985			Vacant							
1986										
1987							Vacant			
1988			McGinley				Smith			
1989										
1990		Byer		Kelly				Vacant		
1991										
1992		Friedman								
1993										
1994						Newman				

The Commonwealth Court Act required the initial members of the court to be appointed by the governor and confirmed by the Senate.¹⁷⁵ Governor Shafer nominated James S. Bowman (a Dauphin County Court of Common Pleas judge) to be president judge.¹⁷⁶ He also nominated James C. Crumlish (a former Philadelphia district attorney), Harry A. Kramer (a former Allegheny County Orphans' Court judge), Roy Wilkinson, Jr. (a Centre County lawyer), Louis L. Manderino (the Dean of Duquesne Law School), Glenn E. Mencer (a McKean County Court of Common Pleas judge) and Alexander F. Barbieri (a Philadelphia Court of Common Pleas judge) to the Commonwealth Court.¹⁷⁷ The Senate confirmed all of these men, and they were installed on April 15, 1970.¹⁷⁸

The initial members of the court originally were to run in partisan elections at the end of their appointive terms. A 1972 statute, however, permitted them to run in retention elections instead.¹⁷⁹ In fact, five of the initial seven members of the court would run in retention elections, and all five would be retained.

Judge Barbieri did not run in a retention election because he resigned to join the Supreme Court.¹⁸⁰ Theodore O. Rogers (a Chester County lawyer) was appointed to the court¹⁸¹ when the Senate was not in session. Consequently, confirmation was not required.¹⁸² An election was scheduled to choose a judge for a ten-year term in November 1971, but that election was canceled when the Supreme Court held that Judge Rogers' term of office lasted until January of 1974.¹⁸³ He was subsequently elected to a ten-year term on the court.¹⁸⁴

Judge Manderino was the other Commonwealth Court judge who did not run for retention. He won a seat on the Supreme Court in the 1971 election.¹⁸⁵ Genevieve Blatt, who had gained distinction as the first woman elected to a statewide office in

175. 1969 Pa. Laws 434.

176. *Bowman Heads Commonwealth Court*, cited at note 9.

177. *Comisky*, cited at note 172, at 25.

178. *Id.*

179. 42 PA. CONS. STAT. § 3131 (3)(i) (1972).

180. 441 Pa. v n.1 (Lindenheim 1970-71) (resigning from the Commonwealth Court); 441 Pa. iii n.5 (appointed to the Supreme Court).

181. 3 Pa. Commw. vii (Laub 1971) (introductory material discussing the Honorable Theodore O. Rogers).

182. *Creamer*, 281 A.2d at 68.

183. *See Rogers v. Tucker*, 279 A.2d 9, 14 (Pa. 1971).

184. *Unknown Democrat Dumps DA Specter*, THE PATRIOT (Harrisburg), November 7, 1973, at 1.

185. *Manderino, Nix Lead Court Race*, cited at note 22.

Pennsylvania,¹⁸⁶ was named to fill the resulting vacancy.¹⁸⁷ Senate confirmation was not necessary.¹⁸⁸

There was no turnover on the court from January 1972 until August 1977, when Judge Kramer passed away.¹⁸⁹ Richard DiSalle, a judge on the Court of Common Pleas of Washington County, was nominated and confirmed to fill that vacancy.¹⁹⁰

In 1978, the General Assembly passed two important statutes concerning the Commonwealth Court. One increased the size of the court from seven to nine judges because of the court's heavy work load.¹⁹¹ Governor Shapp nominated John A. MacPhail, a former judge on the Adams County Court of Common Pleas,¹⁹² and David W. Craig, an Allegheny County lawyer,¹⁹³ to fill the new seats. They were confirmed and took the bench in July 1978.¹⁹⁴

The second significant statute permitted some appointed Commonwealth Court judges (e.g., judges appointed pursuant to an executive order concerning the selection of qualified nominees) to run in retention elections rather than partisan elections at the end of their terms.¹⁹⁵ The Pennsylvania Supreme Court, however, found this act to be unconstitutional.¹⁹⁶

Judges Craig, DiSalle, and MacPhail ran in a partisan election in 1979. Judge DiSalle lost in the primary.¹⁹⁷ Judge Craig was nominated by both major political parties,¹⁹⁸ and he and Judge MacPhail won ten-year terms on the court.¹⁹⁹ Robert W. Williams, Jr., a judge on the Philadelphia Court of Common Pleas, won the third seat on the court.²⁰⁰ Judge Williams was

186. 101 THE PENNSYLVANIA MANUAL 541-42 (1974).

187. *Miss Blatt, Packet Given Judgeships*, cited at note 93, at 1.

188. See PA. CONST. art. V, § 13(b).

189. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

190. 33 Pa. Commw. v (Wilks 1978) (introductory material discussing the Honorable Richard DiSalle).

191. 42 PA. CONS. STAT. § 561 (1978). The 1968 Constitution permitted the General Assembly to set the size of the court. See PA. CONST. art. V, § 4. As a result, a constitutional amendment, like that necessary to expand the Superior Court, was not necessary to expand the Commonwealth Court.

192. 37 Pa. Commw. vii (Wilks 1978) (introductory material discussing the Honorable John A. MacPhail).

193. 37 Pa. Commw. vi (Wilks 1978) (introductory material discussing the Honorable David W. Craig).

194. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

195. 1978 Pa. Laws 1098.

196. See *Abraham v. Shapp*, 400 A.2d 1249, 1253 (Pa. 1979).

197. *DiSalle Named for Position on Superior Court Bench*, THE OBSERVER-REPORTER, November 20, 1980, at 1.

198. *Judiciary Election Results; Superior Court Expanding*, cited at note 38.

199. *Id.*

200. 49 Pa. Commw. v (Wilks 1980) (introductory material discussing the Hon-

the first African-American to be elected to the Commonwealth Court.²⁰¹

In February 1980, President Judge Bowman passed away.²⁰² Governor Thornburgh nominated Madaline Palladino, a Lehigh County attorney, to fill the post.²⁰³ She was confirmed and took the bench in October 1980,²⁰⁴ but only remained on the court for a short time because she lost the 1981 election to Joseph T. Doyle, a former state representative.²⁰⁵ Judge Doyle replaced Judge Palladino in January 1982.²⁰⁶

At the time Judge Doyle joined the court, one position was vacant because Judge Wilkinson had been elevated to the Supreme Court in 1981.²⁰⁷ That post remained vacant until July 1983,²⁰⁸ when Judge Francis A. Barry of the Allegheny County Court of Common Pleas was nominated and confirmed.²⁰⁹

Three Commonwealth Court judgeships were on the ballot in 1983. One position was on the ballot due to Judge Wilkinson's resignation. Another position was on the ballot because Judge Mencer resigned in April 1982 to accept a position on the federal bench.²¹⁰ A third position was on the ballot because Judge

orable Robert W. Williams, Jr).

201. *Cavanaugh Clinches Court Seat*, cited at note 41.

202. 486 Pa. vii n.1 (1979).

203. 53 Pa. Commw. v (Wilks 1980) (introductory material discussing the Honorable Madaline Palladino).

204. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

205. *Nix Retained; 3 Incumbents Lose*, cited at note 136, at 12.

206. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

207. *Two Justices Take Seats*, cited at note 48.

208. Governor Thornburgh nominated Lowell A. Reed, Jr. to fill the position. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 165th Gen. Assem., 1981 Sess., at 870 (June 16, 1981). The Senate confirmed him, reconsidered the vote, defeated the nomination, and again reconsidered the vote. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 165th Gen. Assem., 1981 Sess., at 1431, 1433-35 (November 10, 1981). Governor Thornburgh later recalled the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 165th Gen. Assem., 1981 Sess., at 1451 (November 16, 1981). He then resubmitted it the following year. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 166th Gen. Assem., 1982 Sess., at 90 (February 22, 1982). Once again, he recalled it several months later. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 166th Gen. Assem., 1982 Sess., at 2384 (June 1, 1982).

Governor Thornburgh then nominated former Commonwealth Court Judge Madaline Palladino for the position. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 166th Gen. Assem., 1982 Sess., at 2518 (November 8, 1982). The Senate took no action on the nomination, so the nomination died when the Senate adjourned *sine die*. The Governor nominated her again the following year. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 367 (April 19, 1983). Her nomination was recalled by the Governor two months later. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 757 (June 27, 1983).

209. 77 Pa. Commw. vi (Wilks 1983) (introductory material discussing the Honorable Francis A. Barry).

210. PA. LAW., April 15, 1982, at 34. Governor Thornburgh nominated Lowell A.

Blatt reached mandatory retirement age in June 1983.²¹¹ The winners in the 1983 election were Judge Barry, Madaline Palladino, the former Commonwealth Court judge, and J. Gardner Colins, a Philadelphia Municipal Court judge.²¹²

The court stood at full strength in January 1983, but the next few years would see several extended vacancies on the court.²¹³ Judge Williams left the court in early 1985 to run for district attorney of Philadelphia,²¹⁴ and both Governor Thornburgh and Governor Casey were unable to fill this position.²¹⁵ As a

Reed, Jr. to fill the position, but the Senate took no action on the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 166th Gen. Assem., 1982 Sess., at 2515-16 (November 8, 1982) The following year, Governor Thornburgh nominated former Commonwealth Court Judge Madaline Palladino for the position. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 367 (April 19, 1983). The Governor recalled that nomination a week later. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 382 (April 25, 1983). The Governor was apparently anxious to get Palladino back on the bench because he nominated her to fill two vacancies at the same time. See LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 167th Gen. Assem., 1983 Sess., at 367 (April 19, 1983).

211. Geoffrey Yuda, *An Exceptional Career in Politics and the Law*, PA. LAW., March, 1991, at 12; *Roll 'em: Judge Blatt's Life on Silver Screen*, PA. L.J., March 7, 1988, at 12.

212. *9 Appellate Judges Are Selected*, cited at note 133, at 14.

213. Extended vacancies are understandable from a political perspective because confirmation requires a two-thirds vote of the Senate. See PA. CONST. art. V, § 13(b). They are nevertheless troubling from an administrative perspective, particularly if more than one position is vacant at the same time.

214. *Judge To Run For Phila. District Attorney*, THE EVENING NEWS, January 30, 1985, at B1. Judge Williams lost to future Pennsylvania Supreme Court Justice Ronald D. Castille. *Appellate Seats Filled*, cited at note 146, at 8.

215. Governor Thornburgh nominated Carroll F. Purdy, Jr. to fill the vacancy. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 169th Gen. Assem., 1985 Sess., at 565-66 (May 8, 1985). The Governor recalled that nomination five months later. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 169th Gen. Assem., 1985 Sess., at 1075 (October 7, 1985). He resubmitted the nomination the following year. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 1493 (January 7, 1986). Once again, he recalled it after several months. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 1960 (April 22, 1986). He quickly submitted the nomination a third time. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2015-16 (April 28, 1986). The Senate twice defeated the nomination, but each time reconsidered the vote. The Governor later recalled the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2620 (September 22, 1986). Governor Thornburgh tried one more time, but the Senate took no action on the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2757-58 (November 17, 1986).

Governor Casey subsequently had similar difficulties filling the position. He nominated Bernard L. McGinley II, for the position. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 401 (April 21, 1987). That nomination was defeated. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 875 (June 24, 1987). The Governor resubmitted the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen.

result, the seat remained vacant for almost three years. Similarly, Governors Thornburgh and Casey were unable to fill the vacancy²¹⁶ caused by the mandatory retirement of Judge Rogers in April 1986.²¹⁷ That judgeship remained vacant until January 1988.

Successors to Judges Rogers and Williams were finally chosen in the election of 1987. The two winners were Bernard L. McGinley II, a judge on the Allegheny County Court of Common Pleas, and Doris A. Smith, a former judge on the same court.²¹⁸ Judge Smith was the first African-American woman to be elected to a Pennsylvania appellate court.²¹⁹

The induction of Judges McGinley and Smith put the court back at full strength, but soon another vacancy occurred because Judge MacPhail voluntarily retired in October 1988.²²⁰ Governor Casey was unable to get a nominee confirmed,²²¹ so Judge MacPhail's successor was chosen in the 1989 election. Dan Pellegrini, the solicitor for Allegheny County, won the race²²²

Assem., 1987 Sess., at 899 (June 29, 1987). Governor Casey later recalled it. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 1425 (November 24, 1987).

216. Governor Thornburgh nominated Emil E. Narick to fill the vacancy. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2066 (April 28, 1986). The Governor later recalled the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2620 (September 22, 1986). He later nominated John H. Bingle for the position, but the Senate took no action on the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 170th Gen. Assem., 1986 Sess., at 2757 (November 17, 1986).

Governor Casey nominated Paul Ribner for the post. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 401 (April 21, 1987). That nomination was defeated. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 875 (June 24, 1987). The governor quickly resubmitted the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 899 (June 29, 1987). Later, the Governor recalled the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 171st Gen. Assem., 1987 Sess., at 1410 (November 23, 1987).

217. Judge Rogers was born April 28, 1916. 100 THE PENNSYLVANIA MANUAL 484 (1971). He retired on April 28, 1986. 1986 Annual Report of the Administrative Office of Pennsylvania Courts 117.

218. *Results Unclear From Court Race*, PA. LAW., December 1987, at 5; 111 THE PENNSYLVANIA MANUAL 5-28, 5-30 (1993).

219. *Results Unclear From Court Race*, cited at note 218, at 5.

220. *15 Lawyers Apply for Seat*, PA. LAW., December 1988, at 3.

221. Governor Casey nominated Dan Pellegrini for the post. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 173rd Gen. Assem., 1989 Sess., at 16 (January 3, 1989). The Governor later recalled the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 173rd Gen. Assem., 1989 Sess., at 450-51 (April 24, 1989). He later resubmitted the nomination. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 173rd Gen. Assem., 1989 Sess., at 633 (June 5, 1989). Once again, the Governor recalled it several months later. LEGISLATIVE JOURNAL OF PENNSYLVANIA - SENATE, 173rd Gen. Assem., 1989 Sess., at 1194 (October 17, 1989).

222. *Cappy Leads Voting For Supreme Court*, cited at note 66.

and joined the court in January 1990.²²³

Later in 1990, Judges Barry²²⁴ and Crumlish²²⁵ reached mandatory retirement age, creating two vacancies on the court. This time, the Governor was able to get his nominees confirmed. Robert L. Byer,²²⁶ an Allegheny County attorney who had lost a bid for the court in 1987, and James R. Kelly,²²⁷ a former state senator and county commissioner, were nominated and confirmed to the court. Both men ran for the court in 1991. Judge Kelly was successful, but Judge Byer lost to another Allegheny County attorney, Rochelle S. Friedman.²²⁸

Judge Palladino did not run for retention in 1993. Her successor was Sandra Schultz Newman, a Montgomery County lawyer, who won a ten-year term at the 1993 election.²²⁹ Finally, in May 1994, President Judge Craig resigned effective at the end of the court's term on August 31, 1994.²³⁰ This position had not been filled as of early March 1995.²³¹

2. President Judges

Exhibit 6 lists the persons who served as president judge of the Commonwealth Court between January 1, 1970 and August 1, 1994.

223. 111 THE PENNSYLVANIA MANUAL 5-102 (1993).

224. Judge Barry was born January 9, 1920. 106 THE PENNSYLVANIA MANUAL 422 (1983). He retired on January 7, 1990. 1987-88 Annual Report of the Administrative Office of Pennsylvania Courts 74.

225. Judge Crumlish was born May 5, 1920. 100 THE PENNSYLVANIA MANUAL 482 (1971). He retired on May 3, 1990. 1987-88 Annual Report of the Administrative Office of Pennsylvania Courts 74.

226. 134 Pa. Commw. xvii (Gedid 1990) (introductory material discussing the Honorable Robert L. Byer).

227. 134 Pa. Commw. xv (Gedid 1990) (introductory material discussing the Honorable James R. Kelly).

228. *2 Democrats In Lead for Spots on State Appellate Panel*, THE PATRIOT (Harrisburg), November 6, 1991, at B4.

229. *Dems' Winning Streak in Judicial Elections Ends*, cited at note 72.

230. *Craig to Retire From Commonwealth Ct. Bench*, PA. L. WKLY., May 23, 1994, at 3.

231. Governor Casey nominated Amy Putnam of the Office of General Counsel to succeed Judge Craig. *Approval Unlikely for Judicial Nominees*, PA. L. WKLY., November 21, 1994, at 1. The Senate did not confirm the nomination. Telephone Interview with Gregg L. Warner, Counsel, Senate Judiciary Committee (February 13, 1995).

Exhibit 6. President Judges of the Pennsylvania Commonwealth Court, 1970-1994

Year	President Judge
1970	James S. Bowman
1971	
1972	
1973	
1974	
1975	
1976	
1977	
1978	
1979	James Crumlish, Jr.
1980	
1981	
1982	
1983	
1984	
1985	
1986	
1987	
1988	David W. Craig*
1989	
1990	
1991	
1992	
1993	
1994	

* In May 1994, President Judge Craig resigned from the Commonwealth Court, effective August 31. Judge J. Gardner Collins was elected the next President Judge of the Commonwealth Court.

The Commonwealth Court Act provided that the appointee first named by the governor, when confirmed by the Senate, would be the president judge of the court.²³² Judge Bowman became president judge pursuant to this provision. He remained president judge of the Commonwealth Court after the expansion of the court. The Rules of Judicial Administration provide that when a court expands from seven or fewer judges to more than seven judges, the president judge selected on the basis of seniority is to remain president judge "for a period of five years from the date on which the authorized increase in the size of the court becomes effective."²³³ President Judge Bowman died before that five-year term expired.²³⁴

232. 1969 Pa. Laws 434-35, § 3(c)(1).

233. 201 PA. CODE, Rule of Judicial Administration 706(c)(1) (1991).

234. 486 Pa. vii n.1 (1979) (introductory material discussing the Honorable James S. Bowman).

Subsequent president judges were elected by the members of the court.²³⁵ Judge Crumlish was elected president judge for a five-year term commencing in 1980,²³⁶ and continued to serve as president judge until he reached mandatory retirement age in 1990.²³⁷ Judge Craig was then elected president judge.²³⁸

When President Judge Craig announced his plans to retire from the court, an election was held to choose a successor. For the first time there was a contested election for the position of president judge,²³⁹ and the court split four to four.²⁴⁰ The Rules of Judicial Administration provide that in such a situation, the Supreme Court is to choose a president judge from among the candidates receiving the highest number of votes.²⁴¹ Accordingly, the High Court selected Judge J. Gardner Colins to be the next president judge of the Commonwealth Court.²⁴²

Only three persons served as president judge of the Commonwealth Court between April 1970 and August 1, 1994. The average tenure of the president judge of the Commonwealth Court, therefore, was much longer than the average tenure of the chief justice of the Supreme Court and the president judge of the Superior Court during the same period. The longer tenure of Commonwealth Court president judges can be attributed to two factors. First, President Judge Bowman was president judge from the day he assumed the appellate bench. Second, President Judge Crumlish was able to serve more than one term as president judge. The average tenure of Commonwealth Court president judges will decrease in the future because of the prohibition against serving consecutive terms as president judge.

III. STATISTICAL MISCELLANY

Several patterns and generalizations are obvious from the discussion presented in Section II. For example: (1) many appel-

235. PA. CONST. art. V, § 10(d).

236. Geoffrey Yuda, *Last of the Original 7*, PA. LAW., June 1990, at 9.

237. President Judge Crumlish was reelected in 1985 and 1990. Yuda, cited at note 236, at 9. The Supreme Court did not prohibit the reelection of president judges until May 9, 1990 — less than a week after President Judge Crumlish retired. *In re: Amendment of Rule 706(b) of the Pennsylvania Rules of Judicial Administration*, 524 Pa. XCIII (1990) (introductory material discussing the selection of president judges).

238. *President Judge Says He Will Retire Early*, THE PATRIOT (Harrisburg), May 21, 1994, at B2.

239. *Commonwealth Ct. Gains President Judge*, PA. L. WKLY., June 13, 1994, at 3.

240. *Commonwealth Ct. Gains President Judge*, cited at note 239, at 3.

241. 201 PA. CODE, Rule of Judicial Administration 706(b) (1991).

242. *Commonwealth Ct. Gains President Judge*, cited at note 239, at 3.

late judges have had previous judicial experience; (2) a large number of appellate judges were initially appointed rather than elected; and (3) many appellate judges came from Allegheny and Philadelphia Counties.

To identify additional patterns, this section presents a statistical analysis of Pennsylvania's appellate judges between January 1, 1969 and August 1, 1994. A brief methodological note precedes the statistical examination of all the judges who sat on Pennsylvania's appellate bench between January 1, 1969 and August 1, 1994. Section II, however, showed that some of the appellate judges who served during that period were initially elected or appointed under the Constitution of 1874. To provide insight into the impact of the 1968 Constitution, this section presents a separate discussion of the judges who were initially elected or appointed to the appellate bench under the Constitution of 1968.

A. Methodology

Most of the information presented here came from published sources²⁴³ such as reference works,²⁴⁴ legal periodicals,²⁴⁵ government publications,²⁴⁶ and newspapers.²⁴⁷ This point is significant because the published sources do not always agree. For example, one article in a legal newspaper stated that Justice Kauffman was from Montgomery County,²⁴⁸ whereas another article in the same paper described him as a Philadelphia lawyer.²⁴⁹ The data presented here can be documented, but the reader should be aware that another researcher, also relying on published materials, might obtain slightly different results.

The reader should also be aware of the method used to calculate the number of judges on each of the appellate courts. The triggering event for counting a judge was his joining the appellate court. Applying this principle, the following fact situations

243. The Administrative Office of Pennsylvania Courts also provided information.

244. For example, *The American Bench and Who's Who in American Law*.

245. For example, *The Pennsylvania Lawyer* and *The Pennsylvania Law Journal-Reporter*.

246. For example, *The Pennsylvania Manual* and *The Pennsylvania Legislative Journal - Senate*.

247. Additionally, some information was inferred from the published sources. For example, if a judge's term expired in January 1982, and a biography of the judge indicated that the judge served until 1982, it was inferred that the judge left the bench in January 1982.

248. *Appellate Court Elections: Your Guide to Choosing*, cited at note 34.

249. *Four Candidates are Shoo-ins*, PA. L.J., May 21, 1979, at 1.

were counted as one judgeship: (1) a judge is elected, serves a term, is retained for another term, and retires; and (2) a judge is appointed, successfully runs for a ten-year term, and retires at the end of that term. The following fact situations, however, were counted as two judgeships: (1) a judge on one appellate court is elected or appointed to another appellate court; and (2) an appointed judge loses a bid for a ten-year term, but is later appointed or elected to an appellate court.²⁵⁰ As a result, the number of judges shown in the following tables exceeds the number of individuals who served as appellate judges during the period 1969 to 1994.

B. All Appellate Judges Serving Between January 1, 1969 and August 1, 1994.

What kind of person sat on Pennsylvania's appellate bench between 1969 and 1994? To answer that question, this subsection examines the party affiliation,²⁵¹ race and gender,²⁵² and county and region²⁵³ of every appellate judge serving between January 1, 1969 and August 1, 1994.²⁵⁴ This subsection then attempts to answer a different question: Why do judges leave the bench? To answer that question, this subsection presents

250. Consistent with these principles, Judge Spaeth's service was counted as two judgeships: (1) his first appointive term, which ended because he lost in the primary, and (2) his second appointive term and his elective term.

251. One reason for studying the composition of the bench is that "the decision as to who will make the decisions affects what decisions will be made." JACK PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 29 (1955). Party affiliation was selected for study here because of the apparent link between this variable and case outcomes. See, e.g., Kiel, cited at note 6, at 293; Flango & Ducat, cited at note 6, at 34.

252. "One reason to study judicial recruitment and selection is that representation, access, and participation are important constructs in democratic theory." Slotnick I, cited at note 6, at 317. Additionally, some commentators have argued that the representativeness of the bench relates to the credibility and quality of the bench. See Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 *JUDICATURE* 334, 343 (1983) [hereinafter Goldman II]; Sheldon Goldman, *Judicial Selection and the Qualities that Make a "Good" Judge*, 462 *ANNALS* 112 (1982).

253. One reason for studying these variables is to determine the representativeness of the bench. Another reason is the potential policy implications of these variables. Several persons have called for the election of appellate judges from districts to ensure better geographic diversity on the bench. See, e.g., Shelly, *House Fails To Act On Selection Procedure*, *THE PATRIOT* (Harrisburg), June 22, 1994, at B1; *REPORT OF THE GOVERNOR'S REFORM COMMISSION* 194 (1988) (comment by Joseph A. Quinn, Jr.) [hereinafter Beck Commission Report].

254. For many of the individual variables examined here, this section will compare the data on Pennsylvania's appellate judges to data for the general population. It is admittedly unrealistic, however, to expect the appellate courts to be reasonably representative of the general population in all respects at the same time.

data on the reasons judges left Pennsylvania's appellate bench between 1969 and 1994.²⁵⁵

1. Party Affiliation

Exhibit 7 shows the party affiliation of all appellate judges serving between January 1, 1969 and August 1, 1994. A total of 54.8 percent of these judges were Democrats, whereas 45.2 percent were Republicans. Democrats outnumbered Republicans on each of the appellate courts except the Supreme Court, where the Republican Party had a slight majority.

Exhibit 7. All Appellate Court Judges Serving Between 1969 and 1994: Party Affiliation

PARTY AFFILIATION	COURT			
	Supreme	Superior	Commw.	Total
Democratic	11	20	15	46
Republican	12	16	10	38
Total	23	36	25	84

One may ask whether the appellate courts were reasonably representative of the general population, with respect to party affiliation, during the period 1969-1994. The November 1980 election occurred about midway through the period studied, so voter registration figures for that election provide a suitable yardstick for measuring the representativeness of the appellate bench between 1969 and 1994. Of the voters registered in November 1980, 53.4 percent were Democrats, 41.3 percent were Republicans, and 5.3 percent were registered in other parties.²⁵⁶ The minor parties were underrepresented on the appellate bench between 1969 and 1994. In terms of the two major political parties, Pennsylvania's appellate bench was reasonably representative with respect to party affiliation between 1969 and 1994.²⁵⁷

255. This variable was selected for study here primarily because of its policy implications. For example, commentators periodically argue that judicial salaries should be increased to prevent judges from leaving the state bench for more lucrative positions on the federal bench or in the private sector. See, e.g., Thomas L. Cooper, *The Case For Higher Judicial Pay*, PA. LAW., November 1991, at 15.

256. 105 THE PENNSYLVANIA MANUAL 593 (1981).

257. The term "reasonably representative" is used here to mean that the composition of the appellate bench did not deviate from that of the general population

The proportion of registered Democrats, however, has increased between 1969 and 1994. Democrats comprised 48.5 percent of the Pennsylvania voters registered for the November 1970 election,²⁵⁸ as compared to 50.7 percent of those registered for the November 1992 election.²⁵⁹ This point raises the following question: has the composition of the appellate courts changed over time? To answer that question, Exhibits 8, 9, and 10 show the composition of the three appellate courts at five-year intervals between 1969 and 1994.

Exhibit 8. Composition of the Supreme Court 1969-1994: Party Affiliation

PARTY	YEAR*					
	1969	1974	1979	1984	1989	1994
Democrat	2	3	4	5	6	6
Republican	5	4	2	2	1	1
Vacant	0	0	1	0	0	0
Total	7	7	7	7	7	7

* Figures reflect the composition of the court as of January 30 of the year shown.

by more than five percentage points. For example, since 53.4 percent of the voters were registered Democrats in 1980, the appellate bench would be considered reasonably representative of Democrats if the percentage of Democratic appellate judges was anywhere from 48.4 percent to 58.4 percent of all appellate judges serving between 1969 and 1994.

258. 100 THE PENNSYLVANIA MANUAL 654 (1971).

259. 111 THE PENNSYLVANIA MANUAL 7-22, 7-23 (1993).

Exhibit 9. Composition of the Superior Court 1969-1994: Party Affiliation

PARTY	YEAR*					
	1969	1974	1979	1984	1989	1994
Democrat	4	5	4	8	7	8
Republican	3	2	1	7	8	7
Vacant	0	0	2	0	0	0
Total	7	7	7	15	15	15

* Figures reflect the composition of the court as of January 30 of the year shown.

Exhibit 10. Composition of the Commonwealth Court 1970-1994: Party Affiliation

PARTY	YEAR*					
	1970	1974	1979	1984	1989	1994
Democrat	3	3	4	6	7	8
Republican	4	4	5	3	1	1
Vacant	0	0	0	0	1	0
Total	7	7	9	9	9	9

* Except for 1970, figures reflect the composition of the court as of January 30 of the year shown. For 1970, the figures reflect the initial appointees to the court, who were inducted on April 15.

Consistent with the trend in voter registration, the proportion of Democrats on the appellate courts increased between 1969 and 1994. In 1969 and 1970, Democrats occupied 42.9 percent of the seats on Pennsylvania's appellate bench. In 1994, 71.0 percent of Pennsylvania's appellate judges were Democrats. The latter figure deviates markedly from the general population (for example, in 1992, 50.7 percent of registered voters were Democrats), but it is probably unrealistic to expect the courts to be reasonably representative of the general population at each and every point in time.

2. Race and Gender

Exhibit 11 shows the race and gender of all appellate judges serving between January 1, 1969 and August 1, 1994. White appellate court judges outnumbered African-Americans 78 to 6, and men outnumbered women 75 to 9. No other racial groups (e.g., Asian-Americans) were represented on Pennsylvania's appellate bench during the period studied.

Exhibit 11. All Appellate Court Judges Serving Between 1969 and 1994: Race and Gender

RACE AND GENDER	COURT			
	Supreme	Superior	Commw.	Total
White Male	21	32	18	71
Black Male	1	2	1	4
White Female	0	2	5	7
Black Female	1	0	1	2
Total	23	36	25	84

White males formed the largest group on the appellate bench; about 85 percent of all appellate court judges serving between 1969 and 1994 were white males. Additionally, white males formed a large majority on each of the three appellate courts. About 90 percent of Supreme Court justices, 89 percent of Superior Court judges, and 72 percent of Commonwealth Court judges were white males.

The appellate bench was reasonably representative of the general population, with respect to race between 1969 and 1994.²⁶⁰ Census data²⁶¹ show that whites comprised 89.9 percent of Pennsylvania's total population in 1980, while African-Americans comprised 8.8 percent.²⁶² Because whites comprised

260. Due to the fact that no other racial groups were represented on the appellate courts in the period studied, "race" as used in this piece is limited to African-Americans and whites.

261. Because the 1980 census was taken closest to the midpoint of the period studied, census data for that year is used for determining the representativeness of the appellate bench between 1969 and 1994.

262. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1980 CENSUS OF THE POPULATION, VOL. 1 CHARACTERISTICS OF THE POPULATION, CHAPTER D DETAILED POPULATION CHARACTERISTICS, PART 40 PENNSYLVANIA 40-7 (hereinafter 1980 CEN-

92.9 percent of Pennsylvania's appellate judges between 1969 and 1994, and African-Americans comprised 7.1 percent of that group, Pennsylvania's appellate bench was reasonably representative of these groups during the period studied. Other racial groups were underrepresented.

The appellate bench, however, was not reasonably representative of the general population with respect to gender between 1969 and 1994. Although women comprised 52.1 percent of the state's population in 1980,²⁶³ they only comprised 10.7 percent of the state's appellate judges between 1969 and 1994. This deviation might be due in part, to the composition of the legal profession.²⁶⁴

The proportion of female attorneys has increased in the last 25 years, however.²⁶⁵ Has the proportion of women judges increased? To answer this question, exhibits 12, 13, and 14 show the composition of the three appellate courts at five-year intervals during the period 1969-1994.²⁶⁶

Exhibit 12. Composition of the Supreme Court 1969-1994: Race and Gender

RACE AND GENDER	YEAR*					
	1969	1974	1979	1984	1989	1994
White Male	7	6	5	6	5	6
Black Male	0	1	1	1	1	1
White Female	0	0	0	0	0	0
Black Female	0	0	0	0	1	0
Vacant	0	0	1	0	0	0
Total	7	7	7	7	7	7

* Figures reflect the composition of the court as of January 30 of the year shown.

SUS].

263. 1992 PA. ABSTRACT 5.

264. Male lawyers outnumbered female lawyers by about 6.5 to 1 in 1980. 1980 CENSUS, cited at note 262, at 40-375.

265. Women comprised 24.0 percent of Pennsylvania's attorneys in 1990. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, EQUAL OPPORTUNITY FILE: MONTANA/WYOMING (CD-ROM) (January 1993).

266. The first year shown for the Commonwealth Court is 1970 because the court did not come into existence as a separate court until that year.

Exhibit 13. Composition of the Superior Court 1969-1994: Race and Gender

RACE AND GENDER	YEAR*					
	1969	1974	1979	1984	1989	1994
White Male	6	7	5	13	13	12
Black Male	1	0	0	1	1	1
White Female	0	0	0	1	1	2
Black Female	0	0	0	0	0	0
Vacant	0	0	2	0	0	0
Total	7	7	7	15	15	15

* Figures reflect the composition of the court as of January 30 of the year shown.

Exhibit 14. Composition of the Commonwealth Court 1970-1994: Race and Gender

RACE AND GENDER	YEAR*					
	1970	1974	1979	1984	1989	1994
White Male	7	6	8	7	6	6
Black Male	0	0	0	1	0	0
White Female	0	1	1	1	1	2
Black Female	0	0	0	0	1	1
Vacant	0	0	0	0	1	0
Total	7	7	9	9	9	9

* Figures reflect the composition of the court as of January 30 of the year shown, except 1970. For that year, the figures shown reflect the initial members of the court, inducted on April 15.

These tables show that the appellate bench was almost exclusively staffed by white males in 1969-70. During the 1970s, a few more women and African-Americans entered the ranks of the appellate judiciary, and the number of women and minority judges further increased in the 1980s and early 1990s.²⁶⁷ As of

267. In this respect, the experience of Pennsylvania's appellate bench was similar to that of the federal bench. The federal bench was historically a "bastion of

January 30, 1994, 77.4 percent of Pennsylvania's appellate judges were white males, 9.7 percent were African-Americans and 16.1 percent were women. The proportion of women, African-American, and other minority appellate judges will probably continue to increase in the future because the members of those groups will form a larger proportion of the pool of qualified judicial candidates.

3. *County and Region*

Exhibit 15 shows the county represented by each judge serving on the appellate courts between January 1, 1969 and August 1, 1994.²⁶⁸ Significantly, Pennsylvania has 67 counties, but 47 of these counties have never had one of their own on the appellate bench during the quarter century studied. Many of these 47 counties are small, but some are not. The 1980 census listed eleven Pennsylvania counties as having more than 300,000 residents.²⁶⁹ Three of these counties, Berks, Bucks, and Lancaster, produced no appellate judges between 1969 and 1994.

white male dominance." Slotnick II, cited at note 6, at 372. Women and minorities did not begin to assume the bench in significant numbers until the Carter Administration. More and more women and minorities have taken the federal bench since that time. For a comparison of the Carter, Reagan, and Bush records on the appointment of women and minorities to the federal bench, see Goldman I, cited at note 6.

268. The county listed for each judge is the county most frequently cited by published sources. In some cases, this is the county in which the judge resided at the time of his selection to the appellate bench. In some other cases, it is the county in which the judge practiced at the time of selection.

269. 111 THE PENNSYLVANIA MANUAL 6-11 (1993). These counties were: Allegheny, Berks, Bucks, Chester, Delaware, Lancaster, Luzerne, Montgomery, Philadelphia, Westmoreland, and York.

Exhibit 15. All Appellate Judges Serving Between 1969 and 1994: County

COUNTY	COURT			
	Supreme	Superior	Commw.	Total
Adams	0	0	1	1
Allegheny	7	11	8	26
Beaver	0	1	0	1
Bedford	0	1	0	1
Centre	1	0	1	2
Chester	0	1	1	2
Cumberland	0	2	0	2
Dauphin	0	2	2	4
Delaware	0	1	1	2
Erie	1	0	0	1
Lackawanna	1	0	0	1
Lehigh	0	2	2	4
Luzerne	1	2	0	3
McKean	0	0	1	1
Montgomery	1	2	1	4
Philadelphia	8	8	4	20
Schuylkill	1	1	0	2
Washington	0	1	1	2
Westmoreland	1	1	2	4
York	1	0	0	1
Total	23	36	25	84

The county producing the most appellate judges during this period was the state's second largest, Allegheny. The state's most populous county, Philadelphia, ranked second in producing judges. Together, these two counties produced approximately 55 percent of all the appellate judges, and about 65 percent of the Supreme Court justices, who served between 1969 and 1994. No other single county produced more than four appellate judges or one Supreme Court justice.

Grouping judges by geographic region, rather than by county, can yield additional insights into the type of person who sat on the appellate bench between 1969 and 1994. Exhibit 16 shows Pennsylvania's appellate judges grouped according to east-west geographic regions. These regions are identical to the three districts, eastern, middle, and western, used by Pennsylvania's appellate courts.²⁷⁰ This exhibit shows that the eastern region of the state produced slightly more appellate judges than did the western region. The central region produced less than 12 percent of all appellate judges, and less than 9 percent of Supreme Court justices between 1969 and 1994.

Exhibit 16. All Appellate Judges Serving Between 1969 and 1994: East-West Geographic Region

REGION	COURT			
	Supreme	Superior	Commw.	Total
Eastern	12	17	9	38
Central	2	4	4	10
Western	9	15	12	36
Total	23	36	25	84

Comparing the data in Exhibit 16 to the 1980 census data is helpful in determining the representativeness of the bench. The western region was slightly overrepresented on Pennsylvania's appellate bench because that region contained 35.7 percent of the state's population in 1980,²⁷¹ but produced 42.9 percent of Pennsylvania's appellate judges between 1969 and 1994. The eastern region was slightly underrepresented because it contained 50.7 percent of the state's population in 1980,²⁷² but on-

270. The eastern region is comprised of the following 22 counties: Berks, Bucks, Carbon, Chester, Columbia, Delaware, Lackawanna, Lancaster, Lehigh, Luzerne, Monroe, Montgomery, Montour, Northampton, Northumberland, Philadelphia, Pike, Schuylkill, Sullivan, Susquehanna, Wayne, and Wyoming.

The central region is comprised of the following 18 counties: Adams, Bradford, Centre, Clinton, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lebanon, Lycoming, Mifflin, Perry, Snyder, Tioga, Union, and York.

The western region is comprised of the following 27 counties: Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cameron, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Potter, Somerset, Venango, Warren, Washington, and Westmoreland.

271. 111 THE PENNSYLVANIA MANUAL 6-11 (1993).

272. *Id.*

ly produced 45.2 percent of Pennsylvania's appellate judges between 1969 and 1994. The central region was reasonably represented on the appellate bench; it contained 13.6 percent of the state's population in 1980²⁷³ and produced 11.9 percent of Pennsylvania's appellate judges between 1969 and 1994.

Pennsylvania's appellate bench, however, was more unrepresentative with respect to north-south geographic regions than with respect to east-west geographic regions between 1969 and 1994. Exhibit 17 shows Pennsylvania's appellate judges from 1969 to 1994 using north-south geographic districts. This table was derived by drawing a line across the Commonwealth midway between Maryland and New York. Counties entirely above the line were in the northern region, counties entirely below the line were in the southern region, and counties straddling the line were in the border region.²⁷⁴

Exhibit 17. All Appellate Judges Serving Between 1969 and 1994: North-South Geographic Region

REGION	COURT			
	Supreme	Superior	Commw.	Total
Northern	3	2	1	6
Border	2	1	1	4
Southern	18	33	23	74
Total	23	36	25	84

In 1980, the southern region of the Commonwealth contained 73.4 percent of Pennsylvania's population.²⁷⁵ That region, however, produced 88.1 percent of the state's appellate judges between 1969 and 1994. The northern region contained 14.6 per-

273. *Id.*

274. The southern region is comprised of the following 29 counties: Adams, Allegheny, Beaver, Bedford, Berks, Blair, Bucks, Cambria, Chester, Cumberland, Dauphin, Delaware, Fayette, Franklin, Fulton, Greene, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Perry, Philadelphia, Somerset, Washington, Westmoreland, and York.

The border region is comprised of the following 16 counties: Armstrong, Butler, Carbon, Centre, Clearfield, Columbia, Indiana, Jefferson, Lawrence, Monroe, Montour, Northampton, Northumberland, Schuylkill, Snyder, and Union.

The northern region is comprised of the following 22 counties: Bradford, Cameron, Clarion, Clinton, Crawford, Elk, Erie, Forest, Lackawanna, Luzerne, Lycoming, McKean, Mercer, Pike, Potter, Sullivan, Susquehanna, Tioga, Venango, Warren, Wayne, and Wyoming.

275. 111 THE PENNSYLVANIA MANUAL 6-11 (1993).

cent of Pennsylvania's population in 1980,²⁷⁶ but only 7.1 percent of the state's appellate judges between 1969 and 1994 came from this region. Similarly, the border region contained 12.0 percent of Pennsylvania's population in 1980,²⁷⁷ but only 4.8 percent of the state's appellate judges between 1969 and 1994 came from this region.²⁷⁸

4. *Reasons For Leaving the Bench*

Exhibit 18 shows why Pennsylvania's appellate judges left the bench between 1969 and 1994.²⁷⁹ Judges left for a large variety of reasons. One reason listed in Exhibit 18, "could not run again," was caused by the transition from the Constitution of 1874 to the Constitution of 1968. As a result, no other judge will leave the appellate bench for this reason unless and until the constitution is further amended.

276. *Id.*

277. *Id.*

278. Commentators have disagreed over the relevance of geography in selecting appellate judges. See Beck Commission Report, cited at note 253, at 151, 154. It is worth noting that inadequate geographic balance on the appellate courts can undermine public confidence in the courts. For example, when the Pennsylvania Supreme Court agreed with Allegheny County's claim that the state constitution required the state government to fund the entire unified judicial system (rather than using a joint state-county funding scheme), editorial writers were quick to note that each of the four justices in the majority was from Allegheny County. See *County Court Costs*, THE PATRIOT (Harrisburg), December 28, 1987, at A8; see also *County of Allegheny v. Commonwealth*, 534 A.2d 760 (Pa. 1987).

279. This table does not include President Judge Craig, whose voluntary retirement took effect after August 1, 1994 (the end of the period studied in this article).

Exhibit 18. Reasons for Leaving the Appellate Bench

REASON FOR LEAVING THE BENCH	COURT			
	Supreme	Superior	Commw.	Total
Death	3	1	2	6
Mandatory Retirement	3	5	4	12
Lost Primary or General Election	1	6	3	10
Did Not Run or Run Again	3	2	1	6
Could Not Run Again	3*	2**	N/A	5
Appointed to Federal Bench	1	0	1	2
Appointed or Elected to the PA Supreme Court	N/A	1	3	4
Voluntary Retirement	1	1	1	3
Enter/Reenter Private Practice	1	2	0	3
Ran for Non-Judicial Office	0	0	1	1
Appointed to Executive Branch Position	0	1	0	1
Total	16	21	16	53

* The Constitution of 1874 provided that Supreme Court justices were elected for a single term of 21 years.

** Judges on the bench when the 1968 Constitution took effect could complete their existing terms. Several of these judges, however, could not run for new terms because they were past the mandatory retirement age.

The most common reason for leaving the appellate bench was mandatory retirement; 22.6 percent of the judges who left the appellate courts between 1969 and 1994 did so because they reached age 70. Exhibit 18, however, may understate the impact of the requirement that judges retire upon reaching age 70. Some judges probably did not run for election or retention because they would have reached age 70 shortly after beginning their new terms. Judge Palladino, for example, would have turned 70 only four months after beginning another ten-year term in January 1994. She did not run for retention in 1993.

Surprisingly, the second most common reason for leaving the appellate bench was losing an election. Almost one out of every five judges who left the bench during the period studied left for that reason. Appointed judges must run in a partisan campaign

to remain on the court,²⁸⁰ and Exhibit 18 indicates that many are unsuccessful.²⁸¹

Partisan elections, however, must be distinguished from retention elections. In a retention election, a judge runs unopposed, and the only question for the voters is whether that judge shall be retained on the bench.²⁸² Exhibit 18 shows that no appellate judge lost a retention election between 1969 and 1994.

Exhibit 18 also questions the contention that judges leave the state bench for higher-paying positions in the private sector or on the federal bench. Only 9.4 percent of Pennsylvania's appellate judges left the state bench for private practice or for the federal bench between 1969 and 1994.²⁸³ The data, however, covers an extended time period. The argument that judicial salaries are inadequate may have greater force at specific points in time than over the long term.

C. Appellate Judges Initially Selected Between January 1, 1969 and August 1, 1994.

How many judges were appointed to the appellate bench under the Constitution of 1968 and how many were elected? What kind of person was appointed or elected to the appellate bench under that constitution? How long did he stay on the bench? To answer these questions, this subsection examines the following variables for those judges initially elected or appointed to the appellate bench after the 1968 Constitution took effect:²⁸⁴ method of assuming the bench,²⁸⁵ party affiliation,²⁸⁶ race

280. The initial members of the Commonwealth Court were the only exceptions to this rule. See 42 PA. CONS. STAT. § 3131 (3)(i) (1972).

281. This point will be discussed in greater detail in Section III(C)(1).

282. See PA. CONST. art. V, § 15(b).

283. Exhibit 18, of course, only concerns appellate judges, who are paid more than trial court judges. 42 PA. CONS. STAT. § 3581 (Supp. 1994). It is possible that a higher percentage of trial court judges leave the state bench for higher-paying jobs elsewhere.

284. Some judges, like Justice Pomeroy, were initially appointed or elected under the Constitution of 1874 and elected or retained under the Constitution of 1968. These judges were not included in the statistics presented in this subsection. Although they won elections under the 1968 Constitution, they were running as incumbents, which means they had certain advantages in the electoral process. Therefore, although they were "selected" to the appellate bench under the Constitution of 1968, they were selected in a different sense than those persons initially appointed or elected under the Constitution of 1968.

285. This variable was selected for study here because "research on state courts has found that in many states choosing judges by elections, a substantial percentage initially takes the bench through interim appointments." Flango & Ducat, cited at note 6, at 27-28; see also Philip L. Dubois, *State Trial Court Appointments: Does the Governor Make a Difference?*, 69 JUDICATURE 20 (1985). This subsection will fre-

and gender,²⁸⁷ county and region,²⁸⁸ age,²⁸⁹ immediately previous employment,²⁹⁰ previous judicial experience,²⁹¹ and length of appellate service.²⁹²

1. *Method of Assuming the Bench*

Exhibit 19 shows the number of appellate judges initially selected under the Constitution of 1968 and the method of selec-

quently compare data on judges initially appointed to the bench with data on judges initially elected to the bench in order to determine whether these different selection methods select different judges in Pennsylvania. This information has obvious implications for the ongoing debate over the best method of selecting Pennsylvania's judges.

286. This variable was selected for study in this subsection, in addition to the previous subsection, because party affiliation is clearly a criterion in selecting appellate judges. For example, Justice Wilkinson's nomination to the Supreme Court was held up in the Senate because Democratic senators had concerns about giving Republicans a majority on the Court. *23 Seek Court Seats*, PA. LAW., April 15, 1981, at 24.

287. This variable is considered in this subsection, in addition to the previous subsection, primarily because some articles suggest that women and minorities fare better in certain judicial selection systems than in others. See, e.g., Glick & Emmert, cited at note 6, at 230; Graham, cited at note 6, at 33.

288. These variables are studied in this subsection, in addition to the previous subsection, because they are criteria in the selection process. For example, western Pennsylvanians generally vote for western Pennsylvanians in judicial races. *Dems' Winning Streak in Judicial Elections Ends*, cited at note 72, at 8. Geographic factors do not just play a role in electing judges; they also play a role in nominating and confirming judges. For example, Judge Beck's nomination to the Superior Court ran into difficulty in 1980 because some legislators believed that one of the eight new Superior Court judges should be from Philadelphia. *6 New Judges Take Superior Court Seats*, cited at note 125, at 21; see also, Christopher, cited at note 128, at 1 (noting that a senator from Erie voted against confirming six Superior Court nominees because none of the Governor's eight nominees came from the northern portion of the state).

289. This variable is considered here for several reasons. First, some persons consider age in evaluating a judicial candidate. "Younger, less experienced appointees [to the federal bench] generally receive the lowest ratings from the Standing Committee on the Federal Judiciary of the American Bar Association." Sheldon Goldman, *The Age of Judges: Reagan's Second-Term Appointees*, A.B.A. J., October 1, 1987, at 94, 97. Second, because of Pennsylvania's mandatory retirement provision, age relates to another factor selected for study here — length of service on the appellate bench.

290. This variable was selected for study here because "one career variable of considerable interest in distinguishing among the paths to judgeships taken by different types of nominees focuses on the candidates' last job prior to their pending judicial appointment." Slotnick II, cited at note 6, at 382.

291. This variable was selected for study here because "one popular indicator of judicial quality is prior experience." Flango & Ducat, cited at note 6, at 31; see also Goldman II, cited at note 252, at 35.

292. This variable was selected for study here because of its management implications (i.e., it relates to judicial turnover, continuity, institutional memory, and so forth).

tion used for each judge. Despite the constitutional preference for the election of judges,²⁹³ a majority of appellate judges initially reached the appellate bench by being appointed. Almost two-thirds of the judges selected to the Commonwealth Court were initially appointed rather than elected. The Supreme Court was the only court that had more judges reach the bench by election rather than appointment.

Exhibit 19. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Method of Selection

	COURT			
	Supreme	Superior	Commw.	Total
Elected	9	14	9	32
Appointed	7	14	16	37
Total	16	28	25	69

The number of appointed judges was inflated by the creation of the Commonwealth Court and the expansion of both intermediate appellate courts. These new positions accounted for 17 of the 37 appointees.²⁹⁴

The number of appointees, however, would have been even greater if several vacancies had been filled by appointment. For example, the Senate refused to confirm some Commonwealth Court nominees,²⁹⁵ which caused extended vacancies that were ultimately filled by election.

Exhibit 19 raises two questions that merit additional attention. First, if governors as a whole appointed 37 appellate judges between 1969 and 1994, how many vacancies did each governor fill?²⁹⁶ Exhibit 20 addresses this question.

293. See, e.g., *Cavanaugh*, 440 A.2d at 1382; *Barbieri v. Shapp*, 383 A.2d 218, 222 (Pa. 1978); *Berardocco v. Colden*, 366 A.2d 574, 577 (Pa. 1976).

294. The Commonwealth Court Act originally created seven positions and the General Assembly later expanded the court by creating two additional positions. See 42 PA. CONS. STAT. § 561 (1981). The expansion of the Superior Court created eight positions. See note 123 and accompanying text.

295. See notes 215-16 and accompanying text.

296. This question is important because one reason for studying judicial appointees is to observe and evaluate the performance of the appointing authority. See *Goldman II*, cited at note 252, at 35.

Exhibit 20. Appointments by Administration, 1969-1994

ADMINISTRATION	COURT			
	Supreme	Superior	Commw.	Total
Shafer (1969-71)	1	0	8	9
Shapp (1971-79)	1	4	4	9
Thornburgh (1979-87)	3	9	2	14
Casey (1987-94)	2	1	2	5
Total	7	14	16	37

The number of judges appointed by a single governor under the Constitution of 1968 has ranged from as high as fourteen to as low as five. Governors Shafer, Shapp, and Thornburgh each appointed some judges because of the creation or expansion of the intermediate appellate courts. Governor Casey only filled vacancies in the existing positions. The figures for Governor Casey only show the number of persons appointed to the bench during the first seven and one-half years of his Administration, but no additional appellate nominees were confirmed before his term expired in January 1995.

Exhibit 19 raises a second question. If 37 judges were appointed to the bench, how many of these incumbents subsequently won ten-year terms?²⁹⁷ Exhibit 21 shows that five judges left the bench (due to mandatory retirement, resignation, or appointment/election to another court) before the next election for the position to which they had been appointed. Exhibit 21 also shows that 20 of the 37 appointees won ten-year terms. This figure is surprisingly low. Consider the following statement from several members of the Beck Commission: "as a practical matter, the majority of judges throughout this Commonwealth are initially appointed to their position and the overwhelming number of these appointees are then retained in the subsequent retention election."²⁹⁸ That statement may be true for trial judges, but Exhibit 21 rejects the notion that the overwhelming number of appointees to the appellate courts win ten-year terms.

Exhibit 21 shows that 24 of the 37 appointees ran for office in

297. This question is important given the figures shown in Exhibit 18 (relating to reasons for leaving the appellate bench).

298. Beck Commission Report, cited at note 253, at 207 (Dissenting Report on Judicial Selection and Retention). Of course, the quote is inaccurate in that appointees run in partisan elections rather than in retention elections.

a partisan election, and 62.5 percent of them were successful. The latter figure, which is low for an incumbent running for office,²⁹⁹ is actually inflated in the sense that some appointees (such as Judge Cavanaugh) were not confirmed until they were virtually guaranteed electoral success by capturing the nominations of both major political parties.

Exhibit 21. Appointed Appellate Judges and Elections

RESULT	COURT			
	Supreme	Superior	Commw.	Total
Left Office Before Election Due to Mandatory Retirement	2	0	0	2
Elected/Appointed to Another Court Before Election	0	0	2	2
Resigned Before Election	0	1	0	1
Did Not Run for Office	3	0	0	3
Lost in Primary Election	0	1	1	2
Lost in Partisan Election	1	4	2	7
Won Partisan Election	1	8	6	15
Won Retention Election	N/A	N/A	5	5
Total	7	14	16	37

Exhibit 21 suggests that the appointment process for Supreme Court justices has unique dynamics. Five of the seven Supreme Court appointees did not run for office. Of these, two reached mandatory retirement age before their appointive term expired, and two (Justices Wilkinson³⁰⁰ and Montemuro³⁰¹) pledged

299. In comparison, of the three incumbent governors who ran for re-election between 1969 and 1994 (Shapp, Thornburgh, and Casey), all three were successful. Of four incumbent State Treasurers who ran for re-election during that period (Grace Sloan, Robert E. Casey, R. Budd Dwyer and Catherine Baker Knoll), three were successful (Casey was not). Three of four Auditor Generals who ran for re-election between 1969 and 1994 won (Robert P. Casey, Al Benedict, and Barbara Hafer were re-elected; Don Bailey was not). Finally, both Attorney Generals who ran for re-election during the period (Leroy Zimmerman and Ernest D. Preate, Jr.) were successful. Thus, eleven of thirteen incumbents running for statewide office in Pennsylvania (a total of 84.6 percent) were re-elected between 1969 and 1994.

The key difference between the officials listed above and the judges discussed in the text, of course, is that the judges were not initially elected to office. An appointed judge may not have the established political base or the name recognition of a person initially elected to statewide office.

300. *Wilkinson Installed as Newest Pennsylvania Supreme Court Justice*, PA.

not to run shortly after being nominated. Being unable or unwilling to run for a ten-year term thus seems to aid in the confirmation process for Supreme Court justices.³⁰² This proposition does not appear to be true for Superior or Commonwealth Court judges; the large majority of persons appointed to these courts ran for ten-year terms (either in a partisan election or a retention election).

2. Party Affiliation

Exhibit 22 shows the party affiliation of those judges initially appointed or elected to the appellate bench between 1969 and 1994. This table is generally consistent with Exhibit 7 (relating to the party affiliation of all appellate judges serving between 1969 and 1994), which showed that more Democrats than Republicans served on the appellate bench between 1969 and 1994. The most significant difference between Exhibits 7 and 22 concerns the Supreme Court: although more Republicans than Democrats served on the High Court from 1969 to 1994, most of the persons initially appointed or elected to the Court during that period were Democrats. This explains why Exhibit 8 showed a change in the composition of the Court.³⁰³

Exhibit 22. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Party Affiliation

	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
PARTY	Ele	App	Ele	App	Ele	App	Ele	App	Total
Democratic	6	3	8	8	7	8	21	19	40
Republican	3	4	6	6	2	8	11	18	29
Total	9	7	14	14	9	16	32	37	69

Exhibit 22 shows a difference in the party affiliation of judges

L.J., April 27, 1981, at 2.

301. See *Nominee for State Supreme Ct.*, cited at note 68, at 20.

302. In this regard, it is worth noting that Justice Flaherty (one of the appointed Supreme Court justices who did run for office) was appointed after winning the nominations of both major political parties. See notes 38-40 and accompanying text. The other appointed Supreme Court justice who ran for office, Justice Barbieri, was appointed at a time when Senate confirmation was not necessary. See notes 18-21 and accompanying text.

303. See textual discussion accompanying Exhibit 8.

initially appointed to the appellate bench and those initially elected to that bench. Appointed judges were almost evenly split between the two major political parties, whereas two out of every three elected judges were Democrats. More Democrats than Republicans were elected to every court, but more Democrats than Republicans were appointed to only one court.

What explains the Democratic majority among elected judges? The simplest explanation is the Democrats' success in judicial elections from 1982 to 1991. Of the judges initially elected to the appellate bench during that period, thirteen were Democrats while only two were Republicans.³⁰⁴

Two factors help explain the almost even division of appointed judges between the two major political parties. One factor was that the statutes creating or expanding the two intermediate appellate courts required that new positions be almost evenly divided between the two parties. For example, the law that expanded the Superior Court from seven to fifteen judges provided that no more than half of the appointees could be from the same political party.³⁰⁵

The second factor was partisan politics. Democrats and Republicans took turns in the governor's mansion between 1969 and 1994, and Exhibit 23 shows that every governor except Governor Casey appointed more persons to the appellate bench from his own party than from the loyal opposition.³⁰⁶ Moreover, in 1975, the voters approved a constitutional amendment requiring Senate confirmation of all judicial appointees.³⁰⁷ This change was significant because the Senate was sometimes controlled by the party that did not occupy the governor's mansion.

304. The thirteen Democrats initially elected to the courts during this period were: Supreme Court Justices Cappy, Papadakos, and Zappala; Superior Court Judges Del Sole, Ford Elliot, Hudock, Olszewski, and Tamilia; and Commonwealth Court Judges Colins, Friedman, McGinley, Pellegrini, and Smith.

The two Republicans initially elected to the courts during this period were: Superior Court Judge Kelly and Commonwealth Court Judge Palladino (her second stint on the court).

305. 1980 Pa. Laws 213, § 2. Similarly, the Commonwealth Court Act created seven positions and provided that not more than four of the initial members could be from the same political party. See 1969 Pa. Laws 434, § 3(a). The statute expanding the Commonwealth Court created two additional positions and prohibited both new judges from being from the same political party. See 1978 Pa. Laws 11, § 2.

306. In 1988, the Beck Commission reported that "in the history of the Pennsylvania Supreme and Superior Courts, there have been only eleven Appellate appointees made by a Governor outside of his own party." Beck Commission Report, cited at note 253, at 215 (Dissenting Report on Judicial Selection and Retention).

307. 1975 Pa. Laws 619, 620.

Exhibit 23. Party Affiliation of Appointed Appellate Judges 1969-1994, by Appointing Governor

Governor	COURT AND PARTY AFFILIATION								
	Supreme		Superior		Commw.		Total		
	Dem	Rep	Dem	Rep	Dem	Rep	Dem	Rep	T
Shafer (Rep)	0	1	0	0	3	5	3	6	9
Shapp (Dem)	1	0	4	0	3	1	8	1	9
Thornburgh (Rep)	1	2	4	5	1	1	6	8	14
Casey (Dem)	1	1	0	1	1	1	2	3	5
Total	3	4	8	6	8	8	19	18	37

Did the method of judicial selection used affect the representativeness of the appellate bench, with respect to party affiliation, between 1969 and 1994? Again, 1980 voter registration data provides a suitable basis for determining the representativeness of the appellate bench from 1969 to 1994.

In 1980, 53.4 percent of registered voters were Democrats and 41.3 percent were Republicans.³⁰⁸ Of the appellate judges initially appointed between 1969 and 1994, 51.4 percent were Democrats and 48.6 percent were Republicans. In comparison, of all appellate judges initially elected between 1969 and 1994, 65.6 percent were Democrats and 34.4 percent were Republicans. The appointment of judges therefore yielded an appellate bench that was more representative of the general population, with respect to party affiliation, than did the election of judges.

3. Race and Gender

Exhibit 24 shows the race and gender of the judges initially elected or appointed to the appellate courts between January 1, 1969 and August 1, 1994. This table shows that the appellate judges selected under the 1968 Constitution have generally been white males; only 7.2 percent have been African-Americans, and only 13 percent have been women.

308. 105 THE PENNSYLVANIA MANUAL 593 (1981).

Exhibit 24. Appellate Judges Initially Elected or Appointed Between 1969 and 1994: Race and Gender

RACE AND GENDER	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
White Male	8	6	13	12	4	14	25	32	57
Black Male	1	0	0	1	1	0	2	1	3
White Female	0	0	1	1	3	2	4	3	7
Black Female	0	1	0	0	1	0	1	1	2
Total	9	7	14	14	9	16	32	37	69

The method of judicial selection used made little difference in the representativeness of the appellate bench, with respect to race and gender, between 1969 and 1994. Using 1980 census figures as the criterion for measuring representativeness, both appointment and election resulted in a reasonably representative appellate bench with respect to race. Whites comprised 89.9 percent of the general population in 1980,³⁰⁹ 90.6 percent of the judges initially elected to the appellate bench between 1969 and 1994, and 94.6 percent of the judges initially appointed to the appellate bench in the last quarter century. African-Americans comprised 8.8 percent of the general population in 1980,³¹⁰ 9.4 percent of the judges initially elected to the appellate bench from 1969 to 1994, and 5.4 percent of the judges initially appointed to the appellate bench during that period.

Neither appointment nor election resulted in a reasonably representative appellate bench, with respect to gender, between 1969 and 1994. Women comprised 52.1 percent of the general population in 1980,³¹¹ but only constituted 15.6 percent of the judges initially elected, and 10.8 percent of the judges initially appointed to Pennsylvania's appellate bench between 1969 and 1994.

Surprisingly, Exhibit 24 shows that African-Americans and women formed a majority of judges elected to the Commonwealth Court between 1969 and 1994. They only constituted 12.5

309. 1980 CENSUS, cited at note 262.

310. *Id.*

311. See 1992 PA. ABSTRACT 5.

percent of the judges appointed to the court during that period. This pattern was the reverse of that followed by the Supreme Court and the Superior Court, where African-Americans and women formed a higher percentage of judges appointed to the court than of judges elected to the court.

Exhibit 24 also shows that five of the 37 judges initially appointed to the appellate bench were African-Americans or women. Exhibit 25 shows that four of these judges were appointed after January 1979 (when Governor Thornburgh took office). African-Americans and women represented 21.1 percent of the judges appointed to the appellate courts between January 1979 and August 1994, but only 5.9 percent of the judges appointed to the appellate bench between January 1969 and December 1978.

Exhibit 25. Race and Gender of Appointed Appellate Judges, by Appointing Governor

RACE AND GENDER	APPOINTING GOVERNOR				Total
	Shafer	Shapp	Thornburgh	Casey	
White Male	9	8	11	4	32
Black Male	0	0	1	0	1
White Female	0	1	2	0	3
Black Female	0	0	0	1	1
Total	9	9	14	5	37

To provide comparable data, Exhibit 26 shows the race and gender of judges initially elected to the appellate bench during the periods 1969-1978 and 1979-1994. African-Americans and women constituted 16.7 percent of the judges initially elected to the bench from 1969 to 1978 and 23.1 percent of the judges elected to the appellate bench from 1979 to 1994.

Exhibit 26. Race and Gender of Appellate Judges Initially Elected After January 1, 1969

RACE & GENDER	COURT AND DATE OF ELECTION								
	Supreme		Superior		Commw.		Total		
	1969-1978	1979-1994	1969-1978	1979-1994	1970-1978	1979-1994	1969-1978	1979-1994	T
White Male	2	6	3	10	0	4	5	20	25
Black Male	1	0	0	0	0	1	1	1	2
White Female	0	0	0	1	0	3	0	4	4
Black Female	0	0	0	0	0	1	0	1	1
Total	3	6	3	11	0	9	6	26	32

Two significant conclusions can be drawn from Exhibits 25 and 26. First, time has had an impact on the proportion of African-Americans and women selected for the appellate bench — regardless of the method of judicial selection used. The proportion of African-Americans and women elected or appointed to the appellate bench was higher for the period 1979-1994 than for the period 1969-1978. Second, the method of judicial selection used may produce different results over time. From 1969 to 1978, the proportion of African-Americans and women selected to the appellate bench was larger for judges who were initially elected than for judges who were initially appointed. From 1979 to 1994, however, African-Americans and women comprised an almost equal proportion of elected and appointed appellate judges.

4. *County and Region*

Exhibit 27 shows the county represented by each appellate judge initially appointed or elected between January 1, 1969 and August 1, 1994.³¹² This table is consistent with Exhibit 15 (relating to the county represented by each appellate judge serving between 1969 and 1994), which showed that a relatively small number of counties produced all of Pennsylvania's appellate

312. For information about the way in which this table was prepared, see note 268.

judges. In the quarter-century since the new Judicial Article took effect, judges have been elected from eleven counties and appointed from thirteen counties. A grand total of sixteen counties produced all of the appellate judges initially selected under the Constitution of 1968.

Exhibit 27. Appellate Judges Initially Elected or Appointed Between 1969 and 1994: County

COUNTY	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
Adams	0	0	0	0	0	1	0	1	1
Allegheny	4	1	7	2	4	4	15	7	22
Beaver	0	0	1	0	0	0	1	0	1
Centre	0	1	0	0	0	1	0	2	2
Chester	0	0	0	0	0	1	0	1	1
Cumberland	0	0	1	0	0	0	1	0	1
Dauphin	0	0	2	0	0	2	2	2	4
Delaware	0	0	0	1	1	0	1	1	2
Lehigh	0	0	0	2	1	1	1	3	4
Luzerne	0	0	1	1	0	0	1	1	2
McKean	0	0	0	0	0	1	0	1	1
Montgomery	0	0	1	1	1	0	2	1	3
Philadelphia	3	5	0	6	2	2	5	13	18
Schuylkill	1	0	0	0	0	0	1	0	1
Washington	0	0	0	1	0	1	0	2	2
Westmoreland	1	0	1	0	0	2	2	2	4
Total	9	7	14	14	9	16	32	37	69

Exhibit 27 is also consistent with Exhibit 15 in showing that a large percentage of appellate judges hailed from Allegheny and Philadelphia Counties. These two counties produced 58 percent of all judges elected or appointed during the period 1969-1994. They also produced 81.3 percent of all persons elected or appointed to the Supreme Court during that period.

Interestingly, two-thirds of the appellate judges from Allegh-

ny County were elected to the bench, whereas three-fourths of the appellate judges from Philadelphia County were appointed. Philadelphia County produced only 15.6 percent of the appellate judges initially elected to the bench between 1969 and 1994. In contrast, approximately half of the appellate judges initially elected during that period came from Allegheny County. Moreover, Allegheny County had at least as many judges elected as appointed to every court.

Exhibit 28, which was developed using the same east-west geographic regions used to develop Exhibit 16 (relating to the east-west geographic region of all appellate judges serving between 1969 and 1994),³¹³ shows that the patterns for Allegheny and Philadelphia Counties were followed by their respective regions of the state. That is, most of the judges from the eastern region were appointed, whereas most of the judges from the western region were elected. The central region was like the eastern region in that most of its judges were appointed to the appellate bench.

Exhibit 28. Appellate Judges Initially Elected or Appointed Between 1969 and 1994: East-West Geographic Region

REGION	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
Eastern	4	5	2	11	5	4	11	20	31
Central	0	1	3	0	0	4	3	5	8
Western	5	1	9	3	4	8	18	12	30
Total	9	7	14	14	9	16	32	37	69

The eastern region produced a plurality of the judges initially elected or appointed to the appellate bench between 1969 and 1994. Nevertheless, more than half the judges initially elected to the appellate bench during that period came from the western region.

The appointment of judges resulted in a reasonably representative bench, with respect to east-west geographic districts, but the election of judges did not. The western region contained 35.7

313. See note 270 and accompanying text.

percent of the state's population in 1980,³¹⁴ but that region produced 56.3 percent of the elected appellate judges and 32.4 percent of the appointed appellate judges between 1969 and 1994. The central region contained 13.6 percent of the state's population in 1980,³¹⁵ and produced 9.4 percent of the elected appellate judges and 13.5 percent of the appointed appellate judges between 1969 and 1994. Finally, the eastern region contained 50.7 percent of the state's population in 1980,³¹⁶ but produced 34.4 percent of the elected and 54.1 percent of the appointed appellate judges between 1969 and 1994.

Neither election nor appointment produced a reasonably representative appellate bench in terms of north-south geographic regions between 1969 and 1994. Exhibit 29 shows the appellate judges initially appointed or elected to the appellate bench under the 1968 Constitution using the same north-south geographic districts used to develop Exhibit 17 (relating to the north-south geographic region of all appellate judges serving between 1969 and 1994).³¹⁷ Exhibit 17 showed that the state's southern region produced a large proportion of the judges who sat on the appellate bench after the 1968 Constitution took effect. Exhibit 29 shows that the state's southern region produced an even greater proportion of the appellate judges initially appointed or elected under that constitution. The vast majority of persons appointed or elected to each of the state's three appellate courts after January 1, 1969 came from the southern region.

Exhibit 29. Appellate Judges Initially Elected or Appointed Between 1969 and 1994: North-South Geographic Region

REGION	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
Northern	0	0	1	1	0	1	1	2	3
Border	1	1	0	0	0	1	1	2	3
Southern	8	6	13	13	9	14	30	33	63
Total	9	7	14	14	9	16	32	37	69

314. 111 THE PENNSYLVANIA MANUAL 6-11 (1993).

315. *Id.*

316. *Id.*

317. See note 274 and accompanying text.

The southern region of the state contained 73.4 percent of the state's population in 1980,³¹⁸ but produced 94.0 percent of the judges elected, and 89.2 percent of the judges appointed to the appellate bench between 1969 and 1994. The border region contained 12.0 percent of Pennsylvania's population in 1980,³¹⁹ but produced only 3.1 percent of the judges elected, and 5.4 percent of the judges appointed, to the appellate bench between 1969 and 1994. Finally, the northern region contained 14.6 percent of the state's population in 1980,³²⁰ but produced only 3.1 percent of elected appellate judges and 5.4 percent of appointed appellate judges between 1969 and 1994.

5. *Immediately Previous Employment and Previous Judicial Experience*

Exhibit 30 shows how appellate court judges were employed immediately before being appointed or elected to an appellate court. Many appellate court judges had experience in political positions (e.g., state legislator, county commissioner, or mayor), but very few stepped directly from such a position to the appellate courts. Some, like Judge Blatt, returned to private practice after leaving political office, then joined the appellate bench at a later date.³²¹ Others, such as Judge Popovich, left political office, joined the trial bench, and then moved up to the appellate bench.³²²

318. 111 THE PENNSYLVANIA MANUAL 6-11 (1993).

319. *Id.*

320. *Id.*

321. Judge Blatt was Secretary of Internal Affairs from 1955 to 1967. 103 THE PENNSYLVANIA MANUAL 473 (1977).

322. Judge Popovich was mayor of McKeesport from 1970 to 1973. *Profiles of Court Candidates*, PA. LAW., April 15, 1985, at 30. He was elected to the trial bench in 1973. 103 THE PENNSYLVANIA MANUAL 496 (1977).

Exhibit 30. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Immediately Previous Employment

	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
OCCUPATION*	Ele	App	Ele	App	Ele	App	Ele	App	T
Appellate Judge	1	3	0	1	0	0	1	4	5
Trial Court** Judge***	6	2	11	6	3	5	20	13	33
State Legislator	1	0	0	0	0	0	1	0	1
State Executive Branch Official	0	0	1	1	0	0	1	1	2
Private Practice	1	2	2	4	4	10	7	16	23
Local Government Practice****	0	0	0	1	1	0	1	1	2
Law School Professor/Dean	0	0	0	1	0	1	0	2	2
Other	0	0	0	0	1	0	1	0	1
Total	9	7	14	14	9	16	32	37	69

* Several judges held more than one position immediately prior to joining the appellate bench (e.g., private practice and law professor). Judges are listed here under the occupation most frequently cited by published sources.

** This term includes courts of common pleas and special courts (such as the Philadelphia Municipal Court).

*** This term includes senior judges.

**** This term includes county solicitor.

Exhibit 30 shows that Pennsylvania's appellate judges came from a wide variety of positions.³²³ According to the American Bar Association's Standards Relating to Court Organization, "the selection of appellate judges should be guided by the aim of having an appellate bench composed of individuals having a variety of practical and scholarly viewpoints, including some with substantial experience as a trial judge."³²⁴ Pennsylvan-

323. No Pennsylvania appellate judges were selected from the federal judiciary. Several Pennsylvania appellate judges left the state bench for the federal bench, however, during the period studied.

324. ABA Standards of Judicial Administration Volume 1, Standards Relating to

nia's appellate bench between 1969 and 1994 was largely consistent with this standard.³²⁵

Judicial experience was clearly a prime credential for appellate judges initially selected between 1969 and 1994. Almost half of the appellate judges initially selected under the Constitution of 1968 were drawn directly from the trial bench.³²⁶ Additionally, five judges (such as Justice Manderino)³²⁷ were on one appellate court immediately before being elected or appointed to another appellate court. A total of 55 percent of all appellate judges initially selected under the Constitution of 1968 were drawn directly from the trial or appellate bench. That figure, however, understates the extent to which Pennsylvania's appellate court judges had prior judicial experience. Some appellate court judges, such as Judge MacPhail, left the trial bench, engaged in private practice, and then joined the appellate bench.³²⁸ Others, such as Judge Wieand, left the appellate bench and then returned.³²⁹ Exhibit 31 shows that almost 64 percent of all judges elected or appointed to the appellate courts between 1969 and 1994 had previous judicial experience.

Court Organization Standard 1.21(a)(ii)(1990).

325. One could reasonably argue, however, that Pennsylvania's appellate bench between 1969 and 1994 was drawn more heavily from the trial court bench than was contemplated by the ABA Standards.

326. For a governor or president, appointing a trial judge to an appellate position has the political advantage of allowing the chief executive to appoint two persons rather than one (the appellate judge plus a trial judge to fill the resulting vacancy on the trial bench). Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 312, 324 (1985). Another important advantage of appointing a trial court judge is the reduced risk of surprise; the judge's decisions constitute a track record from which persons can determine the candidate's judicial philosophy. *Id.* at 323-25.

327. See note 22 and accompanying text.

328. See Brief for Intervening Respondents MacPhail and DiSalle at 6, *Abraham v. Shapp*, 400 A.2d 1249 (Pa. 1979).

329. See notes 124-25 and accompanying text.

Exhibit 31. Appellate Judges Initially Elected or Appointed Between 1969 and 1994: Previous Judicial Experience*

JUDICIAL EXPERIENCE	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
None	2	1	3	6	4	9	9	16	25
Appellate Only	1	2	0	0	1	0	2	2	4
Trial** Court Only	6	2	11	5	4	7	21	14	35
Trial** and Appellate	0	2	0	3	0	0	0	5	5
Total	9	7	14	14	9	16	32	37	69

* Previous judicial experience refers to experience in the unified judicial system; it does not include experience on administrative boards performing quasi-judicial functions.

** Trial courts include courts of common pleas and special courts (such as the Philadelphia Municipal Court).

Exhibits 30 and 31 show a few distinctions between judges initially appointed to the appellate bench and judges initially elected to that bench. Judges who moved directly from one appellate court to another generally did so by appointment rather than election. In addition, proportionately more private practitioners were appointed than elected. This tendency was most pronounced for the Commonwealth Court; 62.5 percent of all appointed Commonwealth Court judges were recruited directly from private practice, whereas only 44.4 percent of elected Commonwealth Court judges were drawn from private practice.

Exhibits 30 and 31 also show a few distinctions between judges selected to the different appellate courts. Some of these differences have already been discussed. Additionally, a majority of judges elected to the Supreme Court and the Superior Court were trial court judges immediately before joining the appellate bench. Trial court judges, however, only totalled one-third of the judges elected to the Commonwealth Court. Private practitioners constituted a plurality of the judges elected to that court.

6. Age

Exhibit 32 shows the average age at which judges were appointed or elected to the appellate courts under the Constitution of 1968. Surprisingly, the average age of elected Supreme Court justices was lower than the average age of judges elected to any other court; on average, elected Supreme Court justices were slightly younger than elected Commonwealth Court judges and about five years younger than elected Superior Court judges.

Exhibit 32 also shows a great disparity between the average age of elected and appointed Supreme Court justices. On average, elected Supreme Court justices were more than a dozen years younger than appointed Supreme Court justices. This deviates markedly from the pattern followed by the two intermediate appellate courts. In the Superior and the Commonwealth Courts, the difference between the average age of elected and appointed judges was less than three and one-half years. Exhibit 33, which shows each appellate judge's age at the time of assuming the bench, helps explain the difference between the appellate courts in this respect.

Exhibit 32. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Average Age at Time of Assuming the Bench

	COURT			
	Supreme	Superior	Commw.	All Courts
All Judges	53.7	52.6	50.7	52.2
Elected Judges	48.3	53.4	48.6	50.6
Appointed Judges	60.6	51.9	51.9	53.5

Exhibit 33. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Age at the Time of Assuming the Appellate Bench

	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
AGE	Ele	App	Ele	App	Ele	App	Ele	App	T
36-40	0	0	1	0	1	2	2	2	4
41-45	3	1	1	0	3	2	7	3	10
46-50	4	1	2	5	1	2	7	8	15
51-55	1	0	6	8	2	5	9	13	22
56-60	1	0	2	0	2	3	5	3	8
61-65	0	2	2	1	0	2	2	5	7
66-70	0	3	0	0	0	0	0	3	3
Total	9	7	14	14	9	16	32	37	69

Exhibit 33 indicates that 71.4 percent of the appointed Supreme Court justices were age 61 to 70. Neither of the other appellate courts had such a high percentage of appointed judges from this age group. In this sense, Exhibits 32 and 33 are like Exhibit 21 (relating to appointed appellate judges and elections) in showing that the appointment of Supreme Court justices involves dynamics unlike those at work in the appointment of Superior and Commonwealth Court judges.

Exhibits 32 and 33 also provide insights into the dynamics at work in the election of appellate court judges. Nine out of 32 elected judges, or 28 percent, were age 45 or younger when they took the bench. Only 13.5 percent of appointed judges were from this age group. Moreover, only 6.3 percent of elected judges were 61 years of age or older when they took the bench. More than 21 percent of appointed judges took the bench at age 61 or over. These figures suggest that older candidates may not run for appellate court positions, or that voters may favor younger candidates.

These figures may also reflect the interplay between the ten-year term of judicial office and the requirement that a judge retire at age 70. Voters may be reluctant to elect a judicial candidate who could not complete the term of office. In contrast, voters do not appear reluctant to retain a judge who cannot complete the ten-year term of office before reaching mandatory re-

tirement age.

7. Length of Service

Exhibit 34 presents data on the length of service of judges initially elected or appointed to Pennsylvania's appellate bench between 1969 and 1994. Due to the large number of judges serving appointive terms, and the varying lengths of such terms, this table was calculated as follows: each month of the year was assigned a numerical value (e.g., January was one-twelfth and December was one). The year and month in which each judge assumed the bench was then subtracted from the year and month in which that judge left the bench.³³⁰ For judges still on the bench as of August 1, 1994, this table was calculated using August 1994 as the date each judge left the bench.

Exhibit 34. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Average Length of Service (in years)

	COURT			
	Supreme	Superior	Commw.	All Courts
All Judges	7.0	8.1	7.6	7.7
Elected Judges	10.0	8.0	6.6	8.2
Appointed Judges	3.1	8.1	8.2	7.2

The average length of service for all judges was 7.7 years — about three-fourths of a single elective term. The average length of service was shorter for appointed judges, which is understandable given the number of appointed judges who did not run for, or did not win, ten-year terms.³³¹ The average length of service of elected judges was longer than that of appointed judges, but is still well below a single elective term.

There was virtually no difference in the average length of service of appointed and elected Superior Court judges.³³² This

330. This approach was considered advisable because of such fact situations as Judge Packel's tenure on the Superior Court (from January 1, 1972 to December 31, 1972). See notes 95-97 and accompanying text. If the table was calculated by simply subtracting the year in which the judge took the bench from the year in which he left the bench, the result for Judge Packel would be zero. The result using the approach described in the text is .92.

331. See Exhibit 21 (relating to appointed appellate judges and elections).

332. It is worth noting that the eight expansion judges served an average of 10.5 years of service on the court, whereas the other six appointees averaged 5.2

pattern did not hold true for the Commonwealth Court or the Supreme Court. For the Commonwealth Court, the average length of service was longer for appointed judges than for elected judges. This is because the initial members of the court were permitted to run in retention elections at the end of their appointive terms.³³³ All five of the initial appointees who ran in retention elections won (whereas only 62.5 percent of appointed judges running in partisan elections between 1969 and 1994 won ten-year terms).³³⁴ These five members of the court combined for 60.2 years of service on the Commonwealth Court; the remaining eleven appointees to the court combined for 68.7 years of service.

For the Supreme Court, the average length of service of elected judges was considerably more than that of appointed judges. The average length of service of an elected Supreme Court justice was a full elective term, whereas the average length of service of an appointed justice was a mere three years and one month. The latter number is actually deceptively high. Exhibit 35 shows the length of service of each judge appointed or elected to an appellate court between January 1, 1969 and August 1, 1994. This table shows that six of the seven appointed Supreme Court justices served less than three years on the Court. The only exception was Justice Flaherty, who was nominated and confirmed after winning both the Republican and Democratic nominations for a ten-year term on the Court.³³⁵

years of service on the court.

333. See note 179 and accompanying text.

334. See Exhibit 21 (relating to appointed appellate judges and elections).

335. See note 38 and accompanying text.

Exhibit 35. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Length of Service

YEARS OF SERVICE	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
0-2	1	6	1	6	2	5	4	17	21
3-5	2	0	4	0	2	1	8	1	9
6-8	1	0	2	0	2	2	5	2	7
9-11	3	0	5	2	2	3	10	5	15
12-14	0	0	2	5	1	2	3	7	10
15-17	1	1	0	1	0	2	1	4	5
18-20	0	0	0	0	0	1	0	1	1
21-23	1	0	0	0	0	0	1	0	1
Total	9	7	14	14	9	16	32	37	69

Exhibit 35 shows that 30 percent of all appellate court judges served less than three years in office. This number is explained primarily by the number of appointees who were not elected to ten-year terms. This number, however, is also slightly inflated because three judges (Justice Castille, Judge Newman, and Judge Saylor) took the appellate bench in January 1994.

Exhibit 35 also shows that only ten percent of all appellate court judges served for 15 years or more. A judge's tenure is of course limited by the requirement that he retire at age 70. Nevertheless, the number of judges serving for an extended period is surprisingly small given the average age at which judges are elected or appointed to each of the appellate courts.

Exhibit 35 suggests that many judges completed their ten-year terms. That Exhibit, however, does not permit a definitive conclusion on this point because an elected judge can serve one complete ten-year term, be retained for another ten years, and leave the bench before serving a complete second term.

Exhibit 36 shows, with respect to judges initially selected between 1969 and 1994,³³⁶ the number of judges elected to ten-

336. Exhibit 36 excludes some judges (like Judge Montgomery) who were initially elected to the appellate bench before January 1, 1969, but who were elected to ten-year terms under the Constitution of 1968. These judges were excluded in keep-

year terms (either in a partisan election or a retention election) and the number of judges completing those terms. This table is unlike any other table presented in this subsection for two reasons. First, this table does not include judges elected to ten-year terms commencing after January 1984 because those judges could not complete their ten-year terms within the period studied. Second, this table counts some judges twice who were only counted once in other tables. For example, Chief Justice Nix has served continuously on the Supreme Court since 1972, so his service is counted as one judgeship on all other tables. However, he was elected to ten-year terms commencing in 1972, 1982, and 1992. His terms commencing in 1972 and 1982 are shown in Exhibit 36 as two judges elected to ten-year terms.

Exhibit 36. Appellate Judges Initially Appointed or Elected Between 1969 and 1994: Election to, and Completion of, Ten-Year Terms

	COURT AND METHOD OF SELECTION								
	Supreme		Superior		Commw.		Total		
	Ele	App	Ele	App	Ele	App	Ele	App	T
Elected to a Ten Year-Term	8	1	10	6	4	11	22	18	40
Completed the Ten Year-Term	6	1	6	5	3	3	15	9	24

Exhibit 36 shows that 60 percent of judges elected to ten-year terms under the Constitution of 1968 completed their terms. More than three out of four Supreme Court justices elected to ten-year terms completed their terms, and almost 70 percent of Superior Court judges elected to ten-year terms completed their terms. In contrast, only 40 percent of Commonwealth Court judges elected to ten-year terms completed their terms. This was because of the high number of judges who were initially appointed to Commonwealth Court, and were later elected to ten-year terms, but did not complete their elective terms. Of the judges initially appointed to the Commonwealth Court and later elected to ten-year terms, only 27.2 percent completed their elective

terms. This completion rate is much lower than that of judges appointed to the other two appellate courts.

IV. FOUR THEMES

The data and discussion presented in this article give rise to several general conclusions about Pennsylvania's appellate judges between 1969 and 1994. First, Pennsylvania had many career judges. Second, many of Pennsylvania's appellate judges shared certain characteristics. Third, despite these similarities, there were some significant differences between judges initially elected to the appellate bench and judges initially appointed to that bench. Finally, there were significant differences between the judges on the several appellate courts. This section discusses each conclusion in turn.

A. *Many Career Judges*

Shortly after joining the Supreme Court, Justice Flaherty was quoted as saying that there is a difference between a career judge and someone who becomes a judge "as a prelude to retirement."³³⁷ Justice Flaherty was proud of the fact that he made a career out of being a judge.³³⁸

The data and discussion presented in this article show that Justice Flaherty was not alone; a significant number of his colleagues on the appellate bench made careers out of being judges. A majority of the appellate judges selected under the Constitution of 1968 were judges immediately before joining the appellate bench, and almost 65 percent had prior judicial experience. Additionally, almost 40 percent of all judges serving on the appellate bench between 1969 and 1994 remained on that bench until they died or retired (either voluntarily or mandatorily). These facts, taken together, show that Pennsylvania's appellate judiciary was quite professional during the period 1969-1994.³³⁹

337. Mayle, *Justice Flaherty: Populist on the Supreme Court*, PA. LAW., September 1, 1980, at 20.

338. Mayle, cited at note 337.

339. Pennsylvania's appellate bench is similar to the federal judiciary in this respect. For discussions of the professionalization of the federal bench, see Goldman, cited at note 326, at 323-24.

B. *Some Common Characteristics*

Although there were many differences among Pennsylvania's appellate judges between 1969 and 1994, an overwhelming percentage of those judges shared certain characteristics. For example, of all the judges serving on the appellate bench between 1969 and 1994, 85 percent or more were white males or from the southern part of the state. In certain respects, most of Pennsylvania's appellate judges between 1969 and 1994 came from the same mold.

C. *Method of Selection Matters*

There were some significant differences between judges initially appointed and judges initially elected to Pennsylvania's appellate bench between 1969 and 1994. For example, judges initially elected to the appellate bench were predominantly Democrats, whereas judges appointed to that bench were almost evenly divided between the two major political parties. In addition, more than half the judges elected between 1969 and 1994 came from western Pennsylvania, but a majority of appointed judges came from the eastern portion of the state. Moreover, proportionately more private practitioners were appointed than elected to each of the appellate courts.

The differences between appointed and elected judges were frequently analyzed here in terms of the representativeness of the appellate bench. Which method of judicial selection produces the more representative bench? While neither system is perfect, the appointive system produced an appellate bench that was reasonably representative with respect to three variables, party affiliation, race, and east-west geographic regions, whereas the elective system produced an appellate bench that was reasonably representative only with respect to race.

D. *Three Unique Courts*

The Supreme Court, the Superior Court, and the Commonwealth Court are all appellate tribunals, but there were some significant differences between the judges selected to each of these courts between 1969 and 1994. In some respects, the Supreme Court differed from the two intermediate appellate courts. The persons appointed to the Supreme Court between 1969 and 1994, for example, generally were unable or unwilling to run for a ten-year term. This was not true for the Superior Court or the

Commonwealth Court.

In many cases, however, the two intermediate appellate courts differed from each other. For example, African-Americans and women formed a majority of judges elected to the Commonwealth Court between 1969 and 1994, but only constituted 14.3 percent of judges elected to the Superior Court during that period. Additionally, more relatively young judges were elected or appointed to the Commonwealth Court than the Superior Court from 1969 to 1994. These differences do not parallel the distinction between the highest court in a jurisdiction and lower courts. Instead, they indicate that each of Pennsylvania's appellate courts is a unique entity.

V. CONCLUSION

This article has studied Pennsylvania's appellate bench between January 1, 1969 and August 1, 1994. In some respects, the data and discussion presented here confirm common wisdom. This article, for example, showed that many appellate judges are initially appointed to the bench. In other respects, however, the data and discussion presented here question commonly held notions. The percentage of appointed judges who win judicial elections, for example, is lower than expected.

These surprises show the need for additional research about Pennsylvania's judges. To date, relatively little has been written about the men and women on the bench in the Keystone State. Additional factual information would be helpful for policy-makers debating judicial reform.