

# Evolution of judicial careers in the federal courts, 1789-2008

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In the past few decades, some signs of change in the judicial careers of federal judges have appeared. The most widely noted has been the strong tendency to recruit Supreme Court nominees from the ranks of sitting federal judges. After the selection of Sandra Day O'Connor every Court nominee except Harriet Miers has come from the federal courts of appeals, and opponents cited Miers's lack of judicial experience as a reason to deny her a seat on the Court.<sup>1</sup>

Since the Miers episode, the nominations of Samuel Alito in 2005 and Sonia Sotomayor in 2009 have reinforced the pattern of choosing court of appeals judges to fill Supreme Court vacancies. Meanwhile, studies of federal judges have found evidence that judges appointed to the district courts and courts of appeals have more prior experience in the judiciary than in the past.<sup>2</sup>

These signs of change led Judge Richard Posner to observe that "[w]e may be evolving toward the European system of a career judiciary..."<sup>3</sup> That observation can be understood in terms of the distinction between a career judiciary and what Nicholas Georgakopoulos called the "recognition judiciary" of common-law countries such as the U.S.<sup>4</sup> In a career judiciary, found in many civil-code countries such as France or Germany, lawyers move into lower levels of the judiciary early in their careers, and (to the extent they are successful) they move upward to higher courts over time. Often the highest court stands outside this system, but with that exception the judiciary resembles a bureaucracy in the patterns of selection and promotion.

To varying degrees, common-law countries depart from the model of a career judiciary.<sup>5</sup> The federal judi-

Although there are some intriguing trends in the direction of a career judiciary, the traditional pattern of federal judicial service in the U.S. has not changed fundamentally.

ary of the U.S. fits the model of a recognition judiciary well: judges come to the courts not at the start of their legal careers but after serving in other legal and non-legal positions, and they usually become federal judges relatively late in their professional lives. There is no fixed career ladder within the federal judiciary, and most judges on the district courts and courts of appeals do not win promotion to a higher court.<sup>6</sup>

Given this tradition of a recognition judiciary in the federal courts, any movement toward a career judiciary would be intriguing. Undoubtedly, as Judge Posner noted, we are still a long way from the civil law model.<sup>7</sup> But there may be a significant movement in the direction of a career judiciary, one in which federal judgeships occupy a larger portion of judges' legal careers and judges move upward more systematically through the federal courts.

If this change is indeed occurring, it may be consequential. To the extent that the federal courts move from the model of a recognition judiciary to a career judiciary, that change could affect the perspectives and behavior of federal judges. When promotions through the ranks of judges are common, judges who are interested in promotion may have incentives to rule in ways that presidents and senators favor.<sup>8</sup> And a Supreme Court whose members all served on lower courts may act differently from one whose members have a wider array of backgrounds. For instance, the Court collectively may be more closely oriented to the legal system and less cognizant of the practical consequences of its decisions than it would be if the justices were more diverse in their backgrounds.<sup>9</sup>

The possible effects of the promotional path from the

We appreciate the assistance of the Federal Judicial History Office of the Federal Judicial Center, the extensive suggestions provided by Artemus Ward, and comments from panel participants at the 2009 meeting of the Southern Political Science Association.

1. Julian Borger, *Bush Offers Crucial Supreme Court Seat to His Former Lawyer*, *The Guardian*, October 4, 2005; Seth Stern and Keith Perine, *Defending Miers on All Sides*, *CQ Weekly*, October 10, 2005, at 2720-22.

2. E.g., Sheldon Goldman, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 348* (New Haven: Yale University Press, 1997); Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 *JUDICATURE* 252, 277 (2007).

3. Richard A. Posner, *THE FEDERAL COURTS: CHALLENGE AND REFORM 20* (Cambridge: Harvard University Press, 1996).

4. Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 *U. CHIC. LAW SCHOOL ROUNDTABLE* 205, 205 (2000).

5. Richard A. Posner, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 30-33 (2006).

6. Georgakopoulos, *supra* n. 4, at 205-06, 210-11; Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 *S. CAL. L. REV.* 455, 460-63 (1999).

7. Posner, *supra* n. 3, at 20.

8. Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 *INT'L REV. OF L. AND ECON.* 13 (1992); J. Mark Ramseyer and Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 *J. OF L., ECON., AND ORG.* 259 (1997); Klerman, *supra* n. 6.

9. Lawrence Baum, *Recruitment and the Motivations of Supreme Court Justices*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, ed. Cornell W. Clayton and Howard Gillman, 201-213 (Chicago: University of Chicago Press, 1999); Lee Epstein, Jack Knight, and Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 *CALIF. L. REV.* 903 (2003).

courts of appeals to the Supreme Court have been a matter of concern for some commentators.<sup>10</sup> Indeed, since the Clinton administration there has been considerable interest in diversifying the Court with members who come from fields other than the judiciary. That interest was reflected in President Obama's inclusion of two lawyers without judicial experience among the four candidates whom he interviewed as potential successors to Justice David Souter.<sup>11</sup>

Significant as appointments to the Supreme Court are, we are concerned with a broader question, the extent to which the federal judiciary as a whole has moved toward a career judiciary. Our interest is in judges who have served on what we will call the "primary courts" of the federal judiciary—the district courts (excluding bankruptcy judges and magistrate judges), the (former) circuit courts, the courts of appeals (including the Federal Circuit), and the Supreme Court. We will also speak of a separate category of "non-primary" federal judgeships, defined as positions on specialized courts and as bankruptcy or magistrate judges (including the previous titles of those positions). When we use the terms "federal judges" or "federal judgeships" without modifiers, those terms will refer to judges who have served on the primary courts and not to those who have held non-primary judgeships.

We have referred already to the judicial careers of federal judges. That term encompasses several attributes of the place of judicial work in the lives of people who serve as federal judges. (The term "judicial careers" should be distinguished from the concept of a career judiciary.) One attribute of judicial careers is when and why judges leave their positions. That attribute has been studied extensively and well by other scholars.<sup>12</sup> Our concern in this study is with three other attributes of federal judicial careers:

1. The age and point in their careers at which lawyers become federal judges and the length of their

tenure as federal judges.

2. Prior experience in a judicial position and experience as a law clerk.

3. Promotions within the federal judiciary.

We examine these three aspects because together they capture the underlying components of judicial careers that relate to the idea of a career judiciary. If the United States is moving towards a career judiciary, we expect to find that lawyers are becoming federal judges at an ear-

## The mean age at which appointees receive the commission to their first federal judgeship has increased somewhat over time.

lier point in their lives and careers and serve a larger portion of their lives in the judiciary, that prior experience in the courts is becoming increasingly common for federal judges, and that promotions within the federal judiciary are becoming more frequent over time.

While we are interested in trends of the past few decades, we think it is useful to look at temporal patterns across the history of the federal courts, from 1789 through 2008. This longer time span will allow us to gain greater understanding of overall changes that have taken place in the federal courts, and it will also allow us to capture long-term shifts in career patterns.

10. Epstein, Knight, and Martin, *supra* n. 9, at 953-60; Borger, *supra* n. 1.

11. The two were Solicitor General Elena Kagan and Janet Napolitano, Secretary of Homeland Security. Robert Barnes and Michael A. Fletcher, *Riskiest Choice on Obama's List Embodies His Criteria*, WASHINGTON POST, May 27, 2009, at A7.

12. Among these studies are Deborah J. Barrow and Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987*, 52 J. OF POL. 457 (1990); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PENN. L. REV. 333 (1993); James F. Spriggs, III, and Paul J. Wahlbeck, *Calling It Quits: Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573 (1995); Albert Yoon, *Love's Labor's Lost? Judicial*

The temporal scope of our study and the breadth of the questions we consider distinguish our study from the impressive body of existing research on temporal patterns in the careers of federal judges.<sup>13</sup>

This article is a broad presentation of our findings. By taking an overview of temporal patterns in several aspects of federal judicial careers, we can identify the form and extent of any movement toward a career judiciary.

### Data and methods

For each aspect of a judicial career that we analyze, we examine the set of judges who served on any of the four primary federal courts. For some aspects we also examine the two largest subsets of judges, those who served as district judges and those who served on the courts of appeals. For the courts of appeals, of course, our inquiry begins in 1891 with the creation of those courts rather than in 1789.

Our data come from the Biographical Directory of Federal Judges, compiled by the Federal Judicial Center.<sup>14</sup> The Directory includes information on all people who served on any of the four pri-

*Tenure Among Federal Court Judges: 1945-2000*, 91 CALIF. L. REV. 1029 (2003); and Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. AND ECON. REV. 143 (2006).

13. E.g., Goldman, *supra* n. 2; Deborah J. Barrow, Gary Zuk, and Gerard S. Gyski, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996); Donald R. Songer, Reginald S. Sheehan, and Susan B. Haire, *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 23-45* (2000).

14. The Directory, officially the History of the Federal Judiciary, is at the website of the Federal Judicial Center, <http://www.fjc.gov/public/home.nsf/hisj>. The staff of the Federal Judicial Center facilitated our research by providing the data in electronic format.

**Table 1: Number of judges receiving commissions to their first primary federal court, by four-year period**

Year of first commission	N	Year of first commission	N
1789-1792	28	1901-1904	29
1793-1796	9	1905-1908	39
1797-1800	5	1909-1912	45
1801-1804	25	1913-1916	37
1805-1808	6	1917-1920	33
1809-1812	8	1921-1924	56
1812-1816	3	1925-1928	50
1817-1820	11	1929-1932	56
1821-1824	12	1933-1936	43
1825-1828	11	1937-1940	78
1829-1832	8	1941-1944	50
1833-1836	13	1945-1948	47
1837-1840	9	1949-1952	73
1841-1844	8	1953-1956	92
1845-1848	11	1957-1960	68
1849-1852	9	1961-1964	133
1853-1856	12	1965-1968	131
1857-1860	11	1969-1972	169
1861-1864	27	1973-1976	89
1865-1868	14	1977-1980	243
1869-1872	29	1981-1984	162
1873-1876	14	1985-1988	194
1877-1880	21	1989-1992	168
1881-1884	19	1993-1996	191
1885-1888	17	1997-2000	161
1889-1892	33	2001-2004	193
1893-1896	24	2005-2008	115
1897-1900	25		

mary federal courts that we study. It is quite comprehensive, although there is some missing information on judges' careers—primarily for judges who served early in the history of the judiciary. Our work with these data indicates that they have a very high level of accuracy. All of our own codings of data from the Directory were double-coded for accuracy and reliability.

We generally organize our analysis in terms of the attributes of judges who were appointed during a given period rather than the attributes of all the judges who served during a period. We do so because appoint-

ments are the primary means by which judicial career patterns change and because presidents might actually seek to “engineer” such changes through their appointments.

We present our data systematically as figures.<sup>15</sup> These figures present data for four-year periods that nearly coincide with presidential administrations. Within these figures, we also provide a 12-year moving average to help clarify career trends. We include the moving average primarily because of the small numbers of judges nominated during four-year periods in the early history of the federal judiciary, a fact that creates volatility in the reported percentages. The moving average for a twelve-year period appears above the last of the four-year periods. For example, the moving average obser-

15. We also created tables that provide the data on which the figures are based. These tables can be obtained from the authors.

16. The history of provisions for retirement of federal judges is summarized in Yoon, *Pensions, Politics, and Judicial Tenure*, *supra* n. 12, at 146-48.

vation for the 1997-2008 period appears above the 2005-2008 period. Table 1 shows the numbers of judges who received their first commission to a primary court in each of the four-year periods.

The sections that follow present findings on each of the three aspects of federal judicial careers in which we are interested. We will discuss possible explanations for some of the temporal patterns we found. However, our main interest is simply in depicting those patterns and assessing the magnitude of any movement toward a career judiciary in the federal courts.

### Time of entry and length of tenure

Our first inquiry concerns when appointees begin their service in the federal judiciary and how long they serve. We emphasize the beginning of service because of the life tenure of federal judges. That tenure allows judges to treat the judiciary as the final stage of their legal careers, and indeed the great majority of judges have done so throughout our history. Overall, 85 percent of the judges whose service in the federal courts ended by 2008 reached the end of that service through retirement or death. (We follow the Biographical Directory in defining retirement as resignation by a judge who is eligible for retention of the final salary because of a combination of age and years and service; senior status, available since 1919, is treated as a continuation of judicial service.)<sup>16</sup>

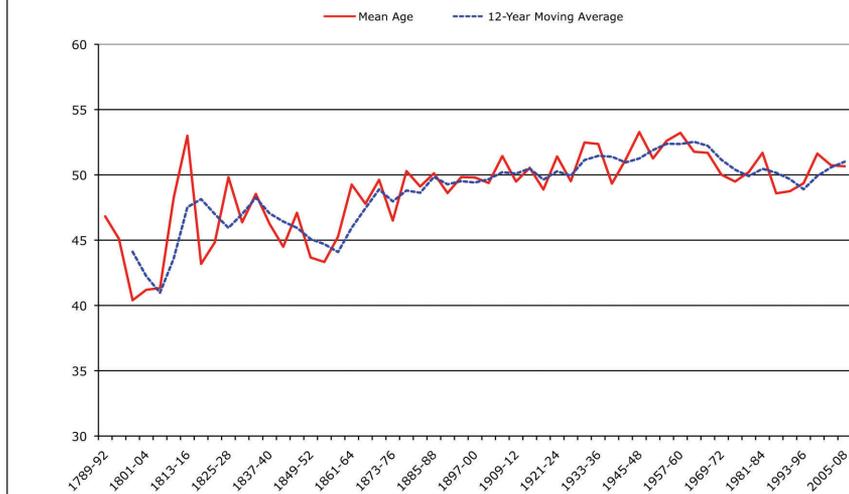
We begin with the age at which appointees become federal judges, shown in Figure 1. The mean age at which appointees receive the commission to their first federal judgeship has increased somewhat over time. For all judges commissioned before 1900, the mean age at which they received their first federal judgeship was 47; for judges commissioned from 1900 to 2008, the mean was 51. Whether or not we regard this increase as substantial, there clearly has not been a trend of appointing people to federal judgeships at an earlier age.

However, comparison of the mean age of appointment over time may be misleading in two respects. First, with the growth of law school as a means of entry into the legal profession, the age at which legal careers begin (which we define in the next paragraph) has increased slightly. The mean age of entry into the legal profession was 24 for pre-1900 judges and 25 since then. Second, life spans have lengthened. A 20-year-old's total life expectancy was 59 years in 1850. In 1998, the life expectancy of a 20-year-old was 78 years.<sup>17</sup> That change is reflected in the lives of federal judges. Among the judges who were commissioned prior to 1900, the mean age at death was 69. For judges commissioned from 1900 to 2008, and who have died by now, the mean age of death was 76. (This figure underestimates the increase in the mean age of death, because judges commissioned in recent decades who remain living will have longer lives on average than those who have died.) Changes in life expectancy might affect both the ages at which lawyers seek federal judgeships and the appointment strategies of presidents.

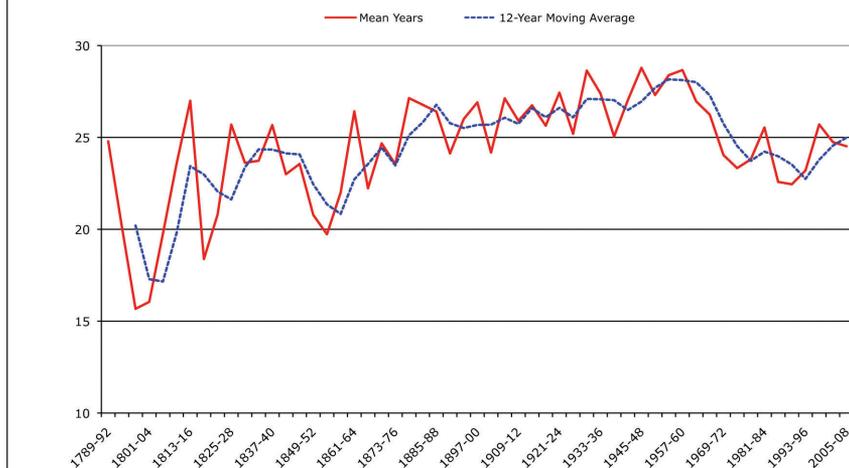
We can systematically take into account the ages at which careers start by counting the time between the beginning of an individual's legal career and the beginning of federal judicial service. We defined the beginning of a legal career as the year that a person received a law degree or, if the person did not receive a law degree, the year that the Biographical Directory lists for reading law. If no information on the years of a judge's education was listed, we substituted the year of a person's first legal position where that was listed. (Of the variables we analyzed, this one had the most missing data, but data on the beginning of the legal career were still available for more than 99 percent of the judges.)

The data are shown in Figure 2. The figure portrays a slight curvilinear pattern over time. The mean number of years between the beginning of a career and the first federal judgeship was relatively small in the

**Figure 1. Mean age of federal judges at time of first commission**



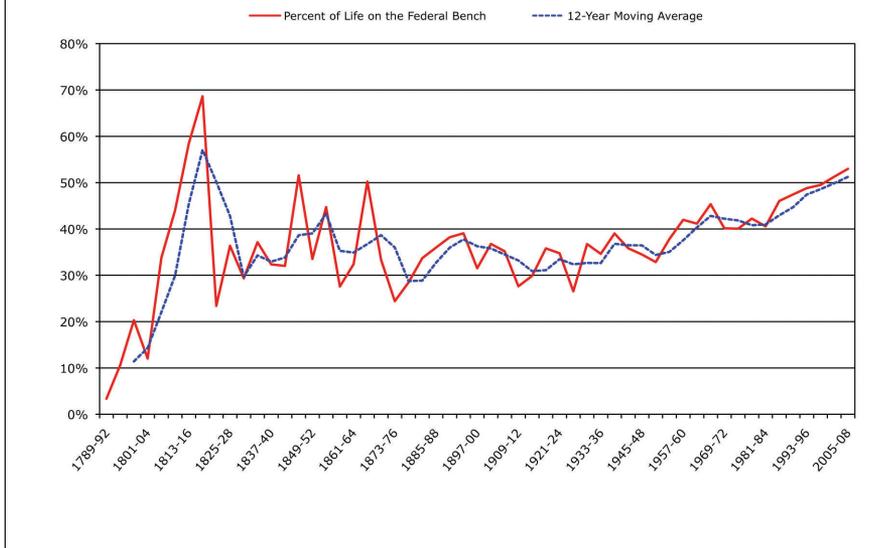
**Figure 2. Mean number of years in legal profession at time of first commission**



early years, increased in the late nineteenth century, and then fell to a lower level in the period since 1969. The overall mean age of new federal judges also declined in that recent period, but to a more limited

17. Michael R. Haines, *Expectation of Life at Specified Ages, by Sex and Race: 1850-1998*, in *HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION 442*, ed. Susan B. Carter et al. (New York: Cambridge University Press, 2006). These figures are the means between the life expectancy of women and men.

**Figure 3. Percent of life on the federal bench (since the start of the legal career)**



extent, and it remained three years higher than the pre-1900 level. In contrast, the mean number of years between the beginning of a career and the beginning of federal judicial service was three years lower in 1969-2008 than it had been earlier in the twentieth century, returning to the same level as in the pre-1900 period. Still, a decline in the mean from 27 years to 24 years does not represent a major change.

Although we do not focus on patterns in leaving the federal bench, it is useful to take leaving into account in conjunction with entrance into the federal courts. To do so, we calculated the proportion of their lives, starting with their entry into the legal profession, that judges spent on the federal bench. (Recall that we treat judges with senior status as remaining on the bench.) There is a high correlation between this measure and two other measures that might be employed—the proportion of a judge’s whole life spent on the federal bench ( $r=.973$ ) and the number of years that the judge served on the federal bench ( $r=.917$ ). Because we categorized judges by their commission date, we excluded judges first

commissioned since 1980, since about 80 percent of those judges remain alive.

There was considerable volatility in this measure in the nineteenth century. However, the most noteworthy trend is the higher percentage after 1920. Judges commissioned between 1901 and 1920 spent a mean of 36 percent of their lives (after becoming lawyers) on the bench. For the three 20-year periods from 1921 through 1980, the means were between 42 percent and 44 percent. In Figure 3 we categorized judges by when they left the bench, so that we could bring the analysis forward to 2008. From this perspective, the change is even more striking. The mean for judges who left the bench in the 1901-20 period was 32 percent, the same as for the pre-1900 period. The mean gradually increased to 42 percent in the 1961-80 period and then jumped to 48 percent in the 1981-2008 period.

There is no simple explanation for these increases, but the lengthening lifespans of judges and the increasing proportions of judges who remain on the bench until death clearly play a part. In any case, it is noteworthy that recent appointees to the federal

courts have become judges, on average, earlier in their careers and that the federal judiciary has come to occupy a larger portion of judges’ legal careers. In those respects, the federal courts have moved closer to the model of a career judiciary. But the movement toward appointment earlier in the legal career has been relatively slight, falling well short of anything fundamental. And on average, judges in recent periods have been appointed later, instead of earlier, in their lives. In contrast, the increase in the average proportion of lives spent in federal judgeships after the beginning of the legal career is more substantial.

### Previous career experience

In this section, we present trends in the percentage of judges who served in a judicial capacity before their first appointment to a primary federal court and in the percentage who previously served as a judicial law clerk. If the federal judiciary is moving in the direction of a career judiciary, then we should observe an increase in the percentage of appointees who served as a judge before their ascension to the primary federal courts. We would also expect an increase in the percentage of federal judges who previously served as a judicial law clerk.

**Overall judicial experience.** Previous judicial experience comes in many forms. Thus it is important to define what we mean by this term. We coded previous judicial experience as (a) judgeships on state courts (i.e., trial courts, intermediate courts of appeals, and courts of last resort), (b) service on federal specialized courts and as bankruptcy or magistrate judges, what we have labeled non-primary federal judgeships; (c) service in state courts as “parajudges” in positions such as commissioner, magistrate, and referee; and (d) state and federal administrative judgeships. A relatively small number of federal judges, 55 out of more than 3,000, have held positions in these last two categories. A judge who had served in any of these judicial roles was coded as having previous judicial experience.

First, we examine the extent of

previous judicial experience for the entire federal judiciary. Figure 4 shows the percentages of judges who had judicial experience at the time of their first appointment to a judgeship in a primary federal court.

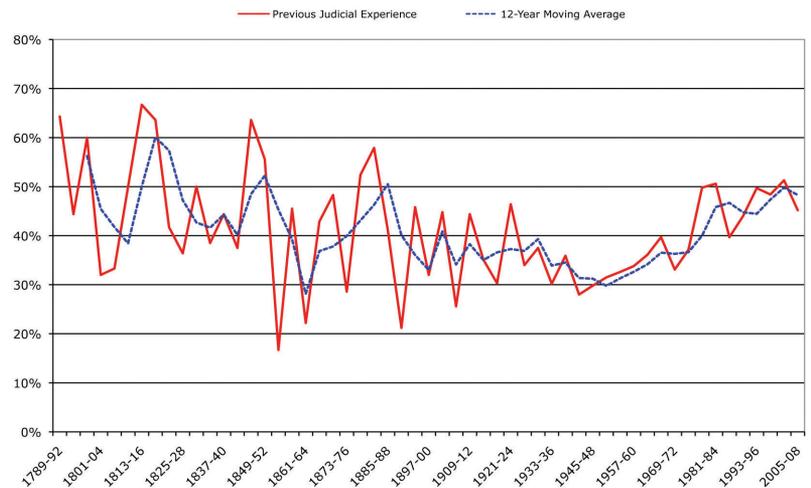
The percentage of appointees with previous judicial experience has fluctuated a great deal over time. Most noteworthy is the most recent change. Since the 1930s, there has been a gradual but clear increase in the percentage of first-time appointees to a primary federal court who had previous judicial experience. Between 1933 and 1936, the percentage of first-time federal appointees with previous judicial experience was 30 percent. That number increased to 49 percent for appointments made between 2001 and 2008.

This increase in recent years is likely due in part to the changing criteria for federal judicial appointments. Before the 1970s, presidents largely used judicial appointments to reward loyal political agents, particularly with regard to lower federal court appointments. However, as ideologically based appointments and the policy preferences of judges became more important to presidents in the late twentieth century, presidents examined the backgrounds of their nominees more carefully. Previous judicial experience could provide presidents with valuable information when evaluating potential judicial nominees.<sup>18</sup>

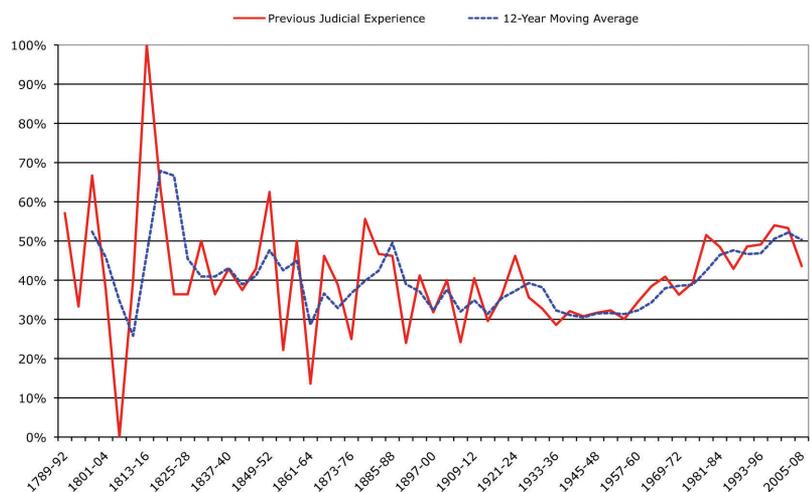
We can probe this trend further by examining separately the previous judicial experience of appointees to the U.S. district courts and U.S. courts of appeals, who together account for the great majority of federal judges. Figure 5 presents the percentages of district court appointees with previous judicial experience.

Across the full history of the U.S. district courts, 42 percent of all appointees had previous judicial experience. There was considerable variability in the amount of prior judicial experience in the early history of the district courts, but the most noteworthy change is a recent one. Before 1969, the percentage of district court appointees with prior judicial experi-

**Figure 4. Appointees with previous judicial experience**



**Figure 5. District court appointees with previous judicial experience**

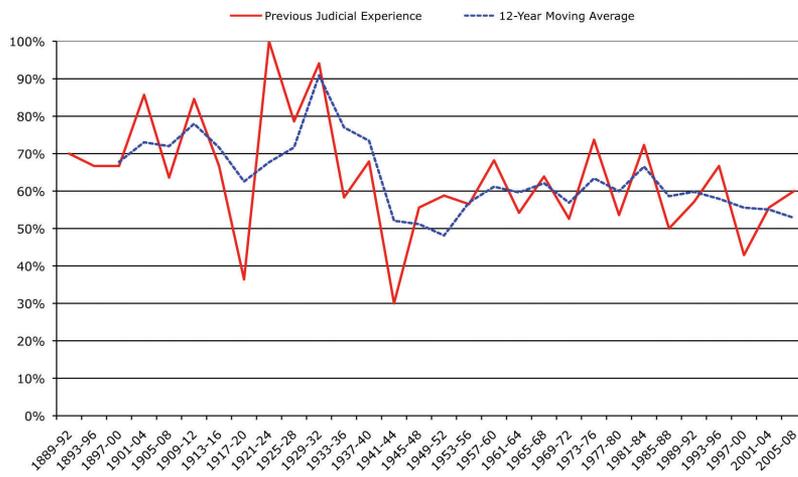


ence was 36 percent. But from 1969 through 2008, the percentage of appointees with prior experience was 47 percent. In fact, during the second term of President Clinton and President George W. Bush's two terms,

more than 50 percent of all district court appointees had previously

18. Nancy Scherer, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (Stanford: Stanford University Press, 2005).

**Figure 6. Courts of appeals appointees with previous judicial experience — including district court and circuit court experience**



served as a judge before taking a seat on the federal bench.

Throughout the history of the courts of appeals, 61 percent of their judges had previous judicial experience, including service on a federal district court, before their appointment to the courts of appeals. As Figure 6 shows, that percentage has fluctuated considerably over time. Between 1891 and 1920, 67 percent of new court of appeals judges had served on another court. The percentage then jumped to 91 percent in the 1921-32 period, dropped to 60 percent in the 1933-68 period, and dropped a bit more to 57 percent in the 1969-2008 period. Leaving aside the anomalous period from 1921 through 1932, there has been a moderate decline in prior judicial experience for court of appeals judges. The reasons for that decline are uncertain. The fluctuation that has occurred apart from the decline may reflect differences in priorities and appointment strategies between political parties and across presidents.

Thus there are differences in the previous judicial experience of district court and court of appeals

appointees. A higher percentage of appointees to the U.S. courts of appeals have had previous judicial experience compared to their counterparts on the U.S. district courts. Given that appointments to the courts of appeals can have significant influence on legal policy throughout the federal judiciary, and that court of appeals judges must grapple with complex constitutional questions at a greater rate than their district court counterparts, it is understandable that a larger percentage of court of appeals judges would have previous judicial experience. Of course, the availability of district judges for promotion to the next level of the federal judiciary is also a factor—perhaps the key factor. We will discuss promotion later.

However, while the percentage of district court judges with previous judicial experience has steadily increased since the 1950s, the percentage of courts of appeals appointees with previous judicial experience has declined slightly. The increase in judicial experience among new district judges suggests a modest movement toward a career

judiciary. But the decline for court of appeals judges is inconsistent with movement toward a career judiciary, in that a large minority of judges at the second highest court level continue to come from outside the judiciary.

**Types of prior judicial experience.**

After examining previous judicial experience in general, we now consider two specific types of previous experience, service on state courts and experience in non-primary federal judgeships. Leaving aside district judgeships as prior experience for court of appeals judges, these two categories account for the overwhelming majority of prior judicial experience for federal judges.

Figure 7 presents data on federal judges who had previous experience as a state court judge at the time of their first appointment to a primary federal court. The trends in state judicial career experience in the late eighteenth and early nineteenth centuries are nearly identical to the trends in Figure 6. This similarity is due to the fact that in this period there were very few non-primary federal judgeships. Therefore, if judges appointed to the federal bench in the early history of the United States had previous judicial experience, they almost always received that experience on a state court.

The percentage of first-time appointees to federal judgeships with previous state court experience was at its highest level early in the nation’s history, and it was 6 percentage points higher before 1900 than it has been since then. However, the decline was reversed in part in the late twentieth century: 32 percent of the new federal judges in the 1933-76 period had experience in state courts, compared to 38 percent in the 1977-2008 period. The overall decline in the percentage of judges with previous state court experience is related to the increase of non-primary judgeships in the federal judiciary, which we turn to next.

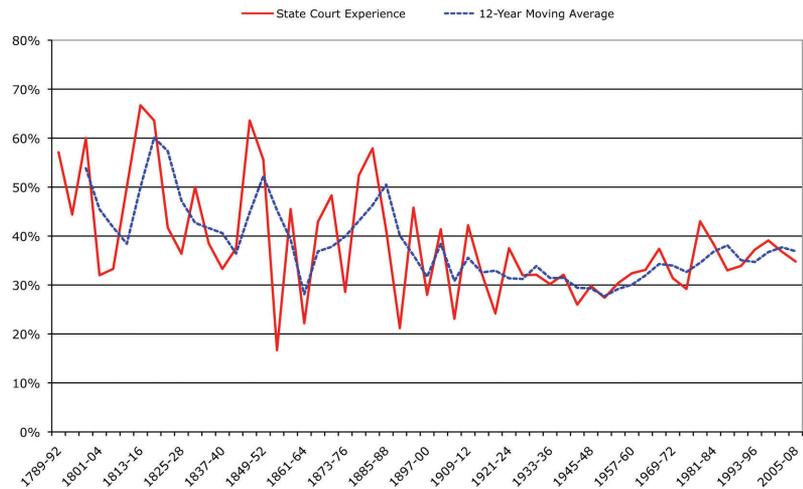
Prior to the 1970s, only a sprinkling of new judges on the district courts and courts of appeals had federal judi-

cial experience outside the primary courts. Since that time, as shown in Figure 8, substantial percentages of federal judges have had such experience. (These include a few judges with experience as federal administrative judges.) The percentages of first-time appointees with federal experience outside the primary courts reached 5 percent in the period from 1969 through 1980 and then rose sharply to 13 percent in the period from 1981 through 2008. Most of these judges had served as magistrate judges or bankruptcy judges, chiefly (almost 90 percent in the 1993-2008 period) as magistrate judges.

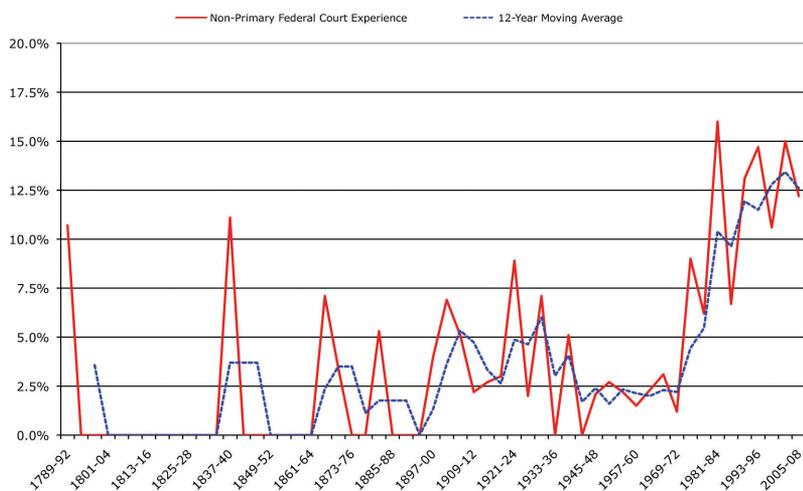
This change reflects the gradual development of bankruptcy and magistrate judgeships into prestigious positions and the growing numbers of judges holding those positions. The first major change in the status of magistrate judgeships was in 1968 with the enactment of the Magistrates Act.<sup>19</sup> At that time the position of commissioner was abolished and replaced with magistrates, who were charged with greater judicial responsibility. The second major shift came in 1979 when Congress added to the magistrates' jurisdiction and mandated their appointment by a merit-oriented selection committee. At this time Congress also instituted a minimum qualification requirement of five years of legal experience and bar membership. Third, in 1990 Congress officially designated magistrates as magistrate judges, which cemented the changes in responsibility and status that had been taking place over the previous 20 years. Bankruptcy judgeships have undergone a similar evolution.<sup>20</sup>

At the same time, the numbers of full-time magistrate and bankruptcy judgeships have grown. The Magistrates Act of 1968 originally authorized 82 full-time positions; by 1990 the number of full-time positions had risen to 329, and it reached 505 by 2007.<sup>21</sup> Since 1990 the number of full-time bankruptcy judgeships has increased by over 20 percent, from 291 full-time positions to 352.<sup>22</sup> Because full-time magistrate and

**Figure 7. Appointees with previous state court experience**



**Figure 8. Appointees with non-primary federal court experience**



19. The evolution of magistrate judgeships is discussed in Christopher E. Smith, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES (New York: Praeger, 1990); Philip M. Pro and Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); and Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate*

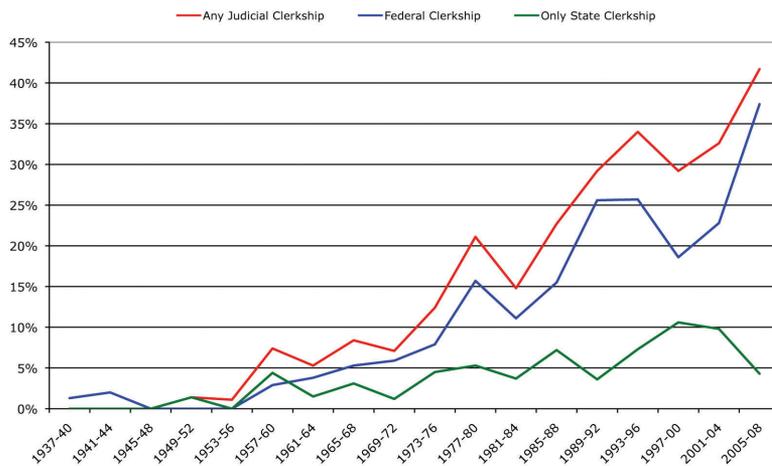
*Judge System*, 1999 FED. CTS. L. REV. 4 (1999).

20. The evolution of bankruptcy judges is discussed in David A. Skeel, Jr., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (Princeton: Princeton University Press, 2001).

21. Foschio, *supra* n. 19; U.S. Courts, "2007 Judicial Facts and Figures," Table 1.1 ([www.uscourts.gov/judicialfactsfigures/2007.html](http://www.uscourts.gov/judicialfactsfigures/2007.html)).

22. U.S. Courts, *supra* n. 21, Table 1.1.

**Figure 9. Judicial clerkship experience in state and federal courts**



bankruptcy judges are stronger candidates for promotion than their part-time counterparts, this growth in positions facilitated movement from non-primary judgeships to positions on the primary federal courts.

Moreover, there is a pragmatic benefit in appointing magistrate judges or bankruptcy judges to primary federal courts. Appointing such a judge should allow for a fast and smooth transition to the new position. In part for this reason, as the number of non-primary federal judgeships increases, it is likely that the number of judges with experience as a non-primary federal judge will continue to increase. Taken as a whole, the rise in this type of judicial experience is indicative of a move towards a career judiciary, all the more so because magistrate judges and bankruptcy judges work within

the federal courts.

**Clerkship experience.** In addition to serving as a judge on a court, an individual can gain valuable judicial experience by clerking for a sitting judge. Judicial clerkships often provide the opportunity for law clerks to serve as a “deputy judge” of sorts. Judges often ask their law clerks to perform legal research on their behalf, write bench memos with recommendations on how to rule in a given case, and draft court opinions. A judicial clerkship is, arguably, the best training one can receive before serving as a judge. Therefore, if the federal judiciary is moving in the direction of a career judiciary, then we should observe an increase in the percentage of judicial appointees with previous clerkship experience.

We begin our analysis of clerkships in the 1930s because clerkship experience was rare for federal judges who attained their positions prior to that time.<sup>23</sup> The number of law clerks in federal and state courts steadily increased over the course of the twentieth century. At the federal level, the U.S. Supreme Court employed law clerks in some capacity since Justice Horace Gray introduced the practice to the Court in

1882. Before the 1930s, however, law clerks were virtually non-existent in the lower federal courts.

Starting in 1930, Congress provided a law clerk for each court of appeals judge. In 1936, Congress permitted up to 35 U.S. district court judges to appoint a law clerk. In the years that followed, Congress continued to pass laws that increased the number of law clerks available to federal judges. In 1959, for instance, Congress authorized all district judges to hire law clerks without getting approval from their circuit’s chief judge, so long as the hiring was within budgetary limits.<sup>24</sup> As a result of those changes and congressional authorization of more judgeships, the number of law clerks in the federal courts has increased considerably.<sup>25</sup> A similar development has occurred in the state courts.<sup>26</sup>

Figure 9 presents the percentages of first-time judicial appointees who held any previous judicial clerkship, appointees who had clerked on a federal court, and appointees who clerked on a state court but not a federal court. Since the 1930s there has been a dramatic increase in the percentage of first-time federal appointees with judicial clerkship experience. Of the judges who were first commissioned in the 1930s and 1940s, only 1 percent had served as law clerks. Of the judges first commissioned in the 1993-2008 period, in contrast, 33 percent had served as clerks.

The main reason for this trend undoubtedly is the increasing number of clerkships in state and federal courts, which increases the opportunity for future federal judges to complete a judicial clerkship before embarking on their legal careers. Even so, the high proportion of recent appointees to federal judgeships who had experience as law clerks is noteworthy. In effect, a new stage of federal judicial careers has opened up.

Given that there was a difference in judicial career experience between district court and courts of appeals judges, it is possible that there has also been a difference in judicial

23. This discussion is drawn from the history of law clerkships in John Bilyeu Oakley and Robert S. Thompson, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 10-35* (Berkeley: University of California Press, 1980).

24. “Law Clerks,” Federal Judicial Center ([http://www.fjc.gov/history/home.nsf/page/law\\_clerks\\_bdy](http://www.fjc.gov/history/home.nsf/page/law_clerks_bdy)).

25. Oakley and Thompson, *supra* n. 23, at 10-21.  
26. *Id.* at 18-29.

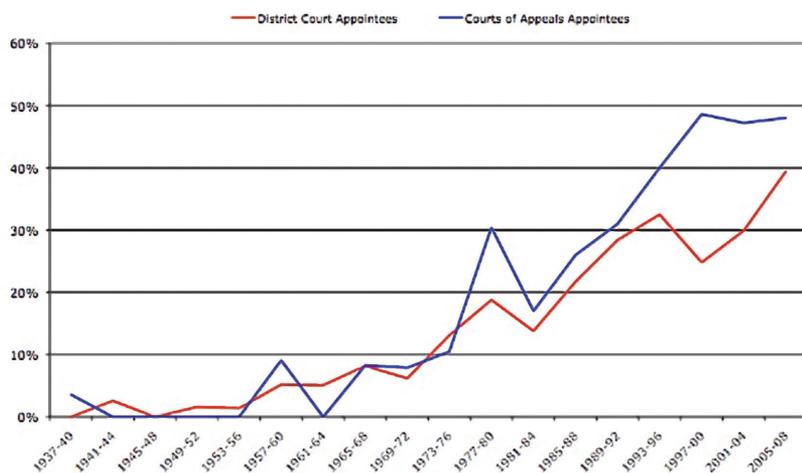
clerkship experience between these two levels of courts. Figure 10 presents data regarding the percentage of district court and courts of appeals appointees who held judicial clerkship positions. Unsurprisingly, the dramatic increase in clerkship experience has occurred at both levels.

Although the trends over time are similar at the two levels, court of appeals judges have consistently had more clerkship experience, particularly in recent decades. Between 1993 and 2008, 31 percent of district court appointees had previously served as a judicial law clerk, compared to 46 percent of courts of appeals appointees. Perhaps it is not surprising that court of appeals appointees would have more judicial clerkship experience given that court of appeals appointees have more judicial experience in general. This systematic difference in clerkship experience and judicial experience between the district courts and the courts of appeals is probably due to the demand to have more qualified individuals sit on the courts of appeals because it is a more prestigious judicial appointment and the greater attractiveness of court of appeals appointments to lawyers with strong credentials.

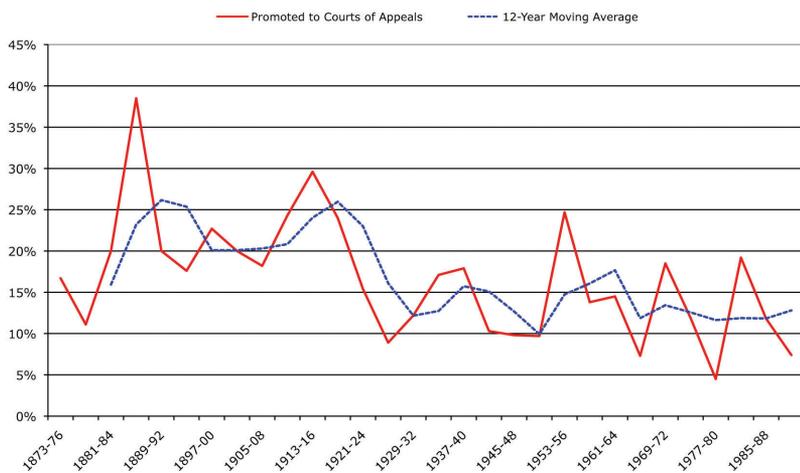
Given the increase in the number of clerkships offered in state and federal courts, it is likely that the trend toward clerkship experience for federal judges will continue in the future. The increase in the percentage of judges with previous clerkship experience could be construed as a step toward a career judiciary. This is especially true because most clerkship experience comes in the federal courts; of the judges commissioned since 1933 who had served as law clerks, 75 percent had clerked for federal judges. However, the trend should not be overstated: even in the current era the majority of federal judicial appointees do not have judicial clerkship experience.

Trends in clerkships and prior judicial experience, taken together, have produced dramatic growth in the numbers of new federal judges who already have experience in the

**Figure 10. District court and court of appeals appointees with clerkship experience**



**Figure 11. Proportion of district court judges promoted to courts of appeals**



federal judiciary. Of the judges who received their first commissions to primary federal courts in the 1957-68 period, 7 percent had served as federal court clerks or in non-pri-

mary federal judgeships. That percentage increased to 15 percent in the 1969-80 period, 26 percent in the 1981-92 period, 32 percent in the 1993-2000 period, and 38 per-

cent in the 2001-08 period. This growth represents a major change in the careers of federal judges.

### Promotion

Another indicator of whether the federal courts have moved toward a career judiciary is the extent to which judges are promoted from one level to another. As we discussed earlier, the dominance of the courts

judges who won those promotions by 2008, beginning with the judges appointed to the district courts in the 1873-76 period.

The figure has to be read with some care because of truncation at both the beginning and the end of the period shown. Some of the district judges who were appointed in the 1870s and 1880s had left their positions or would have been consid-

judges who received judicial appointments in that period.)

Still, the figure provides a sense of how the chances for promotion have changed over time. The trend is actually away from promotion rather than toward it. The percentages of district judges who advanced to the courts of appeals were appreciably higher before 1921 than they have been since. One reason, perhaps the main reason, is that opportunities have narrowed: the ratio of district court judgeships to court of appeals judgeships has increased considerably. That ratio was 2.39 in 1900 and 2.78 in 1910, but it has been above 3.8 since 1970.<sup>27</sup> Even if presidents in the current era were as inclined to promote district judges as they were a century ago, a smaller percentage of district judges would win promotion.<sup>28</sup>

The truncation problem is eliminated and the effect of the change in the ratio of district judges to court of appeals judges is greatly reduced if we look at promotion from the perspective of the courts of appeals. Figure 12 shows the percentages of court of appeals judges who were promoted from the district courts in

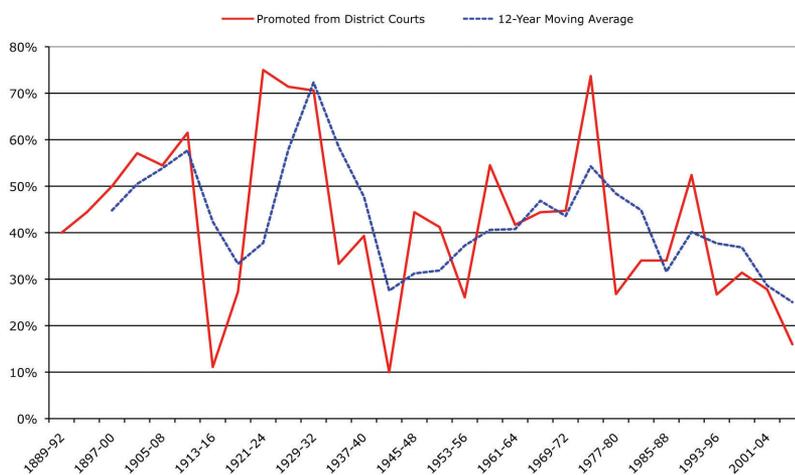
## It is likely the trend toward clerkship experience for federal judges will continue in the future.

of appeals as a source of Supreme Court justices since the mid-1970s has attracted widespread attention. But even if every Supreme Court justice came from a court of appeals, only a small proportion of court of appeals judges could win promotion to the Court. The pattern of promotions from the district courts to the courts of appeals is more significant, because the overwhelming majority of federal judges serve only at those levels. (Only six district judges have won direct promotions to the Supreme Court.) Regular progression from the lowest level of the federal courts to the intermediate level would be a core feature of a career judiciary.

We start by examining the chances that a district judge will win promotion to a court of appeals. During the periods that the circuit courts functioned, district judges could gain promotions to the circuit courts, and a few judges—about a dozen altogether—did move from the district courts to the circuit courts. But the opportunities for promotion grew considerably when the courts of appeals were created in 1891. Figure 11 shows the percentages of district

ered too old for promotion by the time that court of appeals positions began to open in 1891. Conversely, some district judges appointed between 1981 and 1992 had yet to receive promotions by 2008 but will receive them in the future. (We do not include the periods after 1992 in this figure because the truncation problem is far more extreme for

**Figure 12. Proportion of courts of appeals judges promoted from district courts**



27. Data on authorized judgeships are from the website of the U.S. Courts, at [www.uscourts.gov/history/allauth.pdf](http://www.uscourts.gov/history/allauth.pdf).

28. Klerman, *supra* n. 6, at 461-62.

the periods since the courts of appeals were created. Those percentages have fluctuated a good deal over time, in part because partisan considerations affect presidents' interest in promoting district judges.<sup>29</sup> However, there is clearly no upward trend in recent years. Indeed, the percentage for the 2001-08 period is the lowest (23 percent) of any period shown, and the 1993-2000 period is the second lowest (29 percent). This is all the more striking because the increasing ratio of district judges to court of appeals judges might be expected to favor the promotion of district judges. Since presidents now have more district judges to choose from, they would seem more likely to find a district judge with the qualities they seek. Thus, the pattern of promotion provides no support for the conception that the federal courts have come to take on the characteristics of a career judiciary.

## Conclusions

The analyses in this article represent a first inquiry into the possibility that the federal judiciary has come to be more of a career judiciary. While future research can analyze patterns and trends in greater depth, this inquiry provides an overview of temporal patterns in the careers of federal judges.

Several of our findings are inconsistent with the conclusion that we are moving toward a career judiciary at the federal level. People are not becoming federal judges earlier in their lives. There has been only a slight tendency in recent decades for people to join the federal judiciary earlier in their legal careers, and that decline has only reversed an earlier increase. Prior judicial experience has actually become less common for judges on the courts of appeals, and court of appeals judges are less likely to have won promotion from the district courts.

In contrast, some other findings

are consistent with movement toward a career judiciary. One is that district judges have become more likely to have prior judicial experience than in the past. The second, which contributes to the first, is that experience in what we have called non-primary federal judgeships—primarily in magistrate judge positions—has become more common. The third is that increasing proportions of federal judges have experience in judicial clerkships. This is especially true for court of appeals judges.

The second and third findings are probably inevitable, in that they reflect changes in the opportunities to obtain relevant experience. Clerkships have grown enormously in number since the 1930s, and magistrate and bankruptcy judgeships have grown in both number and status. Yet the increasing proportion of federal judges with experience of these two types is a significant development in itself.

Thus, there are some intriguing trends in the direction of what we would expect in a career judiciary. As a whole, however, the findings indicate that the federal judiciary remains what Georgakopoulos called a recognition judiciary rather than a career judiciary. Further, the patterns of change that we have identified are mixed in direction. Whatever may be the good or bad features of the traditional pattern of federal judicial service in the U.S., that pattern has not changed fundamentally. ¶



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29. Barrow, Zuk, and Gryski, *supra* n. 13, at 22-23. As shown by Songer, Sheehan, and Haire, *supra* n. 13, at 34-36, in some past eras Republican presidents were more inclined to promote district judges than were Democrats.