

A Quantitative History of Judicial Elites

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Chris Hanretty, *Political Preferment in English Judicial Appointments, 1880-2005* (2012), APSA 2012 Annual Meeting Paper, available at [SSRN](#).

We Brits like to point to our judiciary as emblematic of the superiority of our common law system. Meritocratic neutrality is one of the signal claims made by both the judiciary and the Bar. A lot of academic ink has been spilt deconstructing that particular claim, but it was nevertheless a delight to stumble across Chris Hanretty's paper [Political Preferment in English Judicial Appointments, 1880-2005](#). It's a delight for a number of reasons. Firstly, Dr. Hanretty is a political scientist, and political scientists are mysteriously rare students of UK legal systems, even in the UK. Secondly, it's based on a sophisticated quantitative analysis. Thirdly, it is well written: a delicious yet concise historical analysis of judicial appointment to the Court of Appeal. Fourthly, there's even a bit of polite methodological argy-bargy (at p.12) for the quants guys (and it nearly always is guys) who love that stuff. But finally, it evidences several important points about the significance of politics, elites and judges.

The study looks at the promotion of judges, largely from the High Court bench (which is the first instance court of highest status) to the Court of Appeal and to what was then the House of Lords (now the Supreme Court). It tests a number of hypotheses about this promotion process to discover whether promotion appears to be related to social standing; education; early appointment as a "rising star"; whether the judge is, for instance, a family (low status) or commercial (high status) judge; overt party political affiliation (historically significant in most narratives); and whether "candidates who were previously appointed [to their initial judicial office] by the governing party are more likely to be promoted."

Some of the indicators are merit based, others purely social and others reflect a mixture, engaging with signals of the class barriers contained within educational elites. Thus various measures of class and education are employed in the study, including not only conventional distinctions between Universities, but an "elite within an elite" group of Oxford and Cambridge colleges; membership of (gentleman's) clubs; and education through a particular elite group of (private) "[Clarendon](#)" schools¹.

There are a number of nuggets in the analysis. "A law degree is a curio until the nineteen-thirties, when it begins to be found amongst a fifth of the senior judiciary." Family judges do indeed find it harder to get promoted than Chancery judges. A memorable quote from [Penny Derbyshire's book](#) is that the Family Courts are seen as the Leyton Orient of the Courts,² [Leyton Orient](#) being a distinctly unglamorous third tier football club. Interestingly, class did not appear to be a factor (although the group under analysis were — as High Court judges — pretty homogenous already), but "[clubbiness](#)" did, suggesting a link between gregariousness and reputation. There is a hint — but only a hint — that having a law degree made promotion to the House of Lords more likely.

In relation to the party political elements of the analysis, overt party affiliation did not help predict promotion. However where a judge was appointed to the Bench by one political party they were more likely to be promoted by the same party (in fact 1.43 times as likely on this data). Interestingly, having been to a Clarendon school is a positive predictor of promotion to the Court of Appeal under Conservative governments.

Largely though, the study concludes that status within the High Court bench is not a significant predictor of judicial promotion. The importance of that finding is limited by the narrow social background of the cohort. Court of Appeal judges are drawn from a pool of judges with high status characteristics, although even so there are some muted signs

of an elite within an elite. More important is the finding that the political stripe of appointing governments matters:

“these findings challenge the conventional wisdom that the appointments process is ostentatiously non-political. Politics does matter, not because political activity procures an advantage (it does not), but because...candidates’ prospects for promotion depended on the identity of the party that initially appointed/promoted them, and on the party of the incumbent Lord Chancellor. This effect was particularly strong in the case of appointments as [Lords of Appeal in Ordinary]. The intentions which sustain such a finding may be entirely innocuous. Those appointing may wish to select ‘reliable’ or ‘trust-worthy’ candidates; and find that candidates already in some sense known to them or their party display these criteria.” (at p.24)

It may be innocuous or it may not. The study does not suggest that judges appointed by reason of their politics do not merit appointment, but it does suggest politics has in some way contributed to their preferment. It is a particularly interesting point given the current debate around diversity where traditionalist judges reject the idea of preferment on the grounds of gender or ethnicity. Whether such political preferment influenced the decisions of judges is much more debatable. Though some of the Government interventions in judicial appointment over the years suggest that the politicians thought it did, or that it might. Hanretty thinks actual influence impossible to prove. Similarly, since the period in question, reforms to judicial appointment have taken place that should further ameliorate the concerns. It may no longer be true that, as [Griffith wrote](#), “The most remarkable fact about the appointment of judges is that it is wholly in the hands of politicians,”³ but Hanretty goes a long way to proving the extent of that effect in spite of the checks built into original systems of judicial appointment.

Interested readers may wish to compare Hanretty’s findings with Shugermen’s account of judicial appointment in the United States⁴ Hanretty is not able to draw a link between the process of appointment and judicial independence. What he shows is that idea of merit is not insulated from political or social influence, whilst the UK the judiciary have historically pretended only merit counts (and rely on this assumption to inhibit changes in judicial appointment).

Like Shugermen, we should be wary of assuming political intervention always leads to predictable results. [Lord Bingham](#) was appointed to be Lord Chief Justice with the then Lord Chancellor ignoring senior judicial recommendations for an alternative appointment. The politician’s idea of merit trumped the senior judges. Yet, Bingham became the most fêted senior lawyer of his generation, partly for his stand against (a later) Government on anti-terrorism legislation but also for the intellectual lead he provided for the House of Lords (what is now our Supreme Court). I also suspect he was rather clubbable.

1. Colin Shrosbree, [Public Schools and Private Education: The Clarendon Commission 1860-1870](#) (Manchester University Press, 2nd ed., 2011). [?]
2. Penny Darbyshire, [Sitting in Judgment: The Working Lives of Judges](#) (Hart Publishing, 2011). [?]
3. J.A.G. Griffith, [Politics of the Judiciary](#) (Fontana Press, 5th ed., 1991). [?]
4. See here for the jot: <http://legalhist.jotwell.com/judicial-independence-but-from-what/>. [?]

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