

1965

Supreme Courts: Oklahoma and the United States--A Studied Comparison of Systems

Norman N. Pickett

Daniel Allis

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Norman N. Pickett, & Daniel Allis, *Supreme Courts: Oklahoma and the United States--A Studied Comparison of Systems*, 2 Tulsa L. J. 138 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol2/iss2/5>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

NOTES AND COMMENTS

SUPREME COURTS: OKLAHOMA AND THE UNITED STATES — A STUDIED COMPARISON OF SYSTEMS

I. INTRODUCTION

The judicial power . . . shall be vested in . . . (a) Supreme Court¹

With these words the framers' of the Constitutions of the United States and the state of Oklahoma planted the seeds creating the respective Supreme Courts. Through the 176 years since the United States Supreme Court was established, the growth and reformation of our nation has presented many opportunities to individuals² who have helped shape the living symbol of democracy and justice as it is known today.

II. THE COMPARISON

A. MAKE-UP OF THE COURTS

The Federal enabling Act³ established a Supreme Court consisting of a Chief Justice and five Associate Justices.⁴ During the next eighty years Congress changed the number of seats at the Bench seven times,⁵ fluctuating this number from four associates to its present eight, plus the Chief Justice.⁶

Section 3 of Article VII of the Oklahoma Constitution created the state court consisting of five justices and provided that the number could be changed by law. In 1917, the Sixth Legislature provided for a bench of nine,⁷ and there have been nine justices since.

¹U. S. CONST. ART. III, § 1; OKLA. CONST. ART. VII, §1.

²See Table No. 1, *infra*, for names of past and present members of the U. S. Supreme Court listed in order of succession.

³1 STAT. 73, (1789).

⁴The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court. All other members of the judiciary sitting on the bench are termed "judges."²⁸ U. S. C. § 451.

⁵These were (by date of Act, with number of associate justices): Sept. 24, 1789, 5; Feb. 1801, 4; April 29, 1802, 6; March 3, 1837, 8; March 3, 1861, 9; July 23, 1866, 6; April 10, 1869, 8. NORTON, *THE CONSTITUTION OF THE UNITED STATES: ITS SOURCE AND ITS APPLICATION* 131-32 (1932).

⁶In 1937 President Roosevelt submitted to Congress a bill to reform the Supreme Court by increasing the number of justices to fifteen. The President gave the reason that it was necessary to provide the Bench with "young blood." Others called it "packing the court", an attempt to place men on the Bench who had much the same philosophy as his. However, Congress refused to allow President Roosevelt to accomplish his desired goals by defeating the bill. *Id.* at 132; PUSEY, *THE SUPREME COURT CRISIS* 16 (1937).

⁷20 OKLA. STAT. § 1 (1961).

During the early years of the Federal Court, the Justices were required to "ride circuit" when they were not sitting en banc. This system proved to be quite unsatisfactory. It was discovered that questions in the Circuit Court decided by one set of judges in the affirmative had afterwards in the same court been decided by others in the negative.⁸ The Court, when sitting as a full body, was faced with review of many of their own cases.

The original idea of the framers was to bring the Judiciary in touch with the community. Due to great distances involved and a lack of uniformity in decisions, the "Circuit Ride" was abolished in 1891 by establishment of the Circuit Courts of Appeals.⁹

The hardships of hearing cases in the separate judicial districts and having to review their own decisions was not placed upon the state justices. The constitution of Oklahoma provides that sessions of the Supreme Court be held at the seat of government.¹⁰

B. SELECTION OF JUSTICES

Within the discretion and wisdom of the nine men of each Court rides the almost unfettered fate of the Nation, and the state, through judicial review and interpretation of the acts of the legislatures. Methods used to select the justices of the separate courts are diametrically opposite. Federal Justices are appointed by the President, with the approval of the Senate, and "hold their offices during good behaviour . . ." creating a lifetime appointment.¹¹ State justices are selected by popular vote.¹² The Oklahoma constitution provides that at each biennial election, three of the justices shall be elected to office, each for a term of six years.¹³

It appears that the desire of the drafters of both constitutions was to "secure the objective of an independent judiciary of competent judges,"¹⁴ but neither method is entirely free of the political factors entering into the selection of justices, nor does either method guarantee judges of merit and competence.

President Washington's appointment of John Rutledge to Chief Justice does not appear to have been entirely of his own choosing.¹⁵ Prior to the appointment, Rutledge wrote the President expressing his desire to receive the nomination and his disappointment at not having been chosen the first Chief Justice. The President then commissioned him on July 1, 1795 as Chief Justice of the United States where he presided in the sought-after position during the August Term; but in

⁸ See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1789-1821), at 87.

⁹ 26 STAT. 826, (1891).

¹⁰ OKLA. CONST. ART. VII, § 5.

¹¹ U. S. CONST. ART. II, § 2.

¹² OKLA. CONST. ART. VII, § 3, 20 Okla. Stat. § 33 (1961).

¹³ OKLA. CONST. ART. VII, § 3.

¹⁴ Note, 4 OKLA. L. REV. 252 (1951).

¹⁵ 1 WARREN, *op. cit. supra* note 8, at 127-28.

December the Senate refused to confirm the appointment.¹⁶

Rutledge's appointment was rejected by Congress primarily because of his vehement attack on the newly ratified Jay Treaty. With Rutledge's rejection Washington finally appointed Oliver Ellsworth, the drafter of the Judiciary Act of 1789. The rejection of Rutledge became an event of great American importance. Rutledge did not die until 1800. If the Chief Justiceship had been held by him it would have become vacant at a time when it is unlikely that John Marshall would have been President Adams' appointee. "Thus upon the event of one chance speech regarding a British Treaty hinged the future course of American Constitutional law."¹⁷

Professor Mendelson of the University of Texas points out in his work: The Constitution and the Supreme Court, that appointments to the Bench are drawn mainly from the appointing President's own political affiliation.¹⁸ The state's constitutional requirement for election of justices, which necessitates campaigning and other political expenses, by no means guarantees that the most capable men will make themselves available for this office.¹⁹ Since statehood Oklahoma has had seventy-two²⁰ men who have sat on the state bench, only nine of whom have been Republicans, one of those being appointed to fill an interim vacancy.²¹ From this it may be seen that selection of justices in Oklahoma is on a partisan basis also.

Washington's appointment of Rutledge set a precedent of selecting the Chief Justice from individuals other than those then sitting on the Bench. This method of selection has been deviated from only twice in the history of the Court.²² Thomas Jefferson stated, in regards to Rutledge's appointment: "It seems to have been intended merely to establish a precedent against the descent of that office by seniority and to keep five mouths always gaping for one sugar plum."²³ In contrast, the constitution of Oklahoma provided that the first chief justice was to be from "one of their number."²⁴ The legislature then provided that the chief justice and vice chief justice be selected by members of the Supreme Court in January of each odd year.²⁵

C. COURT'S IMAGE

The attacks upon the Court are merely an expression of the

¹⁶ Although Rutledge is considered by some writers to have served as an associate justice of the U. S. Supreme Court, it has been written that he declined this appointment in 1789 to become Chief Justice of South Carolina. 30 Fed. Cas. 1392; 1 Curtis 127 (1795).

¹⁷ 1 WARREN, *op. cit. supra* note 8, at 139.

¹⁸ Appendix II at 513-15 (1959).

¹⁹ 4 OKLA. L. REV. 252; Trice, *Judicial Selection*, 8 OKLA. B. A. J. 48 (1937).

²⁰ See Table No. 2, *infra*, for names of past and present members of the Oklahoma Supreme Court listed in order of succession, by Judicial Districts.

²¹ ". . . The Governor shall, by appointment from the district, fill such vacancy until the next general election for State Officers . . ." OKLA. CONST. ART. VII, § 3.

²² Chief Justices White and Stone were promoted from associate justices.

²³ 1 WARREN, *op. cit. supra* note 8 at 129.

²⁴ OKLA. CONST. ART. VII, § 6.

²⁵ 20 OKLA. STAT. §§ 7 & 8 (1961).

unrest that seems to wonder vaguely whether law and order pay.²⁶

— Justice Oliver Wendell Holmes

During the last twelve months there arose a feeling of tension and disquiet across Oklahoma due to the turmoil surrounding the state Supreme Court. The layman has been suddenly, through mass news media, confronted with allegations of wrongdoing among past and present members of the court. He may fail to take into account years of dedication and devotion to duty that preceeded the present allegations, but to members of the judiciary, the bar, and students of law there is a greater awareness of the impact of the alleged misconduct of those charged, and its deterioration of the court's image.²⁷

Shortly after Marshall's appointment in 1801 as Chief Justice, and during a time when an appointment to a federal district court judgeship was considered a far more important and respected position, the Court was faced with the impending impeachment of Justice Samuel Chase.²⁸ However, the Court was able to overcome the detrimental effect this caused on its image and it matured to a respected tribunal. Marshall's leadership and direction played no small part in this feat. The foresight contained in Marshall's opinions written more than a century ago formulated many of the doctrines followed by the courts today.²⁹

The admiration which so many members of the bar hold for Marshall has been summarized in the following words:

The supremacy of the judiciary, implicit if not expressed, only needed the magic of John Marshall to make it a part of a sacred tradition illuminating the written word. In his long service on the bench, the Chief Justice raised the Supreme Court to a position of power and majesty, and he moulded the Constitution by the breadth and wisdom of his interpretations.³⁰

D. QUALIFICATIONS AND TENURE

There are no codified qualifications governing the abilities, background, or education for appointment to the Supreme Court of the United States, not even that of being an attorney, although all justices have been. Qualifications for sitting on the state court are set out in Article VII, section 3, of the Oklahoma Constitution.³¹

The failure of Congress to set out standards governing the selection of individuals has not had an apparent effect on the Court's judicial

²⁶ PUSEY, *op. cit. supra* note 6, at 22.

²⁷ The Tulsa Tribune, March 27, 1965, p. 1, col. 4.

²⁸ See note (a), Table No. 1, *infra*.

²⁹ The four landmark cases are: *Marbury v. Madison*, 5 U.S. (1 Cranch) 60 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 579 (1819); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 629 (1819); and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 23 (1824).

³⁰ John Marshall Bicentennial 1955 (Final Report) 1, Chief Justice Earl Warren, Chairman

³¹ The requisite qualifications are: (a) citizen of the United States; (b) state resident for two years; (c) resident of the judicial district for at least one year; (d) thirty years of age; and (e) he must be a lawyer licensed by some court of record and/or a judge of some court of record for at least five years.

capabilities. However, a situation could arise where a justice may have to hear and decide a case that directly touches on his previous loyalties. Justice Samuel Miller said of the circumstance:

It is in vain to contend with judges who have been at the bar advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interest are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.³²

The average age of the Justices at appointment by decade, reached a low of forty-three in 1799-1809, and a high of fifty-nine in 1909-1919. Since then the average age has continued to decline to the present average age of fifty for the period of 1959-1965. However, they usually sit until they die.

Oklahoma is not faced with this problem because its justices are voted into office, and if the people dislike a particular justice's expressed judicial concepts and policies, the electorate may, theoretically, vote him out of office (provided he has an opponent). To be elected to the state bench results, as a practical matter, in a lifetime appointment.³³

By constitutional authority, the Governor selects justices to fill vacancies on the bench, such appointees serving until the next biennial election. However, the Governor is limited to the judicial district from which the vacancy arose to choose the interim appointee.³⁴ Could not this geographical limitation place an inherent difficulty on the selection of capable individuals?

A lifetime appointment does not appear to be the complete answer. Age, illness, or inertia may leave a justice unqualified for his job, and he might very well be the ninth Justice deciding a five to four decision, which could effect the lives of millions. (To effect the lives of a few does not make it any less an injustice.)

Congress has provided members of the Federal Bench with a retirement program.³⁵ Oklahoma's retirement program is somewhat more complicated.³⁶ It provides basically for semi-retirement of a justice into supernumerary status at age sixty-five after serving ten years, or upon reaching age seventy he may become eligible after serving eight years. The maximum pension receivable is seventy-five per cent of his former salary. To be eligible for the pension, he must make himself available for assignment to vacant benches in various courts, for various reason, throughout the state.

³² ERNST, THE ULTIMATE POWER 300, (1937).

³³ See Table 2, *infra*.

³⁴ OKLA. CONST. ART. VII, §3.

³⁵ A Justice may retire at 70 after serving 10 years as a Federal judge or at 65 after 15 years of service. 28 U.S.C. 371. --

³⁶ 20 OKLA. STAT. §§ 992, 923 & 924. These sections also provide that after 20 years of service, a justice may retire with maximum pension regardless of his age. In contrast, California pays its judges who retire at seventy 75 per cent of their salary for life, but those judges who stay on after seventy have their pension dropped to 50 per cent. In 1959 California had about 80 judges over seventy years of age. Now it has only six. Time, March 25, 1965, p. 63A.

The unwisdom and injustice of requiring one to obtain a specified number of years on the bench to qualify himself for retirement benefits is illustrated by the fact that a justice could be forced into running in a political campaign for re-election to provide himself with an income although he knows he has passed the point of proficiency and effectiveness. If our hypothetical justice did win re-election, it is submitted that his desire to obtain his pension might outweigh his interest in the duties of the office.

III. SUMMATION

From the inception of both the federal and state courts there has arisen many of the same problems. In many ways the courts closely parallel each other. Although the procedure of placing these men on the bench is dissimilar, the desired result is the same: an endeavor to promulgate justice as fairly as possible.

There lies ahead of each member of the bar and student of the law the task of dispelling the idea that "(We) belong to a profession which has always been basically dishonest."³⁷ That statement was made in 1937, and it is still heard today. The court does not pretend to be a divinity; but until the public is made aware of the truly fine job done by both courts, we will continue to hear the accusations of injustice, wrongful influence, and corruption.

³⁷ ERNST, *op. cit. supra* note 32, at 296.

Norman N. Pickett

Daniel Allis

Table No. 1

JUSTICES OF THE UNITED STATES SUPREME COURT
(Listed in Order of Succession)

CHIEF JUSTICES

ASSOCIATE JUSTICES

<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>
J. Jay (F) (NY) 1789—1795	J. Rutledge (F) (SC) 1789—1791	W. Cushing (F) (Mass) 1789—1810
J. Rutledge (F) (SC) 1795	T. Johnson (R) (Md) 1791—1793	J. Story (R) (Mass) 1811—1845
O. Ellsworth (F) (Conn) 1796—1800	W. Patterson (F) (NY) 1793—1806	L. Woodbury (D) (NH) 1845—1851
J. Marshall (F) (Va) 1801—1835	B. Livingston (R) (NY) 1806—1823	B. R. Curtis (W) (Mass) 1851—1857
R. B. Taney (D) (Md) 1836—1864	S. Thompson (R) (NY) 1823—1843	N. Clifford (D) (Me) 1858—1881
S. P. Chase (R) (Ohio) 1864—1873	S. Nelson (D) (NY) 1845—1872	H. Gray (R) (Mass) 1881—1902
M. R. Waite (R) (Ohio) 1874—1888	W. Hunt (R) (NY) 1872—1882	O. W. Holmes (R) (Mass) 1902—1932
M. W. Fuller (D) (Ill) 1888—1910	S. Blatchford (R) (NY) 1882—1893	B. N. Cardozo (D) (NY) 1932—1938
E. D. White 1910—1921 (c)	E. D. White (D) (La) 1894—1910	F. Frankfurter (Ind) (Mass) 1939—1962 *
W. H. Taft (R) (Conn) 1921—1930 (d)	W. Van Devanter (R) (Wyo) 1910—1937 *	A. J. Goldberg (D) (Ill) 1962—Present
C. E. Hughes (R) (NY) 1930—1941	H. L. Black (D) (Ala) 1937—Present	
H. F. Stone 1941—1946 (c)		
F. M. Vinson (D) (KY) 1946—1953		
E. Warren (R) (Cal) 1953—Present		

ASSOCIATE JUSTICES

<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>
J. McKinley (D) (Ky) 1837—1852	T. Todd (R) (Ky) 1807—1826	J. Blair (F) (Va) 1789—1796
J. A. Campbell (D) (Ala) 1853—1861	R. Trimble (R) (Ky) 1826—1828	S. Chase (F) (Mo) 1796—1811 (a)
D. Davis (R) (Ill) 1862—1877	J. McLean (D) (Ohio) 1829—1861	G. Duval (R) (Mo) 1811—1835
J. M. Harlan (R) (Ky) 1877—1911	N. H. Swayne (R) (Ohio) 1862—1881	P. P. Barbour (D) (Va) 1836—1841
M. Pitney (R) (NJ) 1912—1922	S. Matthews (R) (Ohio) 1881—1889	P. N. Daniel (D) (Va) 1841—1860
E. T. Sanford (R) (Tenn) 1923—1930	D. J. Brewer (R) (Ka) 1889—1910	S. F. Miller (R) (Iowa) 1862—1890
O. J. Roberts (R) (Pa) 1930—1945	C. E. Hughes (R) (NY) 1910—1916	H. B. Brown (R) (Mich) 1890—1906
H. H. Burton (R) (Ohio) 1945—1958	J. H. Clarke (D) (Ohio) 1916—1922	W. H. Moody (R) (Mass) 1906—1910
P. Stewart (R) (Ohio) 1958—Present	G. Sutherland (R) (Utah) 1922—1938 *	J. R. Lamar (D) (Ga) 1910—1916
	S. F. Reed (D) (Ky) 1938—1957 *	L. D. Brandeis (D) (Mass) 1916—1939 *
	C. E. Whittaker (R) (Mo) 1957—1962 *	W. O. Douglas (D) (Conn)
	B. R. White (D) (Ohio) 1962—Present	1939—Present

ASSOCIATE JUSTICES

<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>	<i>Name, Party, Residence Term of Service</i>
J. Wilson (F) (Pa) 1789—1798	J. Iredell (F) (NC) 1790—1799	J. Catron (D) (Tenn) 1837—1865
B. Washington (F) (Va) 1798—1829	A. Moore (F) (NC) 1799—1804	S. J. Field (D) (Calif) 1863—1897
H. Baldwin (D) (Va) 1830—1844	W. Johnson (R) (SC) 1804—1834	J. McKenna (R) (Calif) 1898—1925
R. C. Grier (D) (Pa) 1846—1870	J. M. Wayne (D) (Ga) 1835—1867	H. F. Stone (R) (NY) 1925—1941
W. Strong (R) (Pa) 1870—1880	J. P. Bradley (R) (NJ) 1870—1892	R. H. Jackson (D) (NY) 1941—1954
W. B. Woods (R) (Ga) 1880—1887	G. Shiras (R) (Pa) 1892—1903	J. M. Harlan (R) (NY) 1955—Present
L. Q. C. Lamar (D) (Miss) 1888—1893	W. R. Day (R) (Ohio) 1903—1922	
H. E. Jackson (D) (Tenn) 1893—1895	P. Butler (D) (Miss) 1922—1939	
R. W. Peckham (D) (NY) 1895—1909	F. Murphy (D) (Mich) 1940—1949	
H. H. Lurton (D) (Tenn) 1909—1914	T. C. Clark (D) (Texas) 1949—Present	
J. C. McReynolds (D) (Tenn) 1914—1941		
J. F. Byrnes (D) (SC) 1941—1942		
W. B. Rutledge (D) (Iowa) 1943—1949		
S. Minton (D) (Ind) 1949—1956 *		
W. J. Brennan (D) (NJ) 1956—Present		

Sources: MENDELSON, *THE CONSTITUTION AND THE SUPREME COURT*, Appendix II (1959); 82 Sup. Ct. (Preface, p. 13) (1962); 82A Sup. Ct. (Preface, p. 13) (1962); New York World-Telegram, *The World Almanac and Book of Facts* 92 (80th ed. 1965).

Political Affiliation Key: (F) — Federalist; (D) — Democrat; (R) — Republican; (W) — Whig; and, (Ind.) — Independent.

* Denotes that the Justice retired from the Bench.

(a) In 1804 the House of Representatives brought impeachment action alleging irregular conduct by Justice Chase in attempting to influence a jury in a trial for treason under the Alien and Sedition Acts. The constitutional two-thirds majority vote required in the Senate was not obtained. This is the only instance of impeachment proceedings against a Supreme Court Justice. MYERS, *HISTORY OF THE SUPREME COURT*, 246 (1912).

(b) Resigned October 3, 1942.

(c) Promoted from Associate Justice.

(d) Taft, C. J., has been the only member of the Bench to have also served as President of the United States.

7.	8.	9.
<i>Name and Party</i>	<i>Name and Party</i>	<i>Name and Party</i>
T. H. Owen (D) 1917—1920 ‡*	R. M. Rainey (D) 1917—1920	R. Brett (D) 1917—1918
G. S. Ramsey (R) 1920—‡*	R. E. Kennamer (R) 1920—1924 *	J. T. Johnson (D) 1918—1924
W. A. Collier (D) 1920—1922 ‡	F. L. Warren (D) 1924—‡	F. S. Riley (D) 1924—1948
J. R. Miller (R) 1920—1922	J. W. Clark (D) 1924—1932 †	C. T. O'Neal (R) 1948—1954
F. R. Branson (D) 1922—1928	O. Busby (D) 1932—1937 *	F. L. Jackson (D) 1954—Present
T. G. Andrews (R) 1928—1934	D. N. Davison (D) 1937—Present ‡	
T. L. Gibson (D) 1934—1952		
W. H. Blackbird (D) 1952—Present		

Sources: 1963 Directory and Manual of the State of Oklahoma, at 137; Tulsa Sunday World, Feb. 28, 1965, p. 1, col. 8.

Political Affiliation Key: (D) — Democrat; (R) — Republican.

‡ Denotes appointment to office until next biennial election.

* Denotes that the justice resigned from the bench.

† Denotes that the justice was initially elected for unexpired term.

** Impeached May 13, 1965.

(a) As part of plan of redistricting the state into nine Supreme Court Judicial Districts, the number of District No. 4 was changed to District No. 5, whereas the latter became the former. Justices are shown in chronological order from 1917 on rather than by District number. OKLA. sess. 1917, ch. 145, at 232.

(b) *Ibid.*

(c) Served as associate justice in District No. 6 from 1924 to 1930. Appointed to office from District No. 3 upon death of Arnold, J.