

# **THE PATH TO POWER: CHOOSING A JUDGE**

**by Paul H. Mills**

## **How Maine Compares With Other States in Putting Women on the Bench**

The historic nomination of Sonia Sotomayor to the Supreme Court has brought new attention to the way the nation chooses its judges. It has also highlighted the strides made by women in achieving high positions of authority in the nation's judiciary.

Though Maine was a leader in breaking down barriers for women to practice law - admitting Clara Nash the first woman lawyer in New England and the sixth in the nation in 1872 - Maine has not been in the vanguard of placing women in the far more influential arm of the law, the judiciary. It took more than a century after Nash was admitted for the state to name its first female judge, for example. She was Harriet Henry, appointed in 1973, only after 43-other states had already placed a woman on the bench. Moreover, the appointment was to a position at the bottom rung of the judicial ladder, that of the state's District Court system.

Not until 1980 was a woman, Jessie Briggs Gunther, named to the state's upper level trial court. Only in 1983 did Caroline Glassman become the first female appellate judge in Maine, 61-years after Ohio had become the first state to designate a woman for its highest court.

The State's back seat role in appointing women judges was redressed somewhat by the 2001 appointment of Leigh Ingalls Saufley as Chief Justice of the State's Supreme Court. At that time, fewer than 15 other states had ever placed women in such a high position of judicial authority. Even today there are only 20 other states that

have ever done so. Many are ironically among the more rural and conservative jurisdictions in the country. They include Alabama, Mississippi, Alaska, and Utah.

Overall, Maine is nevertheless somewhat behind the eight ball when it comes to the presence of women in the judicial system. Thirteen of the 61 full time court judges in Maine are women, a 21-percent that is below the national average. It's also below the 25-percent figure for female federal judges.

Only two of the nine members of Maine's Supreme Court are women, though in some 22 other states they make up over 40% of the members serving on a highest court.

### **The Effect of Shunning Public Officials When Naming Judges**

But there's more to diversity than either gender or minority group status. Whether Maine or the nation has a judiciary that reflects a cross section of its citizens also depends on other life experiences and backgrounds. On that score, the federal and to a lesser extent the Maine high court systems have become increasingly constricted.

As Adam Liptak of the *New York Times* recently noted, the U.S. Supreme Court is "in some ways the most insulated and homogeneous in American history." None of its members has ever been elected to public office. It is the first Supreme Court composed exclusively of former federal appeals court judges. The only three justices in U.S. history who never privately practiced law are among the nine members of the current Court.

Just 55-years ago, when the U.S. Supreme Court handed down what has become the most popularly acclaimed decision of the last century, *Brown v. Board of*

*Education*, the high Court was made up of judges drawn from a much broader spectrum of leadership experiences.

They included four former high ranking executive branch officials, one of whom had been chief counsel at the Nuremberg War Crimes Trials. Three former U.S. Senators, one of them once a Cleveland mayor, a former California Governor, and a distinguished law school professor rounded out the group. Only one of its members had ever served as a judge before joining the nation's highest judicial tribunal.

The *Brown* decision and the several other integration cases the Court decided in its immediate aftermath share one characteristic that sets the Court of that era apart from today's: they were unanimous. That internal infighting was avoided is largely credited to the political skills of Chief Justice Warren. With a background as California's charismatic governor, Warren had a knack for forging consensus among disparate adversaries even though he'd never been a judge before President Eisenhower made him Chief Justice.

### **Maine Mirrors US in Other Respects**

The Maine Supreme Court of recent decades has followed a pattern similar to that of nation's highest court in that its members are less likely to have had elective legislative experience than in the 1940's and 1950's when it often drew from those with such resumes. Today, former Lewiston State Senator Robert Clifford is the lone former legislator on the Court. It's a Court that like its federal counterpart has during the same time issued an increasing number of closely divided and non-unanimous decisions.

Maine governors have in the last generation, however, been more likely than their predecessors to name appointees without previous judicial experience, even

though they have at the same time usually shunned those with public office backgrounds. Nine of the 22 appointees to the Maine Supreme Court since 1976 never put in time on the bench. This practice was an innovation of Independent Governor Jim Longley, who in 1976 made U-Maine Law School Dean Edward Godfrey the first Maine high court judge since 1940 to arrive at the Court without having previously donned judicial robes. Governor Baldacci's first appointment, that of highly acclaimed Bangor attorney Warren Silver in 2005, followed this pattern.

The upcoming confirmation hearings of Judge Sonia Sotomayor to America's most powerful Court will no doubt raise new awareness of these and similar perspectives. May they further inform the mindset of the appointing authorities in such states as Maine when they consider the most appropriate criteria in selecting high level jurists.

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