Judicial Evaluation—the Counterpart to Merit Selection

by Henry T. Reath

Now, more than ever before in our history, we must begin to rebuild and strengthen a competent and truly independent judiciary through a merit selection process beyond the reach or control of partisan politics. Effective merit selection and retention of judges is the key to revitalizing the judicial branch of government, and effective judicial evaluation is the indispensable counterpart to make merit selection and retention work.

SOUND judicial evaluation is important not only to measure performance and determine which judges shall stay in office but also because it has a most salutary effect in fixing accountability and helping to ensure better judicial performance, even from those appointed or elected to serve for life during good behavior.

We live in troubled times. All around us there is increasing public disaffection and frustration with the workings of government in all three branchs. All too often those in control are more interested in serving their own selfish ends than in serving the public good. Meanwhile, a frustrated and disillusioned public becomes more cynical, disgusted, and disinterested. The situation worsens until a spark of leadership is struck to ignite action to reform time-honored institutions to make them work as they were originally designed. If not, they wither and die.

Nowhere is this more evident than in the judicial branch of government, which serves as the guardian of our precious heritage and is designed to dispense justice wisely and with dignity, fairness, firmness, and compassion. But has it ever been this guardian in our time? Has not too often the judiciary—particularly at the state trial level—had within its ranks too many mediocre or second-rate judges who have denigrated the dignity of their offices by serving as the handmaidens to partisan political leaders on whom the judiciary all too frequently are dependent for their selection, election, compensation, tenure, advancement, and appropriations for general court administration?

Happily, there are signs that the judiciary itself is beginning to recognize the importance and the dignity of its high calling and to use wisely its inherent power to act decisively in financial matters and in other important areas—rule making and court administration, for instance—that so vitally affect its ability to carry out its constitutionally mandated authority. An ever increasing corps of competent, dedicated, hardworking judges are fighting against insuperable odds to keep the judicial ship of state afloat.[1] Too often, all these fine jurists get for their labors is inadequate pay and undeserved brickbats as the scapegoats for the failings of society and a justice and correctional system the judges did not create and cannot control.

Is it any wonder that we hear today from every corner anguished cries about a crisis of confidence in our courts and in our justice system?

But what does judicial evaluation have to do with this crisis of confidence? Just this: if effective merit selection and retention of judges is, as I firmly believe it to be, the key to revitalizing the judicial branch of government, then effective judicial evaluation is the indispensable counterpart to make merit selection and retention work.

Bar associations have been involved for years in the process of judicial evaluation. But that is precisely the root of the problem. For too long we in the legal profession have had the presumptuousness, even the arrogance, to assert that only we have the wisdom and capability to conduct judicial evaluations and then hand down to the public the final judgments on who shall serve. By and large, the results in the major metropolitan areas, with some few notable exceptions, have been disappointing because the evaluations have lacked credibility for the news media and the general public. And in the process thousands of hours of well-intentioned, hard work by many dedicated lawyers go for naught.

EDITOR'S NOTE: This article is adapted from an address to the National Conference on Judicial Selection and Tenure, Denver, Colorado, March 20, 1974.

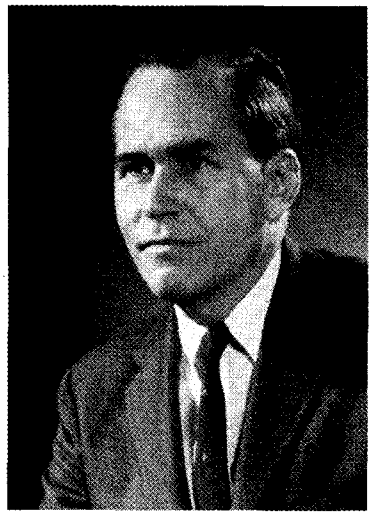
1. See, for example, opinion of Chief Justice Bell of the Pennsylvania Supreme Court in *Carroll* v. *Tate*, 442 Pa. 45, 274 A. 2d 193 (1971), in which the court held that the Common Pleas Court of Philadelphia County had the inherent power to compel the mayor and city council to provide more than a million dollars of funds necessary for court administration—computer programs, probation workers, law clerks, etc.

See also, *Judges for 3d Judicial Circuit* v. *Wayne County*, 386 Mich. 1, 190 N.W. 2d 228 (1971); and *O'Coins, Inc.* v. *Treasurer of the County of Worcester*, 287 N.E. 2d 608 (1972) (Supreme Judicial Court of Massachusetts); and see Burke, *The Inherent Powers of the Courts*, 57 JUDICATURE 247 (No. 6, January, 1974).

In the area of prison reform, see *Hendrick* v. *Jackson*, opinion and order of April 7, 1972, Philadelphia Court of Common Pleas, February term, 1971, No. 2437, aff'd. in part, rev'd. in part, 10 Commonwealth 392 Ct. 1, 309 A. 2d 187 (1973), petition of prisioners to Pennsylvania Supreme Court granted No. 298, January term, 1974.

The key to any successful program of judicial evaluation is active lay participation—people working in concert or as a part of a co-ordinated effort with the legal profession in a broadly based citizens' effort to assist the voters in making those important decisions on critical judicial positions.

If the findings of the judicial evaluation study are to have any weight with political leaders or the public at large, the timing of the release of these data is critical, as is the commitment by a group of concerned citizens to raise the necessary funds to carry out a hard-hitting action program to take the case to the voters.



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Judicial Evaluation Commission Has Promise

Over the years many different organizations and groups have had varying degrees of success with judicial evaluations: bar association conducted plebescites; bar association commissions or special committees on the judiciary; broadly based citizens' organizations; *ad hoc* lawyers' groups; special interest groups; media-conducted polls or studies; and permanent commissions on the judiciary.

Of all of these, the one having the greatest promise for success is a permanent, continuing judicial evaluation commission made up of prominent lawyers, judges, and laymen, adequately funded and staffed to make evaluations of a different group of judges each year. These evaluations preferably should be unrelated to any specific judge coming up for election, re-election, or merit retention in that particular year. The Internal Revenue Service has recently made an informal ruling that a survey of incumbent judges up for election would not qualify under Section 501(c)(3) to permit foundation funding. However, it would seem that a favorable ruling should issue when the judges to be evaluated were selected at random without regard to a specific election. Likewise, a different result should prevail when merit retention is involved—for this is not a partisan political contest.

Cleveland Plan Has Been Frequently Emulated

As for the techniques of the evaluation, volumes have been written on various procedures that have been tried. One of the oldest and most frequently emulated plans is the so-called Cleveland plan first devised some sixty-two years ago by the Cleveland Bar Association. In essence it contemplates a two-fold procedure:

First, all incumbent judges up for re-election are evaluated by a simple questionnaire distributed to all practicing lawyers on whether in their opinion Judge A on his record is entitled to endorsement. Any incumbent judge receiving a yes vote of 80 per cent or higher is automatically endorsed.

If the incumbent receives less than 80 per cent approval, he is rated by a second and much more detailed questionnaire along with all other candidates on a weighted scale on the traditional criteria for judicial evaluation. A minimum standard of at least 70 per cent on a scale of one hundred is required in addition to a designated minimum score on certain critical criteria.

Finally, as a condition for endorsement, each candidate must agree to certain conditions regarding fund raising and campaign practices.

This sort of plan has value in developing a certain amount of statistical data on judicial performance, and no one can seriously dispute the need to obtain a minimal amount of this kind of essential information. There are, of course, a number of variants in collecting hard data on which there is room for vigorous debate —for instance, whether those questioned should be all lawyers, or just trial lawyers, or just those lawyers who have appeared before the judge being evaluated.

Questionnaires Have Pros and Cons

Likewise, in the development of hard statistical data, it would be most desirable, if time and money permitted, to conduct separate polls by carefully constructed questionnaires of jurors, witnesses, and opposing advocates in particular cases, selected at random from cases presided over by the judge being evaluated.

A particularly interesting approach to the difficult problems of financing judicial campaigns is the program initiated by the Dade County Bar Association and enthusiastically endorsed by Chesterfield Smith, former president of the American Bar Association. This plan creates a trust fund, contributed to by lawyers who agree to give to no other campaign organization. Disbursements of the fund are made to candidates who meet standards of qualifications in a bar poll. (See White, *New Approach to Financing Judicial Campaigns*, 59 A.B.A.J. 1429 (1973).)

But experience has also shown that there can be

serious shortcomings to any system that places total reliance on the mere tabulation and publication of the data from questionnaires. In the long run there is no adequate substitute for: (1) personal interviews of the judge or candidate by a fair, impartial, screening panel (preferably preceded by a comprehensive questionnaire); (2) actual monitoring of the judge's performance in the courtroom, further amplified by reports of fact-finding investigating teams; (3) selective confidential personal inquiry of individual practitioners or judges, or both, who merit the universal confidence and respect of their peers about the judge being evaluated.

All Criteria Must Be Considered

As for the criteria or standards of judicial performance, there seems to be almost universal agreement on at least the following: integrity and moral courage; judicial temperament; adequate legal ability; adequate legal experience, courteousness, and consideration; and industry and promptness in performance. To these may be added a host of additional factors such as firmness with compassion, impartiality, efficiency, freedom from influence by eminence of counsel, personal habits compatible with judicial office, freedom from political pressure, freedom from covert partisan political activity, quality of judicial appointments, and commitment to high standards of court administration—avoidance of political patronage.

The weight to be given to any of these factors is a subject on which a great deal has been said. All of them, in varying degrees of importance, are critical in measuring the qualities and capabilities of those to whom we entrust the management of our fragile justice system. However, we should be practical and realistic in establishing standards and how we apply them to individual judges. It does make a difference whether it is a Supreme Court justice or a judge in a small claims court who is being evaluated.

And it has generally been felt that an incumbent judge coming up for re-election or merit retention should not be held to the same high standards of excellence as used in rating lawyers aspiring to a judicial vacancy. This again is a matter of balance, for while much can be said in favor of keeping partisan politics out of the picture and giving the benefit of the doubt to retain an incumbent in office, there obviously are risks to a procedure that could substantially weaken any effort to develop an effective, competent, and politically independent judiciary.

We as a people set extraordinarily high standards and expectations of performance for all our public institutions, including the judiciary. In fact, our standards are a lot higher than those to which we hold ourselves in accounting for our own stewardship in the conduct of our lives, families, businesses, or professions. But then, ironically, we don't support them with the best qualified people, adequate salaries, financial resources, and our moral support and backing.

Now, more than ever before in our history, we must begin to rebuild and strengthen a competent and truly independent judiciary through a merit selection process beyond the reach or control of partisan politics. But to obtain this, lawyers and citizens alike must put a higher priority on our commitment to the critical importance of a fair and efficient justice system as the keystone to preserving our individual liberties and our democratic system of government.

The *quid pro quo* for that commitment is a guarantee of some degree of accountability from the individual judges who man the system. A strong and effective program of fair but thorough judicial evaluation just may be the answer. ▲

Photographs of the Chief Justices

A SET of photographic reproductions—fifteen in all—of the chief justices of the United States, on art-portrait paper, is available from the *American Bar Association Journal.*

Included are the Gilbert Stuart painting of John Jay; Trumbull painting of John Rutledge; painting by Earl of Oliver Ellsworth; painting by Peale of John Marshall; engraving of Roger B. Taney; photographs by the famous Brady, who recorded the Civil War in pictures, of Salmon P. Chase and Morrison R. Waite; and the favorite studio photographs of Melville W. Fuller, Edward Douglass White, William Howard Taft, Charles Evans Hughes, Harlan F. Stone, Fred M. Vinson, Earl Warren, and Warren E. Burger.

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The map is available at $1.50 postpaid from the *American Bar Association Journal,* 1155 East 60th Street, Chicago, Illinois 60637.