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Judicial Selection and the Qualities that Make a "Good" Judge

By SHELDON GOLDMAN

ABSTRACT: This exploratory article considers various aspects of the linkage between the judicial selection and the recruitment of "good"—as defined here—judges and the challenge of determining and applying objective criteria to particular individuals. Certain selection procedures are suggested for maximizing the recruitment of good judges. The article examines five principal judicial selection methods used in the United States, with a focus on federal judicial selection and the changes brought about during the Carter administration. Although evaluation of judicial candidates will remain, for the most part, a subjective process, it may be possible to develop somewhat less subjective ways of assessing who does and does not possess the qualities that make for a good judge.

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IT is a truism of our judicial system that for courts to be able to do their job well, they must, at the very least, be staffed by good people. "Good" judges must be sought out by judicial selection methods designed to the task. Ideally, the methods and processes of judicial selection should be evaluated in terms of their end products—the quality of people they produce for service on the benches of the nation. But this is far easier suggested than researched, as shall be apparent shortly.

Any attempt at evaluation of the linkage between judicial selection and the recruitment of good judges must first come to grips with the problem of defining what is meant by the adjective "good" as applied to a judge. This I discuss in the first part of this article. As I shall argue in the second part, the definition of specific criteria that can be objectively applied to individual candidates is an extraordinarily complex task. Assuming that this task can be accomplished to some extent, it is then necessary to identify what procedures can best maximize the selection of those with the qualities we attribute to good judges. This I attempt to do in the third section, before turning in the fourth portion to each of the principal methods of judicial selection in use today[1] and evaluating them in terms of their closeness to the procedures thought to be best able to produce a good judiciary. I draw my examples and citations primarily from the federal judicial selection process. Space limitations preclude my dealing with a closely related critical issue, that of how to deal with unfit judges.[2] The issue of judicial discipline, including removal from office, must be faced if the courts are to be able to function at their best.

QUALITIES ASSOCIATED WITH GOOD JUDGES

Much has been written about what makes a good judge.[3] Without claiming to be exhaustive, I can identify eight qualities, characteristics, or traits that most would agree are associated with the ideal type of good judge.

1. Neutrality as to the Parties in Litigation. Nothing ill becomes a judge more than a reputation for being biased or playing favorites among disputants.

2. Fair-mindedness. A sensitivity to the requirements of procedural due process as a means to a fair

1. There are five methods: election of judges using a party ballot, election of judges using a nonpartisan ballot, merit selection (the Missouri Plan), executive appointment with confirmation by another body (for example, senate or governor's council), and selection by the entire legislative branch.

2. A review of state and federal provisions, although somewhat dated, can be found in Russell R. Wheeler and A. Leo Levin, *Judicial Discipline and Removal in the United States* (Washington, DC: Federal Judicial Center, 1979).

3. See, for example, the results of the survey of trial judges reported and discussed in Maurice Rosenberg, "The Qualities of Justices: Are They Strainable?" *Texas Law Review*, 44:1063 (Jun. 1966) and the discussion in Allan Ashman and James J. Alfini, *The Key to Judicial Merit Selection: The Nominating Process* (Chicago: The American Judicature Society, 1974 (hereafter cited as *The Key to Judicial Merit Selection*). Also see, for example, Arthur T. Vanderbilt, "Judges and Jurors: Their Functions, Qualifications and Selection," *Boston University Law Review*, 36:1 (Winter, 1956); Richard A. Watson, "Judging the Judges," *Judicature*, 53:283 (Feb. 1970). In general, see Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (Austin, TX: University of Texas Press, 1980), pp. 3-35 (hereafter cited as *From Ballot to Bench*).

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trial is the hallmark of a fair-minded judge.

3. Being Well Versed in the Law. Obviously a person who has had poor legal training, little or no experience as a practicing lawyer, and who is ignorant of the law or does not have the ability and desire to master it cannot dispense justice under law.

4. Ability to Think and Write Logically and Lucidly. Fuzzy thinking and poor craftsmanship are highly undesirable, not only for judges who write opinions but also for judges who must make rulings from the bench or instruct juries.

5. Personal Integrity. A judge must have high moral standards and be able to withstand political and economic pressures and carry out the law to the best of his or her ability.

6. Good Physical and Mental Health. It is difficult to believe that someone could function effectively as a judge with an alcohol or drug dependency, with severe personality disorders, or with a serious physical condition that impairs one's ability to function normally at the intellectual level or that requires medication that might affect one's judgment.

7. Judicial Temperament. Effective trial conduct requires a judge to be even-tempered even under the tensions and pressure-cooker atmosphere of, for example, a prolonged criminal trial, and to be courteous to lawyers, litigants, witnesses, and courtroom personnel. At the appellate court level, judicial temperament might well include the ability and willingness to be a full member of the "team" by doing one's share of opinion-writing and working with colleagues to produce the most authoritative and clear decisions as expeditiously as possible.

8. Ability to Handle Judicial Power Sensibly. Of course, this quality is defined differently by those who differ as to what is the "sensible" or the "common sense" use of judicial power. For example, some believe that a good judge is one who exercises judicial power in support of civil rights and civil liberties, and with a particular sensitivity to racial and sexual discrimination and the rights of the underdogs of society. Others believe that a good judge will exercise judicial power modestly, with great sensitivity to the limited capacity of judges to solve society's problems, and with deference to the policymaking prerogatives of the democratic branches of government.

There are still other qualities that one could argue are important for judges, such as administrative and managerial skills; public relations skills with the legal profession, the media, and the general public; and political skills with public officials and legislatures who determine the jurisdiction of and resources available to the courts. At the institutional level, it can also be argued that a good judiciary is one whose members are chosen by an open process that does not discriminate on the basis of race, sex, or other such nonprofessional attributes. A good judiciary, then, will consist of men and women, as well as whites and blacks and other ethnic minorities.

HOW TO FIND THOSE QUALITIES THAT MAKE FOR GOOD JUDGES

How can these qualities be identified in particular judicial candidates? Let us examine each of these traits seriatim.

Concerning the first quality, neutrality in litigation, how do we dis-

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cover that a judicial candidate is neutral as to the parties and issues before the court? An obvious means is to evaluate any prior judicial record that the candidate for a federal judgeship or higher-level state judgeship may have. Statistical analyses of a simple sort can show, for example, whether black litigants have a marked tendency to win or lose before the judge. What is the level of success of prosecutors in criminal cases, perhaps as compared with those before other judges in the same court? In personal injury suits, does the injured party tend to have an advantage? Furthermore, a qualitative analysis of transcripts of trials or of the judge's opinions can yield a sense of the judge's neutrality, objectivity, or absence of bias.

There is evidence, at least on the federal level, that some sort of accounting of this sort has in fact been part of the selection process.[4] It was widely reported, for example, that the Reagan administration was reviewing the judicial records of those lower court judges who were prime contenders to succeed Justice Potter Stewart.[5] Less publicized are the efforts concerning lower court judgeships. In general, administrations do not look for "neutral" judges in terms of their public policy views. The Reagan administration, for example, has a commitment to appointing conservative judges, just as the preceding Carter administration aimed for more moderate to liberal judges. This is not to say that administrations look for overt biases that explicitly intrude on the judicial process, so that a case is determined by the litigant and the issues raised rather than by the facts and the law. Yet the law in many areas legitimately yields different interpretations that can sometimes produce varied results. Judges selected through a political process can hardly be expected to be public policy virgins, and political officials rightly feel justified in examining previous choices made by candidates for judgeships to see if they coincide with their own.

Especially when there is no judicial record, it is necessary to rely on more subjective sources, such as the views of those who have worked and associated with the candidate. The question arises whether such a survey should be confined to the friends and acquaintances of those conducting the survey or if a more systematic inquiry sampling a broad segment of the bar and bench is in order. The American Bar Association (ABA) Standing Committee on the Federal Judiciary bases its ratings of prospective federal judges on information gathered, for the most part, from surveys of the local and state bar and bench from the candidate's home state. In the early 1960s, the ABA Committee was found to have consulted only a very narrow segment of the legal population,[6] and as a consequence the ratings were thought to be biased by the heavy reliance on the opinions of conservative bar establishment lawyers. Since then, the ABA Committee has sought to expand its contacts to include a broader spectrum of the bar. But this does not change the fact that assessing the quality of neutrality is an imprecise, subjective undertaking when based exclu-

4. See, for example, Sheldon Goldman, "Judicial Appointments to the United States Courts of Appeals," *Wisconsin Law Review*, 1967:186, 206-11 (Winter 1967).

5. New York Times, 1 Jul. 1981, p. A-19.

6. Joel B. Grossman, *Lawyers and Judges* (New York: John Wiley, 1965), pp. 108-13.

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sively on reputational surveys, even assuming that the survey is a broad sampling of legal opinion.

Like the quality of neutrality, fair-mindedness, the second trait, can be assessed more easily for those with a record of judicial experience. However, reliance here needs to be placed on a qualitative analysis of a candidate's judicial record. For those without a judicial record, reliance must be placed on the reputational surveys—despite their limitations—including interviews with opposing counsel, judges before whom the candidate tried cases, and even with former clients.

Concerning the third quality, views of the candidate's legal expertise can be obtained through selected interviews. In addition, it is also possible to use somewhat more objective criteria, such as the candidate's law school achievements, record of scholarly publication, career pattern, and legal experience, and whether those surveyed hold the candidate in esteem as a legal practitioner. Were legal expertise the sole concern in the selection process, a civil-service type examination, much like that given in the continental judicial systems, would be in order.

The fourth-mentioned quality, the candidate's ability to think and write logically and lucidly, is also more easily assessed if the candidate has a judicial record or scholarly publications. Candidates can also be asked to submit copies of some briefs they have written. The crucial questions then become, Who evaluates this material, and what evaluation criteria are employed? Interviews with judges and lawyers can also elicit their views concerning this quality.

The fifth quality, personal integrity concerning candidates for federal judgeships, is investigated by the FBI. Since 1979, the Senate Judiciary Committee has also had its own investigatory apparatus. Such investigations are not without problems. The FBI, for example, reports all allegations without evaluating them. How far is it appropriate to dig into the life and lifestyle of a judicial candidate? Important, even crucial information may evade a superficial investigation, but too intrusive an investigation may lead some potential judicial candidates to forego a judicial candidacy in order to protect their privacy. On balance, because of the sensitivity and indeed the nature of the position, a judicial candidate should be willing to demonstrate that he or she is above reproach by submitting to a thorough investigation.

One might think that a complete physical examination, with the release of all medical records to those with responsibility for making the appointment, would be sufficient to determine that a judicial candidate is in good physical and mental health, the sixth-mentioned quality. But here there are questions of the extensivenes of the examination, particularly as concerns mental health. Should judicial candidates be required to take certain psychological tests or personality inventories? Also, should all those with an official role in the process have access to this information? A former member of the Kennedy administration reported, for example, that an alleged drug addict received an appointment even though the administration knew about the evidence. However, this information did not become known until after the Senate Judiciary Committee hearing and was then hushed up.[7]

7. Victor S. Navasky, *Kennedy Justice* (New York: Atheneum, 1971), p. 275.

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Judicial temperament, the seventh quality, is an extremely subjective trait to assess, although perhaps less so if the candidate has a judicial record that can be investigated. Despite inherent difficulties in such an assessment, it does make sense to interview lawyers, judges, and also former clients. The psychological profile drawn from any testing can be compared with the portrait emerging from the interviews. The danger in evaluating this trait is that it can be used as a catch-all surface reason to oppose someone for a judgeship when the real objection stems from personal animosity; an antagonism based on racial, religious, or sexual prejudice; or the person's politics. At the other extreme, it is equally dangerous to ignore allegations of a lack of judicial temperament. Ultimately, as with evaluation of all qualities, much depends upon the skill, insight, perseverence, sophistication, and commitment of those responsible for judicial selection.

How a future judge will handle judicial power, the eighth quality, brings substantive policy issues directly into the evaluation process. Here, interviews with and questionnaires completed by the candidate, along with formal hearings, can often permit a reasonable determination. Again, the existence of a previous judicial track record allows a more objective evaluation that does not have to rely exclusively upon what the candidate reveals in interviews and questionnaires. To be sure, there is a thin line separating abstract questions about how judicial power should be exercised and how it should be used in specific instances. For example, during the Carter administration, some selection commissions asked candidates for judgeships how they viewed specific issues, such as abortion.

Since 1979, the Senate Judiciary Committee has asked judicial nominees to answer written questionnaires that include a section on the proper exercise of judicial power. Senator Edward Kennedy and his liberal Democratic colleagues on the Senate Judiciary Committee included questions in Part III of the questionnaire that revealed their concern with equal justice and serving the disadvantaged.[8] Senator Strom Thurmond, who assumed the chairmanship of the committee in 1981, and his conservative Republican colleagues on the committee reworked Part III to reflect their central concerns over "judicial activism." The revised questionnaire goes to the heart of the question of the exercise of judicial power:

Please discuss your views on the following criticism involving "judicial activism."

8. There were three questions that were as follows:

(1) President Carter, in his Executive Order of November 8, 1978, stated that the standards for evaluating a proposed nominee to the federal judiciary include whether the person "possesses and has demonstrated commitment to equal justice under the law." In what specific ways have you demonstrated a commitment to equal justice during your career?;

(2) An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility states, in part, that: (a) "Important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available"; and (b) "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Describe what you have done to fulfill each of these responsibilities;

(3) Do you belong to any organization or club which excludes persons or discriminates on the basis of race, sex, or religion? List, with dates of membership. Have you been involved in efforts to change such policies?

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The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad affirmative duties upon government and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.[9]

This line of questioning may raise the philosophical level of committee hearings, but it probably occurs too late in the selection process to have a meaningful effect. It is difficult to believe that an individual already nominated for a judgeship by the president is going to tell the committee majority anything other than what it wants to hear.[10]

In summary, it should be clear that while we can isolate in the abstract the qualities that make for a good judge, it is difficult if not impossible to measure those qualities objectively. Yet it should also be clear that despite the subjectivity of the enterprise, it is extremely important to attempt as best as possible to evaluate judicial candidates as to these qualities. Although errors of evaluation will undoubtedly occur, it is likely that the clearly incapable as well as the clearly capable can be identified through a systematic evaluation of the qualities that have been discussed. No doubt there will be many candidates about whom there is no clear consensus on these various criteria, and it is especially here that the skill, sensitivity, and sophistication of those responsible for judicial selection are crucial for the success of the process.

A prior judicial record can certainly aid the evaluation of a judicial candidate, but it would surely be unwise to insist that any candidate for a higher judicial office must have served on a lower court. Convenience of evaluation is hardly sufficient grounds for imposing such a requirement, which would severely limit the mix of judges on our major trial and appellate courts. There is surely a contribution to the overall performance of those courts when they have lawyers with a variety of professional backgrounds, including law professors, legislators, and executive branch officials.

WHAT PRINCIPLES CAN MAXIMIZE THE SELECTION OF A GOOD JUDICIARY?

The obvious next question is whether certain procedures or principles of judicial selection will likely

9. One other question is also asked: "What actions in your professional and personal life evidence your concern for equal justice under the law?"

10. See the Houston Post, 11 May 1979, p. B-1; New York Times, 14 Jul. 1979, p. 5, for an example of a judge who apparently misled the committee and boasted of it later.

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enhance the probability of good judges being selected and decrease the chances of unqualified judges slipping through. I think four principles can help maximize the possibility of selecting good judges.

1. Openness. The more information about possible judicial candidates, particularly as concerns their qualities, the greater the likelihood that a more rounded and informed evaluation can occur. An open system fosters a wide spectrum of candidates, all of whom are given consideration. There is ample opportunity for various groups and individuals to provide input concerning certain candidacies, and in an open system the names of the leading candidates are publicized, thereby inviting still more input.

2. Active Recruitment of Women, Blacks, and Other Ethnic Groups Who Have Been the Victims of Discrimination.[11] By expanding the net of possible candidates, it is likely that there will be more well-qualified people to choose from. A special effort to appoint more women and minorities can result in a strengthened judiciary whose presence can reassure certain segments of the population of the neutrality and fairness of the judicial process. Their presence and interaction as colleagues can also enhance the sensitivity of other judges on issues of race and sex discrimination, thereby enhancing those same qualities of neutrality and fairmindedness.[12]

3. Thorough Investigation of the Candidate. An investigatory apparatus is necessary to ensure adequate information upon which to evaluate the candidate's qualities and to follow up allegations that may surface during the early stages of the selection process.

4. Some Form of Political Accountability. That judges exercise discretion and by so doing act as policymakers is today taken for granted. The challenge is to place the judiciary within a democratic framework of accountability so that if the judges themselves are not held accountable, those who selected them will be.

EVALUATION OF CURRENT METHODS OF JUDICIAL SELECTION

Let us briefly examine today's principal judicial selection methods from the standpoint of the selection principles just suggested and the qualities that make for a good judge discussed previously.

Judicial selection in the states

Substantial numbers of states and localities provide for either partisan or nonpartisan elections to select judges. At first glance, having the electorate select judges should result in the most open selection process. Anyone can choose to run for a judgeship, and the looking glass of the election campaign lets the voters decide whether a candidate possesses the qualities necessary for being a good judge. A candidate for judicial office will be scrutinized by bar groups who may or may not endorse him or her, and by newspapers whose editorial writers and reporters may take an interest in the

11. See the argument in Sheldon Goldman, "Should There be Affirmative Action for the Judiciary?" *Judicature*, 62:488 (May 1979). See the discussion in Griffin Bell et al., *Whom Do Judges Represent?* (Washington, DC: American Enterprise Institute, 1981), pp. 1-29.

12. See my argument in *Whom Do Judges Represent?*, ibid., p. 15.

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campaign. Direct election of judges is also said to be the highest expression of the democratic process and to embody the highest form of accountability when limited terms of office require judges to stand for reelection. Of the four principles of selection presented earlier, only that of affirmative action would appear unfilled.

In reality, however, the electoral methods fall short of these asserted virtues. Judicial elections are of low saliency. Voter interest and turnout at the polls tend to be low. Often judges in election states come to office not by election but rather by a midterm appointment to a vacant judgeship. Once in office, however, they are able to run with the significant advantage that incumbency confers. With partisan elections, it is the party designation that is the most important factor in the voting decision of the electorate. Judicial elections tend to be uncontested, but when they are contested, particularly for the highest judicial positions, the campaign for office can be at a level that is seen as demeaning the judiciary and the candidates for judicial office.[13]

Such judicial elections can compromise the judiciary's image of neutrality and fairness. Unqualified people can run for office, secure party nominations, and win elections. Yet, and this is the greatest strength of electoral methods, there is clear-cut political accountability, particularly with the partisan election method. Although the voter may be voting the party rather than the individual candidate for judicial office, there do tend to be differences on the whole in the exercise of judicial discretion in certain kinds of cases between Democrats and Republicans that are roughly comparable to the ideological or overall policy differences between the parties.[14] Thus the partisan election method does provide for the greatest accountability of all selection methods and in this respect is also superior to the nonpartisan election method.

The other methods of state judicial selection provide for a more indirect form of political accountability. When legislatures elect judges or governors appoint them, they are held accountable for the judges selected. Yet this indirect form of accountability may provide greater policy coordination than popular election: Republican administrations will select like-minded Republicans, and Democrats will seek their kind of Democrat. This is the "responsible party model" whereby policy coordination among the branches of government is possible, and the party takes the credit or the blame at the next election for the consequences of the implementation of those policies. These judicial selection methods are flexible as to openness and the use of affirmative action; whether they accommodate those goals depends less on the system than upon the particular administrations in power and the political pressures they face. The executive appointment method would appear to permit the full investigatory resources at the disposal of the state to be made available

13. See, for example, the articles reporting the experience of electoral contests for the highest judicial offices in the State of New York: New York Times, 25 Feb. 1972, p. 1, 10 Mar. 1972, p. 31, 9 Nov. 1972, p. 26, 12 Oct. 1973, p. 1. In general, however, see the arguments and empirical findings in *From Ballot to Bench.*

14. See, in particular, *From Ballot to Bench,* chs. 6 and 7.

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for investigating judicial candidates. This may be preferable to reliance on newspaper reporters or bar groups, as is the case with electoral methods. Nevertheless, because the other methods place heavy reliance on political processes, it is possible that judges who are not qualified in the terms we have been discussing may get by. A governor may want to reward a close political ally, or a powerful state senator or party leader may insist on a candidate that does not measure up.

Merit selection—that is, appointment by the chief executive from a list developed by a commission of lawyers, nonlawyers, and perhaps judges—would seem to have many advantages. The avowed rationale for the method is the selection of the best qualified people for judgeships. The emphasis is on qualifications, presumably along the lines we have discussed previously. Merit selection commissions are empowered under the law to recommend only the best qualified people to fill the judicial vacancy, and the governor is legally obliged to make the final selection only from the list of qualified candidates presented by the commission. The process is also presumably an open one, as the commission may consider all those who apply. The assumption is that merit rather than political criteria will determine whether or not an individual survives the screening process to achieve placement on the list of recommended candidates.

The merit selection method is not necessarily incompatible with affirmative action. Indeed, it could be argued that an emphasis on merit should overcome the racial and sexual biases of the past and bring well-qualified women and minorities before the commissions for serious consideration, especially, as noted subsequently, if the chief executive is committed to those goals. Presumably both the merit commission and the governor will have investigated the candidates, so that from the standpoint of that criterion, merit selection is as strong as executive appointment.

How does merit selection work in practice, and to what extent does the merit method accord with the principle of political accountability? In practice, merit selection commissions have been found at times to take party affiliation into consideration when assembling the slate of candidates to be presented to the governor.[15] The fact that commissions consist in part of gubernatorial appointees may invite this. Commissions should not be presumed to be any more or less racially or sexually biased than the public at large. Thus, without a conscious effort, perhaps due to the strong beliefs of a commission chairperson or the moral leadership provided by one or more commissioners, it is unlikely that the commission itself will actively recruit or even encourage women and minorities to apply. Further, by selecting some of the membership of the commissions, the bar associations may be burdening the commission with the biases of the bar establishment, be they political, policy-oriented, or racial/sexual. Lastly, by restricting the governor's choice of the ultimate

15. See, for example, Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Non-Partisan Court Plan* (New York: John Wiley, 1969); *The Key to Judicial Merit Selection*, pp. 70-79; Henry R. Glick, "The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States," *University of Miami Law Review*, 32:509 (Jun. 1978).

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appointee, the merit selection method undermines the concept of political accountability—if not in fact, then in all likelihood—in the perception of the public.

A "merit" process that ostensibly eliminates "politics" will not be perceived as selecting judicial appointees who are in tune with the political philosophy of the governor. Why should the governor be held responsible when the person appointed was certified by the selection commission? It is true that merit selection is usually combined with merit tenure, that is, periodic retention elections whereby the judge runs on his/her record and the electorate answers the single question of whether the judge should be retained in office. Leaving aside the issue of whether retention elections do in fact reflect the informed judgment of the electorate, whatever accountability is present is of a personal, even idiosyncratic nature and is not a political accountability facilitated by the method of judicial selection.

Federal judicial selection

The president appoints federal judges with the advice and consent of the Senate, but in practice, Justice Department officials in consultation with senators from the president's party, as well as the Senate Judiciary Committee, have played the major role in the process.[16] Generally, the assessment of the executive appointment method as we have discussed earlier applies to federal judicial selection. However, the Carter administration in 1977 and Senator Edward Kennedy, who assumed the chairmanship of the Senate Judiciary Committee in 1979, were responsible for some changes in the process.

President Carter established Judicial Service Commissions to recommend candidates for courts of appeals judgeships. The Carter administration pressured senators to establish their own judicial selection commissions to help fill vacancies on the federal district courts. Unlike the state merit selection systems, where the governor appoints only a portion of the selection commission, the Carter commissions were composed solely of Carter administration appointees.[17] President Carter, and particularly his attorney general, Griffin Bell, insisted that qualified women, Blacks, Hispanics, and other ethnic minorities be actively sought. The Carter administration pledged itself to placing more women and minorities on the federal bench, and they achieved remarkable success, particularly at the courts of appeals level.[18]

When Senator Kennedy took over the chairmanship of the Senate Judiciary Committee, he established a separate investigatory apparatus to help the committee independently determine the quali-

16. For a discussion of federal judicial selection, see, for example, Harold W. Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota Press, 1972) and Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System*, 2nd ed. (New York: Harper & Row, 1976), pp. 47-78.

17. See Larry C. Berkson and Susan B. Carbon, *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates* (Chicago: American Judicature Society, 1980) pp. 41-55; and Elliot E. Slotnick, "What Panelists are Saying About the Circuit Judge Nominating Commission," *Judicature*, 62:320 (1979).

18. Sheldon Goldman, "Carter's Judicial Appointments: A Lasting Legacy," *Judicature*, 64:344 (Mar. 1981).

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fications of nominees. In one notable instance, the Senate's investigator uncovered information that resulted in the disapproval and withdrawal of a nomination.[19] Nominees were required to complete an extensive questionnaire before the committee considered their nominations. Thus, from the standpoint of meeting the criteria specified earlier in this article, these developments by the Carter administration and Senator Kennedy refined federal judicial selection to perhaps the best possible combination of methods and procedures.

The Reagan administration abolished the Judicial Selection Commission and instead requested senators to submit several names for appeals court positions so that the administration could select the "best" possible candidate. District judgeships would remain primarily in the domain of Republican senators, who are under no administration pressure to use commissions. The administration also made it clear that it did not favor affirmative action. With President Reagan's historic appointment of the first woman to serve on the U.S. Supreme Court, the administration then conveyed the impression that it had no further obligation to deliberately push for women to serve on the courts. Indeed, of the first 58 nominees to lifetime federal district and courts of appeals positions, only three women—to district court judgeships—were named. Senator Strom Thurmond assumed the chairmanship of the Senate Judiciary Committee in 1981; however, as of this writing he retained the committee's separate investigatory staff, and the committee requires all nominees to complete a revised questionnaire. On its face, the changes by the Reagan administration seem to be a withdrawal from the principles suggested earlier, but it is premature to draw conclusions about the nature of federal judicial selection under an administration still in its first 18 months.

CONCLUSION

In several respects, this undertaking has been troublesome. Whereas it was possible to write of the qualities that make for a good judge, translating those abstractions into measurable, objective criteria is inherently complex and to a large extent impossible. Difficult subjective judgments are at the heart of the task, and they are necessarily made by fallible human beings. Those judgments may be easier if the candidate has a judicial track record, but requiring judicial experience would contradict the principle of an open selection process and would be inconsistent with the tradition of having a mix of legal backgrounds on our higher courts.

A career, civil-service-type judiciary such as that found in Europe would be contrary to our political tradition and would be specially inapposite at a point when there is widespread recognition of the policymaking role of our courts. Our courts and judges cannot be isolated and sanitized from public policy. They are a part, indeed a very special and unique part, of the political process. Thus we are left with devising methods for appraising candidates for judgeships that can only at best be educated guesses as to how well the person will perform as a judge.

I outlined certain principles of judicial selection that probably can

19. Goldman, ibid., p. 353.

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directly or indirectly aid the quest for a good judiciary, but my brief review of the principal judicial selection methods revealed a gap between the appearance and the reality of each method's ability to serve these principles. No one method necessarily produces superior judges. Although some methods come closer to the principles suggested than others, there is no way of knowing what method necessarily produces more good judges than any other selection process, in part because we have no way of objectively determining who is actually a good judge and who is not. If all bar associations were to conduct annual surveys of their membership whereby all judges in the locality would be evaluated as to their on-the-bench performance, there would be some basis for determining which selection method produces the largest proportion of judges who were given high ratings by members of the legal profession. But these surveys are fraught with their own problems.[20] As it stands now, there is no basis for concluding that any one selection system is clearly superior to any other in producing candidates with the qualities that make for good judges or persons whose on-the-bench performance is adjudged to be of a high caliber. There is no hard evidence for any conclusions.

Finally, this excursion exploring the linkage between the qualities of a good judge and judicial selection methods points up the need for empirical research in this domain. There already is a body of research about how selection systems work in practice and also about the linkage between selection methods and the personal attributes and decisional tendencies of those selected. There is even a greater need to measure the qualities that make for a good judge. The inherent subjectivity of the evaluation enterprise should not inhibit us from exploring as best we can and with as many hard data as we can muster the central focus of our inquiry—how we can best select good judges to administer justice in the United States.

20. Steven Flanders, "Evaluating Judges: How Should the Bar Do It?" *Judicature*, 61:304 (Feb. 1978).

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