Fordham Urban Law Journal

Volume 29 | Number 3 Article 11

2002

Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations

Penny J. White

JUDGING JUDGES: SECURING JUDICIAL INDEPENDENCE BY USE OF JUDICIAL PERFORMANCE EVALUATIONS

*Penny J. White**

INTRODUCTION

The current national debate surrounding judicial independence arguably began in 1996 when both presidential candidates engaged in disingenuous political rhetoric about United States District Judge Harold Baer.[1] The national discussion about judicial independence[2] is by no means a new discussion. It dates back to the

* Penny J. White is an associate professor of law at the University of Tennessee College of Law. Professor White is a former trial judge, appellate judge, and associate justice on the Tennessee Supreme Court.

1. During the 1996 presidential campaign, more than 200 members of Congress wrote President Clinton a letter regarding a suppression ruling made by United States District Judge Harold Baer, Jr., of the Southern District of New York. The letter asked the president to call for the resignation of the judge. On March 23, the Republican presidential candidate Robert Dole was quoted in the *New York Times* as saying that Judge Baer "ought to be impeached instead of reprimanded." Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 158 (1997). The criticism of Judge Baer continued and became the springboard for a general attack on appointments to the federal bench made by Clinton and approved by a Democratic Congress. After Dole suggested that Judge Baer be impeached based on the ruling, Clinton spokespersons announced that Baer would be asked to resign, and that if he did not, the president would consider calling for his impeachment. *Id.* Eventually, the Baer debate subsided, perhaps as a result of Judge Baer's subsequent ruling reconsidering the grant of the motion and denying suppression instead. *Id.*

But the underlying issue did not so easily evaporate. Senator Dole charged that Clinton had appointed judges who were "dismantling those guard rails that protect society from the predatory, the violent, the anti-social elements in our midst." Robert Cohen, *Dole Attacks Clinton on Judicial Appointments*, STAR LEDGER, Apr. 20, 1996, at 3. Dole singled out individual judges who he named to the Clinton "Hall of Shame." *Id.* Dole's campaign staff characterized the speech as an "opening shot for the November 5 election, and said it would be a 'major theme' in the months ahead." *Id.*

2. The Baer controversy sparked national debate and comment and even international discussion. In April 1996, at the 52nd United Nations Commission on Human Rights in Geneva, the special rapporteur on the Independence of Judges and Lawyers made the following comment:

> Threat[s] to judicial independence appears all pervasive. As seen judicial independence was recently threatened in a developed country like the United Kingdom.
>
> What is of greater concern is the latest outburst in the United States over a decision of a federal judge given some two months ago to exclude certain evidence in a drugs related trial. From information received just two days ago, the President of the United States was reported to have said through his

early common law,[3] the formation of the American democracy, and the constitutionalization of the American judicial system.

When the colonists declared their independence from England, they compiled a list of grievances setting forth justifications for their actions. One of the listed grievances against King George III in the American Declaration of Independence concerned the King's control of the British judiciary. Categorizing the King's control of the British judiciary as an obstruction of justice, the patriots declared that "[the King] has made Judges dependent on his Will alone for the Tenure of their Offices, and the Amount and Payment of their salaries."[4] Control of the judiciary, however, was not a creation of King George III's reign.[5] It predated his reign by decades, and in fact had been somewhat ameliorated prior to George III's reign when King James II was deposed during the Glorious Revolution of 1688.[6]

Nonetheless, at the time of the American Revolution the founders of the new country remained concerned about a controlled judiciary.[7] Although comparatively little time was spent debating

---

spokesman that if the judge did not change his ruling the President would call for the judge's resignation. Though attempts were made subsequently to distance the President from the words of his spokesman, the damages appear to have been done. It was further reported that Senator Dole had called for the same judge's impeachment.

These political attacks led four judges of the Federal Appeals Court to come in defense of the judge concerned with a public statement which read, inter alia, "These attacks do a grave disservice to the principle of an independent judiciary and most significantly, mislead the public as to the role of judges in a constitutional democracy."

. . . Obviously the President and the Senator, in the heat of their political campaigns, lost sight of constitutionalism.

Id. at 164.

3. At common law, the principle of judicial independence was absorbed in the doctrine *Nemo Judex In Re Sua*: "No man may be a judge in his own cause." Dr. Bonham's Case, 77 Eng. Rep. 646, 8 Coke 114(a) (C.P. 1610). Ironically, Lord Coke, chief justice of the King's Bench, ruled against the Board of Censors of the Royal College of Physicians, an adjudicator of a physician's incompetence and a beneficiary of the resulting fine. Based on this decision, King James I removed Lord Coke from the bench. STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH" 1621-28, (1979).

4. THE DECLARATION OF INDEPENDENCE para. 7, 8 (U.S. 1776).

5. BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-23, 150, 190-91 (1965).

6. 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 195 (7th ed. 1956). After the Glorious Revolution, judges in England were appointed for good behavior, rather than "at the King's pleasure"; their salaries were set by Parliament. *Id.*

7. In 1789, in a speech in which then Congressman James Madison proposed the amendments to the United States Constitution that would become the Bill of Rights, he suggested that the safety of the enumerated rights contained in the amendments

and structuring the judiciary in the proposed three-branch government, the proposed Constitution provided for permanent tenure for federal judges "during Good Behaviour" and forbid any reduction in federal judicial salaries.[8] The federal judges were empowered to hear a large variety of cases, although Congress maintained the authority to expand or contract the size as well as the jurisdiction of the courts.[9] Additionally, the intermingled tripartite system of government with its "great organizing principle, the separation of powers" doctrine,[10] reiterated the commitment of the founders to a separate and independent judiciary.

The commitment to the formation of a new government with an independent judiciary in no way assured that the doctrine of judicial independence would not be challenged. From the very beginning of the American judiciary[11] until the Judge Baer fiasco in 1996

---

would rest largely in the federal courts' hands. "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights. . . . They will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated in the Constitution by the declaration of rights." ROBERT SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES 54 (Adele Westbrook ed., 1985).

8. U.S. CONST. art. III.

9. *Id.* at art. III, §§ 1, 2.

10. *Id.* at art. I, II, & III. ROBERT SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES 55 (Adele Westbrook ed., 1985). The intermingled constitutional plan of the United States was described by Louis H. Pollak, former dean of the Yale Law School, as follows:

> Congress can make laws; but a President, whose salary is inviolable during his term can veto them; Congress can, in its turn, pass laws over the President's veto, but the ultimate impact of any laws enacted depends, *first*, upon the vigor with which the President enforces the laws, and, *second*, on the interpretations put upon them by the judges—appointed by the President, with the Senate's assent, but thereafter holding office for life. On the other hand, the President has to reckon with Congress' power to withhold needed appropriations—and he also has to reckon with Congress' correlative power to inquire into the way in which sums appropriated to the executive department are actually utilized. Similarly, the judges are not unaware of Congress' latent power to contract their jurisdiction. And both the executive and the judiciary are potential targets of the congressional power of impeachment.

Id. at 55 (quoting from 1 LOUIS H. POLLAK, THE CONSTITUTION AND THE SUPREME COURT 74 (1996).

11. In the early days of the United States Supreme Court, the Justices sat as circuit justices as well as members of the Supreme Court. This required each Justice to travel a large circuit and hear, as a court of original and appellate jurisdiction, cases that might ultimately reach the "one Supreme Court" created by the United States Constitution. For both reasons—the arduousness of the task as well as the incompatibility of sitting at trial, on appeal, and at the Supreme Court level—the Justices ardently opposed their circuit judges tasks. They expressed their opposition as early as 1790,

and after,[12] the doctrine has been questioned, challenged, and at times, fiercely opposed.[13]

I. THE ABSOLUTE NECESSITY OF JUDICIAL INDEPENDENCE

One who clearly understands judicial independence cannot comprehend how it could be opposed. A judiciary that is not independent of the other branches of government is subject to their control. Judicial decisions would be influenced, if not dictated, by political pressures, threats, and intimidation. A nation whose judiciary was controlled by the legislative or executive branch would offer no stability to its citizens or corporations as to their legal rights or responsibilities.

The effect of a controlled judiciary is often illustrated by reference to intrusion upon personal liberties. The effect of a dependent judiciary on commercial interests, however, would be equally devastating. Consistent enforcement of contract rights, zoning laws, and employment regulations are crucial to business development. The coexistence in America of a stable, independent court system and a thriving national economy is hardly coincidental. Investors and developers cannot risk doing business in an unstable legal environment where their legal rights depend on who is in power. They depend on uniform application of the law by a judiciary that is not swayed by either majority opinion or political power, but is instead guided by precedent and the rule of law.

---

by writing the president and Congress, but were not totally relieved of their circuit duties until the passage of the Circuit Court of Appeals Act of 1891. At different times between 1790 and 1891, Congress seemed posed to relieve the justices of their circuit riding duties only to decline to do so, often curiously close in time to a disfavored ruling by the Court. COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991, at 12-19 (1992).

12. A very recent example of interference with judicial independence can be found in the United States Congress's failure to confirm Missouri Supreme Court Justice Ronnie White as a federal district judge. Justice White was labeled as "soft on the death penalty," despite his varied record on capital cases. *See* Charles Babington & Joan Biskupic, *Senate Rejects Judicial Nominee*, WASH. POST, Oct. 6, 1999, at A01. This mislabeling results in a de facto qualification requiring judges to rule in accord with congressional wishes in order to be appointed to the federal bench.

13. Some historically significant challenges to judicial independence in the United States include the following: the congressional reaction to the Supreme Court decision in *Marbury v. Madison*, 5 U.S. 137 (1803); the impeachment trial of Justice Samuel Chase; the Progressive Party platform of Theodore Roosevelt, which proposed a congressional veto of Supreme Court decisions; the Franklin D. Roosevelt court-packing plan; the "Impeach Earl Warren" movement; and the modern-day congressional litmus tests for federal court appointments.

If no free-enterprise capitalist could sensibly oppose judicial independence, why do so many of our national leaders assert positions in direct conflict with it? The cynical answer is that the assertions are pure political rhetoric gauged to be popular with the voters that, although dangerous to freedom and prosperity, are nonetheless successful because of the dearth of understanding of the American judiciary and its role in our society. A less cynical, but even more frightening answer is that the dearth of understanding extends beyond the realm of average citizens and includes national political leaders.[14]

II. DEFINING THE CONTROVERSY: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Lawyers and judges, who should understand the significance of judicial independence,[15] cannot attribute all of the blame to ignorance and indifference. The judicial system itself creates some of the confusion.

In the vast majority of states, judges are subject to the vote[16] either for initial selection or retention.[17] In most cases, citizens are given the right to vote for judges just as they are for legislators, governors, and presidents. In those few states where citizens neither vote directly for judges nor decide whether to retain them,

14. Contrast, for example, President Clinton's response to the Dole attack on Judge Baer during the 1996 campaign, with President Mandela's response to the South Africa Constitutional Court's decision striking down legislation aimed at implementing his executive agenda. *In re* State v. Makwanyane and Mchunu, 1995 (3) SALR 94 (CC), *reprinted in* 16 HUM. RTS. L.J. 154 (1995). "Mandela immediately made a public announcement that the court had spoken and its decision must be implemented." Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 173 (1997).

15. Unfortunately, examples abound of both lawyers and judges who have either not understood the principle or who have abused it. The president of a bar association announced that people were beginning to understand that it was easier to "buy a judge" than to buy an entire legislative body. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State*, 72 NOTRE DAME L. REV. 1133, 1133. Judges routinely campaign on platforms designed to curry favor with voters. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

16. This article should not be taken as an expression of opinion on any judicial selection or election method. The propriety of judicial elections, partisan and nonpartisan, retention and competitive, is a topic for another day.

17. *See* Am. Judicature Soc'y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS, SUMMARY OF INITIAL SELECTION METHOD (6-11-96 revision) (on file in the author's office and available from the American Judicature Society); Uelmen, *supra* note 15, at 1133, 1134 n.6 & 7.

judicial selections generally occur through executive or legislative appointment with sitting judges generally subject to periodic legislative or executive approval. In only three states is the judiciary granted quasi-life tenure after appointment,[18] without subsequent review or retention. While all federal judges are appointed for life, the congressional confirmation process is certainly not apolitical.[19]

To the electorate, it must seem that judges who campaign for their positions[20] are political candidates. It follows that judges who raise funds, advertise, and seek support from voters[21] must make promises of future conduct and assert their beliefs and opinions in political platforms.

Just as other political candidates are politically accountable to the voters, the citizenry may believe that judges should be accountable. Political accountability requires adherence to one's platform, fulfillment of one's promises, and responsiveness to public sentiment. Failure to display political accountability is a justification for campaigning against, voting against, and replacing an office holder. If a judge is viewed as "just another politician" who is expected to make and keep promises and to respond to public pressure or sentiment, justice is unlikely. The view of a judge as a politician is inconsistent with the constitutional and statutory obligations of American judges required to preserve an independent judiciary.[22]

If the principle of judicial independence is inconsistent with the typical view of political accountability, does it follow that independence and accountability are concepts in conflict? If so, recent crit-

18. Judges are appointed until age seventy in Massachusetts and New Hampshire. In Rhode Island, judges are appointed for life. Am. Judicature Soc'y, *supra* note 17.

19. *See e.g.*, Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19.

20. The conflict between judicial independence and judicial campaign fundraising is very significant. For the most part, however, that topic is beyond the scope of this article. *See generally* Roy A. Schotland, *Elective Judges Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985); Mark Hansen, *The High Cost of Judging*, A.B.A. J., Sept. 1991, at 44; Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998 at 11.

21. It is true that judicial campaigns are subject to restrictions set forth in the Model Code of Judicial Conduct. These restrictions affect fund-raising, advertising, and the content of campaigns. They subject violators to disciplinary action. Nonetheless, judicial campaigns, viewed from the perspective of lay citizens, appear no different from other political campaigns.

22. Judges in virtually every state and in the federal court system take oaths to "uphold the Constitution and the laws of the United States." Additionally, every state subscribes to some version of the American Bar Association Model Code of Judicial Conduct, which requires judges to uphold the independence of the judiciary. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990). *See* text accompanying notes 33-40 *infra*.

icisms of unaccountable judges and movements to "reign in" an imperialistic judiciary[23] might have merit. But the obvious answer is that independence and accountability are not conflicting principles. Rather, they stand in juxtaposition to one another. Judges are accountable. Their accountability, however, is not political accountability to individuals, party platforms, majority preferences, or public pressure. A judge's accountability is to the law.

III. CLARIFYING THE CONCEPT OF JUDICIAL INDEPENDENCE

The suggestion that judicial independence is incompatible with judicial accountability is premised on a misunderstanding or misinterpretation of judicial independence. The correct interpretation, provided by its historical beginnings, is that judicial independence is the independence of judges in their judicial capacity from control by inapproriate external forces, pressures, or threats.[24]

More, and occasionally, less eloquent explanations of judicial independence have been offered. An early Supreme Court decision defined judicial independence as the freedom of a judge in deciding a case to "act upon his own convictions, without apprehension of personal consequences."[25] Similarly, a federal district judge defines judicial independence as "[t]he freedom of judicial officers to decide particular cases without . . . consideration of . . . preferment

23. Edwin Meese III & Rhett DeHart, *Reigning in the Federal Judiciary*, 80 JUDICATURE 178 (1997). In former Attorney General Meese's opinion, "The federal judiciary has strayed far beyond its proper functions." Meese lists five strategies that Congress must use "to reign in the active federal judiciary and return it to its rightful place in our democracy." *Id.* at 178. The strategies listed are (1) using the confirmation authority to block the appointment of "activist judges"; (2) stripping the American Bar Association of its role in the federal judicial selection process; (3) exercising Congress's power to limit federal court jurisdiction; (4) amending the Constitution to allow future constitutional amendments to be ratified by the states without congressional approval; and (5) stopping the federalization of crime and the expansion of litigation in federal courts. *Id.* at 181-83.

24. For many years the standard for judicial disqualification of federal judges was the so-called external source doctrine. Under this doctrine, a lawyer moving to recuse a federal judge from participating in a case based on allegations of bias had to establish that the source of the bias was "external" to the courtroom. After the case of *Liteky v. United States*, 510 U.S. 540 (1994), the external source doctrine was replaced with a new totality of the circumstances standard, but whether the bias was alleged to have come from an external source remains an important factor for consideration.

25. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 337 (1872) ("For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.").

or retribution."[26] The American Judicature Society, long a promoter of judicial independence, describes the principle as one that frees judges "[t]o act in the best interests of justice rather than be beholden to political obligations."[27] Others suggest that to be independent a judge need only be unbiased.

The common denominator in all accurate descriptions of judicial independence is that judicial independence does not serve to remove a judge from accountability. Rather, it serves to remove a judge from accountability to the wrong sources.

Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require. A judge remains accountable to the fair application of the law regardless of the judge's endorsement of or belief in the law.

IV. DEFINING JUDICIAL ACCOUNTABILITY

Accountability at its simplest, means answerability or responsibility. In the context of judicial accountability, the question is to whom or what are judges answerable and responsible.

Those who espouse a commitment to judicial independence often speak in terms of judicial accountability to the "rule of law."[28] Conversely, those who would undermine the importance of judicial independence argue for accountability to the citizens or constituents.[29] Accountability to something as esoteric and undefined as the "rule of law," they argue, is no accountability at all.[30] It is more meaningful to attempt to identify to whom or what in particular a judge should be accountable, than to debate whether the "rule of law" is precise enough to allow accountability to it.

To whom should a judge answer? Posing and probing alternative responses to that question simplifies the answer. Assume that a judge is accountable to his or her "citizens" or "constituents."

26. *Judicial Independence Revisited*, JUDGES' J., Winter 1998, at 28, 46 (quoting Judge David F. Levi, United States District Judge for the Eastern District of California).

27. *Promoting Judicial Independence*, 80 JUDICATURE 152 (1997).

28. *See, e.g.*, William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723 (discussing generally the meaning and usage of the phrase "rule of law").

29. *See, e.g.*, J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 780 (Accountability in our government must run ultimately to the governed.").

30. *See id.* ("That unelected judges have been left to interpret the equivocal will of elected representatives must sometimes seem the final measure of our government's fall from grace.").

How would those groups be identified?[31] What would accountability to them entail? Would it require that a judge base his or her decisions on the group's opinion about the issue in the case? If so, would a consensus of opinion be required or would the judge be expected to follow the opinion of the majority of the group? How would either a consensus or majority opinion be determined? How and when, if ever, could a previous consensus or majority opinion be reexamined?

Assume instead that a judge is accountable to the other branches of government. Which branch? Would state judges be accountable only to state legislative and executive officials and federal judges only accountable to the Congress and president? If accountability included responsibility to rule in accord with the selected branch's viewpoint, how and when would the controlling viewpoint be determined? Would accountability to branch or either jurisdiction, state or federal, mean that judicial "precedent" would change each time an administration changed?

When logically explored, the notion that judicial accountability includes adherence to the viewpoints of citizens, government officials, or identified groups is exposed for what it is—a preposterous conflict with the essence of our tripartite system of government. Asserting that judges cannot be required to adhere to the viewpoints of any individual or group is not an assertion that judges should not be accountable for their conduct. It is crucial, however, that a judge's conduct be measured by reference to appropriate sources when evaluating whether the judge has acted accountably.

V. SOURCES FOR EVALUATING JUDICIAL ACCOUNTABILITY

What are the requirements of accountable judicial conduct? The requirements flow from at least four sources. First, judges at every level are required to obey and uphold state and federal constitutions. The traditional oath of office taken by judges requires adherence to those documents. Second, judges are required to follow

31. An attempt to identify a judge's constituents proves the absurdity of the notion that judges are to be held accountable to their so-called constituency. Are only those who voted in a judicial election "constituents?" Does that include those who voted against the judge as well as for the judge? If the judge has limited jurisdiction, are only those with matters within the court's jurisdiction constituents? What happens when a newcomer moves to the area? Does the newcomer become a "constituent" only after voting in the first election in which eligibility attaches, or does the "constituent" status from the newcomer's previous residence carry over to the place of the new residence? And what about minors—do they only become "constituents" when they vote for the first time after reaching the age of majority?

the state and federal law, so long as it does not conflict with constitutional principles. Third, except for those few judges who sit on courts of last resort, judges are required to follow judicial precedent. Finally, judges in all United States jurisdictions are required to follow their jurisdictions' canons of judicial ethics.

The requirement that judges follow the constitutions, laws, and judicial precedents is self-explanatory; adherence to the canons of judicial ethics may be less so. Like lawyers, judges who violate the ethical code for judges are subject to discipline, including removal from office.[32] Since judges may be subject to official discipline for ethical violations, the specifics of judicial ethics requirements are important components of any judicial accountability system.

Most states have adopted the American Bar Association's Model Code of Judicial Conduct or some variation thereof.[33] The Code is divided into several canons, usually seven, that set forth either mandatory or suggested rules pertaining to judicial conduct on and off the bench.[34] Although the order of the canons vary greatly from state to state, they generally address judicial independence, competence, integrity, diligence, impartiality, and impropri-

32. Modern day judicial ethics enforcement tribunals are an outgrowth of discontent over judicial accountability methods. The only method provided in the United States Constitution for the removal of a federal judge from office is by impeachment. U.S. CONST. art. III, §1, art. II, §2, art. I, §3. Following that lead, early state constitutions provided for impeachment of state judges as well. In most states, no other device for removal or discipline of state judges existed. The impeachment process was arduous and difficult. In addition to modifying judicial selection methods (as a separate means of accountability), judicial reformers began to create additional methods for disciplining judges when their misconduct did not merit removal, but demanded some sanction. In 1947, New York created the first "Court on the Judiciary," a special court convened to hear cases of judicial misconduct and disability. It was not until 1960, however, that a state created a judicial discipline office that could receive and investigate complaints, convene hearings, and make disciplinary recommendations to the state supreme court. Since 1960, judicial conduct commissions and hearing tribunals have been created by constitutional amendment, statute, or court rule in virtually every jurisdiction. *See generally* Edward J. Schoenbaum, *A Historical Look At Judicial Discipline*, 54 CHI.-KENT L. REV. 1 (1977).

33. Peter A. Joy, *A Professionalism Creed for Judges: Leading By Example*, 52 S.C. L. REV. 667, 692 (2001) ("Forty-nine states and the District of Columbia base their judicial ethics codes to varying degrees on the ABA Model Code of Judicial Conduct. . . .").

34. The ABA Model Code of Judicial Conduct is written in mandatory terms. MODEL CODE OF JUDICIAL CONDUCT (1990). Each canon begins with the words "A judge shall" or "A judge shall not." *Id.* Some states, however, in addition to modifying specific standards within the Code, have phrased their canons in terms of what judges "should" or "should not" do. A third category of states, by far the smallest, has differentiated between mandatory and preferred canons requiring, in some instances, that judges "shall" or "shall not" and, in other instances, that judges "should" or "should not."

ety, as well as extra-judicial and political activities. The canons require, for example, that judges "uphold the integrity and independence of the judiciary";[35] "avoid impropriety and the appearance of impropriety in all activities";[36] "perform the duties of judicial office impartially and diligently";[37] and "refrain from inappropriate political activity."[38]

The often-broad language of the Code is, at times, supplemented with very specific directives. Noteworthy are two of Canon 5's requirements pertaining to inappropriate political activity:

> (A)(3) A candidate for a judicial office:
>
> (d) shall not:
>
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .[39]
>
> (A)(1) A judge or a candidate for election to judicial office shall not:
>
> (a) act as a leader or hold an office in a political organization,
>
> (b) publicly endorse or publicly oppose another candidate for public office;
>
> (c) make speeches on behalf of a political organization;
>
> (d) attend political gatherings; or
>
> (e) solicit funds or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.[40]

35. *Id.* at Canon 1 ("[A]n independent and honorable judiciary is indispensable to justice in our society. A judge should . . . observe those standards [of conduct] so that the integrity and independence of the judiciary will be preserved.").

36. *Id.* at Canon 2(A), (B) ("A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment.").

37. *Id.* at Canon 3(B)(1). ("A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."); *id.* at (E)(1) ("A judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned."

38. *Id.* at Canon 5.

39. *Id.* at Canon 5(A)(3)(a), (d)(i), & (ii).

40. *Id.* at Canon 5(A)(1)(a)-(e).

If any doubt about the appropriateness of a nexus between judges and politics is left by the general language of the Canons, that doubt is removed by the specific limitations imposed on judges and candidates for judicial offices by the subdivisions of Canon 5 .

VI. MEASURING JUDICIAL ACCOUNTABILITY THROUGH JUDICIAL PERFORMANCE EVALUATIONS

An assertion that judges are accountable to constitutional, statutory, and case law as well as to judicial ethical codes does not complete the accountability inquiry. If it is appropriate for judges to follow the proscribed law and ethics, and if their failure to do so is a legitimate basis for finding them unaccountable, how can those who select or elect judges evaluate a judge's conduct and accountability in office? If we would remove judges from common politics and take away campaigning based on fund-raising, promise-making, and issue-positioning as a basis for electing or selecting judges, what can we offer in replacement? If we oppose efforts to elect and select judges based upon political accountability and suggest the existence of more appropriate accountability sources, how can a judge's compliance with appropriate sources of accountability be determined?

> In order for citizens to maintain popular accountability of the judiciary, citizens must be involved in evaluating judicial performance .... They need to (1) gather information about judicial performance from the citizen's point of view and (2) communicate their opinions to the judiciary. ... [T]he main vehicle of judicial accountability is the [election or retention of judges]. Yet this ... cannot serve its function if citizens do not have the interest to vote or the information necessary to make informed decisions.[41]

A. Judicial Evaluation by Bar Polls and Media Polls

Because many have opined that the quality of justice is measured by the quality of judges, judicial evaluation has been a subject of debate since the late 1800s. The first method of evaluation was polling, conducted by state and local bar associations and intended to gauge the bar's preference for one judicial candidate or

41. Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 211, 216 (1989).

another.[42] The early polls were mostly straw polls that evolved into performance polls seeking not only the lawyers' preference, but the lawyers' evaluations as well.[43] Performance polls asked lawyers to evaluate judges based on certain predetermined criteria.[44] The results of the polls were used to try and affect the performance of sitting judges as well as the vote of the electorate.[45]

For obvious reasons, judicial performance evaluations by lawyers are problematic. The premise of any valid evaluation system is that those conducting the evaluation are familiar with those being evaluated. While lawyers may generally be qualified to evaluate the criteria essential to "good" judging, are all lawyers equally qualified to evaluate the judges in a given jurisdiction? Should only those lawyers who have litigation practices be allowed to evaluate judges? Should only those lawyers who have appeared before a judge in a sufficient number of matters be allowed to evaluate performance?

Even assuming a sufficient representative sample of knowledgeable lawyers as respondents, bar polls are riddled with difficulties. Despite efforts at maintaining respondent confidentiality, the content of a response may reveal the identity of a respondent. Lawyers may fear this possibility and give guarded responses rather than candid ones. Lawyers may also evaluate judges based on their personal track record, rather than on objective, appropriate criteria. In extreme cases, groups of lawyers may use the bar poll as campaign fodder for a judicial candidate whom they support over an incumbent.

---

42. *See* JAMES H. GUTERMAN & ERROL E. MEIDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES (1977); S. Flanders, *Evaluating the Judges: How Should the Bar Do It?*, 61 JUDICATURE 304 (1978).

43. Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255, 266-70 (1981).

44. *See* Joel H. Goldstein, *Bar Poll Ratings as the Leading Influence on Non-Partisan Judicial Election*, 63 JUDICATURE 376, 379 (1980) (explaining that the Louisville Bar Association asked each of its members to rate the candidates on "(1) integrity; (2) judicial temperament; (3) legal ability; (4) impartiality, freedom from bias and prejudice; and (5) industry, diligence and promptness").

45. *Id.* at 377. *But see* Aynes, *supra* note 43, at 268 ("As a general rule the results of such polls are utilized by third parties, such as voters or public officials, in making choices about retaining or promoting the judges who were the subjects of the poll. In contrast, as used in this article, the proposal to evaluate judicial performance refers to a systematic, multi-faceted attempt to gather data, subjective and objective, which would give judges insight into their performance in such a manner as to reinforce that performance when it is desirable and to spur improvement where improvement could be obtained.").

On the coattails of the dubious bar polls came media polls—efforts by newspapers to evaluate judges based on surveys developed and administered by the media.[46] Often these polls were conducted in conjunction with bar associations.[47] Though possibly well intended, these programs suffer from the same evils that haunt bar polls, including unreliability, insufficiency sampling, and unknowledgeable evaluators.

B. Alternative Judicial Performance Evaluation Methods

To supplement problematic bar polls and evaluations, as early as 1979 states began to explore alternative ways to evaluate judicial performance. Alaska and New Jersey were the pioneers in judicial evaluation systems. The New Jersey Supreme Court responded to a recommendation to adopt a comprehensive judicial evaluation program for the purpose of improving the quality of justice.[48] Similarly, the Colorado Supreme Court began an initiative aimed at evaluating judges for dual purposes: improvement of the quality of justice and informing the public about the judiciary.[49]

One of the specific charges of the Colorado Committee on Judicial Performance was to ascertain whether dissemination of judicial performance evaluations to the public would make "retention elections [which were used in Colorado] more meaningful" to the public.[50] Despite the identification of risks inherent in publishing the results of judicial evaluation, Colorado ultimately decided that the potential benefits, including a more informed and better-educated electorate, outweighed the risks.[51]

Colorado, Alaska, and New Jersey were not alone in creating more reliable methods of judicial performance evaluation. Arizona, Connecticut, Hawaii, Illinois, Maryland, New Hampshire,

46. *See* ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE ii (1985) [hereinafter GUIDELINES] (discussing judicial evaluations conducted by the media).

47. Aynes, *supra* note 43, at 293 (discussing the possibility that the media may work in conjunction with bar associations in conducting judicial evaluations).

48. *Id.* at 262 ("In New Jersey, the State Supreme Court established a Special Committee on Judicial Evaluation and Performance, and that committee had submitted its report calling for [a program of judicial evaluation] in early March of 1978.").

49. *Id.*

50. *See infra* note 51.

51. The stated goals of the existing Colorado Judicial Performance Evaluation Program are "to provide persons voting on the retention of justices and judges with fair, responsible, and constructive information about judicial performance and to provide justices, judges, and magistrates with useful information concerning their own performances." COL. REV. STAT. §13-5.5-101 (2001 Cum. Supp.).

Utah, and the courts of the Navaho Nation established judicial evaluation programs by 1995, most of which were established to improve judicial skills.[52] Alaska, however, as well as Arizona, Hawaii, and to a lesser degree, Utah and Tennessee, ultimately developed judicial evaluation programs that would be used in the election or selection process.[53]

State judicial performance evaluations varied in many ways. Some were authorized by court rule, some dictated by statute, and some produced by administrative orders or bar association recommendations.[54] The evaluation methods were equally varied. Most programs used survey instruments or questionnaires, but recipients of those instruments were diverse.[55] Some evaluation programs included courtroom observations, videotaped proceedings, background investigations, and interviews. Others required an in-depth analysis of caseload management data, disciplinary records, and health records.[56]

C. ABA Guidelines for Judicial Performance Evaluations

As states experimented with judicial evaluation programs and struggled to identify relevant evaluation criteria, a committee of the Criminal Justice Section of the American Bar Association developed a concept paper suggesting the creation of objective judicial evaluation guidelines.[57] A Special Committee on the Evaluation of Judicial Performance was named in 1983.[58] Two task forces, one on methodology and one on evaluation criteria, were

52. *See* A. John Pelander, *Judicial Performance Review In Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 725 n.6 (1998).

53. ARIZ. CONST. art. 6; ALASKA STAT. §§ 22.07.060, 22.10.150, 22.15.195 (2000); TENN. CODE ANN. § 17-4-201 (2001 Supp.); HAW. SUP. CT. R. 19; UTAH CJA, R. 3-110, 3-111.

54. Kevin M. Esterling, *Judicial Accountability the Right Way*, 82 JUDICATURE 206, 209 (1999) (explaining that judicial performance evaluation commissions "are official state-sponsored independent agencies with either constitutional or statutory authority, and are funded by legislative appropriation").

55. The various recipients of surveys or questionnaires included lawyers, litigants, jurors, court personnel, witnesses, judge being evaluated, other judges, appellate judges, staff attorneys, law clerks, social service or probation case workers, and others. *See* Aynes, *supra* note 43, at 298-302 (discussing the possible sources for evaluating judges).

56. For a chart outlining non-survey sources of information used in Alaska, Arizona, Colorado and Utah state judicial evaluation programs, see Esterling, *supra* note 54, at 210.

57. ABA Special Comm. on Evaluation of Judicial Performance, Concept Paper (1979) [hereinafter Concept Paper].

58. GUIDELINES, *supra* note 46.

named to assist the Committee in its work.[59] By mid-1985, the ABA adopted the *Guidelines for the Evaluation of Judicial Performance*, a document divided into five parts and consisting of black letter principles, endorsed as approved ABA policy, and commentary, offered only for "explanatory purposes."[60]

The preface to the Guidelines emphasized the limitations of the project: "[T]hese are Guidelines, not blueprints; each jurisdiction should find them helpful in formulating its own precisely structured evaluation methods. . . . [N]o simple 'recipe book,' no one final precise template, could be produced for all to embrace. . . . [E]ach jurisdiction will have to work out its own precise 'recipe.'"[61] Yet, the genuine hope that the Guidelines, as sketchy as they might be, would cause a renewed scrutiny of bar and media polls was indisputable:

> Without meaning to reflect wholly negatively on all bar polls, or on all media polls, these Guidelines are intended to spark evaluations that are likely to be more reliable, and that should assure objectivity that may not be present in much bar or media polling. As will be seen, *polling* is *not* the only means—and not the soundest means if taken alone—of evaluating the performance of judges.[62]

The Guidelines are described as "suggestions for criteria, uses, and methodology useful for judging the *quality* and *performance* of our judges," but are not to be used as "substitutes for nor . . . accretions upon the existing Code of Judicial Conduct" nor "principles to be invoked to discipline a particular judge."[63] As suggested criteria for evaluating judges, the Guidelines provide an excellent list of standards to determine if a judge meets the requirements of his or her office and demonstrates appropriate accountability.

VII. GUIDELINE STANDARDS, PERFORMANCE EVALUATIONS, AND JUDICIAL ACCOUNTABILITY

While the Guidelines are careful to differentiate their purpose from that of the Code of Judicial Conduct, they acknowledge the need to draw upon some of the Code's concepts in defining quality

---

59. *Id.* at iii.
60. *Id.* at iii.
61. *Id.* at iv.
62. *Id.* Guideline 1-1.3 provides, however, that the guidelines are not "intended to replace or impair judicial polls conducted by state and local bar associations." *Id.* at 1-1.3.
63. *Id.* at iv (emphasis added).

judicial performance.[64] The seven performance guidelines applicable to all judges refer to all elements of a judge's performance.[65] An eighth standard applies only to judges who work with other judges on multi-judge panels or on administrative matters.[66] The first four guidelines pertain to adjudicative responsibilities and suggest criteria for evaluating conduct by the judge on the bench.[67] The fifth and sixth guidelines describe a judge's managerial responsibilities.[68] The last guideline addresses a judge's public service responsibilities.[69]

A. Standards Related to Adjudicative Responsibilities

The first performance standard, a standard "essential in any . . . evaluation of judicial performance"[70] mirrors Canon 1 of the Code of Judicial Conduct in its requirement that judges exercise integrity and the appearance of integrity.[71] To monitor integrity and its appearance, the Guidelines suggest an evaluation of four criteria: "avoidance of impropriety and the appearance of impropriety; freedom from personal bias; ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, the popularity of the decision, and without concern for or fear of criticism; and impartiality of actions."[72] The last criteria, "impartiality of actions," includes an appraisal of a judge's racial, gender, or other biases and evenhandedness.[73]

The second adjudicative guideline measures a judge's knowledge and understanding of the law.[74] This standard also includes four factors. The judge should understand the "substantive, procedural, and evidentiary law of the jurisdiction; . . . the factual and legal issues before the court; and the proper application of judicial pre-

64. *Id.* at 3-0.

65. *Id.*

66. *Id.* at 3-8. Guideline 3-8 provides for evaluation based on a judge's effectiveness in working with other judges, particularly "when . . . exchanging ideas and opinions . . . during the decision-making process; soundly criticizing the work of colleagues; and facilitating the performance of administrative responsibilities of other judges." *Id.* at 3-8.

67. *Id.* at 3-1.

68. *Id.* at 3-5, 3-6 (guideline 6 pertains to adjudicative and managerial responsibilities).

69. *Id.* at 3-7.

70. *Id.* at 11 cmt.

71. *Id.* at 3-1.

72. *Id.* at 3-1.

73. *Id.* at 12 cmt.

74. *Id.* at 3-2.

cedent and other appropriate sources of authority."[75] The judge should also be able to issue "legally sound decisions."[76] In evaluating a judge's legal knowledge and understanding, evaluators are cautioned "to disregard their personal feelings about a judge's decision. This criterion measures knowledge of the law; it does not measure the extent to which the evaluator and the judge possess the same or harmonious legal philosophies."[77]

The third standard for judicial evaluation of adjudicative skills relates to a judge's oral, written, and nonverbal communications skills. Under Guideline 3-3, a judge should be evaluated based on communication skills including "clarity of bench rulings and other oral communications; quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of a case and the legal precedents at issue; and sensitivity to impact of demeanor and other nonverbal communications."[78]

Lastly, the Guidelines focus on the importance of a positive judicial image. A judge should be evaluated on "preparation, attentiveness, and control over proceedings including . . . courtesy to all parties and participants; and willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law or rules of court."[79] Elaborating on the precise notion of an appropriate judicial image, the commentary identifies the most important element of a positive image as judicial temperament. This judicial temperament includes "patience—but it also includes dignity and understanding. . . . [A] dignified judge can do much to earn and encourage [public] respect. Conversely, a judge without good judicial temperament can do great harm to the dignity of the position."[80]

B. Standards Relating To Managerial Responsibilities

The fifth Guideline relates to a judge's managerial responsibilities.[81] The commentary for Guideline 5 cautions against "case counting" and other imprecise productivity standards,[82] but the Guideline itself recommends evaluation of skills including "devot-

75. *Id.*
76. *Id.* at 3-2.2
77. *Id.* at 13 cmt.
78. *Id.* at 3-3.
79. *Id.* at 3-4.
80. *Id.* at 15 cmt.
81. *Id.* at 3-5.
82. *Id.* at 16 cmt. "In short, the measures for this criterion should look beyond the raw data." *Id.* at 17 cmt.

ing appropriate time to all pending matters; discharging administrative responsibilities diligently; and where responsibility exists for a calendar, knowledge of the number, age, and status of pending cases."[83]

Promptness and punctuality are the subjects of the sixth Guideline.[84] It suggests evaluation of "punctuality including: the prompt disposition of pending matters; and meeting commitments on time and according to rules of the court."[85] The sixth evaluation standard applies to a judge's managerial and adjudicative responsibilities.

C. Standards Relating to Professional and Public Service Responsibilities

Evaluation of a judge's professional and public service centers on judicial education programs and dedication to public needs. Thus, Guideline 3-7 provides for evaluation of services to the profession and the public including "attendance at and participation in judicial and continuing legal education programs; and consistent with the highest principles of the law, ensuring that the court is serving the public to the best of its ability and in such a manner as to instill public confidence in the court system."[86]

VIII. Guideline Standards, Performance Evaluation, and Judicial Independence

Some opponents of judicial evaluation systems will complain that an evaluation system is simply a dressed-up attack on the independence of the judiciary.[87] If an evaluation system is properly devised and administered, that complaint is without merit.

The previous sections have outlined factors that are legitimate considerations in determining the quality of a judge's performance on the bench. Those factors include integrity, freedom from impropriety and from the appearance of impropriety, knowledge and understanding of the law, fairness, preparedness and punctuality,

83. *Id.* at 3-5.

84. *Id.* at 3-6.

85. *Id.* at 3-6.

86. *Id.* at 3-7. The commentary recognizes the significant contributions made by judges in other public arenas, but justifies the exclusion of those from the evaluation criteria in order to avoid "inappropriately penaliz[ing] those judges who are legitimately unable to engage in such extracurricular activities." *Id.* at 19 cmt.

87. Esterling, *supra* note 54, at 208 ("[O]ne major concern in judicial performance evaluations is ensuring the independence of the courts from the will of the commissioners.").

diligence, communication skills, managerial skills, and public and professional service. With very few exceptions, these factors are identifiable and, arguably, objective. Even those factors that seem less defined, such as integrity and fairness, can become solid standards for the measurement of judicial performance under a carefully devised evaluation system.

Integrity, for example, is a principle often thought to be basic to judging.[88] A judge who has integrity is a fair judge, an impartial judge, and a judge who is courageous and dignified in deciding issues brought before the court. In evaluating integrity, a respondent might be asked whether or not the judge engages in ex parte communications, expresses personal or political favor, prejudges issues or cases, rules with decisiveness, or is affected in rulings by ethnic, racial, or sexual bias.

New Jersey inquires as to the "evenhanded treatment of attorneys, fostering [of] a general sense of fairness, absence of bias based on race, gender, ethnicity, religion, or social class, and decisiveness.[89] Respondents are asked to evaluate the judge on each factor as either "excellent, more than adequate, adequate, less than adequate, poor, or not applicable."[90] Connecticut asks for an evaluation of the judge's attitude toward all participants in the proceedings, "women, men, minorities, people of a particular region, indigent people, local attorneys, minority attorneys, women attorneys, and particular attorneys."[91] Alaska evaluates integrity and impartiality based on four factors: "equal treatment of all parties, sense of basic fairness and justice, conduct free from impropriety or appearance of impropriety, and . . . decisions [made] without regard to possible public criticism."[92]

The other factors identified as essential to quality judging are likewise amenable to measurement. Diligence can be assessed by asking for an assessment of a judge's "reasonable promptness in making decisions and willingness to work diligently" in preparation

88. GUIDELINES, *supra* note 46, at 11 cmt. ("It is essential in any program for the evaluation of judicial performance that integrity be included as a criterion.").

89. N.J. Supreme Court Comm. on Judicial Performance, Second Report on the Judicial Performance Program 81 (Dec. 1995) (on file in the author's office and with the New Jersey Administrative Office of the Courts).

90. *Id.*

91. State of Conn., Judicial Performance Evaluation Program, Annual Report to the Chief Court Administrator, Attorney's Questionnaire (1992) (on file in the author's office and with the Connecticut Judicial Evaluation Administrator).

92. Alaska Judicial Council, 1994 Judicial Evaluation Material 94 (May 1994) (on file in the author's office and with the Alaska Judicial Council).

for and during trials and hearings.[93] Legal knowledge and application may be evaluated by inquiring as to the judge's knowledge of relevant substantive, procedural, and evidence law; ability to analyze difficult or complex aspects of a case; soundness, clarity, and completeness of rulings; completeness and accuracy of fact-finding; and clarity of oral or written decision.[94] The evaluation of managerial skills will completely depend on the nature of the judge's position, but might include an appraisal of the judge's skills in docket management, courtroom control, facilitating settlements or alternative dispute resolution methods, and efficient movement of the proceedings.[95]

As is true of any attempt to evaluate, whether the subject of the evaluation be job performance, education performance, applications, or grant proposals, the cogency of the evaluation system will be effected by factors that cannot be controlled by the evaluation system. Some lawyers who have lost cases may give a judge a lower score on knowledge of the law than the judge deserves. Some jurors who were angered by having to serve on jury duty may evaluate a judge's promptness unfairly or even untruthfully. But those eventualities occur in any evaluative process. Developers of evaluation instruments have devised methods to reduce any potential prejudice produced by unfair or dishonest evaluators.[96]

An objective evaluation of the criticisms leveled by those who claim that judicial performance evaluations interfere with judicial independence reveals that the opponents' real concern is with evaluations in general, not judicial performance evaluations in particular. Their criticisms are largely the same as criticisms by those who decry any attempt at objectifying skills and performance in jobs involving judgment, discretion, and intellectual application.

Contrasting the factors upon which a legitimate judicial performance evaluation is based with the factors utilized by those evaluating judges on illegitimate grounds further proves the point. As

93. *Id.* Some states have mandatory time limits for disposing of cases. Commentary to Canon 3(A)(5) of the *Model Code of Judicial Conduct* indicates that diligence is important not only in the disposition of cases but also in a judge's other duties. "At a minimum, . . . promptness includes starting the judicial proceedings on time and ending them on time." MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(5) cmt.

94. *See supra* text accompanying notes 74-78; Concept Paper, *supra* note 57, at 79.

95. *Id.*

96. Some evaluation systems, for example, allow judges to deselect certain respondents based on their perceived bias against the judge. *See* Judicial Performance Evaluation Methodology for the Tennessee Judicial Performance Evaluation Program (on file in the author's office and with the Administrative Office of the Courts for the State of Tennessee).

discussed in the beginning of this article,[97] politicians have, over the course of this nation's history, attempted to evaluate judges based upon the outcome of their decisions. Such evaluation boils down to whether the judge held for or against the criminal defendant or civil plaintiff or found in favor or against capital punishment or punitive damages. No effort is made to analyze the legal issues, the constitutional requirements, applicable judicial precedent, or legislative mandates in any case. Only the outcome is considered, in an extreme vacuum, and with the predetermined judgment that ruling in favor of criminal defendants, civil plaintiffs, or punitive damages, or against capital punishment is inherently wrong and constitutes poor judging sufficient to question whether the judge should continue to serve.

This illegitimate outcome-oriented evaluation has gained more widespread use. For example, members of Congress have encouraged the removal of judges whom they characterize as having ruled for the defense in death-penalty cases or having ruled against the tobacco industry.[98] Some go so far as to try to quantify the percentage of a judge's decisions that comport with their preferred outcome.[99] Thus, judges have been criticized for "siding with criminal defendants . . . 86% of the time."[100] Chambers of Commerce, economic teaching institutes, religious organizations, and special interest groups have all joined the trend of espousing judicial eval-

97. *See supra* Introduction.

98. These references are to United States Courts of Appeals Judges Rosemary Barkett and H. Lee Sarokin. Judge Barkett's nomination to the Eleventh Circuit Court of Appeals caused great controversy, but she was eventually confirmed by a vote of 61-37 in 1995. Judge Sarokin resigned following a series of political attacks citing the attacks as hampering his ability to render independent decisions. *See* Judicial Performance Evaluation Methodology for the Tennessee Judicial Performance Evaluation Program (on file in the author's office and with the Administrative Office of the Courts for the State of Tennessee).

99. This assertion is not intended to indicate that the author believes that those who claim to evaluate in this manner are actually interested in evaluating a judge's performance. *See* Anthony Lewis, *Politicians Play Politics to Intimidate Judges, Nominees*, SUN SENTINEL, Apr. 1, 1997, at 11A. What is important for this discussion is not their true motivation, but the impression that their public comments makes on the uninformed electorate.

100. Clint Bolick, *Clinton Judges Hold Pro-Defendant Record*, USA TODAY Apr. 4, 1996, at 13A; Orrin G. Hatch, *Rule of Law: Is Clinton Tough on Crime? Just Look at His Judges*, WALL ST. J., May 1, 1996, at A15. Senator Orrin Hatch, Senate judiciary committee chair, issued statements against judges based upon their having "written or joined opinions seeking to free defendants . . . or to stretch the law."

uations based solely on whether the judge held for or against the side favored by the group.[101]

When contrasted with the inherent dangers of an evaluation system, motivated by political ambition for the purpose of manipulating an uninformed public and based on nothing but the evaluator's assessment of present political correctness, the concerns about the subjectivity of legitimate evaluation factors are infinitesimal. Furthermore, judicial performance evaluations based upon standards relevant to judging, such as integrity, legal knowledge, diligence, and fairness, serve not only as a valid and reliable measurement[102] of performance,[103] but as a vehicle for judicial self-improvement as well.[104] "A growing body of evidence validates the value of the evaluation process for individual judges and for the justice system as a whole."[105]

It seems obvious that legitimate factor-based performance evaluations do not threaten the independence of the judiciary. The clear criteria used in evaluations and the professional development of reliable and valid methodology[106] shield the system from the inher-

101. *See* T. Carter, *A Lesson Learned*, A.B.A. J., May 1998, at 70. The efficacy of the approach is expressed aptly in the Luntz Research Company's book, *The Language of the 21st Century*, which asserts that "it's almost impossible to go too far when it comes to demonizing lawyers [and judges]. . . . Few classes of Americans are more reviled by the general public . . . and you should tap into people's anger and frustration with practitioners of law. . . . [It] is admittedly a cheap applause line, . . . but it works [so] don't hesitate to resort to ridicule when making your points." The book formed a part of a plan presented by pollster Frank Luntz to congressional leaders in 1998 for election campaign strategies.

102. *See supra* text accompanying notes 88-95.

103. Susan Keilitz & Judith White McBride, *Judicial Performance Evaluation Come of Age*, STATE COURT J., Winter 1992, at 4. "During 15 years of development, judicial performance programs have demonstrated usefulness as a means of examining the performance of individual judges and the judicial system . . . Programs provide meaningful feedback on fundamental aspects of judicial performance that can be used to identify ways of improving individual and institutional judicial performance." *Id.* at 13.

104. Judicial self-improvement is identified as the primary use of judicial performance evaluations by the ABA Guidelines. GUIDELINES, *supra* note 46, at 1-1.1.

105. Keilitz & McBride, *supra* note 103, at 13.

106. ABA Special Comm. on Evaluation of Judicial Performance, Issues in Research and Development and Data Collection for Judicial Performance Evaluation Programs 14 (Apr. 1986).

> Reliability and validity are terms with specialized meanings as used by social scientists. Reliability refers to the accuracy or precision of a measuring instrument (i.e, the less the error, the greater the reliability). . . .
>
> Validity, as compared with reliability, pertains more to the nature and meaning of one's variables. Content validity involves examining each item or question to determine its relevance. . . .

Id.

ent dangers of a decision-based evaluation. In addition to these intrinsic safeguards, the program can include guidelines that specifically address any perceived threats to independent decision-making. The American Bar Association Guidelines, for example, provide that the evaluation program "should be structured and implemented so as not to impair the independence of the judiciary."[107]

Performance evaluation programs may include added assurances that the evaluation process will not usurp judicial independence. Questionnaires and surveys can be prohibited from including questions that might allow responses based on the content of judicial decisions. Judges should be allowed to disqualify certain respondents whose impartiality as an evaluator may reasonably be questioned. Evaluation methods such as video court observations and peer assessment can be given proportionately greater weight than survey and questionnaire responses. By integrating a number of evaluation techniques, surveying a large spectrum of respondents, and allowing disqualification in appropriate circumstances, programs can provide greater assurance that evaluations will not be based on agreement or disagreement with a judge's decisions.[108]

IX. FORGING A PARTNERSHIP: SECURING JUDICIAL INDEPENDENCE BY USE OF JUDICIAL PERFORMANCE EVALUATION

If the modern-day pastime of judging judges based on whether one agrees with the outcome of a case continues,[109] then those who value a separate and independent judiciary must act. One method of exposing the illegitimacy and danger of the outcome-based approach is to educate the public about the role of judges in a democracy and the importance of a judiciary free of legislative or executive control. Another appropriate step is to offer the public an alternative means of evaluating those who serve in the judiciary. Undoubtedly, much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decision in judicial elections.

States that have judicial evaluation programs should reevaluate their programs' goals and ascertain whether the programs, as cur-

107. GUIDELINES, *supra* note 46, at 1-2.

108. *See generally* Michael A. Hallett, *Fostering Public Stewardship of the Courts: The Tennessee Performance Evalution Study*, TENN. B.J., Jan.-Feb. 1997, at 20.

109. *See, e.g.*, Joyce Pornick, *Metro Matters: Ideology? Well, Who's to Judge?* N.Y. TIMES, July 2, 2001, at B1.

rently operating, can provide helpful information to citizens making decisions in judicial elections. If the program's self-improvement goal has required methodologies that are not conducive to a broader use of the evaluations, considerable thought should be given to revising the program or devising another evaluation program for the purpose of providing voter information.

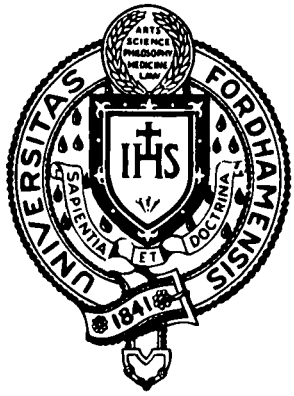
Those states that do not have judicial evaluation programs in place should create commissions to consider devising such programs for the purpose of informing the electorate about the performance of judges who stand for election or retention.[110] The American Bar Association, the National Center for State Courts, and the American Judicature Society, as well as several states with judicial performance evaluation programs, offer abundant resources, research, and information for states that are beginning the process of devising a performance evaluation program. A comprehensive judicial performance evaluation bibliography is also available.[111]

CONCLUSION

The impetus for the existing state judicial performance evaluation programs was not to provide a response to criticism about an unaccountable judiciary. Neither were evaluation programs devised to identify appropriate criteria for voters to consider when deciding how to vote in judicial elections. Nonetheless, the evaluation criteria used in the programs do just that. Like the *Model Code of Judicial Conduct*, the existing state judicial evaluation programs identify objective factors that are legitimate considerations in judging judges. Not only do the criteria give voters an alternative means of evaluating judges, they also educate and remind the electorate that good judging involves objective, identifiable criteria, not allegiance to a political philosophy or alliance with popular sentiment.

110. For a chart outlining some of the different models in place, see Keilitz & McBride, *supra* note 103, at 5-9.

111. For this bibliography and other information, see http://www.ajs.org.


ARTS
SCIENCE
PHILOSOPHY
MEDICINE
LAW
UNIVERSITAS FORDHAMENSIS
IHS
SAPIENTIA ET DOCTRINA
1841