Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 35 | Issue 3 Article 1

Spring 1960

The Quality of Judges

Robert A. Leflar
University of Arkansas

INDIANA LAW JOURNAL

Volume 35 SPRING 1960 Number 3

THE QUALITY OF JUDGES†

ROBERT A. LEFLAR††

To talk about "the quality of judges" implies there are some judges whose quality is good and others who are not so good. Of course there is more than one standard for determining whether a judge is "good." A standard sometimes applied makes quality depend on whether the judge decides for or against the one who is doing the talking about the judge, but that is a standard seldom used, at least by lawyers who have a fair amount of practice. More common among lawyers is a standard under which every judge, during the whole period that he remains on the bench, is a good judge. Unlike that of the Indian-fighters of the old West, the lawyer's attitude may be that the only *bad* judges are dead judges, or possibly judges who sit in other jurisdictions in which the particular lawyer does not practice. Things have to get pretty bad before a lawyer will take any public position other than that the judges before whom he practices are excellent judges. I am going to assume, as do practically all the lawyers who are here tonight, that every judge in Indiana is a good and able judge. What I may have to say about avoiding the selection of poor judges therefore has future application altogether; in the very nature of things, by definition, it cannot apply to any presently sitting Indiana judges, and I know you would not want it to apply to any of them. But the future is pretty important. We are properly

† This address was delivered at the Indiana World War Memorial, Indianapolis, Indiana, February 18, 1960, and was sponsored by the Indiana University School of Law in cooperation with the Indiana State Bar Association as the first of the 1960 Addison C. Harris Memorial Lectures. These lectures were inaugurated in 1958, and have been heretofore published in Volumes 33 and 34 of this Journal.

The Addison C. Harris Memorial Lectures are made possible by a trust created by Mrs. India Crago Harris upon her death in 1946, in memory of her late husband. Addison C. Harris (1840-1916) was a distinguished Indiana lawyer and statesman. He was a member of the State Senate and Minister to Austria-Hungary during the administration of President McKinley. Mr. Harris also served as President of the Indiana Law School, of the Indiana State Bar Association, and of the Board of Trustees of Purdue University.

†† Robert A. Leflar is Distinguished Professor of Law at the University of Arkansas, and Director of the Appellate Judges Seminar, New York University.

concerned about the judges who will sit here after the present judges are gone, and after we are gone too.

The business of improving the quality of our judiciary, which is actually directed at improving the quality of the judiciary's performance of its official duties, has, I submit, three major aspects. These are:

(1) The selection of judges, which includes not only the initial appointment or election, but re-elections if a judge is named not for life but for a term only, and also includes retirement since that process too determines in a negative way who sits on the bench. There has been some tendency on the public's part to feel that only the selection process has relevance to improvement of the judiciary, and we must agree that much of it centers here, but not quite all of it.

(2) The continuing education of judges after they enter upon their judicial careers. There are few of us who ever become so learned, or so wise, that we cannot improve ourselves. We know this is true of lawyers and law teachers, and I venture to suggest that it is true of judges also.

(3) The education of the public, both members of the bar and laymen, on the nature of the judicial function, on what judges do and what enables them to do their job well, or disables them. Public understanding of the judge's situation, and of his job, can create a social, legal and judicial climate encouraging the judge to better performance, and assuring that the judge will get reasonable credit for doing a good job if he does it.

I want to spend most of my time this evening on the first of these three aspects of judicial improvement—the selection of judges—though I will come back to the other two aspects later.

The Selection of Judges

A little personal history may help to explain my own attitude toward improvement of the processes of judicial selection. I have participated in two attempts, both unsuccessful, to "improve" the judiciary of my home state of Arkansas.

The first was back in 1942, when I was a candidate for election as Associate Justice of the Supreme Court of that state. I got licked. The licking was by a narrow enough margin that I did not lose my faith in the voters as a part of the selective process, but it was conclusive just the same.[1] My memory of that experience was revived by a little item to which my attention was called recently, entitled "How to Be Elected

1. The author's service on the Arkansas Supreme Court came several years later, when he filled out an unexpired term by gubernatorial appointment.

Judge in Detroit." It has to do with the selection of a Circuit Judge for Wayne County, Michigan, and I think it is worth quoting:

> Applicants for this position should possess the digestion of an ostrich, a firm right hand with a capacity of at least 3,000 shakes a day, a keen memory for faces and names, dignity tempered by geniality and affability, a fluent tongue coupled with the ability to talk to all sorts and conditions of men—and women—and say nothing offensive and leave the listeners with an impression that the speaker is a person of vast wisdom, good humor and tolerance.
>
> Applicants also should be able to attend a series of luncheons, club and lodge meetings, smokers, dances, a banquet or two, and several sports events in the course of a day and yet find time to attend to the exacting duties of the bench. This, of course, presupposes the physical strength to get along with little or no sleep.
>
> Applicants should also possess a commanding presence, particularly because of the necessity of winning the confidence and esteem of the women. And, naturally, the applicants must possess the specialized education and training necessary for a circuit judge.
>
> If you believe we have overdrawn the case, stir about town a little and observe the actions of the members of the circuit bench, all of whom are candidates for re-election this spring. None has yet blossomed out as a song and dance artist, but short of that they seem to be omitting nothing calculated to win the voters' favor. We might imagine from the newspapers these days that they are everywhere but on the bench. . . .[2]

The second unsuccessful effort in which I was involved, to improve the judiciary of Arkansas, was as a member of a Commission set up in the 1940's to prepare, as a proposed constitutional amendment, a redraft of the Judiciary article of the Arkansas Constitution. We were directed to provide for as nearly an ideal judicial set-up as we could, not for an imaginary state, of course, but an ideal set-up for Arkansas, a state where the Jacksonian democratic tradition of an elective judiciary is very similar to that which prevails in Indiana.

In preparation for that task, we made a fairly thorough study of

2. This is part of an editorial in a Detroit newspaper, quoted in 12 J. AM. JUD. SOC'Y 186 (1929).

judicial selection methods throughout the common law world.[3] A partial summary of what we learned by means of that study, brought up to date to include developments in the last ten years, is relevant to your interests in Indiana.

As to England, we learned that all judicial appointments are made, for life of course, in the name of the Crown, though actually by the Prime Minister, and in fact on the recommendation of the Lord Chancellor's office. The latter maintains a small permanent staff which is constantly engaged in accumulating information and preparing files on barristers who may be considered for major judgeships. Recommendations from the Lord Chancellor's office are nonpartisan, and the record shows that appointments are not based on membership in the party in power.[4] There can be no doubt that in England training and apparent capacity for judicial work are the true bases for judicial appointments.

The American federal selection system was familiar to all of us, with judges named by the President for life, subject to the "advice and consent" of the Senate. We knew that this system has been widely praised, but we also learned that many intelligent and responsible critics regard it as far less than perfect.[5] A few of the states, notably Massachusetts, New Jersey and some of the New England states, followed essentially the same system, with gubernatorial appointments, and in one or two of the states appointments are made, strangely enough, by the legislature. In 35 of the states all or nearly all of the judges have been elected by the people, at least theoretically in the same way that governors and Congressmen are elected. A few states, particularly Missouri and California, had unique systems of judicial selection.

We were especially interested in the Missouri system.[6] This system was based on one formally approved as a model plan for judicial selection by the American Bar Association[7] in 1937, this in turn being based on a proposal made by Albert M. Kales of Chicago in 1913. Its key agency is the "judicial commission" which exists at two levels. The Appellate Judicial Commission has seven members: three lawyers, one

3. Generally, see Stason, *Judicial Selection Around the World,* 41 J. AM. JUD. SOC'Y 134 (1958).

4. See Coldstream, *Judicial Appointments in England,* 43 J. AM. JUD. SOC'Y 41 (1959); Goddard, *Politics and the British Bench,* 43 J. AM. JUD. SOC'Y 124 (1959). As to Canadian methods, see Clark, *Appointments to the Bench,* 30 CAN. B. REV. 28 (1952).

5. See Miller, *Federal Judicial Appointments: The Continuing Struggle for Good Judges,* 42 A.B.A.J. 128 (1955); Miller, *The Selection of the Federal Judiciary: The Profession Is Neglecting Its Duty,* 45 A.B.A.J. 445 (1959); Cooley, *The Department of Justice and Judicial Nominations,* 42 J. AM. JUD. SOC'Y 86 (1958).

6. MO. CONST., art. V, § 29 (1945).

7. Recorded in 62 REPORT OF THE A.B.A. 1033 (1937), and discussed in Wood, *Basic Propositions Relating to Judicial Selection,* 23 A.B.A.J. 102 (1937).

elected from each of the intermediate Court of Appeals districts by the lawyers of the district; three laymen, one appointed from each of the same three districts by the Governor; and the Chief Justice of the state, who serves as Chairman. This commission deals with vacancies on the Supreme Court and the three intermediate appellate courts. A similar Circuit Judicial Commission exists for St. Louis County and one for Jackson County (Kansas City), and these deal with Circuit, Probate and Criminal court vacancies in those counties. The system has not been applied to local courts in the rural counties. Commission members are named to six-year terms, staggered, and there is no reappointment.

When a judicial vacancy occurs in Missouri, the appropriate judicial commission nominates three qualified candidates. The Governor designates one of these as the judge. The newly named judge serves until the next general election more than twelve months after his appointment, then his name goes on a separate nonpartisan judicial ballot, with the question "Shall Judge ———— be retained in office? Yes. No." If the vote is favorable, an appellate judge serves a twelve-year term, a trial judge six years, after which the ballot process is repeated if the judge wishes to seek another term. If the vote is unfavorable, or if a vacancy arises for any other reason, the vacancy is filled in the same manner. Sitting judges were blanketed in when the plan first became effective.

By 1959 Missouri had filled 44 judicial vacancies under its new system.[8] Seven of these were in the Supreme Court, ten in the three intermediate appellate courts and 27 in the St. Louis and Jackson county trial courts. Of the 44 vacancies, 18 came from death, 12 from retirement, six from resignation or non-candidacy for re-election and one from rejection at election. There is no thought in Missouri of abandoning the plan.[9] Originally proposed by initiated act (with 100,000 signatures) it was adopted by a 90,000 majority of the popular vote in 1940, then under a legislative-ordered referendum was again approved in 1942 by more than a two-to-one vote (180,000 majority), then in 1945 was written into a new Constitution proposed in Missouri which, though attacked because it included the judicial selection plan, was approved overwhelmingly.

The California plan,[10] somewhat similar to Missouri's, was adopted as an initiated measure in 1934 by a substantial popular vote. Under it, the Governor appoints new judges on his own initiative, but each appoint-

8. Hemker, Experience Under the Missouri Non-Partisan Court Plan (address delivered at Nat'l Conference on Judicial Selection and Court Administration, Chicago, Ill., Nov. 22-24, 1959).

9. See Crowdus, *The Missouri Experience with Judicial Selection and Tenure*, 25 J.B.A. KAN. 1 (1956); Hyde, *The Missouri Method of Choosing Judges*, 41 J. AM. JUD. SOC'Y 74 (1957).

10. CAL. CONST., art. VI, § 26.

ment has to be confirmed by a three-man commission consisting of the Chief Justice, the Attorney General and the presiding judge of one of the state's intermediate appellate courts. After each judge's appointment, and at the end of each judge's term, the judge's name goes on the ballot, without an opponent, with the question "Shall ———————— be elected to the office of judge? Yes. No." This method of selection does not operate as to the local courts in any particular county until it has been approved by the voters of the county.

In summary these were the plans we had before us when our Arkansas group prepared to draft its plan. We did not choose to follow exactly any of the earlier plans. Our effort was to develop an ideal plan for our state, according to our best lights.

The key agency in our plan, as we developed it,[11] was to be called the Judicial Council. It was to have broad powers including, in addition to a part in the judicial selection process, the duty of organizing a judicial conference, integrating the bar, removing judges under certain circumstances, disciplining members of the bar, regulating admissions to the bar, promulgating rules of procedure, and controlling an administrative office of the courts. The Judicial Council was to consist of eleven (or thirteen) persons, the members being the Chief Justice as presiding officer, four trial judges selected by all the judges of courts of record in the state, four lawyers elected by all the members of the state's bar, and either two or four laymen appointed by the Governor. Other details, including staggered terms and geographical distribution, were spelled out.

The method of filling a Supreme Court vacancy was for the members of the state bar to nominate, by some preferential elective process, three qualified persons, from whom the Judicial Council would appoint one to serve until the next general election more than two years after his designation, his name then to go on the ballot without an opponent but with the question "Shall Judge ———————— be continued in office? Yes. No." If the vote was affirmative the judge would serve an eight-year term then go on the ballot again; if negative, the selection process would be repeated anew. Vacancies in the trial courts would be filled and trial judges voted on in the same manner, except that the three nominees would be named by the members of the district bar only, before appointment by the Judicial Council, and trial judges would serve six-year terms between elections. The difference in length of terms was merely copied from existing practice.

11. Successive drafts of the plan appear in reports published in 2 ARK. L. REV. 174 (1948) and 4 ARK. L. REV. 155 (1950).

Virtues which were believed to justify the Arkansas plan's departure from other methods of selection included:

(1) Further removal of the selection from politics than would be possible if the Governor made the appointments;
(2) The preservation of direct judicial responsibility to the people but without the false assumption that the mass of voters are in a position to make wise judicial selections in the first place;
(3) Giving the bar which practices before the court, and which knows the qualifications of its members better than anyone else, a direct part in the selection process.

This Arkansas plan was never put on the ballot. It failed without ever being voted on. Why?

There was vigorous opposition. This came largely from members of the legal profession, including a few judges. I am inclined to think that a majority of the lawyers favored it, though this was never made clear. It is certain that a great number of the civic-minded citizenry, among non-lawyers, favored it. Here again, however, public sentiment was never clarified because the facts and arguments were never presented to the people, or at least not to very many of them. Why was the plan laid on the shelf without being fully debated, without the people being given a chance to vote on it?

As I look back on it, perhaps a bit nostalgically, I am inclined to think that some of us just got scared, that we simply lacked the guts to get into the kind of statewide battle that would have been involved. The fight would have been a hard one, as it was in Missouri. I still think it could have been won, as it was there, and subsequent events in other states strengthen that bit of guessing by hindsight. Of course I can speak only for myself, as to why we did not make the fight. I know that those of us who prepared the plan were drafted for the job, and we accepted the assignment as one to write up an ideal judicial selection plan, not as one to conduct a statewide campaign for its adoption. For my own part, too, I felt that there is much less need for change in methods of judicial selection in rural areas than in metropolitan areas, and Arkansas is essentially a rural state. You will have to decide for yourselves how far reasons such as these have relevancy in Indiana. Of one thing, though, I am convinced. This is that any broad, extensive judicial reform that may be accomplished anywhere will have to be accomplished with the active cooperation of non-lawyer groups, such as the newspaper editors, the clergy, the Chambers of Commerce, the bankers associations

and other business and professional groups, the labor unions, the League of Women Voters, the organized and thinking citizenry in general. The lawyers and the bar associations can furnish leadership, but they cannot get the job done by themselves. This is true because, if for no other reason, there will always, on any matter of reform in the law, be a vigorous and active group of lawyers in opposition. This will often be a large group too, and sometimes it will be a majority of the bar. This was Chief Justice Vanderbilt's experience in New Jersey. It was the Missouri experience; it was the experience in Kansas a little over a year ago. It will be your experience here in Indiana, as it already has been your experience in other efforts to improve the law that you have made in years gone by.

There has been some real progress in judicial selection methods in other states during the last ten years. Thus, Kansas in 1958 adopted a constitutional amendment[12] applying the essentials of neighboring Missouri's system to the Kansas Supreme Court. There a "Supreme Court Nominating Commission" will be made up of one lawyer from each Congressional district elected by all the lawyers of the district, one non-lawyer chosen by the Governor from each Congressional district, and a lawyer chairman elected by the whole bar of the state. This Commission will nominate for each court vacancy three lawyers from whom the Governor will designate one as judge; if the Governor does not act within sixty days the Chief Justice will name one of the three as judge. The new judge's name will go on the ballot at the next election after serving one year, without an opponent, with the question "Shall ———— of the Supreme Court be retained in office?" The Kansas court term is six years, and other details are similar to those in Missouri.

The two new states have adopted interesting judicial selection systems. Alaska[13] follows the Missouri plan as to all its judges. Their Judicial Council consists of seven members: three lawyers named by the bar of the state, three non-lawyers named by the Governor, and the Chief Justice as chairman. The Judicial Council nominates "two or more" lawyers for each court vacancy, the Governor appoints one of the nominees, and the new judge serves three years before his name goes on a nonpartisan ballot for approval or rejection. The new constitution of Hawaii[14] provides that the judges of all courts shall be nominated and appointed by the Governor, with Senate confirmation, but subject to the

12. Amendment adopted Nov. 4, 1958, reprinted in 42 J. AM. JUD. SOC'Y 129 (1958).
13. ALASKA CONST., art. IV, §§ 1-16, reprinted in 42 J. AM. JUD. SOC'Y 54 (1958).
14. The Judiciary article of Hawaii's new Constitution is copied in full in 43 J. AM. JUD. SOC'Y 16 (1959).

condition that no nomination shall be sent to the Senate except after ten days notice in advance. Essentially it follows the Federal system.

Several other states, either through their legislatures, their bar associations, or combined groups, are currently considering proposals for reform in the judicial selection process. These include Iowa,[15] Arizona, Massachusetts, Michigan, Minnesota, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island and Vermont. All of these states are thinking of some form of the Missouri plan. The current trend, though by no means a torrent, is toward this plan. In view of the fact, it is worthwhile to quote a summary of lawyer-attitudes and judicial reactions to it in Missouri, based on that state's twenty-year experience with it. The summary is part of a statement[16] prepared by the American Bar Association's standing committee on Judicial Selection, Tenure and Compensation:

> The operation of the Missouri plan is perhaps best reflected by the following points made by members of the Bar who have spoken and written on the subject.
>
> 1. It has taken the Missouri courts out of politics as far as that is possible to do. The judges may no longer contribute time or money to political campaigns. They are no longer obligated in any respect to political parties or politicians.
>
> 2. A judge no longer has to be fearful of any of his judicial pronouncements displeasing the political bosses, because the latter did not put him in office in the first instance and he (the judge) is not dependent upon them nor is it necessary for him to incur political obligations in order to remain in office.
>
> 3. As one judge, who served both under the old and new systems, put it: "Political pressure has been taken off their (the judges') backs."
>
> 4. Litigants are now actually receiving a higher quality of justice, and the confidence of the people in the Missouri courts has been restored.
>
> 5. There are now more better qualified men on the bench than under the old system, and this includes most of the incumbent judges at the time of the Plan's adoption, since they no longer have to be politicians in order to remain on the bench.

15. This is another instance of a neighbor of Missouri proposing to follow the Missouri plan. See 42 J. AM. JUD. SOC'Y 166 (1959); 43 J. AM. JUD. SOC'Y 27 (1959).

16. COMMITTEE REPORT, THE AMERICAN BAR ASSOCIATION NON-PARTISAN PLAN 16 (1958).

6. It has encouraged men to serve on the bench who would not submit themselves to the ordeal of campaigning for judicial office under the old political system, or who lacked the means to finance such a campaign.

7. It has given security of tenure in office to capable and conscientious judges with good records. It is now possible for men to contemplate judicial careers.

8. It has promoted efficiency in the courts and speeded up the administration of justice.

9. It is a decided improvement over the old political elective system. Missouri now has a system of judicial selection and tenure which insures a thoroughly qualified and independent judiciary and has the confidence of the people.

Before a judge is selected in the first place is the time when we who are not on the bench have a real chance to determine his judicial capabilities. It is the only real chance we have. We get what looks like a second chance if he has to be named anew for subsequent terms in office, but usually this is not much of a second chance, nor should it be, because the values of judicial tenure make it undesirable to throw out a sitting judge, short of retirement age, under any save extreme circumstances.

One significant aspect, or consequence, of this is that the quality of judicial performance of a judge who is *already* seated is almost wholly controlled either by his brothers on the bench, or by his own personality and conscience, largely by the latter. That of course includes his inherent capacities, and lack of them. The judge can be as industrious as he pleases, or not very industrious, and get by with it, just so he does not actually lay down on the job. He can concern himself in scholarly fashion with the law, or put his main reliance on human analysis and evidence and witnesses, and get by with either approach, just so he does not use it exclusively. He may eschew politics wholly or participate in politics somewhat, provided he does not do it too openly. He may observe the Canons of Judicial Ethics rigidly, or he may skirt a bit about their edges. He may approach the ends of justice blindly, or he may do it with his eyes wide open to all the human factors in his cases. His total conduct may be characterized by rigorous integrity, or he may cut some corners. The administrative controls that are exercised within his court may check some of his careless tendencies, may induce him to do a somewhat better job than if he were left wholly on his own, but those are matters inside the court, and it is his own conscience which in the last analysis brings conformity even with administrative requirements. A judge is expected to decide issues, including issues of his own conduct, on his own

responsibility. If he does not go too far in the wrong direction (and it is not always certain which direction that is), he will stay on as judge, he will not be impeached, he will probably be re-elected if he has to stand for re-election (unless his political party is thrown out bodily, an eventuality over which he has no control anyway), and he will probably be honored as a jurist until he dies or retires, just because he holds the office, whether his performance in it be great, or merely good, or mediocre.

The point I am making is that, once we have named a man as judge, the quality of his performance as a judge passes almost completely outside our effective surveillance and control, unless his performance is extremely bad, or extremely unacceptable on some popular basis. The judge himself has control of his performance, for all practical purposes, after he is selected. Nine times out of ten, or nineteen out of twenty, we take what he gives us, even though what we get may fall short of our judicial ideals, or exceed our expectations. Any notion that the public, or the bar, may have of exerting any genuine control over the quality of judicial performance by judges already on the bench (apart from raw instances) simply is not realistic. The one time when we have a real opportunity to exercise such control is *before* the judge is designated, when we can base a check on his judicial potentialities on information about him that passes out of the picture, never to be effectively replaced by comparable information, once he goes on the bench. In the mass of instances the only chance we have to decide whether we are going to have a great judge, or a good one, or a mediocre one, is before we put the new judge for the first time on the bench.

Of course it is true that, when judges are elected, they sometimes fail of re-election when they seek second or subsequent terms. It might be inferred from that fact that the public, or members of the bar who are the public's advisors, do keep watch on judicial performance, and do penalize by electoral defeat judges whose work was not as good as it should have been. I fear that when we think seriously about the cases in fact of judges being defeated for re-election under traditional election procedures, we will have to admit to ourselves that quality of judicial performance quite often does not have much to do with it. Defeats are more often explained by the vagaries of politics generally, or by the personality and energy of an opponent, or by a modest judge's failure to campaign vigorously because he thinks it unbecoming to his office, or by the efforts of politically oriented economic interests or law firms which hope to control a court or take control away from competing interests or firms. Conceivably the judge's performance of his duties could be a real issue in his re-election campaign, but rarely is it more than a surface

issue. The real reasons for a judge's defeat are likely to have but little to do with how good a judge he has been, in the average case. That emphasizes again my earlier point, that the only real opportunity that we usually have to check on a judge's qualifications, upon the likelihood of his doing a competent, conscientious job as a judge, is before he enters upon his judgeship in the first place.

If that is true, then the vital point in any good system of judicial selection is the beginning of it, the part that determines who goes on the bench in the first place. That is the part of the process which really decides, and properly ought to decide, whether or not we are going to get the best men to serve as judges. After they once become judges, assuming that they do a reasonably good job, our concern should not be with how the sitting judges can be gotten out of office, but also solely with how they can be kept in office, subject only to the single condition that there be some way, more efficient than impeachment, to get them out of office if they turn out to be truly poor judges. Then at the end, of course, there must be some provision for dignified and honorable retirement, to make sure that we do not have poor judges merely because of the inroads of bad health and old age.

No judge was ever great because he was selected in a certain manner, but the manner of his selection may cause him to be less great than he could have been had he been free of the limitations imposed upon him by the circumstances of his selection. Neither brilliance, nor ordinariness, nor conscientious industry, nor indolence, nor integrity, nor even plain incompetence, was ever created in any man by the processes of his elevation to a judgeship. But incentives and motivations, and even obligations, are created by these processes of selection. There are few human beings, be they lawyers or laymen, philosophers or politicians, or both, whose conduct is not in some sense guided by the kinds of obligations and incentives that can arise from one mode or another of judicial selection. A man capable of being a good judge, and naturally inclined to be a good one, may be less good, or may even be a poor judge, because of obligations created by the mode of his earlier selection, or because of motivations arising from the method by which his future continuation in office is to be determined. Or he may be a better judge, reaching upward toward the maximum of his inherent capabilities, because the obligations and incentives involved in the mode of judicial selection all look in that direction.

Among the members of the bar in any state there are many more lawyers inherently qualified to serve as judges than can ever become judges. There are some whose inchoate judicial qualifications are ob-

vious and outstanding, many others whose qualifications are genuine but not so obvious. Then there are others whose disqualifications are equally obvious, at least to those of us who know something about what it takes for a lawyer to be a good judge. There are not enough judgeships to go around, and there is no way we can assure every man a judgeship just because he wants to be a judge and would make a good one. There is no hope of such a heaven for judicially-inclined lawyers. We ask in fact much less than that. The most we ask is that somehow we be reasonably assured that the judges who are named will be selected from among the group of those whose qualifications are either outstanding or substantial, and not even in small part from the group whose disqualifications are obvious. Further, we ought not to select our judges on the basis of wild guesses as to their qualifications or lack of them, if there be available any means by which a tolerably accurate judgment can be exercised in advance as to whether the qualifications exist. There are so many good judicial prospects among the members of our profession that there is no earthly justification for using any system of selection that does not sort out the prospects pretty accurately in advance. It is certainly fair to ask, as to any method of selection that already exists or is proposed: Will it achieve, or at least will it move in the direction of achieving, the designation of judges solely from among those of our number who will really make good judges?

Continuing Education of Judges After They Enter Upon Judicial Duties

There are few men who do not grow as responsibility is thrust upon them, particularly if their responsibilities be in a field, such as the judiciary, in which dignity, devotion to duty, and a tradition of scholarly service are characteristic of the job that is to be done. Few lawyers have already lost the capacity to learn at the time they go upon the bench. Almost any judge improves the quality of his performance tremendously by the time he has been on the bench two years, five or ten years. Much of this improvement, by the nature of things, comes from his own studying, as any judge must study. Much of it comes from his association with other judges, first from his seniors on the same court, then from all the other judges with whom he associates, in chambers, in judicial conferences, at bar association meetings, and whenever he sees them. It comes constantly from the work of lawyers who practice before him. Probably most of it, however, comes from his own experience, because any man who possesses a modicum of sense and wisdom will learn something from each piece of business he handles, each case he hears. All of

this is self-education, which in a very real sense is what all education is.

But there are some areas in which the educative process, including self-education, can be aided by making information, facilities and materials for study, opportunities for association and exchange of experiences, more readily accessible. This is true even as to judges.

Again, I want to fall back upon my own experience, to tell you a little about an enterprise for judicial education that constitutes one of the most fascinatingly interesting activities in America in recent years. This is the Appellate Judges Seminar at the Institute of Judicial Administration in New York City. The idea for it came back in 1955 from Judge Fred G. Hamley, then Chief Justice of Washington, now Judge of the United States Court of Appeals for the Ninth Circuit. His thought was that there ought to be a short course, a seminar of some sort, available for Supreme Court judges, at which they could study and confer about the working aspects of their job, just as such short courses are available in most of the other specialized areas of our profession, and in other professions too. I became Director of the Seminar almost by default. We had our first session for three weeks in the summer of 1956. Later we fixed on a close-packed two weeks period as preferable, and have held one session each summer since then for approximately twenty state Supreme Court and United States Court of Appeals judges, except that in 1959 we held an additional session for the same number of state intermediate appellate court judges.

The faculty for the Seminar includes both Law School teachers and outstanding judges, to give a fair mixture of academic and professional points of view. Judicial faculty members in 1959 were William J. Brennan, Jr., United States Supreme Court; Charles Desmond, new Chief Judge, New York Court of Appeals; F. G. Hamley, mentioned above; Frank Kenison, Chief Justice of New Hampshire; and Walter V. Schaefer, Illinois Supreme Court. Due to the large number of applications, Seminar membership is now restricted to one judge from a court. Members for 1960 will be judges from the highest courts of Alabama, Arizona, Arkansas, Colorado, Georgia, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Texas, Vermont, Washington and Wisconsin. A judge of the Supreme Court of Canada will also be a member.

The seriousness of the work done is illustrated by the fact that three sessions, one and one-half or two hours each, are held daily. Extensive reading assignments are prepared in advance. In 1959 the topics discussed were:

Agencies Offering Services to Appellate Courts (1 session)
Nature and Function of the Judicial Process (5 sessions)
Preparation of Opinions (5 sessions)
Administrative Function of State Supreme Courts (4 sessions)
Current Trends in Negligence Law (3 sessions)
Techniques of Statutory Interpretation (1 session)
Uniform Rules of Evidence (1 session)
State Courts and the Federal System (2 sessions)
Appellate Review in Criminal Cases (2 sessions)
Appellate Control over Judge-Jury Relationship (1 session)
Appellate Review of Decisions of Administrative Agencies (1 session)
Appellate Courts As Supervisors of the Legal Profession (1 session)

As an example, the breakdown of subheads under one of the topics was:

> *Preparation of Opinions.* Critique of quality of judicial opinions (Wigmore's standards); efficient use of law clerks, library, other facilities; exchange of ideas and materials among members of court; conference procedure; concurrences and dissents; writing techniques; printing of opinions; assignment of cases; use of oral argument; delayed rendition of opinions.

Similar breakdowns were made for each of the other topics. Discussion was headed by two or three panel leaders on each subtopic, but with all members of the Seminar participating in round table fashion.

The Appellate Judges Seminar[17] serves us here merely as an illustration of what can be done by way of making "continuing education" more readily available to judges as well as to others in the legal profession. Another illustration is a project now under way to provide a sort of handbook or reading guide for appellate judges, something which will enable them to know about and more readily get hold of the rich literature not only on judicial administration but on jurisprudence, the nature of the judicial process and all the other aspects of their jobs on which almost every appellate judge is hungry for self-education.

The same sort of possibilities exist even more broadly for trial judges. The mere fact that there are more of these judges increases the possibilities. For them, seminars held on a one-state basis are practicable, and probably in most circumstances preferable. They too have need for

17. A more complete description of the work of the Appellate Judges Seminar, in its earlier stages, appears in Leflar, *The Appellate Judges Seminar at New York University*, 9 J. LEGAL ED. 359 (1956).

systematic bibliographies of the literature that bears on their jobs, apart from the literature of the law as such.

It is a rare judge who does not appreciate the need for further self-education, and strive for it constantly. All that I say now is that we should try to make the facilities for such self-education more readily available to them. The quality of our judges is not just an inherent quality, pre-existent in the men themselves. It is something which in almost every case increases itself as the judge continues to serve, throughout his active years, on the bench. But the rate of increase in quality will inevitably to some extent depend on the opportunities which the judge has to continue his education, not just in the courtroom but outside it too, and the encouragement which the rest of us give him to take advantage of those opportunities.

The Education of the Public to Understand the Character and Importance of the Judiciary and Its Function in Our Society

This education of the public is in a very real sense what you are undertaking now, in your Indiana campaign for nonpartisan judicial selection, and in the programs, the news stories, the editorial explanations, the debates that will accompany it. When this campaign is over, the general public in Indiana will know more about your judiciary, what issues go before it, the processes of decision, how it functions and why, and therefore what makes a man a good judge, than has been known before. Assuming that your campaign succeeds in establishing nonpartisan judicial selection, as we all hope it does, the gain will be tremendous. But even if nonpartisan judicial selection were rejected, there still would be substantial gains, because a great number of your citizens, perhaps a minority but still a great number, will know much more about your courts and your judges than they knew before. That alone will mean a gain in the quality of judicial performance in Indiana. It will by itself have a very real effect upon your judges. One of the surest ways to get better performance, maximum good performance, on the part of any public servant is to let him know that good performance will be understood and appreciated by the public for which it is rendered. I suspect that the education of the public as to the nature and function of our legal system, and particularly of our courts, is just about as important to the improvement of their quality as is the education of the judges themselves. It is basic. In a *democracy* it is the one, the only means by which progress can be assured.

And now I must conclude. I have talked about raising the quality of our judiciary. Judicial selection and tenure is of course the basic problem. The one stage at which tangible control looking toward improve-

ment can actually be exercised is the stage of original selection. Any program which is not directed at that stage is incidental, still preliminary, in the nature of a step toward the main goal. That I believe is largely true of your 1960 program here in Indiana. It is a step which you, in your knowledge of the local situation, have wisely concluded that you must take, and take before you try the longer and difficult leap to an ideal method of judicial selection.

The quality of our judges, and of their performance in the judicial process, is probably the surest guide to the quality of our civilization. The quality of our judges is the quality of our justice. In a civilized society the assurance of orderly and fair administration of something at least approaching genuine justice is essential. This is a minimum to which the people are entitled, which they demand. They look to their judges for it, and for such improvement in it as their judges can give them. But the ultimate responsibility, we well know, in a society which includes an established legal profession, lies not upon the judges merely, nor even upon the people, but upon the organized bar. The people look to the bar for guidance, both as to who should be their judges and as to how their judges can most wisely be selected. The judges themselves are the direct product of the bar. As judges they are of about the same quality as the bar that produced them, sometimes better than the bar's average, seldom worse. To a large extent they are selected by the bar, perhaps not formally but nevertheless actually. If the bar under some prevailing system of judicial selection does not select the particular man who serves as judge it nevertheless selects the *type* of man who is to serve. One way or another it is our responsibility, state by state. Not all of our states, through their bars, have accepted the responsibility, nor even recognized it. The bar of Indiana has. May success crown your efforts!