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The Judiciary in the United States: A Search for Fairness, Independence and Competence

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INTRODUCTION

Alexander Hamilton referred to the judiciary as "the least dangerous branch"[1] because it could neither make nor enforce the law without help from the other two branches of government. In the years since then, however, courts and judges in the United States have assumed a much more prominent role in society. American judges preside over criminal trials and sentence those convicted, decide all kinds of civil disputes, both large and small, and make important decisions involving families, such as child custody. They have also become the primary guarantors of the civil and constitutional rights of American citizens.[2]

The case of *Marbury v. Madison* established the principal of judicial review, which gave courts the power to declare acts of the other branches of government unconstitutional.[3] Then, the passage of the Fourteenth Amendment after the Civil War made many of the protections of the Bill of Rights (which was originally directed only at the federal government) applicable to the states. As a consequence, judges are in the position to protect those liberty interests provided by the Constitution from incursions by the state or federal governments. Judges also play a large role in enforcing the numerous modern civil rights statutes providing for equality in employment, housing, public accommodations, and other areas. Protecting the constitutional and civil rights of minorities, of criminal defendants, and of other unpopular groups and causes requires not only wisdom and courage, but also the ability to make difficult and unpopular decisions without fear of being removed from office.

The cornerstones of any legal system, and the greatest measure of whether it can provide justice to its citizens, are its judges. The preamble to the American Bar Association ("ABA") *Model Code of Judicial Conduct* states: "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us."[4] *Fairness* generally

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1. THE FEDERALIST No. 78.

2. Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity*, 32 IND. L. REV. 1167, 1168 (1999).

3. 5 U.S. (1 Cranch) 137 (1803).

4. MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

means that the judges must be unbiased and impartial; *independence* is the ability to decide cases free from political or other outside pressure; and *competence* requires that judges be of the highest ability, with proper training and experience. While there may not always be agreement as to the extent that the American judiciary meets these standards, most commentators agree with these aspirational goals.[5]

The most important factors that affect the fairness, independence, and competency of judges are: method of selection, term of office, compensation, code of conduct, the disciplinary process, gender and racial bias, and education and training. This Article will explore these factors and examine their effect on the quality of both the federal and state judiciary. A useful starting point should be those provisions in the United States Constitution that were designed to help make federal judges unbiased and independent.

I. AN INDEPENDENT FEDERAL JUDICIARY

At the time of the drafting of the Constitution, a full and functioning judicial system, with both trial and appellate courts, existed in each state.[6] There was general agreement at the constitutional convention, however, that some form of federal judiciary was also needed.[7] These would not be courts of general jurisdiction, but would be courts limited to those kinds of cases where it was important to have a judge free from local biases and allegiances. For example, federal judges could decide cases between states, or between citizens of different states, where the decision of a state judge would be suspect on the ground of bias toward his own state or citizen. Another important part of federal jurisdiction was over cases "arising under the Constitution and Laws of the United States," where the Supremacy Clause demanded that a judge put federal law above state laws and interests.[8]

The framers of the Constitution included several provisions designed to minimize local bias, and maximize the independence of federal judges. Federal judges are appointed by the president, with the advice and consent of the Senate, rather than elected by the populace or appointed by a state governor.[9] They serve for life ("during good Behaviour"), and can only be removed by the House and Senate through the cumbersome and little used impeachment process.[10] Finally,

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5. Maura S. Schoshinski, Note. *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994); MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

6. SIMEON E. BALDWIN, THE AMERICAN JUDICIARY 1-17 (The Century Co. 1905).

7. 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *Judicial System, Federal*, 1068-69 (MacMillan Publishing 1986).

8. U.S. CONST. art. VI.

9. U.S. CONST. art. II, § 2.

10. U.S. CONST. art. II, § 4.

their remuneration may not be reduced during their term of office.[11]

The provision for life tenure is of paramount importance to federal judges. They may be called upon to invalidate acts of Congress, the president, or state lawmakers. They may also be required to make decisions that are extremely unpopular with the voting public, such as requiring school busing to achieve desegregation, abolishing prayer in the schools, or enforcing the constitutional rights of criminal defendants. Unlike most state judges, who serve for a fixed term of years and then must either be re-appointed or re-elected,[12] federal judges do not have to worry about losing their positions by making the "wrong" decision. It is not surprising that in the struggle against segregation, civil rights activists in the middle of the twentieth century turned first to the federal courts.[13]

In a recent round-table discussion among federal Court of Appeals judges, general agreement was voiced as to the overriding importance of life tenure for federal judges:

> Life tenure, on good behavior, is certainly the strongest pillar to an independent judiciary
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> . . . .
>
> As a practical matter, everybody knows that if you cross the guy that pays your salary, he might fire you. If you cross the people that voted you in they might vote you out. That is the difference between the legislative branch and the judiciary – the members of Congress are elected to represent the views of their constituents. Judges are not elected to espouse the view of the electorate but to make the right decisions, based on the Constitution and the laws.[14]

While there is agreement among both judges and commentators that life tenure helps produce a more independent federal judiciary, there is not universal praise for this result. What some praise as "independence," others have criticized as "unaccountability."[15] Conservative critics argue that when activist judges reach out beyond the actual text of the Constitution (such as establishing the right to an abortion) the judiciary acts as an "unelected legislature."[16]

> The basic problem is that federal judges have lifetime tenure, and they have the power to overrule almost any decision made by another branch of government, state or federal. Their decisions, not to mention their ethics, are lightly overseen by their colleagues. There is, naturally, some pressure on federal judges to do a good job because otherwise their reputation among their friends and colleagues

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11. U.S. CONST. art. III, § 1.

12. Hon. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the U.S.*, 75 MICH. B.J. 904, 908 (1996).

13. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1955).

14. Judge Bobby R. Baldock et al., *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 DENV. U. L. REV. 355, 360 (1997) (quoting Judge Paul J. Kelley, Jr.).

15. MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 21 (1998).

16. *Id.* at 89.

> would suffer. But even when overruling district judges, appeals courts are usually loath to criticize the judge below, since after all, they're all in the same business, often in the same building, *for life,* and have to get along together.[17]

Although no federal judge has ever been impeached for issuing unpopular opinions[18] (as opposed to illegal conduct, which has led to thirteen impeachments and seven convictions),[19] there have been some attempts to pressure federal judges with threats of removal. For example, in 1970, an attempt was made to impeach Justice William O. Douglas because of his writings arguing that urban riots could be a form of First Amendment-protected political expression.[20]

Because federal judges may not be removed from office does not mean that they are entirely immune from being influenced by political pressure. In a recent, highly publicized case, a federal judge changed a ruling excluding evidence in a criminal case after being subjected to intense public criticism, not only from Republican members of Congress, but from President Clinton, who had appointed him.[21] A White House spokesman called the decision "wrongheaded" and suggested that if the judge did not change his mind, the president might ask for his resignation.[22] After the judge took the highly unusual step of holding a second hearing and reinstating the evidence, he was criticized by the *New York Times* for "caving in" to politicians and sacrificing judicial independence.[23]

Most states have chosen not to follow the federal model of life tenure for judges. In only three states are some appellate judges appointed for life.[24] In all others, judges serve for fixed terms, subject to re-election or re-appointment.[25] Although a number of states have modified the re-appointment or reelection process to make it less political, none of these provides the security and independence of the federal system. There is an ongoing debate as to whether this makes federal judges better able to hear certain constitutional claims, or whether there is now "parity" between federal and state judges.[26] Many civil rights lawyers, however, still generally prefer bringing sensitive civil rights cases to federal, rather than state, court.[27]

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17. *Id.* at 22.

18. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 8 (2000).

19. Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 10 n.29 (1989).

20. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (Harper & Row, 1980)

21. LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT?, 60-61 (1999).

22. *Id.*

23. *Id.*; *Judge Baer's Mess*, N.Y. TIMES, Apr. 3, 1996, at A14.

24. Deja, *supra* note 12, at 904. The states are Massachusetts, New Hampshire, and Rhode Island.

25. *Id.*

26. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977); Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Michael Wells, *Beyond the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

27. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991).

II. THE JUDICIAL SELECTION PROCESS

There are four basic types of selection processes used by the various states: partisan election, non-partisan election, gubernatorial or legislative appointment, and what has become known as the "merit" selection plan.[28] The "merit" selection plan involves gubernatorial appointment from a list of candidates chosen by a nominating commission, with a retention election a year or two later.

A majority of the states (thirty-one) presently use some form of election to choose their judges: fourteen by partisan election and seventeen by non-partisan measures.[29] This was not the case, however, during the early years of the United States. All of the original thirteen states used appointment of judges, either by the legislature, the governor, or the governor and a small council.[30] The move to the election of judges came about during the mid-1800's, as part of the Jacksonian populist movement to wrest power from the political elites and return it to the people.[31]

By the end of the nineteenth century, election of judges had led to a serious problem. As described by one writer:

> Problems with the predominantly elected judiciary became apparent in the late 1800s and early 1900s. During that time, the emergence of strong political party machines in large urban areas and various states resulted in political bosses effectively hand-picking incompetent political hacks for judicial positions who then, through party-controlled elections, replaced otherwise competent non-politically favored judges.[32]

These abuses led to a national reform movement, spearheaded by the American Bar Association and the American Judicature Society.[33] One of the results of that movement was a merit selection plan, first adopted in Missouri in 1940, and some form of which is now used by ten states.[34] Under this type of plan, the governor makes judicial appointments, but he or she must choose one of several candidates selected by a non-partisan judicial commission. These commissions are usually composed of respected judges, lawyers, and lay persons selected from a number of sources. Judges are usually appointed for a one year term and then must face an uncontested yes/no retention election. This entitles them to a longer second term (between seven and twelve years) before they must again face a retention vote.

There is an ongoing debate between proponents of the merit selection process

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28. Deja, *supra* note 12, at 904.
29. *Id.*
30. James F. Lozier, *The Missouri Plan A/K/A Merit Selection is the Best Solution for Selecting Michigan's Judges?*, 75 MICH. BUS L.J. 918, 918 (1996).
31. *Id.* at 919.
32. *Id.*
33. *Id.*
34. *Id.* at 920.

and those who favor elections in order to make judges more responsive to the public.[35] While party machines are not as much a problem as they were a hundred years ago, there are still significant problems with judicial elections, which may compromise the independence, integrity, and competence of elected judges.

First, election campaigns have become very expensive propositions.[36] While judges are prohibited by the *Model Code of Judicial Conduct* from raising money themselves, it may be raised on their behalf by campaign committees.[37] A significant amount of the money raised in judicial elections comes from law firms and attorneys who practice before the court, as well as political action committees that have an interest in matters heard by the court.[38] This results in at least the appearance of impropriety, if not actual conflicts of interest.

Judicial independence is also compromised when judges have to curry favor with party leaders and politicians in order to gain their party's nominations.[39] In addition, having to endure the electoral process may deter the most qualified individuals from seeking judicial positions. It is already a sacrifice for many practicing lawyers to give up a more lucrative practice to accept a lower paying judgeship. To do so in order to engage in a rigorous election campaign without any certainty of obtaining the position is clearly a disincentive for many.[40] For sitting judges, an extensive campaign requires them to spend considerable time away from their judicial duties.[41]

Those who favor judicial elections usually cite the public's right to participate in the process of picking its judges.[42] It may be, however, that the American electorate is neither up to, nor interested in, the task. In many judicial elections voters know very little if anything about the candidates, and often cannot even name the sitting incumbent.[43] In partisan elections, they tend to vote along party lines and in non-partisan elections by ballot placement or name recognition.[44] This problem is exacerbated by the fact that the *Model Code of Judicial Conduct* limits the kinds of statements judicial candidates may make about cases and issues facing the courts.[45]

Moreover, even in those states that elect their judges, the majority of judges are actually first appointed, rather than elected, to the bench. In those states, judicial

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35. Lozier, *supra* note 30; Peter D. Webster, *Selection and Retention of Judges: Is There One "Basic Method?,"* 23 FLA. ST. U. L. REV. 1 (1995); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79 (1998).

36. Lozier, *supra* note 30, at 921.

37. MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (1990).

38. Lozier, *supra* note 30, at 921.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 920.

43. *Id.*

44. *Id.* at 920-21.

45. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

vacancies are usually filled by gubernatorial appointment. One study showed that fifty-three percent of judges in judicial election states were appointed to their first term.[46] Although such judges must stand for reelection at the next general election, they are often unopposed, because it can be difficult finding a qualified attorney to take on the risk of opposing a sitting judge. In Florida, for example, since 1986 85% of the state's 731 trial judges have faced no opposition at the polls.[47] In many such states, gubernatorial mid-term appointments are not made from a choice of qualified candidates approved by a nominating commission, bringing the process full circle back to the patronage system elections were designed to replace.

A recent case in Florida illustrates the problems with contested judicial elections. An attorney with only seven years experience unseated a popular county judge, who had held his position for more than sixteen years and had the support of the local bar and elected officials. The victor won by raising an unprecedented $150,000 and using the money for questionable television and direct mail ads, which have led to his facing discipline by the Florida Supreme Court for his campaign tactics.[48] Florida voters were given the opportunity to switch to a merit selection plan in November 2000, but in spite of support for the plan by the Florida Bar, it was overwhelmingly defeated at the polls.[49]

The merit selection process is not without its own set of problems. Great care must be exercised in the appointment process for and the eventual composition of the nominating committee, to make sure that it remains non-partisan and free from political pressure. The retention election that is part of this process also has its critics. Although the retention election is designed to remove politics from the process, while still giving the public some say, it may not always have that effect. Having a yes/no retention vote may actually make it easier for special interest groups to target a judge for removal if they disagree with his or her opinions.[50] Unlike the situation with contested elections, they don't face the often difficult hurdle of finding another qualified candidate to run in order to unseat an incumbent judge. Says one Florida lawyer involved in the process, "All you have to do in a retention election is get the public to say no to something that has to do with government. Unfortunately, that's getting easier and easier to do."[51] The merit selection plans in some states were criticized at first for not identifying enough qualified minority candidates.[52] Although proponents of increasing the number of minority judges generally favor appointment and merit selection over

46. John Gibeaut, *Bench Battle*, 86 A.B.A. J. 42, 43 (2000).

47. *Id.*

48. *Id.* at 44-46.

49. Howard Troxler, *Merit-based Selections Didn't Fly, Rightly So*, ST. PETERSBURG TIMES, Nov. 20, 2000, at 1B.

50. Lozier, *supra* note 30, at 922.

51. Gibeaut, *supra* note 46, at 50.

52. Lozier, *supra* note 30, at 922.

election, there is no agreement about which process best promotes this goal.[53]

In order for the public to make an informed choice in a retention election (or any election involving an incumbent judge for that matter), a judicial performance evaluation process needs to be in place. The ABA has developed standards for judicial evaluation programs that call for evaluation of judges by lawyers, other judges, court personnel, and litigants on such criteria as integrity, legal knowledge, communication skills, preparedness, attentiveness, proceedings control, managerial skills, punctuality, professional and public service, and effectiveness in working with other judges.[54] The ABA guidelines call for the evaluation process to be controlled by the state supreme court in order to protect judicial independence.[55] Besides informing the public during retention elections, other purposes of the programs are self-improvement of individual judges, effective assignment and use of judges, and improved design and content of judicial education programs. Unfortunately, however, only ten states have implemented comprehensive judicial evaluation programs.[56]

Although the merit selection process is generally viewed as a better process by outside observers, only ten states have adopted it.[57] There may be several reasons for the low adoption rate. First of all, the judicial selection process is ensconced in many states' constitutions, making the process of change more difficult than passing ordinary legislation.[58] Also, it is usually difficult to garner politicians' support for a measure that will reduce their power and influence, especially in a situation like this where the negative effects of the present system are not immediately apparent to the general public.

While the judicial selection process varies from state to state, the process for selecting federal judges is fixed by the Constitution. As noted earlier, Article II of the Constitution specifies that that judges are appointed by the president "with the advice and consent of the Senate."[59] This process was a compromise between those among the framers who favored appointment by the president and those who favored appointment by the Senate.[60] Appointment by the president was opposed as putting too much power in one person, whereas appointment by the Senate was considered unwieldy and impractical.[61] Gouverneur Morris, arguing

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53. *Id.*

54. *See* STANDARDS RELATING TO COURT ORG. § 1.27 (1990).

55. *Id.* §§ 1.20, 1.27.

56. AM. B. ASS'N, JUDICIAL PERFORMANCE EVALUATION HANDBOOK 3 (1996).

57. *Qualifications Are Key: ABA Rethinks Its Strategy and Shows Merit Selection The Door*, 86 A.B.A. J. 111 (Aug. 2000). Today, only fifteen states and the District of Columbia use that model [merit selection] for all levels of court.

58. Erwin Chemerinsky, Symposium, *Preserving an Independent Judiciary: The Need for Contribution and Spending Limits in Judicial Elections*, 74 CHI.-KENT. L. REV. 133, 149 (1998).

59. U.S. CONST. art. II, § 2.

60. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997).

61. *Id.*

for the compromise that eventually prevailed, stated, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[62]

The actual practice of appointment by the president has varied among the different holders of the position. Most recent presidents have used their attorneys general to help them with the selection process.[63] For district court judgeships, members of the Senate from the state in which the court is located, have by custom been informally involved in the selection process. Usually, the senior senator of the president's party from that state gets to pass on a nomination to the president, and senators from that state of *either* party can veto the nomination.[64] Normally, most presidents appoint federal judges who are of the same party and political ideology as themselves, and normally (at least until recent years) the Senate has gone along with the president's choices if the candidate was deemed qualified.[65] Thanks, however, to the provision for life tenure, federal judges, once appointed, are not beholden to the president who appointed them.

President Carter tried to move the process closer to a merit selection system. By executive order he created nominating commissions for each circuit for Federal Court of Appeals nominations, and persuaded senators from thirty states to create nominating commissions for district court appointments.[66] These commissions were supposed to send three to five names to the President from which he would choose his nominee. This process differed from the merit selection process used in some states, however, in that Carter appointed all of the members of the circuit nominating commissions himself and retained the right to choose a nominee not on the commission's list. This attempt at a merit selection process did not last long. It was abolished by his successor, Ronald Reagan.[67]

For more than 120 years, the ABA has also been informally involved in the appointment process. All appointees are rated by the ABA's Standing Committee on Federal Judiciary as either "well qualified," "qualified," or "not qualified."[68] The overwhelming majority of candidates have been found to be either "well qualified" or "qualified." Only twenty-six of 1,608 nominees between 1980 and 1996 were found to be "not qualified."[69] While neither the President nor the Senate is obligated to follow the ABA's advice, a rating of "not qualified" usually results in the candidate being withdrawn or rejected.

Although the committee has sometimes been criticized as being either too

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62. *Id.*

63. *Id.* at 9-11.

64. *Id.* at 12.

65. *See generally* GOLDMAN, *supra* note 60, at 307-19.

66. Exec. Order No. 11972, 42 Fed. Reg. 9659 (Feb. 14, 1976).

67. GOLDMAN, *supra* note 60, at 287.

68. Roberta Cooper Ramo & N. Lee Cooper, *The American Bar Association's Integral Role in the Federal Selection Process*, 12 ST. JOHN'S J. LEGAL COMMENT. 93, 103 (1996).

69. *Id.* at 100.

conservative or too liberal, the president of the ABA maintains that "it is the only entity in the judicial selection process focused solely on professional qualifications."[70] President Bush recently announced, however, that he would no longer ask the ABA to screen potential judicial candidates. This decision was applauded by conservatives, who have accused the ABA of a liberal bias.[71]

In recent years, partisan wrangling between the Senate and the president has led to problems in the process, which had deleterious effects on the federal court system. The Senate Judiciary Committee delayed holding hearings on many of Bill Clinton's appointees to the federal bench, creating dozens of unfilled vacancies, some for more than a year.[72] The President blamed the Republican Senate for partisanship, while the Senate leadership blamed the President for creating the backlog by acting too slowly.[73] Whatever the cause, the effect of so many vacancies on an already overworked federal bench has been considerable.[74]

A separate controversy has arisen as to the proper role of the Senate in the confirmation process for nominees to the Supreme Court. This debate was, for the most part, prompted by President Reagan's nomination of Robert Bork in 1987. Judge Bork testified at a public hearing before the Senate Judiciary Committee for thirty-five hours over five days. He answered numerous specific and detailed questions about his judicial philosophy.[75] Some have questioned whether the Senate overstepped its bounds as a matter of separation of powers and whether such detailed disclosure of judicial philosophy might compromise a justice's ability to remain unbiased on the court.[76]

Two trends have come together in the twentieth century to create this problem: a move toward openness in the Senate confirmation process and more detailed scrutiny of nominees' judicial philosophy. Before 1929, the Senate met in secret session to decide judicial confirmations and did not normally call the nominees to testify.[77] Starting in 1930, the hearings were made public and the nominees began to be "invited" to testify before the Senate Judiciary Committee.[78] In the latter part of the twentieth century, those hearings began to be televised. There was also a trend, during this period, of examining not only candidates' qualifications and character, but also their positions on controversial issues, such as abortion,

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70. *Id.* at 101.

71. Thomas Healy, *ABA Loses Lead Role on Judicial Nominees; White House to Withhold Advance Opportunity to Screen Federal Choices*, BALTIMORE SUN, Mar. 23, 2001, at 3A.

72. Neil A. Lewis, *Partisan Gridlock Block Senate Confirmation of Federal Judges*, N.Y. TIMES, Nov. 30, 1995, at A16.

73. *Id.*

74. *Id.*

75. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 260 (1987).

76. Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 677 (1989).

77. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988).

78. *Id.*

affirmative action, the death penalty, and the rights of criminal defendants.[79]

While some see this as a positive democratization of the process,[80] others argue that it was the framers' intention that the Senate only investigate the qualifications and character of the president's nominee, leaving him free to appoint persons of whatever judicial philosophy he chooses.[81] Others take a middle ground, agreeing that the Senate may examine the judicial philosophy of a nominee, but should do so based on previous writings or statements. The Senate should not ask nominees to state publicly their views on issues that the Court is likely to face.[82]

The reasoning for this position was described as follows:

> The first concern is that statements made in the course of confirmation might skew actual decisions. A judge or justice may consciously or subconsciously feel compelled to decide cases in conformance with his or her answers to the appointing authority, thus voting differently than might otherwise have been the case. This is the problem of actual adjudicative partiality.
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> Even in the absence of actual partiality, it may seem to future litigants that a judge is bound to a predetermined outcome as a consequence of commitments apparently made during confirmation. This appearance of partiality is to be avoided in its own right.[83]

The *Model Code of Judicial Conduct* provides that a judge "shall not, while a proceeding is pending or impending in any court, make any public comment."[84] One interpretation of this is that although nominees may not respond to a question involving the facts of a case before the court or likely to come before the court, they may answer more general questions about their judicial philosophy, or even somewhat more specific questions about their views on controversial issues.[85] Some justices, however, have taken the position that all legal issues may eventually come before the court and therefore a nominee should not express an opinion on any question of law.[86]

It is unlikely that this dispute will be settled in the near future, and it is reasonable to believe that Senate confirmations of Supreme Court nominees will continue to be public and controversial.

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79. *Id.* at 1159.

80. *See, e.g.*, Nina Totenberg, *The Confirmation Process and The Public's Right to Know or Not To Know*, 101 HARV. L. REV. 1213, 1213 (1988).

81. *See, e.g.*, Fein, *supra* note 76, at 673

82. Freund, *supra* note 77, at 1163.

83. SHAMAN ET AL., *supra* note 18, at 419.

84. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

85. Totenberg, *supra* note 80, at 1218, 1219.

86. *See Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States*, 99th Cong. 35, 37, 45, 57 (1983); *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor, to be Associate Justice of the Supreme Court of the United States*, 97th Cong. 80, 94, 96, 108 (1981).

III. DISCIPLINE AND REMOVAL

The National Commission on Judicial Discipline and Removal referred to the problem of disciplining judges for illegal or unethical behavior as a walk on "the tightrope between independence and accountability."[87] While judges must be free to issue unpopular opinions without fear of reprisal, there must be some reasonable method for punishing and/or removing from office those judges who have committed ethical or criminal violations, or in some other way have proven themselves unfit to serve.[88]

Judges, both federal and state, enjoy almost complete immunity from civil damages liability for acts done while in office.[89] While all government officials receive some form of civil immunity, most receive only qualified immunity.[90] This means that plaintiffs may recover if they can show that the officials knew or should have known that their acts were unlawful.[91] Judges, however, receive absolute immunity for any judicial acts, as long as they are not acting in the clear absence of all jurisdiction, even if they acted out of malice and with knowledge of the illegality of their acts.[92] For example, if a judge agrees or conspires with one party to a lawsuit to decide a case a certain way, that would be covered by the immunity.[93]

This immunity applies even if the judge has violated the constitutional rights of a litigant. The Supreme Court has held that this common-law immunity survived the passage of 42 U.S.C. § 1983 even though the statute provides for civil liability against "any person . . . acting under color of state law" who violates the constitutional rights of another.[94] The main purpose of judicial immunity, according to the Court and most commentators, is to protect judicial independence.[95] The Court has stated that a judge, who must decide all cases brought before him, "including controversial cases that arouse the most intense feelings in litigants . . . should not have to fear that unsatisfied litigants [will] hound him with litigation charging malice or corruption."[96]

Some have argued that absolute immunity, which completely deprives an injured party of any compensation, is too drastic a measure and not necessary to protect judicial independence. They posit that absolute immunity need not be

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87. Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 280 (1994).

88. SHAMAN ET AL., *supra* note 18, at 8.

89. Stump v. Sparkman, 436 U.S. 951 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

90. O'Connor v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

91. *Id.*

92. *Pierson*, 386 U.S. at 553-54.

93. *Id.*

94. *Id.* at 554-55.

95. Steven W. Gold, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV 699, 707 (1987); *see also* SHAMAN ET AL., *supra* note 18, at 497; *Pierson*, 386 U.S. at 554.

96. *Pierson*, 386 U.S. at 554.

granted to all judges in all circumstances no matter how outrageous their conduct.[97] In any case, absolute immunity remains the rule in most American jurisdictions.[98]

Judges are not, however, immune from criminal prosecution, even for acts committed while carrying out judicial duties.[99] Judges may be prosecuted for soliciting or accepting bribes, or engaging in other forms of corrupt behavior. In such cases, the need for protecting judicial independence is outweighed by the need to protect the public from criminal behavior.[100]

This is not to say that there is no separation of powers problem when a member of the judiciary is investigated and prosecuted by a member of the executive department. In fact, some have argued that criminal prosecution and incarceration of sitting federal judges before their impeachment is unconstitutional.[101] The fact that the judge would be prevented from hearing cases if incarcerated is said to violate the constitutional requirement that judges may only be removed by impeachment.[102] Several federal judges have tried to block their prosecutions using this argument, but have failed.[103]

The opposite side of this problem is the dilemma of what to do with a federal judge who has been convicted of a serious criminal violation but has not been impeached. Several federal judges were convicted of serious criminal violations in the 1980's and 1990's but refused to resign and continued to receive their salaries, even while in prison.[104] This required the House of Representatives to initiate impeachment proceeding against them and the Senate to conduct a trial.

Even though the Senate used an expedited procedure where a special committee of twelve senators heard all the evidence and only excerpts were presented to the full Senate, it still occupied the Senate for a significant amount of time.[105] In the case of District Judge Harry E. Claiborne, who had already been convicted of tax fraud and sentenced to two years in prison, the full trial before the committee consumed eight legislative days and the truncated trial before the whole Senate took three.[106]

This expedited procedure was challenged in court as a violation of the

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97. *See id.* at 558-59 (Douglas, J., dissenting).

98. SHAMAN ET AL., *supra* note 18, at 497.

99. Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945); SHAMAN ET AL., *supra* note 18, at 513.

100. SHAMAN ET AL., *supra* note 18, at 513.

101. *See* Melissa H. Maxman, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987).

102. *Id.* at 420.

103. *See* United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

104. Maxman, *supra* note 101, at 420.

105. *Id.* at 421.

106. Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Convictions*, 17 HARV. J.L. & PUB. POL'Y 157, 165 (1994).

constitutional requirement that the Senate "try all Impeachments."[107] The Supreme Court held that the conduct of impeachment trials is committed for final decision by the Senate and that the judge's claim was therefore non-justiciable.[108] The length and expense of even the expedited trial process have led some to call for further reforms, such as immediate loss of pay upon conviction of a felony and an even more truncated procedure giving collateral estoppel effect to criminal convictions.[109] Such solutions, however, do not have universal support, and might require a constitutional amendment.[110]

At both the federal and state level, impeachment has proved to be an unwieldy and insufficient method of disciplining judges. Under the Federal Constitution and under most state constitutions, it may only be used for serious criminal behavior and can only result in removal of the judge.[111] There is no provision for less serious violations or for less onerous punishment. This situation led to the development of the ABA *Model Code of Judicial Conduct*. Almost all states and the federal government have adopted a code of conduct based closely on either the 1972 or 1990 version of the ABA *Code*.[112] In addition, each jurisdiction has adopted judicial conduct organizations to enforce it.[113]

The 1990 *Model Code of Judicial Conduct* contains five *Canons*, which are broad statements of policy:

> 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.
>
> 2. A Judge Shall Avoid Impropriety and the Appearances of Impropriety in All of the Judge's Activities.
>
> 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.
>
> 4. A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.
>
> 5. A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity[114]

Under each canon are more specific, mandatory rules of conduct, regulating such matters as when a judge must disqualify him or herself for conflict of interest, what outside employment judges may engage in, what kinds of organizations a judge may belong to, what kinds of investments a judge may hold and how they must be reported on financial disclosure statements, and much

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107. Nixon v. United States, 506 U.S. 224, 227-35 (1993).

108. *Id.* at 228-33.

109. *See* Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265 (Aug. 1994); Broyde, *supra* note 106, at 179.

110. *See* Maxman, *supra* note 101, at 423.

111. SHAMAN ET AL., *supra* note 18, at 26.

112. *Id.*

113. *Id.* at vii.

114. MODEL CODE OF JUDICIAL CONDUCT (1990).

more.[115] The substantive scope of these rules is very broad and the prohibitions are numerous and detailed. It is beyond the scope of this essay to discuss them at length.

The *Model Code of Judicial Conduct* does not itself prescribe an enforcement mechanism, but by 1981, every state had established a judicial conduct organization.[116] These are designed to investigate, prosecute, and adjudicate instances of judicial misconduct. In some states they may impose a sanction themselves, but in most others they may only recommend it to a higher body, usually the state supreme court.[117]

The enforcement mechanisms are designed to minimize the threat to judicial independence. The main way that this is done is through judicial self-regulation. In each state, judges are included as members of the conduct organization, and in many states, judges constitute a majority of the ethics commission.[118] Moreover, all sanctions can be appealed to a court, often the state supreme court.[119] Having judges essentially regulate themselves is thought to be less threatening to independence than if it were done by members of the executive or legislative branch.[120] This self-regulation, however, sometimes leads to charges that judges tend to protect one another and not enforce the *Code* stringently enough.[121]

Another point of criticism is that in most cases, the state judicial ethics commissions' investigations and proceedings are conducted in secret. All states have a requirement that the commission's actions be held confidential while it is investigating a complaint.[122] This is entirely justifiable to protect the reputation of judges who are falsely accused by disgruntled litigants. However, the majority of states carry this confidentiality even further through the process. Only twenty-two states allow public disclosure after the commission makes a finding of probable cause and files formal charges against a judge.[123] The rest of the states keep the matter confidential until the commission has found that a violation has occurred and makes a recommendation of sanctions to the state supreme court, and ten states only permit disclosure after the supreme court has actually issued a sanction.[124] This extended confidentiality has been criticized as unnecessary, and may erode public confidence in the process.[125]

The situation with federal judges is similar, but as in other areas, is impacted

115. *Id.*
116. SHAMAN ET AL., *supra* note 18, at 7.
117. *Id.* at 7.
118. *Id.* at 7, 8.
119. *Id.* at 8.
120. *Id.*
121. *See* BOOT, *supra* note 15, at 21.
122. SHAMAN ET AL., *supra* note 18, at 469.
123. *Id.* at 470.
124. *Id.*
125. *See* SHAMAN ET AL., *supra* note 18, at 469-75.

by the constitutional protections given federal judges. In 1980, Congress passed the *Judicial Councils Reform and Judicial Conduct and Disability Act.*[126] This act created a judicial council for each circuit, composed entirely of judges and chaired by the chief judge. The councils investigate complaints against federal judges and can order sanctions for judicial misconduct.[127]

Unlike many state commissions, however, federal judicial councils were not given the power to remove judges from the bench, since federal judges may only be removed through impeachment. The councils can issue a range of sanctions, including private or public censure, recommendation of impeachment proceedings, and temporary suspension of a judge's caseload.[128] This last sanction has been challenged as an unconstitutional removal, but its constitutionality has not been settled.[129]

IV. GENDER AND RACIAL BIAS

An issue that has received considerable attention in the last twenty years is whether the judicial system and the judges who run it are biased against women and minorities. The issue of gender bias in the courts came to the fore in the 1970's, when law schools first started graduating significant numbers of women. At that time, the American judiciary was almost entirely male, and women lawyers began to complain that both they and their clients were being treated unfairly because of their gender. Some of this unequal treatment came from discriminatory substantive laws, many of which have been gradually reversed through litigation or legislation.[130] But there was also the problem of unequal, discriminatory treatment by male judges who were unused to having female attorneys practicing before them.

In 1988, the Conference of Chief Justices passed a resolution encouraging all chief justices to establish task forces to study gender bias in and minority concerns about the justice system.[131] By 1999, thirty-nine state supreme courts had established task forces to address gender bias in the courts, and twenty-seven to address racial and ethnic bias.[132] Similar task forces were also formed in a number of the federal circuits.[133]

Most of these task forces found and documented numerous instances of gender and racial bias within the court system.[134] These examples ranged from judges

126. 28 U.S.C. § 332 (1980).
127. 28 U.S.C. §§ 331, 332, 372, 604 (1982).
128. 28 U.S.C. § 372(c)(6)(B)(iv) – (vi); 28 U.S.C. § 372(c)(7) – (8).
129. Chandler v. Judicial Council of the 10th Cir., 398 U.S. 74 (1970).
130. *See, e.g.,* Reed v. Reed, 404 U.S. 71 (1971).
131. DISCRIMINATION IN THE COURTS COMMITTEE, CONF. OF CHIEF JUSTICES, RESOLUTION XVII (1988).
132. Selby, *supra* note 2, at 1170.
133. *Id.* at 1170 n. 19.
134. *Id.* at 1170.

addressing women attorneys by their first names and male attorneys by their surnames, to clearly sexual comments made to female attorneys, to outright instances of sexual harassment.[135] Many court systems have begun to try to implement some of the recommendations made by these task forces to remedy the problem.[136]

Many task force reports recognize that, as a first step, it is important that state supreme courts issue a clear statement that gender and racially biased conduct will not be tolerated.[137] These statements should be codified into the rules of the court. The 1990 revision of the ABA *Model Code of Judicial Conduct* declares that a judge "shall perform judicial duties without bias or prejudice," and that a judge "shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice."[138] Although not all states have adopted the 1990 revision, several appellate courts have recently reversed decisions made by judges who have used language showing racial or gender bias.[139] For example, the South Carolina Supreme Court reversed a conviction because the judge had referred to the defendant's attorney as "a pretty girl . . . a nice girl . . . young."[140]

Most experts have realized, however, that "[e]ducation is perhaps the single most crucial component in working toward the goal of a gender-fair system."[141] Many state supreme courts have instituted gender and racial awareness programs for their judges.[142] Perhaps in part because of these programs, there has been an increased awareness by judges of issues of gender and race. Judges are becoming less likely to make overt comments of an objectionable nature.[143] But that does not mean that the problem has disappeared. Judicial attitudes and stereotypes may be deeply ingrained and may manifest themselves in more subtle ways.

One example of how judicial attitudes about race may affect fairness involves sentencing disparities between blacks and whites. Unlike the situation with gender bias, there have been many fewer instances of overt racist statements made by judges, and where they have occurred they have usually led to reversals and/or judicial discipline.[144] But that does not mean that racism, or racial

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135. *Id.* at 1174-75.

136. *Id.* at 1174.

137. *Id.* at 1177-78.

138. MODEL CODE OF JUDICIAL CONDUCT Canons 3B(5) & 3B(6) (1990).

139. Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (July/Aug. 1997).

140. State v. Pace, 447 S.E.2d 186 (S.C. 1994).

141. Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 1996 ANN. SURV. AM. L. 1, 53 (1996).

142. Selby, *supra* note 2, at 1175 (citing LYNN HECHT SCHAFRAN ET AL., GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY 12-16 (National Judicial Education Program 1998).

143. *See generally id.*

144. *See* A. Leon Higginbotham, Jr., *Racism in American & South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 543-45 (1990).

stereotyping, whether conscious or unconscious, does not affect American justice. American judges have traditionally had fairly broad discretion over the length of sentences they can hand down for any given crime.[145] Some studies have suggested that African Americans are more likely to be sentenced to prison or to longer prison terms than similarly situated white defendants for the same crimes.[146] The United States Supreme Court referred to race based sentencing disparities as "an inevitable part of our criminal justice system."[147] The Court, however, refused to declare the death penalty unconstitutional in the face of clear statistical evidence showing that the race of the perpetrator and victim greatly affected whether the defendant was given a death sentence or not.[148]

One way to mitigate the problem of disparate treatment of minorities would be to have more minority judges on the bench. Yet that process is proceeding very slowly. One study showed that as of 1995 only 4.1% of state-court judges were African American.[149] Another proposed remedy to disparity in sentencing has been stricter sentencing guidelines for judges, with mandatory sentences for certain crimes.[150] But sentencing guidelines have created their own problems. In one sense the discretion has merely been transferred from the judge to the prosecutor, who still has great flexibility as to what crimes with which to charge the defendant.[151] Also, some guidelines themselves have been criticized as racist; one example being the harsher mandatory sentences for crack, which is a "black" drug, than for powder cocaine, which is a "white" drug.[152]

Making the judicial system in the United States gender and racially neutral is a complicated problem that will not be solved by any one solution. Although better screening of judicial candidates for racism and sexism, and better education for sitting judges in these areas will help, it will not alone solve the problem.

V. JUDICIAL EDUCATION

As mentioned in the section above, almost every task force that has studied the problem of gender bias in the courts has concluded that educational programs for

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145. *See* Apprendi v. New Jersey, 530 U.S. 466, 481-82 (2000); Williams v. New York, 337 U.S. 241, 246 (1949).

146. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 45-49 (1994); Selby, *supra* note 2, at 1171. *But see* Jon'a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M. L. REV. 107 (1996).

147. McClesky v. Kemp, 481 U.S. 279, 312 (1987).

148. *Id.* at 322.

149. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality & Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95 (1997).

150. Rachael A. Hill, *Character, Choice, and "Aberrant Behavior:" Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975 (1998); Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CINN. L. REV. 1851, 1881 (1995).

151. William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L.J. 157, 163-64 (1996) (arguing that the *Sentencing Guidelines* have shifted discretion away from the judiciary to prosecutors and regulators).

152. 21 U.S.C. §§ 841, 846 (2000).

judges on this issue is of paramount importance in addressing the problem.[153] Judicial education is also necessary for other reasons.

In the United States, unlike many civil-law countries, there is no educational and career track for judges separate from that for lawyers.[154] Most judges are chosen from the ranks of practicing attorneys. Although a few may have harbored long-held dreams of becoming judges, at the time that they attended law school almost all of them intended to become lawyers, rather than judges. It is often said that American law schools teach students to "think like a lawyer."[155] The thought processes and skills of a lawyer are not necessarily similar to those of judges. Lawyers are taught to identify issues, develop arguments for their clients, and represent their clients' interests vigorously. Judges must learn not to take sides, to listen carefully to arguments presented by lawyers, and then choose which one is correct. They must also learn to control firmly yet fairly the partisan conduct of the lawyers who practice before them. In addition, judges must be familiar with a broad range of substantive law. Many lawyers tend to practice in one specific area, such as criminal law, or medical malpractice, or commercial law. Most judges, however, will hear cases in all areas of the law, and must, therefore, have a broader knowledge of the substantive law.

Starting about forty years ago, numerous agencies have been established to provide continuing legal education for judges.[156] By statute, Congress has established the Federal Judicial Center,[157] which is responsible for educational programs for federal judges, and also the State Justice Institute,[158] which has the same responsibility for state court judges. In addition, nearly every state has established an agency responsible for judicial education.[159]

The Judicial Institute of Maryland is a good example of such a court-created judicial training center.[160] It is run by a board of directors, composed of judges from each level of trial and appellate courts, and a representative from each of the two law schools in Maryland and from the organization that provides continuing legal education to attorneys.[161] Each year, the Judicial Institute holds numerous seminars in various substantive areas of the law. Whenever possible, these courses are taught by fellow judges who have developed an expertise in that

153. Selby, *supra* note 2, at 1175.

154. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*. 13 GEO. J. LEGAL ETHICS 217, 228 (2000); Alvin B. Rubin, *Hazards of a Civilian Adventurer in Federal Court: Travel and Travail on the Erie Railroad.* 48 LA. L. REV. 1369, 1371 (1988).

155. Nancy L. Schultz, *How do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992); *see also* The Paper Chase (Trimark 1973).

156. *See, e.g.*, Robert A. Leflar, *Continuing Education for Appellate Judges*, 15 BUFF. L. REV. 370 (1965);

157. 28 U.S.C. § 620.

158. 42 U.S.C. § 10701.

159. A list of all the agencies can be found in the Judicial Branch Education Directory 2000.

160. Admin. Order Replacing Orders as to the Judicial Institute, Admin. Order 2000-207 (Dec. 12, 2000).

161. *Id.* at § 2.

field.[162]

One of the most important programs developed by the Institute is a mandatory orientation program for all new trial judges.[163] This involves the appointment of an orientation committee of three judges responsible for implementing an intensive ten-day on-the-bench training program for each new judge. This program includes visits to prisons and detention centers, and meetings with representatives from referral agencies and parole and probation employees. The cornerstone of the program is six days of bench duties held jointly with different, experienced judges. The new judge is also presented with educational materials and is required to attend a general seminar for newly appointed judges. Such a program should help immensely in the transition from attorney to judge.

CONCLUSION

This Article has attempted to survey the various factors that influence the fairness, independence, and competence of state and federal judges. Some of the factors that operate to affect these characteristics are complicated and controversial. One's view of how successful the state and federal governments have been in attaining these ideals depends on one's view of the fairness of the judicial system as a whole. It is clear, however, that the system can only be as fair as its judges. Therefore, the issues discussed in this Article will continue to be studied, written about, and debated by scholars, politicians, and others interested in our system of dispensing justice.

162. *Id.* at § 3.

163. Admin. Order Amending the Orientation Procedures for New Trial Judges (Aug. 7, 1998). *See also* Correspondence from Frederick C. Williams, Executive Director, Judicial Institute of Maryland (Apr. 3, 2001) (on file with Author).