1967

Who Can Best Judge the Judges

Roger J. Traynor

Follow this and additional works at: http://repository.uchastings.edu/traynor_scholarship_pub

Recommended Citation
Available at: http://repository.uchastings.edu/traynor_scholarship_pub/27

This Article is brought to you for free and open access by the The Honorable Roger J. Traynor Collection at UC Hastings Scholarship Repository. It has been accepted for inclusion in Published Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marusc@uchastings.edu.
WHO CAN BEST JUDGE THE JUDGES

By
Roger J. Traynor

Reprinted from Vol. 53, No. 6
VIRGINIA LAW REVIEW
© 1967
WHO CAN BEST JUDGE THE JUDGES*

Roger J. Traynor†

VIRGINIA, the mother of states, must sometimes be puzzled by so antic an offspring as California. Hence I bring you reassuring word that when California is good, despite its massive growing pains, it is very, very good. In recent years it has developed an outstanding system of courts in which judges can work with impartiality and independence, keeping their distance from the popular or powerful influences that chronically beset legislatures.

We can be grateful for such judges and still recognize that even the best of them are as much in need of responsible critics as anyone else. In addressing myself to the question of who can best judge the judges, I shall in due course report on how California has confronted the question. First, however, by way of obtaining a perspective on how judiciously people are apt to judge the judges at the ballot box, we might consider how judiciously people judge their fellows outside the courtroom.

Assume, as we like to do in the law, that you are newly arrived in a faraway land to conduct operations for the Old Caution Company, a national firm engaged in excavating tar pits and recreating them in panorama for museums. You lease a tar pit of great speculative interest. Excavations all around reveal masses of tar, oozing with fragments of prehistoric animals as well as oil.

In no time you confront fractious problems of judgment. The neighboring tar pit owners are confounding the din of their excavations with earsplitting sound trucks to attract the tourist trade. You complain to Old Caution's local lawyer that they are battering your delicate decibel system, adding that there ought to be a law.

"There is," he responds. "The trouble is that your neighbors see nothing wrong with uncivil behavior when those sound trucks are bringing in so much tourist money."

*Address delivered at the Midwinter Meeting of the Virginia State Bar Association at Williamsburg, Virginia on February 10, 1967. Chief Justice Traynor was elected an honorary life member of the Association in appreciation for the part he played in the meeting.

†Chief Justice of the California Supreme Court. A.B. 1923, Ph.D., J.D. 1927. University of California.
"There must be others whose ears are splitting," you venture. "We can join forces to make ourselves heard."

"You ignore," says Old Caution's lawyer, "that your small voices will be outnumbered. Your neighbors have the money to mold public opinion, and they have done so. If you took a poll today, you might be surprised to learn how many people associate that racket with a booming economy and not with assault and battery."

"It is time you learned," the lawyer continues, "that we call such an opinion the will of the people, whether it be molded by a mob majority, a mob minority or some ill-willed clod broadcasting crudely alloyed vilifications from an arcane lily pad. There is only one thing left to do: test the matter in court."

You do go to court, and the judgment is in your favor. Then comes an unexpected sequel. Gaudy circulars suddenly appear everywhere, purportedly as exposés of the laws governing noise, though actually their target is Old Caution's lawyer. They charge that he advanced against the constitution as it stood until the Year of the Last Great Horsecar. They charge that he instigated the proceedings that led to the deplorable decision against sound trucks in the face of a long line of sound precedents upholding the clangor of doorbell ringers. They declare that the founding fathers would have left some express way open for lowering the boom on sound trucks had they deemed it in the best interests of the people.

The circulars are anonymous, bearing only the fictitious name: The People's Will. No one seems to know:

Who is Willy
What is he?
Who spends so freely
And anonymously.

You envisage the recipients of the far-flung diatribes—the sober citizens and the loons, hurried or harried, with no more than a weary or blurry eye for Willy's concoctions. You deem it well that they still

---

1 See Kovacs v. Cooper, 336 U.S. 77 (1949).
have no power to vote Old Caution's lawyer out of his private office. The people are skilled to do many things, you think, but hardly to pass judgment on lawyers and on matters of constitutional law on the basis of anonymous handbills.

So ends your first lesson in judgment. You will call upon anyone presuming to judge others to justify his judgment by something more than the irresponsible words of nefarious or nilly Willies.

You turn back to the excavations you have undertaken for Old Caution. Suddenly the company geologist comes upon a field mouse, clearly a creature of the soaring sixties, embedded in tar on the rough tracery of a dire wolf, clearly done in by the ages.

"Fantastic!" he exclaims. "Nobody will ever believe it."

Nobody does.

Following the geologist's announcement of the find, Forbes quips that good things may come in small packages, but not on the back of a dire wolf. The Wall Street Journal comments that even in an age of conglomerate mergers, Old Caution's story stretches the imagination. Security analysts join in a blanket judgment that Old Caution is not what it used to be, despite its long and unimpeachable record of sound management and growth.

You reflect that men of affairs, however sound in their own business judgments, tend to be less so in outside fields. The findings of a geologist, you conclude, are not judged best by those who know nothing of geology.

So ends your second lesson in judgment. You will call upon anyone presuming to judge others not only to justify his judgment by something more than the irresponsible words of Willy, but also to present some qualifications of his own for passing judgment.

Once again you go back to your diggings and call in the artist-in-residence to depict the scene for a gift to the community. She creates a colorful abstraction that evokes, for some who see it, an underground landscape of fallen trees and one frail human figure reaching out toward a shaft of sunlight pocked with smoke. The caption reads: Is Excelsior Worth It?

The Excelsior painting, along with others, is displayed in the local museum, to be judged by leading citizens. The judges include an expert on the tax advantages of losses in a swimming pool of interests, a management consultant who thrives on bankruptcies and a native lady
Who Can Best Judge the Judges

who has collected miniatures for so long that she is known as Miss Minnie.

Miss Minnie makes a public statement that, in all fairness to the artist, it is best to remove the work from the list of entries without further ado. She adds that her colleagues agree with her considered judgment that the presentation of an abstraction like *Excelsior*, in a world which is in sore need of concrete works, casts doubts upon the values of the company sponsoring it.3

Old Caution’s president, who is not a dropout from the Harvard Business School for nothing, issues a statement that in his considered judgment somebody could serve humanity by collecting Miss Minnie and depositing her in the nearest trash can before she utters any more puny judgments or draws any more giant inferences. She shouts back that in the name of freedom she will enlist the people on her side to judge *Excelsior*, and for that matter, Old Caution, by the standards of the people.

You record the fracas as your third lesson in judgment. You will call upon anyone presuming to judge others not only to justify his judgment by something more than the irresponsible words of Willy, not only to present his own qualifications, but also to prove himself free from provincial or partisan notions and free from emotional bias.

The people Miss Minnie sets out to mobilize are, as usual, all at the ball game. Left to themselves, Miss Minnie and Old Caution’s president blow up a storm that at last lands them both in court. From now on it is an authentic judge who will be doing the judging; from now on our eyes are on him. What he determines may reach beyond the people before him and leave its mark on the law. Is he better qualified

---

3 An alternative version submitted by the artist also encountered the wrath of Miss Minnie, despite its relative concreteness. This painting depicts a half-upright, sabled dire wolf, nameless and faceless except for one blear eye in its bony head, sinking in tar which is patterned with flaming pots. Within reach of its outstretched forelimbs is a small, half-upright human being with a bewildered face, his forehead tarred with the name: *Uomo Sapiente, ma non troppo*. If he stays put, his name is mud. A steep slab of rock, stabbed with sunlight pocked with smoke, affords him a perilous escape. Far up on a spreading cumulus cloud there is eminent a tar pot steaming up smudge bubbles, tended by a pair of cross-eyed, dog-eared, flaming, grim wolves precariously poised toward the edge of their float.

Miss Minnie, after vehemently objecting to the somber tonality, singular luminosity and dual fields of vision in the work, voices the nub of her criticism: “Certainly we are all opposed to darkness, but there is implicit in this work a reluctance to join forces with all that has gone before, and at the same time a certain disturbing skepticism about our kind of sunshine.”
than any other man in the street to be the judge? And who is the best judge of him?

I find the first question easier than the second. I do not suppose that the average judge is necessarily a better man than the average man in the street or at the ball game. The chances may be no more than one in a million that he is a genius, or one in a thousand that he is extraordinarily competent, or one in a hundred that he has much more than ordinary intelligence. He cannot always be so bright or sensitive as the people who appear before him. Only rarely can he be as well versed in special fields as the specialists. Nevertheless, I think that by training and tradition he is more likely than not to do a better job of judging than even the specialists, and those odds are good enough for me. The law itself, which deals mainly with probabilities, in the main requires of a lawyer only that he prove his case to be more probable than not.4

You may agree that the odds favor the judges if you put two tests to yourself. First, each of you, and particularly any of you disposed to be impatient with judges, should imagine yourself before the court and then ask by whom you would want to be judged. Would your choice be your best friend, who thinks judges should be voted out of office whenever they render an unpopular decision? Would it be your neighbors, who have the most remarkable judgment except as to bringing up their children? Would it be your favorite cousin, who is a dear, but who has long been suffering from hardening of the mind as well as of the arteries? Would it be Willy or Miss Minnie? Would it be Old Caution's president, who is not about to give any weight to your side of the case in an automobile accident suit when he knows for a fact that you are the worst driver in town and obviously deserved what hit you? Would the judge of your choice even be Old Caution's lawyer, a man skilled in advocacy and counselling? Could you be sure that without judicial experience—that hard-learned lesson on how little anyone knows of total human experience—the lawyer would promptly quit himself of views developed from his practice? As you review all these alternatives, you may find yourself thinking better of actual judges.

In the second test, imagine yourself in the courtroom again, but this time as a judge who has just taken the oath of office. The very cere-

mony is likely to work a change in you. Henceforth you are not likely
to pass judgment on your fellows, not even on judges, as easily as you
did by your fireside. The oath of office calls upon you to sacrifice the
comfort of a closed mind.

If you are in a trial court you soon learn that each new case before
you is there because there is something to be said for each side. Rarely
is it clear at the outset which side is more probably right than not, and
sometimes the disputing parties do little to make the issues any clearer.
It is your job to listen intently for the sound of truth in the adversary
presentations. But who can know for sure where the truth lies? In
your daily life do you always know? It is still harder to know as a
judge, when you are confined to the facts before you. As you imagine
yourself in that role, you may once again grow more understanding of
judges.

If you are in an appellate court, there is usually still more to be said
for each side. In each new case you must decide how the law applies
to the facts that have been decided at the trial. I have described else-
where how hard is this seemingly quiet task:

Once the adversary shouting has died down and the court is left
with the echoes and the pro briefs and the con briefs, it is unhappily
mindful of the maxim that solemnly places it above the battle in which
it is about to become the deciding factor. A judge assigned to write
the opinion in a hard case looks up one morning from his desk to
receive the record. Often it closes in on him in gigantesque bundles.
Once in a while it is encased in a deceptively slender fagot of papers
that slides onto his desk without casting a shadow beforehand. Per-
force he looks from the instant case to the calendar and reckons how
best to budget for it from finite time and resources.

He wagers time for the latest intruder against the relentlessly mov-
ing clock, knowing that he must work with intense concentration
against it to absorb the record as well as the briefs of lawyers who
have deliberated the selected facts. He can only hope that the ad-
versaries have been of sufficiently high mind to assemble enough pieces
of the complicated puzzle in enough order to enable him to perceive
something of its contours and inner patterns. However perceptively
he puts the puzzle together, he will be constrained by the number
and arrangement of the pieces that each adversary has litigated in the
trial court.6

---

6 Traynor, La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law,
The judge has no choice but to decide the cases before him, even when he might prefer to see them decided out of court. He has no power to step out from the courthouse to tell people what they should litigate and what they should not.

He knows that he can rarely be more than fifty per cent popular in the courtroom, where the elation of parties who win their cases is matched by the often bitter disappointment of the losers. He is also disposed to be philosophic about his indifferent chances for popularity with the fickle public; he can be as tolerant of their flightiness on questions of law as of other frailties. He knows how few people know anything more about law than what they read in headlines or in capsule reports, and how often these are garbled. For all his tolerance he may reflect with sadness that even people steeped in a democratic tradition are prone to grow heedless of their great heritage of law.

Perhaps no one is better situated to appreciate that heritage, or less in need of history lessons about it, than a Virginian. Nonetheless it may be useful to recall a little history about judges before we come to a final answer on who can best judge the judges.

For centuries there was no such thing as a separate and independent judiciary in England. Before the seventeenth century judges were creatures of the king, holding office at his pleasure and subject to instant dismissal if they rendered a decision that displeased him. When he died, out of office they went, to be replaced by creatures of the new king. Job security was unheard of, let alone independence of mind. The judge most likely to succeed was the one best able to guess what the king expected of him. It is hardly a wonder that judicial corruption grew rampant.6

The wonder is that despite the forbidding aspect of concentrated kingly power, men risked their lives against it. When the Stuarts came to the throne, ringing one variation after another on the divine right of kings, there was a growing mutter of rebellion. In the courts the judges were developing an institutional personality larger than the sum of their individual personalities. With tenuous authority they were beginning to disagree with the divine and absolute monarch. Three times Sir Edward Coke managed such disagreement before James I dismissed him.7

7 See E. Haynes, supra note 6, at 55-58.
The muttering of the people became a rumble, and the resistance of the judges to the king became a trend, culminating in the reforms of the late seventeenth century. The Long Parliament, which Charles I was compelled to convene in 1640, demanded that judges be secure in office during good behavior. This demand was symptomatic of the struggle for separation of powers, and it grew vociferous when Cromwell and Charles II removed judges at will to maintain a loyal court. In 1680 Parliament again petitioned the king, Charles II, for judicial tenure, but it took the Revolution of 1688 and the fall of the Stuarts to bring about the Act of Settlement of 1701, which established tenure during good behavior. Henceforth a judge who not only behaved himself but also behaved like an independent judge was entitled to stay on the job.

The long struggle in England was not lost on the American colonists. Article III of the United States Constitution provides for life tenure and irreducible salaries for the federal judiciary, except in cases warranting impeachment. Moreover, the events from 1775 to 1790 convinced the colonists that an unchecked legislature was potentially as tyrannical as an unchecked king. Such men as John Adams and James Madison were as much on guard against elective despotism as executive despotism. Hence they limited representative government by adopting the Bill of Rights, to be interpreted by the courts. In fine eighteenth century phrases Alexander Hamilton envisaged a judiciary that would

\[
\text{guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.}^9
\]

Whatever their old-fashioned ring, these prophetic words are more timely than ever today, when the new arts of designing men and the influence of particular conjunctures combine to foment ill humors of such magnitude as to menace government itself.

The Supreme Court lost little time in establishing itself as the guardian of the Constitution. It is bringing live coals to Newcastle to recall

\[\text{\footnotesize{9 The Federalist No. 78, at 487-88 (H. Lodge ed. 1888) (Hamilton).}}\]
Marbury v. Madison\textsuperscript{10} in Virginia. Chief Justice Marshall’s pronouncement that the Court had power to adjudge the constitutionality of legislation, though stated in narrow terms, engendered much the same heated controversy in its day as recurring decisions on constitutionality generate in our own time. The precedent of a judicial check upon the legislature was destined to become entrenched across the country, in state as well as in federal courts, but it also generated a dialogue on the judicial power that has not abated in our time.

Separation of powers is more easily said than done, but it was done early in the Republic. There are always indigenous complications, however, which usually are long in the brewing. The first complication of separate judicial power developed around the very problem of who can best judge the judges. I shall note here only the major events that spawned what we now call Jacksonian Democracy—a movement which changed the environment, if not the outward forms of our courts, primarily by giving top priority to popularity as a judicial qualification.

It was natural enough after the Revolution for many to recall with less than kindness that the most prominent members of the bar had been Loyalists. Moreover, postwar debt collections did not endear lawyers, entrusted with these collections, to debtor farmers and businessmen. This incipient hostility fed upon another complex of circumstances. Common-law precedents emanating from England were not always adaptable to new soil, and at the same time there was no historic fund of American common-law precedents. From the beginning, therefore, American judges were compelled to play a far more creative role in the law than their British contemporaries.

Some diehards may have yearned for a distant place with comfortable precedents as old as the hills. Most Americans, however, accepted the reality that judges had to forge their way through a legal wilderness comparable to the actual one westward. They proceeded from that premise, however, to one of those curious extensions that is the despair of logicians. If our judges must perforce be creative when there are no adequate precedents, they speculated, then they are lawmakers no less than the legislators, and the more so because of \textit{Marbury v. Madison}. If that is so, then they too should be answerable to the popular will, that will-o’-the-wisp blown about by the most vocal Willies or Miss Minnies of each fleeting day. The rallying cry would no longer be "\textit{Fiat lux!}" but "\textit{Fiat ignis fatuus!}"
Few noticed the missing links in such thinking. First, judges have no power to interpret the law, let alone make it, except as cases come before them, and even then their interpretation is severely bounded by the case itself and by the common law. They are not at all free to make law as the legislature makes it. Second, their decisions are subject to revision or cancellation by legislation so long as it keeps within constitutional bounds. Likewise, few noticed the dangers of hooking up courts to the popular will. Such a hookup would militate against the people themselves by vitiating the independence and impartiality of judges. Worse still, it would bar the way to rational measures for assuring responsibility in judicial office.

Reason is of little avail, however, when the stars are fixed in their course. They were fixed on the course toward popular, and hence popularly elected, judges, for there was still another influence working in that direction. The revolutionary political philosophy that swept through Europe in the first half of the nineteenth century had its effect in this country, too. If all men are created equal, said facile philosophers, then it follows that all men are equal in every respect. Few realized the madness in this methodical leap to an unforegone conclusion by those who failed to see the trees for the forest. It had taken centuries for men to realize the importance of protecting each individual tree by regulations that would safeguard it against the wild-swinging axes of nilly Willies, who sometimes wore crowns. Now the Willies, sometimes wearing raccoon caps, were intent on cutting individuals down to size again, and all to the same size, like the endless twins in a paper pattern.

Not many suggested that a blacksmith could bind up a wound as skillfully as a doctor, or that a doctor could shoe a horse as skillfully as a blacksmith. Instead, the axe swingers concentrated their efforts on men in government, whose duties were merely to keep the states united, get on with a few explorations, maintaining public order at home and while away any spare time with foreign-policy chores. Such odd jobs were presumably suitable for Everyman, regardless of his qualifications.

During the heyday for the popular man in public office the courts long remained immune from popular assault. For some seventy-five years of our early history practically all state, as well as federal, judges were appointed with tenure assured during good behavior. Nevertheless, they became increasingly vulnerable to criticism that, as in our

own time, ranged from the most responsible reasoning to the most irresponsible ranting.

President Jackson's first inaugural address set the tone of the new day. Nurtured in the philosophy that all men are in fact equal, he soon proceeded to the corollary that they were as fungible in public office as potatoes. It was but a short step to selection of judges by the masses, and between 1846 and 1866 a majority of states took that step. Only the difficulty of amending the Constitution saved the federal judiciary from also being staffed henceforth by Willies and Miss Minnies.

In 1889 Lord Bryce commented that popular elections, short terms and small salaries all worked to lower the character of the judiciary in the United States. He deplored the political character of elections, which sometimes entailed even election frauds. He also deplored the timidity, and sometimes even venality, these elections induced in judges.

Later critics documented the severe losses of judicial manpower that resulted from short terms. Roscoe Pound, emphasizing that continuity and length of service are important factors contributing to an able judiciary, noted: "It is significant that the twelve outstanding judges in American judicial history each served at least a quarter of a century in what was substantially judicial office." Later observers reported with dismay the circus-like aspects of popular elections of judges. Many qualified men who would otherwise grace judicial office cannot bring themselves to run through such a gamut. Moreover, the gamut continues even for a successful candidate, for he is no sooner in office than he must envisage the problem of re-election. Inevitably there are consequences, sometimes dire, for the electorate itself. It is not hard to trace the course of harm from the candidate to the voters. They would not ask of a judge that he put away his workpapers to join a three-ring circus for a few months. They only ask him to do much worse.

In the circus he would need only to please the onlookers, and it is only they who would pay the price for his antics. In a political contest in

---

13 Pound, Introduction to E. Haynes, supra note 6, at xiii-xiv.
which he must market the soul he once called his own, it is the public who must pay the price for his blighted independence.\(^{15}\)

There is little cause for continuing to muddle along with so lunatic a procedure merely because "by luck the populace sometimes gets better than one might expect, or by luck an unlikely choice proves in time worthy of office."\(^{16}\)

Among the most dire consequences of the popularity contest for judicial office is the scofflaw spirit it breeds, militating not only against the bench, but also against the bar and the law itself. Yet the judges cannot properly march in the streets for reform, and bar associations have been slow to muster their forces for better courts.

Nevertheless, a glacial force has been gathering momentum against the slag of years—the force of nationwide legal education, now generally recognized as the best in the world. Young lawyers have come along who are hospitable to improvement in the judicial process as well as in substantive law, and recent years have been marked by accelerating progress. Woe unto the state that fails to keep up with such progress. The quality of that state’s justice signifies much to others about its education and government, and indeed about its future as a distinguished or backward member of the family of states.

Many states have already adopted, or are in the process of adopting, a merit selection plan derived from the so-called Missouri Plan.\(^{17}\) In one such plan the governor of the state appoints a judge, subject to the veto of a commission.\(^{18}\) In another, the governor makes the appointment from a list submitted by a nominating commission, which in large part represents the bar.\(^{19}\)


\(^{18}\) Since 1934, appointments of appellate court judges in California have been made by the governor, subject to confirmation by a commission on judicial appointments. Cal. Const. art. VI, § 26.

\(^{19}\) Among the states having such a plan are Alaska, Colorado, Iowa, Kansas (supreme court only), Missouri (appellate courts and certain trial courts) and Nebraska. See Merit Judicial Selection, Tenure, Discipline and Removal Plans—The Extent of Their Adoption, 50 J. Am. Jud. Soc’y 112 (1966).
The merit selection plans mark a great leap forward from the popular elections of the long heyday of Willy and Miss Minnie, who unfortunately sometimes turned out to be judges as well as voters. These plans also mark a great leap forward from patently political appointments. They are more than ever essential now that the number of judges must be increased to keep up with the population and a prodigious economy.

In California, for example, there are 920 trial court judges, thirty-nine intermediate appellate court judges and seven supreme court justices. During his eight year incumbency from 1958 to 1966 the last Governor of California made more than 560 judicial appointments. Of these, eighty-one were made in the last weeks of his tenure—a phenomenon attributable not only to retirements but also to the fact that the legislature had recently created six new appellate judgeships, six new superior court judgeships and fifteen new municipal court judgeships to handle a workload that was taxing many courts beyond reasonable limits. As one study has noted: "[T]he present power of a California governor in appointing trial judges exceeds that of the President of the United States, inasmuch as appointments by the President to the federal trial court must be confirmed by the Senate." 20

California is moving toward creating a commission on judicial appointments that will nominate all candidates for judicial office. The power of nomination held by such a commission might well be counterbalanced by giving to any lawyer meeting the constitutional and statutory qualifications the right to apply for appointment and to be considered therefor after investigation.

As to the personnel of the proposed commission, most of us with an occupational bent would welcome a dominant representation of judges, reinforced by both law teachers and lawyers in public service and private practice. I should also welcome some representatives of the public. They would not be a Willy or a Miss Minnie who happened to know the governor and little else. The best that one can postulate are citizens of high enough intelligence to comprehend their legal colleagues and of wide enough experience to electrify the legal atmosphere with a few insights from the nonlegal world. They could inaugurate a modern tradition of public service that would do the Republic proud.

It is not enough to resolve the question of who can best select the judges. We reach finally the troublesome question of who can best

20 Nelson, supra note 11, at 4.
judge the judges once they are in office. It is only fair to relate that question to the federal as well as to the state judges, if we agree with the public-spirited Virginian, Thomas Jefferson, that everyone in public life should be answerable to someone. 21

In determining who that someone should be, we can probably agree once again to rule out the usual venal or vociferous characters who would bring the courthouse down with them in their wrath at this judge or that. The problem of disqualification, whether for incapacity or for other reasons, is akin to the problem of removing a defective vessel from a china shop without damaging the sound ones nearby. I have noted elsewhere that in the judiciary, as in every other walk of life, a bad man is as hard to lose as a good man is hard to find. 22

In 1960 California pioneered in resolving the problem of the defective vessel by establishing an unsalaried Commission on Judicial Qualifications, through which the judiciary can police its own ranks. 23 The procedure can be summarized briefly. Upon a complaint to the executive secretary the Commission investigates the allegations. If it finds them frivolous, it does no more than inform the complainant accordingly. If, however, it encounters a problem of judicial incapacity or misbehavior, it seeks a voluntary solution, holding in confidence all proceedings to that end. Such an approach is particularly appropriate for the painful case where a judge must be made to understand that he has become physically or mentally incapacitated. In this regard it is worth mentioning that voluntary retirement is rendered less painful in California by a fair pension system. Confidential preliminary proceedings are also appropriate in cases of errant behavior not warranting removal.

The Commission consists of five judges appointed by the California Supreme Court from specified lower courts, two lawyers appointed by the Board of Governors of the California Bar and two laymen appointed by the governor with the consent of the state senate. This combination gives the Commission a nonpartisan public character free of public pressures.


22 Traynor, supra note 16, at 504.

When the circumstances warrant retirement or removal, and when the judge refuses to retire or resign voluntarily, the Commission arranges for a hearing. It bears noting that there is a long-established Judicial Council in California which has formulated rules to ensure a fair hearing. Once the Commission decides to recommend retirement or removal, the judge is entitled to a hearing before the California Supreme Court.

When a bench can quit itself of a burdensome member through such a commission, it gains as much as the bar and the public. It reaps added benefits from each judge’s quickened awareness that he must meet reasonable standards of competence and behavior in relation to his office. Moreover, once judges are held responsible to an impartial commission, there is no longer the vestige of a case for subjecting them to the popular or powerful will of the day.

I would be confident that qualification commissions will gain wide acceptance, were they not so plainly sensible. As it is, most state judges and all federal judges still remain free of such rational controls. The situation is all the worse as to the state judges because most of them continue to be subject instead to the errant popular will. Should merit selection commissions on judicial appointments and qualification commissions on incumbent judges ever become widespread for both state and federal judges, we shall be well on the way to minimum standards of judicial responsibility.

Lest we now become too zealous about judging the judges, let us temper criticism with some understanding of the almost insoluble problems they are called upon to resolve, the many constraints within which they must work, and the constant critical evaluation of their work that already abounds in legal journals.

The problems that a judge must resolve come from every direction. The public that heeds only Willy or Miss Minnie has not the slightest idea of the volume and endless variety of these problems. For all that many people know there is nothing more to law, and particularly to criminal law, than the most publicized controversies that make constitutional history. A judge is likely to understand the public’s frustration at decisions they do not agree with, for frustration is his daily lot. Rarely can he move swiftly to a decision with the comfortable assurance of those who feel sure there is only one side to a case. It is his job to decide how best to keep the law on a rational path between the devil and the deep blue sea. He may find no more cause for rejoicing than
his critics do when the law compels him to accord a devil the same benefits of due process he would accord anyone else. A critic disposed to hang the judge and his independence might do well to reflect upon what might then happen if a formidable state turned against him, perhaps without cause, and it was his turn next at the gallows.

Moreover, as we noted earlier, whatever the far-reaching consequences a decision may have, the judge must still arrive at it within the narrowest constraints. He must work within the boundaries of the case before him and with the traditional circumspection imposed upon him by precedent. Most people today agree that law does, and must, evolve with the times. Nevertheless, the judge has a responsibility to make clear and orderly transitions from the past to the present. An appellate judge who has the last word in the law must account painstakingly for his decision in an opinion that becomes a public record for all to read and criticize.

The influence of responsible criticism is constantly at work in the law, and not solely in the legal journals. Each new precedent, like every venerable precedent that once also was new, is itself a critical commentary on some inadequacy in the law. The very term means that it was once unprecedented, that it has given a notable turn to the endless evolution of legal rules.

I emphasize the interaction of tradition and criticism in the judicial process because it goes far to explain why judicial office tends to develop, even in mediocre men, an approach to the law that is both disciplined and open-minded, and an objectivity that is the basic element of the judicial spirit. As you reflect upon the endless problems confronting a judge, the constraints within which he must work, the constant barrage of responsible critical opinion that comes his way from lawyers, law teachers and even other judges, you may decide that, everything considered, he is doing his job reasonably well. You may also decide to leave criticism to the many responsible critics who are likewise doing a reasonable job of regularly appraising his work. You may even give your accolade to judges who refrain from crossing swords with irresponsible vilifiers, less because it might be unbecoming to an officer of the law than because it might be a distraction from the demanding work

---


of judicial office. Who knows, you may also work for selection plans that will encourage good men to take judicial office and for qualification commissions that will ensure continuing responsibility in office. Then no one will be able to write you, as Thomas Jefferson once wrote to Peter Carr: "I am much mortified to hear that you have lost so much time; and that when you arrived in Williamsburg, you were not at all advanced from what you were when you left Monticello."  

It is high time to evolve methods for judging our judges properly. Meanwhile, let us have some understanding of the countless perplexing, unpublicized cases that are as much a part of a judge's work as the recurring controversies that make constitutional history. They bespeak the inevitable troubles of a diverse and mobile society as it continues to grow and prosper. To judges and their critics alike, Virginia, like many another mother, may still proffer words of perspective: Trouble is nothing new, my child. Trouble is a condition of life. What counts is to meet it proudly, with all the sense you can muster.