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A TRIAL LAWYER LOOKS AT MERIT JUDICIAL SELECTION

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Recently, Glenn R. Winters, Executive Director of the American Judicature Society, and admittedly the most knowledgeable man in America on the subject of courts, stated that there is no area of government in this country less understood than the administration of justice under our law in our courts. Not only is the man in the street functionally illiterate about how the third branch of government operates; but civic leaders of local, state, and national stature are also uninformed on the subject. It is also true that many members of the legal profession, both bench and bar, are shamefully ill-informed or just do not know. Even our schools and universities are not without their share of fault. For, while they teach much about the executive and legislative branches of government, they teach little, if anything, about the courts and just do not endeavor to cover the subject adequately in their textbooks. They know so little about it that they avoid it.

Although my topic includes the merit selection of appellate judges, I want to talk mainly about the merit selection and the importance of the trial judges.

First, I will briefly discuss the merit selection of appellate judges. It is certainly obvious that popular election, either partisan or so-called non-partisan, is no way to select those judges who have appellate responsibility. This is particularly true if they are selected on either a state-wide or a regional basis. The voters have no way of knowing them except through expensive, time-consuming campaigns; and even then, national or state issues which have no bearing on the courts too often put appellate judges in office with no regard for their qualifications.

At a time when moral decay, soaring crime, and growing contempt for law and order are becoming a top national concern, politics, corruption, and incompetence are sadly degrading some of our country's courts and the image of justice.

We might ask, "Don't people know better than to vote for and to elect a man who has a bad reputation and who might later turn out to be a corrupt judge?" The answer is that they do not. Immediately after an election in New York, the League of Women Voters of the City of New York conducted a survey. Of 3,367 persons interviewed, 88 per cent said they had voted for judges on the ballot; but only half of them could remember the name of even one judge for whom they had voted. One thousand two hundred fifteen voters couldn't remember a single name. The most frequent explanation was: "I voted the straight party ticket." Those who remembered a judge's name did so because it was a name prominent for other reasons.

Even if the people are acquainted with the candidates, how are they to assess those scholarly and reflective characteristics which are so important on the appellate bench? Only through a careful screening of potential candidates for appellate judgeship by a non-political group of lawyers and thoughtful, informed laymen can we be assured of the best possible judicial material on the appellate courts.

I now want to leave the subject of the merit selection of appellate judges and spend the balance of my time discussing the merit selection of the trial judge. He is so important to the judicial system and is an important symbol of justice under law to our people.

Any lawyer who has had experience at the trial level knows that the trial judge in most instances is different from the judges who sit on the appellate bench. This is not to say that a good trial judge cannot become a fine appellate judge.

Many of our trial judges have become distinguished and outstanding appellate judges. It is only to point out that a trial judge has a much more demanding context in which to work. He has to make decisions on the spot which are always subject to review. He has two or more lawyers before him in an adversary setting who are not only trying to make a record for possible appeal but who are trying their best, as they should do, to get a favorable decision from him. He also has to be a person who can communicate with witnesses and jurors.

I recently read one of the most provocative essays about trial judges in the book, *The Courts, The Public and The Law Explosion*, by Harry W. Jones, who is the Cardozo Professor of Jurisprudence at Columbia University. I recommend this book to you. Some of the things I am going to say about the trial judge are from that book.

Basic reforms in court organization and sound and imaginative new procedures for handling the mounting flow of civil claims and criminal prosecutions are indispensable for meeting today's crises in the courts; but law can never be much better than the men who administer and apply it. Legal rules and procedures do not operate automatically, nor do cases decide themselves. There is very little in legal literature on the nature of the judicial process in the lower courts.

I cannot stress enough the importance of the trial judges. The impression that prevails in society concerning the justice or injustice of our legal institutions depends almost entirely on the propriety, efficiency, and humaneness of observed trial court functioning. Important as it is that people should get justice, it is even more important that they be made to feel and see that they are getting it. A typical citizen will never see an appellate court in action; but there is every likelihood that he will sooner or later be drawn into the operation of one or another of our trial courts, whether as a litigant, witness, or juror.

Members of the public look upon the trial judge as living justice and as the personification of the legal order. For better or worse, it is the trial judge upon whom this representative responsibility falls in our society. He is the law for most people. Trial judges' failure in honesty, energy, patience, and fairness can do nothing but impair public fidelity to law. As far as the public is concerned and the public image, the personality of the appellate court justice seems less significant than that of the trial judge of general jurisdiction. The trial judge, to be effective, must have the qualities of mind, heart, and character that may differ from—but are in no way inferior to—the qualities required for effective service on a high appellate court, even a state court of last resort or the Supreme Court of the United States.

It must be brought home to the legal profession and to the public generally that a man unworthy by character and temperament to be an appellate judge is, in a real sense, even more unworthy to be entrusted with the highly visible powers and responsibilities of a trial judge. In the great bulk of litigated cases, the trial judge is by far the most important and influential participant. This is so whether or not the case at hand is a jury case or an appeal from the trial court judgment to one or more higher appellate courts and whether or not the legality of the controversy involves the interpretation of a federal or state statute or a question of common law. The ultimate fate of most cases, whether appealed or not, is determined by what happens to them at the trial stage. In factual disputes, the rulings in the trial court are usually final; and the rulings in the trial court characteristically have to be made by the trial judge "from the hip" and he is usually under pressure and without opportunity for extended consultation of the formal authorities in the law books. Many trial judges who have later moved up to appellate courts have spoken gratefully of the more relaxed pace and opportunity for reflection they found in appellate work after years of the hurly-burly trial court proceedings.

The trial judge who is shaky in professional understanding, imperfect in moral resolution, and unduly conciliatory in personality will inevitably be overpowered and overborn by forceful and aggressive trial counsel. If the adversary system is to work justly, the trial judge must command the respect, not necessarily the affection, of every advocate who may appear before him, however powerful or distinguished the advocate may be. Also, the very real values inherent in the adversary system of litigation are undermined when the trial judge in the case is a man of arrogant and abusive temperament. The trial judge must be an honest man; a man of exceptional integrity, financially, politically, and socially; as well as a lawyer who is distinctively qualified to be a judge.

The way to improve the image of justice is to improve the reality of justice in the trial courts of this country. That is why it is so important that such men as I have just discussed are selected as trial judges. We of the legal profession, both

lawyers and judges, have a special responsibility to see to it that juries, parties, witnesses, newspapermen, and others who come into the trial courts do not only see and feel that justice is being done but also have a sense that it is being done with courtesy and with businesslike efficiency. All of us here today who have had trial experience know that ultimately this is the trial judge's responsibility.

What is the plan for the selection of judges which was endorsed by the American Bar Association in 1937? This plan is often identified by the popular caption, "Missouri Plan," as we were the pioneer adopting state. The Missouri Plan combines the best features of appointive and elective systems. It is characterized by three basic elements:

1. Nomination of slates of judicial candidates by non-partisan lay-professional nominating commissions.
2. Appointments of judges by the Governor from lists submitted to him by the Commission.
3. Review of appointments by the voters in succeeding elections in which judges run unopposed on the sole question of whether their records warrant retention in office (Merit Retention).

This, then, is the plan that Missouri adopted in 1940; and it has operated in portions of our state for almost twenty-five years including the trial courts of my home county, Jackson County, Missouri.

First, Jackson County, Missouri, has better qualified trial judges, in my opinion and in the opinion of most of my colleagues at the trial bar, than it had before under the elective method. This is no reflection, of course, upon many of the fine judges who previously had been elected. Secondly, the majority of our trial judges have been trial lawyers and have been practitioners in all of the courts. They have not come from large firms but have been either individual practitioners or trial lawyers from small firms. Third, the trial judges who have been selected under the Missouri Plan have the confidence of the trial lawyers in Jackson County and, even more important, the confidence of the civic leaders and the general public of our community. May I quote what the president of The Kansas City Bar Association said about the Missouri

Plan: "Any person who must go to court to protect his legal rights can be sure of a fair trial under law before our Missouri Plan judges. No one, be he lawyer or litigant, can expect more and none gets less in our courts." The president of the Lawyers Association of Kansas City said:

This plan has given all citizens of this state the assurance of able and impartial courts in which each citizen is certain of a fair trial. Such a system is fundamental to the continuation of our democratic system. Since the adoption of this Plan in 1940, the Missouri courts under the Plan have fulfilled these high requirements.

This confidence extends beyond just our Kansas City, Jackson County, Missouri, lawyers. Honorable Loyd E. Roberts, president of the Missouri Bar, recently made an impartial survey in which he took a good cross section of all the lawyers in the state. He asked them to give their written confidential opinions to him as to whether or not the Missouri system of selection and tenure of judges under the Missouri Court Plan has functioned for good. "Without exception," Mr. Roberts states, "every lawyer confirmed the fact that the Plan has functioned for the good; and the almost universal opinion among the lawyers in the State of Missouri is that the system is superior to the system which it supplanted." This opinion appears also to be generally held among laymen.

These opinions may not seem to square with criticisms which have been expressed from time to time by individual lawyers. An examination of those criticisms discloses, however, that usually they are of some feature of the system rather than to the system as a whole. Thus, fault-finding of certain features of the plan has sometimes been interpreted as a condemnation of the plan. Nearly every lawyer who replied to Mr. Roberts' request for his opinion of the plan, while entertaining the opinion that the plan has functioned for good and is superior to the plan it supplanted, nevertheless had suggestions for its improvement. Surprisingly enough, there is almost unanimous agreement on the suggestions for improving the plan. It would have been too much to expect that any plan would not, in the course of twenty-five years, disclose areas in which it may be improved.

The general consensus among Missouri lawyers is that there are two areas in which improvements in the Missouri Plan could be made. They are (1) provision for compulsory retirement of judges; and (2) a different method of selecting or appointing lay members to the Commission which selects a panel of three to be submitted to the Governor from which an appointment is to be made.

Under the Missouri Plan, the commissions which select the panels to be submitted to the Governor are made up of lay and lawyer members. For the Supreme Court and the courts of appeals of which we have three in Missouri, there is one commission known as the Appellate Judicial Commission which consists of seven members, one of whom is the chief justice of the Supreme Court who acts as chairman; three of whom are lawyers, one from each of the courts of appeal districts in Missouri, selected by vote of the lawyers of each district; and three of whom are citizens appointed by the Governor, one from each court of appeals district.

The Circuit Court Commission consists of five members, one of whom is the presiding judge of the court of appeals district in which the judicial circuit is located; two of whom are members of the Bar selected by the lawyers of the circuit; and two of whom are citizens appointed by the Governor from among the residents of the judicial circuit.

Let me give you a recent example of how a trial court vacancy was filled. Two of the Jackson County, Missouri, trial judges retired because of a combination of age and illness. This created two judicial vacancies. Our judicial nominating commission issued a public statement carried by our press and other news media that the nominating commission would soon meet to consider two panels of three names each to be sent to the Governor for him to select one from each panel to fill the vacancies and that the nominating commission was open to suggestions and recommendations of names of those members of the Jackson County Bar best qualified to be circuit judges.

The Commission received the names of many outstanding and highly qualified lawyers who were willing to be considered by the Commission because of the non-partisan merit type

of selection involved. The Commission on its own surveyed all eligible lawyers in the circuit to see if it had before it the names of all of those who ought to be considered. From all sources, the Commission ended up with 57 names. After several weeks of careful study by the Commission, the list of eligibles was cut to twelve, then to nine, and finally to those six who the members of the Commission sincerely believed to be the six best qualified of all.

Those six names—three on each of two panels—were sent to the Governor who, after his own independent consideration of them, made his selection of one from each panel. His selections were widely acclaimed by the press and the public as excellent choices from two very outstanding panels. It is well to be noted that each of the two panels of three names submitted to the Governor happened to contain the names of two Democrats and one Republican. The Governor was a Democrat. He appointed a Democrat from one panel and a Republican from the other. This was not deliberate; however, it convinces me that the Missouri Plan has so proved its merit that our Governor, who is oath-bound to follow the Constitution, shares its spirit as well as its letter. He selected the two he thought best qualified, irrespective of political party.

November 5, 1965, will mark the twenty-fifth anniversary of the adoption of the merit selection of judges in Missouri. After twenty-five years, it is my opinion that the lawyers and the other citizens of Missouri feel that the merit selection of judges is the most effective and intelligent way to select judges.