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# THE ATTRACTION AND SELECTION OF GOOD DISTRICT COURT JUDGES

LAWRENCE E. WALSH\*

One of the jewels of our Anglo-American heritage is our judicial system. With all of its defects, delays, costs, and uncertainties, it bridges more effectively than any other institution the inescapable conflicts between individual liberty of thought and action and conformance with patterns necessary to democratic government and the avoidance of violence. The evolution of each of our different courts has produced its particular brand of individual excellence. The polished skills of an English barrister, the prompt rendition of decisions of English courts, and the homespun common sense and differing glints of intellect of our multifaceted state courts have all contributed to our incomparable system of justice.

This paper is devoted to the preservation and strengthening of the high qualities of the United States federal judiciary. My concern with the quality and selection of district court judges is not new or by any means unique.<sup>1</sup> Recent problems with judicial salaries, coupled with the emergence of the federal courts in the last half century as the most prolific and perhaps most important part of our judicial system, requires continuing vigilance to preserve their excellence.

## *Attracting Lawyers to District Judgeships*

My petition is for the preservation of the high quality presently found in our district court judges. To the individual litigants and the lawyers who represent them, these are the judges who will have the greatest impact on most cases. Their decisions are final in ninety percent of all proceedings. Although appellate courts may correct occasional errors of law,<sup>2</sup> all of the human intangibles focus on the trial judge. In

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\* A.B. 1932, LL.B. 1935, Columbia University. The Author has served as United States District Court Judge, S.D.N.Y. (1954-57), Deputy Attorney General (1957-61), Chairman of the American Bar Association Standing Committee on Federal Judiciary (1969-72), and President of the American Bar Association (1975-76). This article is an expanded version of remarks delivered at the Brookings Institution Seminar on the Administration of Justice, held at Williamsburg, Virginia on March 6-8, 1981.

<sup>1</sup> See generally Walsh, *Two Basic Steps Toward the Better Selection of Federal Judges*, 12 AM. U. L. REV. 14 (1963); Walsh, *The Federal Judiciary... Progress and the Road Ahead*, 43 J. AM. JUN. SOC'Y 155 (1960).

<sup>2</sup> The appellate courts' function of correcting errors is not the same as the district courts' function of correctly deciding cases. Only single issues of a case may be before the appellate court and presumptions normally operate in favor of the lower court's decision. Moreover, as the appellate court may only reverse decisions in which there are prejudicial

reality, the courtesy, efficiency, decency, and decorum of the courtroom are his responsibility alone.<sup>3</sup>

The range of problems now committed to these judges would have seemed unbelievable less than fifty years ago. Still required to give precedence to the simplest types of criminal proceedings, federal judges also must manage litigation requiring the review and even the administration of large institutions, conduct class actions involving thousands of claimants, and fashion the ever new forms of relief necessary to meet equitable needs.<sup>4</sup> These contributions are not made in the quiet environment which one ordinarily seeks for reflection. They are hammered out in tension and in conflict under heavy calendar pressure and in full public view, sometimes harassed by community pressure and reaction.

Two basic needs must be met to preserve our excellent judicial system. First, new district court judgeships must be created as the demand upon the system grows.<sup>5</sup> Otherwise, the quality of justice is impaired by overwork and inadequacy of time for the just determination of causes.

Second, district court judges must be compensated fairly. Under standards of selection in effect since the Eisenhower Administration, most judicial appointees have had to sacrifice more remunerative professional opportunities.<sup>6</sup> This is a sacrifice willingly made because of the honor of public service and the high respect in which the federal judiciary is held. Unless compensation is kept within limits of fairness, however, inflation will force the retirement of some of the best judges<sup>7</sup> and will discourage many of the most qualified candidates from accepting appointments.<sup>8</sup>

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errors or which are clearly erroneous, the decisions it upholds may not be actually "correct" in the trial court sense. See Cohn & Baxter, *The Trial Court in the Hierarchy of Judicial Lawmaking: A Threshold Schema*, 59 GEO. L.J. 1, 19-20 n.74 (1970).

<sup>3</sup> See generally Chandler, *The Role of the Trial Judge in the Anglo-American Legal System*, 50 A.B.A. J. 125 (1964); Jones, *The Trial Judge—Role Analysis and Profile*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 124 (H. Jones ed. 1965).

<sup>4</sup> See generally Federal Judicial Center, *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89 (1976) (indicating broad scope of district court issues). The proportion of pending complex cases (antitrust, civil rights, class actions, etc.) has been steadily increasing. See Freeman, *Crisis in the Federal Courts: A District Judge's Analysis*, 13 GA. ST. B.J. 130, 130 (1977); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 401, 401 n.1 (1978).

<sup>5</sup> See generally Mikva, *More Judgeships—But Not All At Once*, 39 WASH. & LEE L. REV. 23 (1982).

<sup>6</sup> See *Quadrennial Commission Recommends Increases for Federal Judges*, 67 A.B.A. J. 162, 162-64 (1981); Chapin, *The Judicial Vanishing Act*, 58 JUDICATURE 160, 160-61 (1974) [hereinafter cited as Chapin]; Kraft, *The Case for Increased Judicial Compensation*, 55 FLA. B.J. 366, 368 (1981).

<sup>7</sup> See Chapin, *supra* note 6, at 161; McGee, *Are Judicial Salary Increases Coming?*, 60 A.B.A. J. 1259, 1260 (1974); Note, *Compensation of the Federal Judiciary: A Reexamination*, 8 U. MICH. J. L. REF. 594, 603 (1975).

<sup>8</sup> See Mooney, *Federal Judges Compensation—Proposed Legislation*, 27 N.Y.U. L. REV. 457, 457 (1952).

Ideally, a judicial appointee should be between the ages of forty and fifty five. In other words, he should be experienced but young enough to undertake the heavy workload he must carry and flexible enough to adapt to the demands of his new calling. Between these years, however, the demands of an appointee's family are likely to be the highest, since his children are probably in preparatory school, college, or graduate school. It is also at this age that he is at the height of his earning capacity. Unless judicial compensation is sufficient to attract the most promising lawyers within this age group, the available pool ultimately will be limited to the independently wealthy, the less qualified, and older attorneys who have passed their most productive years.

### *The Selection Process*

In the United States the process of selecting judges is more complex and less orderly than that in England.<sup>9</sup> In England the legal profession is divided between barristers and solicitors. Judges are selected from the bar which in turn is divided into four inns of court, each consisting of less than one thousand members. Lord Widgery, the late Lord Chief Justice, once told me that he had at least a nodding acquaintance with every barrister and knew most of them, not only in his own Inn, but in the other three as well. A judicial vacancy is filled by the Queen on the recommendation of the Lord Chancellor, who in turn, on an informal basis, may seek the advice of other judges and the benchers of the inns of court—members of a small governing body of each inn. In this way appointments to the bench are expected to be on the basis of merit with little weight to political factors frequently considered in the United States.<sup>10</sup>

In the United States there are over three hundred thousand lawyers and there is no division of the profession between trial lawyers and others. Nor are there any institutions comparable to the inns of court. In the United States, the President appoints federal judges, with the advice and consent of the Senate.<sup>11</sup> These federal judgeships are among the most important of a President's appointments.<sup>12</sup> With life tenure, the long-term influence of a federal judge will probably exceed that of office holders serving merely during the term of an individual President.

A President searching for a judicial nominee depends upon the Attorney General who in turn leaves the responsibility to the Deputy Attorney General.<sup>13</sup> The Deputy Attorney General is unlikely to have first-

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<sup>9</sup> See generally Coldstream, *Judicial Appointments in England*, 43 J. AM. JUD. SOC'Y 41 (1959); Goddard, *Politics and the British Bench*, 43 J. AM. JUD. SOC'Y 124 (1959).

<sup>10</sup> Stason, *Judicial Selection Around The World*, 41 J. AM. JUD. SOC'Y 134, 136 (1958).

<sup>11</sup> U.S. CONST. art. II, § 2.

<sup>12</sup> President Eisenhower in particular recognized the importance of federal judgeships. Until his first heart attack, he met personally every federal judicial nominee before he sent the nomination to the Senate. See Rogers, *Judicial Appointments in the Eisenhower Administration*, 41 A.B.A. J. 38 (1957).

<sup>13</sup> See Chase, *Federal Judges: The Appointing Process*, 51 MINN. L. REV. 185, 195 (1966) [hereinafter cited as Chase].

hand information as to lawyers outside of his own state and a few other places to which his practice may have taken him. He therefore turns to the senators of the state in which the vacancy occurs if they are members of the same party as the President. If they are not, he ordinarily consults the chairman of the national committee of the President's political party.

From these sources the Deputy Attorney General compiles a list of possible candidates. He then has the responsibility for evaluating those suggestions. For this purpose he can seek help from two principal sources: the Standing Committee on the Federal Judiciary of the American Bar Association (ABA Committee) and the Federal Bureau of Investigation (FBI).

Usually, the Deputy Attorney General will first consult the ABA Committee. The Committee is composed of fourteen lawyers divided among the twelve judicial districts. It has no staff and has never sought one. The Committee works informally and can give the Deputy Attorney General a quick preliminary response after interviewing twenty or thirty lawyers in the appropriate community. The advantage of the preliminary investigation is that it reduces the awkwardness of rejection after the public interest generated by a more broad-scale investigation. If the informal investigation indicates that the prospective nominee is "probably Not Qualified," the ABA Committee interviews the candidate and provides him the opportunity to comment on problems which may have arisen before such a negative report is made to the Deputy Attorney General.<sup>14</sup> If the ABA Committee concludes at the informal stage that the proposed nominee is "probably Not Qualified," the Deputy Attorney General usually will not request a formal report.<sup>15</sup>

If the potential nominee is highly regarded, the Deputy Attorney General is then in a position to request a more extensive investigation by both the ABA Committee and the FBI. The ABA Committee will undertake a thorough investigation among the lawyers of the district in which the vacancy occurs. The FBI will obtain for the Deputy Attorney General a community survey as to the person concerned. FBI agents can interview a wide variety of people who may be able to provide information about a candidate's character which would not come to light in the ABA Committee's investigation.<sup>16</sup> The FBI acts solely as an impartial fact-gathering agency and does not evaluate its own reports.<sup>17</sup>

The ABA Committee has been performing its investigatory responsibility for at least fifty years.<sup>18</sup> Its present role, however, began at the

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<sup>14</sup> See *Report of the Standing Committee on Federal Judiciary*, 101 A.B.A. REP. 759, 760 (1976).

<sup>15</sup> *Id.*

<sup>16</sup> See Chase, *supra* note 13, at 200-01.

<sup>17</sup> *Id.* at 201.

<sup>18</sup> See generally Grossman, *Federal Judicial Selections: The Work of One ABA Committee*, 8 MIDWEST J. POL. SCI. 221 (1964); Grossman, *Role of the American Bar Association*

close of the Truman Administration and with the beginning of the Eisenhower Administration. At that time, the President made the critical decision to permit the Committee to review potential nominees *before* they were nominated, rather than express its views in opposition or support before the Senate Judiciary Committee following the nomination. As a result, the ABA Committee was far better able to get frank and candid responses to its inquiry. Once the nomination is made and announced, adverse comment tends to subside and the ABA Committee may be misled by those who are reluctant to criticize someone who is expected to hold such high and powerful office.

The ABA Committee never makes its own recommendation. It merely responds to the names of persons that the Deputy Attorney General submits to it. The Committee believes that if it recommended candidates for vacancies it might compromise its principal responsibility of advising the Deputy Attorney General as to the qualifications of prospective nominees submitted by him.<sup>19</sup>

The ABA Committee does not attempt to evaluate the personal philosophy of the potential nominee. The Committee bases its response solely upon professional qualifications and these have, over the years, been specified as integrity, judicial temperament, and legal ability.<sup>20</sup> The Committee not only distinguishes between qualified and nonqualified nominees, it attempts to grade them into categories of exceptionally well qualified, well qualified, qualified, and not qualified.<sup>21</sup> By so categorizing the nominees, the Committee recognizes that it is desirable to seek only the best qualified, rather than merely exclude the nonqualified.<sup>22</sup>

In the process of evaluating the nominees, the ABA Committee considers several very flexible factors. One factor is trial experience: the Committee usually finds that some trial experience is necessary for a candidate to be found qualified.<sup>23</sup> Another basic requirement is good health and an age which reflects experience at the bar adequate to perform demanding judicial work. The potential nominee's age should leave, hopefully, at least ten years for judicial service. During the Eisenhower Administration, it became established that no lawyer sixty years or over should be appointed to a lifetime judgeship for the first time, unless he

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*in the Selection of Federal Judges: Episodic Involvement of Institutionalized Power*, 17 VAND. L. REV. 785 (1964); *Committee on Federal Judiciary: What It Is and How It Works*, 63 A.B.A. J. 803 (1977) [hereinafter cited as *Committee on Federal Judiciary*].

<sup>19</sup> See *Report of the Standing Committee on Federal Judiciary*, 101 A.B.A. REP. 759, 759 (1976).

<sup>20</sup> See *Committee on Federal Judiciary*, *supra* note 18, at 806.

<sup>21</sup> See *id.*; A.B.A., HANDBOOK FOR MEMBERS OF JUDICIARY COMMITTEES 4-5 (describing standards for the four categories).

<sup>22</sup> *Report of the Standing Committee on Federal Judiciary*, 83 A.B.A. REP. 349, 350 (1958).

<sup>23</sup> See *Committee on Federal Judiciary*, *supra* note 18, at 807 (indicating importance of substantial trial experience); Chandler, *supra* note 3, at 126 (arguing that judicial candidate must have at least 15 years experience in trial-oriented practice).

was found to be "well qualified" or "exceptionally well qualified" and in excellent health.<sup>24</sup> The ABA Committee for many years would not recommend as qualified a person over the age of sixty four. The Committee reconsidered these guidelines in 1970, but made no substantial changes.<sup>25</sup>

After evaluating the qualifications of the nominee and rendering its report to the Attorney General, the Committee does not publicly announce its specific rating. After the nomination is made, the Committee submits its evaluation of the nominee's qualifications to the Senate Judiciary Committee.<sup>26</sup> Though not required to do so, the Judiciary Committee of the United States Senate has requested the opinion of the ABA Committee on every judicial nomination since 1948.<sup>27</sup> Regardless, the By-Laws of the ABA authorize the Committee to oppose the nomination and confirmation of persons whom it considers not qualified for federal judicial positions.<sup>28</sup>

During the thirty years that the ABA Committee has exercised its present role, it has been highly successful in its work. Seldom does a President nominate, and the Senate Judiciary Committee confirm, a person whom the ABA Committee finds not qualified.<sup>29</sup> Perhaps more importantly, Presidents and attorney generals have come to share the view that the President and his administration benefit by a reputation for good judicial appointments.

The Committee has extensively reviewed its procedures twice since the Eisenhower period. In 1970, the Committee was heavily criticized for its failure to oppose the nomination of Judge Carswell to the Supreme Court. As a result, it undertook extensive self-evaluation and sought the advice of bar leaders, law teachers, judges, and other persons active in public affairs.<sup>30</sup> The Committee extensively revised its procedures for the review of Supreme Court nominations which posed problems quite different from that of district court nominations,<sup>31</sup> and which are not the subject of this article.<sup>32</sup> For the most part, the Committee left intact its procedures for evaluating nominees for district court and appellate court judgeships.

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<sup>24</sup> See Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 MASS. L.Q. 138, 142 (1961).

<sup>25</sup> See *Report of the Standing Committee on Federal Judiciary*, 95 A.B.A. REP. 206, 206-07 (1970).

<sup>26</sup> *Report of the Standing Committee on Federal Judiciary*, 101 A.B.A. REP. 759, 759 (1976).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *Report of the Standing Committee on Federal Judiciary*, 100 A.B.A. REP. 782, 783 (1975); *Committee on Federal Judiciary*, *supra* note 18, at 807.

<sup>30</sup> See *Report of the Standing Committee on Federal Judiciary*, 95 A.B.A. REP. 711, 711-12 (1970).

<sup>31</sup> See *Report of the Standing Committee on Federal Judiciary*, 97 A.B.A. REP. 217, 218 (1972).

<sup>32</sup> See *Committee on Federal Judiciary*, *supra* note 18, at 804-06 (1977).

In 1976, the President of the ABA convened a two day meeting at Vanderbilt University to which judges, law school teachers, public officers, and others were invited to again review the procedures of the ABA Committee.<sup>33</sup> After consideration of all criticisms and suggestions, the Committee made modest changes in its procedures. Currently, the Committee is again reviewing its procedures and classifications. The basic elements, however, remain as they have for the last thirty years.

The Committee remains in an extremely delicate position. It is not an agency of government and has no constitutional or statutory basis. The Committee's position and influence are dependent upon others: the government officials with whom it works, and the lawyers and judges who must give candid and thoughtful appraisals of the candidates. The Committee must seek to maintain the confidence of these persons in the complete objectivity, the scrupulous fairness, and the painstaking thoroughness of the Committee's investigations and reports.

The viability of the selection mechanism, its formal and informal parts, is also vulnerable to the persistent neglect of fair judicial salaries. The ABA Committee's goal is to evaluate candidates and identify the most qualified individuals for the federal judiciary. The current inadequacy of judicial salaries will ultimately impede this process in two certain ways. First, economic self-selection out of the process by some candidates reduces the quality of the candidate pool. Second, the inadequacy of judicial salaries causes judicial vacancies as judges leave the bench for more remunerative opportunities.<sup>34</sup>

### *Conclusion*

It is my impression that most trial lawyers believe that the federal court has attracted and retained an exceptionally able group of judges. These attorneys are relatively satisfied with the system of selection and the informal and formal elements of the judicial nominating procedure. It is apparent, however, that the continued ability to select qualified federal judges requires more than adjusting the machinery of the ABA Committee or the formalization of channels of communication between the Bar and the Attorney General. There is widespread concern that the short-sighted denial of adjustments in compensation, necessary to preserve a professional standard of living in the face of inflation, will undermine the success of the last thirty years in attracting able, qualified, and in many cases, exceptional lawyers to the bench. Fairness and the self-interest of a well served community demands a decent adjustment.

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<sup>33</sup> See A.B.A., ANNUAL REPORT OF THE PRESIDENT 6-7 (1975-76).

<sup>34</sup> See *Report of the Standing Committee on Federal Judiciary*, 101 A.B.A. REP. 759, 759 (1976).



