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# Grossman: Lawyers & Judges-The ABA and the Politics of Judicial Selection

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LAWYERS & JUDGES—THE ABA AND THE POLITICS OF JUDICIAL SELECTION. By *Joel B. Grossman*.\* New York: John Wiley and Sons, Inc., 1965. Pp. vii, 221. \$6.75.

In this book, Professor Grossman purports to study the role of the American Bar Association's Standing Committee on Federal Judiciary in the recruitment of federal judges. Apart from a certain amount of trade gobbledegook, Professor Grossman makes a useful examination not only of what the ABA has been doing but also of why it has been doing it, and the possible consequences of its role in the selection of judges.

He deals at some length with the relations between the Bar Association Committee and the Attorney General, the United States Senate, the House Committee on Federal Judiciary, and the changing patterns of judicial recruitment. Professor Grossman, who is a social scientist, raises many interesting and pertinent questions concerning the proposition that lawyers are better able than non-lawyers to appraise accurately the qualifications of candidates for judicial office. Although he seems to believe that the Committee has had little or no effect on appointments to the Supreme Court, he raises the pointed question: "to what extent is the continued quasi-public function of a professional group consistent with the requirements *and* needs of a democratic political system?"<sup>1</sup>

It was not too long ago that many Bar Associations were being criticized because they were not willing to spend the money and the time required to see that a highly qualified judge was selected. The charge was that politics or demands for votes in Congress or "deals" played too large a part in judicial selection and that Bar Associations were supine.

More recently, the Standing Committee on Federal Judiciary of the American Bar Association, under the able chairmanship of Bernard G. Segal of the Philadelphia Bar, has done an outstanding job in aiding the President of the United States and the Attorney General in selecting able and competent judges in the district and circuit courts.

The system of cooperation between the Attorney General and the Bar worked out by Bernard G. Segal seems to have worked very well in practice. But there are those who claim that the selection of judges from the staff of the Department of Justice or other Governmental departments, or from the ranks of United States attorneys, or the elevation of district court judges with similar pre-judicial backgrounds to the

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1. P. 212.

appellate court, may give the Government an advantage when the Government is the plaintiff or the defendant. Although this claim may well be questioned and seems only theoretical, Professor Grossman does not comment upon the fact that the work of the Standing Committee of the ABA may have some ameliorating results in this respect.

Professor Grossman appears concerned not so much with the excellence of the judges selected through this process but rather with the possibility that the older and presumably more prosperous members of the Bar will be influenced in their evaluation of a judicial candidate by whether his supposed judicial thinking will correspond to their own. We may thus be excluding from the bench young men of talent and ability whose views might be somewhat unorthodox.

He also is concerned because there is nothing in the United States Constitution or Congressional legislation which provides for anyone outside of the Federal Government to have any influence in the selection process. Professor Grossman suggests that perhaps the whole method of selection ought to be better defined or outlined by statute.

One of the great features of a democracy is that people are willing voluntarily to take the time and to make the effort to improve the manner in which it works. There are thus dozens of organizations which alone or in cooperation with others devote their time and talent to better government or better administration of laws and to more effective operation of the judicial process. In fact, it is the very beauty of our system that our citizens do not operate within straight-jacketed or codified lines and that men with public spirit, ingenuity and ability can organize in a free manner to cope with the social exigencies, as they arise, as they see fit.

Fortunately for the American people, under our system of democracy, practically all judges selected have had some opportunity while in private practice to meet and live with their neighbors and to become familiar with their problems. As private practitioners they have engaged in the interviewing of clients and witnesses, in the preparation of briefs and oral arguments, in the examination and cross-examination of witnesses, and in the preparation of the actual record of the trial. They have participated in the arguments on the admission and nonadmission of documents, all certified by the lower court to the upper court and agreed upon by counsel as a part of the record on appeal.

What indeed is the difference in education and thinking between a leading trial lawyer constantly trying or arguing cases before an Appellate Court and a sitting judge? They may both have read the same poetry, history, thrillers and works in economics, gone to the same col-

lege and been educated in the same law school. One, of course, is partial and the other is supposed to be impartial. But it is impossible to exclude subjective factors in analyzing a man's ability. Many lawyers, before going on the bench, have occupied positions of great distinction as Governors, Congressmen, Senators, cabinet officers or trial lawyers, though they had not had prior judicial experience. Taft had been a Circuit Judge, Secretary of War, Governor General of the Philippines and President of the United States. The very able and distinguished Mr. Justice Black had a long senatorial experience and "prior judicial experience," though only for a short time as a police magistrate.

As Professor Frankfurter pointed out in a very illuminating article in the *Pennsylvania Law Review*,<sup>2</sup> there is no evidence that nominees to our higher courts have made better judges because they have had some prior judicial experience. Neither Brandeis, Douglas, Frankfurter, Harlan, Hughes, Jackson, Marshall, Roberts, Stone, or Story, among others, had as a practical matter any prior judicial experience. In fact, a lawyer who is continually investigating, trying, arguing or advising with respect to cases involving a large variety of federal questions is probably far better prepared to sit on the Supreme Court or federal courts than would be a state judge, as even Chief Judge Cardozo found out.

For the difference between federal and state litigation, especially since the thirties, is enormous. On more than one occasion Mr. Justice Cardozo complained to friends that he should not have been taken from judicial labors with which he was familiar and which he found congenial in order to preside over controversies to which his past experience bore little relation. Even Mr. Justice Holmes who came from the Supreme Judicial Court of Massachusetts was not at all at home when he first came to the United States Supreme Court. And many a municipal or criminal court judge is not fitted, by such "prior judicial experience," to deal with legal, governmental, economic and fiscal questions of vast complexity and import.

Unlike the system in some European countries where upon graduation from law school members of the Bar are automatically divided into the judiciary and the Bar, we do not require our judges to have "prior judicial experience." And unlike the system in England where members of the judiciary are nominated by the Lord Chancellor from the ablest members of the trial bar who have already "taken silk" and who have become King's or Queen's counsel, we do not divide our Bar

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2. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

into solicitors and barristers and we do not require that our judges come only from the ranks of trained trial lawyers. Praise be.

Even though I cannot endorse all of Professor Grossman's ideas, he has nevertheless produced a competent and scholarly study on the role of the organized bar in judicial selection, which is well worth a busy practitioner's perusal.

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