

LASCHER AT LARGE
July, 1976
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This is probably one of the few items in this issue of the Journal written at the foot of a glacier in the midst of ice flows. It also may be the only constructive thing I produce (and don't give the any lip on that) during a too-short Alaskan cruise. I'm not prepared to turn this into a travel column (than a least not yet, much as I'd like the work), but I would remark -- before getting down to what passes for business under the smiling tiger -- that Alaska is far more beautiful and more fascinating than I had imagined. It's a shame we don't know our relatively near neighbor to the north better.

Moreover, there is just nothing I've ever heard of or encountered that comes as close to loosening the pressure-cooker lid and slowing the ulcer development as a week on a cruise ship. It may not be permanent, nor even a complete solution, but if you're afraid your top is about to blow, it may be the indicated cure. Goodness knows, there is nothing very educational or "broadening" about floating around been pampered, metabolism-lowered and overfed (well may be very is broadening in one sense) by it sure is a downer. Of the right kind. When you're desperate for one.

And so to business. For an opening statement, I'd like to observe that the subject this month will be judges. Judges in various permutations, I might add, perhaps inspired by the fact that one of the cruise ship groups was a bunch of Middle Western judges. But I don't think that is what inspired, just general fixation with the subject.

NON-MAGISTERIAL NIP-UPS

Faithful readers of this column (if that is not (1) assuming facts not in evidence, or (2) a contradiction in terms, or (3) wishful thinking) may be aware I am not above metaphor-mixing. Thus, let me explain that what is about to follow is an exercise in telling the emperor he should stick to his last. Specifically, judges should not be lobbyists. For a goodly number of reasons.

This thought is inspired by some recent goings on in Sacramento on the part of the leadership of the Conference of California Judges (some spies within that organization suggest I should have put quotes around the word "leadership" the first time I used it) in opposing appeal which would have put on the ballot and initiative to set salaries for all elected officials by means of an independent commission. The judges, who were to be included in the plan only as a sort of afterthought and somewhat for their own benefit, went into high hysteria -- not to say dudgeon -- and successfully lobbied its defeat.

My point is not the merits of the proposal which, frankly, seemed both zany and somewhat immoral to me when I first heard it, although in a calm and quiet discussion -- which the lobbying precluded -- I discovered some pretty good if not necessarily persuasive points could be made in support. My problem is with the notion of members of the judiciary acting as arm-twisters for a particular point of view before the Legislature. My concern over the principle was admittedly not eased a whole heckuva lot by the tactics employed, including as it did the spectacle of several Southern California judges simply shutting down their courts (leaving cases and litigated problems -- some of them critical -- hanging and to hell with that), others prowling legislative cloak rooms, and similar machinations more appropriate to the age and ethics of Artie Samish.

WORTH THE PRICE?

Perhaps putting things in the wrong order, a first argument against such highjinks is that they are self-defeating. Sure, Joe and Bill and their boys got the particular bill quashed (for the moment), but the gain was far from worth the candle. The reservoir of ill will best startup is going to hot the judiciary for many move and will probably be an unspoken, potent factor in frustrating some vastly more worthy aims of the courts. The entire institution of the judiciary was savaged in the press over this spectacle and I've been told by influential members of both the other branches that they regard the judges as having established themselves as no more or less than any other industry's pressure group. Fair game, in other words. That's the tragedy.

I have adverted earlier in this space to the proposition that, since the bench is the least dangerous and most helpless branch, the other two owe a reciprocal duty of particular solicitude toward its interests becomes judges are precluded from taking up their own cudgels. When, as just occurred, the wearers of the robe deliberately assume a role indistinguishable from out of a bargaining committee for the San Francisco Rubbish Collectors or the infant dairy industry's legislative reps, they don't just demean the themselves; they self-inflict a wound of immeasurable gravity. We often hear it said, in support of special privileges for the judiciary, that "judges should not be required to go to the Legislature, hat in hand" for whenever they believe necessary. When, in fact, they decided to enter the lists club in hand (or, more accurately, arm-twister in action) they destroy their own position.

Besides expediency, there is an ethical matter. Separation of powers is not a one-way street; it does not merely prevent the Legislature from interfering with the judiciary, but goes the other way, too. The position of a judge is different, but only if he stays different. The office is entitled to respect and the benefits of detachment, but only if it is discharged in a respectable and detached manner. At least one member of the State Bar -- and I suspect it's closer to 50,000 members -- is willing to take up the cause of our colleagues on the bench, but only if they stay there. I would strongly suggest they get their act together, which means closing down its roadshow aspects and keeping it in the theater where it belongs. Everybody, including themselves, will be the better for it.

STATE OR FEDERAL

Recently I said to a highly perceptive and well-informed colleague that I thought it would be much better in all kinds of ways (more challenging, more rewarding, more productive and more fun) to be a judge in any level of the state system than the comparable member of the federal hierarchy. Better to be a Superior Court Judge in one of the federal districts, preferable to serve on the Court of Appeal than the Circuit, and more desirable by far to serve the State Supreme Court than the Big One in Washington. He reacted as if I had gone completely out of my tree. While of bureaucratically itself, is neither newsworthy nor surprising, I was taken aback on the specific subject; I thought everybody knew that.

This is not to say that the same conclusion would follow in every state, but the simple fact is that California isn't every state. And it's got nothing to do with the much touted price differential, although I confess it's a little difficult to rationalize a muni court judge's taking home more than a judge of the Ninth Circuit. Nor is even the occupational hazard of exposure to certain kinds of radiation intrinsic to the federal bench. (We all know this story about the psychiatrist who died, and, upon entering the the Pearly Gates, was greeted by St. Peter with the news that God was anxious for counseling because he was developing delusions that he was a federal judge.)

No, it's the work. In minor degree, I think the federal rules -- those overly-vaunted mysteries -- would be an absolute pain in the bench. Compared to our state procedures, they are utterly rigid, pettifogging, "don't ask why", exemplars of bureaucratically rigid mumbo-jumbo. By contrast, our state practice is a model of common sense. (And anyone who realizes how little impact that quality has on state practice can understand the force of that contrast.)

A THRILL A MINUTE

But more importantly, there is the substance of what they deal with. Sure, every once in a while while they get to decide a Brown v. Board of Education or Gideon v. Wainwright, but what do they do most of the rest of the time? Grapple with all the intricacies of bankruptcy, immigration and patent law. They decide whether the Federal Communications Commission or the Federal Power Commission has jurisdiction over citizen's band broadcasts from dam sites on Indian reservations. They refine the rules concerning the National Labor Relations Board to such a fine point they're nothing but silt. They agonize over abstention, become exquisite over Erie, and harp on habeas. Of course, it's good somebody does this, just like I'm glad somebody compiles the telephone book, but I wouldn't want to make either one my business. A real, honest-to-goodness civil case between a couple of living litigants is as common to those folks as photographs of the Loch Ness monster. They decide cases for law books, not for litigants.

In contrast, our state system deals with the real juice of legal life. They resolve the cases people really litigate a. They decide, not so much for the ages but for now, for your lifetime and mine. They're in the real business of judging, not the business of writing case books and inspiring law review articles.

That they do so very well is almost a bonus. The fact that, in the process of living in the real world, they lead the nation in judicial statesmanship, is really gravy -- although admittedly pretty tasty gravy. You may find this hard to believe, but I still think I was right.

HOW IT WORKS

Since the subject is not roses but the the judges this time, I thought I'd unload on another subject: Where they come from. (No, this is not sex education and neither, for that matter, does it concern divine creation.) it has always seemed to me that one of the greatest -- and most unfortunate -- mysteries concerns the process by which people make the transition from lawyer to judge. The fact that it is mysterious is intrinsically dangerous to public confidence in the resulting product, all the more so when one considers that even a huge segment of the state's lawyers are unaware of the nature of the process. (In my short time on the Board of Governors I've had enough inquiries to convince me that a substantial fraction of the bar thinks the Board plays a vital role in initiating judicial appointments, which is inaccurate, while a lesser but significant number seems to think that local bar associations play the biggest role, which is absurd.)

Another reason I think it's unfortunate that the thing is such a hush-hush business is that the process seems by and large quite decent and rational. Or it would be if it were also well-known, since ignorance of the mechanics probably deprives us of a meaningful number of excellent prospects who would otherwise present themselves if they knew how, while breeding unjustified suspicion. Of course, I am only speaking of current practice, which is all I know, but I think it is a pretty good system that ought to be publicized.

As far as I can tell, here's how it works. A lawyer get his or her name into the pipeline by any one of a variety of ways. (And never mind the cheap-shot jokes about the alternative pronouns, to the effect that she lawyers have an easier road than he lawyers; there is some effort to redress imbalances, but judicial office is not up for female grabs.) A friend may write a letter to the Governor or his appointments secretary, a local bar association or just a bunch of lawyers may do so, a contact in any of the three branches of government or an influential political activist may propose the name (about which more in a moment), an attractive political appointee may surface during the investigation of someone else, or the brutally simple path of writing a letter on one's own behalf and saying you'd like to be a judge, and why, may start the machinery.

NO PAT HANDS

It would be naive to assume that each of these channels is exactly as efficacious as the others. Obviously, if a veteran legislator or highly placed jurist proposes a name, it will get a good bit faster and perhaps closer attention at the initial stages than something that just comes in over the counter. Than it but there are few if any stages. Two things that have amazed me are, first, the fact that powerful support only provides the first shove along the way, and thereafter a prospective appointment seems to run pretty much the same course however it got started; and, second, the equally reassuring fact that every application appears to get serious attention.

Of course, there is a difference between the word "serious" and the word "favorable" (as an opponent once said in a brief: "All prayers are answered, but sometimes the answer is 'no'.") Some get lead it out or back-burnered pretty early on, either on their own hook or by comparison to others in the same running. But I have been both reassured and amazed, during my short span on the fringes of the process, at finding out how many times a name that would seem to be still and unheard is paid great attention.

THE POTENT PDQ

Whatever way a name gets into the system, the next step is filling out a Personal Data Questionnaire ("PDQ") which requires disclosure of everything from driver's license number and name of spouse to listing one's ten most significant cases -- complete with names of judges and opposing counsel. (Every once in a while I go through a sort of mental parlor game to try to figure out which ten I would put down; it's kind of fun.) Then, depending on whether and when there is a vacancy in the office sought, the Governor's Office makes a determination of whether to submit a name to the State Bar for its evaluation as to the candidate's qualification for the office and clearance as to disciplinary record.

Needless to say, I don't have any handle on how that decision is reached, but I assume that there is either or both of intrinsic evaluation of the data supplied and checking with some trusted informational sources in the affected community (geographical legal) before the name is sent out. At this stage, I also assume, some of the political indications and contraindications are scrutinized, weighed and balanced. (The political" in this context predictably draws forth a bunch of squawks, which I translate as meaning "he takes into account factors different from those I do". Hogwash! The process of appointing judges, like any similar act of executive discretion, is inescapably political in its nature. The only question is whether it's kept on a high-level -- of attempting to find people who combine qualifications with desired philosophies, proportion-balancing or the like -- or is allowed to descend to the level of sheer croonyism, back-scratching or even, perhaps worst of all, ideology without reference to quality.) Further, it appears to be the practice usually to send a great many more names than there are openings, in the evident hope of getting a selection of the best appearing prospects.

When a name is sent to the State Bar, it is referred to a member of the Board from the district in which the appointment is to be made or, if the candidate has his office in one district but may be appointed in another (e.g., a lawyer who lives in Marin County and is being considered for that bench but practices in San Francisco), to two affected board members for investigation. In the multi-governor district each is sent, in rotation, to one governor.

DEEP DELVING DETECTION

The member then goes to work on the prospect; as I have written previously, this is just plain hard work -- hard on the ears, eyes, mouth and telephone. By a combination of personal and telephone interviews and written inquiries (but there being a fairly drastic slip opinion concerning the efficacy of the latter), the district Governor thoroughly probed the individual's background, reputation and performance. While everybody operates somewhat differently, there is typically a heavy measure of consultation with lawyers and judges who know the candidate, former associates and opposing counsel, those he mentioned in the PDQ or otherwise, and those he never says one word about, and often just plain checking court records and other data. If he is presently a judge up for elevation, an unannounced and anonymous court visit or two is usual; in many cases a personal meeting with the candidate will be appropriate.

Eventually, a thorough and detailed report is made by that member to the Board as a whole and discussed at length (You better believe it!) at a confidential meeting. The give and take usually is considerable. Often board members other than the one assigned the evaluation will have information about the candidate which they will also present; sometimes even backup investigations, by request or otherwise, will be performed in addition to the primary one. Particularly where there is the likelihood of a low rating, any questions will be thoroughly probed and reprobated, and often sent back for reexamination before the Board acts.

In any event, the candidate is ultimately in given one of four than ratings: Not Qualified, Qualified, Well Qualified, Exceptionally Well Qualified.

If the vote is other than unanimous, as often is, that act together with the division of the Board is reported to the since the administration of a role Warren, Cal. Governors have refrains from persons rated "Not Qualified", with only a handful of exceptions, none in recent times. They have also agreed to consider the relative standing of candidates as to the three ratings which are above the line, an element in the selection process whose role defies much quantitative analysis. About all that a year of experience has yielded on my own part is the impression that, while I have not been invariably pleased with the selection, the Board's rating seems to have played a significant role in a gratifying number of instances.

Thereafter, the Governor makes his choices. Obviously, that last-analysis process defies description even by such a non-angel-tread-fearing column as this.

NOT FOOLPROOF

The process is not infallible, and may not even be the best possible. (You say you notice that already?) Obviously there is nothing to the insurer that the right names get into the hopper in the first place, and random factors such as a candidate's - or his sponsor's -- ability to write an attractive letter or persuasive response to the PDQ may play a significant role which doesn't necessarily reflect judicial capacity. (One prospect endeared himself to me by answering the question regarding honors with: "I was elected Boss of the Year, but all that shows is that my secretary writes a good letter." I figured we needed guys with that perspective of themselves on the bench.)

The two eliminations in the Governor's Office, before and after the Board's check-out, are patently subjective and subject to all kinds of adverted and inadvertent input or exclusion of factors. The Board's evaluation is susceptible to countless human imperfections, both on the part of the member who conducts the investigation and on that of those he involved in the investigatory process. No matter how much one guards against pro or con bias on his own part, or hunts for it in others, the unavoidable potential for error is a matter that constantly frightens -- and prods one to be a thorough as possible in order to mitigate danger as much as can be.

But the goodwill, sincerity and idealism which I have seen manifested in the process have been one of the inspirations drawn from Board service so far. If this system is imperfect, as it is, it is also the subject of tremendous effort to keep imperfections to the minimum possible. Everyone connected with the operation has convinced to me that innings taken as a serious, even awesome, responsibility discharged with real high-minded nuts. I guess my own bottom line would be to say that, if I wanted to be a judge, I wouldn't hesitate to subject myself to the process.

POLLS APART

I'm not all that sure how I stand on the matter of judicial evaluation polls, although I probably lean in the direction of thinking that, if handled rationally and with restraint, they're more good than harm. But I sure know what I don't like: the reaction of the San Francisco Muni Court to the Bar Association poll there.

Their limited lordships sent the bar a ten point ultimatum as to how the evaluation should be conducted (reproduced in the newsletter called "In Re", Vol. 7, No. 3, pp. 8-10). It's pretty enlightening reading. Tells us more about the court's membership than I suspect they would like us to know. Some of the platform planks are real doozies.

For example, the first demand was that the judges should review the membership list before the poll was sent out to determine "if the attorney has appeared in court and would be in a position to grade judges". I don't think it was Disraeli who said "if I can pick the pollsters I'll win all the polls", but he might have. Another idea was that lawyers responding to the poll should identify themselves on the rating sheet and this be turned over to the judges -- a move which would at least cut down on return postage expenditures. Another one merits verbatim quotation: "The Court must have the right to appeal the results of such survey prior to results becoming public." This was "explained" with an equally intriguing admonition: "even a convicted murderer charged with probation violation (!) has a right to face his accusers and to have a hearing." Okay, but let's get back on the subject. Just exactly why are the mechanics of this "appeal"? To hold? On what issues? Do these guys know what an appeal use?

NIFTY NON SEQUITURING

Then, buried in the middle of it, is the nitty-gritty: a demand that the court should be allowed to meet and "determine if an adverse rating to the individual judge is justified", failing which the whole thing is to be deep-sixed. Seems to me that renders the "appeal" redundant. Then they demanded that everyone replying to the survey should certify when he last appeared before the judge involved and how many times, so that the court can throw out the ballots of which they disapprove.

If anybody says anything bad about one of the bench warmers, he would have to answer whether he complained to the Judicial Qualifications Commission (the name of which there were ships got wrong, by the way) and if not, why not. This, to, is "explained" with the following: "Our Municipal Courts are courts of record." They also sit north of the Equator and west of the Mississippi and are open five days a week -- some weeks. Most of their judges have ears on both sides of their heads, too. So what? They're good at non sequiting. Finally, in case all of that didn't work, the last point is that this survey should be submitted to the Department of Economics of the University of California (no fooling!) to determine whether it was a good survey or not.

Wow! These guys have worked a real public service. They've given us all the information we could get from a judicial evaluation poll without the fuss and bother of sending one out. They've told us in advance what the results would be. Ah, well, it takes one to know one. (If I were a judge of the San Francisco Muni Court who wasn't involved in this little misadventure, I'd be filing a lawsuit against all my colleagues who were. For both defamation and intentional infliction of emotional distress.)

AND IN CONCLUSION...

Well, now, having alienated the entire California judiciary -- and the federal bench, too, when I tried to be nice to our own -- I guess I'll go back to practicing law. In the court of Botswana if I'm smart.

No, seriously folks, I think that not only are there some teeny-weeny shortcomings in the California bench that deserve mentioning, but also that we've got such a groovy bunch in general that there's nothing to fear in being frank. There's a helluva lot of humanity and humility under our black robes and I, for one, have every confidence in the ninety and nine. My clients hope I'm right.