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Introduction to "Point-Counterpoint: Two Judges' Perspetives on Trial By Jury"

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INTRODUCTION

The Honorable Ed Kinkeade, U.S. District Judge for the Northern District of Texas

Does justice suffer in a federal judicial system where trials are as scarce as buggy whips? Judge Patrick Higginbotham of the Fifth Circuit Court of Appeals views the disappearance of the jury trial as a crisis. U.S. District Judge Terry Means, on the other hand, views the jury trial as a natural casualty in the evolution of an increasingly efficient judicial system.

Judge Higginbotham has long touted the jury trial as the cornerstone of the judiciary's contribution to justice. In his Eldon Mahon lecture of 2004, he voices his oft-cited concern over the vanishing jury trial and explains the two primary reasons for its decline. According to Judge Higginbotham, the limited role of Article III courts in the scheme of administrative law, and the effects of globalization are chipping away at the trial system. He asks these questions: "Have the courts delegated too much of their responsibilities to surrogates?" and "Will the need for international solutions to multi-country disputes portend the end . . . of the jury trial?" Judge Higginbotham feels that the quality of justice delivered by federal courts has been undermined by (1) fewer trials, (2) abdication of Article III judges' responsibilities to others, and (3) the pressures of a world driven by borderless economies.

Judge Means posits that the diminishing role of jury trials is good for justice. He argues that the jury trial has given way to better models of problem solving that have emerged. Judge Means contends that jury trials are a means, not an end, to justice. He says that the better perspective is to view the vanishing jury trial as part of an evolving process that, if allowed to develop unfettered, will produce the best result. This is an argument based on his observations of law and economics. All of the fear and costs of a jury trial have forced litigants to look for better ways to solve their problems. Although Judge Means likes the results of this evolution, he does not embrace all of the current alternatives to jury trials. He views the increased use of contractual arbitration clauses, in particular, as an alternative that has been forced on many parties under terms just shy of contracts of adhesion. All in all, Judge Means hopes that a more mature process will weed out these less acceptable settlement methods as the trend away from jury trials continues.

The good "ole" days of jury trials do not mean that justice was better served back when more cases made it to trial according to Judge Means. He believes justice is best served when an affordable and acceptable solution can be reached, regardless of whether a jury trial was the means to the end. For Judge Means, the Holy Grail is not the

jury trial itself, in all of its public openness. The ultimate goal is to find an efficient, non-violent system for settling disputes in which both sides are satisfied with the result.

Judge Higginbotham has watched the system change since the mid-1960's. He sees the jury trial as the very reason for Article III judges to exist. Jury trials are the foundation from which all justice emanates. Judge Higginbotham posits that the jury trial represents the cornerstone of the entire third branch of government. Article III judges are in charge of presiding over each civil and criminal case that is filed, but they are also charged with protecting the right to trial itself, he opines. He explains his opinion in detail. How each judge manages his or her personal caseload affects the world's view of the jury trial. The system depends on the careful movement of the parties toward the trial date. Each motion, each hearing, each scheduling order, every action by the court affects the process of justice. The very rules of justice depend on the judge being a good steward over the trial.

In the past thirty to forty years, Judge Higginbotham says that judges have retreated from this task for various reasons. Some of these reasons include efficiency, cost, and crowded dockets. Judges also confess that either they, or the juries, are simply not qualified to handle some of the more technical aspects of modern litigation. Bankruptcy and patent law, in particular, are too complex for laymen, and even generalist federal judges. Citing these reasons, judges have delegated more and more of their duties to mediators, magistrate judges, arbitrators, bankruptcy judges, receivers, and patent experts in the search for a more efficient dispute resolution process. Not that these extra participants have failed to resolve cases, but the diminishing role of the courts has created a vision of justice that is no longer based on the cornerstone of the jury trial. The increased participation of these non-Article III parties ultimately leads to viewing the jury trial as "a must to avoid; a complete impossibility . . . ." to quote the sixties song by Herman's Hermits. Trials are simply too expensive, too risky, too long, and too painful.

Judge Higginbotham reminds the judiciary that trial judges are more than just case settlers. Trial judges must also act as landlords over the "building" known as the justice system. He argues that Article III judges have allowed their building to deteriorate. These caretakers allowed the paint to crack, the elevators to go unrepaired, the windows to remain broken, and have allowed many rooms in the halls of justice to sit silent. The building has a huge sign out front that reads "LANDLORDS HOPING TO PURSUE OTHER OPPORTUNITIES; LOOKING FOR SOMEONE TO ASSUME THEIR ROLE; ALL OFFERS OF HELP WILL BE CONSIDERED."

Judge Higginbotham and Judge Means have devoted their lives to bringing justice to all corners of the federal courthouse. They have

put shoe leather behind their words. They have earned their right to be heard. Whoever carries the golden sword in this argument will portend the course of our country's judicial system. This great debate is made greater still by granting these two jurists a forum to apply their intellects with provocative insights and enlightened dialogue. At the end of the day, it may be that a panel of twelve jurors will have to resolve the ultimate issue—or perhaps an arbitration panel of law professors could reach a more efficient result.