

JUDICIAL SELF-REGULATION—ITS POTENTIAL

TOM C. CLARK*

Faith in the Establishment and the personalities that people it has been increasingly on our minds in the last half decade of the sixties. Indeed our young people have hammered home the idea that all is not well with either the Establishment or those who operate it. The focus has also zeroed in on the courts with their backlogs, their scandals, and their never ending process. The need for higher standards of judicial ethics, more effective procedures and techniques of administration, and an improvement in the appearance of justice itself is heard on all sides. Some say that the old Hulean doctrine should be followed by the judges, namely, that they be wholly intent upon the business of the courts, "remitting all other cares and thoughts as unseasonable and interruptions." However, the judges do not renounce their citizenship and its responsibilities when they take on the robes, and I submit that they should continue to take an active part in public affairs. This is not to say that they should engage in partisan politics but merely that they should not become monastic. Judges are leaders whether they choose to be or not. This is because the public expects more from them. Judicial conduct—both private and public—speaks louder than words. Whether good or bad it has a direct public impact. To many minds the judge is the law. To bend the judge to anyone's will, therefore, raises grave questions. This makes it the more necessary to give pause to any temporary popular demand to straitjacket the judges.

There are demands on all sides to reform both the courts and the judges. Legislatures—federal and state—are on the move with a host of legislative bills. United States Senator Robert P. Griffin has expressed the view that Congress should adopt meaningful guidelines on the permissible nonjudicial conduct of federal judges.¹ And Senator Joseph Tydings has pending his Judicial Reform Act which provides, in effect, for a continuing Congressional surveillance of federal judges through a reporting system.² A national commission with power to reprimand or

* Former Associate Justice, United States Supreme Court.

¹ In a statement presented to the Subcommittee on Separation of Powers of the Senate Judiciary Committee on July 14, 1969, Senator Griffin stated:

I favor the adoption of meaningful guidelines on permissible non-judicial conduct of federal judges. Viewed realistically, meaningful financial disclosure for federal judges—including Justices of the Supreme Court—must accompany these measures. In my opinion, restrictions on non-judicial activities are not in and of themselves sufficient to assure the adherence to such standards.

115 CONG. REC. S8023 (daily ed. July 14, 1969). See also S. 2109, 91st Cong., 1st Sess. (1969) (a bill introduced by Senator Griffin to provide for financial disclosure by federal judges). Senator Griffin's remarks introducing S. 2109 appear at 115 CONG. REC. S4852 (daily ed. May 8, 1969).

² The Judicial Reform Act was originally introduced by Senator Tydings on February 28, 1968. S. 3055, 90th Cong., 2d Sess. (1968). See 114 CONG. REC. 4558 (1968) (remarks of Senator Tydings). Although hearings were held, no affirmative action was taken on the bill and it was reintroduced with

remove federal judges on grounds of lack of "good behavior" is called for in the bill.³ Both senators are convinced that their measure would enhance rather than diminish the independence of the judiciary.

In the state system an increasing number of jurisdictions have adopted discipline and removal commissions, some by legislative act and others by constitutional amendment. Indeed Senator Tydings' proposal is taken from the California experience on the subject.⁴ Illinois has adopted the most stringent set of canons and rules of any of the states. Its Supreme Court has prohibited judges from (1) engaging in the active management of any business or serving as a director or officer of a for-profit corporation;⁵ (2) accepting any duties or obligations that would interfere with the performance of their judicial duties;⁶ (3) allowing the use of their names or the prestige of their office to contribute to the success of any business or charitable cause;⁷ and (4) accepting compensation for any services other than for their judicial duties.⁸

A grave question arises under the doctrine of separation of powers when legislative action is taken. As Mr. Justice Sutherland put it, "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."⁹ It has the weight of age, having been declared by Mr. Justice Story in 1826 to be an "enduring monument of political wisdom."¹⁰ A half century later Chief Justice Waite, in commenting on the doctrine, added that "[t]he safety of our institutions depends in no small degree on a strict observance of this salutary rule."¹¹ The judiciary is already hemmed in by executive and legislative discretion since its very sustenance is dependent upon the flow of funds from the legislatures, and the enforcement of its decrees is left entirely to the executive department. In addition, the Executive appoints the judges in the federal system and in some state systems. It cannot be gainsaid that the founders intended for each branch of the federal government to be master of its own house. This is especially true in the judiciary where history teaches that the bulwark of a free society is its courts.

Judicial independence, of course, has its corollary of judicial responsibility. The judges must be of the stuff that goes to make a good judiciary. What is this stuff

minor changes in the Ninety-first Congress. S. 1506, 91st Cong., 1st Sess. (1969). See 115 CONG. REC. S2732 (daily ed. Mar. 12, 1969) (remarks of Senator Tydings).

³ S. 1506, 91st Cong., 1st Sess. (1969).

⁴ See CAL. CONST. art. VI, § 8, *formerly* art. VI, § 1b, establishing the California Commission on Judicial Qualifications; CAL. GOV'T CODE § 68701-55 (West, 1964). See generally Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72 (1962).

⁵ ILL. SUP. CT. R. 63.

⁶ ILL. SUP. CT. R. 64.

⁷ *Id.*

⁸ ILL. SUP. CT. R. 65.

⁹ *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935).

¹⁰ J. STORY, *Discourse Before the Phi Beta Kappa Society*, in MISCELLANEOUS WRITINGS 19 (1935).

¹¹ *Sinking-Fund Cases*, 99 U.S. 700, 718 (1879).

of which I speak? Legal knowledge? Yes, and of sufficient quality to be able to determine the applicable rule of law in a given case together with the wisdom to apply it with clarity and dispatch. Ability to discover the facts? Yes, and an open mind to recognize the truth and separate it from the chaff. A firm but understanding heart? Yes, and the courage to declare a just decision and enforce it. Integrity? Yes, above all other attributes; and a public and private deportment that is above reproach. A conscience? Yes, but rather than being one that breeds fear and negative action it must be a conscience which at the close of each day's work may whisper softly: "Today you were truly worthy to wear the robe and enjoy the appellation of judge." To maintain such a status in the public mind judges, like Caesar's wife, must live above suspicion. They must welcome constructive criticism of their every act. To do the contrary is to run counter to the nature of every American to know the facts of life and to speak freely about them.

The Third Branch like Robinson Crusoe is awakening from its lethargy. It took scandal after scandal to bring the situation into focus: Manton, Davis, Johnson, three members of Oklahoma's highest court, two from Illinois, a Supreme Court Justice, and several lesser lights. As each of these unfortunate episodes broke into the spotlight of publicity a rash of measures were introduced in the legislatures, both state and federal, but they died on the vine. Nor did the judiciary itself do anything about these self-inflicted wounds. A typical example was Senate Bill 1613 which was introduced in the Eighty-eighth Congress.¹² It sought to establish an Office of Reports in each federal circuit to which the judges of the respective circuits would report annually their extra-judicial activity and income. The Judicial Conference disapproved the adoption of the bill on the ground that "it was an effort to single out judges from other officials of the federal establishment."¹³ And so having chided the Congress, the Conference went on its way without giving any consideration to the problem. In short it put on blinders and took no action in cleaning up the judicial house. Perhaps that is why we suffer ignominy today. In short, we in the federal judiciary must confess that we are dead set in our ways. We have never learned the lesson taught by Mr. Justice Cardozo that "new times and new manners may call for new standards and new rules."¹⁴

Of course, the rules of judicial conduct have not only been few but mostly ambiguous and unenforceable. The American Bar Association did promulgate in 1925 some "guides" and "reminders" sometimes known as Canons. However, they were adopted by only twelve states which included a total of thirty-three jurisdictions. In seven states neither a court nor the legislature has promulgated any rules pertaining to judicial responsibility. Indeed the situation was such that Chief Justice Hughes once explained that "[w]hat is generally called the 'ethics' of the profession is

¹² S. 1613, 88th Cong., 1st Sess. (1963).

¹³ JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 63 (1963).

¹⁴ B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 88 (1921).

but the consensus of expert opinion as to the necessity of such standards."¹⁵ But standards themselves are external and do not deal with personal equations. The public expects and is entitled to more than ordinary conduct on the part of a judge. And, I believe, judges are anxious to maintain a high degree of personal conduct. I submit that most judges are exemplary in their behavioral habits and reflect a good example.

The action of the Judicial Conference of the United States on June 10, 1969, is conclusive evidence of this. It adopted a realistic resolution banning the receipt of income from nonjudicial sources, unless the judge had prior approval from his circuit council. It also imposed public disclosure procedures covering income received from nonjudicial services together with a balance sheet on assets and liabilities. It is true that the Conference later suspended the ban on extra-judicial income in order to afford the American Bar Association Special Committee on Standards of Judicial Conduct sufficient time to re-evaluate the present canons and come up with suggested new ones. However, in the interim Chief Justice Burger has created a review committee of three members to examine the returns of the judges and make report, where indicated, to the Judicial Conference. In addition he appointed a seven-man Committee on Judicial Activities to advise the judicial councils of the circuits as well as individual judges with regard to their off-bench activities, both compensated and noncompensated. In addition the judges have now filed reports with the clerk of the court where they sit listing their outside income for the first six months of 1970. These reports are open to public inspection. Finally, the ABA Special Committee on Standards of Judicial Conduct has been busy under the chairmanship of the distinguished Roger J. Traynor, retired Chief Justice of California. It held open meetings in St. Louis in August and is now polishing up a final draft which should be ready for the House of Delegates in 1971. At the same time the Judicial Conference Committee, headed by Court of Appeals Judge Robert Ainsworth, is readying its report to the Conference at its fall, 1970, session. Even though the Conference elected to await the final report of the Traynor Committee, it would still be entirely possible for the federal system to have definitive standards in 1971.

As I have indicated, Illinois has already adopted very stringent rules and procedures to handle the problem. Some ten states have either a court of the judiciary or a commission that handles complaints against judges. Only last fall, under the auspices of the American Judicature Society, a National Conference of Judicial Retirement and Disability Commissions was organized. It will have its second conference seminar in Denver during December. At these conferences, programs are developed covering the outside interests of judges, the handling of complaints, and the general scope of disciplinary action as well as disability removal. The Commissions act somewhat like an ombudsman and have been proven very effective.

These experiences though not extensive, save in states like California, indicate

¹⁵ *Semler v. Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935).

that the courts can and will adopt effective procedures for self-regulation. It can hardly be denied that judges are better qualified to recognize the personal equations involved in the adoption of standards of judicial conduct. After all, they are balancing and adjusting controversies every day without the interference of political pressures and campaign exigencies. These are delicate matters that judges can adjust much more easily and without the compulsion of a legislative enactment. Furthermore, legislators are political animals who react within the framework of their constituencies which might inject political considerations into final determinations. Finally, a statute freezes the rule into a straitjacket that can only be relaxed by the action of both houses of the legislature. This often makes a political football of the rules and requires cumbersome, delaying, and expensive procedure. On the other hand a court can change its rule *in camera* and with greater clarity and dispatch.

Another consideration, often overlooked, is that faithless lawyers are always involved in judicial corruption. I can remember well that a Wall Street lawyer of high rank in the bar was a co-defendant in Judge Johnson's case in Pennsylvania.¹⁶ And it was through the use of lawyers that Judge Manton carried on his nefarious practices.¹⁷ Moreover, in states requiring judges to stand for election by the people some lawyers get the judge so involved in politics that his official position is compromised. Sometimes we hear of two types of lawyers: the first knows the law and the other knows the judge. This creates an unfortunate public image for the courts as well as the administration of justice. Being officers of the court, lawyers owe a high sense of duty to the judge. The idea that a lawyer's first loyalty is to his client—right or wrong—is itself wrong. His first duty is to the administration of justice and the courts. In view of these considerations, it is important and beneficial to enlist the active participation of the bar in the formulation of the standards. The Traynor Committee has done this through the session in St. Louis and is continuing to do so through circulations and joint meetings. It is to such collaboration as this that legislative procedures do not lend themselves effectively. On the other hand, joint meetings of the judiciary and the bar make it possible to discuss such niceties as well as to formulate rules that would protect both the judiciary and the bar from such practices. Our problem in the past has been to get the bar and the courts to act. I believe that the time is now ripe for such action.

I, therefore, submit that the potential for self-regulation is presently at its highest tide. And it is most encouraging that the Congress and state legislatures have deferred action. The judiciary appreciates this cooperative attitude. It is in the high tradition of our system of checks and balances. The legislatures should limit their scrutiny of judicial conduct to the minimum, withholding its hands unless the judiciary fails to act. In this manner the courts can develop an effective procedure in a minimum of time since they can quickly amend, supplement, or

¹⁶ See generally J. BORKIN, *THE CORRUPT JUDGE* 141-86 (1962).

¹⁷ *Id.* at 25-93.

revise controls as experience indicates a need for change. In addition this recognition by its legislative peers will spur the judges to renewed and continued action to the end that an effective system is devised. Finally, it will eliminate the friction that too often develops between the two branches and will insure against retaliatory action by either. It may well be that the judges may find it necessary to implement their procedures through legislature action. For example, it may prove necessary to make violations of the judicial code of conduct a criminal offense with sanctions more burdensome than the judiciary can devise by unilateral action. Again, perhaps some judges may refuse to make the required reports, in which instance failure to file might well be made a criminal offense. In this manner, through joint action, a model code may be implemented into a more effective one.

The judiciary is often said to be the foundation of our free society. It is to be hoped that we will declare a moratorium on kicking the judges around. Let us urge that all good men and women come to the courts' aid in shoring up public confidence not only in the courts themselves but in the people who operate them. While I verily believe that one who is elevated to judicial office is usually grounded in the fundamental precepts of good judicial conduct and needs no reminder of what is right and what is wrong; nevertheless, I urge the adoption by the courts—both federal and state—of a clear and concise statement of the permissible bounds of judicial conduct. The principles embodied in such a code would aid in the recovery of public respect and confidence in the court that is so necessary in a stable society. I am hopeful that before too long the ABA will approve and promulgate its final draft of Standards of Judicial Conduct and the courts—federal and state—will follow with speed in the adoption of clear and concise canons of judicial deportment based thereon, together with practical and effective procedures for their enforcement.