

Bench and Bar:

The Supervision of Judges

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I

THE SUPERVISION of judges seems, unfortunately, to be gaining ground in this country.* While the methods by which we select judges, with the exception of certain states and by and large the federal government, seem to make such supervision far more important than actually it is, its dangers have received very little publicity and of such dangers there seems even less understanding. This is indeed unfortunate, for the results of such supervision, however helpful over a short-term they may initially seem, open dangers to an independent judiciary hardly understood by those who advocate its supervision.

In Illinois, for example, a Board of Inquiry has been constituted to act as a kind of Grand Jury to separate trivial complaints against an individual judge from those severe enough to seem to merit punitive action by a Courts Commission. In theory this seems not to be unreasonable. In practice, no judge is unaware that any act, of which there are usually two points of view, may thus be subject to review. If the act is unethical or improper, one may ask, why should this not be the case? The answer is as clear as the question: because given two

conflicting points of view, such review must inevitably be a factor in the action, or decision, of the judge and those who know history also know how harmful this can be. The harm comes in small, almost imperceptible, steps. It can and may very well begin with an alleged failure strictly to comply with a code of ethics or rule of court. In attempting to come to a just determination of the matter before him, this possibility of a difference of interpretation or opinion on the part of the Board of Inquiry or Commission is ever present in the mind of the judge and must inevitably affect his decision. From considerations this trivial, the same state of mind will come into increasing prominence in matters more important. From matters more important they will apply to peripheral decisions; from peripheral decisions to matters of judicial policy and from matters of judicial policy to the essence of the cause. Thus, an unconscious or conscious consideration of Board and Commission policies may, and should not, be ever present in the mind of the judge and may well have a bearing of lesser or greater importance in his decision. This is to undermine the independent decision to which it is imperative every judge should come. His own determination of the

cause *sub judice*, with no consideration whatsoever of the reaction of other quasi-judicial bodies, constitute true independence of the judiciary.

The Founding Fathers were well aware of this struggle for judicial independence—of its bitterness and its consequences. They strove to avoid a reoccurrence of the problem in this new land. For many years they were successful. The instant question is whether the current fashion to supervise the conduct of judges may well undo their work. To help to prevent this, the following survey of the historic relationship between Sovereign and Judge, and Judge and Bar has been written. Each reader will draw his own conclusion of the relative importance of complete judicial independence on the one hand, and judicial supervision on the other. The attitude of the writer is never in doubt.

It is, then, the purpose of this article to show that supervision of the Bench by segments of the Bar, or by institutions conceived or approved by the Bar, is contrary to the concept of Anglo-Saxon justice; is highly improper and unrewarding; that members of the Bar should know better than to allow it, let alone encourage it; and in the best interests of the people such policy of supervision should be deprecated, resisted and finally abandoned. The history of the relationship between Bench and Bar and between Bench and institutions conceived and encouraged by an influential Bar seem reasonably conclusive.

II

THE FIRST STEP in this consideration requires a very brief description of the traditional relationship between Bench and Bar: In the early, formative days of the Common Law, the sovereign himself appointed judges¹ and retained jurisdiction over the Bench and Bar.² During the reign of Henry II, "any Court held in the King's name by the King's delegates is *Curia Regis*,"³ and the form which his Court shall take, the mode in which it shall do justice, these are matters for The King; "he is very free to

decide them from day to day as he pleases and this by a few spoken words."⁴ From the year 1187, we hear that the King has chosen 2 clerks and 3 laymen with special training who are not to depart from the King's Court but are to hear all the complaints of the Kingdom. Before the end of Henry's reign "there is a permanent, central tribunal of persons expert in the administration of justice . . . of sworn judges." These are the "Justices residing at the Bench."⁵

Although appointed by the King, and subordinate to him in courts *coram ipse rege*, it is the judges who render judgment. In the famous confrontation between Henry II and Thomas à Becket at the Castle of Northampton, even though the King was angry "he did not venture to pass judgment. Even the duty of pronouncing the judgment was delegated; it was committed to the Justiciar, the Earl of Leicester."⁶ Some 450 years later, Oliver St. John, in his famous argument regarding the Writ of ShipMoney,⁷ states that:

If the process be legal, and in the right Court, yet I conceive that His Majesty alone without assistance of the Judges of the Court cannot give judgment.⁸

Thus judges, until the reign of William and Mary, are very truly the King's servants; he can move them about as seems best to him, or dismiss them at a moment's notice. Nevertheless, they are an arm of the Sovereign, as today they are an arm of sovereign people, without whom justice cannot be rendered.

Having delegated to his judges the administration of justice, the King also delegated the authority he considered necessary to implement this delegation. First and foremost was the duty of regulating members of the Bar.⁹ This duty the judges, in turn, delegated to the Inns of Court, of which our Bar Associations, in this respect, are the successors.¹⁰ This was accomplished by the promulgation from time to time of Judges' Rules under which barristers and attorneys had to become members of

an Inn of Court, or an Inn of Chancery, and there be qualified before practicing in the Royal Courts.¹¹ The Inns of Court then, as now, not only passed upon the qualifications of those who wished to practice in the Courts under the Judges' Rules but then, as now, under these self-same rules the Inns had the right and duty to disbar and to reinstate barristers and attorneys, under the general visitorial jurisdiction of the judges themselves.¹² The complete dependence of the Inns of Court upon the authority of the judges is nowhere more apparent than from an examination of their diminished authority during the Protectorate and the resurgence of such authority at the time of Restoration.¹³

At Common Law, then, the Sovereign delegated jurisdiction over the Bar to the Bench which exercised such jurisdiction, by Judges' Rules, through the Inns of Court, to a greater or lesser degree depending upon the moment in history. Historically and traditionally, to this day, the jurisdiction of the Inns of Courts over barristers appearing in the Royal Courts is complete. Such Inns of Court have no jurisdiction at all over the Bench whence springs their authority.¹⁴ It is obvious that our national and local Bar Associations, which inherited many of the duties of the Inns of Court, have no greater inherent authority than they unless such authority be bestowed by Rules of Court upon which, as in the case of Judges' Rules, all their official acts must rest. Thus the misguided concept of the Bar policing the Bench, as suggested by some Bar Association officials, is based either on a wish to better the Bench, or upon a desire for self-aggrandizement, or upon ignorance of the law.

III

THERE IS YET another argument why the Bar ought not be free to discipline the Bench or initiate institutions for this purpose. This argument is of equal, or even greater, traditional and historic validity than that made above. It is the unqualified and undisputed need for an entirely inde-

pendent judiciary. This need was taken for granted by the Founding Fathers of this nation, knowing as they did, that the independence of the Judiciary was established in England and Scotland before the American Revolution¹⁵ only after a constitutional struggle of the utmost severity. A very brief review of this struggle will indicate its importance, and it should be noted that, in the establishment of the liberties we enjoy, this was the second most important and hardest fought battle between subject and monarch (the most important being the right of the people, through their elected representatives, to assent to all taxation laid by the King).

From section II above, it seems apparent that in the early days of the Common Law, judges were creatures of the Sovereign. This condition endured until the late seventeenth century. During the reign of the Tudors, Judges were usually appointed *quamdiu bene placito*, or during the Sovereign's pleasure.¹⁶ The King had an absolute power in the appointment and dismissal of judges; the judicial branch was, as to tenure of office, at his mercy.¹⁷ However, while this was true in theory, and while theoretical tenure was precarious, it was in practice quite secure.¹⁸ Although *quamdiu* or *durante bene placito*** appeared in their commissions, judges and the barons of the Exchequer held permanent tenure and cases occur of special appointments *quamdiu se bene gesserit*.¹⁹ It made little difference whether the judges held office "during pleasure" or "during good behaviour" for although they might be liable for dismissal, in the practice of the Tudors judges were not dismissed.²⁰

The judges also had definite functions to perform in connection with the making of the laws, corresponding to the Legislative Reference Bureaus in many of our states. As late as Henry VII's reign "the main principles of his legislation were formulated by judges before submission to Parliament"²¹ and under Henry VIII, it was the custom of the House of Lords in Parliament "to secure copies of bills introduced

in The House of Commons and take opinion of the Judges upon them" before they were sent up from the Lower House.²²

The security of the Tudor judges is apparent from the fact that there was no Act of Impeachment throughout their reigns. This form of action lay dormant from 1459 to 1621.²³ This happy situation came to an end when the Stuarts succeeded to the thrones of England and Scotland. James I (of England) and VI (of Scotland) had very firm views on the Divine Rights of Kings. In 1616, he spoke to his judges in The Star Chamber and admonished them

[not] to encroach . . . upon the prerogatives of the Crown; if there falls out a question that concerns My prerogative or a mystery of State, deal not with it. . . . That which concerns the mystery of the King's power is not lawful to be disputed. . . . Keep yourselves on your own benches. . . . Keep therefore your bounds. (For a more complete report of this speech, see footnote 24)

As a result, the judges of James I and Charles I went far in the direction of the theory held by Bacon²⁵ that their business was not merely to declare the law but to support the government; "acting on this theory they developed a doctrine of the prerogative which materially set the King above the law."²⁶ In this the judges were aided by a decision in 1610 best illustrated by argument of Counsel who urged that the only appeal from the King's judges is to The King in Council and the King in Parliament.²⁷ This point of view was again announced in *Floyd's Case* in 1621 and during the impeachment of Lord Bacon.²⁸ In the former it was held that the "House of Commons has no power . . . but on matters concerning that House."²⁹ Even the great Coke, afterwards dismissed from office by Charles I, the son of James I, was in agreement, stating that the Star Chamber:

is the most honourable court that is in the Christian world both in respect of

the Judges of the Court and their honourable proceeding according to their full jurisdiction and the ancient and just orders of the Court.³⁰

By the time Charles I came to the throne, the royal judges were in fact and in theory independent only to the extent they did the bidding of the King. Removable in theory at the King's pleasure, under Charles I they were in fact removed for decisions which he considered to be adverse to the interests of the Crown, and this in spite of vigorous protests from a courageous Bar. Such use and removal of judges became one of the major points at issue between the monarch and the opposition which grew throughout his reign. As the royal fortunes waned, this issue was brought into sharp focus in the *Grand Remonstrance*, presented to Charles on 1st December 1641.³¹ Article 38 of the document specifically stated the issue:

Judges³² have been put out of their places for refusing to do against their oaths and consciences; others have been so awed that they durst not do their duties, and better to hold rod over them the clause *quamdiu se bene gesserit* was left out of their patents and a new clause *durante bene placito* inserted.

This clause shows the hand of Coke, never a man to be bound too tightly by historical accuracy, and is not historically correct.³³ But it pinpointed the gravamen of the complaint which was fortified by the following Article, (39), which stated that:

Lawyers have been checked for being faithful to their clients; solicitors and attorneys have been threatened and some punished for following lawful suits and by this means all the approaches to justice were interrupted and forecluded.³⁴

The *Grand Remonstrance* went unheeded and the Puritan revolution followed. During the Restoration, Charles II, who "had no desire to set out on [his] travels again," took good care not openly to tamper with

royal justice. His brother, and successor, James II, was not as wise. Up to the time of his reign the prerogatives of the King had not rested on an armed force, but upon custom and respect for law. The issue between Charles I and Parliament showed that there was no miraculous attribute in the prerogative which force could not overcome. However, at the Restoration, and in the reign of James II, there still remained within the limits of law a formidable weapon. . . . The King could still dismiss Judges at pleasure. Not used by Charles II, it was still available to his brother. When James II wished to dispense with the operation of a statute passed for the security of the Anglican Church, "the powers of the Crown over the Judges were again used to obtain judicial sanction for illegal acts."³⁵ This questionable use of the royal prerogative resulted in the famous case of *Godden vs. Hales*³⁶ which played a definite part in the Glorious Revolution of 1688, pursuant to which the independence of judges was firmly established.

Hales was appointed colonel of a foot regiment but did not take the Anglican sacrament or the oaths of allegiance as required by law.³⁷ On 11th November 1685, Hales became formally reconciled to the Roman Catholic Church. For these acts, James II gave Hales a dispensation by Letters of Patent under the Great Seal. By a collusive action brought against him, Hales was indicted and convicted at the Rochester Assizes on 28th March 1686. He then pleaded royal dispensation and the case was argued on appeal before twelve judges on the King's Bench. Eleven of these judges (Street, J. alone dissenting) agreed that the plea in bar of the action was good. Judgment was rendered on 21st June 1686 and less than eighteen months later Parliament dealt with the opinion of Lord Chief Justice Herbert in the Bill of Rights accepted by William (of Orange) and Mary when they were invited to occupy the English throne.

It took longer to deal with the question of the independence of judges. But after the death of Mary, the Act of Settlement³⁸

which settled the succession to the Throne, contained the following provision in Article II:

. . . that Judges' commission be made *quamdiu se bene gesserit* and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them.

One final step remained. I George III cap 23 (1760) was passed at the insistence of the young King and completed the independence of the judiciary.

The death of the Sovereign had hitherto determined the Judges' patents of appointment, making it necessary for the new sovereign to issue new patents. The danger that experienced judges might thus be displaced without a technical breach of the law to make way for Royal or ministerial nominees was, even in 1760, more theoretical than real. But it was desirable to make statutory provision against the possibility and this Act, while safeguarding the powers defined in the act of Settlement, made judicial office safe for the future from the caprice of political jobbery of the Sovereign, ministers or courtiers.³⁹

Thus sixteen years before the American Revolution the separation and independence of the judiciary, and the method of removing judges, was well established.⁴⁰ That it influenced the Founding Fathers is quite apparent from reading the Federalist Papers. They, better than most men, understood the severity of the struggle over the preceeding 150 years and the necessity for the impartial and objective administration of justice. It is, perhaps, idle to speculate about their opinion of the various State Judicial Commissions which have been established in our lifetime. Of one thing we may be certain: since the executive arm of the government could exercise no influence over the Bench, they, as all thinking men, would be unable to supply the logic (if indeed it exists!) which would permit the

Bar to clothe itself with disciplinary authority over the Bench, by whose rules it functions, before which it must plead and by whose judgments it is bound. Such pretension, *sua sponte*, is akin to the attempted judgment of Moses by Aaron and Miriam.⁴¹

IV

HAVING REVIEWED the traditional relationship between Bench and Bar, and how it grew; and the struggle for the complete independence of the judiciary, culminating in the inability of the Sovereign to dismiss judges by any means other than impeachment,⁴² a provision adopted by our Constitution, we come to the present. Today the independence of the judiciary is provided by the federal and most of the state Constitutions. The pressing question, which is probably of a temporary nature, is the age old question of "*Quis custodiet ipsos custodes?*" Various solutions have been attempted at both federal and state level. In this last division of this article, we shall a) attempt briefly to describe these measures, b) examine the part, if any, of the several Bar Associations in such solutions, and finally c) suggest the proper place of Bar Associations in the matter, and by what method judges can, and should be disciplined.

At the federal level, the question of removing judges has arisen in two ways; by the ability of the Congress to abolish and to establish courts⁴³ and by the debates in the Congress to determine whether judicial tenure during "good behavior" meant life tenure and, if not, how "good behavior" was to be determined.⁴⁴ Because of a recent, excellent article on this question by Professor Philip B. Kurland of the University of Chicago,⁴⁵ it is here unnecessary to discuss these questions at length. It is enough to state that the Congress recognizes that the abolition of a Court does not deprive a judge of judicial office and that good behavior and life tenure are synonymous. It is interesting that one of the most eloquent defenses of judicial independence was made by Mr. Griswold (of the House

of Representatives). It was clear to him that judges could lose their office only on conviction for misbehavior after impeachment. He found that the failure to provide for the inclusion of the powers of removal that was existent in England, *i.e.*, on motion of both houses of Parliament and action taken pursuant thereto by the Crown, was deliberate.⁴⁶

At state level much more has taken place. For many years the states recognized that impeachment was the only way a judge could be removed from judicial office.⁴⁷ In somewhat extreme *dicta*, the Illinois Supreme Court bluntly stated:

The Canons of Ethics of The American Bar Association are not of binding obligation and not enforced as such by the Courts.⁴⁸

However, in comparatively recent times, it has been recognized that impeachment and constitutional procedures are cumbersome, time consuming and unsatisfactory.⁴⁹ In California, where a constitutional amendment was required to avoid this necessity, a Court Commission was established.⁵⁰ In New York the same end was achieved by Statute and many states have followed this example. Procedures before these Commissions have usually been laid down by Supreme Court rules.⁵¹ The Commissions have the right, usually, to remove, suspend and discipline judges. The exact conditions under which they proceed vary somewhat, but such variation is not pertinent to this argument. They *do* exist; such Commissions may initiate action against sitting judges or act upon complaints laid against such judges. The Commissions have been created by Constitutional amendment, Statute and Supreme Court Rules.⁵² Generally, the administrative staff receives or initiates the complaint, investigates it and then, if the facts warrant, presents it to those who constitute the Commission.⁵³

This may indeed be the optimum method of maintaining discipline over the Bench. From the number of Court Commissions in existence, and contemplated, it would seem

to reflect current, modern thinking. Nevertheless, it is not without dangers. These Professor Kurland notes in his article. He sees two main objections. The first he states in the following words:

Certainly the politics of the Bar Associations offer no advantages over the politics of our elected officials. A combination of the two is likely to provide only exacerbation of the faults of each.⁵⁴

The truth of this observation is so obvious to anyone familiar with the politics of the Bar that no additional elaboration is necessary. However, this objection is compounded by extra-judicial activities a Bar Association may undertake, particularly if encouraged by an ambitious Bar Association president over whom its members, by the constitution of the Association, have little, if any, day-to-day control. This is the rule rather than the exception and is evidenced by the idea, with which this article began, that the Bar, *sua sponte*, police the Bench. As Professor Kurland points out in another article: "There is need for intelligence and integrity on the Bench that goes far beyond an average I.Q. and a distaste for venality."⁵⁵ But in addition to good judges, about which more will be said below, there is need for self-restraint on the part of the Bar, recognizing, as it should, the severe struggle by which the Bench achieved independence and that the problems of the day are fleeting.

Professor Kurland points out an even more objectionable aspect of State Court Commissions:

Nor am I impressed by the recent vogue among the States to provide means for chastising Judges who get out of line. Admittedly, the worse the quality the more external restraint that is required, *provided that the rein is in the proper hands. But the various devices that the States have adopted for policing their judiciaries are little more than polite blackmail*, suggestions that the Bar is unhappy with a judge's behaviour and

he'd better shape up or else. I shudder to think how early the Federal Courts might have been deprived of the services of Judge Learned Hand under such a system as California's. For politeness to Counsel and willingness to tolerate fools gladly were not among his virtues, and it is only such virtues and that of regular attendance at the court house that the policing systems seem capable of evoking from timid judges.⁵⁶ (Italics supplied)

This point of view is reinforced by that of Mr. Emmanuel Celler, late of the House Judiciary Committee, who said in part:

I want to maintain as much independence for our judiciary as is possible, and the only way to maintain what we can maintain as independent judiciary is to make attack upon them (sic) difficult, not too easy; otherwise the judges will no longer be independent, but will truckle to this influence and that influence, to this personage and that personage, and we would, therefore strike a decided blow at the judiciary and destroy their (sic) independence.⁵⁷

In those jurisdictions where judges are elected by popular vote, and Bar endorsements, or their refusal, presumably influence the electorate this danger is even more apparent. Coupled with misguided enthusiasm for policing the Bench, the danger is serious.

What, then, is the proper role of the Bar in this matter? There are several ways to reach a conclusion and to answer this question. At the risk of circuitry, let us approach the matter as Clive Bell approached his definition of Civilization and first determine what the role of the Bar should, and must, *not* be.⁵⁸

It is apparent from a consideration of the traditional relationship between Bench and Bar, and from the history of the long struggle for judicial independence, that, in the absence of constitutional, statutory or judicial delegation, the Bar has no authority

over the Bench.⁵⁹ Any attempt to establish such authority, directly or indirectly, should be eschewed by those presumed to know the law. Nevertheless this is not usually the case.⁶⁰ Because of current events, and the state of public opinion, there is an unfortunate chance that some unthinking members of the Bar use the climate of the times to attempt to establish some semblance of such authority, however unwarranted. This possibility exists because the Bar does, in fact, have a direct and peculiar interest in the competence of the judiciary. In 1915, James Parker Hall, then dean of the University of Chicago Law School, made the following statement which received wide concurrence at the Bench and Bar of the United States:

It has been recognized by every careful investigator of the situation that the most important single factor in securing a high grade Bench is the influence of the Bar upon the selection of Judges.⁶¹

This view was affirmed in 1946 in the leading case of *Smith vs. Higinbotham*.⁶² In *State Bar vs. Supreme Court of Los Angeles County*⁶³ the Court recognized that certain duties were imposed upon Bar Associations by special knowledge, privilege and custom and among these were that Bar Associations do their utmost to obtain the best possible Bench.⁶⁴

It is upon this well recognized public duty to obtain the best possible Bench that fuzzy thinking members of the Bar attempt to base its pretended right for continuous examination of the Bench. The fault lies in the inability to distinguish a sitting judge *qua* candidate for reelection from a sitting judge *qua* judge. Merely to state the distinction is to clarify the problem. The position of a Bar Association, through its committee on candidates, enabling it to submit questionnaires to judges running for the first time, or seeking reelection, and publishing the results thereof to its members is justified *only* if a legal distinction be made between a sitting judge *qua* candidate and a sitting judge *qua* judge. Often

even this distinction is hard to make.⁶⁵ Any conclusions drawn from such questionnaires as to the propriety or objectivity of judicial decisions rendered during the tenure of the judge to whom such questions may be addressed is highly improper.⁶⁶

Another distinction must be made. That is the right of a Bar Association, as it is the right of any citizen, to complain of, investigate, and prefer charges about a judge's private acts and morals.⁶⁷ In *re McGarry*, the Illinois Supreme Court on this point said that it is well settled that a judge cannot be sued for his judicial acts. However, "an attorney at law, even though a judge, may be disciplined . . . (for) lack of morality." Thus a judge can be disciplined by the Bar Association, *as an attorney*, for acts of moral turpitude. But a sitting judge cannot be disciplined, as an attorney, unless his acts show a lack of morality:

We hold the public policy which renders a judge acting in a judicial capacity in a Court immune from liability applies with equal force to disciplinary proceedings of the kind here involved . . . but the private, unofficial and independent actions of a judge as an individual may be subject to such jurisdiction.⁶⁸

It would seem obvious, from the above, that a Bar Association has a well recognized right to suggest competent judges to the electorate, or to the appointing authority, including the right to express opinions on candidates or appointees to high judicial position. This, in itself, is an extension of the traditional and present authority of the Inns of Court,⁶⁹ the American counterparts of which, in some respects, are our Bar Associations.⁷⁰ In the absence of other authority, here ends, or should end, the jurisdiction of the Bar over the Bench.

Notwithstanding, Bar Associations have assumed the right, (often called "duty"), of inviting sitting judges before a committee to explain in fractions of a judicial code of ethics; publishing privately, or publicly, the results of such investigations; attempt-

ing to discipline sitting judges as members of a Bar Association; writing letters of censure of sitting judges; examining sitting judges to pass on their qualifications to sit. Not a single one of the above activities ever has been, or is now, a prerogative of the Inns of Court.⁷¹ Whence, then, (failing a specific delegation of such responsibilities from the highest court), cometh such authority? The Bar Associations themselves would be hard pressed to answer this question.

Compounding this error, Bar Associations have, from time to time, laid down rules and regulations for the conduct of such ultra-vires activities. Such rules sometimes refer to "the nature of the complaint," the right of a sitting judge "to counsel of his own choice," to the protection of his Constitutional rights and the right to a transcript,⁷² all of which appear to clothe the committee with jurisdiction which it does not, in fact, possess, and to give the appearance of bestowing upon the committee powers which it does not have. Of all organizations, a Bar Association should be most careful to learn the law and to act within it. At all cost, a Bar Association must avoid even the appearance of seeming to attempt to do that which is not empowered to do. The mere perusal of a Rule of Procedure similar to that quoted in footnote 72 vitiates beyond argument the excuse made by some unperceptive members of the Bar; to wit, that a Bar Association is doing no more and no less than is the duty of an individual citizen in such states where Court Commissions exist, for no individual citizen would have the temerity and impudence to invite a judge to "a hearing" for an alleged fault in the course of his judicial duties; suggest that the judge appear "with counsel of his choice" or offer to make a transcript of his examination of this judge. The Association which presumes to do so, without specific authority, merits the same response from any sitting judge to which it dares to send such an "invitation" as the judge would make to a similar demand by John Doe.

The last distinction to be made is in regard to conclusions sometimes drawn from *Willner vs. Committee on Character and Fitness*.⁷³ This case held that no man can be deprived of a right without due process of law, including the opportunity to know the reasons on which such deprivation of right is based, to confront and to cross-examine persons making adverse statements and to be represented by counsel. In the *Willner* case, however, the Committee on Character and Fitness (for membership in the New York Bar), the appellee was a statutory committee which, under New York law⁷⁴ had the duty to determine the moral fitness of applicants to the New York Bar. Can any distinction be more clear?

It is, of course, beyond discussion that the resolution of this entire question is possible by the appointment of better qualified judges. Ideally, there should be no need for any code of Judicial Ethics at any court system level. No code of Judicial Ethics has ever been found necessary in the English or Scottish courts. Having done as well as either in the growth of the law during the past two centuries, it is indeed regrettable that there be a lag in this particular and vital field. Present proposed ethical judicial codes, laying the stress they do on the personal finances of a judge, tend to insist upon a field in which financial gain is merely the result of basic errors in judgment. And it is in this precise area—that of judgment—that occupants of the Bench should be most invulnerable.

These difficulties can, and should, be overcome by a better system of choice. If merely a portion of the time and energy spent in considering the discipline of sitting judges were spent in devising better methods of selection, the result would be far more rewarding! At the risk of not inconsiderable presumption, it is contended that, with the proper selection insisted on above, the only necessary code of Judicial Ethics might well contain something like the following:

1. No judge shall enter into any agreement, make any investment or engage in

any occupation, business enterprise or eleemosynary activity which might prevent him from making fair, impartial decisions in any litigation which may be brought before him. If any such interest, direct or indirect, exists he shall, if he is legally able to do so, at once divest himself of such interest.

2. Should any judge find any reason whatsoever which, in his opinion would prevent him from coming to a fair, impartial decision in any litigation before him or coming before him or know of any valid reason whatsoever that might provide the basis of appearance of any special interest in such litigation, however remote such reason may be, he shall disqualify himself from hearing such litigation, *sua sponte*, and without excuse or explanation.

3. In his private life a judge should so conduct himself that no prudent man can find grounds for valid criticism of his actions in any area of conduct, having due regard for all laws, conventions, social customs and current standards of conduct.

4. In his judicial conduct, a judge must endeavor to set an example of fairness, honesty, impartiality and propriety to the Bar; and in his private life, he shall equally endeavor to set a similar example of high principles and standards of behavior to all citizens.

No more should be necessary.

Having determined what a Bar Association Committee on the Judiciary is not and what it should not do, let us conclude by examining the proper use of such a Committee in absence of a specific delegation of authority.

In the first place, it is there. Like the naval theory of a Fleet-in-Being, if its powers are not abused, it is a restraining influence on judicial excess and an aid to the chief judge of those Courts in which such excesses may occur; for, in spite of electoral results which show the influence of Bar endorsement to the marginal, all judicial candidates seeking reelection, all candidates for judicial appointment, and all men seeking judicial election for the

first time, strive to obtain the approval of their local Bar. Such candidates would be naive indeed if they failed to recognize a liaison between the Committee on the Judiciary and Committee on Candidates. They are not naive.

Secondly, a judge attacked in the press, or by other media of communication as is now, alas!, so often the case, should be able to look to the Committee on the Judiciary for his defense. Indeed this should be the prime, overriding duty and objective of a local Committee on the Judiciary and for this purpose a sitting judge will welcome an invitation to appear before such a Committee.

Third, a Committee on the Judiciary is an excellent body to take cognizance of acts of moral turpitude, (as opposed to judicial acts), on the part of a sitting judge and to lay complaints in the proper quarter.

Fourth, a Committee on the Judiciary, traditionally having acted within its proper framework, is an excellent *potential* arm of the Court. Because of its special knowledge, public character and tested responsibility, it is a splendid potential recipient of duties and responsibilities to aid in the administration of justice. This has been recognized, for example, in the states of Ohio and Wisconsin. Under Ohio rules,⁷⁵ a Board of Commissioners on Grievances and Discipline (over the Bench) is made up of members of the Bar, designated by the Supreme Court, within special districts specified by this Court. In Wisconsin,⁷⁶ the Bar has disciplinary responsibilities over the Bench by Supreme Court rule. Here again the districts are specified by the Court but the members of the Bar, acting within such districts, are appointed by the President of the Bar Association with the approval of its Board of Governors. Under such rules, a Committee of The Judiciary can quite properly be of assistance in the judicial process; without such authority, those who live by this process and who, *sua sponte*, usurp authority, take a step to undermine the very system upon which our liberties and their livelihood depend.

*See "Who Judges the Judges" and "Removal and Retirement of Judges," by Braithwaite, published by the American Bar Foundation.

***Quamdiu or durante bene placito/pendente se bene placuit*: "during (the King's) pleasure"; *quamdiu or durante se bene gesserit*: "during good behavior"; *Quis custodiet ipsos custodes?*: "Who shall guard the guardians" (See Part IV); *sub iudice*: "under legal consideration"; *coram ipse rege*: "in the presence of the King"; *sua sponte*: "on his (their) own initiative."

¹⁹Pollack and Maitland, *History of English Law* (2nd Ed.) Vol. I, pp. 154/6; 204. ²⁰Edward I (1292); 4 Henry IV c. 18 (1403); 1 Henry V (1413); 33 Henry VI, c. 7, (1455); 3 James I, c. 7 (1606); Pollock and Maitland *op. cit.*, pp. 190/196, Dugdale, *Original Jurisdiction*, pp. 141, 312, 316, 317, 320. ²¹Pollack and Maitland, *op. cit.* p. 153. ²²*Ibid.* ²³Madox, *Exchequer I*, pp. 798/801. Here is the origin of our term "of The Bench." ²⁴Pollack and Maitland *op. cit.* p. 156. ²⁵Rushworth II, p. 257 (1637). ²⁶Gardiner, "Constitutional Documents of The Puritan Revolution" (3rd Ed, Revised) p. 111. ²⁷*Black Books of Lincoln's Inn I*, pp. 259-310-312) II, pp. 289/290, XL: *Pension Books of Grey's Inn XII*; *Praxis Utriusque Banci*, 26; *Inner Temple Records I*, pp. 63, 192, 413 (1596); *Les Reports (Orders of Judges)*, 266 (1594); Holdsworth, *History of English Law*, Vol. II, p. 496, IV, p. 364, VI, pp. 481/482, 484/485; *Law Review Quarterly XXIV*, p. 397, XXIX, pp. 23/24. ²⁸Fletcher, *Pension Book XXII*; Fortescue, *De Laudibus* c. 48; Dugdale, *Original Jurisdiction* c. LXX; Holdsworth, *History of English Law*, Vol. VI, pp. 433/434; *Boorman's Case* March N.R. 177 (1642); *Redding's Case* Sir T. Rayne pp. 376/377 (1680); *Hill's Case* Cary 77 (1603); *King vs. Grey's Inn I* Doug. 353; *King vs. Benchers of Lincoln's Inn* 4 B.&C. 855; See also *In re. Mosness* 39 Wisconsin 509; *In re. Day* 181 Ill. 73. ²⁹*Inner Temple Records I*, p. 413 (1596); Holdsworth, *History of English Law* Vol. IV, p. 264; *Black Books of Lincoln's Inn I* 259; pp. 310/312; *Pension Books of Grey's Inn* 36, 97; *Pie Case Les Reports* cited above (1594); see statements of Edward I, Henry IV and Henry VI cited in footnote 1. ³⁰*Benchley's Case*, Jenkins 262 (1582); *Jerome's Case* (citing *Osbastion's Case* Cro. Car. 74, (1588); see also *Boorman's*, *Redding's* and *Hill's* cases cited in footnote 10. ³¹Holdsworth, *History of English Law*, Vol. VI, p. 490 *et seq.* ³²Letter of Sir Blanchard Stamp, one of H.M. Judges of The High Court of Justice to the author, "... it was never a function of any of the Inns of Court to exercise any control whatsoever over H.M.'s judges and so far as I know no attempt has

ever been made . . . on the contrary. . . ." ³³I George III cap 23 (1760). ³⁴Anson, *Law and Custom of The Constitution* (2nd Ed.), Vol. II p. 29. ³⁵*Ibid.* ³⁶Tanner, *Tudor Constitutional Documents* 1485-1603 (Cambridge University Press, 1922), p. 342. ³⁷*Ibid.* ³⁸*Ibid.* For a typical grant of office to a Judge see Protheroe, *Statutes and Constitutional Documents* 1558/1625 (4th Ed.) p. 143. This reads in part: "*Ac ipsum Edwardo Flowerdue tercium Baronem de Scaccario nostro facimus, ordinamus et constituimus per praesentes habendum, tenendum et occupandum officium praedictum eidem Edwardo quamdiu se bene gesserit in eodum.*" Author's translation: "Know all men by these presents that We name order and appoint Edward Flowerdue to be third Baron of The Exchequer to have, hold and occupy this office during his good behaviour therein." ³⁹Pollard, *Parliament* p. 34. ⁴⁰*Ibid.* ⁴¹Tanner, *op. cit.*, p. 423. The Tudors reigned from 1485 to 1603. For the salaries and emoluments of Tudor judges see *Ordinances of The Royal Household*. Society of Antiquaries 1790, quoted in Tanner, *op. cit.*, p. 208. ⁴²James I, *Prerogative and The Judges*: "Now having spoken of your office in general I am next to come to the limits wherein you are to bound yourselves, which likewise are three. First, encroach not upon the prerogatives of the Crown; if there falls out a question that concerns My prerogative or a mystery of State, deal not with it, till you consult with the King or his Council or both; for they are transcendent matters . . . That which concerns the mystery of the King's power is not lawful to be disputed; for that is to wade into the weakness of princes and to take away the mystical reverence that belongs unto them that sit in the Throne of God. "Secondly, that you keep yourselves with your own benches; not to invade other Jurisdictions which is unfit and an unlawful thing . . . Keep you therefore all your bounds and for My part, I desire you to give Me no more right in My prerogative than you give to any subject, and therein I will be acquiescent: as for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is it lawful to be disputed.

"It is atheism and blasphemy to dispute what God can do; good Christians content themselves with His Will revealed in His Word, so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that; but rest in that which is the King's revealed will in his law." *Works of James I*, Ed. 1616, p. 556; *A Speech in the Star Chamber on 20th June 1616*. ⁴³Bacon's Essays: "*Of Judicature* . . ." "... let them [the Judges] be yet lions under the throne, being circumspect that they do not oppose or check

any points of sovereignty." ²⁶Anson, *op. cit.* p. 29.

²⁷*Bates' Case*: Argument in Parliament by Mr. Whitelocke 1610—State Trials (Ed. 1779) Vol. XI, pp. 52/61; quoted in Protheroe *op. cit.*, p. 352. ²⁸Protheroe: *op. cit.*, p. 334. ²⁹Protheroe: *op. cit.*, p. 338. ³⁰Coke, *Institutes*, part IV, cap 5. ³¹Rushworth IC, p. 437; Gardiner, *Constitutional Documents of the Puritan Revolution*, p. 202. ³²Coke and Crewe. ³³See the reference above to the usual commissions issued by the Tudors. ³⁴See footnote 31. ³⁵Anson, *op. cit.*, p. 31. ³⁶2 Shower 475; XI State Trials 1166 (1686). ³⁷25 Car II cap. 2. ³⁸12/13 William II cap. 2. (1701).

³⁹Grant Robertson, *Select Statutes, Cases and Documents* (4th Ed. Rev.), p. 238. ⁴⁰I Geo III cap. 23 (1760) provided: "1) The commissions of Judges . . . shall be, continue and remain in full force during good behaviour.

"2) That it may be lawful for His Majesty . . . to remove any judge or judges upon the address of both Houses of Parliament." ⁴¹12 Numbers, Verses 1 to 12. ⁴²The Constitution of The United States, Article III, Sec. I. The similarity between this Section and I Geo. III cap 23. is striking. Similar constitutional provisions are contained in almost all of the state constitutions. ". . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; nothing can contribute so much to firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in great measure, as a citadel of the public justice and the public security." *The Federalist* No. 78. ⁴³Act of 13 Feb. 1801 Ch. 4; 2 Stat. 89 (1801) and the congressional debates in regard thereto II Annals of Congress; The Abolition of the Courts of Commerce and the debates in this regard 49/50 *Congressional Record* (1913). ⁴⁴II Annals of Congress 57, 58, 72, 90, 139/140, 652, 736, 738 (1802); *Congress Globe* 41st Cong. 1st Sess. 337/342 (1869); 48 *Congressional Record* 7843/8000 (1912). ⁴⁵36 *Chicago Law Review* 665. ⁴⁶*Ibid.*, at p. 677. ⁴⁷*In re Gibbs* 51 So. Dakota 464; 214 N.W. 850 (1927) and comments thereon in 41 *Harvard Law Review* 99, 32 *Illinois Law Review* 118 (120), 31 *Illinois Law Review* 893 (901-902); 18 *California Law Review* 50 (53); 28 *Albany Law Review* 1; 36 *California Law Review* 72; 50 *Illinois Bar Journal* 695. ⁴⁸*Hunter vs. Troup* 315 Ill. 293 (1925). ⁴⁹207 Cal. 323; 278 Pac. 432; 181 Fed (2nd) 450; 50 *Illinois Bar Journal* 695; 84 N.Y. Supp. 1025; 36 S. Cal. Law Review 72. ⁵⁰"Hardy, subject of 207 Cal. 323. was impeached on one of five counts. Having done this, the California Senate never wanted to handle another similar case." Wood, *The Cali-*

fornia Judiciary, p. 48 (1959). ⁵¹See, as an example, Supreme Court amendment of Rule 51 of 18 May 1967, by the Supreme Court of Illinois. ⁵²By Constitutional amendments in California, by statute in New York; by the new constitution in Illinois, as examples. ⁵³See reference cited in footnote 61. ⁵⁴Kurland, "Tenure of Federal Judges," 36 *Chicago Law Review* p. 665 at pp. 666/667. ⁵⁵Philip B. Kurland, "Toward an Political Supreme Court," 37 *Chicago Law Review* 19(45). ⁵⁶Kurland, "Tenure of Federal Judges," 36 *Chicago Law Review* 665 (pp. 667/668). ⁵⁷81 *Congressional Record* 6170-3; 6187. (1937). ⁵⁸Clive Bell, *Civilization*, Phoenix Library Ed., p. 12 and Chap. 2, "What Civilization is Not." ⁵⁹See parts II and III above. ⁶⁰See part I above. ⁶¹10 *Am. Jud. Soc.* 3 (at p. 25). ⁶²187 Maryland 115 (1946). Here the Maryland court said: "It has been recognized for many years that it is the privilege of the Bar to publish its opinion on the qualifications of *Judicial Candidates*," (at p. 122); and "It is beyond question that the Bar Association has the powers under its charter and by-laws to engage in the alleged activities in support of sitting judges" (at p. 123). (Italics supplied). ⁶³207 California 323; 278 Pac. 432 (1929). ⁶⁴This decision, among other things, pointed out that, historically, the Bar "is privileged, of public interest" and subject to special discipline. (Italics supplied). ⁶⁵See references under footnote 47, and 32 *Illinois Law Review* 118 (120); 31 *Illinois Law Review* 893 (at 901/2). ⁶⁶See again 207 California 323; 278 Pacific 432 which holds that the right to practice law is held in suspension while a judge sits (citing 84 N.Y. Supp. 105), and the offense of a sitting judge is not an offense against his profession but against his office. The delegated right of Bar Associations to discipline lawyers is not here in issue. See also *Hunter vs. Troup* 315 Ill. 293 (1925); *In re Donaghy* 393 Ill. 62 (1949) (at page 624); *In re Holland* 377 Ill. 346 (1944). ⁶⁷*In re McGarry* 380 Ill. 359; 4 N.E. (2nd) 1942. ⁶⁸*Ibid.* ⁶⁹"Our High Court Justices are still appointed by the Crown on the advice of The Lord Chancellor who no doubt takes advice from individuals, gratified to give it, but certainly not from the *Inns of Court*" (Italics supplied). Letter of Sir Blanchard Stamp, one of H.M. Judges of the High Court of Justice, to the author, June 1966. ⁷⁰See footnote 10. ⁷¹"It is interesting to me to note the summary of activities which you set out . . . because none of them, nor the publication of an opinion on the qualifications of judicial candidates, are activities upon which an *Inns of Court* or the General Council of the Bar would embark." (Italics supplied) Stamp, *supra*. ⁷²One typical rule, as an example, was Rule 4

of the Committee on The Judiciary of the Chicago Bar Association which at one time read as follows:

"In the event the Committee on the executive committee concludes from a consideration of the report on the preliminary investigation that there is reason to believe that the actions or inactions of a judge may (1) be censorable or (2) a violation of an applicable canon of judicial ethics, or (3) justify a proceedings before the Courts Commission no report shall be filed by the committee, or the executive committee until the judge has had an opportunity to be heard as herein provided.

- (a) The judge shall be advised in writing of the nature of the complaint and invited to appear before the full committee or the executive committee, in the discretion of the chairman, regarding the complaint. He shall be informed that he may have counsel of his choice. He shall have the right to present any documents or witnesses bearing on the complaint.

- (b) The chairman in his discretion may invite members of the sub-committee making the preliminary investigation to sit and act as members of the executive committee at the hearing.

- (c) The hearing shall be conducted in a fair and impartial manner but without resort to technical rules of evidence or procedure. All hearings shall be private unless the judge shall request that they be public. A stenographer or machine record may be taken of the hearing in the discretion of the chairman.

- (d) Upon the completion of the hearing the committee or executive committee, as the case may be, shall make a written report to the board of Managers of its conclusions and recommendations."

³⁷³U.S. 96; 83 S. Ct. 1175 (1963). ³⁷⁴*Judiciary Law* p. 90 (1)(a); ³⁷⁵*McKinney Consolidated Laws* c. 30. ³⁷⁶Ohio Supreme Court Rules, Rule XXVII. ³⁷⁷Wisconsin Supreme Court Rules, Rule 10, Sec. 5.