2-25-1972

Judges and Financial Temptations

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The Evening Star
WASHINGTON, D. C.
D. 302,506 SUN. 338,862

FEB 25 1972

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WASHINGTON CLOSE-UP

Judges and Financial Temptations

By LYLE DENNISTON

The closer the nation's judges come to the day when they will have to follow a new code of ethics, the clearer it becomes that many of them are not willing to turn away from strong financial temptations.

One might have thought, after the ethical controversies involving ex-Justice Abe Fortas and Judge Clement Haynsworth, that there would be hardly a judge in the country who did not rush to tidy up all of his outside, non-judicial affairs.

But the evidence is beginning to accumulate that a good many members of the bench feel no special obligation to put themselves above suspicion about their out-of-court dealings. "Business as usual," it would seem, is a fairly widespread attitude.

At a time when every court reformer, in high station or low, complains about clogged dockets, an almost amazing number of judges find lots of extra time to handle off-bench assignments from which they benefit in one way or another — often financially.

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Apparently the most common of these assignments involves either managing someone's estate, or handling someone's trust. Frequently, but not always, the judge had the assignment before he went on the bench, and continued to hold it.

But there are also judges who take an active role in the operation of a business firm. It could be a family-owned firm, but that is not universally true.

To many observers outside the legal profession, it would seem obvious that either of those kinds of duties would put a judge so close to the practice of law or the direction of business that a conflict with his judicial office would be virtually automatic.

How could a judge make the routine investment decisions of an estate or trust manager, or the everyday operating decisions of a businessman, without dealing in matters which, by chance, he may have to pass upon in cases before his court? The answer, usually, is that he cannot.

Much of this has been recognized by the special American Bar Association committee which is drafting a new code of conduct for judges of federal, state and local courts.

That panel has proposed that no judge serve as the manager of any estate or trust unless it is for a member of his family, and even then under quite restricted conditions, and that no judge hold any position in any kind of business firm.

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However, in a clear concession to the many judges who would find those prohibitions uncomfortable or confining, the ABA committee has gone a long way to see that they don't apply to judges now sitting.

Any judge who is on the bench when the proposed code goes into effect could keep all his estate or trust assignments, and could even remain an officer in a business firm, provided it was a family firm.

In other words, kinds of private involvement which the ABA panel, ideally, would not approve for judges in general would be unethical, in practice, only for future judges.

That approach apparently has caused something of a dilemma for another committee — a temporary panel created by Chief Justice Warren E. Burger to give advice on ethics to federal judges until the new code of ethics is available to govern the conduct of all judges.

It was easy for that committee to tell a judge he could not hold office in a business, family or otherwise, because the U.S. Judicial Conference ruled in 1963 that that was forbidden for all federal judges.

But the conference has taken no action yet on judges who serve as executors of estates or trustees of trusts, so the ethics advisory committee had no guideline to follow when a judge asked it if he could keep such an assignment. Apparently, many of the "substantial number" of judges who continue to manage estates or trusts did ask the panel for advice.

Looking to the proposed ethics code for guidance, and apparently finding none because of the exemption for sitting judges, the advisory committee simply announced it would not give advice on the subject. That leaves judges to do as they please, and it is apparent what pleases them.

What that panel, and the committee drafting the new code, are up against, it seems, is a habit of mind among many lawyers and judges that service on the bench is not a career, but is rather a reward that comes politically to a successful lawyer. Viewed that way, of course, the job hardly carries with it a duty of financial self-denial.

Experts on the nature of the American judiciary suggest that this habit of mind has long existed in the older states of the union, and in the states with large metropolitan areas with many wealthy practitioners of the law.

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But these same experts say that there is a growing trend toward a "career" judiciary in the younger, less populous states. In those states, men often go on the bench at earlier ages, and thus have not become well-established attorneys with deep financial involvements.

It is from this sector of the judiciary, it now appears, that there is growing pressure for a more rigorous standard of ethics for judges. Perhaps, then, the days of "business as usual" may not go on without end.

SUNDAY STAR, Wash. D. C., Feb. 27, 1972

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