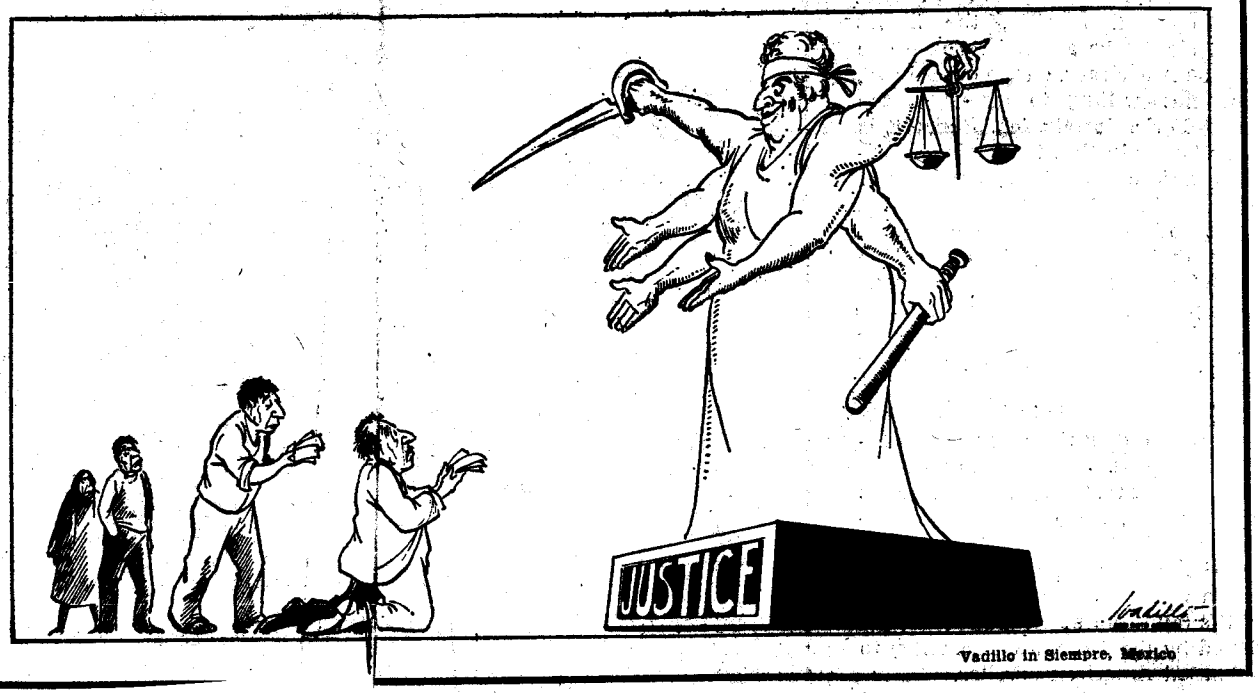
Updating Our Bench Marks



Vadillo in Siempre, Mexico

By John P. MacKenzie

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"THE PLACE of justice is a hallowed place, and therefore, not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption."

These words by Francis Bacon are in the preamble of the current Canons of Judicial Ethics, first published by the American Bar Association 48 years ago. Nobody quite knows why the words are there or why Bacon's words especially were chosen to grace the canons. Bacon, to be sure, had been the highest judicial officer of England, but he also was impeached for taking bribes and served time in the Tower of London.

One thing is certain, however: the new, updated, 1972 version of the ABA's Code of Judicial Conduct will contain no such friller. Gone with Bacon will be excerpts from Deuteronomy and a fragment of the Magna Charta.

The new code, according to the vow of California's retired state chief justice, Roger J. Traynor, who is chairman of the ABA drafting committee, will have none of the "pious platitudes" that helped prevent the 1924 ethical canons from being a practical and effective guide for judicial behavior.

Whether the new code meets that test is a question for the ABA's own parliament, the House of Delegates, which will be asked to adopt it at the association's annual convention next month in San Francisco. There is little doubt that the answer will be yes, but there is room for doubt that the code will satisfy heightened demands for a judiciary that is free from impropriety or the appearance of impropriety.

In the direction of reform, the new code would create these new restrictions on state and federal judges:

- A duty to stay out of off-the-bench business enterprises, including such law practice as trusteeships. Protests that many judgeships pay too poorly to support life are met with the code's dictum that it "may cause temporary hardship . . . The remedy, however, is to secure adequate judicial salaries."
- A duty to file annual public reports of income for non-judicial services.
- A duty to disqualify himself from a case in which he has any financial interest, "however small," down to one share of stock. In addition, the judge is duty-bound to "inform himself about his own investments and take steps to minimize the number of times he must step out of a case.

Under the 1924 canons a judge was told that he should "not enter into such private business . . . as would justify . . . suspicion" that he was using his office to promote his personal business enterprises. As interpreted, judges were considered free to decide for themselves whether to serve as paid bank or corporation officers or directors, and many judges decided in their own favor. Indeed, it is not completely certain that all federal judges have stopped this kind of moonlighting despite a 1963 resolution by the Judicial Conference of the United States calling upon them to do so.

The public filing requirement would be a sharp break with tradition but it would be considerably milder in its impact than reforms adopted in 1969 at the urgent request of retired Chief Justice Earl Warren. Under rules that were suspended indefinitely after Warren E. Burger replaced Warren, every federal judge would have had to file—confidentially within the judiciary rather than publicly—annual reports of all outside income, including investments.

The old canons called for disqualification whenever a judge's "personal interests are involved" in a case and forbade "personal investments in enterprises which are apt to be involved in litigation in the court." A federal judge or Supreme Court justice by law must disqualify himself "in any case in which he has a substantial interest" and for other reasons. The old canons, sometimes dismissed as too "vague," actually were quite tough on this point in contrast to the federal law, which appeared to leave room for case-by-case judgment. The new code draws a clear line at "one share of stock" and Congress will consider later whether to follow that principle.

One test of the code's adequacy would be a measure of its potential impact on the recent ethical controversies which have brought anguish to the judiciary and the nation and which still divide lawyers and laymen as to their merits. Would the Abe Fortas affair have turned out diferently? Would the confirmation fight over the nominee to succeed him, Clement F. Haynsworth Jr., have been settled with wider satisfaction? What of the flap over Justice William O. Douglas and the embarrassments suffered in the lower federal courts, both recently and in the more distant past?

The downfall of Justice Fortas began in the election-year politics of 1968 when a cantankerous Senate denied lame-duck President Lyndon Johnson the prerogative of elevating his trusted friend ot the post of Chief Justice. But Fortas lost many critical votes on basically ethical grounds, such as off-the-bench participation in White House war and riot councils and his acceptance of a $15,000 fee for conducting a series of American University law seminars.

It is doubtful that any canon of judicial conduct, old or new, could have put a wedge between the justice and the President. Fortas maintained to the end that he never discussed a pending case with Mr. Johnson and considered it his patriotic duty to assist the troubled chief executive when the issues were great and the tensions enormous. The new code sounds a theme of avoiding "the appearance" of impropriety as well as actual fault, but so does the 1924 version.

Teaching Encouraged

AS FOR THE lecture fee, the code encourages judges to teach law, although more modest compensation clearly is contemplated. Perhaps the knowledge that future disclosure of the income was expected would have deterred Fortas and saved him the costly, unexpected disclosure by his Senate enemies.

The same might be said for the contract which forced his resignation in May, 1969: the arrangement with the family foundation of convicted stock dealer Louis Wolfson to pay, in exchange for research on social justice, a $20,000 fee annually for life and to his wife after his death.

Fortas maintained that he had done nothing wrong but he quit the bench—the only Supreme Court member ever to do so under fire—when the questioning was hottest. An ABA committee, using only Fortas' published version of the Wolfson deal and citing eight of the old canons, declared that the justice's conduct "was clearly contrary to the canons of judicial ehtics, even if he did not and never intended to intercede or take part in any legal, administrative or judicial matters affecting Mr. Wolfson." The cited canons related mostly to the "appearance" of rectitude and the committee itself

received low marks for failing to spell out specifically where Fortas had gone astray.

The new canon—even assuming it was deemed applicable to Supreme Court justices or followed by them voluntarily—would not compel exposure of the provision for lifetime support of a judge's widow, because that would not be current income to the judge.

Haynsworth, the chief judge of the 4th U.S. Circuit Court of Appeals, was nominated in August, 1969, for the seat left vacant by Fortas. His rejection in November by a Senate vote of 55-45 was the result of combined efforts by civil rights groups, which labeled Haynsworth a symbol of Nixon administration "Southern strategy" because of votes in race relations cases, and organized labor, which pressed an ethical claim that Haynsworth sat improperly in the key union dispute of the decade in his mid-South circuit. While debate raged over the celebrated Darlington Mills textile workers case, critics uncovered at least one instance in which the judge decided a case while holding $16,000 worth of stock in one of the firms involved. Haynsworth admitted a personal lapse, under existing standards, though he and his suppoerters questioned its seriousness.

Prohibited Job

BY HINDSIGHT, the 1972 code would have saved a lot of grief for Haynsworth. It would have forbidden his acting as a director of a vending machine company whose dealings with non-union textile mills provoked organized labor's severest charges of conflict-of-interest. It would not have forced him to report his earnings as a one-seventh owner of the South Carolina vending firm, however. Such a disclosure might have produced an earlier showdown on the judge's qualifications to sit. On that question, the new canons would not specifically disqualify the judge, since his holdings did not include Darlington or its corporate parent, the Deering Milliken Co. Reference to "appearances," however, might have counseled against sitting in the case and against ownership of 500 shares of the J. P. Stevens textile company, which had labor troubles similar to Darlington's.

As to investment policy generally, the new canons will require every judge to "inform himself" about his stock portfolio. Haynsworth drove his Justice Department sponsors frantic by his inability to provide a quick, clear accounting of his market transactions. Days of delay abetted critics by enhancing an atmosphere of evasion.

Still more travail might have been avoided, however, if the rules for judges had insisted on disclosure of investment activity and income. That might have deterred Haynsworth from having such an active pattern of stock dealings.

The duty to "inform himself" rules out for judges a solution to Haynsworth's problems which the nominee volunteered at the eleventh hour in his Senate struggle: some kind of blind trust in which investment decisions are made by an independent agent and insulated from the judge's knowledge. Drafters of the new code rejected such an idea—as Haynsworth apparently did also after his defeat—without explanation.

Good Service

ACCORDING TO Haynsworth's opponents, the 1924 canon served well in helping the Senate judge his conduct. In directing judges to avoid investments in companies likely to have litigation in their courts, for example, the canons were more restrictive than the 1948 federal law on the subject, which calls for disqualification when a judge has a "substantial interest" in a case. The nominee's supporters, including William H. Rehnquist, then assistant attorney general and now a Supreme Court justice, founded their case on the statute's ambiguities. At his own confirmation hearing last November, Rehnquist acknowledged that the Senate's vote against Haynsworth probably indicated that even under the law on the books, judges should henceforth "try to follow that that sort of stricter standard that I think the Senate, by its vote, indicated should prevail."

Still more difficult to assess is the impact of the new code—or any code—on the non-judicial conduct of Justice Douglas.

Douglas at present is voluntarily reporting extensive earnings from his "outside" writings. Under the proposed code, if he were still serving as president of the private Parvin Foundation he would be reporting his $12,000 annual salary. Critics would criticize and the fiercely independent Douglas would remain at least outwardly aloof. The canons decree that a judge's outside activities must not interfere with primary judicial business, but Douglas always leads the court in prompt handling of his personal workload.

As for the foundation and its reputa-

tion, the institution performed undoubted worthy functions including the promotion of international understanding through person-to-person encounters and student exchanges. The chief criticism was that the foundation's income and the background of its principal benefactor had ill-defined but unsavory links to figures identified with organized crime. Douglas spent many of his 10 years with the foundation trying to persuade Los Angeles businessman Albert Parvin to divorce himself and his Nevada casino investments from the foundation, according to the record of the House Judiciary subcommittee's 1970 impeachment investigation. But in short, the complaints against Douglas would be roughly the same under old or new standards.

Scandal and controversy also plagued members of the 5th U.S. Circuit Court of Appeals in recent years as judges admitted holding thousands of dollars worth of stock, personally or in trust, in oil and gas companies whose cases frequently came before them. The new canons would forbid the trusteeships, at least for pay, but amazingly the stricture would apply only to future judges, not sitting ones, except that every judge would have to report the income from service as a trustee. The personal stockholdings would be the judge's "own business" and lawyers would be unaware if there were an undisclosed source of disqualification.

"Duty to Sit"

UNDER THE proposed final draft of the code, a judge who is disqualified may obtain a waiver from both sides after disclosing the basis for disqualification if "independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial." The code says this procedure "is designed to minimize the chance that a party or lawyer will feel coerced into an agreement," but the waiver procedure can't even commence unless the judge somehow communicates that he is willing to preside and deems himself fit to do so.

Missing from the code by design—and happily, according to some ethics experts—is any concept of a judge's supposed "duty to sit" in borderline cases. Instead the reigning principle is the "appearance" of impropriety, which may dictate sitting out a doubtful case.

Also conspicuously omitted is any obligation to disclose personal debt. According to Joseph Borkin, author of a noted study called "The Corrupt Judge," a debt provision might have curbed the venality of Judge Martin T. Manton, the only federal judge to serve a prison sentence for corruption on the bench. A member of the 2nd U.S. Circuit Court of Appeals, Manton, who was heavily in debt and accused of taking bribes, resigned in 1939 to avoid impeachment. (Eight other federal judges have been impeached, and four, including Supreme Court Justice Samuel Chase in 1804, were acquitted.) Manton's argument that he disregarded the bribe each time he actually decided a case and considered only the merits, was ruled no defense by a unanimous Supreme Court in 1940, just as the House of Lords ignored Francis Bacon's plea in 1621 that he took bribes impartially—from both sides—and thus freed himself to treat the parties evenhandedly.

Indebtedness, says Borkin, "is the prime source of judicial corruption" and bankruptcy proceedings the most fertile breeding ground. "A judge who is deeply in debt is a judge headed for trouble," he says.

Financial Privacy

THE CODE dismisses this kind of criticism the same way it treats suggestions for disclosure of investment income: "A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties."

Under the canons, a judge may accept a loan "from a lending institution in its regular course of business on the same terms generally available to persons who are not judges." Says Borkin: "That's a little silly. Everybody knows that judges get the prime rate."

Inadequate though some may deem the code, there was a time when the very idea of a code of conduct designed for judges and set by lawyers was out of the question.

The ABA first published its Canons of Professional Ethics, a set of rules by lawyers to regulate lawyers, in 1908. For more than a decade after that there were only scattered attempts to perform the same function for the judiciary. Resolutions were adopted and forgotten because, according to Susan A. Henderson, a research assistant for

the American Judicature Society: "Many felt such canons were unnecessary, that the real issue was judicial competency rather than honesty. Others believed it was not the proper role of the bar, but of judges themselves, to impose standards on the judiciary."

The event that triggered a change was an outgrowth of baseball's "Black Sox" scandal involving the 1919 World Series. Desperate to restore national confidence in the game, after disclosures that members of the Chicago White Sox had accepted bribes to throw the series to the Cincinnati Reds, organized baseball hired Kenesaw Mountain Landis, the fiery judge of the U.S. District Court in Chicago, as its commissioner.

Landis, who had gained national prominence when he fined Standard Oil of Indiana $29 million for illegal rebates and who had presided over World War I subversion trials, shook the pillars of the Chicago bar once more by serving simultaneously as federal judge and baseball czar. He agreed to compensation of $50,000—$42,500 from baseball and $7,500 from the federal treasury. One of the shaken pillars was John M. Harlan of Chicago, son of one Supreme Court justice and father of another. While some in Congress pressed for Landis's impeachment, Harlan and others rose to the floor of the ABA's convention and said:

"Now, I wish to say right here and now that the American Bar Association, if we are to have any esprit de corps as an association, if professional honor and dignity means anything, ought to tell the American public whether we countenance such an act."

The association then resolved that Judge Landis's conduct "meets with our unqualified condemnation, as conduct unworthy of the office of judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary."

Landis, however, was nothing if not independent. He proclaimed that he would not run from a fight or resign under fire. He waited one year, after the impeachment drive had petered out, to quit the bench and become full-time monarch of baseball.

Change in Mood

THE EPISODE changed the mood of the organized bar. Leaders dusted off old resolutions and appointed a committee headed by Chief Justice William Howard Taft to draw up judicial canons.

Taft, who had been President of the United States and president of the American Bar Association, was a logical man for the job, although the 1972 code might frown on outside activities of such scope. Ironically, the chief justice suffered some ethical embarrassment in his own right in 1922 when the Hearst newspapers bannered a story that he was receiving a $10,000 annuity from the Carnegie Corp. Steel baron Andrew Carnegie had willed the money to Taft, from the interest on U.S. Steel mortgage bonds, for use during his lifetime and for his widow thereafter.

Biographer Alpheus Thomas Mason reports that "The press rallied strongly to the Chief Justice's support. Much gratified, he observed 'that no other newspapers took any part in the attack, and those which have spoken have noted its injustice.'

Nevertheless Taft assigned the annuity to Yale University, telling its president, "I am profoundly concerned that the usefulness and influence of the court should not be lessened on this account."

There were 34 Taft canons. In 1937 the bar added Canon 35, banning news photography in courtrooms, and Canon 36, enjoining judges to conduct proceedings "so as to reflect the importance and seriousness of the inquiry to ascertain the truth." In the minds of many, the canons were ripe for revision in 1969, when the ABA was completing work on a new version of the 1908 professional code. ABA president Bernard G. Segal, who had been calling for a redrafting job for a decade, appointed the Traynor committee to perform the overhaul. The revision was not prompted by the resignation of Fortas from the Supreme Court, but that episode, coming after a year of turmoil over his aborted nomination for chief justice and charges of impropriety against Justice Douglas, gave the effort an added push.

Oddly, the ABA's reform effort was the main reason given for the abrupt halt in implementing the rules which Chief Justice Warren had obtained through the U.S. Judicial Conference, which governs the administrative affairs of the federal judiciary. In October, 1969, the conference voted to suspend the Warren rules, which would have required income reporting beginning May, 1970, to await the product of the association's committee.

Ethics "Hard-Liners"

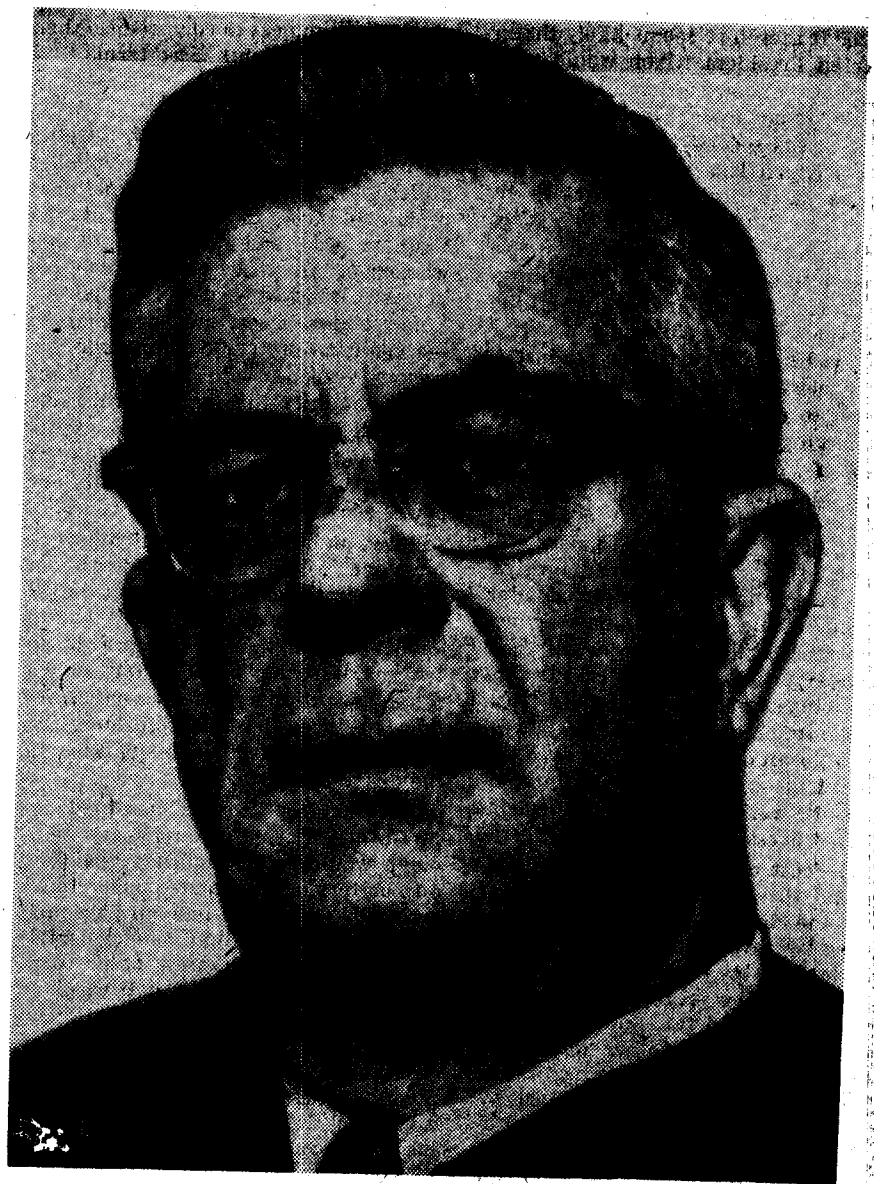
BEHIND THAT vote was a reaction to the Warren rules amounting to a revolt among some ranking federal judges, who claimed the rules were enacted in haste and panic. Without directly challenging Warren, the new chief justice recognized the reaction by declaring publicly that he hoped judges would not overreact, become monks or otherwise retreat from public life.

To monitor the system in "the year or so" contemplated for preparing the ABA code—although few expected such rapid results—Burger appointed an interim ethical advisory panel of respected judges, headed by retired Chief Judge Elbert P. Tuttle of the 5th U.S. Circuit Court of Appeals. Another member of the committee was Judge Harry A. Blackmun of the 8th Circuit, whose appointment was a measure of Burger's high regard for the future justice. Tuttle and Blackmun and others on the committee—derisively called the "Dear Abby Committee" by some disgruntled judges—were known to be "hard-liners" on ethics, committed to strict standards against extensive judicial moonlighting and scrupulous regard for disqualification principles.

The committee issued advisory opinions to judges seeking guidance. Together with a committee headed by Circuit Judge Edward A. Tamm of the District of Columbia, the Tuttle group is preparing a drive to strengthen the code if the ABA's proposals are adopted this summer. Still, the starting point for federal judicial rules will be the ABA's code, a fact which marks another extraordinary deference by public bodies to a private group.

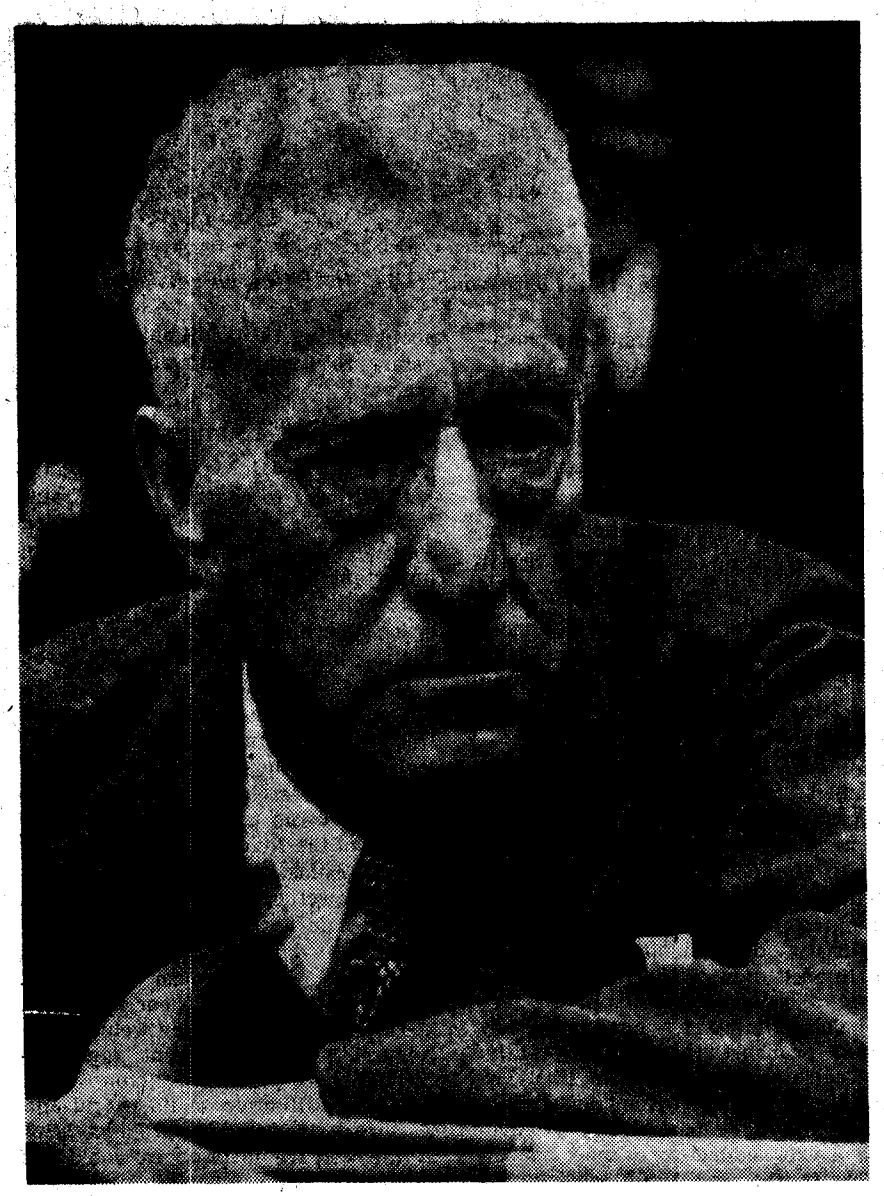
The prestige of the ABA committee is one reason that its recommendations seem certain of bar approval. Traynor, the chairman, is one of America's most respected judges, perhaps the most respected state judge in the nation. The vice chairman is Whitney North Seymour Sr. of New York, a former ABA president and long a leader of the bar. The U.S. Supreme Court is represented by Associate Justice Potter Stewart, who is popular among lawyers.

Other prominent lawyers and judges, known either nationally or within the organized bar, round out the 14-member committee. Some of the committee members continue to expect fire, not from those who consider the code too "soft," but from those who complain of fresh hardships for a beleaguered judiciary.



United Press International

Judge Roger J. Traynor heads the ABA's drafting committee.



Judge Kenesaw Mountain Landis: his action shook the bar.