JUDICIAL DISQUALIFICATION

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 1064

TO BROADEN AND CLARIFY THE GROUNDS FOR JUDICIAL DISQUALIFICATION

JULY 14, 1971, AND MAY 17, 1973

Printed for the use of the Committee on the Judiciary

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WEDNESDAY, JULY 14, 1971

U. S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 6226, New Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick, and Gurney.

Also present: William P. Westphal, chief counsel, and Miss Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee will come to order.

The Subcommittee on Improvements in Judicial Machinery meets today to hold the initial hearing on two bills, S. 1553 and S. 1886, both of which seek to amend that part of the United States Code which states the circumstances when a Federal judge must disqualify himself from participating in a case before his court. This provision of the code—28 U.S.C., section 455—applies to Supreme Court Justices as well as to circuit and district judges, and also to judges of special courts.

In recent years changes in, and nominations to, the Supreme Court have brought public attention to the subject of judicial disqualification. But these celebrated instances have merely focused consideration upon a problem which, at one time or another, can confront every one of our 532 Federal judges.

Under section 455 of title 28, a justice or judge must disqualify himself in four instances:

(1) When he has a substantial interest in any case;

(2) When he has been of counsel in any case;

(3) When he has been a material witness in any case, or

(4) When he is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the proceeding.

Two instances, that is, when the judge has been a counsel or material witness in a case, are fairly definite. But the other two instances are uncertain. their indefiniteness hinging upon the term "substantial" in the one instance, and upon the terms "so related to or connected with *** as to render it improper in his opinion", to sit.

It will be perceived as a practical matter that in these two instances the statute leaves the matter of disqualification to the "subjective" opinion of the judge, or as some cases state it "to the conscience of a particular judge." However, the real evil of our present law is not so much this uncertainty of language or the subjective nature of the ultimate test but rather the fact that there is a corollary rule of law which says that a judge "has a duty to sit." In other words, our system does not permit us to indulge the judge who would "rather not" sit in a particular case. Our system says "if you are not disqualified you must sit."

It has been suggested by many, and I am inclined to agree, that the legal standard which Congress has set up under section 455 has the effect of placing a judge on the horns of a dilemma. And, of course, it may be equally unsatisfactory to litigants and their attorneys in a particular case.

We have under consideration in these hearings commencing today two proposals to rectify this situation. One is S. 1553 which is sponsored by Senator Hollings and the other is S. 1886 sponsored by Senator Bayh.

Before we call upon these distinguished Senators to explain their respective bills, let me make one further explanatory remark. While these two bills are of interest to our judges, we have not scheduled any Federal judges to appear today. The reason is that one of the bills, S. 1553, is quite similar to the American Bar Association preliminary draft of part of the proposed "Canons of Judicial Ethics." It is my understanding that the chairman of the ABA committee working on this subject wishes to defer his appearance before the subcommittee until sometime after October 30, 1971, when the ABA committee will give further consideration to its recommendations. Since it is obvious that a later hearing will have to be held, we have deferred until that time the expression of views by representative Federal judges.

Now, at this time, without objection, the two bills mentioned and the ABA tentative draft will be made a part of the record.

[S. 1553 and S. 1886 and attachments follow:]

92D CONGRESS
1ST SESSION

S. 1553

IN THE SENATE OF THE UNITED STATES

APRIL 15, 1971

Mr. HOLLINGS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 455 of title 28, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 455 of title 28, United States Code, is amended by striking the entire section and adding in lieu thereof:

"SEC. 455. INTEREST OF JUSTICE OR JUDGE.—Any justice of the United States shall disqualify himself in any proceeding where:

"(1) He has a fixed belief concerning the merits of the matter in controversy or personal knowledge of material facts concerning it.

"(2) He has previously served as counsel in the

matter in controversy, or has been a material witness concerning it.

"(3) He is within the fourth degree of relationship by blood or marriage to a person who:

"(a) Is a party to the proceeding or an officer or director of a party;

"(b) Is acting as counsel in the proceeding;

"(c) To the judge's knowledge has a substantial interest in the matter in controversy or the affairs of a party to the proceeding;

"(d) Will likely be a material witness in the proceeding.

"(4) He knows that he, individually or as a fiduciary, has a financial interest in the subject matter in controversy, or in a party to the proceeding. A judge should make reasonable effort to inform himself about his personal and fiducial financial interests and those of the members of his family residing in his household. For the purposes of this subsection—

"(a) 'Fiduciary' means executor, administrator, trustee, guardian, and the like.

"(b) 'Member of his family residing in his household' means any relative by blood or marriage, or a person treated in fact as a relative, who resides permanently in the judge's household.

"(c) 'Financial interest' includes any legal or equitable economic interest, however small, and any relationship as director, advisor, or other active participant, except that—

"(i) ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities;

"(ii) ownership of government bonds is not a 'financial interest' unless the proceeding involves the validity of the bonds or could substantially affect their value.

"(5) A judge disqualified by the terms of subdivision (3) or (4) of this subsection may, if he chooses to do so, disclose to an appropriate court officer, fully and in writing, the basis of his disqualification. The court officer shall transmit the statement to all parties. If all parties and counsel thereupon agree in writing to remit the judge's disqualification, the judge may participate in the proceeding. The judge's statement and the consents of the parties and counsel shall be incorporated in the record of the proceedings."

92D CONGRESS
1ST SESSION

S. 1886

IN THE SENATE OF THE UNITED STATES

MAY 17 (legislative day, MAY 14), 1971

Mr. BAYH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Disqualification Act of 1971".

SEC. 2. Section 455 of title 28, United States Code, is amended to read as follows:

"§ 455. Interest of justice or judge

"Any justice or judge of the United States shall disqualify himself, and shall not accept waiver of disqualification, (1) in any case in which he has an interest, which shall

include any stockholding in a corporate party, any stockholding in a corporation which holds 10 per centum or more of the stock of a corporate party, any stockholding in a corporation of which 10 per centum or more of the stock is held by a corporate party, and the holding of any office of a corporation described in this section; (2) in any case in which he has rendered legal service to a party with respect to any matter or thing in controversy; (3) in any case in which he is or has been a material witness; (4) in any case in which he is so related to or connected with any party or attorney as to create a conflict of interest or otherwise render it improper for him to sit on the trial, appeal, or other proceedings; (5) in any case in which his participation in the case will create an appearance of impropriety; and (6) in any other case in which, in his opinion, it would be improper for him to sit."

SEC. 3. Section 144 of title 28, United States Code, is amended to read as follows:

"§ 144. Bias or prejudice of judge

"Whenever a party to any proceeding in a district court, either with his own verification or over his attorney's signature, makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall

be timely if filed (a) twenty or more days before the time first set for trial or (b) within ten days after the filing party is first given notice of the identity of the trial judge or (c) when good cause is shown for failure to file the affidavit within such times. A party may file only one such affidavit in any case, and only one affidavit may be filed on a side. A party waives his right to file an affidavit by participating in a hearing or submission of any motion or other matter requiring the judge to exercise discretion as to any aspect of the case or by beginning trial proceedings before the judge."

C. Disqualification. A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(1) He has a fixed belief concerning the merits of the matter before him, or personal knowledge of evidentiary facts concerning it;

(2) He has previously served as a lawyer in the matter in controversy, or has been a material witness concerning it;

(3) He or his spouse is within the [third] degree of relationship to a person, or the spouse of a person, who:

(a) Is a party to the proceeding or an officer or director of a party;

(b) Is acting as a lawyer in the proceeding;

(c) Is known by the judge to have a substantial interest in the matter in controversy or the affairs of a party to the proceeding;

(d) Is to the judge's knowledge likely to be a material witness in the proceeding.

Commentary

The degree of relationship is calculated according to the civil law system. For example, the suggested third degree of relationship test would disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the case, but would not disqualify him if a cousin were a party or lawyer in the case.

(4) He knows that he, individually or as a fiduciary, or any member of his immediate family, or any member of his family residing in his household, has a financial interest:

(i) in the subject matter in controversy,

(ii) in a party to the proceeding, or

(iii) that could be substantially affected by the outcome of the proceeding.

A judge should make a reasonable effort to inform himself about his personal and fiduciary financial interests and those of the members of his family residing in his household. For the purposes of this subsection:

(a) "Fiduciary" means executor, administrator, trustee, guardian, and the like.

(b) "Member of his immediate family" means a spouse, child, grandchild, parent, or a person standing in fact or in law in such a relationship.

(c) "Member of his family residing in his household" means any relative by blood or marriage, or a person treated in fact as a relative, who resides in the judge's household.

(d) "Financial interest" includes any legal or equitable economic interest, however small, and any relationship as director, advisor, or other active participant, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities.

(ii) a fiduciary office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(iii) the proprietary interest of a policyholder in a mutual insurance company, or of a depositor in a savings association, or a similar interest in a like organization, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

(iv) ownership of government bonds is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the bonds.

(5) A judge disqualified by the terms of subdivision C(3), or by subdivision C(4) but whose interest is insubstantial, may if he chooses to do so disclose fully and in writing the basis of his disqualification to an appropriate court officer, who shall transmit a copy of the statement to each party and his lawyer, if any. If the parties and lawyers all agree in writing to remit the judge's disqualification, the agreement shall be filed with such officer, and the judge may participate in the proceeding. The judge's statement and the agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

Commentary

The procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. Each court may designate a person to administer the procedure. The officer so selected should be one whose position is as independent as possible of the judge, to further alleviate pressure to sign the agreement.

In class actions "the parties" are the persons specifically named as representatives of the class.

Senator BURDICK. I am pleased to call upon Senator Bayh as the first witness. Senator Bayh.

STATEMENT OF SENATOR BIRCH BAYH, A UNITED STATES SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Thank you, Mr. Chairman, and members of the committee.

I appreciate the opportunity to testify before this subcommittee of the full Judiciary Committee on which I have the privilege of serving with the distinguished Senator from North Dakota.

I ask unanimous consent to have my statement put into the record in toto. I will then just briefly summarize my thoughts on the subject.

Senator BURDICK. Without objection, the entire statement will be made a part of the record, and your summary will be appreciated.

[The prepared statement submitted by Senator Bayh reads in full as follows:]

STATEMENT OF SENATOR BIRCH BAYH ON JUDICIAL DISQUALIFICATION

Mr. Chairman, I am very pleased to have the opportunity to testify before this Subcommittee about judicial disqualification. As every member of this Subcommittee knows, in recent times the Senate has been involved in a series of difficult and troubling controversies concerning the fitness of nominees to the federal bench. One of the most consistently troubling of the issues we have had to face is the question of when a judge ought to disqualify himself from participation in the hearings of a case. And it must be admitted that these difficult and unfortunate disputes are still continuing.

These debates have been lengthy and at times bitter, but I hope we have learned a valuable lesson in ethics in the course of all our discussions. And I believe that we have enunciated new standards of conduct in judging some of the nominations which have come before us. These new, higher standards represent a useful and welcome change in the law, and I hope that as a result of these hearings this Subcommittee will report out a bill and do its part in writing these lessons, and these standards, into the law of the land.

JUDICIAL DISQUALIFICATION ACT OF 1971

The standards of judicial conduct demanded by the American people have improved substantially in recent times. I fear that some Federal judges, intentionally isolated from the need to face the voters, have not been consistent in adhering to this new, more rigorous, sense of propriety. Particularly where financial interests are involved, we need a major revision in our statutory provisions governing judicial disqualification. I believe that S. 1886, the Judicial Disqualification Act of 1971, is such a major revision.

The Judicial Disqualification Act amends sections 455 and 144 of Title 28 of the United States Code. Both of these revisions reflect the thoughts and testimony of John Frank, one of our foremost authorities on judicial disqualification, who will be testifying later today. They were drafted and revised with the continuing advice and invaluable assistance of Mr. Frank.

The draft revisions, and last year's bill, were circulated to a number of distinguished lawyers, judges, and professors across the country. Many thoughtful

and interesting responses were received and a number of these suggestions have been incorporated in the proposed legislation.

There are a number of defects in section 455. The central provisions of section 455 require a judge to disqualify himself in any case in which he has a "substantial interest." Those are the crucial words, "substantial interest."

Unfortunately the words "substantial interest" have at least three interpretations in the Federal courts. In the majority of circuits any pecuniary interest requires disqualification. But the fifth circuit, and apparently the eighth circuit as well, has interpreted the statute to mean that a judge may sit regardless of interest, unless the decision will have a significant effect upon the value of the judge's interest. And the fourth circuit interprets the statute as permitting "disclosure and waiver," in which the judge discloses his interest in the case and may hear it if the parties waive their objection. Such waivers are often made because counsel dare not jeopardize their relationship with a judge before whom they appear regularly by seeming to question his impartiality.

A further problem with section 455 is that although judges are prohibited from sitting in cases where they have been of counsel, or witness, or where they are related to a party or counsel, the statute fails to remind the judges of their obligation to "avoid the appearance of impropriety" as required by the American Bar Association's Canon's of Judicial Ethics.

REVISION OF SECTION 455

The Judicial Disqualification Act is intended to correct many of these problems. The proposed revison of section 455 eliminates the "substantial interest" language and clarifies the type of interest requiring disqualification. The rule is clear and simple. The bill precludes participation by a judge in a case if he holds any stock—even a single share—of a corporate party, or any corporation substantially related to a corporate party.

The bill deliberately avoids any resort to the device of disclosure and waiver, and imposes mandatory disqualification in cases where the provisions of the statute are met. The revision also requires the judge to disqualify for appearance of impropriety, thereby codifying the requirement of proposed canon 5. Finally, the bill relaxes the so-called duty to sit in cases where the judge is not disqualified by the provisions of the statute, and gives him fair latitude to disqualify himself in other instances where "in his opinion, it would be improper for him to sit."

The revision of section 455 would be very similar to the judicial disqualification standards recently recommended in the tentative draft of the Special Committee on Standards of Judicial Conduct of the American Bar Association. This very distinguished group, chaired by the Honorable Roger Traynor, former chief justice of the California Supreme Court, believed that:

A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: . . . He knows that he, individually or as a fiduciary, or any member of his immediate family, or any member of his family residing in his household, has a financial interest: (1) in the subject matter in controversy, (ii) in a party to the proceeding, or (ii) that could be substantially affected by the outcome of the proceeding.

An "interest" according to their standard would include any legal or equitable interest, no matter how small, in a party or thing involved in the litigation or any directorial or active participation in any organization involved in the litigation.

Let me summarize briefly the provisions of revised Section 455. First, the judge shall not take part in any case in which he has any interest. An interest is defined to include any stockholding in a corporate party, any stockholding in a corporation which owns 10 percent or more of the stock of a corporate party, and the holding of any office of a corporation described above. Second, the judge must recuse himself in cases in which he has rendered legal services to any party with respect to any matters or thing in controversy. Third, he is required to not participate in cases in which he is or has been a material witness. Fourth, another judge must be assigned if the judge in question is so related to or connected with either a party or an attorney as to "create a conflict of interest" or otherwise make it improper for him to sit on the proceedings. Fifth, a judge would have to excuse himself whenever his participation

would create even "an appearance of impropriety." Sixth, and finally, the judge would be able to disqualify himself in any case in which "in his opinion, it would be improper for him to sit."

DIFFERENCES BETWEEN S. 1886 AND S. 1553

The other bill being considered today, S. 1553, would essentially incorporate the provisions of Canon 2 of the tentative draft of the American Bar Association's Canons of Judicial Ethics, which was proposed to the association by the Special Committee on Standards of Judicial Conduct. Today I ought to point out a few of the differences between the two bills.

The most important difference is that S. 1886 explicitly forbids waiver of the disqualification requirements. The judge has no choice but to take himself out of the consideration of the cause. I fully realize that in some cases the conflict will be de minimis and waiver may well be proper. But those few cases should not lead us to establish a rule which can only cause trouble in the long run. No lawyer or party should have to be put in the position of indicating to a judge that he does not trust his ability to try the cause fairly. Since most lawyers practice regularly before a relatively small number of judges, the lawyer, knowing he will be facing the same judge in another cause in the near future, is likely to feel he must show his confidence in the judge by asking the judge to waive the disqualification.

The procedure for waiver specified by S. 1553 is, to my mind, especially unfortunate. In most cases, the judge is not expected to disclose the reasons for his disqualification. However, if the judge believes that there is no need for disqualification in a certain case, section 5 of S. 1553 allows the judge to disclose in full the nature of the conflict to an appropriate court officer. The statement is then submitted to the parties and their counsel. If all parties and counsel agree that the disqualification is unnecessary in the particular instance, then the judge may participate in the case. If the judge submitted such a written statement, a litigant would draw the natural conclusion that the judge felt that there was no need for him to disqualify himself in that particular case. And by not agreeing to a waiver under these circumstances, the parties would in effect be telling the judge that they disagreed with him about his ability to try a case fairly and impartially. I believe that this is the type of decision that no lawyer or party should have to be faced with.

My bill avoids this unnecessary and unpleasant dilemma by providing specifically that the judge "shall not accept waiver of disqualification." While I recognize that there may be a few circumstances in which these rules will force a change of judge even though the parties would have been perfectly content to have him decide the issue, I believe that it is much more important to remove the burden of waiver from parties and litigants in every other case.

There are a few other differences between the two bills which I ought to point out. While both prohibit participation if the judge has any financial interests however small, S. 1886 specifies the exact holdings a judge may have in a parent or subsidiary of a corporate party. In addition, my disqualification bill specifically requires disqualification in any case in which the judge's participation would result in "an appearance of impropriety," a ground for disqualification mentioned by the Supreme Court in the *Commonwealth Caotings* case. S. 1553 does not include such a provision.

REVISION OF SECTION 144

S. 1553 deals only with judicial disqualification. S. 1886 includes an additional section which would amend section 144 of Title 28 to give litigants a peremptory challenge to a judge. I believe that this section complements section 455 and that it is a necessary part of any complete approach to the problems of judicial disqualification.

Under present law, when a motion to disqualify for prejudice or bias is made, a party is often dismayed to learn that under section 144 the judge himself determines whether the allegations are sufficient. Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias.

This result distrubs me because it contributes to the lack of confidence in our courts. This lack of confidence does not, in my opinion, reflect some basic defect in our political system or our judicial procedures. The problem is not so

much one of fundamental injustice as the appearance of injustice. No statute creates more distrust than does the section 144 procedure for disqualification for prejudice.

One possible change in section 144 would require some other judge to rule on the question of a trial judge's alleged bias. However, this still puts undue pressure on counsel, and it ignores the possibility of embarrassment and tension created when one man must rule on the impartiality of his colleague—and often, his friend.

The Judicial Disqualification Act of 1971 takes a different approach to changing section 144. It would create a right in a litigant to one peremptory challenge of a trial judge assigned to hear his case, adopting a disqualification provision now employed in California and nearly 20 other States. Under such a provision a judge is disqualified upon the filing of an affidavit alleging bias or prejudice and signed by the party or by his lawyer. The disqualified judge is left with no option except to determine whether the application has been timely made. The affiadavit must be filed before any discretionary matter has been presented to the judge. Each side is restricted to one challenge, in order to avoid abuse in cases where one of the parties simply wants to create delays or to avoid trial altogether.

CONCLUSION

Mr. Chairman, I want to commend you for taking the lead in studying and debating this most difficult question. I look forward to the continuation of this debate both in the full Judiciary Committee and on the floor of the Senate. I sincerely hope that this year will result in final passage of a new series of statutes designed to define with greater precision the specific instances in which our federal judges should and should not participate in the cases assigned them. Only when we finally succeed in bringing some clarity and certainty into our judicial disqualification rules will all litigants be assured of fair and impartial justice in the federal courts.

Senator BAYH. Well, I will attempt to resist the senatorial tradition of summarizing a 15-minute statement in 30 minutes. I know the Senator from North Dakota has shared the interest of the Senator from Indiana in judicial ethics. Let me say emphatically, that we should not limit our efforts to sharing confidence in just one branch of Government. I have introduced the Omnibus Disclosure Act, which has been referred to the Committee on Government Operations. It deals with disclosure not only on the part of the judiciary but the executive and the Congress as well.

We have had a couple of very difficult battles over Supreme Court judges. These have been controversial to say the least, and, hopefully, out of this controversy we can gain better understanding of the need to deal with this problem of judicial disqualification.

Also I see the next witness is going to be our distinguished colleague and friend from South Carolina, Senator Hollings.

He has studied this carefully, as have I, and I understand that our staffs are going to meet later on today with Mr. John Frank, who is, without question, one of the leading, if not the leading, expert in the whole business of judicial disqualification.

Last year I co-sponsored the bill of the Senator from South Carolina, and I understand he has a revised version. I hope he will permit me to share a cosponsorship with him this year again.

For the sake of time, let me suggest that I am deeply concerned about the specific reference in section 455, title 28, of the U.S. Code, to "substantial interest." "Substantial interest" is a broad term. No one knows exactly what it means. In the *Commonwealth Coatings* case it was discussed rather thoroughly—and not with total agreement, but at least rather extensively in one of the nomination con-

frontations. It seems to the Senator from Indiana that the Supreme Court spoke rather eloquently, in incorporating the ABA Canons of Ethics, which refer specifically—and I quote— "to the need to avoid the appearance of impropriety." The court almost went to say that almost any interest was a substantial interest in the terms of the need to avoid the appearance of impropriety.

The Committee on Standards of Judicial Conduct of the American Bar Association, with Judge Traynor as the chairman, specifically dealt with this question, and I quote very briefly:

> A judge should disqualify himself in any proceedings in which any impartiality might reasonably be questioned, including but not limited to, instances where: * * * He knows that he, individually or as a fiduciary, or any member of his immediate family, or any member of his family residing in his household, has a financial interest: (i) In the subject matter in controversy, (ii) in a party to the proceedings, or (iii) that could be substantially affected by the outcome of the proceeding.

Now, Mr. Chairman, I realize that some of these financial interests might be described as de minimis. As I said repeatedly in the debate we had at some length on the floor of the Senate, it is difficult for me to envision very many judges directly and intentionally involving themselves in a conflict-of-interest, one in which they thought their holdings or the holdings of their family would influence their judgment or would cause them to decide to feather their own nest.

But it seems to me that we need to go further than this. If we are concerned, as most of us are with the need to shore up public confidence in our public institutions, we need to remove any scintilla of doubt that the public might have that that judge would be prejudiced in his decision. And that is why the criteria that we establish in S. 1886 is rather strict.

And one of the distinctions which our measure makes with the recommendation of the bar association is that in our bill, S. 1886, we explicitly forbid the waiver of the disqualification requirement.

I think it is important for us not to put any of the attorneys practicing before the bench in the position where they have to say to the judge, "All right, we will go along, Your Honor, although we are concerned." There is a great reluctance on the part of counsel to suggest to the judge that he is prejudiced, because they are going to have to go ahead and practice before that judge later.

Therefore, we require the judge to disqualify himself and we explicitly prohibit waiver. Furthermore, we permit each counsel to have one peremptory charge. Some might say this is a challenge without explanation. This is a rather high test, but I think it is important for us to establish that type of standard if we are to shore up the confidence that has been waning significantly.

I am looking forward to reading the testimony of our colleague from South Carolina and former professor and now counsellor at law, John Frank, who has worked carefully with our staff in structuring 1886.

I also note that in the audience is one of the learned members of the Indiana appeals court, Justice John Robertson, who will make a significant contribution to this committee by testifying about my home state's experience with the peremptory challenge.

That is the end of my abbreviated testimony, Mr. Chairman, and I appreciate your courtesy.

If you have any questions, I will be glad to try to deal with them.

Senator BURDICK. Yes, I have just one or two questions here bearing on the last portion of your testimony.

In North Dakota, the method of disqualifying judges that are deemed to be prejudiced was provided for by the filing of an affidavit of prejudice. However, a new law just enacted by the legislature, which shall become effective on July 1 of this year, or has been effective, provides that all that is necessary is the filing of a written demand for the change of the judge, executed in triplicate and need not be in the form of an affidavit.

Thus, North Dakota has made it easier to secure change of judge.

Since practically all of the Federal districts have at least two judges, provision should be made for the disqualification of Federal judges. And what do you think about the North Dakota procedure where you simply ask that the judge be changed?

Senator BAYH. I concur in that.

Senator BURDICK. No filing or affirmative showing of bias or prejudice.

Senator BAYH. No. One should not have to prove bias, because if you have to file an affidavit affirmatively alleging prejudice and bias before a judge, it is going to do one of two things, or maybe both: It is going to prejudice that judge against that counsel who has to try cases before him every day, every week, every year; or (2) it is going to make that counsel reluctant to file a challenge alleging bias or prejudice even though he knows it exists, because he is going to be concerned about the prejudice this might establish in the judge's mind against him in future cases. My bill's allegation of bias will not do this because it is clearly pro forma.

I think this device can be abused, but I think one challenge is not extreme.

Senator BURDICK. Now, I will state another area: Suppose, before the commencement of the trial of a case, the judge presiding at the case calls the attorneys into his chambers and he said: "Gentlemen, I have one share of stock in the Sunbeam Manufacturing Co., does that bother either one of you gentlemen?"

Suppose they say "No." It is actually a waiver.

What do you think about that procedure?

You have got one share of stock, probably out of a million outstanding.

Senator BAYH. That is, of course, a difficult case, I have gone on record—and I certainly feel—we should remove that judge. I have talked to a number of judges, and it does not pose the type of administrative problem that some people assume it does. In fact, most judges, I understand, follow the practice of disqualifying themselves if there is any question at all.

There are enough cases to go around, that makes it just a matter of shifting one case from one judge to another, and the problem we are confronted with, Mr. Chairman, is: What if that judge brings the lawyers in, even if it is in the privacy of his chambers, and says: "Do you feel this would really make the bias or would affect

my judgment on a case?" If a lawyer feels it would, then he is faced with the same confrontation, the same problem that I referred to earlier.

The second question is: you remember the Grace Van Lines case. I do not want to harken back to this very controversial confrontation we had, but the conflict involved in that case was minimal in the judgment of the Senator from Indiana, but it had the appearance of impropriety. Perhaps I should forward to the committee—and I will ask my staff to do this—a letter from Prof. David Mellinkoff of the UCLA Law School which very articulately—better than the Senator from Indiana could describe it—describe the problems involved with the appearance of impropriety. In a particular suit a conflict involving a few shares might be important to one person and not to another. And I am concerned about doing what the Canons of Legal Ethics describe we must do. We must not only avoid impropriety but avoid the appearance of impropriety. Justice shall have the appearance of justice, and I think we have to say "All right, let us just shift that case to someone else and give another case to the judge who removed himself."

Senator BURDICK. Do I understand your answer to be, in the situation I presented to you, the lawyers should not be permitted to waive any possible grounds of disqualification?

Senator BAYH. That would be my verdict.

Senator BURDICK. Even though it is a minimal interest?

Senator BAYH. For the reasons I just stated, yes.

What is minimal to you and me might not be minimal to that fellow working out in the shop or down on the farm.

Senator BURDICK. In my hypothetical, we had 1 share of stock out of 1 million outstanding. That is pretty minimal, is it not?

Senator BAYH. That is right. But suppose it had been 10 shares or 100 shares, still with 1 million outstanding, it is de minimis in your eyes and mine, but what about the person that is looking at that court from the outside?

Senator BURDICK. I am just trying to get your view, that is all.

Senator BAYH. I feel rather strongly about that, although I feel the case you present would involve no actual prejudice, and in most cases, you do not have a judge sitting looking at his stock portfolio. I do not think any of the judges nominated to the Supreme Court really looked at their stock portfolio before they decided a case. I do not think, gentlemen, that those gentlemen were that kind of judges. But the question is: What kind of responsibility do we have now to give a complete appearance of propriety, the avoidance of any appearance of impropriety, and I think just saying "total and complete disqualification, no waiver of disqualification" is the best way to handle that.

Senator BURDICK. Now, one last question.

On the top of page 2 of your bill it says, going back into section 455:

> Any justice or judge of the United States shall disqualify himself and shall not accept waiver of disqualification in any case in which he has an interest, which shall include any stockholding in a corporate party, any stockholding in a corporation which holds 10 per centum or more of the stock of a corporate party, any stockholding in a corporation of which 10 per centum or more of

the stock is held by a corporate party, and the holding of any office of a corporation," et cetera.

Now, there you have got a 10-percent rule, so to speak, to the public.

Now, what is the difference in the public eye between 10 percent and 9 percent?

Senator BAYH. Well, perhaps none. However, I am not talking about the judge's holdings, but the holdings of the parent in conglomerates that we have, and the relationships they have, the interlocking goes on forever and gets rather tenuous. In that case, I was willing to make a 10-percent bright line test.

Senator BURDICK. Then, you do recognize the minimal interest?

Senator BAYH. It is a minimal interest, but a different sort of interest. It is in the direct party, but in the subsidiary.

Senator BURDICK. Well, that is an interest.

Senator BAYH. In the best of all possible words I would rather that not be in there. John Frank, I hope, will testify to this specific issue. He has discussed it; we have talked to him about it. I would rather it not be anything, but I think we can push this too far. If you had 1 of the 1 million shares, that would not concern me. But the question is where do you draw the line? In the party we should draw the line at any interest.

Senator BURDICK. You could have very well a greater interest in the 10 percent in the subsidiary than your 1 percent in the main company?

Senator BAYH. That is right, and if it is the wisdom of yourself and the subcommittee, if you want to strike that 10 percent, you would have no objection from the Senator from Indiana.

Senator BURDICK. Thank you, Senator Bayh.

Senator BAYH. Thank you. I appreciate your willingness to deal with this. This is not a matter that has a great deal of press appeal, I suppose, or perhaps public appeal, but it is one of restoring confidence.

Senator GURNEY. I have some questions, Senator. Pursuing the point that the chairman was just asking about, this 10-percent rule, I think it might be difficult, perhaps, sometimes for a judge to keep track, possibly, of the holdings of a major corporation in subsidiaries, and he might have known them at the time he acquired his stock but there might be changes made later on. Suppose he ran afoul of this particular provision in your bill unwittingly and unknowingly, what happens if he goes ahead and tries the case?

Senator BAYH. Well, I think that case would then be subject to reversal on appeal.

Senator GURNEY. Well, suppose it were not discovered until the case was through; then what?

Senator BAYH. Then, it would have to be considered on its merits at the time. You have to consider each case on its merits. As I said to the chairman, I have no objection if you want to take that 10 percent out of there, but if you are to suggest that there be no limit whatsoever on the holdings of subsidiaries, you are permitting a loophole in the law big enough to drive a truck through.

Senator GURNEY. My question is not directed at all as to whether the 10 percent is wise or unwise. My question is directed as to what

is going to happen to the litigation in cases and the respective rights of the parties if the case is tried and unwittingly falls within this rule?

If we are going to pass a bill here, we had better make darn sure that we have got a bill that is not going to cause all kinds of problems down the road. That is what I am asking.

Senator BAYH. I cannot answer it any differently than I just answered. It has to be considered on its merits. After the time for appeal had run, I would assume a person would forfeit any right to reopen a case like that. That is normally what courts hold on appeal, if the protest, the allegation of impropriety, had not been made in a timely fashion.

Senator GURNEY. Well, if we left that in, and this bill got anywhere, do you not think it would be well if we clarified and spelled that out and possibly put a statute of limitations in there?

Senator BAYH. Perhaps so; perhaps so. I suggest that if we do that in this area, then perhaps we have to do the same thing in all other allegations of bias and other protestations that might be made towards the judges' qualifications. And, perhaps, the committee would care to do that.

Senator GURNEY. You do see that this might cause some difficulty?

Senator BAYH. Yes, but; no more so, though, than any other area where the same allegation could be made by one of the parties and is made frequently. The timeliness I think has to be considered.

Senator GURNEY. This provision here on bias or prejudice of the judge, that has nothing to do with stockholdings at all. That is just if you have some reason to think that maybe the judge would be biased, and there are judges like that. We all know, those who have practiced law, that this is true, and sometimes we feel as though it is hard to get a fair hearing. But that is what that is directed to?

Senator BAYH. The challenge?

Senator GURNEY. Yes.

Senator BAYH. Yes, sir. It could be either.

Senator GURNEY. What about in a jurisdiction like, say, North Dakota?

How many Federal judges are there in North Dakota?

Two? Might not this pose some burdens if you had just a few judges? And I suspect that probably in some States you only have one Federal judge, and if you knock him out would that not delay a trial possibly and cause some problems?

Senator BAYH. Well, it is not uncommon to have judges moving from one district to another. I admit that if you have one judge in a State, there might be some administrative burdens, but I do not know whether there are any States in the Union that have just one judge. North Dakota has two, and I would suggest that there are very few that have less than that.

Senator BURDICK. Senator, may I interrupt?

Senator GURNEY. Yes.

Senator BURDICK. There are three States that have but one judge.

Senator GURNEY. Thank you. I might point out that, on that particular subject, I know in Florida, for example, where we do have

problems with overburdened Federal courts that we usually get judges to come into Florida from places like North Dakota and jurisdictions where there are only one or two judges, where the dockets perhaps are not so heavy, and I guess maybe they like to come to Florida in the wintertime—if the chairman does not mind my making that observation.

But if you kick a judge out in one of these States, it seems to me that it does pose some problem in the handling of a docket.

Senator BAYH. I would rather not say that in 47 States we are going to permit this, but that in three we are going to risk the possibility of prejudice. Perhaps as much as some of the North Dakota judges want to come to Florida in the wintertime, perhaps some of the Florida judges would like to shoot pheasant in North Dakota in the fall, and this could be arranged.

Senator BURDICK. Do you want me to outline the season?

Senator GURNEY. One further question, though—and I think this is fairly serious here.

More and more there is a tendency, I think, on the part of some lawyers to try to frustrate the courts, a man like Kunzler, for example. This seems to be a habit, and a way of life, as far as he is concerned, and I expect there are others, too. But do you not think in a case like that, that you would automatically make use of a provision like that in order to try to delay the trial somewhat?

Senator BAYH. Oh, in that particular instance, yes. He would have one challenge, and he would take it. If a person is desirous of delaying, there are a number of vehicles that can be used to try to delay cases. I share the concern of the Senator from Florida about unnecessary delay. I would wish we could find ways to minimize this, and I think that some very good suggestions have been made to accomplish this goal. Here, again, I think giving one challenge is not going to make the situation much worse than it is right now.

Senator GURNEY. Well, what would happen in this: Suppose we have two judges as we have in the case of North Dakota and the case is ready for trial on the judge's calendar, and this provision is taken advantage of. I presume that judge, the other judge in the district, would try the case. Where does the case go on his calendar?

Senator BAYH. Well, I suppose it would go at the bottom of the calendar.

Senator GURNEY. If you had a delay of a year or so, then it would be another year or so, I suppose, before the case would be reached; is that right?

Senator BAYH. Our bill, my bill 1886, would require that the protests be lodged at least 20 days before trial. Now, perhaps, we should do some redrafting and make this protest even more timely, the challenge more timely. I would welcome such a change.

Senator GURNEY. Well, again——

Senator BAYH. Challenges can be made, and delay tactics can be made on other grounds. And I think it is worth the possible misuse of this challenge to give the appearance of no impropriety.

Senator GURNEY. One of the real problems in our whole judicial system, as we all know, those of us who practice law, is the extreme

long delay that we incur in a great many districts. I think it is the rule rather than the exception, and the cases do take a long time to come to trial.

We had a bill pending before this very committee, as you know, to require speedy trials.

Senator BAYH. I am a cosponsor of that bill.

Senator GURNEY. I think you did; and so did I. But this really troubles me, because I know lawyers, and I am sure you do, too, Senator Bayh, who just make a practice of delaying and stalling, and if you get a case ready for trial and one lawyer has all of his witnesses there and he is ready to go, having spent a lot of time and expense, both he and his client, and witnesses, and when you open up this barn door to knocking the judge out, it seems to me it creates a tremendous hardship and thwarts the very part of the law, delay in cases, that is our greatest problem today.

Senator BAYH. The jury and the witnesses, of course, are not assembled 20 days prior to the trial date; so, that is not a problem. It is possible now, as the Senator from Florida knows, to bring a protest alleging bias against judges, or a judge in a given case, but it hardly has the appearance of justice and equality under the law if that judge, then, is the one who sits to determine his own bias, which is now the case. Perhaps, there can be a way in which the committee can change this. I am not wedded to this amendment or any other, and certainly not to any specific wording of this amendment, although I have been interested in it a long while.

What I want to do is to find a way to deal with the problem where one of the parties has a feeling that that judge is biased.

How do you permit that complaint to be lodged, without either prejudicing the lawyer against his client or the judge against the lawyer?

It seems to me that the provisions of this come closer to it than any I have seen.

Senator GURNEY. Well, I would agree with you, I think it is a problem, and I would like to see some way to do it, too. But the peremptory challenge, I think, might cause some problems. I can see where there might be another way of doing it, possibly, before a judge in another district, or before maybe a panel of judges or something in those extreme cases, and I expect that they would not be too many, but I think you have a point. I just think the peremptory thing may cause problems.

Just one other question I have here, and that is along the line the chairman was talking about, where you have what is obviously an inconsequential interest like a share or just a few shares in General Motors. I think 100 shares probably would be inconsequential.

Now, I see your point as far as the attitude of the public is concerned. Maybe even one share to them looks like a conflict of interest. But I wonder if there would be a better procedure of going about it?

Let us say that both parties want a particular judge for a reason. Maybe he is extremely skilled in a certain type of case, cases involving economics, or something, because the judge has an excellent background in that, and both lawyers really want him. Is it not pos-

sible, or would it not be wise, to put in a piece of legislation like this, that while the judge might be automatically disqualified because of the conflict of interest, both lawyers could, if they agree, request that the judge sit, nonetheless?

Senator BAYH. Well, it would be better for the parties to make the suggestion than the converse. Now, where the judge sometimes brings the parties or the counsel into the chambers and says: "Here, I have this interest, and if you like, if you feel I am prejudiced against your client, I will disqualify myself." That burden, it seems to me, is an unbearable one for the lawyer. If the judge were automatically disqualified, and, then, both counsels had to ask his return that would not be as severe, although it still puts that lawyer in almost the same light. The fact remains that the situation is not quite the same where you require affirmative action to qualify rather than to disqualify.

Senator GURNEY. I can see that might be helpful in the case where the judge does have special expertise, or maybe also in a jurisdiction where there are only one or two judges, and you do have your problems of getting a speedy trial because of a shortage of judges.

Senator BAYH. We have 19 States that do permit this kind of a challenge. As a matter of fact, it is everyday practice, so it is not foreign to the American judicial practice.

Senator GURNEY. I do not have any further questions.

Senator BURDICK. Well, I am a little confused now. In my chamber situation, the judge says: "I have a share or two in X corporation," and then both lawyers said: "That is all right; we will accept you." Do you agree with this?

Senator BAYH. No. I would prefer that that judge be disqualified.

Senator BURDICK. The question of referring to the law and writing the law here, would you want the parties to have an opportunity waive any party that may appear from a conflict of interest?

Senator BAYH. I would prefer not. I think I can make a distinction between the case the Senator from Florida described and the one you described.

Senator BURDICK. There is no distinction. It is still a waiver.

Senator BAYH. Well, all right, very close to the same.

Senator BURDICK. Well, do we waive or do we not?

Senator BAYH. I would prefer not to waive.

Senator BURDICK. All right.

Senator BAYH. There might be one judge that has unique talents over others, but I think you can always find a judge that has unique talents that does not have stock in one of the parties. And I have had correspondence with several judges in the aftermath of the confrontation we had on the Senate floor, and the general thread of this correspondence is that automatic waiver is much easier to handle and will not pose the type of administrative obstacles that many people immediately envision. In fact, more judges than not say: "Well, this is what we do anyway; this is S.O.P." It may not be written in the statutes, but most judges look at their holdings with infinite care to avoid the type of confrontation, even a de minimis one, so I am advised. I am not a judge, of course.

Senator BURDICK. One other question that arose from the exchange between you and the Senator from Florida in regard to a statute of limitations: Did I understand you to favor an additional statute after the time for appeal and all other times have expired?

Senator BAYH. I do not think this is necessary. I think this basis for appeal would have to meet the same test of timeliness as any other one.

Senator BURDICK. Well, let us take a situation where a case is tried and has gone to the Supreme Court and has been affirmed and all of the times for appeals or any other motions have expired, and, then, some Saturday afternoon he learns that judge X has 10 shares of General Motors, and General Motors was a party in the case. Can he do nothing about it?

Senator BAYH. I would say nothing. I mean, the chances of that happening are relatively remote.

Senator BURDICK. No. He could very well find out later that maybe the judge himself had overlooked it in his portfolio, a few shares of stock.

Senator BAYH. That particular case would not concern me at all. I think the allegation of bias, the use of the challenge or all of these things should be done in a timely fashion, and I am concerned that the court process is dragged out far too long and there are too many ways in which dilatory tactics can be used to delay.

I happen to believe that this tactic does not fall in the dilatory category.

Senator BURDICK. In other words, it is your testimony that if the time for appeal has expired, or appeal has been had and all other proceedings have come to an end, there could be no further redress or opportunity for a party to raise this question of conflict of interest thereafter?

Senator BAYH. Yes, that is accurate. But I think the test of whether the counsel should have known and if he knew it before time to make the allegation and did not make it so that he could then allege it on appeal, I think he should forfeit the right to make it—if he knew it beforehand. If he did not known it beforehand and found out about it accidently, the case that you propose, then I think he should allege it as long as the right to appeal still exists; but if that has been exhausted and time has expired, then, I think he has lost his right. I think there has to be some end.

Senator BURDICK. Thank you.

Senator GURNEY. Let me ask a couple of other questions here. In the State of Florida, we have an intangible tax, and you file a tax return with the county tax assessor listing your holdings of securities that the intangible tax is based on. That is a matter of public record. Would that be a notice to the attorney that if the judge had such an intangible tax return on file which showed holdings in General Motors and he undertook to try a General Motors case, would that put the attorney on notice?

Senator BAYH. Well, does your intangible tax law and the forms filed thereunder have the same security as a Federal income tax return would?

Senator GURNEY. No; they are actually open to public inspection.

Senator BAYH. I think that could be a reasonable basis. That does not deal with the subsidiary problem you raised.

Senator GURNEY. No; it does not.

One other question. What about the wife of a judge? Does she fall within the category of this?

Senator BAYH. Yes.

Senator GURNEY. Connected with any party?

Senator BAYH. Yes; if she lives with him.

Senator GURNEY. So, if she has stock in General Motors, that would also disqualify a judge?

Senator BAYH. Yes, I think that is important. We have used the member of the family living in the domicile of the judge. There has to be some termination point there, but to permit one spouse to own stock and the other one to sit in court I think gives the same allegation of possible interest or impropriety that exists as if the judge himself owned the stock.

Senator GURNEY. What about the case of a child?

Senator BAYH. If the child lived in the domicile of the judge.

Senator GURNEY. Minor children?

Senator BAYH. Yes.

Senator GURNEY. Thank you.

Senator BURDICK. Thank you, Senator.

Senator BAYH. Thank you, gentlemen.

Senator BURDICK. Our next witness will be Senator Hollings from the great State of South Carolina.

STATEMENT OF SENATOR ERNEST F. HOLLINGS, A UNITED STATES SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Mr. Chairman, Senator Gurney.

I appreciate very much the opportunity to appear this morning. In the Appropriations Committee we are marking up, in executive session, our agricultural bill, and I would ask permission of the committee that I be able to file my statement here in its entirety as if delivered before the committee and then with a few comments try to answer any questions that you may have.

Senator BURDICK. Without objection, your entire statement will be made a part of the record.

[The prepared statement submitted by Senator Hollings reads in full as follows:]

TESTIMONY OF ERNEST F. HOLLINGS ON S. 1553

MR. CHAIRMAN: I appreciate the opportunity to appear before you today to discuss S. 1553, which I introduced on April 15. This bill would replace the present language of 28 U.S.C. 455 with new Federal standards respecting the disqualification for interest of United States judges.

The two basic sources of law on the subject of disqualification are common law and state statutory law. At common law a judge was bound to disqualify himself only for financial interest in the litigation. State statutory law to date has developed three grounds for disqualification: bias, interest and direct relationship.

With respect to the federal judiciary, there are two provisions dealing with disqualification, 28 U.S.C. 144 which provides for disqualification for judicial bias or prejudice, and 28 U.S.C. 455 which is the only Federal provision on

disqualification for interest and relationship. Section 455 presently provides that:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

The Canons of Judicial Ethics, drafted by the American Bar Association, are designed to set forth principles to guide the judge's conduct. However, they do not clarify substantively the bases for disqualification set out in the Code.

During the consideration of the Supreme Court nomination of Clement F. Haynsworth, Jr., I became aware of the dilemmas created by the loose language of Section 455. The term "substantial interest" is patently vague. Hence, whenever a question of possible interest arises, a federal judge is faced with balancing the vague statutory language with the well established rule in the Federal system that a judge is obligated to sit where he is not disqualified by statute. In the case of *In re Union Leader Corporation*, 292 F. 2d 381 (1st Circuit 1961), the Court stated "there is as much obligation upon a judge not to recuse himself where there is no occasion as there is for him to do so where there is."

The investigation of the financial interest charges against Judge Haynsworth was thorough. The finding was that under existing Federal law, he had a duty to sit rather than disqualify himself because the financial interest was so small. The American Bar Association, which promulgated the Canons of Judicial Ethics, absolved the Judge of any suspicion. However, the cloud of doubt created by his opponents obscured his distinguished qualifications. The fact that this issue caused weeks of debate on the Senate floor clearly illuminates the underlying problem.

While the question of disqualification rarely attracts widespread publicity, it is constantly before the members of the courts. Realizing the inequities in requiring a judge to determine whether his interest is sufficient to prevent him from sitting or so small as to require him to sit and being aware of the fact that any such decision was subject to repeated reevaluation by others, I introduced, while the Haynsworth hearings were still underway, a bill addressed to this problem. This measure was not acted upon during the remainder of the 91st Congress.

After taking this initial step, I contacted numerous authorities in this area and solicited their views. S.1553 is a refinement of my original bill and reflects many of the comments and suggestions which I received. In my opinion, S.1553 is a comprehensive but practical approach to judicial disqualification. It goes beyond the financial interest issue, which was my initial motivation, to clarify several other areas of possible interest.

Under S.1553, a judge would be disqualified if, with respect to the matter in controversy, he has (1) a fixed belief in the merits, (2) personal knowledge of material facts, (3) served previously as counsel or (4) been a material witness. Present law specifies only the latter two conditions as bases for disqualification. The Canons of Judicial Ethics do not add substantively to these bases. Each of these situations, while not necessarily indicating a bias or prejudice, do amount to an involvement or interest which I feel is sufficient to call for disqualification.

On the subject of disqualification for relationship, a judge would be disqualified from a proceeding by S.1553 if he is related within the fourth degree by blood or marriage to: (1) a party, including an officer or director thereof (2) a person acting as counsel, (3) a person likely to be a material witness, or (4) someone who to the judge's knowledge has a substantial interest in the matter in controversy or in the affairs of a party to the proceeding. Section 455 presently provides that a judge shall be disqualified if he is "so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . ." The Canons merely provide that he should not act "where a near relative is a party" (Canon 13). As opposed to the present general language, the standard set by S.1553 is specific; it spells out the exact instances where disqualification must occur. Hence, once they have complied with the statutory mandates, the judiciary would not be required to face the possibility of later charges of impropriety in their conduct.

Lastly, with respect to financial interest, S.1553 provides that a judge would be disqualified if he knows that, individually or as a fiduciary, he has a finan-

cial interest in the subject matter or in a party in the proceeding. This provision goes on to state that he "should make reasonable effort to inform himself about his financial interests and those of the members of his family." A realistic line must be drawn to clarify those financial matters which are too remote for a judge to be held responsible. It is my feeling that the financial dealings of children who are fully grown and living away from home or of siblings or other relatives living in another household are too remote for inclusion in a statutory standard. Accordingly, S.1553 imposes disqualification upon the judge only because of the financial interests of persons related to him by blood or marriage, or persons treated as such, who permanently reside in his household.

The financial interest itself would include any legal or equitable economic interest, *however small*. The present law provides for disqualification in the event of "a substantial interest." I feel this is unfair to require a judge to determine whether his interest is "substantial." As illustrated during the Haynsworth term. There is no reason why the integrity of a judge or of the judiciary as a whole should be impinged or threatened by such disagreements. By including any economic interest regardless of size, S.1553 will prevent such challenges and will cause the judge's actions to be above reproach.

In summary, S.1553 is a needed piece of legislation. It presents a sensible set of specific standards for judicial disqualification. It removes the onus presently on the individual judge to balance general guidelines with his duty to serve. Enactment of this legislation is certain to clarify and facilitate the judge's decision and increase the public esteem in the judicial office.

I thank you for this opportunity to discuss my proposal, and I will be happy to answer any questions which you may have.

Senator HOLLINGS. Mr. Chairman, and Senator Gurney, from the moment I started to get into this disqualification, I learned the hard way in the Haynesworth nomination. I hasten to emphasize that the purpose of introducing this bill is not to retry the Haynesworth case. Senator Bayh and I joined, at the time of our debate on the Senate floor, in an agreement that we would try to sponsor something that would clarify this provision, 28 U.S.C. 455, about a judge having substantial interest and that big determination of putting a judge in the position of in his own discretion determining what is substantial, by trying to fix it with more precision in the statute. I would be delighted also to have the Senator from Indiana join on this particular bill. I join gladly with him on his bill. I think either bill would be an improvement.

Yesterday I had the privilege of meeting Judge John Frank, who I understand is going to appear later before this committee, who is considered by both Senator Bayh and I as an expert in this particular field, far more knowledgeable on the question of disqualification than I. As a result of that conference, his staff—that is, Senator Bayh's staff—and mine will confer later today and try to reconcile any differences we have, along with the changes by the Bar Association in the Canons to be discussed at their meeting in October. I hope that we can come up really with what will be the best bill to eliminate the vagueness and misunderstanding under the present section 455, and the decision of *Union Leader Corporation* in 1961 in the first circuit, 292 Fed. 2d. The court then said, and I quote:

There is as much obligation for a judge not to recuse himself where there is no occasion as there is for him to do so where there is.

Historically, I learned from Professor Frank that the statute and the decisions followed the practical consideration of a scarcity of judges, which was the case until the late sixties when we began to catch up. For example, in my own State of South Carolina, at that

time we only had two Federal judges. We now have five, and if a judge is disqualified from one case, then there are plenty of cases on the docket to keep him busy and several other judges who could hear that case. The opposite was true in yesteryears.

Now, I think the primary concern of the Senator from Indiana and myself is that we do not have any misunderstanding—and I advisedly use the expression of "appearance of impropriety." He does not want the appearance of impropriety. I do not want the appearance of impropriety, yet I think that is one of the big differences in S. 1553—by myself—and S. 1886—by Senator Bayh.

Specifically, I think that the main differences may be emphasized. I go right to the heart of the problem and eliminate under S. 1553 the question of what is substantial. I say: Financial interest includes any legal or equitable economic interest, however small, and any relationship as director, adviser, or other active participants, with the listed exceptions.

So, I use the expression "however small" to get away from this 1 percent or one share of stock. I do not believe it is good to try to correct this situation and get into a percentage.

The 10 percent as is provided in the Bayh bill, I believe goes really—it has got the right motivation and interest, but it gets right back into what we had in the Haynesworth case. In no instance, in the Brunswick case, Carolina Vendomatic, or whatever they were, there was never any nine, eight, or seven. There was a percentage of a percent, and in all cases less than 1 percent, and yet under the Bayh bill, under the first part we have got the justice or the judge "shall disqualify himself" in a case in which he had an interest, including a stockholding in a corporate party, any stockholding in a corporation which holds 10 percent or more. So, you have the 9 percent and 8 percent, by that time in a statute, and the judge is looking at it and saying: "Now, I have only 8, so I can go ahead and sit."

But, then, under section 5 of the Bayh bill, it says:

> In any case in which his participation in the case will create an appearance of impropriety——

And that is what was involved, gentlemen, in the charges at the time of the Haynesworth debate. There was no real question about the integrity of Judge Haynesworth. He continues, for example to sit as the Chief Judge of the Fourth Circuit today. No one ever asked him to resign. It was just the appearance of impropriety. It was not 8 percent or 9 percent—to the Senator from Indiana—but it was 0.008 percent which was an appearance of impropriety.

I think we have got to agree, if we are going to have a statute—let us get to the real heart of the problem and say: Any interest, however small.

I think, on the other hand, as Senator Bayh does—but it is not in my bill—in section 6:

> In any other case in which in his opinion it would be improper for him to sit.

That has not been abused under section 455. There was the concern that it would be, but I do not think it has been abused, and it is in the present statute now, and I think Senator Bayh is correct,

that probably should be included where the judge, in his opinion, feels he should not sit. That is not included in my bill and would be an improvement on it.

I do include the waiver, because I believe, as the previous questions by the distinguished Senator, Senator Bayh, indicated, that you ought to have a chance for a waiver by the parties. I so worded S. 1553 as to not put the lawyer himself in a precarious position. I quote:

> A judge disqualified by the terms of subdivision 3 or 4 of this subsection may, if he chooses to do so, disclose to an appropriate court officer, fully and in writing, the basis of his disqualification. The court officer shall transmit the statement to all parties. If all parties and counsel thereupon are in writing to remit the judge's disqualification, the judge may participate in the proceeding. The judge's statement and the consents of the parties and counsel shall be incorporated in the record of the proceedings.

I think that is a salutary feature in trying to study out, with the American Bar Association, what should be provided as a waiver. A waiver should be included, and by requiring waiver by the parties, the attorneys are isolated from possible pressure from the judge.

I think, going further though, under section 144 of Senator Bayh's bill, the matter of the challenge: He has the affidavit and is explicit, the affidavit of bias or prejudice. I would rather go to the North Dakota example of the outright peremptory challenge given by the distinguished chairman. We have them for jurors, why not a judge? That does not hurt the judge's feelings, you do not go to his bias or his prejudice, you just say: I do not like the way you handle cases.

One of the best friends I have is the Chief Judge in the District Court in South Carolina, Judge Martin. I do not mind saying for the record that I would not want my clients who are charged with crimes—and I have been on that side of the court—to get Judge Martin to handle that. He does it in a very fair manner, but somewhat severe in my terms, and if he ever goes to sentence them he gives them too long a sentence, I feel, and I tell him that he is tough. I would rather go to Senator Thurmond's former law partner, Judge Simons, who is a little bit easier, and if I can get an extension or continuation or let the fellow stay in jail and let him come up before Senator Thurmond's law partner, I would rather do that, although both judges know that I am a much closer friend of Judge Martin. And that happens with lawyers.

I think we ought to have a peremptory challenge, and I would hope the committee would ask Judge Frank about his experience, because he has been traveling to the various judicial conferences consulting with the judges and the bar on this particular question and has been very, very active with the American Bar and could bring us up to date on that particular point. But I think the challenge would be an improvement.

Other than that, I would be glad to try to answer any questions.

Senator BURDICK. Well, thank you, Senator, for you contribution this morning.

The only question I have is the question dealing with the procedure of a waiver. I notice you require a written statement by the judge and a written waiver by the parties and the counsel.

Senator HOLLINGS. Yes, sir.

Senator BURDICK. Would it not be more convenient and a nicer way to handle it, let us say, at a pretrial conference, to call the parties in before the court?

Senator HOLLINGS. No; I like that in writing. That gets that separation from intimacy. You get called into the judge's chambers and the judge is off the record, and says: Look——

Senator BURDICK. He is not off the record; he is on the record.

Senator HOLLINGS. OK, he is on the record. He says: "Now, look, Mr. Hollings," and so forth and so on, "your client, I am sure you can handle your client and get him to waive that."

Senator BURDICK. No, no, it is on the record, a part of the record.

Senator HOLLINGS. I know, but I do not want it back in chambers. I want him to submit it in writing and have it submitted to me in writing, and I would rather get it from the clerk and then get it indirectly from the judge, and I will have room to move around and consult with my partners and really see and, of course consult with the parties as the waiver indicates.

Senator BURDICK. Well, how we do it, sir, is not the greatest issue here. But the idea that you could waive by agreement of the parties.

Senator HOLLINGS. But it is important that the waiver is unfettered and free. I think, when you put it in writing and submit it to the lawyer outside of chambers and not in open court—you get me in the courtroom—or in chambers, and I am tied up. You send it to me in writing, and I will send it back in writing, and there is no embarrassment at all, and there is no pressure, and it is free in an unfettered way.

Senator BURDICK. It would have a lot of merit.

Now, I understand now you are in agreement, you and Senator Bayh, on the amount of interest?

Senator HOLLINGS. Well, I do not know. You heard the testimony just like I did, and I think he yielded some on the 10 percent. I think, if you analyze that and his testimony and the position we took during that debate, quite to the point—I mean any interest. What we wanted to do was to get rid of any interest, even one share.

Senator BURDICK. Whether it be in the parent company or a subsidiary?

Senator HOLLINGS. Yes, sir, let the judge know exactly where he stands, because it is still my strong feeling that my distinguished friend and Chief Judge, Clement Haynesworth, obeyed the law. He was known. He has a reputation among the judiciary, among his colleagues on the bench, of trying to be one that was a stickler to try to clean those dockets and make judges serve, and everything else, and he was a leader. And on this substantial interest, it had to be substantial, and, then, after he obeyed it, it was not substantial, and everybody will agree to that. Then, he got up here to the U.S. Congress who wrote the law, and we beat him on the head for his obedience and said: "Oh, this is the appearance of impropriety. Get out of here; you cannot be promoted to the U.S. Supreme Court. But you can still stay as chief judge." I think that is wrong. That is why I am trying to correct it.

Senator BURDICK. As I summarize your testimony and the testimony of Senator Bayh, you are in a large area of agreement here—at least, from the testimony. The only difference seems to be whether or not the parties and counsel can waive apparent grounds for disqualification.

Senator HOLLINGS. But I do emphasize—I think when you take out of the law the phraseology as to substantial interest, that matter of discretion, and then you reinsert it as in S. 1886, the Bayh bill, that expression that in any case in which his participation in the case will create an appearance of impropriety, then you have got him back in the soup again.

We have written a statute and then canceled it out.

Senator BURDICK. I understand.

Senator HOLLINGS. That is tough. That is a human judgment. There are certain things that we just cannot legislate.

Senator BURDICK. In other words, your objection goes to subsection 5?

Senator HOLLINGS. Yes, sir.

Senator BURDICK. Not to subsection 6?

Senator HOLLINGS. No, sir. I think subsection 6 would be an improvement, by Senator Bayh, on my proposal, S. 1553, yes, sir.

Senator BURDICK. Senator Gurney?

Senator GURNEY. Well, that was an excellent statement, Senator Hollings. There are one or two things, though, that I am puzzled about, as to what they mean in your bill.

In this subsection 1 of section 455, could you amplify a little bit on what you mean by "fixed belief concerning the merits of the matter in controversy or personal knowledge of material facts concerning it?"

Senator HOLLINGS. Senator, I do not know, other than the language itself has been used—from some of the cases.

Senator GURNEY. This is language——

Senator HOLLINGS. It is a phrase used among the American Bar and included in the canons.

Senator GURNEY. And there is a sort of a history on what this means?

Senator HOLLINGS. Yes, sir.

Senator GURNEY. What about the "personal knowledge of material facts," is that true of that, too?

Senator HOLLINGS. That is right.

Senator GURNEY. Let us take a situation here.

Suppose our Federal judge in a small community has a case, a celebrated case, pretty well known, and probably the judge would know a great deal about it, have personal knowledge of a lot of the facts. Again, I am not exactly sure what the language means, unless it is language of art.

Senator HOLLINGS. Well, that would be under that canon, if you had a personal knowledge of the material facts. Of course, the names of the parties would be a material fact, but I mean it is really considered a substantive material fact that would go to the merits of the case or the issues involved in the case itself. And other than that, I do not think, after all, within his own mind, if he knew the

facts, that he would come about them through some association personally as a former counsel, which is later covered, really, or by relationship, by connection, or otherwise, like that; and it is mandatory that he shall disqualify himself.

Senator GURNEY. On page 2 of the bill, lines 11 and 12 or line 11, section 3(d), material witness in the proceeding—well, let us take here again, and I am really not sure what the term means, but let us take an automobile accident case where a witness is related to the judge and simply testifies, you know, as to what she or he saw, as far as the accident is concerned. Would that fall afoul of that provision?

Senator HOLLINGS. Yes, sir.

Senator GURNEY. It would?

Senator HOLLINGS. Yes, sir.

Senator GURNEY. It seems to me that that might be a rather harsh rule. I do not see why that should disqualify anybody. That is what I am saying. Why should it?

Senator HOLLINGS. Well, I think that is a broad matter. I discussed that with our friends from the American Bar and they agreed that once they got to the fourth degree there was no longer a matter of debate. If you have a material witness and they are related to him, in the fourth degree, then the judge knows that he has to disqualify himself, and under the statute would be required to disqualify himself and move on to another case.

Senator GURNEY. Is that presently in the law?

Senator HOLLINGS. No, sir.

Senator GURNEY. I can understand if the witness has some kind of interest in the lawsuit; but so help me, if he is completely a disinterested witness and is simply testifying as to what he saw, I should not think that——

Senator HOLLINGS. It should not. And, of course, what we are really trying to do is to get back to Senator Bayh's appearance of impropriety. We are trying to put out specifics, those things that could be reviewed as improper. But this is not proof positive. In many instances and in many situations that you and I can think of, this would not be so, but when you do have a material witness appearing and they are within the fourth degree by blood or marriage in the judge's proceeding, then he should disqualify himself.

Senator GURNEY. One final question on this peremptory challenge. This really does trouble me. I do not think it would matter too much in jurisdictions where you had a number of judges, but it seems to me it really might be troublesome where you had very few judges. And even in the case where you had a lot of judges and you could easily assign the case to another judge, there is a possible delay of the trial that troubles me in a good deal. The case worked its way up, and I do not know how far the docket is behind in New York now. But, as a young lawyer, the Federal court judges' docket, when I practiced in 1938—and now that is a long time ago—there, in New York City, it seems to me there were 3 years behind even then and maybe even more so, and the cases were never assigned to a judge until the case finally worked its way up the calender, you know, and not too far in advance when you were going to try a case, and if you

knocked this thing off in a peremptory challenge and it goes to the bottom of the other dockets that he is assigned to, then, it seems to me, this would be a terrible hardship on the parties. And that really bothers me. Is there any way that we could avoid that?

Senator HOLLINGS. Senator, I do not think that that necessarily has been the experience. I am sure that John Frank can answer better than I, or some friends in the American Bar like the distinguished chairman from North Dakota, whether or not the peremptory challenge has bogged down the calendar in those States. I think in those States where you have had it that has not been the experience. I think it is used timely and in such a fashion as to not get all the way ready to try and then knock the judge out. You know, it is done ahead of time, and there are those cases, of course, assigned to other judges that can be assigned right over to him, so he will still have even share of work to keep the calendar up. So, there is no lack of cases for him to try as long as the machinery not so situated as to bring all of the witnesses and lawyers and everything all the way to court, and then use a peremptory challenge. But I would be very surprised if that happens. I do not know about the peremptory challenge, but we could certainly look to the States that have had it and learn just exactly whether or not it has caused delay.

Senator GURNEY. I guess that is true.

I do not have any further questions, Mr. Chairman.

Senator BURDICK. I wonder if this problem could not be alleviated by a timely action, that as soon as the case is assigned or as soon as it appears on the calendar, make the objection either for disqualification or waiver, or peremptory, and do it timely?

Senator HOLLINGS. Right. What you have to do is require that the challenge he used within a short time after the judge has been assigned.

Senator GURNEY. It seems to me that that probably would be the way to take care of it, and I almost would rather see that safeguard in the bill that required the challenge to be made when the case is assigned, and then we would try to overcome that problem.

Senator BURDICK. Well, I have no further questions, Senator; and thank you for your contribution.

Senator HOLLINGS. Thank you both very much.

Senator BURDICK. I think that the subcommittee will try to hammer out something that will give the courts a better appearance, I hope, before the public.

Senator HOLLINGS. And we will be glad to work with Mr. Westphal and your staff, and the staffs will confer this afternoon with Judge Frank.

Thank you.

Senator BURDICK. Thank you.

The next witness is John P. Frank, an attorney from Phoenix, Ariz., a native of Wisconsin. He has degrees in law and other degrees from the University of Wisconsin and Yale Law School.

He served as clerk for Justice Hugo Black, assistant to Secretary Harold Ickes, and to Attorney General Biddle.

We are pleased to welcome you to the committee.

STATEMENT OF JOHN P. FRANK, ATTORNEY, PHOENIX, ARIZ.

Mr. FRANK. Thank you, Senator.

The subject that we are discussing today of disqualification is one that has interested me for a good many years. When I was professor of law at Yale, there was an episode that you will remember, Senator of Justice Jackson making some criticism of Justice Black on the matter of disqualification in a particular case. It was a colorful episode, 25 years ago, and at that time, I made a national survey and published an article which continues to be used in the disqualification field. I referred to that topic recently when I was asked by your committee to appear here as an expert witness and as an adviser to the committee in connection with the Haynesworth matter because that involved a disqualification problem. I continue to write in the area, and without putting it in the record, I would send up to you and to Senator Gurney copies of recent articles on this subject. I would like simply to wish them off on you, to encumber your already burdened shelves.

Senator BURDICK. They will be so received and made a part of the file.

Mr. FRANK. Thank you.

Let me turn to the immediate matters that we have, and first of all, I plan to really give a synopsis of my statement because I want to reach the points, the hard points.

The statute on disqualification is absolutely unsatisfatory, and however you change it, there is a plain duty, I submit to make changes, because there is conflict between the statutory standards and the American Bar Association standards. The injustice of the Haynesworth matter was getting someone caught, as I see it, between those conflicting standards. The ABA has the so-called adherence of impropriety standards, and the no interest standard, and the Federal statute by virtue of amendments in 1948, which have no legislative history and seem to have been a pure fluke, has the substantial interest standard. The result is you have one rule of ethics laid down by one body, and a different one by another body. One of the finest gentlemen that I have ever had the privilege to know got badly caught in the middle.

Now, the fact of the matter is, as Justice Blackmun said, when he was before the Judiciary Committee in connection with his own appointment, that he had very materially altered his own practices in the recent past, after the work of this committee. What he said was, "The times have changed," and a truer word was never said. They obviously have changed on the subject of disqualification, and it seems to me, and I take it probably to everyone within the sound of my voice, that those changes should be reflected in the statute. The only problem is how truly and fairly and soundly to do it, but a change is needed.

Now, let me report what you know, Senator Bayh introduced a bill to make those changes, and he permitted me to work with him so that I was involved in the draftsmanship of it. Meantime, I am sure you are aware the American Bar concluded to revise its "Canons of Judicial Ethics" to meet the changing conditions which were

emerging from recent events. The Federal Judicial Conference after the flurry of excitement caused by the Fortas episode referred, in effect, the whole matter to the American Bar Committee, which is headed by Chief Justice Traynor, has Potter Stewart as one of the members, and is as good a committee as there can be.

Now, what you have at the moment is first the Bayh bill which is close to the ABA draft, and second, the Hollings bill, which is virtually verbatim the ABA's draft as it stands at the present time. I said virtually because there is one difference, and I will point out that in a little bit, and I suppose that was probably an inadvertence. So, we clearly now have the two law forces moving toward each other and will end up, I trust, with a uniform standard which could be mutually satisfactory and eliminate the gaps.

In connection with this, let me make a general observation. The general thrust of the law now is to make disqualification easier. We have been applying a terribly strict standard in the Federal system as a throwback to the days when there were not many judges, but as you pointed out, Senator Burdick, there are only three States that have only one Federal district judge now. Senator Gurney, may I say the reason there are those three States that do not have but one judge is because they do not have enough litigation to put in your eye. If they did, they would have more. So, 99 percent of the Federal litigation is now in places where there are lots of judges. There simply is not a personnel problem, and we must deal with it as we find it. This is, in its own odd way, another result of the population explosion, and it has consequences in public administration.

In these circumstances, I have talked in the formal statements I have given you about the background analysis of disqualification and its common law history, where it comes from and so on. I will go into that if you wish, but your minutes are precious, and I thought that I would hit the high points ad get to the heart of the problem. So, let me say that we started with the common law rules from the time of Lord Coke with disqualification for interest. No man can be judge in his own case is the oldest rule there is. Next was disqualification for relationship. We did not have a disqualification for bias at all in the common law. It did not recognize that possibility.

What has happened in the 19th century is the inclusion of the third element, disqualification for bias, and it is still growing and the concept grows and expands. It is a vital part of the developing of common law, and it affects very much the statute that is before you now and whatever you may wish to do about it.

The largest additional expansion that has come into the law in recent years is the so-called appearance of improprieties. Now that we run into this problem, the appearance of impropriety, which is an external standard of how does it look to the people who are receiving the justice. That standard is not in the Federal statute at the present time, but it has been in the canons for years and it was adopted in so many words by the U.S. Supreme Court about 3 years ago in the *Commonwealth Coatings* case.

We now have the condition that the bar is telling us and the Supreme Court is telling us that something to be taken into account,

seriously and gravely, is the appearance of justice to the community as well as the objective fact of whether justice is there or not. So, in some fashion, you will need to take this into account.

Now, let me turn to the specific statutes which we have before us. What is the biggest single change under the existing law, as has been told you by the Senators, and as you know, is that the 1948 statute says, a judge shall disqualify if he has a substantial interest. That clearly implies that if his interest is not substantial, he need not disqualify.

Now, what happened prior to that? In my 1946 survey which was responded to by seven of the senior circuit judges, and by 30 of the supreme court chief justices of the various States is that throughout the country in almost every instance, up to 90 percent of those reporting, any interest at all was regarded as disqualifying. There were one or two exceptions, and I had a letter that might interest you from the then-chief justice of Michigan to the effect that if he had a very small holding, he felt he could sit; and Judge Biggs has had the view that perhaps we could have a waiver, a subject that interests you. In other words, there was an 85, 90 percent rule of "absolutely any interest, find somebody else to decide it."

Senator GURNEY. Did they give you any examples of their disqualifying themselves? The reason I ask that question is a lot of us get questionnaires, you know, and sometimes the questions are like this old question of when did you stop beating your wife. You have got to answer it in a certain way; otherwise it will be misunderstood. And I can see where a judge could get a question, "Do you always disqualify yourself for any interest at all," and he would say, yes, because if he said no, he would be suspect. You know, you see? I mean did you go behind this?

Mr. FRANK. We did, and I will follow up, Senator. Of course, that can happen. All I can say is that the dominant view before 1948 was disqualification. When that amendment was made in 1948, Federal judges began the practice of sitting if there were small holdings. In your circuit, the fifth, we have the case of sitting where there were small holdings. Judge Blackmun sat where he had small holdings, as he told your committee; and others developed the waiver practice, which amounts to the same thing, because they are sitting when they have a small holding.

Now, it is clearly felt that this is undesirable, and so the ABA committee, Judge Traynor's committee, lays down the rule that a judge should not sit if he has any interest at all. We have found that we burn our fingers on the question of more or less, and that one man's more is another man's less. To a judge with a million dollars a holding may not seem much, but to a litigant with peanuts, it may be a lot, and so the Traynor committee has unanimously recommended, and it is unquestionably going to be an ethical standard, that if you have any interest at all, find somebody else to do it, find something else to do with your time, but do not try this case.

Senator Bayh's bill does the identical thing, so that in that respect, this is the big change, and anything else is relatively minor. Now, that is a change in Federal law, and I trust that we all agree that it ought to be made.

You have had some talk that has interested you here about the problem that obviously arises in a sophisticated society of holding corporations or subsidiaries. What do you do where the case is brought by a party, the party is either a subsidiary, hypothetically, of General Motors, or has subsidiaries of its own, and the judge happens to hold stock in either the holding company or the susidiary? What should he do then? I will take responsibility for my draftsmanship which must be inadequate, because it has led to a great deal of confusion before this committee today. All that the 10 percent provision says is that this is how you define a holding company or subsidiary. In other words, what the bill says is that if a party company owns less than 10 percent of the stock of something else, that other corporation will not be regarded as a subsidiary. There has to be some definition, in other words, of what is a holding company, or what is a subsidiary, and that is all the 10 percent does. What it says is that if the party holds more than 10 percent of the stock in X company, then X will be regarded as a subsidiary. And in that case, the judge must disqualify. If the holding is less than 10 percent of the stock in X company, the X is not regarded as a subsidiary at all. It is simply an incidental or a random investment.

Now, I hold no brief for the 10 percent. It could have been 5 or 15. Obviously there can be no wisdom in the number, but the point is you have to put in some definition in order to give the judge a fair protection so that it has some standards so that where his company, the one which is the party has infinitesimal amounts of stock in some other companies, they will not be regarded as subsidiaries at all, but rather as a random investments. Senator, am I making this clearer now than before?

Senator BURDICK. I want to ask a question at this point. Suppose this subsidiary qualifies and the part interest is less than 10 percent of the party company in the subsidiary, but the judge may have a substantial interest in the subsidiary greater than one share or two of stock that he may have in the parent. Why is that not a conflict then?

Mr. FRANK. In the view that is taken, if the view that is taken here, let us call party P, if I can revert back to being a school teacher, and subsidiary X, if it is really a subsidiary, and if he has one share of stock, he should not hear the case because we are adhering to the views that any holding, any holding in a party or in an intimately related corporation is disqualifying, because we have given up on the notion of trying to decide more or less. That is the big change that is here. So, if he has any at all, out. The only use, I repeat, of the 10 percent formula, is as a definition to determine whether it is a subsidiary or not, so what we are saying is that if a parent, if the party which is the parent, holds a few shares of stock in something, it would not be regarded as a subsidiary. That point frankly says the judge will be given some protection by being given some standard from this body, and it does not matter what you make it, just make it something.

Senator BURDICK. It seems to me if it is for the public that you should make it consistent, and you should carry through on the subsidiary for any percentage.

Mr. FRANK. The only reason, and I can fully yield to this, as I have suggested, but I do make this point, we do not wish to put judges in the position of where they cannot have stock at all, or a rich man cannot be a judge, or anything of that sort. Now, what the judge has to do is as a practical matter, is he has to have his portfolio and his clerk or his secretary has to check it against the record, but we also have to keep in mind the point Senator Gurney made in the colloquy with Senator Bayh, and that is we do not want to clog judicial administration by having mistakes turn up later that require retrials or anything of that sort. And there is a limit to what the judge can do. If he has to remember not merely his own portfolio, but the portfolios of other companies in which he has any stock, no matter how minor, it will be terribly awkward. This is the reason for the formula. Again, you come to practical limits, and if you consider that a change, it is, but that is the theory of the thing.

While I am at it, may I meet the point Senator Gurney made with respect to when can the issue of disqualification be raised? In this respect, Senator, there is no change whatsoever from existing law. Under existing law the rule is substantial interest. Under the new law it would be any interest, but the question of timing of when can you argue about it would be all the same. That is to say you could raise the question of interest just as you can raise the question of no jurisdiction because there was no diversity, or no jurisdiction because there was no Federal question, you can raise it in the course of the litigation, but not after the litigation is over. In this respect, there is nothing novel, different, or new at all, and nothing that would raise any problems that do not already exist otherwise.

Senator GURNEY. Does that need to be spelled out?

Mr. FRANK. I think it is inherently implicit in the situation. Now, the standard of review may be different. It is my view that if the judge turns out at the appeals stage to have had any interest, it is reversible error. As to the discretionary things, the appearance of an impropriety, that should be reviewed only for gross abuse of discretion. As to the objective standards, we are not making any difference at all, because on the matter of timing, you can raise substantial interest at any point in the case. If you make it a 100-share interest or a 1-share interest, you are not going to the change timing of the challenge at all.

Senator GURNEY. Well, let me see if I understand this. If the case is appealed, then when the appeal is rendered, the decision is rendered by the appellate court, that ends any possibility of raising the conflict of interest question?

Mr. FRANK. At that point, it is res judicata, because under the cases the same would be true of an issue of diversity. If you find—once it is a final judgment, and it is entered, and you did not argue about that, it is the same as it was with no Federal question, and it had been tried by a blunder.

Senator GURNEY. Well, now, let us suppose, and my law practice is really rusty, I cannot remember, it has been so long since I was in court, but the appellate court decides a case. I cannot remember now, but do you have to go back to the trial court and enter a final judgment on that appeal, or what happens?

Mr. FRANK. What normally happens, it is entered on remand and the final judgment then entered, but once it leaves the Supreme Court, it has become the law of the case and you cannot alter it, so it would not make any difference.

Senator GURNEY. One further question. Would that be when the opinion is published or when the judges voted prior to writing the opinion?

Mr. FRANK. You mean when it became final? It would become final at the point under the rules at which a petition for rehearing can no longer be entered, and a petition for rehearing no longer can be filed, judgment can be entered by the clerk, and that will have the effect of closing it off.

Senator GURNEY. Let me go back to the colloquy you were having with the chairman here on this stock interest and ask a related question. I notice that the Hollings bill has this mutual fund business spelled out. The Bayh bill does not. Does the Bayh bill cover a mutual fund situation?

Mr. FRANK. I do not think adequately, and I would hope, it seems to me, that the ABA and Judge Traynor and Senator Hollings have raised a good point here, and I would hope if the contemplated colloquy between the staff leaders for the two Senators and Mr. Westphal goes forward, that that point could get attention, I must say I do not think I personally have given it adequate attention.

Senator GURNEY. Is it your opinion that mutual funds should be exempted? That is what the Hollings bill does, I believe.

Mr. FRANK. I am inclined to think so, unless they are major holdings, again. The goal is to get to something which is practical enough to be livable.

Senator GURNEY. I find that difficult myself.

Mr. FRANK. If you will allow me to cop out on that, I am in some doubt. I have not given this the attention that I think it deserves.

Senator GURNEY. If we are going to make that an absolute rule, if that is the wise thing to do, I do not know whether it is or not, and let us assume it is, I do not see why mutual funds should be excluded. Moreover, you have got a lot of mutual funds floating around that have rather restrictive interests. I can think of one in Florida, for example, in my own State, which is a mutual fund involving only properties in the State of Florida, investments in Florida. I think one covers any Florida investments, and I think another covers Florida investments only in real estate, but it is a mutual fund which is registered with the SEC, just as much of a mutual fund as any of the big ones out of New York, and I can see where a fund like that in Florida, if you had just a few shares, could be a very substantial interest as far as litigation before a judge is concerned. Or for that matter, if a judge had a very substantial wealth, and put his money, say $1 million or $10 million, if he was lucky enough to be that wealthy, this one big mutual fund, which has rather substantial holdings in General Motors or something, it would be a rather substantial interest. I would almost think that if you were going to say any interest, I do not see how you can exclude mutual funds.

Mr. FRANK. Will you permit me some time for thought as I do not feel I have done an adequate job of thinking this through for myself, and I would like to send a letter to the chairman? I would like a chance to meditate briefly on that exact point.

Senator BURDICK. May I inject at this point, I can see the problem of mutual funds because you have got major companies, and those major companies have subsidiaries, just like the branches on a tree. It goes over the whole Nation.

Mr. FRANK. Right.

Senator BURDICK. I wonder if the answer might lie in the ABA's suggestion that they base this interest in subsidiaries on knowledge, the judge, if he knew? If he knows that he individually, or his fiduciary, or other member of his immediate family, or any member of his family residing in the household has a financial interest, if he knows of the interest, it is based upon knowledge.

Do you want to speak to that?

Mr. FRANK. Well, I think the knowledge test will help, but at the same time I think we want to go as far as possible to let the fellow inform himself. He cannot just drift, and that may mean the judge has to reshuffle his portfolio, as some have in the light of events, we are all familiar with, and narrow the holdings and not find themselves in a position where they are unlikely to know. So, you reach the problem in short of how do you input a standard of knowledge and get the fellow to be careful about it, and that is part of it.

Let me touch, if I may——

Senator GURNEY. Well, let me just pursue that one bit more, because I do think we have to meet this problem.

Mr. FRANK. Unquestionably.

Senator GURNEY. I would think, and we did not ask Senator Hollings that question, but I am sure he probably put that in there or whoever drafted the bill did because of the sometimes very fast and enormous changes in the holdings of mutual funds. That is probably why. In other words, if they list their holdings every quarter or 6 months, or once a year, for that matter, the judge may inform himself of that, but you may have several hundred cases of changes in the meantime. That is probably why it was put in.

But I also throw this out too, in the case of large corporation, especially a conglomerate, and this is going on, you know, or has been in the United States at quite some pace, I think a judge could own something in Western, which is one of the conglomerates, and they are buying and selling all of the time, and he could fall afoul of that not really knowing what he owned at any one time, as far as a subsidiary is concerned. So, what I am saying, is I think we have a real problem here. We are going to have a problem.

Mr. FRANK. I think the 10-percent formula or some other percentage of the degree or size of holdings may be helpful when you get to the second degree that way.

Senator GURNEY. Or maybe some reasonably standard of knowledge. You may have to put that in.

Mr. FRANK. Yes. If I may, I will mention the other major elements here. There are two, so the first element is the elimination of the substantial interest and the substitution of any interest as the

approach. The second is the so-called appearance of impropriety, the appearance to the community standard.

Now, the ABA has that traditionally, and they have it in these new canons too. It is in number five, rather than in number two, and what Senator Hollings has done with his bill is essentially give you new canon number two, new canon number five has the appearance of impropriety, and the only reason it is there rather than in two is that it is meant to cover all aspects of a judge's behavior, and not merely the matter of disqualification. So, it would reach improper antics, public drunkeness, any of the things that are just plain wrong, as well as disqualifications. But I am assured by the reporter of the ABA that it is meant to apply to disqualification as well. They simply, as a matter of draftsmanship, put it at this broader point. So, I think that it is in the ABA, that it is in the Supreme Court decisions. I do find the phrase frighteningly empty of content. But, it is there. It is traditional, and I fear we simply have to live with it.

Senator BURDICK. What do you do about the argument that appearance is based upon a faulty premise?

Mr. FRANK. Senator Burdick, what is worrying me, as I said forthrightly in one of the articles that you have, is that it may have an unwholesome pressure for conformity, and stuffiness and all of the other vices which Federal judges are likely to be subject to, and some State judges as well. On the other hand, this is the way the profession has chosen, and that the Supreme Court has chosen, of reminding judges that when they take that oath, they take the responsibility to keep up an appearance in the community, that is a meaningful, real thing, and it really has worked pretty well, I think. I cannot think of a single instance that I know of, and I think we would hear of such things, in which it has had an inhibiting, unwholesome effect on human behavior, beyond stuffiness, and some of the judges are subject to that anyway. It seems to me it has worked pretty well, and has been in the ABA canons for a great many years. We cannot escape the fact that it is meaningful to a great many members of this body who constantly in their own minds use it as though it were a meaningful standard, and the law ought to reflect the judgments that you actually make from day to day.

Now, the other point, the big change is this one: take Senator Gurney, the case of Judge Rives in your own circuit. I suppose he is as good a man as there is. Judge Rives has an interesting opinion in the matter of Edwards. The whole panel sat. Judge Rives said I really do not think I should be in this case. He says, forthrightly, I think it looks wrong, and in this matter, the parties are bound to feel this would affect my judgment. If I had any discretion, I simply would not sit. But I have consulted with the other judges, and they tell me under the Federal cases, I must sit whether I want to or not. I therefore am sitting. It shows up as a 5 to 4 decision in your circuit, with Judge Rives casting the deciding vote despite the circumstance that he clearly feels that he should not be there. Judge Rives did do the right thing, but we have enough judges now so that if the judge in his heart thinks that he does not belong on a case, then let him find, again, something else to do with his time.

So, the big three changes are number 1, elimination of substantial interests; number 2, the change by including the appearance to the community; and number 3, the elimination of the so-called duty to sit.

The other topic to which I would like to avert, is the peremptory challenge. May I say a word about that?

Senator BURDICK. Yes.

Mr. FRANK. First of all, I have submitted to you letters, and this is the most meaningful part of it at all, showing the great satisfaction of the States which have the peremptory challenge system, and the feeling that it is a just system, a better system. I have attached to the statement which you have a table listing all of the States. Sometimes, Senator Gurney, it is hard to know. Your Florida statute is drafted so that it is open to the construction that is a peremptory challenge, and I have called Florida counsel to discover that they do not quite use it that way in your state. It is close to that, but not quite. Many of the States are moving away from the affidavits entirely. The lead one at the moment is—I say this hesitantly because I do not want to disqualify our chairman—is drafted by his brother in the State of North Dakota, and was recently adopted there. I think it represents what is regarded as the best thinking now in the profession. It calls for transfer of the case to another judge without any affidavit of bias. North Dakota, Montana, and Wisconsin have that system. Senator Bayh kept the affidavit in the belief that many Senators like Senator Gurney come from States that do not have peremptory challenge so it would look more familiar if you kept the affidavit. All this really is is a request for a change. There will be minutes of awkwardness, of course, in the three States with only one federal judge but this is a terribly minor problem. The overwhelming weight of the cases are in places where this does not exist at all, and there can always be problems. I have given you letters from the chief justices of the States of Arizona, Minnesota, Missouri, Montana, Nevada, and North Dakota. My own chief judge has written a terribly emphatic letter on how well pleased our bar and bench is with this sytem. I have since received another letter that came from Phoenix yesterday from the chief justice of Washington, saying that Washington believes this should be extended to the Federal system. That chief justice would be distressed if it were not because he finds it so satisfactory for Washington. It just makes everybody happy.

On the other hand, the problem that Senator Gurney raised is real, and I will now make a major point against myself. I also will give to the clerk or through Mr. Westphal and ask that it be included a letter from the chief justice of California, Judge Wright, who reports a questionnaire they have had there indicating a real abuse, and that is in the belated use of the challenge, which can have many of the effects you are talking about. So, they are now carefully examining how to deal with that problem. Senator Bayh has tried to reach that problem by making it a timely requirement.

I want to be hasty because I know some judge from Indiana is here, and I just do not want to use his time, but let me say hastily that you have the problem first where the case is assigned to a judge when it is filed. At that point, you have it quite early. You also have

the so-called master calendar system in the big cities where the case may not be assigned until almost immediately before trial.

Senator GURNEY. This is the case I was concerned with.

Mr. FRANK. Right. In that master calendar, the only place you have it by definition is where there are a lot of judges and there are simply no problems at all there. It was a fluke that it went to judge A, and it could just as well have gone to judge B. You just swap them around. That presents no difficulties.

Where there isn't a master calendar, let me say unequivocably, the choice should be made early. The counsel should not be allowed to test the water to find out if he is going to get favorable rulings. If the judge has had anything to do with the case, counsel should not be allowed to remove him. I must speak, I hope, with a pardonable but pungent candor. What is happening is the cities are attempting to achieve fairness by using a lot system. Every once in a while you get a case in the Federal system going to a judge where it clearly should not be, where it is just going to be a plain invitiation to error; it is going to be a waste, and a misfortune. I will ask you to evoke in your memory a case which I shall not identify by name, but you will know perfectly well what I am talking about. A certain major matter heard in a certain major city which is familiar to all of us, where by the fluke of the calendar, the case went to a judge who simply was incapable of handling it, whether for age or other factors. The district attorney would not have conceivably wanted him because he had dead guilty defendents, yet he is going to get error every pace of the way, every day of the trial. The defense does not want him for reasons of his eccentricity or oddity. What we have done is put ourselves in a corner once the name comes out of the box, and the case has to stay there. That system is just plain no good. We have got to get some flexibility into it somehow. I can only say with great earnestness that those of us who have lived with what is known as the North Dakota system like it.

Senator GURNEY. May I just say this: Would it be your suggestion then that we have language in the bill here on the section of bias or prejudice that would make certain that it was not, the trial was not delayed because of peremptory challenge?

Mr. FRANK. It must not be, and I would not allow it. I have written the strongest book in America, a lecture given at the University of California on the need for a radical reform of American law, and anything that is going to cause any delays I am as emphatically against as you are. This is just a matter of allocation of work. May I say a last word, Senator Burdick, and then be done, with appreciation for the chance, because it is a topic that has deeply interested me. I for one would be grateful if the committee could not come to final conclusions before the ABA meets in October, and not before you hear others, but I would be very grateful if you could come to what I would call truly tentative conclusions particularly on the 455 section. The reason is that we have been trying to bring the ABA draft and the legislative draft as close together as possible. It seems to me that it would be helpful to the ABA committee as it comes to its final conclusion if it knew not merely that there had been a hearing here, but also if you could in some appropriate fashion indicate

the drifts of your minds and say tentatively we think something like this is desirable. I think this would be helpful in the New York meeting in October. Both Senator Bayh and I went to St. Louis and appeared at the first meeting, and the Bayh bill got changed to fit, and it will be changed some more as a result of this discussion. I think if you do that that it would be helpful.

The only topic that I have not reached is the waiver, and may I just say a word about that?

Senator BURDICK. Yes.

Mr. FRANK. If I deduce from your general tone on the thing, you have some doubts there. One is bound to. I can only say that I believe that I at least would make it nonwaiverable, if I could, because waiver really is a function of a velvet blackjack. Nobody pushes you around, but people push young lawyers around, who have timidity. When a waiver is put to a lawyer, he is then in a position where if he refuses to waive, he implies that the judge is somehow wanting in integrity or objectivity because the judge is willing to sit despite the fact he has an interest. That is really what it comes to. If we mean the judge should not sit if he has an interest, then we ought to really mean it and not have him sit if he has an interest. We should not nullify the standard we are applying by then putting the squeeze on the lawyer to have him relinquish the right to have a judge who does not have an interest. I think the most limiting thing said on this score was said by Judge Biggs, and I am very fond of Judge Biggs and respect him deeply, when he said we always get waivers in our circuit. I will bet they always get waivers in their circuit. When you always get waivers it means that you are nullifying the standard, and you are just reducing it to nullity.

Senator GURNEY. I would make this observation: I think your point is well founded. If you did not have the peremptory challenge in there, it would be well founded, but I do not see how any judge can get a hold on any lawyer as long as you have the peremptory challenge.

Mr. FRANK. If we keep the peremptory challenge that will solve the problem for the trial court, but we are in no way suggesting you apply the peremptory challenge to the court of appeals, and there you have a perfectly real problem of a waiver. Judge Learned Hand, I suppose we all feel is about as good as any, and he was a fellow, the fellow that Senator Burdick was talking about, that kept a minor, piddling amount of stock in some corporation. It used to somehow amuse him when those cases came up to lean over the bench and say, "Now, I have a little bit of stock here; would you rather that I withdraw?" Everybody went through the ceremony of saying, "No, no." But the point here is that he should have sold that stock. If those cases came up before him often enough to do this, then he should have sold that stock and should not have involved himself in those cases.

This is not a life-and-death matter. If you feel strongly about it, you ought to adopt the ABA system and return the waiver through the clerk. The suggestion in the Hollings bill comes from the district judge in Maine who is worried about first circuit problems because he is the only judge in Maine, and a singularly able one, but I can

only say that I believe that if we really are going to embrace as an article of religious faith that judges with interest should not be on cases, and that no man should be a judge in his own case if he has any interest at all, then we should not nullify it with finesse and devices and so on. So, if we believe it, let us stick with it.

Thank you very much.

Senator BURDICK. What about the case where the lawyer really wants this judge?

Senator GURNEY. That is the case I am thinking about too.

Mr. FRANK. Let me hasten to say I have had that case where I have personally said, "Judge, please, we would rather have you, let us get on with it." This does happen, Senator, and I am sure you have had that experience too. All I can say is that I think it is rare, and that the problem of the judge's holdings really ought to be solved by his narrowing his portfolio. If interest crops up often, they should do that. If they have concentrated portfolios, you cannot say this is a luxury and you cannot have it and be a judge. Even a fellow has a fairly narrow, limited amount of investment in a case, if I had to choose I simply would not put a lawyer in the box of waiver.

Senator GURNEY. I would make this observation: I think perhaps the case might be read, or you might have the conflict of interest, but I certainly do not think the case is rare where the lawyer would rather have one judge in preference to another.

Mr. FRANK. That happens almost always.

Senator GURNEY. That is right; it does. Some judges are darned good judges, and by George, you do not want some knucklehead on who is not. And I agree with the chairman that I really think the lawyer ought to have an opportunity.

Senator BURDICK. There are a lot of cases where a lawyer believes the judge will be even more strict in settling this case if he has an interest, and lean over backwards.

Mr. FRANK. Then it is the other fellow who does not want a waiver.

Senator BURDICK. But they both agree to this judge rather than complicate delays and other things. It has some merit.

Mr. FRANK. I can only say this is a relatively minor part of what is really a serious reform in major proportion.

Senator GURNEY. I would think so, and I would certainly think that we are talking about a rare case that does not come up often. And the other thing is how does it look to the public, and if everybody agrees, we want that judge, the client, the lawyers, then I do not see how it could be anything but viewed by the public as being all right.

Senator BURDICK. I think one of the stickiest things in this bill right now—or this legislation—is what do we do about mutual funds, what do we do about the subsidiaries, and this is real sticky. Now, apparently, the parent company we can be pretty pure in that, but when you get into requiring some judge to know what his interest is in a thousand subsidiaries out of a mutual fund, or seven or eight other subsidiaries, I do not know what I would do. I too have some mutual funds, and I do not know where I would go to find out exactly what the interest is in all the interrelated companies.

Mr. FRANK. That is why I think the percentage formula has some merit. If you could do the same thing with the mutual funds, let him define the size of interest, so if they are scattered, minor holdings, they can let them go.

Senator BURDICK. But, the judge does not know. There is no formula. He could not know if he has any.

Mr. FRANK. That simply is a form of subsidiary. You could require that in mutual funds he be required or require himself to have knowledge of what the major holdings of the mutual funds are, and that is all.

Senator BURDICK. But the mutual and holding companies also have subsidiaries.

Mr. FRANK. You are dead right, and at that point I can simply suggest that you are going to have to make a cutoff somewhere. The phrase that is used in relationship—the one I like from a case in 1572, an English case, is that: The more removed the blood is, the cooler it is. In other words, if it is your 42d cousin, forget it. It is just not close enough to disqualify. Now, some such test of remoteness must be applied here as to the economic interest too, exactly for the reasons you stated.

Senator BURDICK. Why do we not follow the pure rule in regard to direct parent companies and apply the knowledge rule to the subsidiaries? Would that not take care of it?

Mr. FRANK. It would; and it might well be a good solution so long as at least you could not remove some duty on the part of the judge to be informed. In other words, you could not have a fellow utterly neglecting to find out.

Senator BURDICK. Certainly we would assume that the judge would make some effort.

Mr. FRANK. Yes. This may well do it.

Senator BURDICK. Well, then, I understand that you would accept clause 6 in Senator Hollings bill and everybody would accept clause 6 in the Bayh bill?

Mr. FRANK. Senator, will you forgive me, but I do not have the actual bill in my hand at this minute.

Yes, I believe that clause 6 is of truly vital importance. That is the one that solves the problem for Judge Rives. It gives the judge a discretion.

Senator BURDICK. But it is on clause 5 where the difference of opinion appears between the two bills?

Mr. FRANK. Well, on 5, there I would hope to persuade both you and Senator Hollings that that ought to be there. It will be in the ABA canons for sure. It is in the Supreme Court's opinions, and it has been in the ABA canons for our lifetimes, and I sure think that it would be too bad to try to erase it. I do think that Senator Hollings' solution of the section 4 problems is better, codifying the relationship.

Senator BURDICK. Would you excuse me just for 2 minutes, and the staff will put questions to you.

Mr. WESTPHAL. In your reference, Mr. Frank, to the *Commonwealth Coatings* case, that was a case in which this arbitrator had a direct financial interest in one of the companies that was before him,

and he failed to disclose it. The arbitration rules required him to disclose any such interest and he did not do so, and the Supreme Court then held that that was error.

Mr. FRANK. That is right.

Mr. WESTPHAL. In handing down that decision they, among other things, mentioned this appearance of impropriety language in the existing "Canons of Judicial Ethics".

Mr. FRANK. That is correct.

Mr. WESTPHAL. Would not the appearance of impropriety that occurred in that specific case also be covered by clause 6 of the Bayh bill, or would it not be included as "an interest" in the first clause of the Bayh bill, even if there were no clause 5 at all in the Bayh bill?

Mr. FRANK. Well, the clause 1 of the Bayh bill deals with actual interest.

Mr. WESTPHAL. And that is what this arbitrator has.

Mr. FRANK. Well, you might get him that way, but that happens to be a coincidence in this particular case. If I may thrust to what is the heart of your question, Mr. Westphal, if the question is: "can the phrase appearance of impropriety be soaked up under some other phrase?" sure it can. But in view of the fact that it has been used so extensively in the canons and in the cases it would seem to me undesirable to duck it, because then you always have to go around and explain that we meant to cover it by some other term or phrase. It has become sufficiently familiar so that I would not solve it that way.

Mr. WESTPHAL. Yet, the draftsmen of the ABA tentative draft knew that they had used the language "appearance of impropriety," and in their existing Canons?

Mr. FRANK. Right.

Mr. WESTPHAL. Yet, when they set about to write it, that part of it that deals with disqualification, they apparently just studiously avoided the use of the phrase "appearance of impropriety" and substituted rather the phrase "in any way in which his impartiality might reasonably be questioned." It is apparently what they did.

Mr. FRANK. While that is there, it is because they used it, as I said earlier, in canon 5, and I am advised by them that they mean it to apply to the disqualification too. So I think I have said frankly, and I think it would be better if they cross-reference this, because of the creation of just the kind of confusion that we are having now. But the reporter tells me that is meant to be applicable to the disqualification.

Mr. WESTPHAL. The point of either a statute or canon specifying the grounds for disqualification is to preserve the impartiality of the trial judge or of the appellate judge.

Mr. FRANK. Sure.

Mr. WESTPHAL. That is the sole point of it.

Mr. FRANK. Right. Well, that is not quite true, if you will permit, because we are advised by the highest authority that not merely preserving the impartiality, but preserving the appearance of the impartiality is an independent value.

Mr. WESTPHAL. Yes. We have preserving of public confidence in the judicial system and including the judge who decides the case.

But, in the tentative draft and in the existing ABA canon, this phrase "appearance of impropriety," as you have just pointed out, is used in a canon which is intended to cover judges' conduct outside of the courtroom, whereas the statute or canon on disqualification is intended only to have an effect on a legal qualification or disqualification?

Mr. FRANK. I personally cannot accept that statement. I think that the appearance canon is meant to cover both outside and inside of the courtroom.

Mr. WESTPHAL. Then you would urge that the ABA should have included the expressed phrase, the specific phrase "appearance of impropriety" in canon 2?

Mr. FRANK. I think so, and I think they intended to do so, and that is what they think they have done.

Mr. WESTPHAL. Is there a difference between these, the language we might employ in these general catchall groups of disqualifications, such as "appearance of impropriety," "in any case in which in his opinion it would be improper to sit," or the ABA language, "in any case in which his impartiality may well be questioned," is there a difference in that language in that some of these changes seem to make it purely subjective in the eye of the judge, and that that is the test, whereas the ABA language, for example, seems to set up a test for an outsider looking at this situation, whether they would reasonably question his impartiality?

Mr. FRANK. You have now hit it just exactly. That is the distinction. Number 6 here gives the judge the privilege of refusing when, in his opinion, it is improper for him to sit. For example, he knows for some reason, personal to him, about his relations with the matter, which the world does not know at all, but he knows, and he feels uncomfortable about it. If I may take the case that Senator Burdick mentioned, let me refer to my namesake, but not a relative, the former Judge Jerome Frank, who was a close friend. We had adjacent offices at the Yale Law School once upon a time, and used to share thoughts on these things. He used to speak of the lean-over-backwards problem, and on certain matters he did not sit because he felt that his ties were so close to someone there that he just could not be fair about it and that as a result, he would be trying so hard to be fair that he would be getting himself into the scale of justice instead of being wholly objective; he wanted out, and he took himself out. He was doing what 6 says. In his opinion it would be improper for him to sit. In terms of the appearance of impropriety, which is the one that is external to the judge, there is not any impropriety at all. It is matter that Senator Bayh spoke of concerning Professor Mallenkauf of UCLA that was about an injured workman. The point is that the injured workman lost a $30,000 claim. He is penniless, and there was nothing wrong with the decision by any objective stand, but it probably looked terrible to the injured workman. You are dealing with the objective standards, the external in the first place, and the internal, subjective one in the other.

Mr. WESTPHAL. Are you suggesting that whatever statute results should contain both an external standard and an internal standard?

Mr. FRANK. That is right. I think to meet the responsibility of the

bar that we need both, a 5 and a 6, and that is why Senator Bayh has them both.

Mr. WESTPHAL. Do you think Judge Rives' situation that you referred to, where he just felt that he should not sit at all, being the sole remaining member of the panel, that made the initial decision prior to the hearing, that Judge Rives' situation could be taken care of by the ABA language, which says in a case in which the impartiality might reasonably be questioned? Do you think that language leaves the board enough flexibility so that Judge Rives might have said to himself that in this particular situation someone might reasonably question my impartiality were I to participate?

Mr. FRANK. That is an external standard, someone external to myself might reasonably question, and that is the outside. The other one is the one where this very commonly happens, that only the judge knows, but he knows, he knows something happened earlier in his life that unfits him for this case.

Senator BURDICK. May I give an example of this appearance of impropriety?

Mr. FRANK. Please.

Senator BURDICK. Early in the exchange here I explained to you this could very well result in an appearance of guilt upon a faulty premise. There was a judge in Fargo, N. Dak., that has chin whiskers, a scholar, and a gentleman, and there was a fellow over in Moorhead, across the river, in the next State. Moorhead and Fargo are side-by-side, separated by the Red River. This fellow over there looked identically, or looked very much like this judge. The judge from North Dakota was a temperance leader. He led an exemplary life. The fellow who looked like him frequented the bars, and many people confused the two, and to some people, the North Dakota judge gave the appearance of a drunkard. Now, could this not well happen in using this canon?

Mr. FRANK. Well, I personally would feel that a fellow should not disqualify himself in those circumstances because he would be yielding too much to whimsical factors. What did he actually do? I assume that he did not disqualify?

Senator BURDICK. The story goes on that this judge got a hold of this fellow one day and said, he demanded, that he shave.

Mr. FRANK. Now, there is a pretty good solution. The alternative that I was about to suggest was that he might try a little drinking himself to bring himself closer together with this other fellow.

Mr. WESTPHAL. Just a few more questions, as fast as we can get through them Mr. Frank.

Both the ABA's version and the S. 1553 seem to be drafted to the theory that we should set up as many specific situations under which a judge should disqualify himself as we can. And 1886, while it has a few, has retained a few of the specific ones that were in the old law and has this parent and subsidiary situation, S. 1886 generally seems to have in clauses 4, 5, and 6, an attempt to cover the basis for disqualification in quite general language. Now, is there a difference in your mind as to whether we use specific situations or whether we use more general language?

Mr. FRANK. I believe we need both. If I may be precise on this. I feel number one, in the Bayh bill is categorical, hardcore, if you have any interest, get out of there.

Item number two, is if you ever represented the party, and that comes from the existing statute, it is hard and specific and ought to stay.

Item three is where you have been a material witness. It is in the existing statute, it is hard and specific, and it ought to stay.

It is my opinion that the Hollings bill is better than the Bayh bill in its definition of relationship, and I simply would move his in in lieu of the 4 that is here, It is more specific and it is better.

Item 5 and 6 are the general ones in the Bayh bill, and they are the only general ones. Those are the ones which have the appearance of impropriety or the external standard, and the internal sense of freedom from the duty to sit, the Rives' situation. Those two are general, and I think they should be general. They give the judge a discretion which in the Federal system he has not hitherto had, and I submit that he ought to be given that discretion. We have now enough judges to afford that luxury.

Mr. WESTPHAL. In clause 4 of the Bayh bill would you accept an attempt to specify as the ABA and the Hollings bill does the degree of kinship which should disqualify?

Mr. FRANK. It is my view that I would, as I say, adopt the Hollings draft because we have left the judge—I realize that a man can have a terribly close relationship with a fifth cousin, but we are giving the judge his option to get out if he feels that way, and I think the judge is entitled to the protection of a hard line that he is not subject to criticism lightly, and I would give him the better measure of the Hollings bill in that respect.

Mr. WESTPHAL. All right. In other words, where circumstances which impel this disqualification occur frequently enough, or are, as you say, hard-or clear-cut situations, they should be specifically stated in the bill?

Mr. FRANK. That is right.

Mr. WESTPHAL. Yet there should be a broad basis of disqualification or so-called catchall in order to take care of—for example, if we specify the third or fourth degree of kinship disqualification, but we may have this 42d cousin that is residing in the household of the judge, and they are thicker than fleas, then he should get out in that case too?

Mr. FRANK. I totally concur.

Mr. WESTPHAL. Now then, can we employ that same sort of analysis or rationale as we approach the matter of waiver? Should we recognize that in certain situations the judge's interest or the judge's connection with the party, or his relationship with the part is on the face of it, or per se, not only disqualifying, but if he were to remain in the case it would give a bad appearance to the public, and therefore, we should not permit waiver at all, whereas there may be other situations in which we might permit waiver?

Do you think that same analysis or approach can be taken to the waiver question?

Mr. FRANK. We now reach a distinction. As a practicing lawyer, I have peacefully to yield to the court, when I have lost, and if Sena-

tor Burdick, you think we should have some loopholes for waiver, then, as I say, I will gracefully accede.

Senator BURDICK. I am merely making a suggestion. I have not made an opinion.

Mr. FRANK. No; I know that, Senator. But what I am saying is that it is not the biggest question in the world, but I cannot budge from my basic position. I have too often seen waiver used as a badgering device, and while the ABA has sought to eliminate that by running it through the clerk's office and getting all these communications, and while I personally have had the identical experience mentioned here of wanting a judge and wanting to keep him, I personally on balance would feel that an absolute rule would be better than to get into this kind of measure.

Mr. WESTPHAL. Now, the ABA in their version and the Hollings bill does also, they seem to recognize that there are certain situations where waiver will not be permitted under their draft, but provides that under certain situations there might be a waiver. Now, if the number of situations where a waiver would not be permitted were increased, I take it you would still not accept the ABA version? You would want to have an absolute prohibition against waiver?

Mr. FRANK. Let me make a distinction. The ABA is laying down rules for all of the States of the Union. If I can put it succinctly, I take it we are about there, the ABA is laying down standards for all of the States in the United States. I do not personally know about the problems in some local counties, and it may well be that that is a good thing for States. I am testifying only to the Federal system. This is the case in which if it were up to me I would apply some strict Federal standard and let the ABA go its own way for the State courts.

Mr. WESTPHAL. I have a number of questions that I would like to ask you, Mr. Frank, and I think we can probably go through them as fast as we can, and if we can be succinct in the questions, and if you can be succinct in your answers.

Mr. FRANK. I can give you the fastest bunches of yeses and noes that you have ever heard.

Mr. WESTPHAL. Under clause 3 of the Bayh bill it provides that if the relationship to or connection with a party is such as to create a conflict of interest, or otherwise render it improper for him to sit, does that language give any loophole if, for example, the judge rationalizes that the mere fact that his grandson represents the party before him does not create a conflict of interest in his mind, and therefore, he would not disqualify himself?

Mr. FRANK. I believe he should get out of that case, and I repeat, I think the Hollings language is better, and once again, we kept the old Federal language for the sake of familiarity.

Mr. WESTPHAL. I think you have already indicated that the exclusion of insurance policy holdings and policy savings and loans from the definition of financial interests meets with your approval? I think that adds to the concept we are trying to get at?

Mr. FRANK. Mr. Westphal, I am sorry. I simply did not hear the question.

Mr. WESTPHAL. I think that you have already indicated that that provision in the ABA draft which would exempt from financial interest a policy holding by a judge in an insurance company——

Mr. FRANK. Oh, yes.

Mr. WESTPHAL [Continuing]. Also with deposits in mutual savings and loans should not be deemed as a financial interest?

Mr. FRANK. That is correct.

Mr. WESTPHAL. I take it you feel the same way, we should recognize the religious and charitable exceptions that are recognized in the ABA draft?

Mr. FRANK. Yes.

Mr. WESTPHAL. You state that clause 6 in the Bayh bill is the one which in your opinion changes the duty to sit and frees a judge such as Judge Rives, to withdraw from a case if he just simply feels that it is improper for him to continue to participate in it. I think that is clause 6?

Mr. FRANK. Yes; on that score, in an effort to get to be at one with the ABA, I would suggest that we adopt their language in which its impartiality might reasonably be questioned. While I like ours better, again this is a matter of trying to work out a unified standard.

Mr. WESTPHAL. One advantage of adopting the ABA language is the fact that the language in clause 6 is quite similar to part of the existing section 455, and it is that language in 455 which has been engrafted into the duty to sit; so if we change the language completely and use some additional language, plus seeing that we get the proper legislative history in the committee report, there will be no question but what we are attempting to "wipe out the duty to sit?" Would that be your opinion, Mr. Frank?

Mr. FRANK. I simply am approaching it differently, sir. I believe there are times to be uniform than to be right, and I would not haggle over details. I would rather have a uniform system.

Mr. WESTPHAL. Either upon disqualification or upon use of a peremptory challenge as provided in section 3 of the Bayh bill, and an occasion can arise where it may be necessary for the assignment to be made to the district judge from outside the circuit to go in and preside at a trial of a case in which a judge is disqualified or challenged. And under the existing statutes, the Chief Justice of the United States makes the assignment from one circuit of a district judge into another circuit, and that statute, which is section 292 of the title 28 provides that the Chief Justice may not make such an intercircuit assignment of a district judge without obtaining the consent of the chief judge of the circuit from which he is borrowing that district judge. Assuming my statement of existing law to be correct——

Mr. FRANK. It is.

Mr. WESTPHAL. Do you feel that because of the changes which may be made in the law, maybe disqualification, and because of the policy we have or may have of peremptory challenge of a district judge, that that concept, that feature should be removed from the existing law?

Mr. FRANK. Not for that reason, sir.

May I take just a moment to concisely answer? I personally strongly support giving the Chief Justice more effective authority to move the people around, and I would support such legislation. But, that is wholly independent of this, and should be kept so in my view, because the demand would not rise because of this bill. It arises from wholly different things, and there is a resistance to that proposal which has nothing to do with this subject. So, we would be biting off a fight we do not have to be in, and I think that should stand on its own bottom and be an independent matter.

Mr. WESTPHAL. On this question of waiver, if the judge does not have the opportunity to initiate, but waivers have gone through in terms that simply say, Senator Gurney said, possibly suggesting that if both parties want they can initiate it, they can agree, they can agree that he can sit, whatever his basis in disqualification was, would not give the right to initiate it, does that make a difference in your mind as an approach to the waiver question?

Mr. FRANK. In my own opinion, it would not, because all this is is a maneuverable means whereby one fellow goes back and says to the judge, well, I wanted to, but I could not get him, and that is the kind of thing that I would like to avoid.

Mr. WESTPHAL. Would you feel the same if it provided that both parties have to agree before either one of them can approach the judge and say this? It is often difficult to control human behavior.

Mr. FRANK. Life just is not lived that way, and it would not happen.

Mr. WESTPHAL. All these bills and proposals deal with the financial interests of the judge. Is the fact that a judge may have a secured or unsecured debt of $50,000 or $10,000 or $5,000 which he owes to a party or to an attorney for a party, do you think that is a financial interest within the meaning of the word interest in the Bayh bill, or financial interest in the ABA bill?

Mr. FRANK. I believe that in that circumstance it is. I would regard that as a grounds for disqualification under 5 or 6, under the Bayh bill. The judge may also think of it in terms of interest under 1. The reason that there is not an effort made to deal with the debtor situation is that it is simply impossible to draw rational lines, and I would not know how to do it because debts themselves range too much in size, nature, and all of the rest, so that we do not know how. That is really what it comes to. The general law has been that, hypothetically, you have an insurance policy, and you borrowed on your insurance policy, and you could still hear a case involving the insurance company, and yet that is a debt. In your case, the fellow should not sit, and it is beyond my draftsmanship capacity to solve it. I would leave it to discretion.

Mr. WESTPHAL. One other concrete situation, if I could take the time, suppose that the judge was in a situation where he is asked to preside over a trial which, let us say, involves the validity of some off-shore oil drilling leases or rights of some kind. And suppose that Texaco is the named party defendent. The judge has absolutely no interest in Texaco, but he has 10,000 shares of Gulf Oil, and Gulf Oil has similar interests in off-shore drilling situations. Now, I take

it that under the draft of the Bayh bill that this would be covered by one of your catchall phrases?

Mr. FRANK. That is a straight case of appearance of impropriety. I do not believe there is a man in America who would doubt but that that would look terrible.

Mr. WESTPHAL. And while the judge's interest may not be a direct financial interest to a party in that case, it is the situation in which it would be improper for him to sit?

Mr. FRANK. That is correct, and clearly improper. That is a good illustration, as I say, of the need for the appearance phrase.

Mr. WESTPHAL. Mr. Frank, would you like to add something?

Mr. FRANK. I would not like to add a comment except to say thank you. But I would like to add for the record the report of the Judicial Counsel of California to which I referred, and I would also like your leave to give to the clerk, as soon as I am away from the stand, the originals of the letters which were attached and copied into my statement. I would also ask, if I may, to place in addition to those in the record, that the record be kept open long enough for you to receive, as you will later today or early in the morning, the letter from the Chief Justice of Washington which has arrived.

Senator BURDICK. The record will be kept open and we will receive the letter from the chief justice of California and the originals of the other letters that you have referred to. The record should also show that without objection the prepared statement of Mr. Frank will be incorporated in the hearing record

[The material referred to follows:]

JUDICIAL COUNCIL OF CALIFORNIA

PEREMPTORY CHALLENGE OF JUDGES—C.C.P. § 170.6

Assemblyman James A. Hayes, Chairman of the Assembly Judiciary Committee, has asked the Judicial Council to study the use of peremptory challenges againt judges (Code of Civil Procedure Section 170.6) on a blanket basis, with a view towards recommending any needed corrective legislation in the 1970 Legislature.[1]

Mr. Hayes indicated that during the 1969 legislative session, the Assembly Judiciary Committee studied a request for additional judgeships for the Alameda Superior Court and found that the need for such judgeships was, in some part, the result of repeated disqualifications of two of the court's judges by the district attorney and the public defender, respectively. In spite of the disqualifications, Mr. Hayes stated, the two judges were not transferred out of the criminal department, and consequently they were not able to assist the court in disposing of its caseload. The continued assignment of those judges to the criminal department, Mr. Hayes pointed out, resulted only in unwarranted expense to the county and considerable delay in the administration of justice.

The peremptory challenge of judges has long been of concern to the Judicial Council and the presiding judges of this state. In 1963, for example, the Council made a six-month study of the use of such challenges and found that they had been filed in about one-fifth of the trial courts (81 of the then-428 trial courts) and that the great majority were filed in multi-judge courts (about 85 percent of the 738 peremptory challenges reported during the six-month period were filed in courts with three or more judges).[2] The Judicial Council concluded that the peremptory challenge "did not cause any serious problems during that period." However, in order to clarify the availability of peremptory challenges against appellate department judges, as well as to facilitate

[1] Letter of June 23, 1969 from Assemblyman James A. Hayes to Chief Justice Roger J. Traynor.

[2] Judicial Council, Nineteenth Biennial Report (1963) 34–35. This study was continued through 1964 with about the same results.

the assignment of qualified judges to replace the disqualified judges, the Judicial Council and the State Bar jointly recommended the addition of Sections 170.7 and 170.8 to the Code of Civil Procedure, to provide, respectively, that the peremptory challenge statute is inapplicable to appellate department judges and that, when there is no qualified judge to hear a case, the clerk or the judge must notify the Chairman of the Judicial Council of that fact.[3]

In 1965 the Judicial Council again considered the use of peremptory challenges, particularly in regard to a State Bar proposed to modify its application to pretrial proceedings. The Council at that time noted the following abuses:[4]

Several presiding judges have indicated that in some instances peremptory disqualifications have been made for reasons of trial strategy rather than because of any real feeling on the part of counsel that the challenged judge is prejudiced. Other judges are concerned about the accumulation of such motions against them, particularly in view of the fact that they are afforded no opportunity to deny the charges. Another facet of this problem of accumulation of motions, which. . . is of special concern to the Judicial Council due to the necessity of assigning judges to replace those disqualified in one-judge counties, is the excessive and persistent use of the disqualification procedure by certain attorneys against certain judges. Still another problem. . . is the wide-spread practice of circumventing the statutory procedure by informing the presiding judge or his calendar clerk that if a certain judge or any of several judges is assigned to the trial of the case he will be challenged at the commencement of trial.

The Judicial Council concluded that an overall study of the peremptory challenge statute was needed but, at the State Bar's request, agreed to defer the study because the State Bar desired to proceed with its proposed amendment in the 1965 legislative session.[5] Thus, the abuses noted by the Council in 1965 continue today. In addition, as indicated below, it seems clear that the peremptory challenge statute is sometimes used by attorneys to effect a continuance, as well as to engage in "judge-shopping", particularly in the superior courts.

So that the Judicial Council might have the benefit of the current experience and the recommendations of all courts on this matter, a staff questionnaire concerning the use of peremptory challenges was recently sent to the sole, senior or presiding judge of each superior and municipal court, asking whether the peremptory challenge is used properly by attorneys, and if not, what are the abuses. [Copy of questionnaire attached.] The recipients were also asked to indicate whether ". . . there [is] a need to amend Code of Civil Procedure Section 170.6, and if so, would it be appropriate to merely add a provision to Section 170.6 that would permit a judge, in cases of repeated use of peremptory challenges against him, to raise the issue of abuse of process for determination by the presiding judge." In addition, they were asked to discuss this matter with the other judges, if any, on their court so that every judge might have an opportunity to express his views.

One hundred and thirty-four replies, apparently including 50 consensus-of-court replies, have been received to date: 41 from municipal courts;[6] 93 from

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[3] *Ibid;* Cal. Stats. 1963, Ch. 872.

[4] *Proposed 1965 Legislation Amendatory of Code of Civil Procedure Section 170.6—Peremptory Disqualification of Judges* (February 1, 1965) at 9–11. The Judicial Council also noted: It may be worth considering whether the statute should be amended to require that the affidavit or oral statement under oath include "a concise statement of the facts relied upon by affiant in support of the charge of prejudice." Such a requirement might draw it more clearly to a lawyer's attention that this procedure is not like the peremptory challenge to a juror, but is intended to be based upon cause. The statute might also be revised to give the challenged judge an opportunity to file a counteraffidavit, or to make a counterstatement for the record, even though no procedure for determining the issue is provided. This would mean that the charge of prejudice, in cases where the challenged judge wishes to deny the charge, would not be allowed to stand uncontroverted.

[5] *Id.* at 9 and 11.

[6] Except as otherwise noted the following 36 municipal courts apparently made a consensus reply to the questionnaire: Berkeley-Albany, Fremont-Newark-Union City, Oakland-Piedmont, Richmond, Walnut Creek-Danville (2), Fresno, Bakersfield, Alhambra, Beverly Hills, Burbank, Citrus, Compton, E. Los Angeles, El Monte, Inglewood, Long Beach (5), Santa Monica, South Bay, Whittier, West Orange Co., Desert, Sacramento, San Bernardino Co., El Cajon, North County (San Diego), Southern (San Mateo), Santa Barbara-Goleta, Santa Maria, Palo Alto-Mountain View, San Jose-Milpitas, Santa Clara, Sunnyvale-Cupertino, Santa Cruz Co., Central (Sonoma Co.), Modesto, and Ventura Co.

superior courts.[7] The replies clearly seem to show there are far fewer abuses of the peremptory challenge statute in municipal courts than in superior courts. As indicated below, 26 out of 41 replies from municipal courts or municipal court judges indicate that the peremptory challenge statute is usually used properly by attorneys, and only 8 courts or judges said it is usually used improperly. In the superior court category, excluding the 70 replies by Los Angeles judges, 11 out of 23 replies indicate usually proper use; and 12 replies, improper use. The 70 Los Angeles judges: 32 replies, usually proper use; 26 replies, improper use; and 12 judges said they did not have sufficient experience with such challenges to warrant a comment.

More importantly, while 20 municipal courts or judges indicate there is no abuse of the premptory challenge statute, only 1 superior court (and 6 Los Angeles judges) said there is no such abuse. In spite of their statements relative to abuses, however, only 10 municipal and 2 superior courts or judges (and 17 Los Angeles judges) recommended that the peremptory challenge statute not be changed. On the other hand, five municipal and nine superior courts or judges (and eight Los Angeles judges) recommended the repeal of that statute, in favor of the disqualification procedure set forth in Code of Civil Procedure Section 170. The remaining courts or judges either approved the suggested hearing procedure outlined in the staff questionnaire or recommended some other change.

SURVEY CONCERNING USE OF PEREMPTORY CHALLENGES

[C.C.P. § 170.6—November 1, 1969]

	Municipal Courts (75)	Superior Courts (57)	Los Angeles Superior Court	Total
Number of replies	41	23	70	134
Number of courts represented	[6] 36	[7] 19	1	56
Number of consensus replies	34	16	----------	50
1. The peremptory challenge statute usually is:				
(a) Used properly	26	11	32	69
(b) Used improperly	8	12	26	46
(c) Insufficient experience to comment	7	0	12	19
2. Specifically, the peremptory challenge statute is:				
(a) Not abused	20	1	6	27
(b) No knowledge of abuse	2	0	13	15
(c) Abused for the purpose of:				
(1) "Judge shopping"[8]	11	9	24	44
(2) Effecting a continuance	3	5	13	21
(3) Retaliating against a judge for a prior ruling	1	4	3	8
(4) Not going before unknown judge, particularly when he is challenged by a local attorney	0	3	11	14
(5) Blanket challenge	[9] 3	[9] 4	[9] 3	10
3. The peremptory challenge statute should:				
(a) Not be changed	10	2	17	29
(b) Be repealed	5	9	8	22
(c) Be amended to provide for:				
(1) A hearing as outlined in the questionnaire	12	6	17	35
(2) A hearing by an outside judge	4	3	1	8
(3) A factual statement by consel showing any alleged prejudice	1	2	9	12
(4) An optional reply by the judge	0	1	1	2
(d) Be amended to limit its use:				
(1) To nonpublic officials	0	1	1	2
(2) To clients	0	1	3	4
(3) To nonjury trials	1	2	1	4
(4) To civil cases	0	0	1	1
(5) To a given number within a certain period	0	1	5	6
(e) Be amended to eliminate the allegation of prejudice	0	2	7	9

[8] In about 10 instances the judges indicated the "judge shopping" occurred in criminal cases, sometimes by defendants appearing in proper.

[9] In some instances the courts have averted blanket challenges by not assigning cases to judges who would be challenged by counsel.

[7] Except as otherwise noted, the following 19 superior courts apparently made a consensus reply to the questionnaire: Alameda (3), Butte, Contra Costa (2), Fresno, Imperial Marin, Monterey, Orange, San Bernardino, San Diego, San Francisco (2), San Joaquin, Santa Cruz, Shasta, Solano, Stanislaus, Ventura, Yolo, and Yuba.

In view of the substantial number of replies stating that the peremptory challenge statute is usually used properly by attorneys and the fact that about one-half of the superior and municipal courts apparently are not faced with problems warranting a reply to the questionnaire, it would clearly seem there is no basis for recommending the repeal or drastic limitation of the peremptory challenge at this time. However, the Judicial Council should, it would seem, make appropriate recommendations to the 1970 Legislature that might eliminate the various abuses reported by the judges. The use of peremptory challenges to effect unwarranted continuances or engage in judge-shopping, and particularly its use on a blanket basis, seriously hinders and delays the administration of justice. In addition, if a judge may be challenged on a blanket basis merely because his decisions are not in accord with an attorney's desires, the judge's judicial independence, as well as his reputation in the community, might be unfairly attacked without any remedy. Such abuses, it would seem, might be eliminated by appropriate amendments to the peremptory challenge statute.

No abuse can, of course, be judicially established and eliminated without an appropriate hearing. In this regard a significant number of the judges (35), as indicated above, recommended the hearing procedure outlined in the staff questionnaire that would permit a judge, in cases of repeated use of peremptory challenges against him, to raise the issue of abuse of process for determination by the presiding judge. Moreover, since peremptory challenges are often made before the presiding or master calendar judge with or without the knowledge of the challenged judges, it would seem that the presiding or master calendar judge, with the concurrence of a challenged judge, should also be permitted to raise that issue. In such cases, as well as for challenges in the smaller courts, it would be desirable, as some judges suggested, to permit the issue of abuse of process to be determined by a judge assigned by the Chairman of the Judicial Council. Such a procedure would meet the problem of repeated challenges, which has the most serious effect on the work of the courts.

Several other suggestions made by various judges would also help to insure the proper use of peremptory challenges. For example, in instances where a blanket challenge is made by a public official or a law firm, many office or firm members might not share the view that a particular judge is "prejudiced" but may be instructed to challenge that judge. Since an attorney exercising a peremptory challenge is required to file his own affidavit or declaration of prejudice, it would seem that he should also be required to state that he is acting upon his own knowledge or belief and not because he is instructed to do so. Moreover, it is alleged that the prejudice is directed against a client, the client should be required to execute the affidavit or declaration. It would also seem that since it is improper to exercise a peremptory challenge to effect a continuance or to engage in judge-shopping, a person exercising such a challenge should be required to state that he is acting in good faith and not for the purpose of delaying the proceedings or of seeking a more favorable judge.

Finally, in order to avoid similar abuses against court commissioners, it would seem that the recommended changes should be made applicable to such commissioners.

Recommendation

It is recommended that the Judicial Council take appropriate action to have Section 170.6 of the Code of Civil Procedure amended, as follows:

Attachments.

Section 170.6 of the Code of Civil Procedure is amended to read:

170.6.* * *

(5) Any affidavit filed pursuant to this section *shall be signed by the person as to whom prejudice is believed to exist and* shall be in substantially the following form:

[Here set forth court and cause]

STATE OF CALIFORNIA
County of———ss:

----------, being first duly sworn, deposes and says: That ~~he is~~ *I am* a party (or *an* attorney for a party) to the within action (or special proceeding). That----------, the judge or court commissioner before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against ~~the party~~

~~(or his attorney)~~ *me* (or ~~the interest of the party (or his attorney~~ *my interests*) so that ~~affiant cannot or believes that he~~ *I believe that I* (*or the party*) cannot have a fair and impartial trial or hearing before such judge or court commissioner. *That this affidavit is not made for the purpose of delaying or continuing the trial* (*or hearing*) *or of attempting to influence or to compel a judge or court commissioner to take or to refrain from taking any action or to obtain a judge or court commissioner favorable to me* (*or my interests*), *and that this affidavit is freely and voluntarily made in accordance with my own knowledge and belief.*

Subscribed and sworn to before me this____day of_____, 19___.

(Clerk or Notary Public or other officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section *shall be made by the person as to whom prejudice is believed to exist and* shall include substantially the same contents as the affidavit above.

(6.1) In the event of repeated disqualifications of a judge or a court sommissioner by any person pursuant to this section, such judge or court commissioner, or the presiding or master calendar judge with the consent of such judge or court commissioner, may request a confidential inquiry on the question of abuse of process by such person. The inquiry shall be conducted under rules of procedure adopted by the Judicial Council, and a report shall be made to the Chairman of the Judicial Council by a judge designated for that purpose by the Chairman.

(6.2) As used in this section, an abuse of process is any use of this section primarily to accomplish a purpose for which it is not intended, including a delay or continuance of any trial or hearing, an attempt improperly to influence or compel a judge or a court commissioner to take some action or refrain from it, an attempt to obtain a more favorable judge or court commissioner, or the use of this section in the absence of one's own knowledge and belief.

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THE JUDICIAL COUNCIL OF THE STATE OF CALFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS

To: Each Presiding Judge of a Superior or Municipal Court.
From: Administrative Office of the Courts Ralph N. Kleps, Director.
Date: September 26, 1969.
Subject: *Peremptory Challenge of Judges—C.C.P. § 170.6.*

Assemblyman James A. Hayes, Chairman of the Assembly Judiciary Committee, has asked the Judicial Council to study the use of the peremptory challenge to judges under Code of Civil Procedure Section 170.6. As you may know, there have been some situations in recent years in which the peremptory challenge has been abused. principaly by invoking it on a blanket basis. If experience indicates that such abuses are widespread, corrective legislation may be introduced in the 1970 Legislature.

In order that the Judicial Council may have the benefit of the experience of all courts when it considers this matter at its next meeting, we would appreciate your completing and returning the enclosed questionnaire to this office by October 6, 1969. If convenient, it would be helpful if you discussed the matter with the other judges on your court so that every judge may have an opportunity to express his views.

Enclosure.

JUDICIAL COUNCIL OF CALIFORNIA—ADMINISTRATIVE OFFICE OF THE COURTS

SPECIAL STUDY—PEREMPTORY CHALLENGE OF JUDGES

_____
(Name of Court)

1. Generally speaking, in your experience is the peremptory challenge to judges under Code of Civil Procedure Section 170.6 used properly by counsel?

2. In what ways, if any, and with what frequency is the peremptory challenge being abused?

3. In your opinion is there a need to amend Code of Civil Procedure Section 170.6, and if so, would it be appropriate to merely add a provision to Section 170.6 that would permit a judge, in cases of repeated use of peremp-

tory challenges against him, to raise the issue of abuse of process for determination by the presiding judge? What other changes might prevent such abuse?

4. Additional comments.

(Signature of Judge)

(Use reverse side or attach additional sheets if needed)

Please return this questionnaire to: Judicial Council, 4200 State Building, San Francisco, California 94102—Attn: Mr. Paul M. Li

SUPREME COURT OF CALIFORNIA,
San Francisco, July 7, 1971.

Mr. JOHN P. FRANK,
Attorney at Law Lewis & Roca,
Phoenix, Ariz.

DEAR MR. FRANK: This letter responds to your letter of June 23, 1971 concerning United States Senate Bill 7013 and requesting my views on how the affidavit system for peremptory disqualification of judges has worked in California.

The statute permitting the peremptory challenge of judges has, in my opinion, been a serious problem in court calendaring operations and has often interfered with the judiciary's efforts to reduce court congestion and delay. For your information, I am enclosing a copy of a study of the operation of this system in California that was made by the Superior Court Committee of the Judicial Council in 1969. The study notes some misuse of the peremptory challenge by attorneys to effect continuances or to engage in judge-shopping.

I trust this information will be helpful in your study.

Sincerely yours,

DONALD R. WRIGHT.

Enclosure.

THE SUPREME COURT,
State of Washington, July 9, 1971.

Mr. JOHN P. FRANK,
Attorney at Law,
Phoenix, Ariz.

DEAR MR. FRANK: This will acknowledge receipt of your letter of June 23, enclosing a copy of S. 1886 introduced by Senator Bayh of Indiana dealing with the disqualification of judges.

As you know, we have long had in this state a statutory provision analogous to a proposed amendment of Section 144 of Title 28, United States Code, which permits disqualification of a judge upon timely affidavit interposed by a party to a pending action. Our experience with this provision has been extremely satisfactory, and I am sure very popular with the practicing members of our State Bar Association. I am certain too that the vast majority of our trial judges are happy and content with the operation of the statute and would, no doubt, oppose any repeal or modification of it.

Trusting you will excuse the delay in responding to your inquiry which was occasioned by the conclusion of a term of court and my attendance at the Conference of Chief Justices and the ABA Convention in New York, and thanking you for the courtesy of your inquiry, I remain

Sincerely yours,

ORRIS L. HAMILTON,
Chief Justice.

SUPREME COURT OF WYOMING,
Cheyenne, Wyo., July 14, 1971.

Mr. JOHN P. FRANK,
Lewis & Roca, Lawyers,
Phoenix, Ariz.

DEAR MR. FRANK: During my time as a practicing attorney and as a judge in Wyoming, I have never heard a suggestion that our state should do away with the affidavit system of disqualifying judges. I am sure the lawyers and judges both like the system and would want no other.

We have recently superseded by rule the statute for change of judge. The rule was worked out and recommended by our permanent rules committee. Both lawyers and trial judges are well represented on this committee and the Dean of the Wyoming Law School has been chairman. The rule was presented to and approved by the Wyoming Judicial Conference before adoption.

I think the principal changes from the previous statutes are that the affidavit for change must be filed 15 days before trial rather than five days before trial; also the motion for change must not only be supported by affadavit but a certificate of counsel must be attached stating that the affidavit is made in good faith and not for the purpose of delay.

Our son Don, who is in your offices, attended the Wyoming Law School. Although he did not actively practice in Wyoming, he is a member of the Bar in this state and may have some thoughts on this subject.

For your information I am enclosing a copy of our recent order for changes in rules. The rule pertaining to change of judge is included. Please let us know if we can be of further assistance.

Sincerely yours,

JOHN J. MCINTYRE.

IN THE SUPREME COURT, STATE OF WYOMING—APRIL TERM, A.D. 1971

IN THE MATTER OF WYOMING RULES OF CIVIL PROCEDURE

ORDER

It is ordered that new Rule 40.1, Wyoming Rules of Civil Procedure, reading as hereinafter set out, be adopted:

RULE 40.1—TRANSFER OF TRIAL AND CHANGE OF JUDGE

(*a*) *Transfer of Trial.*

(1) The court upon motion of any party made within fifteen (15) days after the last pleading is filed shall transfer the action to another county for trial if the court is satisfied that there exists within the county where the action is pending such prejudice against the party or his cause that he cannot obtain a fair and impartial trial, or that the convenience of witnesses would be promoted thereby. All parties shall have an opportunity to be heard at the hearing on the motion and any party may urge objections to any county. If the motion is granted the court shall order that the action be transferred to the most convenient county to which the objections of the parties do not apply or are the least applicable, whether or not such county is specified in the motion. After the first motion has been ruled upon, no party may move for transfer without permission of the court.

(2) When a transfer is ordered the clerk shall transmit to the clerk of the court to which the action has been transferred all papers in the action or duplicates thereof. The party applying for the transfer shall within ten (10) days pay the costs of preparing and transmitting such papers and shall pay a docket fee to the clerk of court of the county to which the action is tranferred. The action shall continue in the county to which it is transferred as though it had been originally filed therein.

(3) The presiding judge may at any time upon his own motion order a transfer of trial when it appears that the ends of justice would be promoted thereby.

(*b*) *Change of Judge.*

(1) Any party, at least fifteen (15) days prior to the date set for trial, may move for a change of district judge on the grounds (A) that the presiding judge (i) has been engaged as counsel in the action prior to his election or appointment as judge, (ii) is interested in the action, (iii) is kin to a party, or (iv) is a material witness in the action; or (B) that the party or his counsel believes that the presiding judge is biased or prejudiced against the movant. The motion shall be supported by an affidavit made by either the party or his counsel stating one or more of the above grounds, with a certificate of counsel attached that such affidavit is made in good faith and not for the purpose of delay. No more than one motion for change of judge shall be filed on behalf of

a party, but the affidavit may disqualify one other judge on the same grounds. The presiding judge shall forthwith call in another district judge, not disqualified, to try the action.

(2) The presiding judge may at any time on his own motion order a change of judge when it appears that the ends of justice would be promoted thereby.

(3) *Probate Matters.* In any controverted matter arising in a probate proceeding, a change of judge, or in cases where a jury is demandable, a transfer of trial, or both, may be had for any cause authorizing such change in a civil action. The procedure for such change shall be in accordance with this rule. Except for the determination of such controverted matter, the judge having original jurisdiction of such probate proceeding shall retain jurisdiction in all other matters in connection with said proceeding.

It is further ordered that Rules 6(a), 27(a)(4), and 30(b)(6), Wyoming Rules of Civil Procedure, be amended to read as follows, the amending portions being in italics and the deleted portions indicated by asterisks:

RULE 6—TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, *Columbus Day,* Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the governor or legislature of the State of Wyoming.

RULE 27—DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a district court of the state, in accordance with the provisions of * * * *Rule 32(a).*

RULE 30—DEPOSITIONS UPON ORAL EXAMINATION

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization.

(6) A party may in his notice *and in a subpoena* name as the deponent a public or private corporation or a partnership or association or governmental agency and * * * *describe* with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. *A subpoena shall advise a non-party organization of its duty to make such a designation.* The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

It is further ordered that the following addition to Rule 87(a), Wyoming Rules of Civil Procedure, be adopted:

RULE 87—LAWS SUPERSEDED

(a) Generally.

(3) From and after the effective date of these rules, the sections of Wyoming Statutes, 1957, as amended, hereinafter enumerated, shall be superseded, and such statutes and all other laws in conflict with these rules shall be of no further force or effect:

Sec. 1–53, 1–54, 1–56 and 1–57.

It is further ordered that these rules be published in the *Wyoming Reporter* and shall become effective ninety days after their publication in the Pacific Reporter, Second Series, Advance Sheets, and thereupon shall be spread at length upon the journal of this court.

Dated at Cheyenne, Wyoming this 12th day of July, 1971.

By the Court:

JOHN J. MCINTYRE, *Chief Justice.*

STATEMENT OF JOHN P. FRANK

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STATEMENT OF JOHN P. FRANK

My name is John P. Frank, and I am a practicing lawyer and member of the firm of Lewis & Roca in Phoenix, Arizona. I have law and other degrees from the University of Wisconsin and from the Yale Law School, and have served in various government positions, most notably as law clerk to Mr. Justice Hugo L. Black of the United States Supreme Court in the October, 1942, Term. I have taught law at Indiana University and the Yale Law School on a full-time basis and at the University of Washington and at both of the Arizona law schools on a lectureship basis. I have handled legal problems or lectured less extensively on legal subjects in more than half of the states. I am the author of approximately ten books, largely on legal subjects, and of numerous articles.

Among those articles is a publication in the 1947 *Yale Law Journal* on the disqualification of judges. That article was based on a national survey of the practice in each of the federal circuits and in each of the states, involving a questionnaire to all State Chief Justices and Senior Circuit Judges. The extensive participation by those persons has given that article greater standing than would normally be the case with an academic essay, and in consequence I was requested by Senator Eastland to appear as an expert witness on the subject of disqualification before the Senate Judiciary Committee in connection with the appointment of Judge Haynsworth to the Supreme Court.

The Haynsworth appointment and a series of related matters have given the normally law visibility problem of disqualification an unusual prominence in current legal thinking. Two matters became vividly apparent:

1. The federal statute on disqualification of judges is absolutely unsatisfactory. It conflicts severely with contemporary standards of good practice. It also conflicts with the current standards of the American Bar Association Canons of Judicial Ethics. The truest thing which has been said about disqualification in the past two years was the observation of Mr. Justice Blackmun when he appeared before the Judiciary Committee in connection with his own appointment. He had very recently materially altered his own practice in this regard, and as he told this Committee, on the matter of disqualification, "the times have changed."

2. Disqualification is related to the whole general subject of conflict of interest among judges, a broad area of which disqualification is only an important subdivision. In addition to a need for revision of the law as to the relatively narrow topic of disqualification, there was need for a wholesale reconsideration of the whole topic of conflict of interest.

To meet the needs thus revealed, two things have been done:

1. Senator Bayh has permitted me to work with him in preparing a new federal disqualification act. It is the bill for this purpose which is before this Committee at the present time.

2. The American Bar Association, in collaboration with the Federal Judicial Conference, has created a committee to review the entire topic of judicial ethics, including disqualification, and to prepare new Canons of Ethics for the judiciary of the country. A committee for this purpose, headed by former Chief Justice Roger Traynor of California with a distinguished membership which includes Justice Potter Stewart of the Supreme Court, is in an advanced stage of preparing new Canons of Judicial Ethics to fit the standards and demands of our times.

The ABA standards developing in the new Code of Ethics relate to two measures immediately before this Committee. Senator Bayh has sought to move his bill in the direction of the ABA standards, and the ABA committee has been thoroughly cognizant of his bill in developing its standards. Senator Bayh and I both appeared before the Traynor Committee at its 1970 meeting at the American Bar Association convention in St. Louis.

This leads to the second bill which is before the Committee. Senator Hollings has taken the bulk of the disqualification language in the current draft of the ABA standards and converted it into his bill which is also before this Committee. There is, if I may anticipate my later more precise remarks, no vast difference between these bills.

The general thrust of the growth of law at the present time is to make disqualification easier. The most conspicuous single fact making for an easier standard of disqualification is that in contemporary times, except for the special situation of the Supreme Court, we have more judges available than was the case when the rules of disqualification were formulated in seventeenth century England. We can apply a stricter ethical standard when, as a practical matter, we have alternative solutions to the judicial manpower problem. In the past thirty years, the number of federal judges has radically expanded. Only a few states now have but one federal judge, and the larger cities have such judges by the squadron. Only one Court of Appeals is limited to three judges. In the larger circuits, the chambers line the halls. The result both can and should be that the standard of disqualification goes up; it is so easy to put someone else on the case.

Historically, the traditional bases of disqualification of judges were either interest or relationship. The bedrock principle of disqualification, hundreds of years old, is that, "No man shall be a judge in his own case." The difficulty, of course, is in the application of the principle; how much interest is interest? What degree of identification is required to make it the judge's own case?

Closely related is the problem of the relationship of the judge either to a party or to a lawyer in the case. Here, too, there are complications as to the degree of the relationship. As was said in a 1572 decision, "All the inhabitants of the earth are descended from Adam and Eve and so are cousins of one another," but, "the further removed blood is, the more cool it is." American practice has shifted very radically, particularly in regard to the matter of the relationship to counsel. In the nineteenth century, justices heard cases presented by brothers or brothers-in-law, but in the twentieth century, the son of Chief Justice Hughes resigned as Solicitor General when his father was appointed as Chief Justice, and Justice Tom Clark went off the Supreme Court when his son became Attorney General.

The big expansion of the law of disqualification since the nineteenth century has been the addition of a ground of disqualification for personal bias. This reaches all of the problems by which relationship other than a blood relationship can corrupt judgment. In addition to the factors of plain personal bias for or against a party, there is the network of factors such as former connection with a law firm which is presenting a case, and bias may be thought to exist when the lawyer has dealt with the identical problem (as for a government agency) before coming to the Court.

The largest additional standard to have been applied in the federal system in recent years is the so-called standard of "the appearance of impropriety." The wholesome abjuration to avoid "the appearance of impropriety" has long been in the ABA Canons but has not been in the federal statute. This phrase was expressly approved in 1968 in the case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968). The federal practice had not merely not applied this standard, it had appeared to reject it by developing a rule of law that the judge had a positive duty to sit; the rule has been that, "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid rea-

son" not to. [Cases are collected in my essay *Disqualification of Judges*, Winter, 1970, issue of *Law and Contemporary Problems*, p. 51, n. 35.] This rule tended to give a hard line approach, permitting disqualification only when a clear classic ground existed for it.

28 U.S.C. § 455

The present federal disqualification provision, 28 U.S.C. § 455, is as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

This statute conflicts with the best contemporary standards in three vital respects:

1. The 1948 amendment provides that the judge shall disqualify himself in a case in which he has a "substantial interest." The term "substantial" was added in the 1948 codification, and extensive research shows no explanation whatsoever of this change. The change was a grim mistake because the term "substantial" is so elastic that good and conscientious people do not know how to behave. A rich man may find a several thousand dollar stock holding in a corporate party "insubstantial," and yet a poor litigant may take a very different view of the same number of dollars. The Fifth Circuit has held that the addition of the word "substantial" to the statute in 1948 was an actual change of its meaning; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 440 (5th Cir. 1968).

This "substantial interest" test conflicted with the ABA standard which has existed side by side at the same time; see American Bar Association Canons of Ethics, Opinion of Committee on Professional Ethics, No. 170 (1957).

The current ABA standards as being revised by the Traynor Committee clearly and decisively preclude a judge from sitting in a case in which he has any interest in a party at all, large or small. This is the contemporary practice—it is what Justice Blackmun meant when he referred to changing times. The federal statute most urgently needs to be changed to accord with this concept.

2. The federal statute as it now exists does not incorporate the standards of "appearance of impropriety." Both the existing and the pending ABA Canons do import that standard, and the Supreme Court has clearly declared it to be mandatory. The federal statute should be changed accordingly.

3. Federal judges need to be given greater elasticity in exercising their discretion as to whether or not to sit. An example of a case in which a judge felt that he had to sit even though he thought it was wrong and did not wish to do so is *Edward v. United States*, 334 F.2d 360, 362, n. 2 (5th Cir. 1964), in which Judge Rives wished to withdraw but felt that he was not free to do so because his grounds did not fit any of those specified in the statute. In consequence, his vote controlled and decided an important matter. The sincerity of his struggle between distaste for sitting and yielding to what he regarded as the imperative command of the statute is fully apparent from his opinion. A federal judge should not be in that situation and Judge Rives should have been free to withdraw if he felt that it was a poor thing to sit.

28 U.S.C. § 144

Present 28 U.S.C. § 144 is as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

What I have said goes to the matter of the judge's own disqualification of himself, or, if need be, his disqualification by command of a higher court. We

have been talking about the grounds for self-disqualification. A related yet wholly separate subject is the matter of the disqualification of a judge at the request of a party. We deal here with a situation in which, for whatever reason, one side or the other simply doesn't want the particular judge to hear the case.

Contemporary practice in the United States on this score takes two forms. For the most part, the older states still adhere to the residual English common law notions under which a judge may be disqualified only for clearly specified grounds. There are approximately thirty such states. On the other hand, twenty states take a very different view. In those states, a judge may be disqualified simply because one side or the other does not want that judge on the case. This is commonly referred to as disqualification by affidvait, and amounts to the filing of an affidavit asserting bias or prejudice and requesting another judge. As utilized in this affidavit practice, the assertion of "bias or prejudice" is a pure legal fiction; nobody really believes that bias or prejudice actually exists. This has come to be simply a form of words. The party making the affidavit is not called upon to explain or prove that the bias or prejudice really does exist. A more forthright way of referring to the very same practice is to refer to it as a peremptory challenge, because where this sytem exists, the challenge to the judge is as peremptory as the challenge to a juror. Today states such as Wisconsin, Montana and North Dakota are eliminating even the apparent requirement of bias.

As I have said, there are approximately twenty states which have a system which operates to this effect; I attach a table of those states to this statement. The states which have this system like it very much. I shall submit with this statement favorable letters from Chief Justices from several of the states.

I personally strongly recommend the peremptory challenge system and urge its adoption for the federal trial courts; it has no bearing on appellate courts. If another judge is available, there really is no reason why a case should be heard before a particular judge if one of the parties would prefer someone else. The system must not be allowed to be abused and an instrument of delay, but this is easily guarded against. The overwhelming number of cases in the federal system are heard in multi-judge district courts—and the timely shift of a case from Judge *A* to Judge *B* is no inconvenience to anyone. Particularly in the large courts where cases are assigned by chance, the peremptory challenge serves as a constructive antidote to the inevitable occasional misfunctioning of the chance assignment system.

THE BAYH BILL

I turn now to the specific provisions of the Bayh bill. The bill has gone through several stages to reach its present posture. Prior to its introduction, Senator Bayh circulated an earlier draft very widely to lawyers and judges throughout the country inviting comments. He received a great many helpful suggestions. Support for the general principles of the self-disqualification portions of the bill were overwhelming; I am sure that the Senator will make available to the staff of the Committee that entire file if it has any wish to see them. Response to the peremptory challenge portion of the bill was less unanimous, the reaction tending to be unfavorable if the lawyer was not used to the system in his own state and very favorable if he was used to it. The bill was revised in the light of these suggestions and then introduced by Senator Bayh and Senator Tydings. Subsequent to its introduction, it was again distributed and was discussed, as earlier noted, before the Traynor Committee. The bill was deliberately held back last year so that it might track along with the ABA standards. It was then introduced this year by Senator Bayh. Its practical effect would be to make these changes in existing law:

1. The judge shall disqualify in any case in which he has an interest, regardless of whether it is substantial or insubstantial. This means, concretely, that if he has any stock in a corporate party whatsoever he should not sit. The bill also recognizes that there may be problems of shareholdings in a corporation which either holds stock in a party (the holding company) or which is a subsidiary of a party. The bill moves on the premise that it will be more convenient for all if a rule of thumb is created to determine interest in these cases, and it therefore provides that if the parent or subsidiary holds ten percent or more of the stock of a party or is held by a party to the extent of ten percent or more, then the judge should disqualify. The same is true if

the judge is an officer of any corporation covered by the provision. This will bring the federal statute into accord with what, it is firmly believed, is the best and the most general national practice as well as into accord with the ABA standards.

2. The statute expressly imports the "appearance of impropriety" test of *Commonwealth Coatings.*

3. The statute eliminates the so-called duty to sit and thus would relieve a person in a position of Judge Rives, described above, by permitting the judge to exclude himself, at his discretion, where he believes that it would be improper for him to sit.

4. One other change is an express prohibition of waiver of disqualification. What happens is that where a judge has a small interest, he may reveal the existence of the interest to the lawyers who, under present practice, may then waive it, permitting him to sit. This, to put it bluntly, commonly amounts to a velvet blackjack. To refuse to waive in those circumstances amounts to an assertion that the judge is not to be trusted, and where a lawyer will be practicing before the same judge for years to come, this is more of a strain than ought to be put on his daring and forthrightness. It is the view of the bill that if the judge should disqualify, then let him do it without any ifs, ands, or buts about it.

The peremptory challenge section of the Bayh bill revises 28 U.S.C. § 144 to provide that where a party files a timely affidavit, another judge shall be assigned to hear the case. The first sentence of Senator Bayh's revision of 28 U.S.C. § 144 makes only a one word change in the existing law, but it is an important word. The existing law provides that the judge, upon the filing of a "timely and sufficient affidavit" shall withdraw. The change deletes the word "sufficient" so that the affidavit is deliberately converted into a pure form.

At the same time, the Bayh bill is carefully drafted to prevent abuse. It does so by specifying when the affidavit is timely: It is timely if filed twenty or more days before the time first set for trial or within ten days after the filing party is first given the notice of the identity of the trial judge. The object here is to cover both the master calendar and the individual calendar districts so as to keep the option for the party if he is not told who his judge is until the eve of trial. A safety valve is left for extenuating circumstances.

The number of affidavits is restricted to one on a side. The fact that there may sometimes be conflicting parties on a side has been duly taken into account. California would permit each of those parties a strike, but this federal statute would not. With the existing number of federal judges, one on a side is the maximum which can be afforded. Let me make clear that if a side exercises its challenge to strike Judge *A*, and finds itself getting Judge *B* who owns stock in one of the parties, this does not mean that Judge *B* will sit. It means merely that he cannot be removed by peremptory challenge—he is still governed by the earlier section as to the proper standard of conduct. Finally, the section provides that a party waives his right to file an affidavit if he participates in any proceedings in which the judge exercises discretion—the party does not, in short, get to try the water before he decides whether to go swimming.

BAYH-HOLLINGS BILL COMPARISON

Let me turn now to the comparison of the Hollings bill and the ABA standards as they presently exist since Senator Hollings' bill is essentially the ABA standards. The differences between the Bayh draft and the Hollings-ABA draft are these:

1. The Hollings draft does not contain the "appearance of impropriety" standard. This, I am sure, is not because he meant to exclude it, but because the ABA draftsmen have seen fit to put that standard in a different section of their Canons than the disqualification Canon. I think, respectfully, that this is a mistake and that all of the disqualification grounds ought to be clearly identified in one section.

2. The Hollings-ABA standard would still permit waiver in exceptional cases where it is requested both by the judges and the parties in writing. The ABA waiver provision may well be desirable for some states, and since we are dealing with Canons of Ethics which will be generally applied throughout the country, this greater elasticity may be desirable for state purposes. As to this, I express no opinion. It is not very desirable for federal purposes. To have the federal statute differ from the Traynor recommendation in respect to this

detail involves no serious moral matter, but merely a question of practicality. The ABA standard is a long step forward over the existing practice where waiver can be readily forced in open court. Nonetheless, I recommend that the federal statute bar waiver.

3. The Hollings-ABA plan is a code of ethics and not a rule of practice. Hence, it does not—and should not—import percentage standards for interests in corporate holding companies and subsidiaries. On the other hand, this kind of precision is what statutes are for. I would therefore keep the Bayh percentage formula, regarding it simply as providing a workable formula to carry out the ABA standard.

Other than this, there are no important differences, and these are not great gaps. I am assured by the Reporter for the Traynor Committee that the phrase permitting disqualification in cases "in which his impartiality might reasonably be questioned" permits disqualificaton where "the judge thinks it improper for him to sit."

CONCLUSION

In conclusion, I hope that this Committee can settle on a text of a disqualification bill satisfactory to it and approve it. I further express the hope that, the Subcommittee having approved a bill, it take appropriate steps not to pass the bill through to the Senate floor until after the final hearing of the Traynor Committee which will be held in October, 1971. I regard it as unlikely that there will be any material or significant change in the Traynor recommendations as a result of its October meeting, but it is conceivable, and should there be such substantial changes, this Subcommittee ought to take a last look at its own work before the bill passes. The object, of course, is to arrive at an essentially uniform system. Yet in suggesting that the measure move at this easy pace, I do not mean to suggest any weakness of spirit as to whether it should eventually pass in the year 1972. The bedrock fact is that the 1948 provision on disqualification is simply not good. It conflicts with the present standards of the bench, including the Supreme Court, of the bar, and of the Senate itself. It badly needs correction.

STATES WITH DISQUALIFICATION OR CHANGE OF VENUE DEVICES WHICH AMOUNT TO OPTIONAL TRANSFER OF A CASE TO A NEW JUDGE

State	Statutory reference	Types of actions covered
Alaska	Alaska Stat. § 22.20.022 (1967)	Civil and criminal.
Arizona	Ariz. Rev. Stat. §§ 12-409—411 (1956)	Civil.
Do	Ariz. R. Crim. P. 196-200	Criminal.
California	Cal. Code Civ. P. § 170.6 (West 1971 Supp.)	Civil and criminal
Hawaii	Hawaii Rev. Stat. § 601-7 (b) (1968)	Civil and criminal.
Idaho	Idaho Code § R1-1801 (1969 Supp.)	Civil and criminal.
Illinois	Ill. Rev. Stat. ch. 38 § 114-5 (1970)	Criminal.
Do	Ill. Rev. Stat. ch. 146 §§ 1 to 3 (1970)	Civil.
Indiana	Indiana Stat. § 2-1401 (1967 Supp.)	Civil.
Do	Indiana Stat. § 9-1301 (1956)	Criminal.
Maryland	Maryland Code art. 75, § 44 (1957)	Most civil cases and crimina capital cases.
Do	Maryland Const. art. IV, § 8	Criminal.
Minnesota	Minn. Stat. § 542.16 (1971 Supp.)	Criminal.
Do	Minn. R. Civ. P. 63.03	Civil.
Missouri	Missouri Stat. § 545.66 (1949)	Criminal.
Do	Missouri Stat. §§ 508.120-140 (1970 Supp.)	
Do	Missouri R. Civ. P. 51.03	Civil.
Montana	Rev. Codes Mont. § 93-901 (4) (1969 Supp.)	Civil.
Do	Rev. Codes Mont. § 95-1709 (1969 Supp.)	Criminal.
Nevada	Nev. Rev. Stat. 1.230 (1957)	Civil only.
New Mexico	N.M. Stat. § 21-5-8 (1953)	Civil and criminal.
North Dakota	N.D. Century Code § 28-13-01 (1960)	Civil.
Do	N.D. Century Code § 29-15-13 (1960)	Criminal.
Oregon	Oregon Rev. Stat. §§ 14.250-270 (1969)	Civil and criminal.
South Dakota	S.D. Compiled Laws §§ 15-12-1 to 17 (1967)	Civil.
Do	S.D. Compiled Laws §§ 23-23-1,-4,-8 (1967)	Criminal.
Washington	Rev. Code Wash. 4.12.050 (1962)	Civil and criminal.
Wisconsin	Wisc. Stat. § 261.08 (1971 Supp.)	Civil.
Do	Wisc. Stat. § 971.20 (1971 Supp.)	Criminal.
Wyoming	Wyo. Stat. Sec. 1-53 (1957)	Civil.
Do	Wyo. R. Crim. P. 23 (d) (1969 Supp.)	Criminal.

SUPREME COURT,
Phoenix, June 28, 1971.

MR. JOHN P. FRANK,
Attorney at Law,
Lewis & Roca,
Phoenix, Ariz.

DEAR JOHN: I have received your letter of the 23rd of June requesting my views on how disqualification of a judge by the affidavit system has worked in Arizona. As you stated, Section 144 of the proposed Act is very similar to that of Arizona's Section 12–409, B–5. I have had experience with Arizona's Act both as a lawyer and as a judge and, while it is seldom used, I believe it to have several virtues which justify its existence.

It is of importance to the integrity of any judicial system that not only do supplicants before the bar have justice, but that there be the appearance of justice. Some judges gain the reputation of being a corporate judge, a labor judge, a conflicting judge, and the like. When this occurs, litigants are often reluctant to have their causes tried by or placed for decision before such a judge. A procedure which permits a case to be assigned to a different judge gives to a litigant the feeling that he will get at least an even break in the courtroom and the proceeding, therefore, takes on for him the appearance of justice.

Sometimes, of course, judges are, in fact, biased or prejudiced against a particular litigant. More often a judge is biased or prejudiced against a particular cause or type of case. The judge, of course, would be the first to deny that such bias or prejudice exists. But when a judge is disqualified for bias or prejudice, it gives him reason to examine his personal idiosyncrasies and attitudes. Disqualification has a salutatary effect upon a judge since it tends to restrain arbitrariness and intolerance—particularly in judges who are appointed for life.

As you can see, I am a strong believer in the right to disqualify a judge and most heartily endorse the proposed action of the Congress.

With my very highest regards, I am

Very sincerely yours,

FRED C. STRUCKMEYER, JR.

THE SUPREME COURT OF MINNESOTA,
St. Paul, June 28, 1971.

MR. JOHN P. FRANK,
Attorney at Law,
Phoenix, Ariz.

DEAR MR. FRANK: I have your letter of June 23 enclosing a copy of a bill introduced by Senator Bayh of Indiana, dealing with the disqualification of Federal judges.

We have had a statute in this state for many years permitting the disqualification of a judge by filing an affidavit of prejudice. That is all that is required on the first disqualification. Thereafter, if the judge selected to take the place of the disqualified judge is not wanted, actual prejudice must be proved.

Our system has worked very well. I know of no complaint with it, and I would not like to see it discarded. I think anyone should have the right to disqualify a judge whom he thinks is biased or prejudiced. When it comes to disqualifying more than one judge, sometimes the purpose is to select the judge a client wants, which is equally bad. But under our system, where actual bias must be shown before the second judge can be disqualified, I think it has worked very well.

Sincerely yours,

OSCAR R. KNUTSON, *Chief Justice.*

SUPREME COURT OF MISSOURI,
Jefferson City, June 28, 1971.

MR. JOHN P. FRANK,
Lewis & Roca,
Attorneys at Law,
Phoenix, Ariz.

DEAR MR. FRANK: The proposed amendment to Section 144, Title 23, U.S.C., relative to disqualification of a district judge is quite similar to our Civil Rule

51.06, V.A.M.R., which gives to a party what is in effect one peremptory challenge of the trial judge. The rule has worked very well for many years. We are accumstomed to it and like it. It serves useful and just purposes.

In recent years there has been a growing objection to the requirements of (1) an affidavit, and (2) an allegation that the judge is biased and prejudiced. The argument is that this requires the litigant or his counsel to stultify himself in most instances.

The court has a committee which is in the process of revising all of our criminal and civil rules. The committee has recently recommended to the court that we make drastic changes in all parts of Rule 51. It is unlike that we will consider this recommendation before September and, of course, I do not know whether it will be adopted.

I assume you would be interested in seeing what has been proposed to us, and, therefore, enclose a copy of the committee's final draft and its report or comments. I believe you will find this interesting.

Very truly yours,

FRED L. HENLEY,
Chief Justice.

Enclosure.

SUPREME COURT,
Helena, June 28, 1971.

JOHN P. FRANK, ESQ.,
Attorney at Law
Phoenix, Ariz.

DEAR MR. FRANK: I have your letter of June 23 with regard to the disqualification of federal judges.

I know that the Bar in Montana would be happy to have this system adopted. We have had disqualification of state judges since about the turn of the century and while once in a while we have some trouble, ordinarily it has worked out very well. As you know, sometimes the judge takes a rather critical view of a lawyer and then the lawyer figures he can not get justice in that court. The disqualification system cures that type of trouble.

Of course it does raise the problem of increased cost, particularly in the less populated districts where they only have one judge and another judge must be called in. However this is taken care of by the disqualified judge and is not bothersome to us.

By and large I would say that the affidavit system of disqualification is good, although it can be abused and sometime is for purposes of delay.

Very truly yours,

JAMES T. HARRISON,
Chief Justice.

JUNE 25, 1971.

Mr. JOHN P. FRANK,
Lewis & Roca,
Phoenix, Ariz.

DEAR MR. FRANK: Your letter of June 23, 1971, concerning legislation pending before the Senate Judiciary Committee, has been directed to my office.

The provisions of NRS 1.240 present a procedural scheme somewhat similar to that proposed in section 144 of the bill which you have included in your letter. I have spoken to several members of this court regarding the provisions of NRS 1.240. It seems to be the general consensus of opinion among the justices that the statute, although rarely used, is an essential part of our legal system in Nevada. The statute affords the opportunity for one to gain a more impartial adjudication of one's rights when there exists a case wherein the judge may harbor some prejudice.

The operation of this statute in Nevada bespeaks the quality and impartially of the judiciary in this state. I am sure that the judges in the federal system are just as qualified and impartial, thus, the proposed statute will be of great assistance in those rare instances where a member of the judiciary may possess some slight prejudice.

If I may be of any future assistance, please feel free to contact me.

Sincerely,

SALLY S. DAVIS, ESQ.
Special Legal Assistant to the
Nevada Supreme Court.

SUPREME COURT, *Bismarck, June 28, 1971.*

MR. JOHN P. FRANK,
Lewis & Roca,
Attorneys at Law,
Phoenix, Ariz.

DEAR MR. FRANK: I have your letter of June 23 in regard to a bill now pending in the United States Senate Judiciary Committee dealing with disqualification of Federal judges.

North Dakota has had a method of disqualifying judges who are deemed to be prejudiced, providing for the filing of an affidavit of prejudice. However, a new law just enacted by the Legislative Assembly, which will become effective on July 1 of this year, provides that all that shall be necessary is the filing of a written demand for change of judge, executed in triplicate. It need not be in the form of an affidavit. Thus North Dakota has made it even easier to secure a change of judge. Since practically all of the Federal districts have at least two judges, provision should be made for the disqualification of a Federal judge.

I am sure Senator Burdick, who comes from North Dakota, is well aware of the change of our law in this regard. It was his own brother, a district judge in this State, who proposed the legislation making a change of judge easier by not requiring that the demand be in the form of an affidavit of prejudice.

Very sincerely yours,

ALVIN C. STRUTZ.

Senator BURDICK. Thank you, Mr. Frank. You have been of great assistance.

We have one more witness for today, and unless there is objection, I think we will proceed with Judge Jonathan P. Robertson, who is a member of the appellate court of the State of Indiana. He is a former trial judge in the circuit court of the State of Indiana.

Indiana is one of the 19 or so States that has a system under which a judge can be peremptorily challenged, and Judge Robertson, would you give us the benefit of your experience in Indiana?

STATEMENT OF JUDGE JONATHAN P. ROBERTSON, INDIANA APPELLATE COURT

Judge ROBERTSON. I believe in view of the lateness of the hour I will summarize my statement, and if it is all right with you, I will give the reporter my written statement.

Senator BURDICK. Without objection, the entire statement will be made a part of the record.

[The statement referred to may be found on page 192.]

Judge ROBERTSON. Thank you, sir.

Indiana is one of the States where the litigants or the attorneys have an absolute right to a challenge of a judge for any reason, just merely asking, and the mechanics of the system are relatively simple. I believe they would go a long way to answering some of the questions Senator Gurney has raised. When a change of a judge is asked for, there are several methods in which the judge, the new judge may be selected.

One is by an agreement, or in certain cases consent can be given to the naming of a special judge. This applies to ex parte proceedings. In the event both of these methods fail, then the judge who is being disqualified selects three names and each party strikes one of the three, and the one remaining judge becomes the special judge in the case.

There are very absolute and tight time agreements on this. Once the judge is notifed that there is no agreement or consent, then he has 3 days in which to name the panel and the parties have 2 days to strike from that panel. However, as a matter of practice, it is normally done by a series of phone calls, and it takes less than just a few minutes.

I realize that this is not what is intended in the Federal system, but I do tell you these things to show you that it can work, and that it is not—if the judge requires the parties to adhere to any time schedule that may be set out in the rules, it cannot be used as a dilatory plea. The time limits for asking for a change of judge are 10 days after the issues have been closed upon the merits, or if it is set for trial, which is within 30 days after the case is filed, which happens rarely. Then the change may be asked for as soon as you know the case is set for trial.

If the parties fail to adhere to the time limits, then it is deemed waived and you are out of luck as far as a change of judge is concerned.

The one big criticism, if it is a criticism at all, and it comes mostly from judges in Indiana, is that it can be used as a delaying tactic, but I am also of the opinion that the judges that say this are the ones that take personal offense at having the case removed from them. And if that be the case, then I do not think that this goes to the merits of the system at all. The system works well in Indiana. It is looked upon with favor, and I would estimate by more than 90 percent of the bar and more than 90 percent of the bench.

It does provide a safeguard for the litigants if they feel they are not going to get a fair shake before a judge, or they would rather have a different judge, and they can ask for it. In Indiana, people are quick to assign political motives to almost anything, and where judges are elected, it is a great safeguard for the judge and for the parties. And where there are personality clashes between attorneys and judges, the attorneys or attorney can merely, in such circumstances, get a change of judge, and get into a favorable forum, at least being equal with all other parties.

It does allow, too, if you can reach agreement, the utilization of a judge who has expertise in a certain field, or one who you know is qualified to hear a very important case. If there is a new judge on the bench, it gives you the opportunity to get a more experienced judge, and I am also familiar with the situation where there is a nonfunctioning court, whether it be by design or laziness, or because of illness, the special judge system fills in to help make productivity of what would be otherwise wasted time.

I think in summary I would recommend to you the amendment for peremptory challenge of the judge. In Indiana we have found that it gives a very desirable impression of a fair trial to both the bar and the public, and it can act as a safety valve to protect against situations that arise beyond anyone's control, and obscures the path of justice.

If you have any questions, I would be pleased to try to answer them.

Senator Burdick. Thank you, Judge, for this fine contribution. You perhaps have answered part of this, but to what extent would

you say that this privilege has been abused by setting up a stage for dilatory tactics and delay et cetera?

Judge ROBERTSON. The word "abuse" troubles me in that question, in that it is a matter of right, and whether it is abused or not, you do not know for what reason they are asking for it.

Senator BURDICK. Should I change the word to overuse?

Judge ROBERTSON. Yes, sir, my experience has been that approximately 10 to 15 percent of the average judge's caseload is subject to a change of judge motion. If there are more than that asked for it is a sign that something is wrong in that court, whether it be illness on the part of the judge, or something along that line.

Senator BURDICK. To what extent have judges been moved around under this new law, as compared to the prior law?

Judge ROBERTSON. When we eliminated the requirement of filing an affidavit for bias or prejudice, I did not notice any appreciable change in the number of changes of judges. As a matter of fact, by eliminating bias and prejudice as an aspect of our statute several years ago, we did away with the use of a legal function that was just automatic, and the attorneys like it much better, even though they, I think, hate to tell a judge that you think he is biased.

Senator BURDICK. If the practice or the privilege is overused, and I use that phrase, would you have any suggestion on how that might be discouraged?

Judge ROBERTSON. Yes, sir, and I think the practical way is to point out to the attorneys that they can delay the case by the naming of a judge who is extremely busy or, for instance, a judge who is not known to function very quickly. Most judges that I know avoid naming judges of this kind, their ability and work productivity are taken into consideration in selecting judges. But, it is so established in Indiana, that it really does not upset anything. It is just a switching system of a judge to another court.

Senator BURDICK. Does this cause any problems for court administration?

Judge ROBERTSON. No, sir, when a new judge comes in and it is his case, the personnel and the staff function for him just as they would their regular judge. It is no problem at all.

Senator BURDICK. You do not notice any problems at all through the change of judge systems?

Judge ROBERTSON. No, sir, everybody thinks greatly of it, and I might add that the judges in Indiana love it because each time they get to be a special judge in a case, they get a $25 per diem, and it is always interesting to sit on another bench and hear new lawyers. I find that to be a very enjoyable experience.

Senator BURDICK. Is the selection of special judges the exclusive method for replacing a challenged judge?

Judge ROBERTSON. It is the most common, except there is sometimes a panel named by the Supreme Court of Indiana if the judge is a party or has a relative who is a party, but 90 percent of the time it is used as I described it.

Senator BURDICK. In general, what would you describe as being the attitude of the judge who is removed from a case by challenge?

Judge ROBERTSON. Most judges really do not mind at all. It gives them an opportunity to go on and be a special judge someplace else.

There are some prima dona types in Indiana who take a personal affront to having a case taken away from them, but they are rare.

Senator BURDICK. Well, then, in general, the new system or new method is working well in your opinion?

Judge ROBERTSON. It is indeed, sir.

Senator BURDICK. Thank you very much.

Judge ROBERTSON. Thank you very much.

Senator BURDICK. The record will be held open for 10 days and that will conclude the meeting.

[Whereupon at 12:40 p.m. the hearing was concluded.]

S. 1064—A BILL TO IMPROVE JUDICIAL MACHINERY BY AMENDING TITLE 28, UNITED STATES CODE, TO BROADEN AND CLARIFY THE GROUNDS FOR JUDICIAL DISQUALIFICATION

THURSDAY, MAY 17, 1973

U. S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 457 Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel and Miss Kathryn M. Coulter, chief clerk.

Senator BURDICK. The committee will come to order.

Today we have scheduled a hearing on S. 1064, the judicial disqualification bill which I introduced with the cosponsorship of 12 of my colleagues: Senators Bayh, Bible, Gurney, Hartke, Hollings, Humphrey, Javits, Mansfield, McGovern, Metcalf, Muskie, Percy, and Williams.

Briefly, this bill proposes to amend the present Federal statute on disqualification of judges to make it conform generally with the newly adopted American Bar Association Canon of Judicial Conduct which relates to disqualification of a judge from participation in a particular lawsuit.

Let me state at the outset that this effort to improve the Federal statute relating to disqualification of judges was recommended by Senator Hollings and by Senator Bayh, each of whom introduced in the last Congress legislation patterned on an earlier version of the New ABA Code of Judicial Conduct.

During the 92d Congress, on July 14, 1971, the subcommittee held a hearing on these two bills—S.1553 and S.1886—sponsored by Senators Hollings and Bayh, both of which proposed to amend section 455 of title 28 which requires Federal justices and judges to disqualify themselves under certain circumstances.

At the time of those hearings the American Bar Association had under consideration a draft proposal of a new code of judicial conduct part of which undertook to declare with greater certainty the circumstances which require disqualification. In August of 1972 the House of Delegates of the American Bar Association approved the Code of Judicial Conduct and recommended its adoption by the

judicial systems of this country, both Federal and State. The Judicial Conference of the United States at its recently concluded meeting of April 5–7, 1973, adopted the Code of Judicial Conduct as applicable to Federal judges, with some modifications not material to our inquiry here today.

For 60 years the U.S. Code has contained a statutory provision requiring disqualification of judges in cases where they have a conflict of interest. As I explained at the hearing in 1971 the present statute has created some problems because it not only sets up a subjective test of disqualification and is couched in uncertain language, but also because it has been construed to incorporate a so-called duty to sit.

It has been suggested by many, and I am inclined to agree, that the legal standard expressed in the existing section 455 has the effect of placing a judge on the horns of a dilemma. And, of course, it may be equally unsatisfactory to litigants in a particular case.

S. 1064 is based upon the newly recommended ABA Code of Judicial Conduct and would amend 28 U.S.C. 455 so as to follow the new canons. This bill, as does the canon 3C, attempts to be as specific as possible in enumerating the instances when a Federal judge should disqualify himself. In addition, the bill sets up a general standard that a judge should disqualify himself when "his impartiality might reasonably be questioned". This language eliminates the "subjective" opinion of the judge as the basis for disqualification and substitutes a so-called reasonable man test of impartiality. By so doing the "duty-to-sit" concept is eliminated.

Disqualification of a judge accomplishes a twofold purpose: It insures that a judicial decision is not tainted with partiality and it enhances public confidence in the judicial system. Certainly at a time when there are 667 Federal judges active and retired, and at a time when Congress is asked to create an additional 62 judgeships, it is not inappropriate for Congress to say that a judge, whose impartiality might reasonably be questioned, should step aside and let another judge handle the proceeding.

It is believed that the enactment of this bill will do much to remove our Federal judges from the horns of the dilemma they currently face. Congress will have specified the amount and type of financial interest, the degree of relationship, and the prior association which forces disqualification. Congress will have relieved the judge of the "duty-to-sit" which presently clouds his judgment when he is forced to determine whether his interest is a case so "substantial" as to require his disqualification.

S.1064 makes two changes in the form and language of the ABA provisions on disqualification:

The ABA canon 3C in section (1)(b) specifies the grounds for disqualification based upon the judge's prior connection as a lawyer. The ABA, in a commentary to this subsection, attempts to explain how this would affect a judge who had served as a lawyer for a Government agency. Because many Federal judges are appointed to the bench from prior service as a U.S. District Attorney or as an attorney for a Federal agency or the Department of Justice; this particular ground becomes more important as it affects the Federal system. Therefore, S.1064 proposes that section (1)(b) of the ABA

canon be limited to the prior private practice of the judge and that a new section which is section (b) (3) of the bill apply to the prior service of the judge as a Government lawyer. In other words, section (b) (3) is an attempt to codify the commentary made by the ABA relative to prior Government service.

The second respect in which S.1064 differs from the ABA version is contained in section 1(e) of the bill as it relates to waiver or remittal of disqualification. Under the ABA canon 3D, if the ground for disqualification is either the financial interest of the judge, his spouse or child or the kinship of the judge to a party or a lawyer, the parties are permitted to waive the basis for disqualification. S.1064 would not permit waiver in these two instances. It is my personal belief, that public confidence in the impartiality of our Federal court system would be greatly enhanced by prohibiting waiver in these two instances, especially since even the ABA canon would not permit waiver of the other grounds for disqualification specified in the canon. Therefore, under S. 1064 waiver of disqualification would be permitted only under the general circumstances reached under the subsection (a) of the bill, but waiver would not be permitted for any of the specific circumstances enumerated in subsection (b) of the bill.

We are pleased to have as our first witness Former Chief Justice Roger J. Traynor of the California Supreme Court, now professor of law at Hastings College of Law, who served as chairman of the ABA Special Committee on Standards of Judicial Conduct.

Judge Traynor will be the first witness this morning. Now at this time, without objection, I would like to incorporate into the record a statement by Senator Birch Bayh and one by Senator Ernest Hollings with reference to the pending bill.

[Statement of Senator Birch Bayh in full follows:]

STATEMENT OF SENATOR BIRCH BAYH

Mr. Chairman, I am very pleased to have the opportunity once again to testify before this Subcommittee on the need for revision of the statutes governing disqualification of federal judges. As you will recall, Mr. Chairman, during the 1st Session of the 92nd Congress, I introduced a bill to amend Section 455 of Title 28 which deals with judicial disqualification to meet what I considered to be serious deficiencies in the statute that had become apparent in the course of Senate hearings on certain nominees to the federal bench. Hearings were held by this Subcomittee on my bill as well as on a similar bill introduced by the distinguished Senator from South Carolina, Mr. Hollings. These hearings were recessed pending final approval of a new Code of Judicial Conduct by the American Bar Association. The bill I introduced in 1971 was based largely on the then current tentative draft of the new Code by the ABA's Special Committee on Standards of Judicial Conduct. The recommendations of that Committee have now been finally approved.

At the beginning of the 93rd Congress you, Mr. Chairman, introduced S. 1064, the bill now pending before this Subcommittee, which would, with certain modifications, codify the new Code of Judicial Conduct in a new Section 455. I appear here today to strongly support this legislation and to urge prompt action on it by the Subcommittee and by the Senate as a whole.

In my testimony before you in 1971, I indicated that I felt that the present Section 455 had at least three major deficiencies. First, its central provision requires a judge to disqualify himself in any case in which he has a "substantial interest." These are the crucial words, "substantial interest." The problem has been one of differing definitions of what "substantial interest" means. Under S. 1064 and the ABA Code the term "interest" would be precisely de-

fined to include any legal or equitable interest, no matter how small, in a party or thing involved in the litigation or any directorial or active participation in any organization involved in the litigation.

The second problem with the present Section 455 which I felt we needed to address ourselves to was the problem of waiver of disqualification by the parties involved. S. 1064 deliberately avoids resort to the device of disclosure and waiver and would bar waiver in any of the specifically enumerated circumstances where disqualification is required. Unfortunately, in my view, the ABA Code would permit waiver of disqualification by the parties in cases involving a potential conflict of financial or personal interests in the outcome of the case. Since the purpose of this legislation, however, is to increase public confidence in the judiciary, it would be unwise to allow this type of waiver, and I fully support the provisions of S. 1064 in this regard.

Section 455 presently also fails to require disqualification in cases where there may be an "appearance of impropriety." Since, as I have indicated, I feel that the need and importance of this legislation is grounded on how the judiciary appears to the American people, I feel that the inclusion of this provision is important.

There is one slight technical change of language which I would like to suggest that the Subcommittee consider. S. 1064 now reads as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances: . . .

It seems to me that this language might be read to indicate that the specific circumstances enumerated in subsection (b) define situations in which a judge's impartiality might not reasonably be questioned, but in which he ought to disqualify himself anyway. I am sure that this is not what is intended, and I would suggest that perhaps using the phrasing contained in the ABA Code requiring a judge "should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: . . . ." would be more appropriate.

Finally, there is one further problem which I would like to point out to the Subcommittee. Under present law, when a motion to disqualify a judge for prejudice or bias is made, under Section 144 of Title 28, the judge himself determines whether the allegations are sufficient to require his disqualifying himself. In my view, litigants who believe that they cannot get a fair trial before a particular judge should not have to convince that same judge that he should disqualify himself. Accordingly, the bill I introduced in the last Congress would have amended Section 144 to create a right in a litigant to one peremptory challenge of a trial judge assigned to hear his case, adopting a disqualification provision now employed in many state judicial systems. Under such a provision the disqualified judge is left with no option except to determine whether the challenge is timely once an affidavit alleging bias or prejudice is filed by a party or his attorney. Each side in the litigation is restricted to one challenge in order to avoid abuse in cases where one of the parties simply wants to create delay or avoid trial altogether. As I have indicated previously, I believe that amending Section 144 in this way would complement the revised Section 455 and that it is a necessary part of any complete approach to the problems of judicial disqualification. I am aware of the fact, however, that this provision may be more controversial than the proposed amendments to Section 455 contained in S. 1064. While I would very much like to see such provisions included in the current bill, it may be that the Subcommittee would be better advised to hold further hearings at a later date on amending Section 144. I simply wanted to point out to you, Mr. Chairman, what I consider to be an imporant aspect of the problem with which we should deal.

I appreciate this opportunity, Mr. Chairman, to share my views with you and the Subcommittee on what I consider to be a very important piece of legislation. Once again, I would urge that it be promptly acted upon. Thank you for your attention.

Statement of Senator Ernest F. Hollings

Mr. Chairman, I am very pleased to have the opportunity to testify before you again on the need for a revision in the current law covering the disqualification of Federal judges.

The hearings on the nomination of Judge Clement F. Haynsworth, Jr. to the Supreme Court pointed out to me the inherent inequities created by the loose language of 28 U.S.C. 455. This section provides that a judge shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party, or his attorney as to render it improper, in his opinion, for him to sit. The inequity results from the vagueness in this section, such as identifying a "substantial interest" or a person "so related or connected as to render sitting improper." Hence, in each case we ask the Federal judge to balance this vague statutory language with the well-established rule that a judge is obligated to sit in all cases where he is not specifically disqualified by statute. Such a situation is unfair to the judge and to our system of justice.

At one time in our past history when we had few judges to cover matters pending before the courts, the rule establishing a duty to sit had a foundation in practical necessity. However, we now have a sufficient number of judges to allow an interchange of assignments in order to eliminate possible conflict of interest, and because of this, there is no longer a need for this rule. Rather the weight of the presumption should be changed to one of a duty not to sit if there is any reason why service would be improper.

As a result of the Haynsworth nomination, I introduced legislation to add certainty and clarity to Section 455. During the last Congress this took the form of S. 1553. In attempting to resolve the problems created by existing law, my approach in S. 1553 was to list the specific instances where a judge would be disqualified. Mr. Chairman, you were kind enough to hold hearings on this subject. Rather than take the Subcommittee's time to elaborate on this bill, I would merely incorporate by reference my testimony on this bill. Senator Bayh's proposal was considered at that time as well, and I think we all came away feeling that we had a unanimity of purpose. Those hearings were recessed pending final approval of a new Code of Judicial Conduct by the American Bar Association. We now have the benefit of this Code revision and many fine legal minds have contributed of their time and talents in its drafting. S.1064, the bill which you introduced earlier in this session would, as I interpret it, codify the new Code as a revision of Section 455. I join you in supporting this proposal and in urging prompt action on it by the Senate.

What we lack with the present law we gain through your bill and the Code of Ethics which it codifies. We must have specific standards by which a judge can determine the propriety of his conduct, and the specific instances listed in your bill accomplish this. Elimination of a presumption that there is a duty to serve further relieves the judge of the impossible task of balancing duty and propriety. It is my feeling that the general disqualification provision in Section 1 should be very narrowly interpreted; that is to say, it clearly should be a test of impartiality by which the reasonable man would be motivated. It should never be interpreted to include a mere spurious or loosely based charge of partiality.

In balance, Mr. Chairman, I am pleased that we have finally come to a point where enactment of legislation seems near. As we realized during consideration of these measures last year, we are all attempting to accomplish the same thing, and S.1064 is the vehicle. I am confident it will clarify and facilitate the judge's decision and increase the public esteem in the judicial office.

I appreciate this opportunity to discuss this matter and I hope that we will soon see it enacted into law.

Senator BURDICK. We are pleased to have you here.

STATEMENT OF HON. ROGER J. TRAYNOR, FORMER CHIEF JUSTICE, CALIFORNIA SUPREME COURT, CHAIRMAN OF ABA SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT

Mr. TRAYNOR. I am glad to be here, Mr. Chairman.

Senator BURDICK. How long have you been in Hastings?

Mr. TRAYNOR. I was in Hastings the year before last. I retired on January 31, 1970. On February 1 I was in Charlottesville, Va.—a little Garden of Eden—and then I went to another beautiful spot,

Boulder, Colo., for the summer, and then I went to Hastings for a year. Last year I had the great pleasure of spending the school term at the University of Utah, in Salt Lake City. It has been a wonderful experience to visit all of these beautiful places in the United States. It confirms an impression I have occasionally looking out of an airplane window that there must be a lot of wonderful people down there. By goodness, there are.

It has been a great joy to be a peripatetic professor.

Senator BURDICK. Did you happen to meet a gentleman by the name of Everett Fraser when you were in Hastings?

Mr. TRAYNOR. He is a great man and one of the great stalwarts of the country in the legal education field.

Senator BURDICK. Both I and the chief counsel of the committee were under his tutelage for 3 years.

Well, you may proceed in any manner you wish. Do you have a complete statement filed?

Mr. TRAYNOR. I have a statement I have filed. I might just recapitulate part of it and put the rest of it in the record, if that is agreeable to save time?

Senator BURDICK. Very fine.

[The statement of Roger J. Traynor in full follows:]

STATEMENT OF ROGER J. TRAYNOR, CHIEF JUSTICE OF CALIFORNIA, RETIRED, VISITING PROFESSOR OF LAW, COLLEGE OF LAW UNIVERSITY OF UTAH

Mr. Chairman and members of the Committee, I very much appreciate your invitation to testify today on the important subject of Judicial Disqualification. Professor Thode and I also appreciate the suggestions of Chief Counsel Westphal as to the division of effort between us that would be most helpful to the Committee, namely, that I "give broad testimony, commenting upon the necessity of insuring public confidence in the judiciary, the function of canons or rules in guiding judicial conduct, the relative advantages or disadvantages of general as compared to specific language;" that I "also comment on particular problems such as what the policy should be on investments by a judge, and what are the problems involved on the waiver problem involved in Canon 3D. This would then leave to Professor Thode a discussion of the language finally adopted by the ABA Committee. He could point out the instances where a general proscription was decided upon, and that more specific prohibitions were made, and the reasoning behind each of these." We propose to follow as best we can these most helpful suggestions of your Chief Counsel.

In 1964 Lewis F. Powell, Jr., then president of the American Bar Association, proposed to the Association's House of Delegates that it undertake a reexamination of the ethical standards applicable to lawyers and also to judges. The House of Delegates accepted his proposal. The first project undertaken involved the lawyers' standards, and the result was the *Code of Professional Responsibility*, adopted by the House of Delegates of the Association in 1969 and now in force in most of the states. The Association then turned its attention to the *Canons of Judicial Ethics*, which had not undergone substantial reexamination or revision since its adoption by the Association in 1924. In August 1969 President Bernard Segal of the American Bar Association appointed the Special Committee on Standards of Judicial Conduct to consider changes in the Canons of Judicial Ethics that were promulgated a half-century ago.

Three outstanding federal judges are members of the Special Committee: Associate Justice Potter Stewart of the Supreme Court of the United States; Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit; and Judge Edward T. Gignoux, United States District Judge for the State of Maine. The three distinguished and presently active state judges on the Committee are Justice James K. Groves of the Supreme Court of Colorado, Ivan Lee Holt, Jr., a Missouri trial court judge, and George H. Revelle, a trial court judge of the State of Washington. At the time of my appointment as Chairman of the Committee I was Chief Justice of California. The six out-

standing lawyer-members of the Committee are Vice-Chairman, Whitney North Seymour of New York City, William L. Marbury of Baltimore, Maryland, E. Dixie Beggs of Pensacola, Florida, Walter P. Armstrong, Jr., of Memphis, Tennessee, Edward L. Wright of Little Rock, Arkansas, and W. O. Shafer of Odessa, Texas. The Committee includes a law professor and former Justice of the Supreme Court of Arkansas, Robert A. Leflar of the University of Arkansas Law School. Professor Leflar is not alone in representing the law teaching profession. The Committee also relies heavily on the scholarship and dedicated services of two other noted law professors—E. Wayne Thode of the University of Utah College of Law, as Reporter, and Geoffrey C. Hazard, Jr., of Yale Law School, as Consultant.

Since October, 1969, the Special Committee has held eleven meetings averaging two days each, and there have been many sub-committee meetings. The Committee meetings have been held on Saturdays and Sundays to achieve maximum attendance. Absenteeism has averaged about one Committee member per meeting, a remarkable record. Several members have not missed a meeting. You probably are aware that the Committee members serve without compensation, but you may not realize that their per diem allowance does not cover all their expenses.

After substantial research into the law and the facts relating to judges' activities and with the aid of suggestions from the Bench, Bar, legal educators, and interested laymen, the Committee issued an Interim Report in June 1970. The Committee made no attempt at that time to present a complete draft of a Code of Judicial Conduct. The Report consisted of a statement of basic principles and was designed to acquaint the legal profession and the public with the progress of the Committee's work to that date and to stimulate constructive criticisms and suggestions. The Committee distributed the Report to 14,000 persons, inviting comments and suggestions. Over 500 suggestions were received in writing and at two public hearings. All suggestions were considered, and many were incorporated into the Tentative Draft of Canons of Judicial Ethics, which was widely distributed in May 1971. The Committee again invited suggestions and criticisms and received more than 500 suggestions from many individuals, from 27 committees of bar associations and other groups,[1] as well as periodic reports from several special committees of judicial organizations.[2] The Committee considered all suggestions and adopted many of them in the process of refining the Tentative Draft. The product is the *Proposed Final Draft of the Code of Judicial Conduct*, a copy of which is attached as Appendix A.

At its very first meeting the Committee emphasized the necessity of preserving the independence and integrity of the judiciary and the importance of judicial participation in the formulation and enforcement of standards of judicial conduct. Canon one articulates this basic premise:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing,

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[1] Association of American Law Schools, ABA Ethics & Professional Responsibility Committee, Alameda Bar Association, Association of the Bar of the City of New York, California State Bar, Colorado Bar Association, Conference of California Judges, Chicago Bar Association, Delaware State Bar Association, Florida Bar Association, Illinois State Bar Association, Indianapolis Bar Association, Law Enforcement Assistance Administration, Louisiana State Bar Association, Massachusetts Bar Association, Milwaukee Bar Association, National Association of Attorneys General, National Conference of State Trial Judges, National Legal Aid & Defender Association, New York State Bar Association, Pennsylvania Conference of State Trial Judges, San Francisco Bar Association, Seattle-King County Bar Association, Tulsa Bar Association, U.S. Army Judiciary, Washington State Bar Association, and Wisconsin State Bar Association.

Although each of the 27 organizations listed above responded to the Committee's request for suggestions and criticisms relating to the *Tentative Draft*, I think it is fair to say that each organization generally supported that draft.

[2] Special Committee on Judicial Standards of the Judicial Administration Section of the ABA, Judge Eugene A. Wright, Chairman; Committee on Judicial Ethics of the National Conference of State Trial Judges, Judge Warren P. Cunningham, Chairman; Committee on Standards of Judicial Conduct of the North American Judges Association, Judge Joseph A. Zingales, Chairman; Special Committee on Judicial Ethics, National Council of Juvenile Court Judges, Judge William S. Fort, Chairman; Committee on Judicial Ethics of the Appellate Judges' Conference, Justice William A. Grimes, Chairman; Committee on Judicial Conduct of the National Conference of Special Court Judges, Judge James A. Noe, succeeded by Judge J. M. Kelly, Chairman; and the Committee on Judicial Ethics of the Association of Supreme Court Justices of the State of New York, Justice James O. Moore, Chairman. In addition, numerous other committees of lawyers and judges gave the Committee the benefit of their views with regard to the *Interim Report* and the *Tentative Draft*.

and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 3A(1) implements this premise by the provision that "a judge should be unswayed by partisan interests, public clamor, or fear of criticism."

An independent and honorable judiciary is an indispensable condition of justice in our society. It is not enough that people have confidence in the sturdiness of judicial procedures. They must have utmost confidence in the integrity of their judges. The basic purpose of the Code of Judicial Conduct is to assure that judges will be worthy of that independence and deserving of that confidence.

To that end Canon 2 of the Code provides that "A judge should avoid impropriety and the appearance of impropriety in all his activities," and subsections A and B of that canon provide:

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. . . .

This canon is implemented by a commentary that provides: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Early in its deliberations the Committee decided that its function was not to submit a second edition of the Ten Commandments or an annotated edition of the Seven Deadly Sins. It endeavored to avoid pious truisms and rhetorical ornamentations and to keep hortatory expressions to a minimum.

Although the faithful performance of the duties of a judge depends largely on his own conscience, prescribed rules of judicial ethics can require observance of proper standards and provide specific definition of his responsibilities to support and guide him on questions of proper judicial conduct that may be subject to differing views.

Generalization is necessary in any code, but concreteness and specificity should be employed wherever feasible. Thus Canon 3C begins with a general standard requiring disqualification if the judge's "impartiality might reasonably be questioned" and then sets a series of specific standards for disqualification based on relational, financial, and other grounds. These specific standards present concrete answers to many disqualification problems.

The Committee set forth a general minimum ethical standard in each area covered by the Code and then endeavored to insure that specific applications did not fall below that minimum. In setting the minimum standard for judges throughout the country, however, realistic considerations had to be kept in mind.

Although the Committee realized that it would be futile to set Draconian standards that could not be obeyed in many areas in the country, it deemed it essential to set a minimum standard applicable to all areas until such time as it is feasible to prescribe a higher standard for all areas. Two examples illustrate the Committee's resolution of this problem.

The first example relates to the political activities of judges and candidates for elective judicial office. The Committee recognized that the ethical standards of impartiality and the appearance of impartiality may be incompatible with the practical political necessities involved in being elected to judicial office. The Committee also recognized that thousands of judges are elected to office and that the elective system will not change soon. In Canon 7 the Committee endeavored not only to set minimum standards, but also to upgrade the standards for campaigns for elective judicial offices.

The second example relates to the business activities of judges. Canon 5C(1) and (2) set the upgraded standards the Committee believes that ultimately every full time judge should be required to meet:

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of

his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

The realities are, however, that in some jurisdictions the salaries of full time judges do not approach an adequate level, and judges without independent means must "moonlight" or forgo being judges. The Committee was convinced, nevertheless, that even in these jurisdictions judges should comply with the minimum standard prescribed by Canon 5C(1). The Committee recognized that compliance with this canon might cause hardship in jurisdictions where judicial salaries are so inadequate that judges are presently supplementing their income through commercial activities. The Committee was unwilling to lower the basic standard in 5(C)(1). The remedy, it believe, is to secure adequate judicial salaries. The Committee also believes that Canon 5C(2) sets a minimum standard to which all judges should ultimately adhere. It proposes, however, that:

Jurisdictions that do not provide adequate judicial salaries but are willing to allow full-time judges to supplement their income through commercial activities may adopt the following substitute until such time as adequate salaries are provided:

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

Jurisdictions adopting the foregoing substitute may also wish to prohibit a judge from engaging in certain types of businesses such as banks, public utilities, insurance companies, and other businesses affected with a public interest. The effective date of compliance provision of the Code also qualifies Canon 5C with regard to judges engaged in a family business at the time the Code becomes effective.

Other specific provisions of Canon 5 relate to the financial activities of judges. Thus subsection C(3) provides:

A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

Under Canon 3C(1)(c), a judge is disqualified if he knows that he, individually or as a fiduciary, or his spouse, or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

Canon 3C(2) provides: A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

"Financial interest" is defined by Canon 3C(3)(c) as ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

The Committee has attempted to meet directly and with as much specificity as possible the critical ethical issues of our time. One such issue is the public reporting of a judge's financial activities. The alternatives were to require complete public reporting of a judge's investments and debts, to require no

reporting at all, or to take no position on the question of reporting. The Committee chose not to evade the issue and made its decision clear as to the items that should not and the items that should be publicly reported. Thus Canon 5C(6) provides:

A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

The commentary amplifies that canon as follows: Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. 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.

We come, finally, Mr. Chairman, to the provision of the proposed code that is perhaps of greatest interest to your Committee, namely Canon 3D, which provides:

D. *Remittal of Disqualification.*—A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, 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 judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

The commentary to Canon 3D provides: This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

Because of the potential hardship on the parties, particularly in emergency cases, that might be entailed by the delay in a proceeding until a qualified judge could be obtained and in the interest of efficient administration of justice, the Committee decided that under certain circumstances the disqualification based on financial interest or relationship could be waived. For reasons that Professor Thode will develop, we abandoned substantiality of the judge's financial interest as the basis for disqualification and took the strict position that ownership of a legal or financial interest, however small in the subject matter in controversy, disqualified the judge. Nevertheless, there are bound to be instances in which all interested parties would readily agree that the interest was insubstantial and the relationship immaterial. Our principal problem was to minimize the chance that a party or counsel would feel under pressure to waive the disqualification and to devise a procedure to that end that would be practicable and operate with reasonable simplicity. Under our proposal, the judge must disclose on the record the basis for his disqualification. We believe that ordinarily he will do so only if he feels that the relationship is immaterial or the interest insubstantial. After such disclosure, the parties and lawyers, independently of the judge's participation must agree that the basis of disqualification is immaterial or insubstantial. The phrase "independently of the judge's participation" will require consultation of counsel and parties out of the presence of the judge. It is believed that the delay in the proceeding this absence of the judge entails will not prove too disruptive. The requirement that the parties as well as their lawyers agree is imposed in the belief that parties are less likely than counsel to feel judicial pressure and that it serves not only to protect counsel but to give them an avenue of escape from any such pressure they may otherwise feel. To simplify the procedure and to prevent unnecessary delay, when a party is not present, the judge is permitted to proceed on the written assurance of the party's lawyer that the party's consent will be subsequently filed. We believe that his sense of professional responsibility and the necessity of his continued good relationship with his client will preclude the lawyer from heedlessly giving such written assurance in the hope of currying favor with the judge.

Thank you for the privilege of appearing before you and for your interest in the work of the American Bar Association Special Committee on Standards of Judicial Conduct.

Mr. TRAYNOR. I wish first to express my deep appreciation for the privilege of being invited to testify on this important subject of judicial ethics, and both Professor Thode and I also appreciate the guidance your chief counsel has given us.

As to the general scope of my testimony, the chief counsel suggested that I talk broadly on the problem of judicial ethics and about the work of the American Bar Association Committee. A code of judicial conduct was first suggested by Louis F. Powell, Jr., when he was president of the American Bar Association proposed that ethical standards of practicing lawyers be formulated and that ethical standards be set up for judges.

The first project culminated in the Code of Professional Responsibility, which has been widely adopted throughout the country. After the project was completed, we set about to set up a code of judicial conduct and a very distinguished committee was appointed by Mr. Bernard Segal, then president of the American Bar Association. The members are listed in my prepared statement and I should like to add, and this may be a self-serving statement, that I think it was one of the most distinguished committees the American Bar has had.

The committee met 13 times, for 2 days each. It was a hard working committee. We met Saturdays and Sundays. We had subcommittees, and we had tremendous help from judges, lawyers, law professors, throughout the country and also great help from this committee in our deliberations. Our efforts finally culminated in the Code of Judicial Conduct, which the American Bar Association House of Delegates adopted last July in San Francisco.

I must say that I think the proposed bill that you have before you is well balanced and very badly needed. It is a vast improvement over the present law. I think it is very gratifying that you have seen fit to incorporate into the bill most of the basic provisions of the Code of Judicial Conduct relating to the disqualification of judges. There are two or three differences that I should prefer to see you abandon, but I don't think they are of great consequence.

Senator BURDICK. Would you explain why?

Mr. TRAYNOR. Yes, the first one is on the question of waiver of disqualification. We provided a system in which the judge would disclose on the record if he felt that his disqualification was based on a matter of no great significance. Then we were very much concerned about not having what John Frank calls the velvet fist. I have often felt that when a judge asks counsel if it is agreeable to counsel that the judge participate in the case, it is very difficult for counsel to resist the implied invitation the judges' statement of "do you mind if I sit" implies. Most counsels feel a pressure to waive the disqualification. We were very much concerned to prevent pressure of any kind on counsel to agree to the judge's sitting. Under the Code of Judicial Conduct, if the judge thinks that the ground for the disqualification is insubstantial, he will set forth on the record what the ground of disqualification is and will then leave the courtroom or the judge's chambers so that counsel can determine among themselves whether they agree to have him sitting.

We also have a provision that not only must counsel agree but the parties must also agree. We believe that these provisions relieve this velvet glove pressure on counsel to waive the judge's disqualification.

One of the reasons that we differed with the notion of never allowing waiver, which your bill adopts was that we felt that in some areas there are not many judges available. Of course you must understand that this code is nationwide. It is for State judges and elected judges, appointed judges, and Federal judges. So the problem is probably more acute with respect to State judges than it would be with respect to Federal judges. But even with respect to Federal judges we had one of the distinguished members of our committee—Judge Ed Gignoux, the U.S. district judge for the State of Maine—who related experiences he has had. He had a few shares of some stock, really not a substantial interest in the corporation, and the administrative difficulty of getting somebody to replace him and the delay entailed did not seem to justify his disqualification.

Our problem was how to take care of such a case in view of our basic provision that a judge should be disqualified no matter how small his financial interest is. So I think that this basic provision, incorporated in your bill is a tremendous improvement over the existing Federal law. I think the present law calls for disqualification only if the financial interest was substantial. That test involves too many subjective elements. "Substantial" is such a hard concept to tie down that we were convinced that we must stand by the proposition that a judge is to be disqualified for any financial interest no matter how small.

And then we have provisions that the judge must know about his financial interest and he must use reasonable effort to know about the financial interests of members of his household. Although we didn't want to sacrifice our basic provision or get into these vague questions of substantiality, we called for the disqualification of the judge for any financial interest, however small, but permitted waiver of the disqualification when the interest was relatively insubstantial and, independently of the judge, counsel have agreed, with the added clincher that the parties also agree to the waiver to make it doubly sure that there be no velvet glove on the judge's fist to induce counsel to agree to the judge's sitting.

We also felt that not only in cases like Judge Gignoux's—I don't know how many more situations in the Federal system there are like that, Maine is a big state and it is not so easy to get judges to replace a judge like Judge Gignoux—but that in emergency cases also, such as temporary injunctions in labor disputes or other emergency cases, waiver might be appropriate.

Now of course if the judge felt that his interest was so substantial as to disqualify him, he would still have the problem of delay and emergencies. Yet, we did not want to be too rigid. It seems to me that our disqualification provision has much to be said for it.

The one other provision in the bill that caught my eye was with respect to judges who had been lawyers in Government service. Our basic provision on disqualification when a judge's former law office is involved in a proceeding did not meet the problem of Government lawyers who become judges. We therefore set forth in a commentary

that a lawyer in a Government agency does not necessarily have an association with other lawyers in the agency but that a judge formerly employed by a Government agency should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association. Your provision about judges' having served in Government employment calls for disqualification if in that service the judge expressed an opinion concerning the merits of the controversy.

I was wondering if you could not strike out lines 12 and 13 on page 2 stating "or expressed an opinion concerning the merits". You define "proceeding" over on lines 12 and 13 of page 3 of the bill. I wonder whether that definition wouldn't cover the problem.

Earlier in one of our drafts we had a provision that a judge who had a fixed opinion about a subject would be disqualified. There are many things on which it may be good for judges to have fixed opinions, like fixed opinions on freedom under the first amendment, fixed opinions that racial discrimination is invidious, and so on. So I don't know how strict by your provision should be construed that if a judge has a fixed opinion about the merits of a particular case, he should be disqualified.

With the exception of our differences with respect to your very strong provision against waiver and your provisions with respect to Government employment, are the only two provisions with which I have any misgivings whatever. I am most enthusiastic about what you have done. I think it is a tremendously important bill and badly needed. I am grateful for the fine job that is represented by this bill.

Senator BURDICK. Thank you, Judge. I have a few questions, and I believe the staff may have a few also.

Who were the Federal judges who served on your ABA Committee?

Mr. TRAYNOR. The most distinguished was Justice Potter Stewart of the U.S. Supreme Court, then Judge Irving Kaufman of the U.S. Court of Appeals for the Second Circuit and I think if he is not now the chief judge succeeding Henry Friendly, he will be very shortly. Then there was Judge Edward Gignoux. Judge Gignoux is the district judge in Maine. They have only one U.S. district judge in the whole State of Maine.

There were several very distinguished and presently active State judges: Justice James K. Groves of the Supreme Court of Colorado; Ivan Lee Holt, Jr., a Missouri trial court judge; George H. Revelle, a trial court judge from Washington State and at the time of my appointment I was Chief Justice of California. We had a number of very outstanding lawyers, also.

As I said earlier, even if I do say it myself Senator, I am very proud of that committee. The wisdom that was accumulated there was as impressive as any I have ever had the pleasure of enjoying.

Senator BURDICK. The interim report of your committee was distributed to over 14,000 people I understand?

Mr. TRAYNOR. That is right.

Senator BURDICK. I assume that these were lawyers, judges, and legal scholars?

Mr. TRAYNOR. Right.

Senator BURDICK. And also, were any copies sent to civic leaders who were nonlawyers.

Mr. TRAYNOR. That is right.

Senator BURDICK. And after making this distribution, you received 500 letters making comments and suggestions?

Mr. TRAYNOR. On two different occasions, yes.

Senator BURDICK. Pardon?

Mr. TRAYNOR. Yes; we sent out a tentative report and we sent out our proposed final report, and each time we had over 500 letters that were carefully studied and many valuable suggestions came from those letters.

Senator BURDICK. And were they considered?

Mr. TRAYNOR. They were very carefully considered.

Senator BURDICK. Then the tentative draft of the new canons were widely distributed in May 1971 and again criticism was requested?

Mr. TRAYNOR. Right.

Senator BURDICK. And again over 500 replied were received and considered?

Mr. TRAYNOR. That is correct.

Senator BURDICK. Now when was the proposed final draft distributed to the public?

Mr. TRAYNOR. I have forgotten. Do you remember?

Mr. THODE. I believe it was May of last year. It was either late April or early May last year.

Senator BURDICK. May of 1972?

Mr. Traynor. Of 1972, yes.

Senator BURDICK. In July of 1972 the House of Delegates of the ABA approved the new canons?

Mr. TRAYNOR. That is right.

Senator BURDICK. Do you believe that your committee afforded lawyers at large, State judges, Federal judges and legal scholars every opportunity to offer criticism and suggestions relevant to the language employed in the new canons?

Mr. TRAYNOR. They have had an abundance of opportunity, yes.

Senator BURDICK. Do you, in your prepared statement, indicate that these new canons in many respects were drafted as minimum ethical standards for all judges?

Mr. TRAYNOR. That is right.

Senator BURDICK. Pardon?

Mr. TRAYNOR. That is right.

Senator BURDICK. Then to the extent that S.1064 sets a higher standard with respect to waiver of disqualification, do you see any reason why it is improper for Congress to decide to set a more strict rule of waiver?

Mr. TRAYNOR. No.

Senator BURDICK. What comments do you have on the provisions in section (b) (3) of the bill to prescribe specifically the prior connection of a Government lawyer which would require his disqualification?

Mr. TRAYNOR. Well, as I said earlier, the lines 9 through 11 are satisfactory to me. I have misgivings about "or expressed an opinion concerning the merits of the controversy".

Senator BURDICK. In other words, the language on line 12 and 13 bothers you?

Mr. TRAYNOR. Yes.

Senator BURDICK. Now if the word "particular" or the language "the particular case in controversy" were added at the end of line 12 on page 2, would this alter your attitude toward section (b) (3) of the bill?

Mr. TRAYNOR. Well, then you have to look at lines 12 and 13 on page 3. What is added that is not already covered by lines 12 and 13?

Senator BURDICK. What does it add?

Mr. TRAYNOR. Why do you need that language in view of the provisions that the "judge shall disqualify himself from a proceeding in which his partiality might reasonably be questioned"?

I don't see what added protection you are giving to protect the parties and the public from a judge who is partial because of his government service.

Senator BURDICK. Well, then, it would be your opinion that we should delete that portion on line 12 and 13?

Mr. TRAYNOR. That would be my recommendation, most respectfully.

Senator BURDICK. My staff has some additional questions, Judge, and I will turn you over to the staff.

Mr. WESTPHAL. On this matter that you and the chairman were discussing about the language which would require a judge, who had prior service as a Government lawyer and while in such service expressed in opinion concerning the merits of a controversy—and this is the language on lines 12 and 13 on page 2—on that, you previously stated that your concern is that that language might be misinterpreted as requiring a judge who happened to have some fixed belief on the doctrine of contributory negligence, for example, or about the freedoms under the first amendment, that that might be construed as disqualifying him in a case involving that legal issue. Is that generally what your position is?

Mr. TRAYNOR. Yes; we came to that conclusion because of an earlier draft that we had in which we had language something like this in which the judge had a fixed opinion. We received several letters from all over the country that judges shouldn't be disqualified when they have fixed opinions like I mentioned about the first amendment or that discrimination based on race or sex or color and so forth are inherently invidious. Some of these broad terms are hard to pin down as to how far a judge should be a strict constructionalist of them or otherwise. We wouldn't want to get into the hassle of having judges disqualify themselves for having opinions on the law in general.

Mr. WESTPHAL. But on the other hand, as opposed to an expression of opinion on a general issue is the situation where—and fortunately this has not happened too frequently—a judge has expressed an opinion prior to coming on the bench on a particular case.

Mr. TRAYNOR. Well, I think he should then disqualify himself, and I think he would under the general provisions of the code. Your language is pretty good here "in which he participated as counsel, as advisor or material witness concerning the proceedings". And that,

supplemented by the other provisions of the new bill, would seem to me adequate to cover the problem.

Mr. WESTPHAL. On the one hand, we have situations where if all the judge has done in his prior activity is to express a general opinion on a general point of law, well, we certainly don't want to disqualify him in that instance.

Mr. TRAYNOR. No.

Mr. WESTPHAL. But on the other hand, in other situations, you can have a problem of a different kind where the judge, even though he has not served as counsel, advisor or a material witness in a particular proceeding, where he has nevertheless expressed an opinion concerning the merits of that particular case. Now you just stated that you would agree that under those circumstances, he should disqualify himself?

Mr. TRAYNOR. That is right.

Mr. WESTPHAL. And this language, which is on lines 12 and 13 of page 2 of the bill, is merely an attempt to put into the statute a specific requirement that under that circumstance he should disqualify himself.

Now I think the question is this. That if the language, which the chairman has suggested, and that is "the particular case in controversy" is added at the end of line 12, doesn't this then have the advantage of saying that in the second instance, where he has expressed an opinion on a particular matter that is now before him, that he should disqualify himself, but that he need not disqualify himself if all he has done is express a general opinion about the doctrine of contributory negligence or some general views on consumer litigation or something of that kind.

What would your reaction to that language being added be?

Mr. TRAYNOR. Well, as I said, what does that add that isn't covered by the definition of "proceeding" on lines 12 and 13 on page 3. That states a proceeding "includes pretrial, trial, appellate review or other stages of litigation". Now, as I get the import of your question, he has expressed an opinion on the merits of a particular case and I suppose your misgiving is that the general disqualification provisions of 455(a) lines 6, 7 and 8 in which his impartiality might reasonably be questioned wouldn't cover it.

It would seem to me that it would. I'm a little shy about unnecessarily creating problems that such ambiguous language as "expressed an opinion" might entail.

Mr. WESTPHAL. Well, I think that if we can recognize that there are two different types of expressions of opinion, then we are in agreement.

Mr. TRAYNOR. There are two different ones, right.

Mr. WESTPHAL. If we could do that, then we can probably narrow this down to the proper language to arrive at a legislative solution. Solve one of the problems without getting into a ridiculous solution on the other problem.

Mr. TRAYNOR. Right.

Mr. WESTPHAL. Now I take it you are familiar with the situation which recently occurred in the case of *Laird* v. *Tatum*?

Mr. TRAYNOR. Yes.

Mr. WESTPHAL. In which there was question about an expression of an opinion concerning a particular case and you will recall that Justice Rehnquist decided to write a special memorandum in some length, going into that particular set of circumstances. And the then existing law in order to resolve in his own mind this question as to whether under those circumstances he was disqualified. And in that particular case of *Laird* v. *Tatum*, I think that case alone illustrates the fact that a problem can arise which bears upon the impartiality or partiality of a judge who has expressed an opinion in a particular case.

Now without going into the merits of Justice Rehnquist's resolution of this problem that he had, he did state in there after concluding that he should not disqualify himself, he concluded that reasonable men might differ and arrive at a different conclusion on the same facts that he had.

So that if this problem does exist, and if the Congress can fashion appropriate language which serves as a standard or a guide for the judge, it would seem to me that the Congress would be helping a judge to resolve these questions and to make it difficult for someone to criticize the judge later for failing to act one way or the other.

Mr. TRAYNOR. That is quite true. I have difficulty being impressed by the acuteness of the problem, however.

Mr. WESTPHAL. Pardon?

Mr. TRAYNOR. I have difficulty being disturbed by the acuteness of the problem. I don't find it an acute problem. I feel that it would be adequately taken care of by other provisions in your bill.

Mr. WESTPHAL. Well, I would concede to you, Justice Traynor, that this type of situation is one which most easily arises only during the first 2 or 3 years of service on the bench of a lawyer who came to the bench from Government employment as a lawyer in some capacity. Once he gets by that initial 3-year period, unless he has a habit of making public statements about matters pending in lower courts for example, or in his own court, this occasion should never arise again.

Mr. TRAYNOR. Yes; I have no strong opposition to your proposal, Mr. Westphal, more power to you if there is a real problem there and you can find the specific language. It is fine, but I don't see the urgency.

Mr. WESTPHAL. As you can appreciate, Justice Traynor, the committee is trying to search for this appropriate language.

Mr. TRAYNOR. That is right.

Mr. WESTPHAL. Language that satisfies what you would like to see and also satisfies, and does not do any harm, to the other problems that we have.

So, let me just mention this as to the frequency of this and then I will leave the point, because I think we raised the issue and we can't resolve it here.

One of the newspaper articles that the chairman inserted into the record has reference to a situation where a judge had participated in the decision on a criminal case in which he had had some participation while he was in the district attorney's office.

Mr. TRAYNOR. Well, I think he is disqualified.

Mr. WESTPHAL. And this was a matter of some public concern, and reached a point where it was commented upon in the newspapers and to the extent that a standard, a specific standard, can be set to guide judges in similar situations in the future, this is a desirable legislative object, is it not?

Mr. TRAYNOR. Indeed.

Mr. WESTPHAL. Certainly the other language in lines 9, 10, and 11 in which we say that a judge who comes to the bench from government employment and in such capacity participated as counsel, advisor, or material witness, this is certainly not new law. This is existing practice.

Mr. TRAYNOR. Right; it is vitally important.

Mr. WESTPHAL. All right. Now, then, on this point of waiver of disqualification, you mentioned that the conclusion of your committee was that it was appropriate to permit waiver where the financial interest was so small that once a judge makes disclosure of that on the record, it would be appropriate to permit the parties to waive it if they so desired?

Mr. TRAYNOR. Yes; a very important condition though is that it is permitted as long as the waiver is done independently of the judge. We did the best we thought we could to remove the slightest pressure from the judge on counsel. There were two safeguards we had that we thought were adequate on this and that was: One, that this waiver must be made independently of the judge, out of his presence, and the basis for the disqualification must be disclosed on the record; and two, to clinch the matter as best we could, we provided that the parties must agree and not simply counsel. Then to take care of emergency cases where parties were not available, we provided that the judge could proceed on the written assurance of counsel that his party's consent will be subsequently filed.

Those are the provisions we felt removed the velvet-glove type situation, the iron-fist situation. We hoped it removed this "yes, Your Honor" type, yet secretly reluctant of acquiescence.

I have seen it before. I am sure you know the pressure I am talking about.

Mr. WESTPHAL. Right.

Mr. TRAYNOR. And that was a real problem. We wanted to preclude that.

Mr. WESTPHAL. Now the language of this bill goes even further to remove this velvet blackjack from the hands of the judge, doesn't it?

Mr. TRAYNOR. Yes; you just stop it. You cut it off at the outset.

Mr. WESTPHAL. Right. Now, then you mentioned that one problem you get is that in a single-judge district, if you don't permit waiver, it may cause some relative inconvenience in that another judge has to be assigned into that district to preside over that case in which the judge has disqualified himself?

Mr. TRAYNOR. Right.

Mr. WESTPHAL. Now, of course, that problem will exist in any event in a single-judge district where the basis of that judge's disqualification is one of the other three or four specific grounds of disqualification set forth in the canon, isn't that true?

Mr. TRAYMORE. Yes; but the only grounds on which you would permit waiver would be where his impartiality might reasonably be questioned.

Mr. WESTPHAL. I understand.

Mr. TRAYNOR. That would be the only ground.

Mr. WESTPHAL. And that is the basis for the disqualification, and if that is the basis, then in a one-judge district, another judge is going to have to be assigned in any event?

Mr. TRAYNOR. That is right; but as I mentioned before, it is tied in with this disqualification for financial interests, no matter how small. We didn't want to open the door to the claim that the Judge's financial holdings were so insubstantial that counsel need not waive. We didn't want to open that up, because we wanted to maintain the disqualification for any financial interest, however small.

The other matter on which the Code of Judicial Conduct would allow waiver would be on relationships. Those are the only two.

Mr. WESTPHAL. Do you have any strong feelings that if the Congress should decide that the supply of Federal judges be much larger in the Federal system than it is in some of the State systems to which your canon would also be applicable, that in the light of that relatively greater supply and the relatively greater ease of the assignment of judges, from one district to another, that the provision as to waiver should not apply? That is, the waiver of a judge for financial interest, however small, should not apply?

Mr. TRAYNOR. Right. There shouldn't be any waiver then.

Mr. WESTPHAL. All right. I would take it you would have no strong feelings if that should be the policy?

Mr. TRAYNOR. No. I have not.

Mr. WESTPHAL. That is all the questions I have.

Senator BURDICK. Thank you, Judge.

Mr. TRAYNOR. Thank you, Senator.

Senator BURDICK. Our next witness is Prof. E. Wayne Thode, University of Utah College of Law, the Reporter for the American Bar Association Special Committee on Standards.

STATEMENT OF PROF. E. WAYNE THODE, UNIVERSITY OF UTAH, COLLEGE OF LAW

Professor THODE. I have filed a statement with the committee, Mr. Chairman.

Senator BURDICK. You may proceed to summarize it then. The full statement will be made a part of the record without objection.

[The statement of Prof. E. Wayne Thode in full follows:]

STATEMENT OF E. WAYNE THODE, PROFESSOR OF LAW, UNIVERSITY OF UTAH COLLEGE OF LAW, AND REPORTER FOR THE AMERICAN BAR ASSOCIATION'S SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT

Mr. Chairman and members of the Committee, I am honored to be invited to testify on disqualification standards for members of the judiciary. From October 1969 through August 1972, I was the Reporter for the American Bar Association's Special Committee on Standards of Judicial Conduct, more widely known as the Traynor Committee. During that time the Committee's work product evolved through at least thirteen drafts. On August 16, 1972, the Final Draft was unanimously adopted by the House of Delegates of the American Bar Association. The new *Code of Judicial Conduct* superseded the old *Canons of Judicial Ethics* as the American Bar Association's statement of the standards to which it believes all judges should adhere. I shall discuss the disquali-

fication provisions of the new *Code* and give reasons, as I understand them, for the language used.

The provisions of the Code relating to disqualification are as follows:

C. *Disqualification.*

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

COMMENTARY

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

COMMENTARY

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. *Remittal of Disqualification.* A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, 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 judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

COMMENTARY

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

I shall discuss most of the subsections in order. The disqualification section begins with a general standard that sets the policy for disqualification, that is, "A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The general standard is followed by a series of four specific disqualification standards that the Committee determined to be of sufficient importance to be set forth in detail. Although the specific standards cover most the situations in which the disqualification issue will arise, the general standard should not be overlooked. For example, there is no specific disqualification provision for impropriety or appearance of impropriety, although Canon 2 deals with impropriety in general. If the impropriety or the appearance of impropriety would lead a reasonable person to question a judge's impartiality in a given case, then the judge should disqualify himself on the basis of this general provision.

Before discussing the specific disqualification provision, I wish to point out to you that the old *Canons of Judicial Ethics* have only two disqualification provisions:

1. Canon 13 states that a judge "should not act in a controversy where a near relative is a party," and

2. Canon 29 provides that a judge "should abstain from performing any judicial act when his personal interests are involved."

The Committee found these two provisions to be far from satisfactory, not only for their incompleteness, but also for their lack of guidance in a specific situation.

Subdivision (a) has gone through several formulations in drafting. At one time the language provided for disqualification if a judge "had a fixed belief concerning the merits." It was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case. We were confronted, however, by an interpretation of many able judges and law professors that would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case. For example, it was argued that a judge with a fixed belief that the First Amendment precludes a libel action by a public official against a newspaper in the absence of proof of malice should disqualify himself in a libel case of that general character. This interpretation was not intended; indeed, the Committee recognized the necessity and the value of judges' having fixed beliefs about constitutional principles and many other facets of the law. As a result of the apparent ambiguity of the proposed language, the Committee adopted in its stead the present language of "personal bias or prejudice" and has received support for that language from its former critics.

The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute. Subsection 3C(1)(a) therefore provides for his disqualification on that basis, too.

Neither of the topics covered in subsection 3C(1)(a) appears in the *Canons of Judicial Ethics.*

Canon 3C(1)(b) sets the standard for problems that arise most often for a new judge. A judge should not sit in a proceeding in which he has been a witness or has acted as a lawyer. The Committee was of the opinion that he should also disqualify himself in a proceeding if a lawyer with whom he previously practiced law was a witness or served as a lawyer concerning the same matter during such association. The Commentary clarifies the status of a judge who was formerly a lawyer in a governmental agency. An agency—for example, the Justice Department—is not fully equated with a private law firm, in that a former agency lawyer is not considered to have been associated with all other lawyers in the agency. If the former agency lawyer, now a judge, served as a lawyer in the matter in controversy, he is disqualified. The judge is disqualified also if his association with an agency lawyer now before the court or his association with the matter in controversy leads to the conclusion that, under the general standard of Canon 3C(1), his impartiality might reasonably be questioned. The general standard should be considered also when a former associate or partner in a private law firm is a lawyer in the proceeding before a judge. Can the judge's impartiality reasonably be questioned because of the former association? The longer the judge is on the bench, the less the likelihood that the general standard will require his disqualification because of that former association.

Canon 3C(1)(c) is a very important provision. It sets the disqualification standard for financial interests. Chief Justice Traynor has already discussed the policy decisions on which this subsection is based. I shall discuss the details.

The Code provides for a judge's disqualification if his own personal financial interests are involved. It also specifies two other types of financial interests that will result in his disqualification:

1. The interests held by a judge as a family fiduciary. The *Code* allows a judge to act as a fiduciary for the estate or person of a member of his family. The Committee felt, however, that the interests held by the judge as a family fiduciary should disqualify him the same as his personal financial interests disqualify him. He should not have greater leeway in handling economic interests for another than for himself. In the Committee's opinion, the appearance concerning a lack of impartiality is the same.

2. The interests of a judge's spouse and minor children residing in his household. Again the Committee felt that the appearance of a lack of impartiality would be the same whether the interest was that of a judge or one of the specified family members. The same disqualification standard that is applied when the judge's personal financial interests are concerned should be applied when the financial interests of a judge's spouse or minor children are concerned. There is one significant difference however, in the standard applied when a judge's interests, rather than those of his spouse or minor children, are in issue. Canon 3C(2) requires a judge to *know* what his personal and fiduciary financial interests are, but he is required to make only a reasonable effort to learn of the financial interests of his spouse and minor children residing in his household.

One important result of requiring a judge to know about his financial interests is to preclude the use of a so-called "blind trust" by a judge as a means of protecting himself from disqualification or from the necessity of investing in a manner to minimize the likelihood of his disqualification. The Committee rejected the blind trust concept for several reasons:

1. The complexity and cost of the blind trust would make it unavailable to most judges.

2. There was doubt as to how blind the blind trust would be. The judge, for example, may be required to sign an income tax return that reports investment income and capital gains and losses. There are many other ways in which the blindfold may be removed.

3. Most important was the doubt that the public and litigants would believe that the trust was blind if after a decision the fact was disclosed that the judge had had a substantial blind trust interest in the winning party in a proceeding before him.

The Committee also considered and rejected the "substantial interest" test of the present Section 455, title 28 of the United States Code. There were two main reasons for the rejection. One was based on the doubt that the "substantial interest" test, when applied to a direct economic interest, is constitution-

ally sound. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court held that the decision by a judge who received a small portion of the court fees collected from a defendant upon conviction denied the defendant due process of law. The Court held that a judge's decision should be set aside if there is "the slightest pecuniary interest on the part of the judge." 273 U.S. at 524. *Tumey* presents a fact situation that can be distinguished from the type of problem dealt with here, but the Supreme Court in *Commonwealth Coatings Corporation v. Continental Casualty Company*, 393 U.S. 145 (1968), clearly indicated that *Tumey* is not to be limited to its specific fact situation. Several state courts also have taken the position that any direct economic interest disqualifies the judge. *See, e.g., Hughes v. Black*, 160 A.2d 113 (Me. 1960); *State v. Churchill*, 195 So.2d 599 (Fla. Dist. Ct. App. 1967); Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43 (1970).

A further reason for rejecting the "substantial interest" test was its ambiguity. Does "substantial" mean that the judge's financial interest in the party is to be compared to the total of all financial interests in the party? On such a basis, one hundred shares of AT&T stock compared to the total number of shares outstanding might well be considered insubstantial. But what if the one hundred shares represent all of the judge's assets? Surley this is substantial from the judge's point of view. Judge George Edwards, in his *Commentary on Judicial Ethics*, 38 Fordham L. Rev. 259, 267 (1969), takes the sound position that "substantial" must be examined also from the viewpoint of the judge's assets. On the basis of such a standard, in each case in which the judge determined his interest to be insubstantial, the judge's total financial picture would necessarily be relevant and would become public if his decision were challenged. Thus, administering the "substantial interest" standard could result in great uncertainty or an invasion of the personal financial privacy to which the Committee felt a judge is entitled.

The Committee finally concluded that for the purpose of disqualification the economic interests of a judge should be divided into three categories. Those categories and the significance of each in making the disqualification decision are as follows:

1. A direct legal or equitable ownership interest, however small, in a party to a proceeding disqualifies a judge. (Another subsection, Canon 3C(3)(c), defines a relationship as a director, advisor, or other active participant in the affairs of a party as a direct financial interest that will disqualify a judge.)

2. A direct legal or equitable ownership interest, however small, in the subject matter in controversy disqualifies a judge. This category becomes significant in *in rem* proceedings.

3. An interest that could be subtantially affected by the decision in a proceeding before a judge disqualifies him. This category has a broad sweep. For example, if the decision in a proceeding involving only one bank will have a substantial effect on the value of stock of all domestic banks in the jurisdiction in which the court sits, then the judge is disqualified if he has stock in any domestic bank. Here the issue is not whether a judge has a "substantial interest," but whether the interest that he has could be substantially affected by a decision in the proceeding before him. A second example involving the investments held by a mutual fund in which a judge has an interest is discussed under Canon 3C(3)(c)(i), *infra*.

Another interest that falls into this third category is a judge's interest as a ratepayer to a party involved in proceedings before him. Examples include a judge as a customer of a public or private utility company, as a taxpayer, or as a premium payer to a stock insurance company. Although being a ratepayer does not involve "ownership of a legal or equitable interest" in the party to whom the judge made such payments, the Committee concluded that at some point a relationship to a party as a utility customer, taxpayer, or premium payer should disqualify a judge. The test is that a judge should disqualify himself if the outcome of the proceeding could substantially affect his interest as a customer of the utility, as a taxpayer, or as a premium payer.

The fourth and final specific ground of disqualification is based on family relationship. Old Canon 13 states, "A judge shall not act in a controversy where a near relative is a party." The Committee considered that "near relative" is too indefinite and that a relative as a *party* is only a part of the problem.

The degree of relationship that will result in disqualification is statutory in many states, possibly because of the lack of specificity in Canon 13. Twenty

states set the disqualification at the third degree; eight states specify the fourth degree; and one state, Michigan, uses the ninth degree. The third degree of relationship selected by the Committee automatically disqualifies a judge if, for example, his nephew or uncle is involved in the proceeding. There is no automatic disqualification if his first cousin is involved, but the general Canon 3C(1) standard of "impartiality" might require the disqualification of the judge if he in fact had a close personal relationship with the cousin. A "Relationship and Degrees of Kindred" chart is attached as Appendix A.

The disqualification standard was expanded to include not only a relative within the third degree as a party, but also any relative within the third degree who is a director or officer of a party, or who is known by a judge to have a substantial interest in the subject matter or in a party, or who is a known material witness in the proceeding, or who is a lawyer in the proceeding. As the Commentary to Canon 3C(1)(d)(ii) makes clear, however, the fact that a relative of a judge is affiliated with a law firm that is involved in the proceeding does not automatically disqualify the judge. The Committee felt that such a broad disqualification is not justified. Of course, either a breach of the general impartiality test or a judge's knowledge that his lawyer-relative's interest in the law firm could be substantially affected is a basis for disqualification.

The relationship disqualification standard applies in the same manner to a judge's relatives, to a judge's spouse's relatives, and to the spouses of all the foregoing relatives. The Committee concluded that to maintain the appearance of impartiality the disqualification standard should encompass all persons within the third degree of relationship to a judge or his spouse even though the relationship arises only through marriage.

As has been discussed under Canon 3C(1)(c), *supra*, subsection 3C(2) requires a judge to keep currently informed about his own personal and fiduciary financial interests. If he does not, he should be subject to sanctions for violation of this provision.

On the other hand, a judge is required to make only a "reasonable effort" to learn of the financial interests of his spouse and minor children residing in his household. This differentiation in requirements is based on the sensible position that in order to preserve the appearance of impartiality a judge need not be forced to demand and obtain the information about the affairs of his spouse and minor children residing in his household; he should be required to make only a reasonable effort to obtain the information. Many factors will be relevant to the determination of "reasonable effort." Did the interest of the spouse or child come from the judge or from another source? Does the spouse or child know the nature of the interest, or is he or she the beneficiary of a blind trust? Has the spouse's or child's financial interest been supervised by the judge in the past, or has the judge not been involved in the handling of the interest?

The Committee decided that the requirement that a judge make a reasonable effort to learn of the financial interests of his spouse should not apply to the financial interests of other adult members of his family residing in his household, or of members of his family who no longer reside in his household. Canon 3C(1)(d)(iii) provides for disqualification of the judge only if he has knowledge of the financial interests of those persons. The judge has no duty to seek the information.

Subsection (3) provides a series of definitions to be used in applying the *Code*. Subsection (3)(a) and its Commentary make clear the method of determining the degree of relationship between a judge and a person whose relationship with the judge may disqualify the judge. The essence of the test is to count as one degree each person in the chain from the judge to the common ancestor and from the common ancestor to the person whose relationship raises the issue. For example, if the issue is raised by the judge's relationship with X, a son of the judge's father's brother, the counting of degrees would be as follows:

The judge's father is related in the first degree; his father's father, the common ancestor, in the second degree; the father's brother, in the third degree; and the brother's son, X, is related to the judge in the fourth degree.

Subsections (3)(b) and (3)(c)(ii) contain provisions that may profitably be considered together. The definition of "fiduciary" in (3)(b) provides a precise statement of one category of a judge's disqualifying financial interests; the exception in (3)(c)(ii) provides that a judge's interest as an office holder in an educational, religious, charitable, fraternal, or civic organization is not a

"financial interest" in securities held by the organization. Considered together, (3)(b) and (3)(c)(ii) provide the key to understanding the kinds of fiduciary interests that will cause a judge to be disqualified. They draw a line between a judge's interests as a fiduciary for a "private" trust or estate and some of his interests as a fiduciary for what could broadly be considered a public institution—an educational, religious, charitable, fraternal, or civic organization. If such an organization is a party in a proceeding before the judge, Canon 3C(1)(d) requires his disqualification. However, the financial interest of such an organization in securities held by it in a party is not an interest attributable to the judge that will disqualify him, unless of course in the particular case the interest and his connection with it bring into play the broad test of Canon 3C(1) that "his impartiality might reasonably be questioned." (It should be pointed out here that Canon 5B(3) precludes a judge from giving investment advice to such an organization, thereby making his role quite different from the one he has as a private interest fiduciary.) Were it not for the distinction drawn by the two subsections under discussion, the fiduciary disqualification standard would as a practical matter preclude judges from being trustees of any type of "public" institution with an investment portfolio. As a matter of policy, the Committee was not willing to do this.

Subsection 3C(3)(c) defines "financial interest" to mean "ownership of a legal or equitable interest, however small." This definition is part of a carefully constructed, cohesive system that sets standards for disqualification of a judge for economic interest and gives guidance for investments. Not all of a judge's economic interests are defined as "financial interests." (See the discussion under Canon 3C(1)(c), *supra*.) The "financial interest" of a judge that will disqualify him as his direct legal or equitable ownership interest, no matter how small, in a party or in the subject matter in a proceeding before him. The Committee was also of the opinion that active participation by a judge in the affairs of a party should be treated in the same manner as a judge's having a "financial interest" in that party.

The Committee strongly felt that it should identify certain types of investments by a judge that would not automatically lead to his disqualification. The investments authorized in subsection 3C(3)(c)(i) are those available through regulated investment mechanisms. Ownership of shares in a mutual or common investment fund requires a judge's disqualification under Canon 3C(1)(c) if the fund is a party to a proceeding before him, but under subsection (c)(i) a judge's interest in a fund does not automatically result in his disqualification simply because the fund holds securities in a party to a proceeding before him. The judge is disqualified, however, if he participates in the management of the fund. The Committee considered and rejected the use of a disqualifying percentage figure for holdings by such a fund in a party before the court. For example, it was suggested that if the fund in which the judge has an interest has at least ten percent of its assets invested in a party before the court, the judge should be disqualified. The percentage test was rejected on the basis of the practical difficulty in determining at any given time what investments are held by a fund, and on the basis that the mutual fund's management, knowingly or unknowingly, could cause an investing judge's disqualification at any time during a proceeding by an investment in a party litigant. The indirectness of the interest in a party litigant, the judge's lack of control over the fund's investment decisions, the likelihood that the judge does not know and cannot easily find out at any given time about a fund's portfolio, and the need for some types of non-disqualifying investments for judges led the Committee to make the policy decision that investments in such funds should be available to a judge. The protection against disqualification is not absolute. Here, as in all other circumstances, the broad test of Canon 3C(1), that a judge's "impartiality might reasonably be questioned," is applicable. In addition, if the judge knows that his fund holds securities in a party and if the outcome of the proceeding could substantially affect the value of his interest, subsection 3C(1)(c) requires his disqualification just as it does for any other known economic interest of his that is not defined as a financial interest. A judge, however, is not required to know, or to make a reasonable effort to ascertain, what security interests are held by his mutual or common investment fund, since such security interests are not defined as a judge's financial interests.

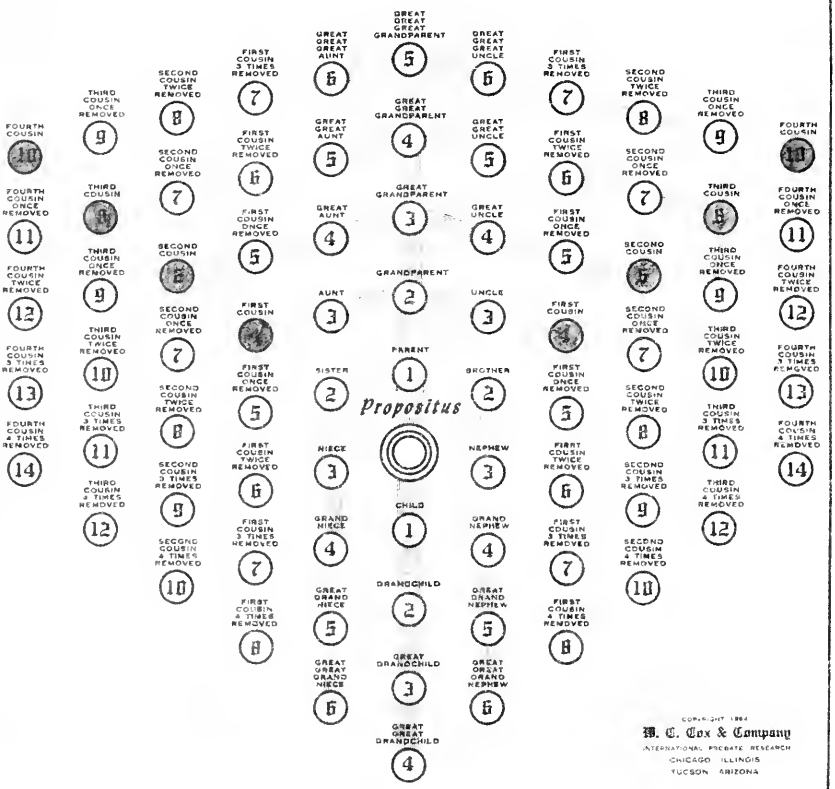
When a judge deposits money in a mutual savings association or takes out a policy of insurance in a mutual insurance company, he has a technical legal

interest in the association or company. The Committee was of the opinion that these technical interests, and other similar ones, should not be a basis for disqualifying a judge even though the association or company is a party to a proceeding before him, unless the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable. The same reasoning was applied to a judge's investments in government securities when the governmental entity is a party to a proceeding before the judge. Absent these exceptions, these types of investments might well be denied the judge because of the likelihood that these entities would be in his court often enough to bring Canon 5C(3) into operation.

Appendix A

RELATIONSHIP and DEGREES of KINDRED

The Cox Chart



Numerals indicate the degree of kindred to the propositus or decedent. Full cousins are indicated in red. Cousins below full cousins are "in the descendancy", all above are "in the ascendancy". Consult an Attorney regarding rights of persons of each degree of kindred in the various jurisdictions.

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In Canon 3C(3)(c) the Committee endeavored to set a standard for economic disqualification for indirect and technical interests that assures impartiality and the appearance of impartiality but at the same time makes available to a judge some types of non-disqualifying investments.

Chief Justice Traynor has discussed the policy basis for the *Remittal of Disqualification* section, and its practical operation, and so I shall not discuss that section.

This concludes my discussion. Thank you for your invitation to appear and for your kind attention to my remarks.

Professor THODE. Mr. Chairman, I am honored to be invited to testify on the disqualification standards for members of the judiciary. From October 1969, through August 1972, I was the reporter for the American Bar Association's Special Committee on Standards of Judicial Conduct, more widely known as the Traynor committee. The product of that committee, the "Code of Judicial Conduct", was adopted on August 16, 1972, by unanimous votes of the House of Delegates of the American Bar Association and it superseded the old "Canons of judicial ethics" as the American Bar Association's statement of the standards to which it believes all judges should adhere.

I shall discuss the disqualification provisions of the new code, and give reasons, as I understand them. I of course cannot speak for that committee, but I will give you my understanding of the reasons for the particular language in the disqualification section.

I shall also discuss the subsections of canon 3 (c) in the order in which they appear in the "Code of Judicial Conduct".

Now the disqualification section begins with a general standard that sets the policy for disqualification, that is, " a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." The general standard is followed by a series of four specific disqualification standards that the committee determined to be of sufficient importance to set forth in detail.

Although the specific standards cover most of the situations in which disqualification issues will arise, the general standard should not be overlooked. For example, there is no specific disqualification provision for impropriety or appearance of impropriety, although canon 2 deals with impropriety in general. Now if the impropriety or the appearance of impropriety would lead a reasonable person to question a judge's impartiality in a given case, then the judge should disqualify himself on the basis of this general provision. That is, his impartiality can reasonably be questioned because of the impropriety.

The old canons of judicial ethics have only two disqualification provisions and they are old canon 13, where it states that a judge "should not act in a controversy where a near relative is a party", and old canon 29, which provides that a judge "should abstain from performing any judicial act when his personal interests are involved."

The committee found these two provisions to be far from satisfactory, not only for their incompleteness but also for their lack of guidance in a specific situation.

Subdivision (a) of canon 3(c), that is, "he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings" went through several

formulations in drafting. At one time the language provided for disqualification if a judge "had a fixed belief concerning the merits." It was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case. We were confronted, however, by an interpretation of many able judges and law professors that would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case. That interpretation was not intended by the committee and so, because of the ambiguity in that language, the language was changed to its present form of "personal bias or prejudice" and it has received support for that language from its former critics.

The committee also concluded that a judge cannot be, or cannot appear to be impartial if he has personal knowledge of evidentiary facts that are in dispute.

Subsection 3(C)(1)(a) therefore provides for this disqualification on that basis also.

Canon 3(C)(1)(b) sets the standard for problems that arise most often for a new judge. A judge should not sit in a proceeding in which he has been a witness or acted as lawyer. The committee was of the opinion that he should also disqualify himself in a proceeding if the lawyer with whom he previously practiced law was a witness or served as a lawyer concerning the same matter during such association.

The commentary clarifies the status of the judge who was formerly a lawyer in a governmental agency. An agency, for example, the Justice Department, is not fully equated with a private law firm, in that a former agency lawyer is not considered to have been associated with all other lawyers in the agency. I might say we started out by equating the two and, as we went along the committee decided that that really was taking too hard a line because to say that all lawyers in the Justice Department or the FCC or any other agency are to be considered in the same way that you would consider the lawyers in a private law firm, that was just too sweeping a disqualification and there was no good reason for it.

So the language was changed and the commentary sets up the modification and the explanation for its application to Government lawyers. I should say that in the code we used the commentary sometimes for the purpose of example or explanation of a provision, but we never added new standards in the commentary.

As the commentary points out, if a former agency lawyer, who is now a judge, served as a lawyer in the matter of the controversy, he is disqualified. The judge is disqualified also if his association with an agency lawyer, who is now before the court, or his association with the matter in controversy leads to the conclusion that, under the general standard of canon 3(C)(1), his impartiality might reasonably be questioned. The general standard should be considered also when a former associate or partner in a private law firm is a lawyer in the proceeding before a judge. Can the judge's impartiality reasonably be questioned because of the former association? The longer the judge is on the bench, the less the likelihood that the general standard will require his disqualification because of that former association.

Canon 3(C)(1)(c) is a very important provision. It sets the disqualification standard for financial interests. The code provides for a judge's disqualification if his own personal financial interests are involved. It also specifies two other types of financial interests that will result in his disqualification:

1. The interest held by a judge as a family fiduciary. The code allows a judge to act as a fiduciary for the estate or person of a member of his family. The committee felt, however, that the interest held by the judge as a family fiduciary should disqualify him the same as his personal financial interests disqualify him. He should not have greater leeway in handling economic interests for others than for himself. In the committee's opinion, the appearance concerning a lack of impartiality is the same.

2. The interests of a judge's spouse and minor children residing in his household. Again, the committee felt that the appearance of a lack of impartiality would be the same whether the interest was that of a judge or one of the specified family members. The same disqualification standard that is applied when the judge's personal financial interests are concerned should be applied when the financial interests of the judge's spouse or minor children are concerned. There is one significant difference, however, in the standard applied when a judge's interests, rather than those of his spouse or minor children, are in issue. Canon 3(C)(2) requires a judge to know what his personal and fiducial financial interests are, but he is required to make only a reasonable effort to learn of the financial interests of his spouse and minor children residing in his household.

Now, we had many examples in letters from the judges stating that a spouse, for example, was a beneficiary of a blind trust. The judge in that situation did not know what was in that trust and the spouse didn't know either. I didn't think that he had to pry in and find out what was in that fund, and the committee agreed.

We had examples of minor children that had trusts that the father the judge, did not know what was in them. The judge felt in those circumstances, having the trust set up that way by a grandfather or some other relative, that he ought not to have to pry into it when he never had when he was not a judge.

The committee agreed that he ought not to have to demand to know what is in there. He could just ask and if he didn't find out that would then be a reasonable effort to find out, but he shouldn't have to demand to be informed.

One important result of requiring a judge to know about his financial interests is to preclude the use of a so-called blind trust by a judge as a means of protecting himself from disqualification or from the necessity of investing in a manner to minimize the likelihood of his disqualification. The committee rejected the blind trust concept for several reasons:

1. The complexity and cost of the blind trust would make it unavailable to most judges.

2. There was doubt as to how blind the blind trust would be. The judge, for example, may be required to sign an income tax return that reports investment income and capital gains and losses. There are many other ways in which the blindfold may be removed.

3. Most important was the doubt that the public and litigants would believe that the trust was blind. If after the decision the fact was disclosed that the judge had had a substantial blind trust interest in the winning party in a proceeding before him. The reaction of the public, it seems to me, if they found out the judge had a $100,000 interest in the winning party and he said he didn't know he had that interest, but the result was greatly to his advantage, would be one of scepticism. It seems to me that a judge ought not be put in that kind of position with regard to the public. The committee decided that he must know about his interests so he can thereby disqualify himself rather than using this blind trust.

The committee also considered and rejected the substantial interest test of the present section 455 title 28 of the U.S. Code. There are two main reasons why they rejected that substantial interest test. One was based on the doubt that the substantial interest test, when applied to a direct economic interest, is constitutionally sound. The old case of *Tumey* v. *Ohio* raises an issue about whether a party gets due process of law if a judge has any type of direct economic interest in the outcome of a case. The *Tumey* case did involve a criminal case in which the judge got part of the amount of the court fees collected from a defendant upon conviction. Now, you could distinguish that case certainly, from the kind of problems that we are talking about, but the Supreme Court in the *Commonwealth Coatings* case certainly applied *Tumey* much broader when it said that an arbitrator was disqualified because he failed to inform the parties that he had had financial dealings with one of the parties to the arbitration proceeding. The Court cited *Tumey*, and so it seems to me that *Tumey* must be interpreted much broader than it has been.

Several States have also taken the position that a judge with any direct interest must disqualify himself.

A further reason for rejecting the substantial interest test was its ambiguity. Does "substantial" mean that the judge's financial interest in the party is to be compared to the total of all financial interests in the party? On such a basis, 100 shares of AT&T stock compared to the total number of shares outstanding might well be considered insubstantial. But what if the 100 shares represent all of the judge's assets? Surely this is substantial from the judge's point of view. Judge George Edwards of the sixth circuit in an article in the Fordham Law Review in 1969 takes the sound position that "substantial" must be examined also from the viewpoint of the judge's assets. On the basis of such a standard, in each case in which the judge determined his interest to be insubstantial, the judge's total financial picture would necessarily be relevant and would become public if his decision were challenged.

Thus, administering the "substantial interest" standard could result in great uncertainty or an invasion of the personal privacy to which the committee felt a judge is entitled. The committee felt that applying that kind of standard would be an invasion of privacy because if there was a challenge the judge's whole financial picture would have to be laid out in order to make a determination about the substantiality of the interest.

The committee also concluded that for the purpose of disqualification the economic interests of a judge should be divided into three

categories. Those categories, and the significance of each in making the disqualification decision, are as follows:

(1) A direct legal or equitable ownership interest, however small, in a party to a proceeding disqualifies the judge. Also the committee defined a relationship as a director, advisor, or other active participant in the affairs of a party as a direct financial interest that will disqualify a judge.

(2) A direct legal or equitable ownership interest in the subject matter in controversy disqualifies a judge. This category becomes significant in *in rem* proceedings.

(3) An interest that could be substantially affected by the decision in a proceeding before a judge disqualifies him. This category has a broad sweep. For example, if the decision in a proceeding involving only one bank will have a substantial effect on the value of stock of all domestic banks in the jurisdiction in which the court sits, then the judge is disqualified if he has stock in any domestic bank. Here the issue is not whether a judge has a substantial interest, but whether the interest that he has could be substantially affected by a decision in the proceeding before him. A second example involving the investments held by a mutual fund in which a judge has an interest is discussed under canon 3(C)(3)(c)(i).

There are other kinds of interests that fall into this third category. The judge's interest as a ratepayer to a party involved in proceedings before him is one example. Examples include a judge as a customer of a public or private utility company, as a taxpayer, or as a premium payer to a stock insurance company. A judge may have many cases with a governmental unit before him to which he is paying taxes; and he is going to have cases of public or private utilities coming before him, and he too is paying those bills. He is a customer, he is a consumer. Being a ratepayer does not involve ownership of a legal or equitable interest, but the committee concluded that at some point a relationship to the party as a customer, taxpayer, or premium payer should disqualify a judge. The test is that a judge should disqualify himself if the outcome of the proceedings could substantially affect his interests as a customer of the utility, as a taxpayer, or as a premium payer.

Senator BURDICK. May I ask you a question right here? I notice what you said about mutual funds. There are some special mutual funds. Now let's assume it is an energy mutual fund and let's assume that all of the stocks in that fund were interests in power companies and so forth. In the case before the judge, if it involves utilities, is that sufficiently separated from the judge, or should he disqualify himself?

Professor THODE. I think if the judge is aware of the kinds of investments, specifically, that that mutual fund has, then he falls under the disqualification section whereby his impartiality might reasonably be questioned because he knows of the fund's investment in a party.

Senator BURDICK. But generally speaking, mutual funds do not disqualify him unless he participates directly?

Professor THODE. He can not participate as director or advisor and not be disqualfied, but if he is a general kind of mutual fund

owner and he does not know from day-to-day or week-to-week the kinds of interests, that would not disqualify him.

Senator BURDICK. But what about some special mutual fund?

Professor THODE. Certainly under this interpretation it must not be so narrow that he does know of kinds of investments that it has. If he knows what the fund's interests are, then the general standard should apply to him and he would be disqualified. I think a judge would have to be very careful in investing in these narrow mutual funds because it seems to me they are likely to lead to disqualification.

The fourth and final specific ground of disqualification is based on family relationship. Old canon 13 states that "a judge shall not act in a controversy where a near relative is a party." Well, the committee thought that was pretty indefinite. Who is a near relative? So the present standard sets the disqualification at the third degree. In doing research for this code we discovered that 20 States set the disqualification at the third degree and 8 States set it at the fourth degree and one State, Michigan, uses the ninth degree. I doubt that the judges ever really know whether they are within the ninth degree. I think only in Utah where we have the marvelous genealogy records would a person find out whether he is related to another in the ninth degree. I don't think, as a practical matter, they can apply that in Michigan, but it is a statutory provision.

The committee adopted the third degree, but it applies not only to a relative within the third degree but to the spouse of a relative within the third degree. The committee could see no basis for a distinction between relatives and spouses of relatives. They thought they both should come under the disqualification standard.

It also applies to include not only a relative within the third degree as a party, but also any relative within the third degree who is a director, or officer of a party, or who is known by a judge to have a substantial interest in the subject matter or in a party, or who is a known material witness in the proceeding, or who is a lawyer in the proceeding.

I previously discussed subsection 3(C)(2) which requires a judge to keep currently informed about his own personal and fiduciary and financial interests. If he does not, he should be subject to sanctions for violation of that provision.

I have already pointed out how the judge does not have to know of the financial interests of a spouse and minor children, but only has to make a reasonable effort to learn of those things. As to other relatives, the code does not require that a judge make any effort to find out, if he does not know, that a relative has an interest in the party or the subject matter, even though it is an interest that could be substantially affected by his decision.

Knowledge of such an interest would disqualify him, but he doesn't have to search out the knowledge or make a reasonable effort to get it. It is only if he knows of this interest of such a relative, then he must disqualify himself.

Again, it is the appearance of impartiality that controls here, and that standard was considered important enough that the committee felt the judge ought to be disqualified if he had that kind of knowledge about a relative's interest.

Now subsection 3 provides a series of definitions to be used in applying the code. Subsection (3)(a) and its commentary make clear the method of determining the degree of relationship between the judge and a person whose relationship with the judge may disqualify the judge. Now to go into the details of that, we used the civil law system, and we have spelled out by definition what that means, and also by example.

Subsections (3)(b) and (3)(c)(ii) contain provisions that may profitably be considered together. The definition of "fiduciary" in 3(b) provides a precise statement of one category of a judge's disqualifying financial interests. On the other hand, if a judge is an officeholder in an educational, religious, charitable, fraternal, or civic organization, that is not a "financial interest" in securities held by the organization. Investments of that kind by those types of institutions are not financial interests of a judge that will disqualify him.

The committee decided, as a matter of policy, that if a judge should be disqualified for those kinds of interests, then the practical thing to do would be to say he can't be a trustee or fiduciary for any of those organizations, because almost all of them have some kinds of investments—or many of them do. It would require such a broad sweep of disqualification that the committee's decision was that those kinds of investments, that is, by educational, religious, charitable, fraternal, or civic organizations, should not disqualify a judge holding such office.

On the other hand, the code does provide that a judge cannot be on an investment committee of that kind of institution. So he is not required to have detailed knowledge about the investments of those institutions.

As I have already pointed out, subsection 3(C) defines "financial interest" to mean ownership of a legal or equitable interest, however small. This definition is part of a carefully constructed cohesive system that sets standards for disqualification of a judge for economic interests and gives guidance for investments.

The committee felt strongly that it should identify certain types of investments by a judge that would not automatically lead to his disqualification. The investments authorized in subsection 3(C)(3)(c) are those available through regulated investment mechanisms.

As we have already discussed, Mr. Chairman, generally speaking the mutual funds and common investment funds are available to a judge, but there are dangers even there if they are very narrow in the kinds of investments they make. The judge, of course, is disqualified if that mutual or common investment fund is a party to a suit before him. He is disqualified if he participates in the management of that fund. The committee considered and rejected the use of a disqualifying percentage figure for holdings by such a fund in a party before the court. The committee decided that really that was an unworkable system. How does the judge know whether the fund has a 10-percent interest today in this particular party? He may start the suit and tomorrow he would be disqualified. The committee felt that that was not a sound way to go about establishing a disqualification standard.

I think it is important concerning any of these investments to keep in mind that the general standard is always applicable to a judge if the circumstances are such that it appears that his impartiality might reasonably be questioned.

Now when a judge deposits money in a mutual savings association or takes out a policy of insurance in a mutual insurance company, he has a technical legal interest in the association or company. The committee was of the opinion that the technical interests, and other similar ones, should not be a basis for disqualifying a judge even though the association or company is a party to a proceeding before him. Unless the value of his interests could be substantially affected by the outcome of the proceeding or the broad test of canon 3(C)(1) is applicable, he should not be disqualified.

The same reasoning was applied to a judge's investments in Government securities when the Government entity is a party to a proceeding before the judge. Is his interest one that could be substantially affected by the outcome? Again, as always, the general standard, "Can his impartiality reasonably be questioned under these circumstances?" must be answered

In 3(C)(3)(c) the committee endeavored to set a standard for economic disqualification for indirect and technical interests that assures impartiality and the appearance of impartiality but at the same time makes available to a judge some types of nondisqualifying investments.

Concluding my discussion, I think I should point out to you that to my knowledge the following States have adopted the code: Colorado, Massachusetts, New Hampshire, Virginia, West Virginia, and also the District of Columbia judges have adopted the code. And as you certainly are aware, the Federal Judicial Conference has adopted the code.

Now I do not know the specifics of these adoptions. My general impression is that the disqualification section probably was not changed in any way, but I have not seen their final adoptions, so I cannot state that with certainty. But the kinds of correspondence I have had with people who were involved in these adoptions indicates to me it was in other areas of the code that they might have made some changes.

This concludes my discussion, Mr. Chairman. Thank you again for the invitation to appear.

Senator BURDICK. Thank you for your contribution this morning.

I have a few questions, and I will be followed by the staff.

You mentioned in your statement that in the old Canons of Ethics, a disqualification of a judge was required in only two specific instances, namely, where a party was a near relative to the judge, and where the judge's personal interests are involved. In this respect, the old canon and the present language of section 455 of title 28 are somewhat similar, in that the present statute refers to "substantial interest" and refers to the judge being "so related" to a party. Do you agree?

Professor THODE. Yes, sir.

Senator BURDICK. In your statement, you explained the problems which arise from use of the word "substantial" as a description of

the amount or character of financial interest which requires disqualification. Isn't it also possible that the word "substantial" as used in the present form of the Federal statute can cause some problems where the value of the judge's stock is only $1,000 or $2,000 but the party before him is someone whose annual income is only $2,000 to $3,000?

Professor THODE. I think so, sir. I would have to state that he may have an insubstantial interest, but if it is as much or more than the value of the litigation before him, it seems to me to create real problems.

Senator BURDICK. You say that the result of the requirement that a judge knows of his financial interest, the result is to preclude the use of a blind trust. Since a blind trust is precluded, to what extent do the canons in the new Code of Ethics permit a judge to have and to hold financial investments, and to what extent does the language in canon 5(C)(1) of the Code of Ethics bear upon this question?

Professor THODE. Certainly the judge has to be very careful in the kinds of investments that he makes. He may invest in mutual funds, government securities, and other kinds of investments, hopefully, in companies that are not likely to come before his court.

5(C)(1) deals with the problem of the judge actively being involved in businesses, as manager, director, operator, employee, and so on. It seems to me it is closely tied in with this same idea that we are talking about, that is the judge must be very careful in his investments, but he also must be very careful in not getting into business himself or otherwise being involved in business activities.

There is a great danger in the judge being involved in business activities, because the natural feeling of "well if I do business with the judge, I may get a break, or at least not be worse off than before, but if I don't do business with him he is going to hold it against me." That is just a terrible situation that litigants and parties should not be put into.

Senator BURDICK. As I understand your testimony, the ABA committee which drafted the new Code of Ethics gave consideration to the possibility of writing into the code a fixed percentage of ownership in a corporation or in a mutual fund which would determine the grounds of disqualification. Would you explain again why such a fixed percentage is not workable?

Professor THODE. There were several drawbacks to the fixed percentage. I suppose the most significant one was the practical difficulty in determining at any given time what investments are held by a fund. If there is a party before a judge and his fund has some kind of investment in it, he needs to know today whether that fund has a 10-percent interest or whatever the fixed percentage is, and that may be very difficult to find out. Even if he finds out that it is less than 10 percent, the fund managers may change that tomorrow and might increase it. He may find it is only 5 percent today and he can sit in the case, and yet tomorrow, while he is trying the case, the fund managers buy more and it is now 15 percent. He would be disqualified.

So the danger of allowing fund managers, either intentionally or unintentionally, to be able to affect the judge's disqualification,

which the committee found to be undesirable, plus the difficulty of finding out about the funds, led to the rejection of a percentage test.

Senator BURDICK. I understand completely what you say, As a matter of fact I have a small interest in a fund and, so help me, I don't even know what they own.

Professor THODE. That is the situation with most, I am sure.

Senator BURDICK. But when you get into the special funds, you have a little different problem?

Professor THODE. Yes, sir.

Senator BURDICK. Am I correct in understanding that the third degree of relationship which compels disqualification is computed whether that relationship is either by blood or by marriage?

Professor THODE. Yes, the method of computation is that you trace back to the common ancestor, for example, if you are talking about a first cousin who is a lawyer in the case. In that case, is the judge disqualified? Well, you trace back to the common ancestor, who is the grandfather. The judge's father would be number 1, the grandfather number 2, the brother of the judge's father would be number 3, the cousin is number 4. The judge would not be automatically disqualified because he is not within the third degree, but you still have the general question of whether the judge was very close to his cousin. Did they grow up together? Is there a general appearance here of lack of impartiality because of this relationship?

The judge never gets away from that standard. It is always with him even if there are no others available.

Senator BURDICK. Are you familiar with the fact that the Judicial Conference of the United States, in a meeting in April of 1973 where it adopted the new Code of Judicial Conduct approved by the American Bar Association as being applicable to all Federal judges, stated in its resolution adopting the code that the provisions of the code would not abrogate or modify any statutes "which are considered to be more restrictive than the provisions of the ABA code"?

Professor THODE. Yes, sir.

Senator BURDICK. In your opinion, is the present language of section 455 of title 28 "more restrictive" or is it less restrictive than the provisions of the new Code of Judicial Conduct as adopted by the ABA?

Professor THODE. In my opinion it is less restrictive.

Senator BURDICK. Do you agree that it is desirable that the provisions of the Federal statute relating to disqualification should conform as near as possible to the requirements of the Canons of Judicial Conduct, particularly as they relate to the subject of disqualification of a judge?

Professor THODE. I think that is very desirable.

Senator BURDICK. I assume you had an opportunity to become familiar with the provisions of the bill S.1064. Do you see any fundamental reason why the Federal rule pertaining to the waiver of disqualification should not be more restrictive than is permitted by paragraph D of canon 3 in the ABA code?

Professor THODE. I think that is primarily a function of how many judges you have, and the administrative time and costs that are involved in moving judges around as the disqualification waiver becomes narrower and narrower. Personally, I think your provision

is narrower than the code, and that means it is likely that there will be more judges shipped around, but it seems to me if the system can stand it, it is probably a desirable thing to narrow the waiver provision.

Senator BURDICK. The waiver is provided in the code only in two instances?

Professor THODE. Yes sir.

Senator BURDICK. For the relationship and ownership interests?

Professor THODE. That is right, and my judgment is that the issue that presents waiver most often—and I think this would be true of Federal judges as well as State judges—is the financial interest. Secondly, I think the next issue is the relationship interest.

The other bases for disqualification are not presented as often, and so the waiver problem is presented less often in those contexts.

Senator BURDICK. You are aware that the bill doesn't provide for such waivers?

Professor THODE. Yes.

Senator BURDICK. Do you want to speak as to that?

Professor THODE. It seems to me that with regard to the waiver, I think I am probably a little bit disturbed by the fact that the grounds on which the present bill allows waiver are the ones that under the code cannot be waived. It seems to me the situation has been turned around here. The waiver grounds in the bill are very narrow. I don't have any strong feeling that if a party wants to waive, or is willing to waive, what appears to be some general appearance of lack of impartiality, than I have no strong feeling that he should not be able to do it.

I think the committee's feeling was that there is a public interest here and it may be broader than the parties' interest. Even though the parties are willing to say "Yes, the judge is impartial" even though there are these appearances that might make it otherwise, I think the committee's feeling was, "Will the public see it that way even if the parties are willing?" I think that is why the committee set its standard the way it did.

Senator BURDICK. S. 1064 proposes that the effect of prior service as a Government lawyer be expressly set forth as a ground of disqualification of a Federal judge. I would be interested in your comments upon this problem, and your opinion about the choice of language set forth in subparagraph three of the bill.

Professor THODE. Well, lines 9 to 11 seem to me to be completely consistent with the code. They have given me no difficulty at all. Lines 12 and 13 cause me concern, but with the suggested amendment concerning the merits of the particular case in controversy, it seems to me to be more acceptable. I think the only danger is in the ambiguity that you talked about with Chief Justice Traynor, namely, is it subject to improper construction? Is it likely to raise an issue of an attempt to disqualify a judge, or a judge disqualifying himself, because he has a fixed belief or a fixed opinion about the general law rather than about how it applies to the particular case?

Your suggested language helps that problem and, if it is construed that way, it appears to me that it is perfectly consistent with the Code of Judicial Conduct. The problem we ran into is the dan-

ger of an ambiguity there that would require, or allow, some persons to contend that a judge ought to disqualify himself because he has a fixed belief about constitutional principles, for example. You must somehow avoid that ambiguity, and by your proposed change you have helped to clear up the doubt in my mind about the situation where a judge's impartiality might reasonably be questioned because he has stated his opinion on some broad principle of law. So if you can clear that up——

Senator BURDICK. Our staff has some questions now.

Mr. WESTPHAL. Professor Thode, the general standard or so called catch-all requirement of disqualification where his impartiality might reasonably be questioned, and a requirement that in certain circumstances he should disqualify himself, would you agree that the expression of that general standard coupled with the specific bases of disqualification, has or should have the effects of eliminating this duty to sit concept?

Professor THODE. Yes; I think that has been done away with, and we have instead the general proposition which is that he should not sit if his impartiality might reasonably be questioned.

Mr. WESTPHAL. Now, on that point, is there any difference in your mind between the language of the canon, which says that a judge "should disqualify himself" and the language of S.1064 which says "he shall disqualify himself"? Is there any material difference in your mind between whether the word "shall" is used or whether the word "should" is used?

Professor THODE. No; I see both of them as mandatory and it certainly was the intent of the committee when they drafted the code, even though they used "should", that that was a mandatory standard. In the preface to the code they state that all of the standards, unless it is specifically indicated that they are not mandatory, are mandatory standards.

Mr. WESTPHAL. One other point I would like a little discussion on so we can get it into the legislative history here.

Canon 2 of the new Code of Judicial Conduct is one which covers a requirement that a judge should avoid impropriety and the appearance of impropriety in all of his actions. Now quite obviously, your committee in drafting canon 3(C) relating to the disqualification, chose not to use the term "appearance" or the term "impropriety" as being a specific or even a general ground of disqualification. Isn't that true?

Professor THODE. That is correct.

Mr. WESTPHAL. All right. I think your general written statement you have submitted to the subcommittee covers this point, but I think it is important that it be clarified. Under what circumstances, or to what extent is impropriety or an appearance of impropriety a possible ground for disqualification?

Professor THODE. Well, it seems to me it is only when the impropriety or the appearance of impropriety is the kind that would lead a reasonable person to question the judge's impartiality in the particular case. Not all kinds of improprieties are included in that, just those that have an impact on this particular case so that a judge might reasonable be thought not to be impartial.

Mr. WESTPHAL. So in effect what the ABA committee has done, they have adopted a standard of avoidance of impropriety or appearance of impropriety as a general standard to guide the conduct of a judge in any of his activities on or off the bench?

Professor THODE. That is correct. And he could be censored or otherwise brought to task for violation of that, even though it would be a violation that would not require his disqualification in a particular case.

Mr. WESTPHAL. Now then, I take it that it is not the intention of the ABA committee—and I don't think it would be the intention of Congress should it enact this legislation—to bar a judge from making any financial investments of any kind?

Professor THODE. Oh no.

Mr. WESTPHAL. That is not the intention?

Professor THODE. No, the committee recognized that the judge has problems in terms of his financial investments, and has tried to work out ways to give him some guidelines on what he could invest in, but certainly it had no intent to bar his investments.

Mr. WESTPHAL. The first suggestion that the new "Code of Judicial Conduct" makes to the judge is in this canon 5(C) subparagraph 3 that the chairman has referred to in which it says," a judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified."

Now I think the situation is one that you can give an example similar to this one.

I originally come from Minnesota. The Northern States Power Co. is a big utility up there. If the judge sitting there decides he should own some public utility stock, all the canon says in effect is, well, you shouldn't buy Northern States Power stock.

Professor THODE. That is right. He had better buy Utah Power and Light.

Mr. WESTPHAL. He could buy Utah Power and Light or something of that kind because the Utah Power and Light isn't apt to become a party in any proceeding in front of him. And notwithstanding that, if the judge does pick up a few shares of Northern States Power stock and then Northern State Power becomes a party in a proceeding in front of him, then he has no choice but to disqualify himself and have another judge, who does not own any Northern States Power Co. stock, try that case.

Professor THODE. That is correct. He also has a second duty. He must reexamine his portfolio, and if he decides that it is likely that he is going to have several of these cases, then he has an obligation to get rid of that stock.

Mr. WESTPHAL. Now on the matter of the waiver, under the waiver provision of S. 1064, which is subsection (e) on page 4, lines 15 through 20, waiver is permitted where the disqualification is based upon the general standard of "impartiality being reasonably in question." Now that waiver under the general catch all disqualification is not permitted under the ABA?

Professor THODE. That is correct.

Mr. WESTPHAL. You previously gave the example of a cousin in the fourth degree. Disqualification for the fourth degree wouldn't be expressly or specifically required by the third degree requirement?

Professor THODE. That is correct.

Mr. WESTPHAL. And you pointed out that waiver might be required depending upon how close the judge was to his fourth degree relative?

Professor THODE. Right.

Mr. WESTPHAL. Now under the bill which is before the subcommittee, in that particular situation the judge, if his cousin was not close to him, he might well say to counsel that "well, this party or this attorney that is in this case is a distant cousin of mine and I am stating here on the record that we were not as close as brothers. I haven't seen him in 30 years. I searched my conscience and I don't think it will have any effect on my impartiality in this case, but I am disclosing it on the record."

Now under that circumstance under the bill S.1064 a waiver would be permitted?

Professor THODE. That is correct.

Mr. WESTPHAL. And under the canons of the ABA a waiver would not be?

Professor THODE. Correct, but he could sit unless he decided that his impartiality might reasonably be questioned under those circumstances.

Mr. WESTPHAL. But it seems to me that there is such a variety of circumstances that might be questioned under the general standard of disqualification that there may be some advantage to permit waiver under those circumstances, because it does not say to the judge that you must resolve this thing in isolation and at your own peril as to whether these circumstances might reasonably give rise to a question about your impartiality. The system set forth in the bill says that when you get one of these situations that might be rather close, rather than you having to decide at your own peril, disclose it on the record to counsel and if they want to waive it, then fine.

Professor THODE. I think there is certainly a rational basis for that. I was thinking yesterday of a different kind of circumstance. Perhaps the judge's father was an officer in a party 10 years ago, but he was kicked out in a stockholder's revolution or something. This doesn't fit any of the general provisions. But might a judge reasonably appear to no longer be impartial because his father was kicked out as an officer 10 years ago?

Well, under the code, if the answer to that was yes, he would have to be disqualified. Under the proposed bill here, he might not be.

Mr. WESTPHAL. I think this is one of the questions that enters into a determination of policy that must be set by Congress. One of the questions Congress must consider in setting that policy is to what extent can the Congress, by making the basis for disqualification so specific, to what extent in permitting or not permitting waiver can Congress set up a system which offers as much protection as possible to a judge so that he doesn't get caught on the horns of a dilemma where he must risk possible censure, public or otherwise, because of a decision he might make on whether he should disqualify himself or not. I think this is one of the things that should be considered.

Professor THODE. That is certainly true. It seems to me Congress may very well be in a position to do a much more thorough job here than many States may do because the States may be more strained

financially and feel that they cannot have a broad kind of disqualification, and therefore they must allow the parties to waive as an alternative to waiting 6 months for another judge to show up.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Thank you very much for your testimony.

Professor THODE. Thank you, Senator. I appreciate appearing.

Senator BURDICK. Our next witness is Mr. John P. Frank, attorney, Phoenix, Ariz.

Good to see you again Mr. Frank.

STATEMENT OF JOHN P. FRANK, ATTORNEY, PHOENIX, ARIZ.

Mr. FRANK. Thank you, Senator.

Senator, I have submitted a statement, which you have, and I would also have caused to be submitted my most recent article on this subject. It is in the current "*Utah Law Review*" which is the symposium which has all of the authors in the United States especially interested in this.

I assume if I may, Mr. Westphal, that you have received it?

Mr. WESTPHAL. Yes.

Mr. FRANK. I ask leave, then, if I may, in the interests of saving time, to simply mention two or three high spots of my statement, because you have other witnesses, and then offer for inclusion in the record the statement and the Utah piece, which is very short, as you can see.

Senator BURDICK. Without objection your statement will be received for the record and the law review article, for the file.

[The statement of John P. Frank in full follows:]

STATEMENT OF JOHN P. FRANK

My name is John P. Frank and I am a practicing lawyer and member of the firm of Lewis and Roca in Phoenix, Arizonia. To avoid repetition, I attach as an exhibit to this report an identifying footnote and a bibliography of my work in the field of disqualification as it appeared in my most recent article on disqualification of judges, 3 Utah Law Review 377 (1972). Since that article covers much of this testimony, I submit a copy with this Statement.

By virtue of my general acquaintance with this subject, I was called upon by Senator Eastland to appear as an expert witness to advise the Judiciary Committee in connection with the nominaton of Justice Clement Haynsworth at the United States Supreme Court. Senator Bayh and I appeared together before the Traynor Committee of the American Bar Association at its 1971 meeting in St. Louis on this subject. I also appeared before this Subcommittee on a draft of legislation on this subject, Senator Bayh's S1886, on July 14, 1971.

The general thrust of all of the discussion of recent years is that §455 as it stands, the present federal disqualification statute, is wholly inadequate to the needs of our time. It needs a complete rewrite. The matter is important because it goes to the character and reputation for integrity of the federal judiciary.

What is needed is a solution and not any particular form of words. There are various ways of handling this problem. I was permitted to join with Senator Bayh in the drafting of his earlier proposal. I published a proposed draft of my own in the Utah article just referred to. Senator Hollings of South Carolina has given very close thought to this subject, and proposed a draft which has great merit. The Traynor Committee has made its own recommendations, and these have now been adopted as the Canon for the American Bar Association. They have in turn been approved by the Federal Judicial Conference. We need a statute to complete the job.

The matter has had the most scrupulous thought, and we have reached the occasion on which it is time to be done. In my view, we should not stand on a particular form of words, but we should achieve these two goals:

1. Our federal disqualification statute ought to be in conformity with contemporary practice and contemporary ethical standards, taking into account the greater number of federal judges now available than when the Act was originally passed. We can, in terms of plain manpower, afford to weigh the balance a little more heavily in the direction of care to avoid appearances which might have been borne at an earlier stage of our history when there was less manpower to do work which had to be done.

2. We should try to keep the federal statute as nearly in accord as possible with the recommendations already adopted by virtue of the work of the Traynor Committee. That Committee was distinguished beyond most committees, its work has been widely praised and ratified, and we must not put a federal judge into the position of having to chose which he shall obey, the federal statute or the ABA Canons. We may, if we wish, make the federal statute more strict than the ABA Canons; but under no circumsttnces should we make it less strict. Maximum uniformity is desirable.

In my 1971 appearance, I did generally lay out the standards, principles, and problems in this area. I incorporate that testimony by reference and confine myself now to comments on the particular bill before the Committee. In the discussion in the following paragraphs, the numbers below refer to those in the bill.

§*455(a)*. This provision, which provides that the judge shall disqualify where his "impartiality might reasonably be questioned," I understand to be the adoption of the so-called "appearance of impropriety test' 'as stated by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). This standard was expressly endorsed by Justice Blackmun in the course of his confirmation hearings before the Senate Judiciary Committee and it follows exactly the parallel provision of the ABA Canons. It eliminates the so-called "duty to sit" rule of *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964) and numerous other cases collected in note 9 of my Utah article, instead giving judges a reasonable latitude to disqualify where an appearance of unfairness may reasonably exist if they sit.

§*455(b)(1)*. This provision on personal bias or prejudice accords with the ABA Canon, and accords with the tradition on this subject. The provision is not as progressive as I personally would have wished since it does not reach possible bias or prejudice on an issue, but only on parties; but I would leave an accomplishment alone and accept it.

§*455(b)(2)*. This provision bars the judge if, put generally, he had been involved in the matter in his private practice. The provision is traditional, it accords with the ABA Canon, and is readily workable. It covers the situation, essentially, in which either the judge when he was a lawyer was involved in the matter or the situation in which the matter was in his own office when he left it to take the judgeship, whether he had something to do with it or not; and it also includes any activity as a material witness.

§*455(b)(3)*. The ABA Canons cover the previous involvement of the lawyer in the manner in controversy without making a distinction between his involvement in a private law office or in a government agency. This is left to a comment in the government agency situation. It has seemed to the draftsmen of S1064, particularly in the light of the problems raised in Justice Rehnquist's opinion in *Laird* v. *Tatum*, 93 S.Ct. 7 (1973) that it would be better to divide the private and public practice provisions. Hence the Subsection (2) to which I have just commented is restricted to private practice and a new provision (3) is added to cover public employment as an attorney.

In *Laird*, a case involving the problem of whether Justice Rehnquist needed to disqualify in a certain matter because of his involvement in problems concerning the same subject matter in the Department of Justice, Justice Rehnquist concluded that he should not disqualify. He generously quoted extensively from certain writings of my own in coming to his conclusion, and I believe him to be wholly correct in the conclusions under the law as it has existed. The new (3) covers the realities of government practice. It disqualifies the judge who may have been involved in the particular matter "as counsel, advisor or material witness" and it also disqualifies the judge who, whether he was in the particular matter or not, may have "expressed an opinion concerning the merits of the controversy" which is in the particular case.

I must acknowledge that I find this language ambiguous and that I do not know whether it is intended to reach the "the controversy" in the general sense of the broad merits of the legal issue or whether it means "the controversy" in the sense of the particular controversy with the particular individual involved in the case. For example, an Attorney General may have expressed an opinion that the Selective Service Act is constitutional, and I do not suppose that it is meant to disqualify him from all Selective Service disputes which may arise thereafter. On the other hand, if he has expressed an opinion as to whether the Act is or is not being properly applied in respect to a particular draftee, then it seems clear that the new statute would exclude him from a case involving that draftee and I would like to believe that this is what is intended by the section. In any case, the section does not bar the judge who has been in a government agency merely because others in the agency may have been dealing with the particular subject matter so long as he had nothing whatsoever to do with it.

§455(b)(4). This provision has to do with the financial interest in the matter and must be read in conjunction with the later definition which provides that a financial interest reaches the ownership of "a legal or equitable interest, however small" and also reaches a relationship as the director, advisor or other active participant in the affairs of a company.

This is the most important provision in the new law and is essentially the same as the ABA Canons. It eliminates all questions of whether the interests of the judge are more or less and rids the law of the limitation requiring disqualification only in cases of the "substantial interest" which came into the federal statute in 1948. No one has ever published and I have never been able to find out why that clause was added in 1948 and I am compelled to regard it as an accident and an extremely unfortunate one at that. That qualification was out of accord with the practice at the time it was put into the law, has created severe trouble, cost and injustice since, and we are well if belatedly rid of it. I have covered that subject thoroughly at pages 381 to 385 of the Utah article which I import by reference.

As I construe the section, if the interests of the judge as a creditor, debtor or supplier of a party will in any way be affected by the case, then he must disqualify. Otherwise, he should not do so. Under the statute, a judge with an interest in the third party which in turn has business relations to a party to the case is not disqualified for interest unless the case directly affects the third party. A contrary rule would lead to impossible consequences. The new Canon and the proposed statute give us a good practical solution of an age-old problem.

§455(b)(5). This section covers the types of disqualification commonly grouped under the classification of "relationship." It follows the Canons and presents no new problems.

§455(c). This provision requires the judge to be informed about his own personal financial interests and calls upon him to make a reasonable effort to know about those of the relations who might, by virtue of their holdings, cause him to be disqualified. There are highly practical problems here. Some people hold a wide number of stocks, or maintain portfolios in which there may be considerable turnover. There exists the possibility of disqualification in fact where the judge does not know that he has a particular investment. I read this provision to be virtually a requirement that those judges who have extremely dispersed holdings must make an effort to consolidate them; they will not be excused for failing to know what they have. On the other hand, they clearly cannot as well know of varying investments of relatives, and here all that is required is "a reasonable effort."

§455(d). This section includes a series of definitions which I have used insofar as it is useful in the earlier discussion.

§455(e). This section deals with the problem of waiver. There are those who believe that there should be no waiver of disqualification; I have been one of them. The practicalities of life are that waiver can be a kind of a velvet blackjack in which the lawyer who is going to appear before the same judge at another time in another case really has very little choice. On the other hand, there is also the feeling of those from the areas in which other judges are not available that waiver should be allowed. The ABA has reached a practical solution permitting waiver where the parties agree in writing, outside the presence of the judge, that the relationship is immaterial or the financial interest is insubstantial; and the ABA Canons further provide that such an

agreement must be signed not merely by the lawyers but by the parties, this giving maximum protection to the lawyer, for it will never be known whether it was the lawyer or the party who drew the line.

The statute applies a stricter standard than the ABA Canons in this regard. Waiver is permitted in the cases in which the disqualification arises only because of a reasonable question about impartiality, and this after full disclosure. There may be no waiver if the judge is disqualified for interests, relationship, or bias.

This seems to me a practical solution.

Please permit me to conclude on a note of personal appreciation. I have been involved with this subject matter for more than 25 years, and it interests me enough to bestir myself to write occasionally or to speak on it. I can do so in the circumstances of the relatively pressure-less life of an attorney and writer. For United States Senators to pay close personal attention to such a matter is another thing. On the scale of war, peace, taxes, the air, the land, the sea, and all the other major concern of Senators of the United States, disqualification of judges has to be a comparatively minor concern. Yet because it goes to character and integrity and fairness in the appearance of fairness, it does have an importance of its own.

In these circumsttnces, as a member of the Bar, I express personal gratitude to Senator Bayh, Senator Hollings, and Senator Burdick, each of whom, to my own knowledge, have spent extended time personally, and not merely through staff, on the details of this matter. I believe that Chief Justice Traynor and the members and staff of his Committee will acknowledge that this Senate Committee and the Senators I have named have made a contribution to the formulation of the ABA Canons and the Congress can well complete the job by carrying these reforms into law.

Mr. FRANK. If I may, what I would like to do is just extemporize a little, because you are going to get a high degree of repetition, and we must avoid that.

What happened, Senator, you of course are familiar with, but I would like this to be in the record.

This is an extraordinary case of a highly technical piece of legislation which has taken the attention directly and personally of the members of this body. One might suppose that this kind of thing might go off on simply a staff basis to be resolved, but it hasn't. The fact is that since the concern over the matter has arisen over the past few years, you personally and Senator Bayh and Senator Hollings in particular have given a great deal of personal attention to it.

After the incidents of a few years ago, Senator Bayh asked me to prepare, and I did, a draft bill which he revised and introduced, which is the immediate predecessor of this one. Senator Hollings at the same time introduced a bill and then Senator Bayh. Senator Hollings and I had extended discussions on the subject. Following that, the Chief Justice of the United States was also very concerned and caused the Traynor committee to be established to deal with the whole broad subject of which this is a relatively small part.

Senator Bayh and I went to St. Louis together and presented the views which had emerged among the Senators on the basis of much discussion here to the Traynor committee. The Traynor committee gave us abundant time for presentation and Professor Thode then gave the closest attention to the suggestions emanating from here. The result is that this canon 3(C), the section which we are talking about now, codified in this bill, essentially contains as much as in fairness it should. The basic ideas which emerged came not from staff members but from Senators in this body because of their great concern not with the mechanical details, but with the integrity of the judicial system of the United States.

In consequence, I would say emphatically we have been given by Chief Justice Traynor, Professor Thode and the others all of the consideration possibly useful for this point of view. Our suggestions as originally made are contained in a copy of a suggested bill, which is attached to my article. The suggestions contained therein are in somewhat different words but fundamentally contain all of the recommendations of Chief Justice Traynor. We have achieved a meeting of the minds among earnest people concerned with this matter which surely must be rare in the history of legislation.

Now, Senator, we need this bill badly. We really do because the present law invites confusion. The best thing that has been said on this subject was one sentence by Mr. Justice Blackmun when he was before the full committee on his confirmation hearing. He said, dealing with the subject of disqualification—and I might add at a point at which he was repudiating previous practices of his own—he said in substance that we are dealing with an area in which times have changed. And indeed they have. And those changes are contained, Senator, in your bill, and they are contained in the work which the good Chief Justice Traynor and his group have given us.

The bill is a dandy and I hope it can be adopted promptly. It has had 3 years of consideration now and it is time to bring to the the wrap up and get done with it. I hope that the report can reflect in some way the facts so that it is clear in the record of the involvement of Senators Bayh and Hollings and their contributions here. I assume that you and your brothers, in some fashion suitable among Senators, without small talk from witnesses, will settle that among yourselves.

Moving now to the details, I adopt entirely the view of Professor Thode on the impropriety matter. What I meant to say in my statement was precisely what he said in response to the questions he was asked. I hope I have done so also. I cleared that portion of my remarks with Chief Justice Traynor and we are totally in agreement too.

The basic value here I think is to get a bill as nearly as possible identical with the recommendations of the Traynor committee. This is not a matter of deference to Chief Justice Traynor at all but because it is completely unfair to leave the judges of this country in the possible position of being wipsawed between materially different standards.

Insofar as your bill faintly deviates from the Traynor committee report, they are good deviations. Your addition about the problem about Government lawyers is a very unique problem and it is a very good suggestion and I am glad to hear it.

Insofar as you deviated a little on the waiver, your suggestions fit better with the Federal system. I am well aware from my discussions with members of the Traynor committee of the fact they had to take into account State problems and rural areas to a greater extent than you do. I think what has been proposed in your bill is an excellent compromise of that troublesome problem.

Beyond that, Senator, I have spoken in a technical way in this memorandum and I would like to say merely, if you can accept this without its appearing improper, that I am very grateful for these hearings. I personally worked on this subject, I suppose more than

anybody else in the United States, because it struck me as interesting more than 25 years ago. I suppose most of the articles in the field are mine. I would like simply to say that I think it is a great contribution that Senators personally have been willing to give of their time to this apparently minor element of the law. We are all trying to build an edifice of integrity in which we can take pride in our legal system so that there will be justice for our people. And permit me to say, sir, with gratitude on behalf of whatever segment of the Bar I may be said to represent, that you have done it and it is a fine thing and I hope it moves through this session of Congress without further delay.

If there are questions, I would like to deal with them, but beyond that I would like to stand on my statement as made.

Senator BURDICK. I want to say for the record first of all that I want to acknowledge the tremendous help you have given this committee, not only with the work you have done with Senator Bayh, but the work you have done with the committee. You have done a yeoman's service.

In my opening statement I also recognized the contribution that both Senator Bayh and Senator Hollings gave to this. Again, we want to give them all of the credit we can. This is not my bill. This is a composite of bills, taken from Senators like Senators Bayh and Hollings.

Do I understand in your testimony that the bill in its present form, except where you referred to some minor differences between the committee and the ABA, that the bill in its present form is satisfactory to you?

Mr. FRANK. Senator, the only suggestion that I raised in my statement was the phrase dealing with Government attorneys about dealing with the matter in controversy and so on. If you can remember that passage, at page 2, section 3, lines 9 through 13. I pointed out in my statement that the phrase "or expressed an opinion concerning the merits of the controversy" is a little ambiguous and Mr. Westphal, in response to my written statement I believe, has already prepared a brief amendment to improve that. Professor Thode spoke to that amendment, if I heard him correctly, a few minutes ago. With that minor improvement, I don't see anything else worth changing here.

Senator BURDICK. You would add the words on page 2 of the bill, line 13, the words, reading as follows "or expressed an opinion concerning the merits of the particular case in controversy"?

Mr. FRANK. Yes; and I think that would be helpful. I would like to expand on that a little if I may.

We cannot overlook the fact, Senator, that you are dealing with a multitiered system and what Professor Thode said a moment ago is terribly important. We have more judges now. I have emphasized this too. We can afford a more generous standard of disqualification than might have been the case 50 years ago or at some earlier time. The one place for which that is not true is in the U.S. Supreme Court where there is no way of getting substitution. Now that is an isolated problem and it shouldn't be allowed to control the whole

system, but what I anticipate will happen as a byproduct of the suggested amendment is that this will restrict subsection 3 to expressions on the particular case and essentially on the merits of that case. And that is livable for the Supreme Court. If a Supreme Court Justice, who is an attorney general, has spoken to the merits of a particular case, he really ought to be off without a doubt.

On the other hand, this must be read in conjunction with the more generous language of "impartiality might reasonably be questioned". That remains in the bill as it was.

I assume that district judges and court of appeals judges will be able to construe section 3 more generously than Supreme Court Justices may, because they will read it in conjunction with lines 6, 7 and 8 on the first page.

By putting these together, it may be that someone who is an assistant attorney general and becomes a district judge in a big city where there are plently of other district judges, may be able to disqualify himself a little more liberally than a Supreme Court Justice. The Supreme Court Justice must concern himself with whether he may break a quorum and paralyze the country, because sometimes you couldn't get any decisions if a rule of excessive rigidity is used.

Adopting this will give us a system that we can live with at the Supreme Court level. The amendment will still permit liberal disqualifications where there are enough judges to provide for that greater liberality because it is, after all, part of the whole bill and the other standards remain.

Senator BURDICK. If we understand each other correctly now, with those additional words, the bill is all right?

Mr. FRANK. I hope you pass it and do it right away because we are in conflict now with the ABA standards.

Senator BURDICK. You have the assurance of the subcommittee we will try.

Mr. WESTPHAL. Just one brief point to clarify the record. On page 3 of your prepared statement you discuss section 455(a) and you make a statement that you understand section 455(a) to be the adoption of the so-called appearance of impropriety test. I think you previously stated that you modified that statement by adopting what Professor Thode has briefly said on this same point?

Mr. FRANK. If you will allow just one wiggle from an old friend, Mr. Westphal, I don't modify but I do clarify. And I do because I know that Senator Bayh has felt strongly about this and he wants this concept, but I believe that what I have tried to say here is exactly what Professor Thode has said. In other words, I believe we are at one. Chief Justice Traynor's statement and Professor Thode's statement have simply said better than I have what I have said here. I construe my language to be exactly and precisely what you drew from Professor Thode in your colloquy a moment ago.

Mr. WESTPHAL. That is all. Thank you very much.

Mr. FRANK. Thank you.

Senator BURDICK. Rowland Kirks will be the next witness. I want to say that I understood you had some travel problems and that is the reason you were scheduled at this time.

STATEMENT OF ROWLAND F. KIRKS, DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. KIRKS. I appreciate your consideration, Mr. Chairman, this is a busy time for our system and it involves quite a bit of travel. I do appreciate the courtesy that was extended to me by Mr. Westphal and by the committee.

Senator BURDICK. We have a copy of your statement here, which will be made a part of the record in full and you may proceed in any way you wish.

Mr. KIRKS. It is a rather brief statement and in view of the limited scope in which I am appearing before the committee, I wonder if I might read it?

Senator BURDICK. Surely.

Mr. KIRK. Mr. Chairman, I appear today at the request of the subcommittee to report the recent action taken by the Judicial Conference of the United States relative to the application of the American Bar Association's Code of Judicial Conduct to Federal judges generally. I should point out that the bill, S. 1064, which is the subject of today's hearings, has not been acted on by the Judicial Conference of the United States. Furthermore, it has not been considered by the Conference nor by any Judicial Conference committee. For this reason I am unable to express any view regarding the merits of the legislation on behalf of the judiciary and I appear here only to report to you on actions taken by the Judicial Conference.

Historically, Federal judges generally have been guided in their conduct as judges (1) by legislative enactments, (2) by resolutions adopted from time to time by the Judicial Conference of the United States, and (3) by the opinions of the committee on ethics of the American Bar Association. Federal judges from time to time requested and received opinions on matters of judicial ethics from the American Bar Ethics Committee and on occasion Federal judges have served as members of that committee.

In recent years the Judicial Conference has dealt with matters of judicial ethics and conduct more frequently, considering new problems as they have occurred. Most notably, in September 1963 the Conference adopted a resolution on the propriety of service by Federal judges as officers or directors of corporate organizations. The resolution then adopted read as follows:

> No justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit.

In June 1969, the Conference adopted specific resolutions relating to outside income of Federal judges and required the filing of an annual report of such income by every Federal judge. At the same time the Conference authorized its Committee on Court Administration to formulate standards of judicial conduct for Federal judges and to draft proposed legislation to enable the Conference to enforce its resolutions.

Meanwhile Chief Justice Burger had taken office and before the meeting of the Judicial Conference in October 1970, he received a letter from then Chief Justice Roger J. Traynor, chairman of the

special committee of the American Bar Association created in August 1969 to study the entire problem of revising the canons of judicial ethics. In his letter Chief Justice Traynor noted:

There will be obvious advantages if the rules finally developed for federal judges can take into account the work of our committee. It will be fortunate if both the federal and state judiciaries can eventually abide by the same set of basic cannons, and if the federal judiciary can avoid the possible clash of circuit councils in interpreting what is considered appropriate nonjudicial services. To achieve these ends the members of the committee respectfully suggest that the Conference may wish to consider suspending for as long a period as it deems appropriate any further action on all the resolutions adopted in June. We make this suggestion so that the Conference in whatever action it ultimately takes, may have the benefit of the research and work of this committee.

Upon consideration of the request of Chief Justice Traynor the Conference modified the requirements for the reporting of outside income by Federal judges by amending its June 1969 resolution and pledged its full cooperation with the American Bar Association committee in its efforts to draft a Code of Judicial Conduct. Meanwhile, Chief Justice Burger appointed an interim Advisory Committee on Judicial Activities which was commissioned to render advice to Federal judges on matters of judicial ethics and conduct pending the completion and consideration of the ABA Code of Judicial Conduct.

That code, as you know, Mr. Chairman, was adopted by the American Bar Association at its annual meeting in August 1972. The Judicial Conference committees charged with the responsibility of reviewing its provisions were not prepared to make a final report to the Conference when it met in October 1972. Such a report, however, was rendered and action was taken by the Judicial Conference at its session on April 5 and 6 of this year.

Mr. Chairman, in general the Judicial Conference adopted the ABA Code of Judicial Conduct, as approved at the August 1972 annual meeting of the association, but at the same time adopted more stringent requirements necessary to adapt the code to Federal judges who have secure tenure unlike most State judges who are elected. In this regard the Conference excepted from its approval of the ABA code only those provisions which appear by their terms inapplicable to members of the Federal judiciary. For example, canon 5C(2), relating to outside employment of judges, is directed to part-time judges of State courts and to State judges only. That provision was deleted.

Further, the judicial conference resolution adopting the ABA Code specified that conference action did not abrogate or modify any conflicting provisions of statutes or prior resolutions of the judicial conference "which are considered to be more restrictive than the provisions of the [ABA] Code."

The conference also rejected that portion of the ABA Code captioned "Effective Date of Compliance", permitting a person who holds judicial office on the date the code becomes effective:

"to continue to act as an officer, director, or nonlegal advisor of a family business" or permits him "to continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family."

As a substitute for this section, the conference adopted the following provision:

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it and should do so in any event within the period of one year. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family if terminating such relationship would unnecessarily jeopardize any substantial interest of the estate or person.

In summary, the judicial conference resolution makes the ABA Code of Judicial Conduct applicable to all Federal judges, except that a Federal judge must follow a more restrictive provision relating to outside income and is required to give up a position as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family, as soon as reasonably possible and in any event within the period of 1 year, unless very unusual circumstances exist. If circumstances require the judge to fulfill a personal obligation to a nonfamily estate or trust, he must do so without compensation under the judicial conference resolution standard.

There is one other matter to be emphasized. Recognizing the practical problems facing part-time Federal magistrates, part-time referees in bankruptcy, and special masters, some of whom receive annual compensation of as little as $100 to $500, the conference resolution provides that the Code of Judicial Conduct will not restrict any functions or privileges accorded by statute or resolution of the conference to such officers.

Mr. Chairman, I would like to offer for the record a copy of the resolution adopted by the judicial conference on April 6th and a copy of a document marked appendix A containing the statutes and resolutions of the judicial conference, previously enacted or adopted, pertaining to matters of judicial ethics and conduct.

Thank you for the opportunity to appear at this hearing.

Senator BURDICK. As I understand the action taken by the judicial conference in April, 1973, that meeting, they stated that where it adopted the new Code of Judicial Conduct, they stated in the resolution adopting the code that the provisions of the code would not abrogate or modify any statutes which are considered to be more restrictive than the provisions of the ABA Code.

Mr. KIRKS. Yes.

Senator BURDICK. So if Congress determines that the present statute of disqualification is less restrictive than the ABA canon on disqualification, then an atttempt by the Congress to conform the statute with the canons would be consistent with the action taken by the judicial conference, is that not so?

Mr. KIRKS. Yes.

Senator BURDICK. Now the judicial conference itself decided that parts of the ABA Code, for example, in 5C subsection 2, relating to outside employment, should not be applicable to Federal judges, is that not true?

Mr. KIRKS. Yes.

Senator BURDICK. You are aware that the findings of the Traynor committee are almost totally embraced in this bill?

Mr. KIRKS. I am aware of that, Mr. Chairman.

Senator BURDICK. I guess there are about two minor differences here and that is about all there are, and I suppose you are not qualified to speak on those?

Mr. KIRKS. No; I am not.

Senator BURDICK. I didn't mean qualified, you are not authorized. Let's put it that way.

Well, thank you, sir.

Mr. WESTPHAL. I have no questions.

Senator BURDICK. Thank you very much for your contribution this morning. The resolution and your appendix A will be received for the record.

At this time there will be included in the hearing record a copy of S.1064.

[The bill S. 1064 may be found at p. 130:]

RESOLUTION

The Judicial Conference adopts the Code of Judicial Conduct approved by the American Bar Association in August, 1972, with the following modifications:

(1) The adoption of the Code will not restrict any functions or privileges accorded by statute or resolution of the Conference to part-time magistrates, part-time referees in bankruptcy or special masters;

2) The adoption of the Code will not abrogate or modify any conflicting provisions of statutes or resolutions of the Conference. Except as provided in number (1) above, to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, the latter will control.

(3) The provisions of the Code relating to "Effective Date of Compliance" shall be modified to read as follows:

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it and should do so in any event within the period of one year. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family, if terminating such relationship would unnecessarily jeopardize any substantial interest of the estate or person.

(4) The entire commentary under Canon 5C(2), (including the blackface, bracketed material) is deleted.

The Joint Committee is directed to give further study to the provision of Canon 7 as it uniquely relates to federal judges.

APPENDIX A

STATUTES

Nepotism

The United States Code contains three statutes which concern nepotism. 28 U.S.C. §458 states that:

"No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanquinity within the degree of first cousin to any justice of judge of such court."

Section 1910 of Title 18 of the United States Code provides in part that:

"Whoever, being a judge of any court of the United States, appoints as receiver, or trustee, any person related to such judge by consanquinity or affinity, within the fourth degree—

"shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Note: There has been no judicial interpretation of the meaning in these statutes of the terms "degree of first cousin" or "within the fourth degree." The matter is somewhat complicated by the existence of two established methods

by which degrees of relationship are computed. The canon or common law method and the civil law method both are in extension use. It is recommended that the system of computing degree of relationship that is the more restricted by followed.

A new section 3110 was added in 1968 to Title 5 of the United States Code. This statute applies to the entire judicial branch as well as the legislative and executive branches and prohibits the appointment, employment, promotion, or advancement, or recommendation of individuals for such appointment, etc., by a public official. A public official cannot appoint, etc., a relative in the agency in which he is serving or over which he exercises jurisdiction or control. The statute defines the term "relative" to include:

"An individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister."

Note: This statute quite clearly applies to all appointments within the judicial branch whether made by a judge or clerk of the court, probation officer, United States magistrate, etc.

Practice of Law

The practice of law by a judge is, of course, prohibited under the provisions of 28 U.S.C. 454 which provides that:

"Any justice or judge appointed under the authoirty of the United States who engages in the practice of law is guilty of a high misdemeanor."

Section 955, Title 28 of the United States Code also provides that:

"The clerk of each court and his deputies and assistants shall not practice law in any court of the United States."

Similar prohibitions apply to full-time magistrates (28 U.S.C. 632(a)), and full-time referees (11 U.S.C. 67 (b)).

Interest in Litigation

The United States Code, Title 28, Section 455, "Interest of justice or judge," provides that:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Note: This Section is included, although the restrictions of the Code as to financial interest are more stringent, because of the other provisions contained in this Section. Where more restrictive, the Code prevails.

Conflict of Interest—Criminal Code

Two sections of Title 18, United States Code, applicable to the Judicial Branch, concern conflicts of interest. They are part of Chapter II, *Bribery, Graft, Conflicts of Interest*, and are set out in full below.

"§203. Compensation to Members of Congress, officers, and others in matters affecting the Government.

"(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

"(1) at a time when he is a Member of Congress, Member of Congress Elect, Resident Commissioner, or Resident Commissioner Elect; or

"(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia.

"in relation to any proceeding, application, request for a ruling or other determination, contract, claim controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

"(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Commissioner, officer, or employee—

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

"(c) A special Government employee shall be subject to subsection (a) only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

"§205. Activities of officers and employees in claims against and other matters affecting the Government.

"Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—

"(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

"(2) Acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

"A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

"Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

"Nothing herein or in section 203 prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or to her personal fiduciary except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, provided that the Government official responsible for appointment to his position approves.

"Nothing herein or in section 203 prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States provided that the head of the department or agency concerned with the grant or contract shall certify in writing that the national interest so requires.

"Such certification shall be published in the Federal Register.

"Nothing herein prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."

No attempt has been made to include all of the Criminal Code which might apply to judges, etc., equally with other citizens or persons employed by the

United States Government generally but the following two sections are pertinent:

§155, Title 18, United States Code

Fee Agreements in Bankruptcy Proceedings

"Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership, bankruptcy or reorganization proceeding in any United States court or under its supervision, enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate; or

"Whoever, being a judge of a court of the United States knowingly approves the payment of any fees or compensation so fixed

"Shall be fined not more than $5,000 or imprisoned not more than one year, or both."

§291, Title 18, United States Code

Purchase of claims for fees by court officials

"Whoever, being a judge, clerk, or deputy clerk of any court of the United States or a Territory or Possession thereof, or a United States district attorney, assistant attorney, marshal, deputy marshal, magistrate, or other person holding any office or employment, or position of trust or profit under the United States, directly or indirectly purchases at less than the full face value thereof, any claim against the United States for the fee, milleage, or expenses of any witness, juror, deputy marshal, or any other officer of such court, shall be fined not more than $1,000."

RESOLUTIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Participation in Business Corporations

The Judicial Conference of the United States at its meeting in September 1963 adopted the following resolution:

"RESOLVED: No justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit."

At the March 1971 meeting of the Judicial Conference it was further resolved that with respect to a judge (i) whose semi-annual report indicates non-compliance with the 1963 resolution of the Judicial Conference or (ii) who has failed to file such report

"(a) The Review Committee shall notify such judge, and the chief judge of the circuit or the chief judge of other courts who are members of the Conference of such fact who shall then request such judge to advise within 30 days that he is in compliance;

"(b) In the event such judge fails or refuses to advise that he has complied as in paragraph (a), the chief judge shall inform such judge that unless the judge advises within 60 days that he is in compliance, this fact will be published in the next report of the Judicial Conference;

"(c) If at the expiration of the 60-day period, the judge fails or declines to file the semi-annual report, the chief judge shall also request the judge to state whether he is or is not in compliance with the 1963 resolution; a failure or refusal so to state will likewise be published;

"(d) In the event the judge declines to make a report on grounds of conscience, he shall be advised that if desired such fact will be noted in the published report."

Participation in Educational, Religious, Civic and Charitable Organizations

At its October 1971 session, the Judicial Conference adopted the following recommendations:

The number of positions held by federal judges as officers or directors of educational, religious, civil and charitable organizations should not be so great in number as to jeopardize the particular performance of judicial duties.

Judges' participation as officers in such groups and organizations should not numerically exceed a quantity which would necessitate undue absence from the performance of judicial duties and responsibilities.

Federal judges should not serve as officers or directors of organizations, national, regional or local, which are present or potential litigants in the federal courts or are the promoters, sponsors or financiers of organizations sponsoring litigation in the federal courts.

At its September meeting in 1958, the Judicial Conference adopted the following resolution:

"RESOLVED, That no person employed on a full-time basis in the federal judicial establishment shall engage in the private practice of the law." (p. 18)

In the manuscript of the proceedings of the Judicial Conference of Senior Circuit Judges, October 1–4, 1940, the following resolution was adopted:

"RESOLVED, That hereafter the Director be requested to advise any district or circuit judge, or any other judge under the jurisdiction of the act that it is the sense of the Conference of Senior Circuit Judges that no secretary or law clerk who is appointed should do any work outside of the salary paid him in the capacity of secretary of law clerk, or occupy and be appointed to any office in any federal or state court, including masterships, receiverships, etc., or practice law."

The appointment of such persons to dual offices has in certain cases been authorized by statute, and the Judicial Conference.

Financial Reporting:

"All Federal judges, including judges in senior status performing some judicial services, shall report every 6 months, commencing with the period ending June 30, 1970, for the preceding 6 months, as to monies received from extrajudicial services, gifts, payments of excess expenses, positions held in business or other organizations and participation in cases where the judge had any financial interest. Copies of these reports should be filed within 30 days after the end of the reporting period with the *Review Committee* of the Judicial Conference, with the judicial council of the circuit, or the appropriate court; and with the office of the clerk of court of which the judge is a member, where they will be made available to the public immediately." Report of the Proceedings of the Judicial Conference, March, 1971.

PUBLIC REPORT

For 6-month period ending _____, 197_.

STATEMENT OF EXTRAJUDICIAL SERVICES, GIFTS, EXCESS EXPENSE REIMBURSEMENT PARTICIPATION IN CASES, AND POSITIONS HELD DURING REPORTING PERIOD

Name _____
Judicial position_____
Court _____
Official address_____

I. EXTRAJUDICIAL SERVICES

A. State your total income for all extrajudicial services performed by you, including lecturing, teaching, writing, serving as a trustee, executor or director, and all other services performed by you. (If none, write "None.")

B. As to any such income from a single source in excess of $100, list and describe separately the services rendered, specifying the amount of time spent on each matter and the compensation received for each matter.

II. GIFTS

List and describe separately each gift received by you or your spouse or any member of your immediate family in your household during the period which had a value in excess of $100. Gifts received from a member of your immediate family (e.g., partents, spouse, children and siblings) may be excluded. For each gift, state the donor and your best estimate of its value. (If none, write

"None.") (Note: Books and periodicals received from publishers need not be included. Report of the Judicial Conference, October 29, 30, 1970).

III. EXCESS EXPENSE REIMBURSEMENT

List and describe separately all reimbursements for your nonfederal expenses which exceeded the actual out-of-pocket cost of those expenses, including any such excess reimbursement which was paid to members of your family or staff who were accompanying you. For each instance, state the source and the amount of the excess reimbursement. (If none, write "None.")

IV. PARTICIPATION IN CASES

A. Have you participated in the hearing or decision of any case, knowing at the time of such participation that you, your spouse, or any member of your immediate family in your household had a financial interest in any of the named parties? If so, state the name of the case, the nature and amount of the interest, the amount in issue in the case, and the reasons why you deemed it proper to participate. (If none, write "None.")

Note: This statement relating to "participation" is in terms of "knowingly participated" for the following reason: The Conference recognizes that because of the existence of many mutual and diversified investment funds, large conglomerates and trusts having a wide range of investments and affiliates, there may be cases in which a "named party" may own interests in a corporation, but which ownership is not known to the judge who (or whose spouse or family member in his household) may also be a stockholder of such corporation. The Conference recognizes that without knowledge of such stock ownership by the party, the judge's action could not be affected by this fact. Thus, the report to be made under this requirement relates only to the "knowing" participation by the judge. In this paragraph IV the term "party" does not include the U.S. government.

B. Have you engaged in any transaction involving the securities or other property of a party to a case while that case was pending before you? If so, for each such transaction state the name of the case, the nature and amount of the transaction, the amount in issue in the case, and any explanation you may wish to make. (If none, write "None.")

C. Have you participated in the hearings or decision of any case at a time when you knew that your spouse or any member of your immediate family in your household was an officer or employee of any named party in the case? If so, state the name of the case and why you deemed it proper to participate. (If none, write "None.")

V. POSITIONS HELD DURING REPORTING PERIOD

A. List all positions held by you in any organization, business or charitable, such as an officer, director or trustee, regardless of whether any compensation was received therefor. (If none, write "None.")

B. List all other fiduciary positions, such as trustee or executor (If none, write "None.")

I certify that the above statement is accurate, true and complete to the best of my knowledge and belief.

Signed _____

Date _____

At the March 1971 meeting of the Judicial Conference it was further Grover Tape 6—GPO6953 Mach 11 Monarch Crown Mag. NITE—6-25-73___ resolved that with respect to a judge (i) whose semi-annual report indicates non-compliance with the 1963 resolution of the Judicial Conference or (ii) who has failed to file such report:

(a) The Review Committee shall notify such judge, and the chief judge of the circuit or the chief judge of other courts who are members of the Conference of such fact who shall then request such judge to advise within 30 days that he is in compliance;

(b) In the event such judge fails or refuses to advise that he has complied as in paragraph (a), the chief judge shall inform such judge that unless the judge advises within 60 days that he is in compliance, this fact will be published in the next report of the Judicial Conference;

(c) If at the expiration of the 60-day period, the judge fails or declines to file the semi-annual report, the chief judge shall also request the judge to state whether he is or is not in compliance with the 1963 resolution; a failure or refusal so to state will likewise be published;

(d) In the event the judge declines to make a report on grounds of conscience, he shall be advised that if desired such fact will be noted in the published report.

The Judicial Conference of the United States at its meeting in October 1972 adopted the following resolution:

That all full-time magistrates and all full-time referees in bankruptcy be required to file with the Review Committee, with the Chief Judge of the District Court in which they operate and with the Clerk of that court a semi-annual Public Report of Extrajudical Income in the same form and at the same times as is presently required of federal judges.

Extrajudicial Services

The Judicial Conference on the recommendation of the Review Committee, at its meeting in October 1971, approved the following resolutions:

Upon the ultimate adoption by the American Bar Association of a new set of Canons of Judicial Ethics, the Judicial Conference of the United States should establish some guiding criteria as to the propriety, in nature and amount of honoraria accepted by federal judges for commencement addresses, lectures, speeches, etc. Your [Review] Committee suggests that the amount accepted by federal judges, if honoraria per se are approved, should never exceed the amount which would be paid to a non-judge for the same or similar services;

The chief circuit judge of each circuit should exercise close superivision over the extrajudicial teaching and lecturing commitments of the judges within his circuit to such an extent that these and other extrajudicial activities will be held to such a minimum as to insure that those activities are not being carried on to the detriment of the performance of official judicial duties. Each chief circuit judge should be especially alert to carefully check all extrajudicial activities in those districts where the judicial work is not current.

Interim Advisory Committee on Judicial Activities

The Conference resolved that when an individual judge's report indicates to the Review Committee that a specified activity may be one that should be considered by the Interim Advisory Committee, the Review Committee is requested to suggest to such a judge that he make a formal inquiry of that committee respecting such activity.

Courtroom Photographs

The Judicial Conference in March 1962 passed the following resolution concerning the taking of photographs in the courtrooms or their environs:

"RESOLVED, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court."

Again at its March 1965 session the Conference reaffirmed the application of Rule 53 of the Federal Rules of Criminal Procedure to all proceedings in United States Courts, including ceremonial proceedings, and to all proceedings before United States Commissioners wherever held. The Conference agreed that the taking of photographs or the broadcasting of proceedings before a United States commissioner should not be permitted regardless of whether such hearing or proceeding takes place on Federal property, in the private office of the commissioner, or otherwise.

93D CONGRESS
1ST SESSION

S. 1064

IN THE SENATE OF THE UNITED STATES

MARCH 1, 1973

Mr. BURDICK introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 455 of title 28, United States Code, is amended to read as follows:

"§ 455. Disqualification of justice or judge

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) where he has a personal bias or prejudice con-

cerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

"(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the controversy;

"(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

"(ii) Is acting as a lawyer in the proceeding;

"(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iv) Is to the judge's knowledge likely to be a material witness in the proceeding;

"(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

"(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

"(2) the degree of relationship is calculated according to the civil law system;

"(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

"(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

"(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

"(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

"(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

"(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

"(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

SEC. 2. This Act shall not apply to the trial of any proceeding commenced prior to the date of this Act, nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act.

Senator BURDICK. We will include in the appendix to the hearing record a copy of the ABA Code of Judicial Conduct and two newspaper articles relating to two recently publicized incidents which involved the circumstances affecting the disqualification of a judge.

And at this time there will be included in the hearing record, not only for the sake of completeness, but by way of further examples of the nature of the subject of judicial disqualification the following documents. First, a memorandum dated April 9, 1962, from Mr. Katzenbach to Mr. White and a memorandum of Mr. Justice Rehnquist, 409 U.S. 824, in reference to the case of *Laird* v. *Tatum*, 408 U.S. 1.

May 1972 / Final Draft

Code of Judicial Conduct

Special Committee on Standards of Judicial Conduct
American Bar Association

ABA

AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

Code of Judicial Conduct

CAUTIONARY NOTE: This Final Draft of the Code of Judicial Conduct has been prepared by The Special Committee on Standards of Judicial Conduct of the American Bar Association. It has not been acted upon by the American Bar Association.

Additional copies may be obtained without charge from the American Bar Association, Circulation Department No. 3018, 1155 E. 60th Street, Chicago, Illinois 60637.

Preface

Almost fifty years ago the American Bar Association formulated the original *Canons of Judicial Ethics*. Those Canons, occasionally amended, have been adopted in most states. In 1969 the Association determined that current needs and problems required revision of the Canons. In the revision process, the Association has sought and considered the views of the Bench and Bar and other interested persons. In the judgment of the Association this Code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement.

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CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
(2) A judge should maintain order and decorum in proceedings before him.
(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

(5) A judge should dispose promptly of the business of the court.

Commentary

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court

and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Commentary

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7-107 of the *Code of Professional Responsibility.*

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary

Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware.

Commentary

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
  (i) is a party to the proceeding, or an officer, director, or trustee of a party;
  (ii) is acting as a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1) (d) (iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:
(a) the degree of relationship is calculated according to the civil law system;

Commentary

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.
A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, 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 judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary

Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

*(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge engaged in a family business at the time this Code becomes effective.

Canon 5 may cause temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income through commercial activities. The remedy, however, is to secure adequate judicial salaries.

[Canon 5C(2) sets the minimum standard to which a full-time judge should adhere. Jurisdictions that do not provide adequate judicial salaries but are willing to allow

full-time judges to supplement their incomes through commercial activities may adopt the following substitute until such time as adequate salaries are provided:

*(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

Jurisdictions adopting the foregoing substitute may also wish to prohibit a judge from engaging in certain types of businesses such as that of banks, public utilities, insurance companies, and other businesses affected with a public interest.]

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary

This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. 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.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Commentary

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary

A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gather-

ings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary

Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

Submitted by the Special Committee
on Standards of Judicial Conduct

Roger J. Traynor, *Chairman*
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April, 1972

[From the Minneapolis Tribune, March 1973]

JUDGE TAKES STOCK OF WIFE TO STAY ON NSP CASE

U.S. District Judge Miles Lord may have taken a loss in domestic tranquility on a stock sale made Thursday.

The stock he sold belonged to his wife, and he didn't have time to consult her on the decision, since he was on the bench at the time the decision was made.

Judge Lord was presiding at a hearing on a suit against Northern States Power Co. (NSP) by a consumer organization when he recalled that Mrs. Lord owned some NSP stock.

He briefly considered dropping from the case, but since time was important to the contestants in the suit, he decided instead to get rid of the stock. Judge Lord ordered his secretary to call his broker and sell at the going price, whatever it might be. She did.

Later, when it appeared that a settlement of the case might be possible, Judge Lord surveyed the attorneys for both parties in the case and said, "I hope my wife will forgive me."

The settlement try failed, however, and the case went on.

Judge Lord said that his wife acquired the stock in 1951, when he was a law student.

[From the Washington Post, May 8, 1973]

HIGH COURT LETS STAND CONVICTION

(By John P. MacKenzie)

Over the dissent of our justices, the Supreme Court yesterday denied the petition of a Washington man who sought to disqualify a judge for past involvement in his case as a government attorney.

Without comment by the majority, the court let stand the conviction of John R. Gay for larceny and ignored Gay's claim that Judge Frank Q. Nebeker of the D.C. Court of Appeals should not have taken part in the city court's decision against him.

Dissenting on grounds that the "appearance of justice" required a strict standard of disqualification were Justices William O. Douglas, William J. Brennan Jr., Potter Stewart and Thurgood Marshall.

Nebeker's name appeared on the government's appeal briefs as the principal appellate lawyer in the U.S. attorney's office, a post he held until named to the highest local court by President Nixon in May, 1969.

Gay's lawyer, joined in part by Solicitor General Erwin N. Griswold, told the Supreme Court that although Nebeker probably did not notice the coincidence, the appeal should be reconsidered by a fresh panel of the Court of Appeals.

The dissenters conceded that there was no federal law that precisely covered the case but they contended that the American Bar Association's new code of judicial conduct—which has been adopted as a rule governing city judges—called for Judge Nebeker's disqualification.

"In this case any appearance of impropriety may reflect on the federal judiciary as a whole," the dissenters said.

WHITE MEMORANDUM 4–9–62

DISQUALIFICATION OF SUPREME COURT JUSTICES BECAUSE OF A PRIOR PARTICIPATION IN A CASE AS A GOVERNMENT ATTORNEY OR OFFICIAL

This memorandum deals with the question as to when a Justice of the Supreme Court is disqualified from sitting in a case because of prior participation as a Government attorney or official.

The federal statute governing the disqualification of United States judges is 28 U.S.C. 455, reading as follows:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper in his opinion, for him to sit on the trial, appeal or other proceeding therein."

This statute, derived from section 601 of the Revised Statures, applied only to district judges prior to the revision of the Judicial Code in 1943 and its enactment into positive law as Title 28 (Act of June 25, 1943, 62 Stat. 369). According to the Reviser's Note, the section is now applicable "to all justices

and judges of the United States", and 28 U.S.C. 451 provides that for the purposes of Title 28, the "term 'justice of the United States' includes the Chief Justice of the United States and the associate justices of the Supreme Court." The only reference to this statute in the decisions of the Supreme Court appears in a dissenting opinion by Mr. Justice Harlan in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, 695 (1960), a case which did not involve disqualification but the eligibility of a retired circuit judge to participate in the decision of a case under 28 U.S.C. 46(c), requiring the participation of all "active" circuit judges. Justice Harlan, in dissenting from the decision that the statute excluded retired judges, observed that under the circumstances the question was one of policy to be left with the various Courts of Appeal "if indeed not to the conscience and good taste of the particular circuit judge concerned, as in most instances of individual disqualification for other reasons. Cf. 28 U.S.C. §455."

It should be emphasized that a justice or judge may exercise discretion under 28 U.S.C. 455 only if his relationship or connection with a party or his attorney is the ground for possible disqualification. In that event, the disqualification turns upon the question whether, in the justice's or judge's opinion, the relationship or connection would render it improper for him to sit. However, if the justice or judge (1) has a substantial interest, (2) has been of counsel, or (3) is or has been a material witness, disqualification is mandatory, not discretionary. See *Roberson* v. *United States*, 249 F. 2d 737 (C.A. 5, 1957) cert. den., 356 U.S. 919; *United States* v. *Vasilick*, 160 F. 2d 631 (C.A. 3, 1947); *United States* v. *Maher*, 88 F. Supp. 1007 (D.C. Me., 1950); *Ex parte N. K. Fairbank Co.*, 194 Fed. 978 (D.C. D. Ala., 1912).

In the *Roberson* case, it appeared that the district judge before whom the defendant had been tried had been the United States Attorney who had prosecuted one of the Government witnesses in another case. The Court of Appeals held that the judge had not been disqualified on the ground that he had been counsel in the case of the defendant. It stated, however, that "a United States attorney is of counsel for the Government in criminal prosecutions" and continued that if the judge as United States Attorney had "[a] prior knowledge of the facts or a prior interest in an issue arising out of them" this "may be a ground for disqualification." 249 F. 2d, at 741. The Court of Appeals for the Third Circuit held in the *Vasilick* case, *supra*, that the statute disqualified a judge who as United States Attorney has signed the indictment on which the defendant had been tried and convicted, pointing out that in such an instance "his disqualification is not a matter for the exercise of his own discretion but is unconditional and absolute." 160 F. 2d, at 632. The majority of state decisions involving similar statutes are to the same effect. See Annotation, "Disqualification of Judge", 72 ALR 2d 443, 508 (1960): "In most of the cases it has been held that a judge who, as prosecuting officer, signed an information or indictment was disqualified from sitting in the case."

From the foregoing, it seems clear that a government attorney is "of counsel" within the meaning of 28 U.S.C. 455 with respect to any case in which he signs a pleading or brief, even if this was merely a formal act, and probably should be regarded as "of counsel" if he actively participated in any case even though he did not sign a pleading or brief. I might note that judges of the Court of Claims are also subject to the section. At his confirmation hearing on April 5, Oscar Davis stated that he would disqualify himself with respect to matters pending in the Department while he was here only in those two circumstances. This answer appeared completely to satisfy Senator Keating, the only subcommittee member present.

Conceivably, it could be argued that an officer like a United States Attorney, the Attorney General or the Deputy Attorney General is "of counsel" with respect to every case under his general responsibility even though he has had no actual connection at all with it and has signed no pleading or brief. There is, however, no case or authority under 28 U.S.C. 455 to that effect, and the practice of the only Supreme Court Justice appointed from the Department since the 1948 revision indicates a contrary interpretation. We are advised that Mr. Justice Clark in some cases would telephone the Department to determine whether he had ever participated in the Department's consideration of the case before the Court.

The view represented by the practice followed by Mr. Justice Clark was articulated by the author of a law review article written prior to the extension of the statute to all United States Justices and judges in 1948. See Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 624 (1947): "There is no impropriety where the judge's role as prosecutor has largely been formal, as in the

case of Attorneys General, who have only theoretical responsibility for minor cases in their departments." I agree with this view, and see no reason why either as a matter of technical construction or policy, you should be regarded as "of counsel" with respect to all litigation in the department subject to your technical supervision. This seems to have been the view the Department took prior to the revision of Title 25. See attached letter from the Assistant to the Attorney General to Dennis Hurley, dated July 24, 1940, relating to Mr. Justice Murphy. And Mr. Davis' recent testimony is consistent with this view.

I believe the foregoing also provides an adequate guide to the exercise of discretionary authority under 28 U.S.C. 455 in forming an opinion as to whether a former relationship or connection renders it improper to sit. The Solicitor General's Office tells us that Attorneys General and solicitors General who went on the Court before the revision of Title 28 appear to have disqualified themselves only if they personally participated in a case at any stage or if their names appeared on a brief or pleading. And, according to Frank, Mr. Justice Murphy, although Attorney General while the *Schneiderman* denaturalization case was in the Department of Justice had so little connection with it that "he felt free to vote against the Department he formerly headed." 56 Yale L. J., *supra*, at 624. On the other hand, Mr. Justice Jackson thought that his connection with the case after he succeeded Justice Murphy as Attorney General was direct and close enough to justify his disqualification. *Ibid.* Frank also states that Justice Jackson, on other occasions, recognized that his previous contact with a matter was too slight to be prejudical. *Ibid.* Chief Justice Stone also agreed that an Attorney General's participation in a case might be so minor and formal as not to require disqualification. After referring to certain cases in which Justices on the Court disqualified themselves, Stone said (*Id.*, 634):

"In these cases, the disqualifications were due to one of two causes. As you know, we have a number of ex-Attorney Generals and an ex-Solicitor General on the Court, and in these particular cases, a number of members of the Court have had something more to do with the case then the mere pro forma relations which an Attorney General often has with cases in the Department of Justice."

Apparently, Stone rarely disqualified himself, although he did so, for example, in the *Aluminum Co.* case because it seemed to him that his connection with it as Attorney General was "so intimate" for a time that it was "distinctly undesirable" that he should assume to sit in it.[1]

Attachment.

JULY 24, 1940.

DENIS M. BURLEY, ESQUIRE,
Brooklyn, N.Y.

DEAR DENIS: I regret that in the rush of things a reply to your recent letter was delayed.

I note your suggestion that in the case of *United States* v. *Dickerson*, recently decided by the Supreme Court, the opinion was written by Mr. Justice Murphy, although the case had been pending in the Court of Claims during his tenture of office as Attorney General and the Government had been represented in the case by his office.

I am afraid that I am unable to agree with you that if these facts had been called to Mr. Justice Murphy's attention, he would have disqualified himself from participating in the case in the Supreme Court. When the Attorney General or the Solictor General is elevated to the bench, he is not considered disqualified to participate in every case that happend to be pending in the Department during his tenure of office. Such a disqualification attaches only to those cases which had come to his personal attention or as to which his name was signed to a brief or some other document.

This has been the attitude of other members of the bench, as well as of Mr. Justice Murphy. One must bear in mind that thousands of matters are pending in the Department of Justice at any time and that the Attorney General has personal knowledge of but a small proportion of them.

With kind regards,

Sincerely yours,

(S) MATTHEW F. MCGUIRE,
The Assistant to the Attorney General.

[1] *Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives* 78th Cong. 1st Sess. on H. R. 2803, *To Change the Quorum of the Supreme Court of the United States*, 24 (1943). See also, 30A. Am. Sup. Sec. 168.

SUPREME COURT OF THE UNITED STATES

No. 71-288

Melvin R. Laird, Secretary of Defense, et al., Petitioners, *v.* Arlo Tatum et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[October 10, 1972]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its

[1] In a motion of this kind, there is not apt to be anything akin to the "record" which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

hearings on "Federal Data Banks, Computers and the Bill of Rights," and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U. S. C. § 455 which provides:

> "Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, or appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motions summarize their factual contentions as follows:

> "Under the circumstances of the instant case, MR. JUSTICE REHNQUIST's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

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[2] See Executive Report No. 91-92, 91st Cong., 1st Sess., Nomination of Clement F. Haynsworth, Jr., pp. 10–11.

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings, p. 619.

There is one reference to the case of *Tatum* v. *Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The former appears as follows in the reported hearings:

> "However, in connection with the case of *Tatum* v. *Laird,* now pending in the U. S. Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird* v. *Tatum,* other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird* v. *Tatum,* treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government's conduct of the case of *Laird* v. *Tatum.*

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U. S. C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, [or] is a material witness . . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird* v. *Tatum,* these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States* v. *District Court,* — U. S. — (1972), for which I was not officially responsible in the Department but with respect

to which I assisted in drafting the brief, and in *S & E Contractors* v. *United States*, —— U. S. —— (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird* v. *Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale Law Journal 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection." Frank, *supra*, 35 Law & Contemporary Problems, at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In *Schneiderman* v. *United States,* 320 U. S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U. S., at 207.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court

> of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H. R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, *supra,* 56 Yale Law Journal, at 612.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, *United States* v. *Darby,* 312 U. S. 100 (1941), and in later cases construing it, including *Jewel Ridge Coal Corp.* v. *Local 6167, UMW,* 325 U. S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. "The Labor

[3] See denial of petition for rehearing in *Jewel Ridge Coal Corp.* v. *Local 6167, UMW,* 325 U. S. 897 (1945) (Jackson, J., concurring).

Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States* v. *Hutcheson*, 312 U. S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in *McGrath* v. *Christensen*, 340 U. S. 162 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U. S., at 176. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length

the doctrine expounded in the case of *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1922). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937), in which a closely divided Court overruled *Adkins.* I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, *supra,* 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Christensen would have preferred not to argue before Mr. Justice Jackson;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

MR. JUSTICE DOUGLAS' statement about federal district judges in his dissenting opinion in *Chandler* v. *Judicial Council*, 398 U. S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the profferred defense, and the like. Lawyers recognize this when they talk about

[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in *Christensen* does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

> 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e. g.*, the opinion of Mr. Jus-

tice Harlan, joining in *Lewis* v. *Manufacturers National Bank,* 364 U. S. 603, 610 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See *Worcester* v. *Street R. Co.,* 196 U. S. 539 (1905), reviewing 182 Mass. 49 (1902); *Dunbar* v. *Dunbar,* 190 U. S. 340 (1903), reviewing 180 Mass. 170 (1901); *Glidden* v. *Harrington,* 189 U. S. 255 (1903), reviewing 179 Mass. 486 (1901); and *Williams* v. *Parker,* 188 U. S. 491 (1903), reviewing 174 Mass. 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, *supra,* 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualifi-

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[5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

cation in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. *Edwards* v. *United States*, 334 F. 2d 360, 362 (CA5 1964); *Tynan* v. *United States*, 376 F. 2d 761 (CADC 1967); *In re Union Leader Corporation*, 292 F. 2d 381 (CA1 1961); *Wolfson* v. *Palmieri*, 396 F. 2d 121 (CA2 1968); *Simmons* v. *United States*, 302 F. 2d 71 (CA3 1962); *United States* v. *Hoffa*, 382 F. 2d 856 (CA6 1967); *Tucker* v. *Kerner*, 186 F. 2d 79 (CA7 1950); *Walker* v. *Bishop*, 408 F. 2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e. g.*, *Tinker* v. *Des Moines School District*, 258 F. Supp. 1971, affirmed by an equally divided court, 383 F. 2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U. S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to

the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instances is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U. S. C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice

[6] *Branzburg* v. *Hayes, In re Pappas,* and *United States* v. *Caldwell,* — U. S. — (1972). *Gelbard* v. *United States* and *United States* v. *Egan,* — U. S. — (1972). *Airport Authority* v. *Delta Airlines Inc.* and *Northeast Airlines Inc.* v. *Aeronautics Commission,* — U. S. — (1972).

without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him]. . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.[7]

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[7] Petitioners in *Gravel* v. *United States,* No. —, O. T. 1971, have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case. Because respondents' motion in *Laird* was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in *Gravel,* insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it relates to disqualification verges on the frivolous. While my peripheral advisory role in *United States* v. *New York Times,* — U. S. — (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in *Gravel,* a different case raising entirely different constitutional issues.

Senator BURDICK. Also a statement submitted by Mr. Roger K. Newman, of Brooklyn, N.Y. With reference to the last item, the record should show that Mr. Newman has supplied the subcommittee with copies of the written permission he has received for publication to this subcommittee of the correspondence included in his statement.

[Statement of Roger K. Newman in full follows:]

TESTIMONY ON JUDICIAL DISQUALIFICATION, PRESENTED BY ROGER K. NEWMAN

I should first like to thank the subcommittee for permitting me to testify. I am a graduate student in Politics at New York University with a deep and fervent interest in law, especially the functioning and output of the Supreme Court. With this introductory statement out of the way I would like to present my remarks.

No responsible commentator would doubt, I think, that an independent judiciary is essential to the American system of government. The judiciary in all its activities must be unspoiled and untainted by even the slightest taint of scandal and corruption. "The place of justice is a hallowed place," said Bacon, "and therefore not only the Bench, but the footpace and precincts and purpose thereof ought to be preserved without scandal and corruption." "A fair trial," the Supreme Court has declared, "in a fair tribunal requires an absence of absolute bias in the trial of cases."

The Court must be the exemplar of impartiality. "[T]o perform its high function in the best way," "justice must satisfy the appearance of justice." "For the proper administration of justice requires of a judge not only actual impartiality but also the appearance of a detached impartiality."

The disinterestedness of the Court must not be questioned; it must be above reproach. For "to distrust the judiciary marks the beginning of the end of society." I trust we have not reached that point. But the problem lies, of course, with the men who constitute the Court.

Every Justice who sits on the Court approaches each case, it is presumed, with a free and open mind. But he brings to bear certain preconceptions as a result of his previous experiences and life style. A judge must wash his hands of any of these when tackling a case. Difficult it admittedly is, but why are we to have judges otherwise? It is the duty of a judge to ferret out his dominant unconscious personal motives. The writings of Felix Frankfurter are replete with this warning; his life is testament to it. As Jerome Frank said, "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness." ". . . [O]ur system has always endeavored to prevent even the possibility of unfairness."

Thus, in recusing himself in Public Utilities Commission v. Pollack, Justice Frankfurter commented:

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feelings on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man in it. It does. The fact is that on the whole judges so lay aside private feelings in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that most fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not sit in judicial judgment on it. I am explicit in the reason for non-participation in

this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case.

After the case, Justice Frankfurter corresponded with a friend on this matter:

JUNE 9, 1952.

HON. FELIX FRANKFURTER,
Supreme Court of the United States,
Washington, D.C.

MY DEAR MR. JUSTICE: This time I travelled almost the longest distance I've ever gone. I had to undergo emergency surgery and was in the Flower Fifth Avenue Hospital for quite a time. I am now convelescing, moving around cautiously in a limited way. That accounts for the fact that I haven't sent you the pictures of which I spoke. They are now on their way. My illness also accounts for the fact that I haven't been able to finish the work on your Brandeis manuscript.

I was interested in the Capitol Transit case and, if I may do so with entire propriety, I'd like to ask you about your disqualifying yourself in that case. Some time ago I was interested in disqualifying an administrative official in Pennsylvania. The Supreme Court of Pennsylvania never reached the question of disqualification because the case was decided on the merits. But in the course of the case studying the question I came across in re *Crawford's Estate*, 307 Pa. 102, 160 A.585 at 587, where the Court said that "temperamental prejudice on the particular class of litigation involved" is one of the "recognized grounds" for disqualification. I had never heard of that ground before or since, and am still not sure I understand what it means in the context of a particular set of facts. I wonder if it's possible that your action in the Capitol Transit case was based on that "recognized ground" for disqualification?

Do please tell me if you want any more or larger copies of any or all of the pictures taken at your Brandeis dinner.

As always,

Yours most respectfully,

ARTHUR W. A. COWAN.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., June 11, 1952.

MY DEAR ARTHUR: I am terribly sorry to hear you have been under the knife. Heed the wisdom of a fellow who has watched in others the effect of surgery. No matter how quick the dealing and how confident you may be that all is as it was, an operation has subtle aftermaths. It takes it out of one unbeknownst. So go slow.

In our Court each man decides for himself when he thinks he ought not to sit in a case. Of course a man ought not to take himself out of a case for silly or pernickety reasons. I didn't know anything about the "recognized ground" formulated in *Crawford's Estate*. What I wrote expresses precisely the reason why I thought it best not to sit in that case. I had been, loosely speaking, a party in interest.

The photographs have come and some of them are altogether admirable, particularly of Justice Roberts. I am asking the Marshall whether he desires to take advantage, for his collection, of your kind offer to have some larger copies of some of the pictures.

With good wishes,

Sincerely yours,

FLEIX FRANKFURTER.

I enclose some correspondence between Justices Brennan and Black and Professor Edmond Cahn on this matter in the hope it will be of interest to the subcommittee.

NEW YORK UNIVERSITY SCHOOL OF LAW,
May 19, 1964.

HON. WILLIAM J. BRENNAN, JR.,
U.S. Supreme Court,
Washington, D.C.

DEAR BILL: It seems a shame, after some months of silence, that I should have to tell you that I disagree with your decision to withdraw from the Marks case. But then "Tender are the wounds of a friend", and besides I agree with you so often that occasional disagreement is almost necessary.

It may perhaps alleviate the stricture if I add that I also disagree with your withdrawing from the Schnieder case. For years I have preached (not too successfully) that when a *constitutional* issue is involved, every justice owes the country his vote and that the recusatory factors factors applicable to ordinary litigation can do no more excuse him than they would the President in performing his constitutional duty as commander-in-chief. I think it absurd to postulate that a man fit to sit on the United States Supreme Court cannot decide a constitutional issue according to law just because he may have some personal interest in the outcome or because his former law-partner or son may argue the case. In non-constitutional cases, I should go along with the traditional practice, because the Congress can usually remedy an unfortunate outcome. But where the Constitution is involved, I should contend that a justice fails in his duty if he abstains from voting unless he is incapacitated or could not attend the argument.

Someday, sooner or later, I must find the time to publish this contention, which I have been advancing informally over a period of years. When I do, I shall not argue that former law-partners, sons, etc. should be disqualified in any way. Rather I shall argue that if constitutional principles can emanate from conventions composed of delegates having immediate interests at stake, they can also emanate from judges whose professional discipline and life experience have especially prepared them to put bias and affection aside.

With warm and friendly regards, believe me

Cordially yours,

EDMOND CAHN.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., May 21, 1964.

DEAR EDMOND: It's a most powerful argument, magnificently and beautifully expressed. Hugo, to whom I showed your letter, asked me to express the same thought on his behalf. He remembers reading some earlier case in which Story stated your view in explanation of why he did not recuse himself in the case. Hugo does not remember what the case was. However, Story was not faced with the congressional policy declaration with which the Court has had to contend since 1948. 28 U.S.C. § 455, 62 Stat. 908 provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

This statute was based on an earlier 1940 statute which did not apply to the Justices of this Court and did not contain the last clause covering relationship to a party's attorney. The changes were proposed as part of a general revision of the Judicial Code undertaken in 1945. The legislative history doesn't disclose why Justices of ths Court were included. It does say something but not much about relationship to a party's attorney. What is says is:

"Relationship to a party's attorney is included in the revised section as a basis of disqualification in conformity with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule."

Several of us since I came here have found it necessary to respect this policy. Hugo, Bill Douglas, Tom Clark and I have followed the practice of recusing ourselves in cases brought here by law firms with which our sons are connected.

You indeed make forceful arguments, but we have thought that respect for the congressional policy is necessarily indicated.

With warmest personal regards, I am

Sincerely,

WM. J. BRENNAN, JR.

NEW YORK UNIVERSITY SCHOOL OF LAW,
May 26, 1964.

Hon. WILLIAM J. BRENNAN, JR.,
U.S. Supreme Court,
Washington, D.C.

DEAR BILL: Thanks warmly for your good letter of the 21st on recusation. It presents me with a hard problem, to wit, shall I or shan't I argue with my friend at this extremely trying stage of the Court term?

If you regard § 455 as requiring your withdrawal in the Schnieder case (much less the Marks case), I really ought to be considerate and avoid further discussion, at least for the time being. Perhaps I have read too many blue-books and become myopic, Bill. All I can discern in the section is: (a) a categorical direction to disqualify oneself if one "has a substantial interest, has been of counsel, is or has been a material witness", which categorical direction I believe the justices would have to disregard in any one of the many situations exemplified by *Evans* v *Gore* 233 U.S. 245; and (b) a summary of the previous practice obtaining when a justice "is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit."

Of course, the operative words "in his opinion" make part "(b)" of the section merely potestative. Potestative is what withdrawal for this cause always was and if words mean anything potestative it remains.

There is a deal more to be said on the constitutional issues, and I'll hold it for a quieter day. But meanwhile, I just couldn't let the problem dangle from the hook of §455; it's a twenty-pound problem and §455 looks to me like a one-pound hook.

Maybe I'll have to give a speech on the subject, after all. Preparing one would be a fit punishment for disagreeing with you and Hugo.

With bleary eyes for which, alas, neither your martinis nor Hugo's bourbon can be blamed, believe me

Cordially yours,

EDMOND CAHN.

NEW YORK UNIVERSITY SCHOOL OF LAW,
May 27, 1964.

HON. WILLIAM J. BRENNAN, JR.,
U.S. Supreme Court,
Washington, D.C.

DEAR BILL: I need an excuse for writing you again on recusation so soon after yesterday's letter, and fortunately I have one. You furnished the excuse by mentioning Hugo's reference to a statement made by Justice Story.

I feel reasonably certain that the case Hugo has in mind is *The Venus*, 8 Cranch 253 at 287.

To appreciate the force of Justice Story's statement it is necessary to note that he did not hesitate to sit in the Supreme Court on appeal from his own determination in the Circuit Court. See *Brown* v. *United States*, 8 Cranch 110, 129; *The Julia*, 8 Cranch 181. Moreover, if my count is correct, Justice Story's vote was not indespensable to disposition of *The Venus* because without it the division would have been three to two.

You will observe that Justice Story, though supporting my position in substance, does not make the distinction I offered between constitutional and non-constitutional cases. *The Venus* was a case of considerable moment which had to be decided at a time when war tempers were high. Since Story seems to have decided a number of prize cases on circuit, we can infer that he felt that silence in *The Venus* would diminish the prestige of the majority's determination. At any rate, if the precedent is important, surely one can argue my thesis *a fortiori*.

This is the only incident that needs to be added to John Frank's splendid research in 56 Yale L.J. 605. I confess to surprise that the distinction between constitutional and noncontitutional cases does not emerge in John's article. Perhaps that very circumstance would help me in urging the justices and the bar to take a fresh look at recusation.

I imagine that you showed Hugo my letter of yesterday. Since today's letter revolves around his miraculously dependable recollection, I an sending him a copy.

Oh, what strange ideas we fuse when first we practice to recuse!

Cordially yours,

EDMOND CAHN.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., May 27, 1964.

Prof. EDMOND CAHN,
New York University School of Law,
New York, N.Y.

DEAR EDMOND: There's another side which deserves some advocacy, but I am frankly not able now to give time to its expression. Maybe we'll have a chance when I am at the Seminar in July.

With warmest personal regards, I am

Sincerely,

WM. J. BRENNAN, JR.

NEW YORK UNIVERSITY SCHOOL OF LAW,
May 27, 1964.

Hon. HUGO L. BLACK,
U.S. Supreme Court,
Washington, D.C.

DEAR HUGO: Since Bill Brennan has brought you into our correspondence on the subject of recusation I feel it will convenience you and him to send you a copy of the enclosed letter.

I can understand that no justice of the Court can reasonably be expected to take the initiative of espousing the thesis for which I stand. If I believe in it, the duty is mine to declare and urge it. Consequently, unless you or Bill think that I am really on the wrong track, that is what I intend to do at the earliest opportunity. Any comments of yours would be extremely welcome and—it goes without saying—would be treated as confidential, unless you authorize quotation.

This note gives me a chance to congratulate you warmly and happily on your opinion in *Griffin* v. *City School Board.* It is a truly admirable performance. Hugo, you certainly scintillate with the Griffins!

The demands of recent years diverted me from my long-term philosophical interests and required rather constant preoccupation with issues on constitutional law. Now that so much has been won on behalf of our libertarian principles I feel free to return to my own bent. The philosophers have been giving justice a very bad time and I want to devote the years ahead to defending the woman I love.

With affectionate greetings to you and Elizabeth, believe me

Your friend,

EDMOND CAHN.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., May 28, 1964.

Prof. EDMOND CAHN,
New York University School of Law,
New York, N.Y.

DEAR EDMOND: I hadn't had a chance to show Hugo your letter of yesterday nor talk with him about your very interesting discussion of *The Venus.* I'll write you at greater length when I can get together with him.

With warmest personal regards, I am.

Sincerely,

WM. J. BRENNAN, JR.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., June 1, 1964.

Prof. EDMOND CAHN,
New York University,
The Law School,
New York, N.Y.

DEAR EDMOND: Your letter of May 27th was very welcome, particularly because I had lost my reference to Judge Story's opinion in *The Venus*, 8 Cranch 253, at 287.

I know of no reason whatever why you should not discuss the subject of Supreme Court Justices taking themselves out of cases. An article by you would be provocative and would cause people to think. Perhaps many would

reappraise their previous views. While the general rule is, of course, an excellent one, there have undoubtedly been cases where judges have gone too far in refusing to participate in a decision on legal points of great importance which needed to be decided. I shall look forward with interest to reading your article.

Thanks for your reference to my Prince Edward County school opinion. Some communications have come to me on that subject taking a view opposite to yours in language not altogether pure and holy.

We are very busy.

Elizabeth and I send you and Lenore our best regards.

Sincerely,

HUGO L. BLACK.

Does the robe transform the man when he goes on the bench? Frankfurter believed it did if the man in it "is any good." A new judge is not automatically cleansed of all prejudice or immunized against social pressures. Indeed, his life experiences remain with him, forever. "When I woke up one morning a federal court judge," Jerome Frank has written, "I found myself about the same person who had gone to bed the night before a SEC Commissioner." It is, therefore, especially important that a newly robed Justice does not impart his recent experiences into his decisions. To prevent this, I will suggest an amendment to 28 U.S.C. section 455. Before discussing my suggestion, I shall consider, briefly, the problems of a new Justice.

Any newly-appointed Justice, no matter how great his intellectual equipment, must, in Judge Friendly's words, "go through the form of re-examining the efficacy of every element in the pharmacopoeia." He must think through all his premises. And, after all this, Justice Douglas had suggested that it takes a new Justice 10 years to get fully into the "swing" of things on the Court. Needless to add, I am not impugning in any way any Justice, prior or present. I am simply stating what some have perceived to be true.

The problem of whether a Justice should sit in a case is especially acute with a new Justice. It is even more so for a Justice, new or not, who has worked in the Executive Branch of the Federal Government. As the legal arm of the Government, the Department of Justice is the largest single litigant before the Court, appearing in more than a third of the cases argued each year. A Justice who was formerly an official in that Department should recuse himself in all cases in which he had been involved while working there. Such was the case with Justices Jackson and White. Such should be the case with all Justices who were previously officials with the Department of Justice. The recently adopted Code of Judicial Conduct of the American Bar Association states:

Canon 3. *A Judge Should Perform The Duties Of His Office Impartially And Diligently.*

C. DISQUALIFICATION

COMMENTARY

A judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

The general rule of thumb that most Justices have accepted is that one should abstain from any case with which he has had personal contact, or as quoted above. A new Justice coming from the Justice Department might indeed, in my opinion, have his impartiality "reasonably be questioned" unless he recuses himself. Cases brought during his tenure in that Department will usually come before the Court. The new Justice might sit; then again, he might not. It is granted that "[t]he question of when a judicial officer is disqualified to sit in judgment in a particular case is one of the most difficult and delicate problems in judicial administration" but in *Berger* v. *U.S.*, the Court readily admitted Congress' role in effectuating this: ". . . we may say that its [Congress] solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free . . . from any 'bias or prejudice' that might distrub the normal course of impartial judgment."

To prevent this quandry which would only result in diminished public confidence in the Court, I suggest that 28 U.S.C. Section 455 be amended as follows:

No Justice who has previously been an appointed official in the Executive Branch of the Federal Government shall sit in any case instituted during his tenure in that appointed position. This provision shall be effective for a period of three (3) Supreme Court Terms excluding the one during which the Justice takes his oath of office. If he is appointed while the Supreme Court is in summer recess, then this provision shall be effective for the following three (3) Terms.

Time assuages and minimizes the impact of many personal relationships. Closeness to a litigant might well have an often indiscernible but nevertheless real impact on a judge's thinking in a case. Distance in time and in intensity affords a more objective perspective.

I realize this is an imperfect answer to a most perplexing problem and hope that this discussion may possibly shed some light on it. What is really needed are judges with a sense of history, of tradition, of humility, in short, judges with enlightened consciences.

STATEMENT OF JUDGE JONATHAN P. ROBERTSON

Indiana has, for many years, been regarded as a liberal State when it came to allowing a change of venue from the judge or the county. With the adoption of our new rules of civil and criminal procedure, patterned after the Federal rules, on the 1st of January, 1970, the rule was further liberalized. In that it gives the parties to a cause of action the right, without showing cause of any sort, to remove their case from the jurisdiction of a particular judge or from a particular county.

Quoting verbatim from the Indiana Rules of Trial Procedure, rule 76(1) says:

"In all cases where the venue of a civil action may now be changed from the judge or the county, such change *shall* be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one change from the county and only one change from the judge."

The trial rule gives—*as a matter of right*—each party to a lawsuit, without giving a reason, the opportunity to either move the case to another county or to have the opportunity of selecting another judge to hear the case.

The mechanics of the system are relatively simple.

In the event the motion asks for a change of judge, trial rule 79 sets forth the manner in which the special judge is selected.

Except in criminal cases, divorce or annulment actions, and election contests involving the judge of the court in which the contest is filed, the parties are given the opportunity to agree upon the new judge. In the three above listed exceptions, or in the case of an ex parte proceeding, there may be consent given to the naming of a particular judge.

Absent agreement or consent, the judge before whom the cause is pending, within 3-days upon notification that there is no agreement, names a panel of 3 persons. The moving party first strikes one, the adversary strikes another, leaving one who in turn is selected as special judge. The rule requires the striking to be completed within 2-days. It is not unusual, however, for the process to take place by means of two or three phone calls, which makes the selection process complete within a matter of minutes.

The person named has 10-days to be notified of his appointment and appear to assume jurisdiction. Failure to do so requires a repeat of the previously described process.

In the event the moving party fails to strike—the court reassumes jurisdiction. In the event the adversary party fails to strike, the clerk of the court strikes in his behalf.

When the change of judge is occasioned by his disqualifying himself, the procedure works the same way, with the plaintiff first striking, then the defendant, in the event there is no agreement between the parties.

The rule allows any judge or lawyer duly admitted to practice in Indiana, to be named to the panel. In practice, in rural counties especially, it is normal to name three fellow judges from surrounding or nearby counties. I had the oppor-

tunity, sitting as a trial judge, to act as special judge in twelve different counties in southeastern Indiana. In the larger counties, such as Marion County—Indianapolis—the courts utilize attorneys as special judge on a more regular basis.

Several features of the change of venue system are worth noting.

There is a definite time schedule involved which must be adhered to if the change is to be granted, with one exception.

The exception to the time schedule is when a party discovers a valid reason for a change of venue and can for a good cause prove it by affidavit and/or evidence to the court.

The change must be requested, in a civil case, no later than 10-days after the closing of the issues on the merits, or within 30-days after filing if the case does not require a closing of the issues.

A change is deemed waived if not asked for if the cause is set for trial prior to the expiration of the previously mentioned time periods, unless a party promptly objects.

The court retains jurisdiction for emergency matters, such as restraining orders, only until the new judge qualifies.

The system of change of venue from the judge for criminal cases is covered by rules of criminal procedure Nos. 12 and 13. The method of selecting the special judge is the same as I have previously outlined. The primary difference is the change must be applied for within 10 days of a plea of not guilty, or within 5 days after the trial date is set, whichever comes first.

While I have grown up, legally speaking, under this system of change of venue, and find it to be a worthwhile procedure in many respects, the system does have its critics. The primary complaint is the delay in bringing a case to trial. And there are attorneys who do use it in the hopes of gaining additional time prior to trial. However, if the court requires the parties to adhere to the schedule as set forth in the court rules, any delay is minimal. The rules also require the moving party to act expeditiously in perfecting the change. And there are some judges who consider such a change as a personal insult, but this does not go to the merits of the system.

One fact must be stressed and that is this system does not give the parties, absent a mutual agreement where allowed, to select a certain judge or to move to a certain location, but only to rid their case of a particular judge or place. Races to the favorable forum are kept to a minimum.

The advantages of the system as I have seen them, from general practice, as a prosecutor, as a trial judge, and now as an associate justice on the State appellate court, are numerous, and can best be illustrated by several examples.

An inescapable fact is that judges are human, and as such, susceptible to the frailties attendant thereto.

In Indiana, where politics are second only to basketball, in the sporting field—as some of you may have noticed—any political motivation on the part of the court, either real or suspected, by attorney or client, can be removed from the case for the mere asking.

There are inevitable personality conflicts that exist between certain lawyers and judges, and where this does exist the lawyer is rarely in a position to represent his client on an equal basis with the rest of the bar. I am familiar with a situation where an attorney was required to practice for almost three years by filing a motion for a change of judge with the complaint in the case. The reason for this situation was that the judge did not take very kindly to the attorney filing an insanity petition questioning the judge's mental health and asking for his commitment to a nearby asylum. While the attorney did have cause for a change under the more traditional rules, the system employed in Indiana expedited the procedure by not requiring affidavits, a hearing, and the awaiting of a ruling.

Another situation where a change of judge proves helpful is when the dreaded syndrome of the "judges-complex" rears its ugly head. I am familiar with still another situation where a judge of long-standing and good reputation, as often as not, would go beyond both legal requirements and good logic in trying a case. An uncontested divorce normally not requiring more than 15 or 20 minutes could turn into a 2- or 3-hour proceeding.

In each of the above illustrations there are corrective procedures that can be employed and eventually resolve the difficulties, but rarely quick enough to relieve a party to a lawsuit then pending.

In situations of this sort, the change of judge rule provides a speedy and efficient protective device for the attorneys and litigants. I am further of the opinion that it adds greatly to the impression of a fair trial.

Another way in which this system affords relief is in the case of a non-functioning judge, the parties can relieve him of the case, and, hopefully, proceed to the conclusion of their case. One judge near my home was hospitalized for a prolonged period of time. Judges from the surrounding counties were selected as special judges and processed litigation, thus giving productivity to what would have otherwise been wasted time.

The judge in my county will be spending the month of August at the national college of State trial judges. During his absence three important lawsuits are scheduled for trial by special judges. This is still another example.

When there is a new judge on the bench, or in the case of a judge in failing health, the attorneys have the opportunity to obtain either a more experienced judge or one who is capable of giving an important trial the attention it deserves.

In short, in our system of trial courts where there is no centralized control over the judges, the change of judge system can be, and is, utilized to prevent wasted effort and non-productive time as much as possible with the end result of speeding litigation to its conclusion. In my opinion, this more than offsets any claim of delay, if it in fact does cause delay in the first instance.

I have noticed the proposed legislation being considered by this committee contains the language that if the judge has personal bias or prejudice, the affidavit may be filed asking for a change. Indiana had similar language until the late 1960's. It is my personal opinion that this standard is probably too subjective to be meaningful, and while in use in Indiana constituted no more than a legal fiction to be mechanically complied with. By the elimination of this type of language in Indiana the rule then accurately reflected the practice, as well as eliminating language that sometimes raised the ire of the judge. In addition, I did not observe an appreciable increase in the number of requests for change of judge but instead a sigh of relief among the attorneys.

I am sorry that I do not have any statistics on the frequency that this procedure is used. It has been my observation, however, that under normal circumstances that from 10% to 15% of a judges' caseload will be subject to a motion for a special judge. If the percentage raises dramatically more than that it is usually the sign of some sort of difficulty in that particular court.

There are two "comfort" features in this system for the judge. About 10 years ago the Indiana secondary-education system was required to undergo a major reorganization with the purpose of doing away with many of the smaller marginal high schools. Many lawsuits, as hotly-contested and emotionally charged as a mountain family feud, were the result. It was common in these cases for a change of judge to be taken—simply for the reason of getting him off the hot spot. Usually the substitution of a more detached legal mind was beneficial in carrying out the desired legislative intent.

The other feature is that virtually all of the judges I am acquainted with enjoy the chance to sit on a different bench. Observing new legal ideas and methods are an important part of the judicial experience. I would not be completely honest if I didn't add that they all enjoy the $25 pay that goes with acting as special judge.

In summary, my opinion is that a change of judge procedure adds to the desirable impression of fair trial to both the bar and the public. It also can act as a safety valve to protect against situations which arise beyond anyone's control and thus smoothes the path of justice.

The procedure can work efficiently and if the court is diligent in requiring the attorneys to perform as required according to specified time limits, it can rarely be used as a dilatory tactic.

I hope my testimony has been helpful to you, and I would be pleased to try to answer any questions you may have. Thank you.

Senator Burdick. The record will also be kept open for Senator Hollings of South Carolina's introduction of his statement into the record.

That concludes the hearing, and the meeting is adjourned.

[Whereupon, at 12:15 p.m. the subcommittee recessed, subject to the call of the Chair.]