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JUDICIAL DISQUALIFICATION

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BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 1064

TO BROADEN AND CLARIFY THE GROUNDS FOR
JUDICIAL DISQUALIFICATION

MAY 24, 1974

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JUDICIAL DISQUALIFICATIONS

FRIDAY, MAY 24, 1974

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF
JUSTICE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., pursuant to notice, in room 2218 Rayburn House Office Building, the Honorable Robert W. Kastenmeier (chairman) presiding.

Present: Representatives Kastenmeier (presiding), and Cohen.

Also present: Herbert Fuchs and Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearings will come to order.

The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, has convened to hear testimony on two measures. The first of these is S. 1064, a bill to improve judicial machinery by amending title 28 of the United States Code to broaden and clarify grounds for judicial disqualification. This bill passed the Senate on October 4, 1973. It would amend section 455 of title 28, United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted Canon, of the Code of Judicial Conduct, which relates to disqualification of judges for bias, prejudice or conflict of interest. To do this the bill amends section 455, title 28, which states the circumstances in which a Federal judge must disqualify himself from consideration of a case before his court. Under section 455 a judge must disqualify himself in four instances: One, when he has a substantial interest in any case; two, when he has been of counsel in any case; three, when he has been a material witness in any case or, four, 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 a proceeding.

The subcommittee is advised that provisions of section 455 differ from those of the American Bar Association's Canon of Judicial Ethics.

Obviously it is undesirable to have our judicial officers subject to conflicting behavior requirements. What is more, we must strive for the clearest and simplest formulation if the judicial branch is to operate at the highest ethical level. S. 1064 will be placed in the record at this point.

[S. 1064, 93d Cong., first sess.]

AN ACT 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 concerning 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 particular case in 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. Item 455 in the analysis of chapter 21 of such title 28 is amended to read as follows: "Disqualification of justice or judge."

SEC. 3. 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.

Passed the Senate October 4, 1973.

Attest:

FRANCIS R. VALEO,
Secretary.

Mr. KASTENMEIER. The subcommittee is honored to have with it this morning the Honorable Roger J. Traynor, former Chief Justice, California Supreme Court, chairman of ABA Special Committee on Standards of Judicial Conduct; and also John P. Frank, attorney at law, Phoenix, Ariz., whose competence in this particular field is nationally appreciated.

Gentlemen, you are both welcome, and you may proceed as you will.

TESTIMONY OF HON. ROGER J. TRAYNOR, FORMER CHIEF JUSTICE, CALIFORNIA SUPREME COURT; CHAIRMAN OF ABA SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT; ACCOMPANIED BY JOHN P. FRANK, ESQ., ATTORNEY AT LAW, PHOENIX, ARIZ.

Judge TRAYNOR. Thank you, Mr. Chairman. We do appreciate, with all your work now, and the pressure you are under, your giving us this opportunity to express our views on this bill.

A crucial issue in which the present statutes differ from the Code of Judicial Conduct is on the disqualification for financial interest.

Under the present statutes a judge is disqualified only if he has a substantial interest. That raises a number of questions as to what is substantial, depending upon the subjective judgment of the judge. We felt that those difficult questions would be removed by what appears to be a Draconian rule, but it seems to us the only effective rule, and would be in line with Tumey against Ohio and another case decided recently, that maybe a judge with an interest participating no matter how small his interest is, might raise a question of due process of law.

The other provision of the existing statutes that is inconsistent with the Code of Judicial Conduct is a duty under the statutes to sit if he is not technically disqualified. We thought it would be more effective and better practice to have the disqualification as mentioned on the very first page of the bill here. He should disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Those are the two discrepancies that we think call aloud for conformity.

As you said in your statement, Mr. Chairman, it is unseemly to have the Code of Judicial conduct, which has been adopted by the U.S. Judicial Conference, and the statutes in conflict. For those two reasons we think it is important to have this bill, S. 1064, adopted.

We had several hearings on the matter that the American Bar committee held. We heard Senator Bayh in St. Louis. Then we had a hearing at the Burdick committee. They are all reported there, and we would respectfully suggest that we would like to incorporate that in your proceedings, if that is agreeable to you. I think this statement, the report of the Senate committee, is an excellent statement, a summary of the discrepancies and reasons for change. I think that is a very good statement.

Mr. KASTENMEIER. Without objection, your statement as it appears before the Senate committee will be incorporated in our proceeding. [Judge Traynor's statement from the Senate hearings 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 re-examination 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 re-examination 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 outstanding 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, 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.

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*.

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 forego 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 5C(1). The remedy, it believes, 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. This 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. KASTENMEIER. Mr. Frank.

STATEMENT OF JOHN P. FRANK, ESQ., ATTORNEY AT LAW,
PHOENIX, ARIZ.

Mr. FRANK. Mr. Chairman, thank you.

Let me say a personal word.

I began working in this field in 1947, at the time of the controversy concerning Justice Black and Justice Jackson on the Supreme Court as to proper standards for disqualification. At that time, because of the immense national interest which was extraordinary, I was able to get a response from the presiding judges of almost all the circuits, and the chief judges of almost all the States to a questionnaire on disqualification practice in America. That was published at that time, and the article has been much used from then until now as a kind of guideline on when to disqualify.

May I say just a word? I know you are pressed, but the history may interest you a little. What happened was a major misfortune. In the course of the codification in 1948, by apparently plain blunder, when the Judicial Code was recodified for the first time the word "substantial" was put in front of "interest" as a test of disqualification, so that when I made my survey in 1946-47, the Federal judges of the United States were disqualifying in the case of any interest, as seven-eighths of the State judges were, too. What happened when the word "substantial" went in there was that as new generations came along new approaches began to develop and it got to be a question of more or less. A judge felt that he need not disqualify, particularly if he was a

rich man, if he had a small interest. What difference does it make? There was a genuine deterioration between 1948 and 1970 on the proper standards on this subject.

This reached an apogee in certain cases in the fifth circuit with which you are probably familiar, in which several judges had real interests in public utilities on matters coming before them. These were small to them because they were rich men but to the country at large it was just not a good thing.

When the matter came on in connection with the appointment of Judge Haynesworth, the Senate Judiciary Committee asked me to appear as an expert witness on the general law of disqualification. I advised the committee to the best of my ability. At that time Senator Bayh, for whom I have high regard, and I saw the matter differently as to its then application under the then existing law, but we both agreed on two things: First, that it was grossly unfair—I really use that colorful phrase deliberately—to apply at the confirmation level, standards which were incompatible with what the law actually was as it was written. It made the statute a boobytrap.

Senator Bayh took the view that the law should be changed to conform with the standard being applied.

When Justice Blackmun was appointed, the identical problem arose with him, because he had heard cases in which he had shares in the Ford Motor Co. He said to the Senate committee:

We must candidly recognize that the standards and times have changed and we are approaching things differently now.

In an effort to bring the statute into conformity, Senator Bayh, Senator Hollings and I worked out a bill which would do fundamentally two things. First, it would provide that a judge must disqualify if there was any interest. The great dramatic episode in the Haynesworth matter was not the one that you recall but in a sense a different one. It was a case where a judge had a piddling bit of stock in some corporation. He got it pending a rehearing on a case that was clearly to be affirmed anyway, but the feeling was that whereas from where he sat it was nothing, from the standpoint of the injured workman, who was losing his all as a result of a decision, it just isn't going to look that way. It would be better to have a standard in which any financial interest is a disqualification. To put it bluntly, we have enough judges now that we can afford a higher standard.

Secondly, on the matter of the so-called appearance of impropriety, we have had a conflict in the Federal system, at least since about 1920. The ABA standard has been that a judge should disqualify if it was going to look bad if he sat. Now I do not mean that as loose talk. Clearly you cannot womp up an imagined impropriety. I have written quite critically of this, because it would be easy to create a storm, and a judge should not yield to it, but there are other matters dramatized by a case of Judge Reeves of the fifth circuit. Judge Reeves some years ago issued an opinion saying, "I clearly would not like to be in this case, I have expressed views, I have been involved. It would be better if I were out of it but I can't get out," and so his vote became a controlling vote in a serious matter.

What the statute does basically is solve both those problems. As a byproduct of the earlier contention, Senator Bayh and Senator Hollings put in bills before the Burdick committee and which in fact I worked on. Meanwhile as a byproduct of other national attention, the Traynor committee was established. The Traynor committee had

on it Justice Potter Stewart, several judges and bar members and it did have extensive hearings. Judge Traynor did a wonderful job as he always does. Senator Bayh and I went out to St. Louis, appeared there discussed this matter in the way Judge Traynor and I are discussing it with you.

Those points of view were accepted by the Traynor committee, which was going in the same direction anyway. At that point the two Senators abandoned their bill and said, "Now we will wait for Judge Traynor's bill." Hence the matter was held over for a year on the Senate side. When the Traynor committee reported, its report went to the Judicial Conference. The Judicial Conference then adopted the Traynor standards, which are set forth in the Senate hearings, and it ordered that they be followed. Rowland Kirks has made a statement describing that in the Senate materials.

At that point it was informally agreed that Senator Burdick would put in a third bill which would be supported by Senators Bayh and Hollings, and that third bill is the one you have which is the Traynor bill.

It has passed the Senate.

A last word. It is obvious that you two gentlemen are giving time to this today because this is serious business. It is a part of the morality of the times that we simply must improve these standards, and we must end the conflict which exists. This is a bill which is obviously easy to get lost because it is housekeeping. The immense excitement of a few years ago has diminished now so that disqualification doesn't have the high passion that it had, but I make bold to say that it would be a distinct public service if you could send this bill wheeling and give us a uniform standard throughout the United States.

If you have any questions, I would love to grapple with them as best I can.

Mr. KASTENMEIER. Thank you, Justice Traynor and Mr. Frank. I have just a couple of questions. I think most members of this committee, its parent committee and the House, probably have very little by and large to do with the question they have had very little exposure to, the question of disqualification. Therefore, it is for many people a new area concerning which they have very little expertise.

Did I understand you to say that at one time the rule was any interest, and then it was changed to "substantial"?

Mr. FRANK. What happened was that prior to the 1948 revision of the Judicial Code it was less a matter of rule than a matter of practice, and as my survey published in the Yale Journal of 1947 shows, the overwhelming practice was that there was disqualification for any interest. I won't burden your record with a few illustrations to the contrary. One Federal circuit took the view that if the holding was very small, the person might sit. The Michigan Supreme Court took that view, and so on, but I would say that 90 percent or more of the court in the country took the view that any interest was a disqualification and said so in writing to me and it has been published. I still have this written report.

[Mr. Frank's statement from the Senate hearing 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, Arizona. 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 nomination of Justice Clement Haynesworth 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 choose 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 circumstances 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 Coating 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 circumstances, 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. What happened was I think an abridger or codifier, meaning to get the sense of the previous law simply accidentally changed so that the word "substantial" went into the code in 1948.

I have exhausted the legislative history. There is no explanation of it. Nobody asked for it. It just happened.

Mr. KASTENMEIER. I take it that in the discussions and dialogs that have taken place about this question, that there isn't any substantial opposition to this bill or the proposal within this bill, particularly on this point. Is there any opposition at all?

Mr. FRANK. I will defer in a moment to the Chief Justice, but let me say that I believe I know. I have had articles on the subject in the Duke, the Michigan and the Utah Law Reviews, have had a good deal of mail and have been in touch with the bar throughout the country. I think it is fair to say so far as I know there is no longer a soul in the United States who doubts that it would be better to take judges out

if they have any interest at all. The question of experimenting with more or less, as Chief Justice Traynor has said, so clearly depends upon economic perspective of the person making the judgment, that it is a decision better not presented. Have you heard of any opposition?

Judge TRAYNOR. No, I haven't.

Mr. FRANK. I have heard none.

Mr. KASTENMEIER. Does S. 1064 concern itself with other changes than that particular change "substantial interest" to "any interest"?

Mr. FRANK. Do you wish to direct that to me or to the Chief Justice?

Mr. KASTENMEIER. Let me direct it to Judge Traynor.

Judge TRAYNOR. I think you had better reply.

Mr. FRANK. Let me say what the statute does, speaking broadly now, if this is what you want, listing the changes that are made in existing law. If you will look on page 1, lines 6 to 8, that is new. That is the elimination of the so-called duty to sit. The provisions from there on, all of page 2 is essentially, with qualifications which I will explain if you wish, the codification of existing law of the present Judicial Code in substance, with this qualification: The provision in lines 14 and 17 is the heart of the bill. The judge disqualifies if he knows that he has a financial interest. That eliminates the question of substantiality and the question of more and less.

Second, Judge Traynor has codified the relationship provision a little more usefully than it was before, and has nailed down the provision on page 2 with a provision on page 3, line 18, which says that "Financial ownership means ownership of a legal or equitable interest, however small." That is the guts of this bill, and its vital aspect.

Then comes the matter of practical problems about mutual funds and so on, which are dealt with here. It achieves the two results which the judge mentioned: (a) It makes changes, but (b) it also gives some clarifications.

The other change is minor but meaningful in several colorful cases. On page 3 is the admonition that a judge should inform himself about his personal and fiduciary financial interests. We have had occasions, episodes where the judges truly didn't know. If you don't mind, I won't name names because it simply leads to loose talk.

Mr. KASTENMEIER. It isn't necessary.

Mr. FRANK. In a certain case which is well known to all of you, a judge who had a very broad portfolio has simply sold out his stocks and narrowed it and put things back into a very narrow portfolio so that he can carry in his head what it is that he owns, so that he won't run into accidental involvements. That is what this is aimed at.

Mr. KASTENMEIER. Page 1, line 6, I am wondering what the practical meaning of this is:

Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Mr. FRANK. May I address myself to that? As you have said, the committee does not deal with this commonly and therefore you may be unaware that these are terms of art. These are not empty words, what they do is adopt the ABA standard as it has existed since 1922, and as it has been interpreted over and over again by ABA canons and decisions around the country. Most of the States follow this practice anyway. It gives the judge certain latitude so that he can at least think the matter through. I want to make loud and clear for purposes of this

record, because I assume that this record may have importance for many, many years in the future, that this does not mean that judges are going to be casually getting off the bench or that somebody can march into a judge and say, "Well, I just don't feel comfortable with you. I wish you would go away. I question your impartiality." That is not to happen at all.

For example, it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it; something of that sort. To that extent he has made up his mind. To challenge on that ground is not permitted by this clause at all. It is meant to cover the kind of thing where, for example, personal relationships are involved. A judge may in fact have personal ties of friendship, not a legal relationship in the sense of kinship but personal ties of friendship, so close with a litigant that he feels that it is just not right for him to be in that case. This permits him to take himself out, in that circumstances. Some judges have done it anyway.

If I may give an illustration of my almost namesake and old friend, Judge Frank with whom I have no relationship whatsoever. Jerome Frank did in fact not sit in *Morris Ernst's* cases because he said, "This is one of my oldest friends and I would lean over backwards. I wouldn't be dealing fairly with him."

In so doing, the truth is that Judge Frank was violating the existing statute, and others did too. They could because there was no close check on it. Others have viewed the same question the opposite way and felt they did not have that latitude. What this does is put in some common-sense.

Mr. KASTENMEIER. Actually, outside of this, in coexistence with this, is the view that a judge has a duty to sit.

Mr. FRANK. That is right.

Mr. KASTENMEIER. In cases where he might not reasonably be disqualified and disqualify himself.

Mr. FRANK. The judge, unless his impartiality may reasonably be questioned in terms of common traditions of what is a reasonable doubt does have a duty to sit. He is required to go back to the books and find out what the traditions and practices have been. There will be growth and change, of course, as there always will be in the common law, but Chief Justice Traynor, a stern disciplinarian and a great judge, was not telling judges to go off and take vacations just because cases were uncomfortable. That is not what this means. You concur, I believe.

Judge TRAYNOR. Right.

Mr. KASTENMEIER. I yield to my friend from Maine.

Mr. COHEN. I thank the chairman for yielding. First, let me say what an honor and privilege it is for me to be sitting here. Just less than 10 years ago when I was buried away in the catacombs of law school, going through many, many traditional decisions I think one of the saving graces of all that tedium that goes into getting a degree was reading some of your opinions, Judge Traynor. I think you will occupy for me at least a very high place.

Judge TRAYNOR. Thank you, sir. That is high praise and I appreciate it.

Mr. COHEN. I only have a couple of questions. As I understand it, this would prohibit any kind of financial interest of a judge sitting on

a case in which he might have any kind of an interest, is that correct?

Judge TRAYNOR. That is right.

Mr. COHEN. That would take in a situation I assume that if a fairly wealthy judge has several million dollars in assets let's say tied up in perhaps a blind trust or some sort of a portfolio, would he be required, under this legislation, to review each and every stock that he had?

Judge TRAYNOR. Yes, he is obliged to, and in a way repudiate the blind trust device.

Mr. COHEN. So he has a continuing obligation constantly to review whatever assets he might have in the form of stocks?

Judge TRAYNOR. That is right, and there is an exception here for mutual funds, because of the impossibility of keeping track of a portfolio of a mutual fund.

Mr. COHEN. That would be the only exception.

Judge TRAYNOR. That is right, and then there was some talk at times of including his duty to know what his wife had. We thought that was not feasible, which reminds me of a story which you may have heard. I heard the first about 40 years ago. The Commissioner of Indian Affairs came out to visit the Indian reservation and to announce Indian policy that there would no longer be polygamy allowed on Indian reservations. The Commissioner explained to the Chief, who had three wives, that he had to give up all but one, and the Chief asked, "What do you suggest?" He said, "Well, you select the one that you want and you tell the others that they cannot be your wives anymore."

The Chief said, "You tell them."

That is part of the thinking back of this business. I think we provide this on page 3, "to make a reasonable effort to inform himself about the financial interests of his spouse and minor children residing in his household." To answer your question directly, the Judge has an obligation, and he cannot avoid it by blind trust.

Mr. COHEN. On page 3, you say, "A judge should inform himself about his personal fiduciary and financial interests." Does it make a difference in terms of words of art, "should" as opposed to "shall," as to the mandatory aspect?

Judge TRAYNOR. I don't think so.

Mr. COHEN. I do not notice that there is any penalty imposed for violation of this particular bill or penalty as such. Would it be an impeachable offense for which a judge could be removed?

Mr. FRANK. If I may answer that, that is not what is intended. What is intended is that first the judge is admonished that he is not to do these things; second, should he have a misunderstanding or misinterpretation of the matter, he is subject to review. He is subject to mandamus and he is subject to reversal. Even under the existing law there has never been any enforcement problem.

Judge TRAYNOR. Your question suggests another which is a decidedly interesting one intellectually. That is whether a judge who sits in violation of these standards, whether the judgment that he enters is then subject to collateral attack. It would be my judgment that where his disqualification was for financial interest, and he did not keep track of his interests or if he deliberately sat despite the financial interest, thinking that, say, five shares in General Motors was insubstantial, in violation of our more heroic provision that any interest, however small, would raise a serious question as to whether that judgment would be subject to collateral attack.

His sitting where he gives the appearance of impropriety and so forth, I doubt if that would be subject to collateral attack. The bill does not attempt to meet your question but it is a very interesting one.

MR. COHEN. So far as the mandatory aspects then of this provision, you are suggesting the decision itself might be subject to collateral attack.

Judge TRAYNOR. Collateral attack.

MR. COHEN. Those areas of discretion where it is a matter of judgment on the part of the—

Judge TRAYNOR. Yes, I should think in view of *Tumey v. Ohio*, Commonwealth Coatings, the last one I think was by Justice Black, disqualified even an arbitrator who had a financial interest where it was contrary to due process of law.

In *Tumey v. Ohio*, as I recall, the judge was participating in the fees that were required to hear the case and the U.S. Supreme Court held held that was contrary to due process of law. I think there is strong support for the proposition that a judge who sits in violation of the financial interest disqualification would subject his judgment to collateral attack.

MR. COHEN. You raise an interesting question in my mind, Mr. Justice Traynor. The thrust of this bill it seems to me is in the field of financial interest. In other words, the prohibition against any appearance of impropriety on account of financial interest, and touches only briefly in terms of other types of interest the judge might have. For example, impartiality might be reasonably questioned. I would assume that you, Mr. Frank, would feel fairly confident that the canons of judicial ethics are drafted in such form that there was adequate protection against other types of approaches, for example, to judges that we were talking about prior. There was adequate language there, but I guess the question you pose in my mind, Justice Traynor, is could a different situation excluding the financial interest, but in the field of impartiality, be reasonably questioned? Let's assume an approach made by a third party to a judge. Could that be subject to collateral attack? In other words, third defendants might raise the question about impartiality in a matter of discretion. Could that be collaterally attacked?

Judge TRAYNOR. When you embark on an investigation of the limits and ramifications of collateral attack, you are almost in a law school examination or course. We did not think it appropriate for us to go into such matters.

MR. FRANK. I would say, if I might supplement, it is subject to direct attack without question. The question of collateral attack, whether it reaches the point that it becomes, as the Judge has said, a denial of due process and is so void or whether it is mere error would require a set of qualifications that is beyond the scope of this bill or our commentaries.

Judge TRAYNOR. We cover in some detail the question of ex parte communications between the judge and third persons and we take a very strong position against that, even to the consulting of law professors and people who would ordinarily be considered objective. We require that any communication between a judge and a third person must be on the record and open to the clear light of the sun.

MR. COHEN. That is prior to the discussion of this bill.

Judge TRAYNOR. That is right. That is in the Judicial Code which the Judicial Conference has adopted, the Code of Judicial Conduct.

Mr. FRANK. May I supplement, Mr. Cohen? You are aware that what this bill is is simply a half of one of the canons of the Traynor report, and that the other canons, which are the ABA canons and the Judicial Conference requirements have never traditionally been statutory. Those are left to ethical enforcement. What the Chief Justice is addressing himself to in response to you and some of the rest of us are seeming only the tip of the iceberg which happens to get into the statute here—

Mr. COHEN. Would you gentlemen be kind enough to furnish the rest of the iceberg?

Mr. FRANK. It is there at page 137 of the book of Senate hearings; 137 has the whole canons. This particular matter is the last half of Canon 3. That is the only part of it that has traditionally been in statute.

Mr. COHEN. Thank you very much. As a matter of fact, your point is well taken. I was involved with a case several years ago in which there was an ex parte communication by the prosecuting attorney to the presiding justice, which went through the first circuit and was finally reversed as a fundamental denial of due process, simply the notion that an ex parte conference with the presiding judge gives rise to images of the whisper in the judge's ear, and whether it is innocent or not, what was discussed is inherently prejudicial. I appreciate your comments.

Thank you.

Mr. KASTENMEIER. On the point, gentlemen, that the gentleman from Maine raises, that is to say, should a person with an interest in litigation who may or may not be the main litigant make a financial offer to a judge, an offer which as the case may be in a different position on the job, and that were not on the record, what would the duty of the judge be, to disclose that, perhaps?

Might he disqualify himself in that case?

Mr. FRANK. This is a recurrent problem. A judge might disqualify himself very properly, and judges do disqualify themselves in the midst of trials, not frequently, but from time to time for precisely this kind of reason. The matter always calls for a deliberate weighing of factors. How far into the trial are we? How much waste would there be? Was the offer really intended to be an offer which was intended for a corrupt purpose or is this some kind of a blundering accident? Where it normally happens, I am sure you will confirm, Mr. Chief Justice, is some—forgive the expression—well-meaning boob gets in touch with a judge not intending evil but in fact doing it, someone blindly not perceiving what is happening here.

For example, a pathetic recurring case is the mother of the defendant who is impassioned in a situation and wishes the judge to know that "My boy is just fine," that kind of thing. Those episodes occur and call for individual judgment, but they very frequently result in the judge having to disqualify and declare a mistrial in midstream. Is that not about right, Judge?

Judge TRAYNOR. Yes.

Mr. COHEN. Just to follow that up, that again raises the question you mentioned before with Judge Frank. He felt because of the friendship that he would be forced to lean over backwards. I assume you meant against his friend.

Mr. FRANK. That was his trouble. On the other hand, I appeared from time to time before Justice Black, with whom I had a very close social relationship. He always cheerfully said, "I can decide against you as well as I can against anybody else," and I am sure that is true. It depends on the kind of subjectivity about the judge, the number of alternatives, practical solutions and so on. Those things exist.

Mr. COHEN. Let me just get your opinion on this. This is quite a bit unrelated but it would be helpful to me personally. Let me assume that we are just talking about a jury. If a counsel for a defendant or a prosecutor were to make a job offer to, say, someone on the jury during the course of a trial that would take place that would be put into the record at some later time, in your opinion and in your professional judgment would that be tampering with a jury?

Mr. FRANK. Yes.

Mr. COHEN. Is there any less standard proposed for judges?

Mr. FRANK. I will turn to the Chief Justice who sees this more broadly, but I would say that the main point, Mr. Cohen, is that a judge may perhaps have a greater durability and imperviousness, stability, sophistication and so on.

Mr. COHEN. Just from a point of view, however, if you are talking about an impartial jury, and if either the defendant or the defense counsel or plaintiff were to make a proposition to a juror while he is sitting on that case, with respect to future employment, there is no doubt in your mind that that would automatically be tampering with the jury?

Judge TRAYNOR. I probably think that would be true.

Also, if the purpose of offering the judge a promotion or for the objective of anything influencing his judgment, there is no doubt in the world about it.

You see, this code was designed not just for Federal judges, but judges throughout the country.

But a Governor, for example, might not know all the cases that are before a court, and might have in mind promoting a judge from the trial bench to the intermediate appellate court, or to the Supreme Court; and he would like to talk to the judge and see what kind of man he is and see whether he is the kind of man the Governor would like to see put on the bench.

If it is done without clear evidence before it is done, with the evidence often covert or influencing the judge, that is utterly unforgivable.

Mr. COHEN. If the offer were rejected, where a judge or a juror was in a position not to demonstrate to the world but to himself that his impartiality has not been destroyed, or in any way impaired, he might be in the position, as Judge Hand, to lean over backwards to demonstrate that fact, which is not also doing justice.

Judge TRAYNOR. That is correct.

Mr. KASTENMEIER. I have one last question I would ask you, Mr. Frank.

I understand that under section A, a judge could accept a waiver of disqualification, but not under those cases in section B. I wonder if you would enlarge upon that.

Mr. FRANK. What happens, for illustration, is this: The late Judge Hand, for example, had a few shares, as I understand it, of Westinghouse. When a Westinghouse case came along, he would come out on

the bench—I can say this uncritically, because Judge Hand has the respect of all—he would come out on the bench, smile benignly at counsel, and say “perhaps I had better disqualify here, I have a few shares of Westinghouse.” Everybody would stand up and say, “No, no, judge, do not do that.” The fact of the matter is, that it was a form of blackjack. Nobody in the room really had any alternative. Not to waive amounts, in effect, to giving offense.

We discussed this matter in St. Louis. Judge Biggs said somewhere that in his circuit, they all were waiving. I responded, that is exactly what is the trouble with the practice of that circuit; of course they do. If I had my way, there would be no waiver under any circumstances.

On the other hand, there is room for reasonable difference of opinion here, particularly in the districts where the geographic distances are enormous. There is some ground for putting a little flexibility into it, because life has to go on.

Take, for example, Judge Doyle in your district, where you only have one. It is the busiest circuit in the country, the busiest district in the country, I think, or one of them. Until you get a second judge there, if you were to disqualify Judge Doyle, Judge Gordon or someone else would have to come over from Milwaukee.

What the Senate did was solve that problem, I think, very sensibly. They split the difference; they said if the judge has financial interest he is out: there is not going to be any waiver. If, on the other hand, there is a reasonable question of impartiality, the clause will put a little more latitude in there.

If, hypothetically, in the Madison district, Judge Doyle found himself with a case in which his ties were very close with one side or another, he could raise that question for discussion. And if there was a general waiver and concurrence, it could be put aside.

May I give a last illustration of an experience 2 weeks ago in my own State. I appeared before a given judge who said to the other side, now I want you to know that I have known Mr. Frank since I was a boy and we have been friends a long time. If there is any discomfort about that, I want out. On the other hand, he said to the other counsel, I have known you for a long time. I performed your marriage ceremony; we have been friends a long while. No; both said, forget it, decide the case.

This permits that kind of flexibility, which I think is an admirable solution.

Judge TRAYNOR. I must say, Mr. Chairman, this differs from the Code of Judicial Conduct proposed by the American Bar. We were aware of this problem—this velvet blackjack—where the judge says, I have, say, 10 shares of General Motors: Do you mind if I sit? And they fall all over each other to be the first one to say “Oh, no, your honor.” And you can see their fists clench below the desk and they are saying “The so and so should not put us in that spot.”

So, we realized that, but we were drawing the code for the whole country. Many jurisdictions do not have a plenitude of judges. And so, we tried to take care of the velvet blackjack problem by requiring the judge, when he feels he should sit without any influence of his financial interests or kinship, to reveal that on the record; and then ask for double assurance that it was not simply the stipulation of counsel that would be enough, but there must be the agreement of the parties to the litigation. But in the federal system, there is not the problem

of the lack of judges that there is in many local jurisdictions. And we thought that there should be some give or take there, by reducing the pressure on counsel to agree to the judge's sitting.

Mr. COHEN. The iron chain, and it equally binds.

Mr. KASTENMEIER. I appreciate that, and with that our hearings on this matter are closed.

On behalf of the committee, I would like to express the thanks of myself for your appearance here this morning, Judge Traynor, and your appearance, Mr. Frank.

Judge TRAYNOR. Thank you.

Mr. FRANK. Thank you.

Mr. KASTENMEIER. It has been very helpful indeed.

[Whereupon, at 11 a.m. the subcommittee turned to the consideration of other matters.]

[Before the hearing the following report of the Department of Justice on S. 1064 was received by the subcommittee:]

DEPARTMENT OF JUSTICE,
Washington, D.C., April 4, 1974.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 1064, a bill "To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification."

The bill would amend section 455 of Title 28 of the United States Code. Presently, 28 U.S.C. 455 requires a judge to disqualify himself in any case in which he has a "substantial interest." This provision, which has long reflected the maxim that "no man should be a judge in his own cause," has been the subject of differing interpretations. In some circuits, disqualification is required if the judge has any pecuniary interest whatever. In other circuits, the judge may sit unless it appears that his decision could have a significant effect upon the value of his interest. In still other circuits, if the judge discloses his interest in the case he may nevertheless hear it, provided the parties waive any objection to his sitting. The result is that in borderline cases a judge must decide the disqualification issue at his peril, with the possibility that if he decided to sit he may be subject to criticism or that public confidence in the federal judicial system may be weakened.

The proposed amendment to section 455 would provide greater uniformity by eliminating the "substantial interest" standard. Moreover, it would not permit a waiver of disqualification by the litigants on this particular issue. S. 1064 would also clarify and improve the existing law in other respects.

Subsection (a) of proposed section 455, contains the general provision that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This sets up a more objective standard than the existing statute where the judge's own opinion is the deciding standard. Disqualification under subsection (a) may be waived. (See proposed section 455(e).)

On the whole, with few exceptions, S. 1064 tracks the new Code of Judicial Conduct which was unanimously approved by the House of Delegates of the American Bar Association in August 1972, and adopted for Federal judges by the Judicial Conference of the United States in April 1973. By making both the statutory and ethical standards of conduct for judges virtually identical, Federal judges would no longer be subject to dual standards governing their qualifications to sit in a particular proceeding. S. 1064 differs slightly from the Code of Judicial Ethics in that S. 1064 would not permit waiver of either financial interest or kinship within the third degree as grounds for disqualification, whereas provision is made for "remittal" of disqualification in those situations by Canon 3 D of the Code of Judicial Ethics. "The rationale here is that these are two

instances in which the public at large would feel that a judge, most certainly should disqualify himself." Senator Burdick, 119 Con. Rec. S. 18682, Oct. 4, 1973 (Daily Ed.).

S. 1064 represents a salutary advance in the development of the administration of justice. However, consideration should be given to adding a provision such as is embodied in 28 U.S.C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before.

The Department of Justice recommends enactment of this legislation, amended as suggested above.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

[Subsequent to the hearing the following letter from the Administrative Office of the U.S. Courts was received by the subcommittee:]

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURT,
Washington, D.C., May 23, 1974.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reference to your letter of November 5, 1973 transmitting for an expression of views S. 1064, a bill to improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification. As I indicated in my letter of November 7th, this bill has not been considered by the Judicial Conference of the United States. However, it now has been referred to the Judicial Conference Joint Committee on the Code of Judicial Conduct for United States Judges for its consideration and report to the Conference at its next session in September.

As you know the Judicial Conference in April 1973 adopted the American Bar Association's Code of Judicial Conduct, with certain modifications, although Canon 3, relating to judicial disqualification, was adopted without any modification whatsoever. The Conference resolution approving the Code further provided that any statute or previous resolution of the Judicial Conference which was less restrictive than the new Code would not be applicable, and that any such statute which was less restrictive would be superseded by the stricter provisions of the Code.

The Senate Judiciary Committee report on the bill, S. Rept. 93-419, is not clear on this point. The report seems to indicate that the less restrictive provisions of the present statute, 28 U.S.C. 455, govern. Actually, as between the present statute and Canon 3, the more restrictive provisions of the Code govern. Thus the provisions of Canon 3 of the Code of Judicial Conduct, which would be written into the statute by S. 1064, are already in full force and effect in the federal judiciary by virtue of the adoption of the Code by the Judicial Conference. Whether it is now necessary or desirable to have Canon 3 written into a statute is one of the questions to be considered by the Judicial Conference Committee.

I will be pleased to transmit to you the views of the Federal judiciary on this matter as soon as the Judicial Conference has considered it in September.

Sincerely yours,

ROWLAND F. KIRKS,
Director.



