The original documents are located in Box 14, folder "1974/12/05 S1064 Judicial Disqualification" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
DEC 5 - 1974

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 27 1974

Postal 12/5
To archives 12/6

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1064 - Judicial disqualification
Sponsors - Sen. Burdick (D) North Dakota and 13 others

Last Day for Action

December 6, 1974 - Friday

Purpose

To codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

Agency Recommendations

Office of Management and Budget	Approval
Administrative Office of the United States Courts	No recommendation
Department of Justice	Approval

Discussion

The United States Code presently contains a provision requiring disqualification of Federal judges in cases where they have a bias or conflict of interest.

Recently, however, the Judicial Conference of the United States has made applicable to all Federal judges the new canon on disqualification. That canon is more restrictive than the present United States Code provision.

The enrolled bill would amend the United States Code by making it conform, with several exceptions, to the requirements of the new canon.

The exceptions to that canon are that the enrolled bill would go beyond the canon to:

-- amend the disqualification provision to apply to Federal justices, magistrates and referees in bankruptcy as well as to judges;

-- amend the general provision so that a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned;" and

-- set forth new specific situations when the judge must disqualify himself, including:

- "where he has...personal knowledge of disputed evidentiary facts concerning the proceeding;"

- where, as a Government lawyer, he has expressed an opinion concerning the merits of the particular case in controversy; and

- where there is a relationship within the third degree by either blood or marriage of one involved in the proceeding.

The enrolled bill also provides that a judge has a duty to inform himself about his own financial interests, however small, and that he make a reasonable inquiry about the financial interests of his spouse and minor children residing in his household.

The enrolled bill further differs from the Canon of Judicial Ethics in that it would not permit the parties to waive disqualification if it is required on the grounds of either financial interest or kinship within the third degree.

Milford H Rowsel

Assistant Director for
Legislative Reference

Enclosures

APPROVED
DEC 5 - 1974

THE WHITE HOUSE

WASHINGTON

ACTION

Last Day: December 6

December 3, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 1064 - Judicial Disqualification

Attached for your consideration is S. 1064, sponsored by Senator Burdick and 13 other senators, which would codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

OMB recommends approval and provides you with additional background information in its enrolled bill report (Tab A).

Bill Timmons and Phil Areeda recommend approval.

RECOMMENDATION

That you sign S. 1064 (Tab B).

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

November 22, 1974

W. H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20530

Dear Mr. Rommel:

This will acknowledge receipt of your enrolled bill request of November 22, 1974, requesting views and recommendations on S. 1064, an Act to improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification.

The Judicial Conference of the United States opposed enactment of S. 1064 on the basis that it was unnecessary in view of the adoption by the Conference of the Canons of Judicial Ethics. In the circumstances, no recommendation is made concerning Executive action.

Sincerely,

William E. Foley
Deputy Director

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

NOV 27 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined a facsimile of the enrolled bill, S. 1064, "To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification."

The bill, which amends 18 U.S.C. 455, is designed to enhance public confidence in the Federal judicial system.

Section 455(a) would provide generally that "any justice, judge, magistrate, or referee in bankruptcy of the United States" shall disqualify himself in any proceeding in which his impartiality might "reasonably" be questioned. In effect, this amendment establishes as the standard of judicial propriety the view of the reasonable man. It is intended to prevent judges from sitting in borderline cases where the judge's impartiality might reasonably be questioned.

Section 455(b) sets forth specific grounds for disqualification. Under section 455(b)(4), the judge is disqualified if he or any member of his immediate family has any financial interest in the subject matter of the controversy that could be substantially affected by the outcome of the proceeding. Presently, 28 U.S.C. 455 requires a judge to disqualify himself in any case in which he has a "substantial interest." The existing provision has been the subject of differing interpretations and considerable misunderstanding. The bill would provide greater uniformity by eliminating the "substantial interest" standard.

Section 455(b)(3) of the bill requires disqualification of a judge where he has served in government employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy. Section 455(e) would not permit a waiver of disqualification by the litigants on the particular issues covered by section 455(b).

Section 455(c) requires a judge to inform himself about his personal and fiduciary financial interest and those of his spouse and minor children residing in his household. The term "financial interest" is defined to exclude ownership in such matters as mutual funds, unless the judge participates in the management of the fund.

The Department of Justice recommends Executive approval of this bill.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

To: Warren Hendricks
11-27-74
6:15 p.m.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 27 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1064 - Judicial disqualification
Sponsors - Sen. Burdick (D) North Dakota and 13 others

Last Day for Action

December 6, 1974 - Friday

Purpose

To codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

Agency Recommendations

Office of Management and Budget	Approval
Administrative Office of the United States Courts	No recommendation
Department of Justice	Approval

Discussion

The United States Code presently contains a provision requiring disqualification of Federal judges in cases where they have a bias or conflict of interest.

Recently, however, the Judicial Conference of the United States has made applicable to all Federal judges the new canon on disqualification. That canon is more restrictive than the present United States Code provision.

The enrolled bill would amend the United States Code by making it conform, with several exceptions, to the requirements of the new canon.

ACTION

Last Day: December 6

December 3, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 1064 - Judicial Disqualification

Attached for your consideration is S. 1064, sponsored by Senator Burdick and 13 other senators, which would codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

OMB recommends approval and provides you with additional background information in its enrolled bill report (Tab A).

Bill Timmons and Phil Areeda recommend approval.

RECOMMENDATION

That you sign S. 1064 (Tab B).

ACTION

Last Day: December 6

December 3, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 1064 - Judicial Disqualification

Attached for your consideration is S. 1064, sponsored by Senator Burdick and 13 other senators, which would codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

OMB recommends approval and provides you with additional background information in its enrolled bill report (Tab A).

Bill Timmons and Phil Areeda recommend approval.

RECOMMENDATION

That you sign S. 1064 (Tab B).

ACTION

Last Day: December 6

December 3, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 1064 - Judicial Disqualification

Attached for your consideration is S. 1064, sponsored by Senator Burdick and 13 other senators, which would codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

OMB recommends approval and provides you with additional background information in its enrolled bill report (Tab A).

Bill Timmons and Phil Areeda recommend approval.

RECOMMENDATION

That you sign S. 1064 (Tab B).

Last Day: December 6

December 3, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 1064 - Judicial Disqualification

Attached for your consideration is S. 1064, sponsored by Senator Burdick and 13 other senators, which would codify grounds for judicial disqualification and to conform those grounds with the new canon of the Code of Judicial Conduct relating to bias, prejudice and conflict of interest.

OMB recommends approval and provides you with additional background information in its enrolled bill report (Tab A).

Bill Timmons and Phil Areeda recommend approval.

RECOMMENDATION

That you sign S. 1064 (Tab B).

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 753

Date: November 27, 1974 Time: 6:30 p.m.

FOR ACTION: Geoff Shepard o.k.
Bill Timmons o.k.
Phil Areeda mu ob.

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, December 3, 1974 Time: 4:00 p.m.

SUBJECT:

Enrolled Bill S. 1064 - Judicial disqualification

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

x ____ For Your Comments

x ____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor, West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 753

Date: November 27, 1974 Time: 6:30 p.m.

FOR ACTION: Geoff Shepard ✓
Bill Timmons
Phil Areeda

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, December 3, 1974 Time: 4:00 p.m.

SUBJECT:

Enrolled Bill S. 1064 - Judicial disqualification

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

x ____ For Your Comments

x ____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor, West Wing

Recommend Approval

J. L. May for G.C.S.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

THE WHITE HOUSE

WASHINGTON

November 29, 1974

MEMORANDUM FOR: MR. WARREN HENDRIKS

FROM: WILLIAM E. TIMMONS

SUBJECT: Action Memorandum - Log No. 753
Enrolled Bill S. 1064 - Judicial Disqualification

The Office of Legislative Affairs concurs in the attached proposal and has no additional recommendations.

Attachment

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 753

Date: November 27, 1974 Time: 6:30 p.m.

FOR ACTION: Geoff Shepard
Bill Timmons
Phil Areeda

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, December 3, 1974 Time: 4:00 p.m.

SUBJECT:

Enrolled Bill S. 1064 - Judicial disqualification

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

x ____ For Your Comments

x ____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor, West Wing

No objection
P Areeda

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

Calendar No. 392

93D CONGRESS
1st Session

SENATE

REPORT
No. 93-419

DISQUALIFICATION OF JUDGES

OCTOBER 3, 1973.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1064]

The Committee on the Judiciary, to which was referred the bill (S. 1064) to amend title 28, United States Code, by broadening and clarifying the grounds for judicial disqualification, having considered the same, reports favorably thereon, with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill is to 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.

AMENDMENTS

1. Page 2, at the end of line 12, add the words "particular case in", so lines 12 and 13, on page 2 will read as follows:

"or expressed an opinion concerning the merits of the particular case in controversy;"

2. On page 4, after line 20, insert a new section 2 reading as follows:

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."

3. On page 4, line 21, change the designation "Sec. 2." to "Sec. 3."

Purpose of Amendments

1. Witnesses at the hearings stated that the phrase "or expressed an opinion concerning the merits of the controversy" might be construed as requiring disqualification of a judge who had expressed an opinion on a general proposition of law, e.g., contributory negligence or First Amendment rights. Testimony at the hearings established that such an expression of opinion should not disqualify the judge. However, where the judge had expressed an opinion about the merit or lack of merit of a specific case before such matter came before him in a particular proceeding, the witnesses were in agreement that under such circumstances the judge would be disqualified. The purpose of the amendment is to make this distinction.

2. This is a technical amendment to conform the Chapter analysis and necessitates the renumbering of section 2 of the original bill.

Statement

For 60 years the United States Code has contained a provision requiring disqualification of judges in cases where they have a bias or a conflict of interest. The existing statute which this bill proposes to amend is Section 455 of title 28 which reads as follows:

> **§ 455. Interest of justice or judge**
>
> 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.

For many years the old Canons of Judicial Ethics had two provisions requiring disqualification. Canon 13 provided that "a judge should not act in a controversy where a near relative is a party". Canon 29 provided that "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved".

These statutory and ethical provisions proved to be not only indefinite and ambiguous, but also, in certain situations, conflicting. The uncertainty of who was a "near relative" or of when the judge was "so related" caused problems in application of both the statutory and the ethical standards. While the Canon required disqualification for involvement of "his personal interests", the statute required such action only when it was "a substantial interest". Questions were inevitably raised as to whether 100 shares of 1,000,000 outstanding shares in a party corporation was "substantial"; whether the $1,000 value of such shares out of the judge's total investments of $400,000 was "substantial"; or whether substantiality must be judged in the light of the particular party's financial situation. Moreover, the statute made the judge himself the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification.

The existence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.

In 1969 the American Bar Association appointed a distinguished committee to consider changes in the Canons of Judicial Ethics. The chairman of the committee was former Chief Justice Roger J. Traynor of the California Supreme Court. Mr. Justice Potter Stewart, Judge Irving R. Kaufman and Judge Edward T. Gignoux represented the three tiers of the federal judiciary on the committee. In the course of its work the ABA committee prepared various preliminary and tentative drafts which were distributed to 14,000 lawyers, judges and lay leaders throughout the country. At each step of the drafting process the committee received and considered the comments made by many of these leaders. The committee's work culminated in a final draft of a proposed Code of Judicial Conduct which was unanimously approved by the House of Delegates of the ABA in August 1972.

Since approval by the ABA, the new Code of Judicial Conduct has been adopted by Colorado, Massachusetts, New Hampshire, Virginia, West Virginia and the District of Columbia. More importantly, the Judicial Conference of the United States in April 1973 adopted the new Code of Judicial Conduct as being applicable to all federal judges. The conference action specifically provided that its action did not abrogate or modify prior resolutions of the conference or conflicting provisions of statutes "which are considered to be less restrictive than the provisions of the ABA Code".

Thus, the present situation is one where the Judicial Conference has made applicable to all federal judges the new Code of Judicial Conduct, including Canon 3C relating to disqualification of judges. The present language of section 455 of title 28 is less restrictive than the new Canon on disqualification. The bill (S. 1064) under consideration would amend section 455 by making it conform, with two exceptions, to the requirements of the canon on disqualification. If so amended, federal judges would no longer be subject to dual standards governing their qualification to sit in a particular proceeding. The bill would make both the statutory and the ethical standard virtually identical.

Legislative consideration of this problem commenced in the 92d Congress after introduction of S. 1553 by Senator Hollings and of S. 1886 by Senator Bayh. Both bills were patterned after a preliminary draft of the proposed new ABA canon relating to disqualification of judges. A hearing was held on July 14, 1971, after which the matter was deferred until the ABA committee and the House of Delegates completed action on the proposed new code. An additional hearing was held on May 17, 1973, wherein the bill, as amended, received the support of Judge Traynor, Professor E. Wayne Thode and John P. Frank.

Bases for Disqualification

Canon 3C of the Code of Judicial Conduct provides 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 of 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;

(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;

(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 financing 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;

(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.

The above language, with a technical change in paragraph (1), is carried into the provisions of S. 1064.

Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion". This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. This language also has the effect of removing the so-called "duty to sit" which has become a gloss on the existing statute. See *Edwards* v. *United States* (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a "duty to sit". Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this "duty to sit" would enhance public confidence in the impartiality of the judicial system.

While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.

At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

Subsection (b) of the amended statute sets forth specific situations or circumstances when the judge must disqualify himself. These specific situations in subsection (b) are in addition to the general standard set forth in subsection (a). Thus, by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves.

Subsection (b) (3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover

the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (408 U.S. 824) his decision not to disqualify himself because of prior testimony before a congressional committee.

Much of the history surrounding and the intent of the language employed in this bill derives from the action of the ABA committee and is contained in the testimony given by the chairman and the reporter for that committee, at the hearing held by this Senate committee on May 17, 1973. Certain aspects of the effect of this bill, not discussed previously, merit specific mention in this report.

Under subsection (a), coverage of the amended statute is made applicable to magistrates as well as Supreme Court Justices and all other federal judges.

Under subsection (b)(5), the degree of kinship which disqualifies is a relationship within the third degree by either blood or marriage.

Under subsection (c), the judge has a duty to inform himself about his own financial interests. This precludes use of a so-called blind trust. Since a judge must report in his income tax reports the profit, loss or earnings from the trust property, the trust is not blind as a practical matter. With respect to the financial interests of his spouse or minor children, the judge need not know what they are, but must merely make a reasonable effort to inform himself of their investments.

Under subsection (d)(4), a financial interest is defined as any legal or equitable interest, "*however small*". Thus, uncertainty and ambiguity about what is a "substantial" interest is avoided. Moreover, decisions of the Supreme Court in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) support the proposition that the judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process.

Subsection (d)(4) also provides that investments in mutual funds, policies in a mutual insurance company, or savings in a mutual bank, are generally not "financial interests".

These provisions of the bill with relation to disqualification based on financial interests are not intended to deprive the judge of the opportunity to make financial investments. However, they must be considered in the light of Canon 5C(3) of the ABA Code of Judicial Conduct which 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 divert himself of investments and other financial interests that might require frequent disqualification.

Therefore, a judge is free to invest. He should invest in companies which are not likely to become litigants in his court. If that should happen, then he must disqualify himself.

Waiver of Disqualification

Subsection (e) of the amended statute prohibits a judge from accepting from the parties a waiver of his disqualification where it is based on any of the specific situations set forth in subsection (b) of the amended statute. However, where the basis of disqualification is because "his impartiality might reasonably be questioned" a waiver is permitted after a full disclosure on the record of the basis for disqualification. Thus, a small financial interest or a kinship within the third degree cannot be waived under this provision of the bill. While the ABA canon on disqualification would permit waiver in these two instances, the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who becomes disqualified.

Communications

As mentioned previously, the Judicial Conference of the United States has adopted the Canons of Judicial Conduct, including the canon on disqualification, as being applicable to all federal judges. However, the Judicial Conference has not directly considered this particular bill.

Estimated Cost

Enactment of this bill involves neither direct cost nor appropriation of funds.

Sectional Analysis

section 1

Subsection (a) makes the amended statute applicable to any justice, judge or magistrate of the United States and sets forth a general standard governing disqualification of a judge.

Subsection (b) requires, in addition, the disqualification of any justice, judge or magistrate in the five specific situations set forth in the bill.

Subsection (c) requires that the judge should know of his own financial interests and requires that he make a reasonable inquiry about the financial interests of his spouse and minor children residing in his household.

Subsection (d) contains definitions of terms "proceeding", "fiduciary", and "financial interest" as used in the bill, and provides that the degree of relationship shall be calculated according to the civil law system.

Subsection (d) permits waiver of disqualification of a judge arising under the general standard in subsection (a) but prohibits waiver of any disqualification arising from the specific situations set forth in subsection (b).

Section 2 makes the bill inapplicable to trials commenced and to appellate matters which were fully submitted prior to the effective date of the Act.

Section 3 changes the analysis of Chapter 21, title 28.

Changes in Existing Law

In compliance with subsection (4) of rule XXXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic).

CHAPTER 21 OF TITLE 28, UNITED STATES CODE

Chapter 21—General Provisions Applicable to Courts and Judges

* * * * * * *

Sec.
[§ 455. Interest of justice or judge]
"§ 455. Disqualification of justice or judge

* * * * * * *

[455. Interest of justice or judge]

[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.]

"§ 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 enu-

merated 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.

SEC. 3. Item 455 in the analysis of Chapter 21 of such title 28 is amended to read as follows:

§ 455. Disqualification of justice or judge

RECOMMENDATION

The committee believes that S. 1064 as amended is meritorious and recommends it favorably.

* * * * * * *

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93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1453

JUDICIAL DISQUALIFICATION

OCTOBER 9, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

AND INDIVIDUAL VIEWS

[To accompany S. 1064]

The Committee on the Judiciary, to whom was referred the bill (S. 1064) to improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 1, line 5, and on page 4, lines 22 and 23, strike "disqualification of justice or judge." and insert in lieu thereof "Disqualification of justice, judge, magistrate, or referee in bankruptcy."

On page 1, line 6, strike the word "or" and after the word "magistrate" add a comma and the following new language: "or referee in bankruptcy".

On page 4, line 15, strike the word "or" and after the word "magistrate" add a comma and the following new language: "or referee in bankruptcy".

PURPOSE OF THE AMENDMENTS

The amendments place referees in bankruptcy within the categories of judicial officers required to disqualify themselves in particular cases, namely, justices and judges of the United States, magistrates and now, referees in bankruptcy. In this report the term "judge" is sometimes used to include justices, magistrates, and referees in bankruptcy.

PURPOSE OF THE AMENDED BILL

The purpose of the amended bill is to 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.

For its report herein the Committee adopts among other things major portions of Senate Report Number 93–419 to accompany S. 1064, which reads substantially as follows:

STATEMENT

For 60 years the United States Code has contained a provision requiring disqualification of judges in cases where they have a bias or a conflict of interest. The existing statute which this bill proposes to amend in Section 455 of title 28 which reads as follows:

§ 455. Interest of justice or judge

> 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.

For many years the old Canons of Judicial Ethics had two provisions requiring disqualification. Canon 13 provided that "a judge should not act in a controversy where a near relative is a party". Canon 29 provided that "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved".

These statutory and ethical provisions proved to be not only indefinite and ambiguous, but also, in certain situations, conflicting. The uncertainty of who was a "near relative" or of when the judge was "so related" caused problems in application of both the statutory and the ethical standards. While the Canon required disqualification for involvement of "his personal interests", the statute required such action only when it was "a substantial interest". Questions were inevitably raised as to whether 100 shares of 1,000,000 outstanding shares in a party corporation was "substantial"; whether the $1,000 value of such shares out of the judge's total investments of $100,000 was "substantial"; or whether substantiality must be judged in the light of the particular party's financial situation. Moreover, the statute made the judge himself the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification.

The existence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.

In 1969 the American Bar Association appointed a distinguished committee to consider changes in the Canons of Judicial Ethics. The chairman of the committee was former Chief Justice Roger J. Traynor of the California Supreme Court. Mr. Justice Potter Stewart, Judge Irving R. Kaufman and Judge Edward T. Gignoux represented the

three tiers of the federal judiciary on the committee. In the course of its work the ABA committee prepared various preliminary and tentative drafts which were distributed to 14,000 lawyers, judges and lay leaders throughout the country. At each step of the drafting process the committee received and considered the comments made by many of these leaders. The committee's work culminated in a final draft of a proposed Code of Judicial Conduct which was unanimously approved by the House of Delegates of the ABA in August 1972.

Since approval by the ABA, the new Code of Judicial Conduct has been adopted by Colorado, Massachusetts, New Hampsire, Virginia, West Virginia and the District of Columbia. More importantly, the Judicial Conference of the United States in April 1973 adopted the new Code of Judicial Conduct as being applicable to all federal judges.

By letter dated May 23, 1974, addressed to the Honorable Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, the Honorable Rowland F. Kirks, Director of the Administrative Office of the United States Courts, advised as follows:

> 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.

Thus, the present situation is one where the Judicial Conference has made applicable to all federal judges the new Code of Judicial Conduct, including Canon 3C relating to disqualification of judges. The present language of section 455 of title 28 is less restrictive than the new Canon on disqualification. The bill (S. 1064) under consideration would amend section 455 by making it conform, with two exceptions, to the requirements of the canon on disqualification. If so amended, federal judges would no longer be subject to dual standards governing their qualification to sit in a particular proceeding. The bill would make both the statutory and the ethical standard virtually identical.

Legislative consideration of this problem commenced in the 92d Congress after introduction of S. 1553 by Senator Hollings and of S. 1886 by Senator Bayh. Both bills were patterned after a preliminary draft of the proposed new ABA canon relating to disqualification of judges. A hearing was held on July 14, 1971, after which the matter was deferred until the ABA committee and the House of Delegates completed action on the proposed new code. An additional hearing was held on May 17, 1973, wherein the bill, as amended, received the support of Judge Traynor, Professor E. Wayne Thodé and John P. Frank.

On October 4, 1973, S. 1064 passed the Senate, and on May 24, 1974, the House Judiciary Subcommittee on Courts held a hearing on the measure.

Bases for Disqualification

Canon 3C of the Code of Judicial Conduct provides 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 of 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;

(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;

(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 financing 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;

(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.

The above language, with a technical change in paragraph (1), is carried into the provisions of S. 1064.

Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion". This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called "duty to sit" which has become a gloss on the existing statute. See *Edwards* v. *United States* (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a "duty to sit". Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this "duty to sit" would enhance public confidence in the impartiality of the judicial system.

While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.

At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumtances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

Subsection (b) of the amended statute sets forth specific situations or circumstances when the judge must disqualify himself. These spe-

cific situations in subsection (b) are in addition to the general standard set forth in subsection (a). Thus, by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves.

Under subsection (b)(1) a judge must, among other things, disqualify himself "where he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." The question arose during consideration by the House Committee on the Judiciary, whether enactment of this provision would bar judges from dealing with summary contempts in open court before them. The Committee agreed that no such interpretation is warranted. The summary contempt procedure has been and remains an indispensable exception to the usual procedures and the bill would not affect it.

Subsection (b)(3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (408 U.S. 824) his decision not to disquality himself because of prior testimony before a congressional committee.

Much of the history surrounding and the intent of the language employed in this bill derives from the action of the ABA committee and is contained in the testimony given by the chairman and the reporter for that committee, at the hearing held by this Senate committee on May 17, 1973. Certain aspects of the effect of this bill, not discussed previously, merit specific mention in this report.

Under subsection (a), coverage of the amended statute is made applicable to magistrates and referees in bankruptcy as well as Supreme Court Justices and all other federal judges.

Under subsection (b)(5), the degree of kinship which disqualifies is a relationship within the third degree by either blood or marriage.

Under subsection (c), the judge has a duty to inform himself about his own financial interests. This precludes use of a so-called blind

trust. Since a judge must report in his income tax reports the profit, loss or earnings from the trust property, the trust is not blind as a practical matter. With respect to the financial interests of his spouse or minor children, the judge need not know what they are, but must merely make a reasonable effort to inform himself of their investments.

Under subsection (d)(4), a financial interest is defined as any legal or equitable interest, "*however small*". Thus, uncertainty and ambiguity about what is a "substantial" interest is avoided. Moreover, decisions of the Supreme Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927) and *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968) support the proposition that the judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process.

Subsection (d)(4) also provides that investments in mutual funds, policies in a mutual insurance company, or savings in a mutual bank, are generally not "financial interests".

These provisions of the bill with relation to disqualification based on financial interests are not intended to deprive the judge of the opportunity to make financial investments. However, they must be considered in the light of Canon 5C(3) of the ABA Code of Judicial Conduct which 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 divert himself of investments and other financial interests that might require frequent disqualification.

Therefore, a judge is free to invest. He should invest in companies which are not likely to become litigants in his court. If that should happen, then he must disqualify himself.

Waiver of Disqualification

Subsection (e) of the amended statute prohibits a judge from accepting from the parties a waiver of his disqualification where it is based on any of the specific situations set forth in subsection (b) of the amended statute. However, where the basis of disqualification is because "his impartiality might reasonably be questioned" a waiver is permitted after a full disclosure on the record of the basis for disqualification. Thus, a small financial interest or a kinship within the third degree cannot be waived under this provision of the bill. While the ABA canon on disqualification would permit waiver in these two instances, the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who become disqualified.

Communications

The Department of Justice has submitted the following favorable report on the measure:

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 or 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 Cong. 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.

As mentioned previously, the Judicial Conference of the United States has adopted the Canons of Judicial Conduct, including the canon on disqualifications, as being applicable to all federal judges.

By the following letter dated September 20, the Director of the Administrative Office of the United States Courts, advised Honorable Peter W. Rodino, Chairman of the House Committee on the Judiciary, that the Judicial Conference has voted to express its disapproval of S. 1064 on the basis that enactment is unnecessary at this time in view of the adoption by the Conference of the Code of Judicial Conduct for United States judges:

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., September 20, 1974.

Re: S. 1064—Judicial Disqualification

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is 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. I am authorized to report to you that the Judicial Conference of the United States at its session on September 19th and 20th voted to express its disapproval of S. 1064 on the basis that enactment is unnecessary at this time in view of the adoption by the Conference of the *Code of Judicial Conduct for United States Judges.*

For your information I am enclosing a copy of that portion of the report of the Joint Committee on the Code of Judicial Conduct which sets out the reasons for Conference disapproval of the bill. Representatives of the judiciary will be pleased to appear before your Committee to discuss the provisions of the bill, if the Committee so desires, or furnish any additional information which may be requested.

Sincerely yours,

ROWLAND F. KIRK, *Director.*

Code of Judicial Conduct September 1974

REPORT OF THE JOINT COMMITTEE ON THE CODE OF JUDICIAL CONDUCT

To the Chief Justice of the United States, Chairman, and Members of the Judicial Conference of the United States:

S. 1064, 93RD CONGRESS, TO IMPROVE JUDICIAL MACHINERY BY AMENDING TITLE 28, UNITED STATES CODE, TO BROADEN AND CLARIFY THE GROUNDS FOR JUDICAL DISQUALIFICATION

This bill was introduced in the United States Senate on March 1, 1973. Hearings were held before the Senate Judiciary Committee on May 17, 1973; a favorable report was filed on October 3, 1973; and the bill passed the Senate on October 4, 1973. The Chairman of the House Judiciary Committee requested a report on the bill on November 5, 1973 and the Director of the Administrative Office responded by transmitting a copy of the Code of Judicial Conduct for United States Judges which had been approved by the Conference in April 1973. Subsequently on May 23, 1974 the bill was referred to your Committee by the Director for study and report to the Conference, and the Chairman of the House Judiciary Committee was advised of the reference. Later, on June 24th, the Subcommittee on "Courts, Civil Liberties, and the Administration of Justice" reported the bill favorably to the House Judiciary Committee. At the time of the meeting of your Committee on July 26th, the bill had not been acted on by the full Committee.

The purpose of the bill, as stated in S. Rept. 93–419, is to make "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."

Your Committee reviewed the bill carefully and concluded that it is unnecessary and it would be unwise to write the provisions of the new ABA Code into a statute at this time. Canon 3C of the ABA Code, relating to disqualification, is already in full force and effect in the Federal Judiciary by virtue of the adoption of the Code of Judicial Conduct for United States Judges by the Judicial Conference in April 1973. The Code was developed after careful study by a distinguished ABA Committee and was intended for uniform adoption by all courts throughout the nation, both state and federal. The Conference has decided to follow the lead of the ABA by approving the ABA Code in its entirety, except for changes necessary to adapt the Code to the federal judicial system. It would be prudent, in the view of your Committee, to permit a reasonable period of time to elapse before consideration is given to amending the Code or writing it into a statute where amendment may be difficult.

While the report of the Senate Committee indicates an intention to have the "statutory grounds for disqualification

. . . conform generally with the recently adopted canon of the Code of Judicial Conduct . . .", your Committee would like to call attention to two significant changes. Subsection (e) of Section 455, Title 28, United States Code, as provided in the bill, would (1) permit a waiver of disqualification in some circumstances where a judge's "impartiality might reasonably be questioned" and (2) require disqualification of a judge whenever

> (4) He . . . 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 person: [Is a party to, a lawyer in, has an interest in, or is a material witness in the proceeding.]

On the other hand, the Code of Judicial Conduct (1) requires disqualification in all circumstances where the judge's "impartiality might reasonably be questioned", and (2) permits a "remittal of disqualification" upon the agreement of the parties and their attorneys in circumstances where "the judge's relationship is immaterial or . . . his financial interest is insubstantial."

According to the Notes of the Reporter, the ABA Committee, which drafted the Code, considered carefully the question of disqualification and the matter of remittal. With respect to remittal a procedure was developed which "the Committee felt would be acceptable." The Reporter to the Committee wrote in his Notes:

> Because of the hardship to litigants that could be brought about in some jurisdictions by the delay in obtaining another judge to replace a disqualified judge, the Committee decided that under specified circumstances a judge's disqualification based on economic interest or a family relationship could be waived. . . . With this in mind, the Committee devised a system that allows the remittal of a judge's disqualification if the . . . prerequisites [set out in the Code] are met.

It is the view of your Committee that this approach is sound. The general rule should be that a judge is disqualified in *all* circumstances in which his "impartiality might reasonably be questioned" and that a waiver (or remittal) should be permitted only in specially defined circumstances and under specified controls. The provision of the Code, Canon 3D, permitting a remittal of disqualification by agreement of the parties and their attorneys in circumstances where "the judge's relationship is immaterial or . . . his financial interest is insubstantial," may in a particular case be advantageous to the litigants and in the best interests of the administration of justice. Copies of S. 1064, S. Rept. 93–419 and the pertinent provisions of Canon 3C of the Code of Judicial Conduct are attached as Appendix A.

Your Committee recommends that the Conference express its disapproval of S. 1064 on the basis that enactment is un-

necessary at this time in view of the adoption by the Conference of the Code of Judicial Conduct for United States Judges. The Committee further recommends that the views of the Conference be transmitted immediately to the Chairman of the House Judiciary Committee together with a copy of the Committee's report.

Notwithstanding the views expressed in the foregoing letter and report, it is felt that the American people are entitled to ethical behavior on the part of all three branches of the Government, not merely the Executive or legislative branches. It no way derogates from the dignity of the Federal judiciary to suggest that not the judges alone should formulate their rules of ethics but that the Congress and the President, as well as bar groups, may appropriately participate, or at least aid, in such formulation. We believe that legislative consideration of the problems of judicial ethics is fully warranted.

What is more, there are substantial differences between existing section 455 of title 28, and the amended version proposed in S. 1064. In the judgment of the Subcommittee these differences could lead to confusion and should be greatly narrowed. Adoption of S. 1064 would eliminate most of them.

Estimated Cost

Enactment of this bill involves neither direct cost nor appropriation of funds.

Votes

No record votes were taken in the Committee's consideration of S. 1064.

Sectional Analysis

SECTION 1

Subsection (a) makes the amended statute applicable to any justice, judge, magistrate or referee in bankruptcy of the United States and sets forth a general standard governing disqualification of a judge.

Subsection (b) requires, in addition, the disqualification of any justice, judge, magistrate or referee in bankruptcy in the five specific situations set forth in the bill.

Subsection (c) requires that the judge should know of his own financial interests and requires that he make a reasonable inquiry about the financial interests of his spouse and minor children residing in his household.

Subsection (d) contains definitions of terms "proceeding", "fiduciary", and "financial interest" as used in the bill, and provides that the degree of relationship shall be calculated according to the civil law system.

Subsection (d) permits waiver of disqualification of a judge arising under the general standard in subsection (a) but prohibits waiver of any disqualification arising from the specific situations set forth in subsection (b).

Section 2 makes the bill inapplicable to trials commenced and to appellate matters which were fully submitted prior to the effective date of the Act.

Section 3 changes the analysis of Chapter 21, title 28.

Changes in Existing Law

In compliance with subsection (3) of rule XIII of the Standing Rules of the House, changes in existing law made by the bill as reported are shown as follows: (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in **italic**).

CHAPTER 21 OF TITLE 28, UNITED STATES CODE

Chapter 21—General Provisions Applicable to Courts and Judges

* * * * * * *

Sec.

§ 455. [Interest of justice or judge.] *Disqualification of justice, judge, magistrate, or referee in bankruptcy.*

* * * * * * *

§ 455. [Interest of justice or judge.] *Disqualification of justice, judge, magistrate or referee in bankruptcy.*

[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.]

"(a) Any justice, judge, magistrate, or referee in bankruptcy 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 civil 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, magistrate, or referee in bankruptcy 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.

SEC. 3. Item 455 in the analysis of Chapter 21 of such title 28 is amended to read as follows:

"455. Disqualification of justice, judge, magistrate, or referee in bankruptcy."

RECOMMENDATION

The committee believes that S. 1064 as amended is meritorious and recommends it favorably.

* * * * * * *

INDIVIDUAL VIEWS OF MR. DENNIS OF INDIANA ON S. 1064—CONCURRED IN BY MR. BUTLER OF VIRGINIA

I have serious reservations as to the merits of this bill.

In the first place, and on the philosophical level, I do not think we can really legislate judicial integrity, and I question whether we ought to attempt by Congressional enactment to dictate to the judiciary a proper course of ethical judicial conduct; something the judicial branch ought to be able to handle for itself and, so far as I am advised, has generally handled very adequately and with few serious complaints.

In the second place, and on a more utilitarian level, it is my judgment that the approach taken in this bill is unreasonable and unrealistic.

I have, of course, no objection to the principle expressed in Sec. 455 (a)—that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, unless, as provided on page 4 of the bill in subsection (e), the parties mutually agree, after full disclosure of the facts, to waive the disqualification.

Under Sec. 455 (b), however, a judge shall disqualify himself whenever he "has a financial interest in the subject" of the controversy, which is defined to mean "ownership of a legal or equitable interest, however small," and this disqualification is absolute and may not, under any circumstances, be waived; in the language of the bill "No . . . judge . . . shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)."

The necessary effect of this inflexible provision is that, by legislative enactment, we could have a true Daniel come to judgment—or a Learned Hand upon the bench—and if the case involved, let us say, the Exxon Corporation, and the judge owned 20 shares of common stock, which he had inherited from his parents many years before and had never particularly thought of since, he absolutely could not sit, even though both parties to the cause preferred him—because of his expertise, learning, and integrity—to any and all other available members of the judiciary.

To me, an inflexible provision of this kind does not make good sense, does not make for the highest quality of justice, and represents an over-reaction to a problem which, so far as the Committee has been advised, is largely non-existent.

I cannot be enthusiastic about this legislation.

DAVID W. DENNIS.

I concur with the views expressed above by my colleague from Indiana, Mr. Dennis.

M. CALDWELL BUTLER.

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CORRECTED SHEET

S. 1064

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

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, judge, magistrate, or referee in bankruptcy

"(a) Any justice, judge, magistrate, or referee in bankruptcy 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, magistrate, or referee in bankruptcy 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, judge, magistrate, or referee in bankruptcy.**".

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.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

November 25, 1974

Dear Mr. Director:

The following bills were received at the White House on November 25th:

S. 386
S. 1064
S. 2299

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D. C.