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FOR THE UNITED STATES HOUSE OF REPRESENTATIVES

HOUSE COMMITTEE ON THE JUDICIARY,

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

HEARING ON "EXAMINING THE STATE OF JUDICIAL RECUSALS AFTER *CAPERTON v. A.T. MASSEY*"

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Good afternoon Chairman Johnson, Ranking Member Coble, honorable Subcommittee members, and invited guests. My name is Richard Flamm. I am a California attorney who specializes in matters of legal and judicial ethics; and, specifically, disqualification motions and appeals. I have written and lectured extensively in this field. Most significantly, for purposes of this Hearing, I am the author of a nationwide treatise on *Judicial Disqualification: Recusal and Disqualification of Judges,* which has been extensively relied on by state and federal judges throughout the nation.

Thank you for the opportunity to address you today regarding the status of the federal recusal laws. I am pleased that Congress has decided to devote attention to this important topic, but I think it should be pointed out that this is not the first time that Congress has chosen to do so. Approximately once every generation the subject – which is frequently before the courts, but seldom in the public eye – comes to the forefront of the American consciousness; and, when it has, Congress has tended to respond by inquiring into the wisdom of the prevailing law, just as this honorable Subcommittee is doing today. On almost every such occasion, Congress has endeavored to facilitate the ability of a litigant who has legitimate concerns about whether a judge will be impartial and unbiased in presiding over her case to have that judge removed; thereby making the American system of justice both be – and to appear to be – fair.

Some of the changes Congress has made, through the years, have undoubtedly been quite helpful in fulfilling this Congressional purpose. As I will discuss, however, not every disqualification provision Congress has enacted has been enforced by the courts in the manner that Congress intended. Therefore, in keeping with poet and philosopher George Santayana's familiar aphorism, to the effect that "those who cannot remember the past are condemned to repeat it," I thought it might be helpful to provide this honorable Subcommittee with a brief overview of prior attempts to fashion a comprehensive federal judicial disqualification framework, in the hopes that any law this Congress elects to adopt will avoid a similar fate.

The notion that judges should stand fair and detached between the parties who appear before them did not originate with Congress; in fact, edicts designed to ensure judicial impartiality have been recorded since ancient times. *See, e.g.,* Babylonian Talmud, Tractate Shabbath 10a

("[e]very judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One...in the work of creation"), quoted in 1 E. Quint & N. Hecht, Jewish Jurisprudence 6 (1980). Likewise, the concept of "peremptory" disqualification is of ancient origin. Pursuant to the Roman Code of Justinian, a party who believed that a judge was "under suspicion" was permitted to "recuse" that judge, so long as he did so prior to the time issue was joined. This expansive power on the part of early litigants to effect a judge's recusal formed the basis for the broad disqualification statutes that generally prevail in civil law countries to this day.

The common law standard was initially put forward by Bracton who, like early Roman scholars, believed that a litigant should be allowed to disqualify a judge on the basis of even a suspicion of bias. But England's parliament ultimately decreed that judges were not subject to disqualification for "suspicion" alone, but only for pecuniary interest in a cause. 3 Blackstone, Commentaries 361. *See also* Liteky v. U.S., 114 S. Ct. 1147, 1151 (1994) ("[r]equired judicial recusal for bias did not exist in England at the time of Blackstone"). Thus, in contrast to the civil law system of "recusation," the common law notion of what constituted good grounds for seeking a judge's disqualification was exceedingly simple: A judge would be disqualified for possessing a direct financial interest in the cause before him, and for absolutely nothing else. In the American Colonies, as in England, only pecuniary interest in a pending cause constituted good cause for seeking the disqualification of a sitting judge; and, when Congress first tackled the subject matter this Subcommittee is currently considering, the initial federal judicial disqualification statute likewise proved to very limited. It called for disqualification only when a judge had a pecuniary interest in a proceeding over which he was to preside, had "acted in" the proceeding, or had been "of counsel for" a party. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

Not long after the original federal disqualification statute was enacted, Congress was reminded that non-financial motives can also impact judges; and the statute was amended, in 1821, to include a judge's relationship to a party as an additional ground for seeking disqualification. *See* Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Other amendments ensued, but the first significant overhaul of the federal disqualification scheme did not take place until 1911, at which time the original federal statute became § 20 of the Judicial Code. Act of Mar. 3, 1911, ch.

23, § 20, 36 Stat. 1090. Like its predecessor statute (and the "primary" judicial disqualification statute that is in effect today, 28 U.S.C. § 455), § 20 was a "for cause" provision. A judge who was the object of a § 20 motion was required to recuse if, and only if, the moving party could demonstrate that he had run afoul of one of the statute's enumerated proscriptions. For litigants, satisfying this requirement proved to be exceedingly difficult. For one thing, the statute provided no mechanism by which a party could seek to disqualify a judge for bias. Congress attempted to rectify this and other perceived shortcomings, not by amending § 20, but by enacting a new statute, § 21 of the Judicial Code. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090.

According to a recent article in the *National Law Journal*, one of the proposals this honorable Subcommittee plans to discuss is one which would make "substitution automatic if any party to a case swears an affidavit alleging prejudice." This may be a good idea, but it is not a new one. Section 21 provided that: "[w]henever a party to any action or proceeding [files an affidavit stating] that the judge before whom the action or proceeding is to be tried or heard has a personal bias...either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated [to hear] such matter." In other words, a judicial challenge statute Congress clearly intended to be peremptory has been the law of the land for almost a century.

Congress recognized that a provision which authorized a party to remove a judge on the strength of an affidavit alleging bias could be susceptible to abuse; and, in an attempt to avert such abuse, it imposed several procedural limitations on the statute. For example, the moving party's allegations of judicial bias were required to be filed in a timely manner, and made in affidavit form. In addition, the moving party's counsel was required to certify that her client's affidavit was made in good faith. These types of checks against the possible abuse of a peremptory challenge provision were not unusual. In fact, following Congress's adoption of § 21 the legislatures of many states enacted similar statutes, and the limitations the various state legislatures placed on their peremptory challenge statutes do not appear to differ materially from those which Congress placed on § 21. However, whereas courts in those states that have adopted peremptory challenge statutes have tended to liberally construe and zealously enforce them, § 21 has not fared very well in the federal courts.

The statute first came before the Supreme Court in *Berger v. United States*, 255 U.S. 22 (1921) – a case in which petitioners had submitted an affidavit alleging that the district judge was biased against them because they were of German descent. The bias manifested by the judge in *Berger* was hardly subtle. He said, among other things, that one must have a "very judicial mind" not to be prejudiced against German-Americans "because their hearts are reeking with disloyalty." In the face of comments like this, the Supreme Court had little trouble finding that, even though actual judicial bias had not been proven, the challenged judge should have stepped down. But *Berger* is remembered not for its outcome, but for what the Court said about how § 21 motions were to be decided. The Court held that, while a judge who had been called upon to decide a § 21 motion must accept the moving party's factual allegations as true, the judge could decide whether the alleged facts, if true, were "legally sufficient" to compel her disqualification. The decision thereby invested federal judges with a significant measure of discretion in deciding whether to grant motions which Congress clearly intended to be peremptory.

Undoubtedly, Congress could have taken steps to impress upon the High Court the peremptory intent behind § 21, but it did not do so; and, when Congress next tinkered with § 21 in 1948, Congress made no attempt to reassert the statute's peremptory intent. The statute was recodified as 28 U.S.C. § 144, but was virtually unchanged. Since then, some federal judges have adverted to the peremptory intent behind the statute, but few judges who did not admit to being biased appear to have recused themselves merely because a party filed a § 144 motion.

At the same time that § 21 was reconstituted as § 144, and began its slow descent into oblivion, § 20 was recodified as 28 U.S.C. § 455, which read: "[a]ny 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." Act of June 25, 1948, ch. 646, §455, 62 Stat. 908. Under this version of this statute, recusal remained a largely subjective matter. In fact, once a judge satisfied himself that none of the three enumerated grounds for disqualification existed, a presumption against recusal was typically indulged, to the effect that the challenged judge not only could remain on the case if he so chose, but was deemed to have a duty to do so. Thus, by the middle of the Twentieth Century the federal judicial disqualification

scheme consisted of two statutes, one of which, § 455, was intended to be self-enforcing, but was only sporadically enforced; while the other, § 144, was intended to be peremptory, but was rarely if ever construed in such a way as to mandate the automatic disqualification of a federal judge.

These problems were evident in 1948, but the subject of judicial disqualification did not come to the fore again until the late 1960's, when opponents of the United States Supreme Court nomination of Judge Clement Haynsworth seized upon his failure to recuse himself from presiding over a number of cases in which he had a financial interest in a party as the basis for denying him the appointment. Judge Haynsworth's unwillingness to recuse was not unusual for the times. In fact, Justice Blackmun – who was eventually confirmed for the same seat – also participated in cases in which he possessed a financial interest in a party. Still, notoriety arising from this situation, and from a number of highly publicized cases involving other judges' refusal to recuse themselves, began to kindle public sentiment for altering the standards for disqualifying federal judges. In response, Justice Lewis F. Powell Jr., who was then President of the American Bar Association, proposed that a new Code of Judicial Conduct be written. The resulting Code, which the ABA adopted in 1972, called for disqualification, *inter alia*, whenever a judge's impartiality could "reasonably be questioned." In 1973 the Judicial Conference of the United States adopted the Code, with only minor modifications, as the governing standard of conduct for all federal judges except United States Supreme Court Justices.

The ethical imperatives enumerated in the Code were much more stringent than those that had been prescribed in the statutory laws that pre-existed it. Therefore, following the Code's adoption federal judges who were called upon to decide challenges to their ability to preside over cases were obliged to choose between inconsistent legal and ethical imperatives. In 1973, the House Committee on the Judiciary concluded that this situation placed federal judges on the "horns of a dilemma," and Congress set about implementing a plan designed to correct this problem. In 1974, Congress acted to reconcile the Code with the federal statutory scheme, as well as to broaden the grounds for disqualification, by rewriting 28 U.S.C. § 455. The process was completed with the enactment of the 1974 amendments to § 455, which altered that statute to the point of virtual repeal. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609.

In the 1974 version of § 455 Congress adopted the literal language of the ABA Code, with few exceptions. Thus, whereas the pre-amendment version of § 455 had consisted of little more than the 1821 prohibition against a judge presiding over any case in which he held an interest, or was related to a party, the new version of § 455 provided that a federal judge was to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," as well as in a number of specifically enumerated circumstances – including where the judge possessed personal bias toward a party or in favor of its adversary. This statute, together with § 144, pretty much sums up the state of the federal judicial disqualification scheme as it exists today.

There are some who would argue that the existing federal judicial disqualification scheme works just fine, and that no changes need to be made to it. I am not one of them. I am of the opinion that the federal disqualification framework, as presently constituted, is deeply flawed; and, worse, fraught with serious pitfalls both for litigants and unwary counsel. For one thing, while § 144 gives the illusion of being a peremptory challenge provision, and therefore a simple and straightforward means for a party who truly believes that a federal judge is biased to secure the removal of that judge, many of those who have sought to challenge judges in accordance with that statute have learned, the hard way, that things are not always what they seem. Likewise, while § 455 lulls litigants into believing that a judge whose impartiality may reasonably be questioned will be obliged to stand down, because the person who decides what a "reasonable person" would believe is usually the very judge whose ability to be impartial has been questioned, parties who avail themselves of this provision are often in for a rude awakening.

Even for a judge who makes a good faith effort to determine what a reasonable person would believe, deciding a § 455 motion is not necessarily an uncomplicated task. As one federal judge put it, it "is not as easy as the Congress and the Court of Appeal seem to think it is to determine what a 'reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge." Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D. Ohio 1981). This problem is compounded by the fact that judges often take accusations of bias or partiality both personally and very seriously. Of course, judges do sometimes recuse; but, over the years, there have been thousands of reported cases in which federal judges have declined to grant disqualification motions. In this situation, the moving party's fate may be left to

a judge whom that party not only believes may not be impartial, but who may have become biased, subconsciously or otherwise, by the fact of having his impartiality questioned.

Situations in which judicial bias is suspect can also pose a serious dilemma for counsel. As I point out in my treatise, during the first half of the Nineteenth Century one judge tersely noted that, in some districts, lawyers who wanted to try to disqualify a federal judge were "advised to write out their motion to disqualify on the back of their license to practice law." This does not happen today, but what does occur is far from ideal. A litigant is unlikely to expect to appear before a particular judge again; and, therefore, may feel that she has little to lose in seeking that judge's recusal; but an attorney who frequently handles litigation in federal court is likely to be less than eager to make a recusal motion if she perceives that doing so may prejudice her ability to effectively litigate before that judge in later cases. Judges are supposed to be part of the solution to a controversy, not part of the problem, so this reluctance to assert a legislatively prescribed right is unfortunate. The fact is, however, that attorneys who would be more than willing to file almost any other kind of motion are likely to refuse to move to disqualify a judge.

I volunteered to testify before this honorable Committee because I believed that my background in the field might be helpful to your deliberations, and I do not want to belabor the record with gratuitous comments. It may be worth pointing out, however, that while Congress has consistently acted in a way designed to foster public confidence in the integrity and impartiality of federal judges, the federal judicial disqualification framework as it is presently constituted, and as it has been interpreted by the courts, may have engendered a situation where many litigants have come to perceive the judicial system to be less fair than they might have if no federal disqualification statutes were on the books at all.

There are other problems with the current federal judicial disqualification scheme as well. For example, while there is no requirement that a federal judge explain his reasons for deciding a judicial disqualification motion, judges who decline to disqualify themselves often write lengthy opinions explaining their reasoning, while those who recuse seldom say why. As a result, the jurisprudence does not provide much guidance to parties and counsel as to whether disqualification is warranted in a particular case. Instead, as Professor Leubsdorf has ruefully

observed, the case law tends to reflect "an accumulating mound" of reasons for denying disqualification. Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 244 (1987). Another problem is that while, with the passage of the 1974 amendments to § 455, Congress clearly intended to do away with the so-called "duty to sit" concept as a restriction on a judge's proper exercise of discretion when confronted by a disqualification motion, a spate of recent federal court decisions have affirmed the pre-amendment view that a federal judge is as duty-bound not to recuse himself when the facts do not give fair support to a charge of prejudgment, as he is to excuse himself when the facts warrant such action.

But if Congress were to attempt to address only one shortcoming of the existing statutory framework it should, in my opinion, do something about § 144. In making a motion to disqualify a federal judge, some parties invoke only that statute, others invoke only § 455, still others invoke both statutes, and some invoke neither; leaving it to the challenged judge to decide which disqualification statute applies, and how to apply it. This is problematic because the sponsors of the 1974 amendments to § 455 did not specify how they expected §§ 144 and 455 to interact. For example, it has never been firmly resolved whether the procedural requirements set forth in § 144 are also to be applied to motions made under § 455.

On account of lingering confusion as to the intended interplay between the two federal judicial disqualification statutes, a significant investiture of judicial time and energy has been invested in hand-wringing over such matters as whether or not §§ 144 and 455 are to be construed "in pari material." Such a happenstance might be tolerable if a significant benefit were derived from having two disqualification statutes on the books; but § 144, as presently constituted, is of little or no utility. In fact, the United States Supreme Court has pointed out that the statute "seems to be properly invocable only when § 455(a) can be invoked anyway." *See* Liteky, supra at 1154. It would appear clear, therefore, that it is time for § 144, as presently constituted, to go. The question is: should § 144 be amended and improved, in a way that is calculated to insure that it will be enforced in the manner Congress originally intended, or should the statute simply be repealed?

In states that have enacted peremptory challenge statutes, the right to challenge a judge on a peremptory basis is widely considered to be a useful and valuable one, and one that assuages the concerns of a great number of litigants and attorneys. In such jurisdictions, moreover, it does not appear that courts have found that the occasional interposition of the peremptory challenge right has proven to be a major obstacle to the proper administration of justice. It would be my preference, therefore, that § 144 be amended with a clear directive from Congress that the federal peremptory disqualification statute is to be construed liberally in favor of disqualification, and not as a nit to be picked until the peremptory purpose of the statute is eviscerated. Should Congress elect not to go this route, however, I believe it is imperative that Congress make this intent clear by repealing the existing peremptory challenge provision. This would not be the optimal solution, in my view, but it would be far better than the existing situation, in which unwary litigants and their counsel are lulled into making motions that have little chance of success, and may be exceedingly ill-advised.

Thank you, once again, for the opportunity to share these concerns and suggestions with this honorable Subcommittee.

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