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# **Disqualification of Federal Judges by Peremptory Challenge**

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# DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE

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## I. INTRODUCTION

Implementing a procedure to permit parties in federal criminal and civil cases to peremptorily challenge and remove the assigned district judge is not a new concept; it has recently received considerable attention, however. Since August, 1979, the American Bar Association's House of Delegates has adopted two resolutions supporting the idea, and two bills to permit peremptory challenge and removal have been introduced in Congress. The authors and supporters of this idea argue that it will enhance the fairness as well as the appearance of federal judicial proceedings. Further, they cite dissatisfaction with the present system of judicial disqualification as one of the reasons for change. Arguing that similar procedures are already operating with relative efficiency in several states, they suggest that grafting a peremptory challenge system onto the federal code will be easy and will cause minimal disruption of federal judicial administration.

The federal judiciary has responded to this idea and the effort to implement it as attentively as its supporters have advocated it. Resolutions and recommendations against establishing peremptory challenge procedures have been

adopted by the judges of the Northern District of California<sup>1</sup> and the District of New Jersey,<sup>2</sup> the Executive Committee of the National Conference of Federal Trial Judges,<sup>3</sup> the Judicial Conference of the Ninth Circuit,<sup>4</sup> and the Committee on the Administration of the Criminal Law<sup>5</sup> and the Advisory Committee on Criminal Rules<sup>6</sup> of the Judicial Conference of the United States. The Conference itself, without closing the door to change, has accepted the resolutions and recommendations and expressed a "strong disapproval of any legislation which would permit the peremptory disquali-

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1. Resolution of the Judges of the United States District Court for the Northern District of California (May 23, 1980.)

2. See letter from Judge Frederick B. Lacey (D. N.J.) to A. Leo Levin (July 25, 1980) (copy on file at the Federal Judicial Center).

3. Id.

4. Judicial Conference of the Ninth Circuit, Resolution 6(a), adopted on July 16, 1980.

5. See Report of the Committee on the Administration of the Criminal Law to the Chief Justice of the United States and Members of the Judicial Conference of the United States 9-13 (Sept. 1980).

6. See Proposed Amendment to the Federal Rules of Criminal Procedure: Hearings on H.R. 7473 Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (1980) (statement of Judge Walter E. Hoffman) [hereinafter cited as Hearings on H.R. 7473].



fication of judicial officers."<sup>7</sup> The judiciary argues that the proposed changes would greatly disrupt calendars, delay the commencement of criminal trials, inhibit judicial independence, and discourage judges from rendering unpopular decisions.

Although the issue has prompted considerable debate and discussion, most of it has just touched the surface, alluding to the need for a peremptory challenge procedure and the problems associated with it. The hearings before Congress were brief; only a handful of witnesses were present, and the testimony consisted of conclusions and opinions unsupported by any data or studies. This report is an attempt to explore the concept more thoroughly, highlight the issues and arguments, point out potential problems, and inform what will probably be a continuing debate on the topic.

Although this report reflects the perspective of the federal judiciary, its author has attempted to be even-handed, presenting some of the arguments of those who seek to change the status quo. Once the issues and arguments are on the table, decision makers in the bar, the bench, and in

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7. It added, however, that "present provisions dealing with disqualification for cause are themselves not effective or strong enough and should be improved." Report of the Proceedings of the Judicial Conference of the United States 104 (Sept. 1980).

Congress will be better equipped to grapple with the matter. They can then develop a solution or a set of alternatives that will respond reasonably to grievances and avoid undesirable consequences of abrupt change.

One final but important point should be made. Although this report presents significant arguments against implementing a peremptory challenge system, the burden of proof should not be the negative one--the federal judiciary should not be required to demonstrate the deficiencies and drawbacks of a federal peremptory challenge system. Rather, those who would establish such a system must bear the burden of proving its necessity and demonstrating that its impact will not be more disruptive than valuable.

## II. THE FEDERAL JUDICIAL DISQUALIFICATION STATUTES

The call for a peremptory challenge procedure is based partially upon dissatisfaction with existing mechanisms for judicial disqualification.<sup>8</sup> Therefore, a brief description of the present system, its background, and its interpretation follows; more detailed treatment of the topic appears in numerous descriptive and critical articles.<sup>9</sup> Standards for federal judicial disqualification are found in 28 U.S.C. §§ 144 and 455. Section 144 has remained virtually un-

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8. See, e.g., Hearings on H.R. 7473, note 6 supra (statement of John J. Cleary).

9. See, e.g., Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43 (1970); Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947); Schwartz, Disqualification for Bias in the Federal District Courts, 11 U. Pitt. L. Rev. 415 (1950); Tilewick, Decisions Construing the Judicial Disqualification Statute (Fed. Judicial Center 1977); Disqualification of Federal Judges for Bias or Prejudice, 46 U. Chi. L. Rev. 236 (1978); Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 Fordham L. Rev. 139 (1976); Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973); Caesar's Wife Revisited--Judicial Disqualification After the 1974 Amendments, 34 Wash. & Lee L. Rev. 1201 (1977); Project, Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status, and the Oregon Experience, 48 Or. L. Rev. 311 (1969); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966); Note, Judicial Disqualification in the Federal Courts, 1978 Law Forum 863; Note, Disqualification of a Federal District Judge for

changed since it was enacted in 1911.<sup>10</sup> It provides that the trial judge will disqualify himself when a party files an affidavit alleging that the judge has a personal bias or prejudice against him or in favor of an adverse party. The affidavit must state the facts and the reasons for the belief that bias or prejudice exists; also, it must be accompanied by a certificate from counsel stating that the motion for disqualification is made in good faith.

The legislative history and wording of this statute suggest that it was intended to provide for the automatic

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Bias--The Standard Under Section 144, 57 Minn. L. Rev. 749 (1973); Comment, Disqualifying Federal District Judges Without Cause, 50 Wash. L. Rev. 109 (1974).

10. 28 U.S.C. § 144 reads as follows:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The statute was originally codified at 28 U.S.C. § 21. When this law was reenacted in 1949 as § 144, one of the few

disqualification of the judge upon the submission of the affidavit.<sup>11</sup> But in Berger v. United States,<sup>12</sup> an early review of the statute, the Supreme Court held that the trial judge must rule on whether the facts alleged in the affidavit are sufficient to establish bias or prejudice. That case held that affidavits submitted under the statute are to be taken as true; no hearings are to be held regarding the facts alleged.

One of the more important issues facing the courts in applying section 144 is the question of how strong the inference of bias must be before recusal is granted. It has been argued that although no party should be compelled to try a case if the judge is actually biased, there is little likelihood of significant harm to the litigant's interests unless the judge is actually prejudiced.<sup>13</sup> Most courts have

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changes made was to add the qualifying word "sufficient" before the word "affidavit."

11. During the debate on the bill that became 28 U.S.C. § 21, Congressman Cullop of Indiana, the chief sponsor of the legislation, was asked whether the challenged judge retained any discretion to rule on the affidavit. He replied, "No; it provides that the judge shall proceed no further with the case." 46 Cong. Rec. 2627 (1911).

12. 255 U.S. 22 (1921).

13. See Note, Disqualification of a Federal District Judge for Bias--The Standard Under Section 144, 57 Minn. L. Rev. 749, 758-59 (1973).

adopted a "real prejudice" rule and demand an affirmative showing of actual bias.<sup>14</sup> These courts treat allegations made in the affidavit as evidence and require that the allegations, accepted as true under Berger, must prove that the judge is actually biased.<sup>15</sup> Other courts have construed the section liberally and have required disqualification when the affidavit has recorded the appearance of judicial bias. These courts stress that even though the judge might in fact be impartial, the appearance of fairness in judicial proceedings is of paramount importance.<sup>16</sup>

Section 455 requires disqualification upon the judge's own initiative in certain specific instances. It is much broader than section 144; it applies to all judges (trial, bankruptcy, and appellate) and magistrates.

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14. See, e.g., United States v. Daley, 564 F.2d 645 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir.), cert. denied, 406 U.S. 976 (1972); Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968).

15. See United States v. Gilboy, 162 F. Supp. 384, 393 (M.D. Pa. 1958) ("A prima facie case will not suffice."); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1446 (1966).

16. See, e.g., Mitchell v. United States, 126 F.2d 550 (10th Cir. 1942); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); United States v. Quattrone, 149 F. Supp. 240 (D. C. 1957). See Note, Disqualification of Judges Because of Bias and Prejudice, 51 Yale L.J. 169, 175 (1941); Comment, Disqualification of Federal Judges for Personal Bias, 16 U. Chi. L. Rev. 349, 353 (1949).

Before 1974, section 455 called for self-disqualification when a judge had a substantial interest in the case, when he had been a material witness or of counsel, or when he was so closely related to or associated with a party or attorney that it would be improper, in his opinion, for him to sit on the case.<sup>17</sup> Those standards were ambiguous; the "substantial interest" criterion and the phrase "in his opinion" caused significant problems.<sup>18</sup> Further, the standards seemed to conflict with the 1972 ABA Code of Judicial Conduct, which called for disqualification whenever the impartiality of the judge might reasonably be questioned.<sup>19</sup>

After reviewing these matters, Congress amended section 455 in 1974 to require that the judge disqualify himself in the following specific circumstances:

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17. Until 1974, 28 U.S.C. § 455 read as follows:

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

18. See E. Thode, Reporter's Notes to Code of Judicial Conduct 65 (1973); Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 Fordham L. Rev. 139, 144 (1976); Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 741 (1973).

19. See H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 2, reprinted in [1974] U.S. Code Cong. & Ad. News 6351, 6352.

(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<sup>20</sup> to be a material witness in the proceeding.

The statute also urges the judge to inform himself about his personal and fiduciary financial interests and those of his family.<sup>21</sup> Finally, the statute incorporates the standard for disqualification in canon 3C(1) of the ABA Code of

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20. 28 U.S.C. § 455(b).

21. 28 U.S.C. § 455(c).



Judicial Conduct, by providing that the judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>22</sup>

The legislative history of the 1974 amendments indicates that the general purpose of section 455's new language was to "broaden and clarify the grounds for judicial disqualification,"<sup>23</sup> but many issues remain that divide the circuits. Although the courts seem to agree that section 455(a) replaced a subjective, discretionary standard with the more objective one of reasonableness,<sup>24</sup> they disagree on whether the judge should apply the "reasonable man" test from the position of the impartial observer or from the more sensitive viewpoint of the litigant.<sup>25</sup> The proper relation-

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22. 28 U.S.C. § 455(a). Subsection (d) defines various words and phrases used within the statute. Subsection (e) provides that parties can waive only a § 455(a) disqualification; waiver of any ground for disqualification enumerated in § 455(b) is not permitted. The full text of the statute is provided in appendix A.

23. See Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) [hereinafter cited as Hearing on S. 1064].

24. See H.R. Rep. No. 93-1453, supra note 19, at 5; United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976); United States v. Ritter, 540 F.2d 459, 464 (10th Cir. 1976); In re Vepco, 539 F.2d 357, 362 (4th Cir. 1976).

25. Compare SCA Servs., Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977); Parrish v. Board of Comm'rs, 524 F.2d 98, 103 (5th Cir. 1975) (en banc), cert. denied, 425 U.S.

ship between sections 144 and 455 is a source of controversy,<sup>26</sup> as is the distinction between bias in fact and the appearance of bias in the context of section 455.<sup>27</sup>

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944 (1976); *United States v. Baker*, 441 F. Supp. 612, 617 (M.D. Tenn. 1977) with *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), cert. denied, 429 U.S. 951 (1976); *Parrish*, 524 F.2d at 108 (Tuttle, J., dissenting).

26. See Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 *Fordham L. Rev.* 139, 152-54 (1976).

27. Compare *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) with *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978); *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), cert. denied, 429 U.S. 951 (1976); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 525 (S.D. Fla. 1977).

### III. RECENT PROPOSALS FOR PEREMPTORY CHALLENGE

In 1980, two bills were introduced in the House that would have created a peremptory challenge procedure as part of the judicial disqualification system.

The first, H.R. 7165, was introduced by Rep. Dan Lungren of California on April 24. The "Peremptory Challenge Act of 1980" provided that:

If all parties on one side of a civil or criminal case to be tried in a Federal district court or a bankruptcy court file an application requesting the reassignment of the case, the case shall be reassigned<sup>28</sup> to another appropriate judicial officer for trial.

The legislation would have allowed parties to challenge a United States district court judge, a United States bankruptcy judge, or a United States magistrate by filing an application for reassignment within twenty days after the initial assignment of the case. The bill was referred to the Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice; no hearings were held and no other action was taken on the bill.

Five weeks later, Rep. Robert F. Drinan of Massachusetts introduced H.R. 7473. It would have permitted the

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28. H.R. 7165(a)(1), 96th Cong., 2d Sess. (1980). The full text of this bill is provided in appendix B.

reassignment of a criminal case merely by the defendant's filing a notice within fourteen days after the initial assignment of the case. Apparently in recognition that use and abuse of the peremptory challenge procedures might occur more readily in small districts,<sup>29</sup> the legislation was written to apply only in districts having three or more judges in regular active service.<sup>30</sup>

H.R. 7473 was referred to the Subcommittee on Criminal Justice, of which Congressman Drinan was chairman. Hearings were held a week later. Witnesses representing the American Bar Association, the Federal Public and Community Defenders, and the National Legal Aid and Defenders Association testified in favor of the proposed challenge procedure. They cited deficiencies in the present disqualification system and the positive experience of several states with similar legislation;<sup>31</sup> they argued that such a procedure would reduce the number of direct and collateral attacks on convictions and would enhance the public's perception of the

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29. See pages 28 and 29, infra, for more discussion of this potential problem.

30. H.R. 7473, 96th Cong., 2d Sess. (1980). The full text of this bill is provided in appendix C.

31. See Hearings on H.R. 7473, note 6 supra (statement of John J. Cleary).

fairness of criminal proceedings.<sup>32</sup> Judge Walter E. Hoffman of the Eastern District of Virginia, representing the Judicial Conference on other matters pending before the subcommittee, gave his personal comments on the proposal.<sup>33</sup> He noted that the Advisory Committee on Criminal Rules had rejected a similar proposal and had argued that the legislation would have a disastrous effect on federal court case loads. He urged that the Congress postpone consideration of the procedure pending more detailed study--by Congress and others--of its consequences. After the hearings, Assistant Attorney General Alan Parker wrote to Congressman Drinan stating the Department of Justice's opposition to the legislation.<sup>34</sup> Seven weeks after the hearings, the subcommittee

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32. Id. (statement of Richard J. Wilson).

33. Judge Hoffman testified on June 9, 1980, concerning a set of proposed amendments to the Federal Rules of Criminal Procedure. During the course of that testimony, he was asked to comment briefly upon the proposed peremptory challenge legislation. Since the Judicial Conference had not yet had an opportunity to either review or take a position on the proposals, Judge Hoffman could not speak on its behalf and, therefore, offered only his own reactions to the bills. Subsequently, he prepared a more thorough written statement and forwarded it to the subcommittee. See note 6 supra.

34. Letter from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Honorable Robert F. Drinan (June 25, 1980).

failed to approve H.R. 7473 for full committee action.

Although the two bills prompted a great deal of discussion and activity in both support and opposition, the move towards a system of peremptory challenges to federal judges had been active for some time. Several proposals for non-discretionary reassignment were made in the 1970s, both in and outside of Congress.

In 1970 and again in 1971,<sup>35</sup> Sen. Birch Bayh of Indiana proposed legislation that would have amended 28 U.S.C. § 144 to read, in part:

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

Senator Bayh felt that litigants who believe they cannot get a fair trial before a particular judge should not have to convince that judge to disqualify himself. Further, the Senator believed that such changes were a necessary part of any complete approach to the problem of judicial disqualification. However, viewing his proposal as too controversial, he withdrew the portion of his bill that dealt with section

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35. S. 4201, 91st Cong., 2d Sess. (1970); S. 1886, 92d Cong., 1st Sess. (1971).

144, in favor of the language that was eventually adopted as the 1974 amendments to section 455.<sup>36</sup>

In 1974, the National Conference of Commissioners on Uniform State Laws adopted, as part of the uniform Rules of Criminal Procedure, a provision allowing a defendant in a criminal trial to obtain a change of the judge before the trial, by filing a timely demand.<sup>37</sup> This concept received more support in 1976, when the ABA Commission on Standards of Judicial Administration noted:

Consideration should be given to adopting a procedure for peremptory challenge of a judge. The theory of such a procedure is that a party should be able to avoid having his case tried by a judge who, though he is not disqualified for cause, the party believes cannot afford him a fair trial.

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36. Hearing on S. 1064, supra note 23, at 76.

37. Rule 741(a) reads:

A defendant may obtain a substitution of the judge before whom a trial or other proceeding is to be conducted by filing a demand therefor, but if trial has commenced before a judge no demand may be filed as to him. A defendant may not file more than one demand in a case. If there are two or more defendants, a defendant may not file a demand, if another defendant has filed a demand, unless a motion for severance of defendants has been denied. The demand shall be signed by the defendant or his counsel, and shall be filed at least [ten days] before the time set for commencement of trial and at least [three days] before the time set for any other proceeding, but it may be filed within [one day] after the defendant ascertains or should have ascertained the judge who is to preside at the trial or proceeding.

Such a belief may stem from the judge's views or practices regarding the type of case in question, from the judge's inexperience with the type of matter involved or from previous interchanges between the judge and the party or his counsel. . . . Although a party is not entitled to have his case heard by a judge of his selection, he should not be compelled to accept a judge in whose fairness or understanding he lacks confidence if that can be avoided without interfering with administration of the court's work.<sup>38</sup>

These comments conclude that a peremptory challenge procedure would give parties additional assurance that their cases would be determined justly.

Finally, in August, 1979, the ABA House of Delegates adopted a resolution supporting legislation to allow a defendant in a federal criminal trial to move for peremptory transfer of the case to another judge.<sup>39</sup> The procedure would apply only in those districts with three or more district judges.<sup>40</sup> And in February, 1980, the House of Delegates adopted a complementary resolution that urged enactment of legislation to permit peremptory challenge of a federal district court judge, magistrate, or bankruptcy

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38. ABA Comm. on Standards of Judicial Administration, Standards Relating to Trial Courts § 2.32, at 51-52 (1976).

39. [1979] ABA Resolution 102D. The text of this resolution is provided in appendix D.

40. An earlier version of this resolution would have limited its applicability to districts with five or more judges.



judge in a civil case; this procedure would be available in all districts regardless of the size of the court.<sup>41</sup> The bills introduced by Congressmen Lungren and Drinan were patterned after the two ABA resolutions.

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41. [1980] ABA Resolution 125. The text of this resolution and the accompanying proposed statute are provided in appendix E.

#### IV. STATES' EXPERIENCE WITH PEREMPTORY CHALLENGE

Most state jurisdictions have a statutory procedure with clearly specified grounds for the disqualification of trial judges for cause, upon the filing of a timely motion by a party.<sup>42</sup> The grounds necessary to secure recusal are varied, but it is generally recognized that a judge may be removed from a case in which he is related to a party or attorney, he had previously participated in matters connected with the case, or he has an interest in the outcome of the case. These state statutes, like the federal ones, have been subject to considerable litigation concerning the extent of the judge's interest, closeness of relationship, and degree of prior participation.

Several states also permit a party to remove a trial judge by filing an affidavit asserting that bias or prejudice exists or noting the party's belief that a fair trial cannot be obtained. The facts underlying the affiant's claim need not be stated; the party making the affidavit is

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42. See, e.g., Md. Const. art. IV, § 7: "No Judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, by affinity or consanguinity, within such degrees as now are, or may hereafter be prescribed by Law, or where he shall have been of counsel in the case."

not called upon to explain or prove that the bias or prejudice really does exist. Furthermore, several other states permit the judge to be disqualified simply because one side or the other does not want that judge on the case; no grounds need be stated nor an affidavit presented in those jurisdictions.

The term "peremptory challenge" has been applied to the procedures in these two sets of states; the challenge to the judge in these jurisdictions is as peremptory as a challenge to a juror. Even where an affidavit is required, it appears to have become simply a formality;<sup>43</sup> if the affidavit or the motion meets statutory requirements, usually concerning time of filing, the judge must step down. The remainder of this section will discuss the statutes in these states and some of the experience that the bench and bar have had with them.

Seventeen states currently have some form--rule or statute--of judicial peremptory challenge procedure.<sup>44</sup> Fifteen of those states apply the procedure to both civil

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43. See Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 Fordham L. Rev. 139, 160 (1976); Caesar's Wife Revisited--Judicial Disqualification After the 1974 Amendments, 34 Wash. & Lee L. Rev. 1201, 1220 (1977); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1438 (1966).

44. In his statement prepared for the hearings on S. 1064, John P. Frank included a list of 19 states with

and criminal cases: Alaska,<sup>45</sup> Arizona,<sup>46</sup> California,<sup>47</sup>  
Idaho,<sup>48</sup> Indiana,<sup>49</sup> Minnesota,<sup>50</sup> Missouri,<sup>51</sup> Montana,<sup>52</sup>

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statutes that provided peremptory transfer of a case to a new judge. See Hearing on S. 1064, supra note 23, at 65. His inclusion of Hawaii and Maryland in this group appears to have been in error. Haw. Rev. Stat. § 601-7(b) requires that the affidavit to be filed "shall state the facts and the reasons" for the belief that the judge is biased. Although the Maryland venue law is similar to the peremptory system (see Md. Const. art. IV, § 8; Md. Code Ann. art. 75, § 44 (1965)), the party obtaining the change of venue has no valid objection when the same judge appears on the bench in the new venue. See Greenberg v. Dunn, 245 Md. 651, 227 A.2d 242 (1967).

45. Alaska Stat. § 22.20.022 (1976); see Alas. Civ. R. Ct. 42(c) and Alas. Crim. R. Ct. 25(d). See Note, Peremptory Challenges of Judges in the Alaska Courts, 6 U.C.L.A.-Alas. L. Rev. 269 (1977).

46. Ariz. R. Civ. P. 42(f); Ariz. R. Crim. P. 10.2.

47. Cal. Civ. Proc. Code § 170.6 (West Supp. 1980).

48. Idaho R. Civ. P. 40(d); Idaho Crim R. 25.

49. Ind. R. Trial P. 76; Ind. R. Crim. P. 12. See Note, Change of Judge in Indiana: A Continuing Dilemma, 2 Ind. Legal F. 164 (1968); Note, Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms, 38 Ind. L.J. 289 (1963).

50. Minn. Stat. § 542.16 (Supp. 1980). See Minn. Stat. § 487.40 (Supp. 1980); Minn. R. Civ. P. 63.03; Minn. R. Crim. P. 24.03.

51. Mo. R. Civ. P. 51.05; Mo. R. Crim. P. 30.12. See Ely, Right to Change of Venue or Change of Judge Under the Missouri Constitution, 20 Mo. L. Rev. 13 (1955).

52. Mont. Sup. Ct. R. 3-1-801(4).

New Mexico,<sup>53</sup> North Dakota,<sup>54</sup> Oregon,<sup>55</sup> South Dakota,<sup>56</sup> Washington,<sup>57</sup> Wisconsin,<sup>58</sup> and Wyoming;<sup>59</sup> an Illinois statute<sup>60</sup> operates only in criminal cases, and a Nevada statute<sup>61</sup> only in civil cases. Of the states that permit challenges in criminal cases, Idaho, Illinois, and Wisconsin permit only the defendant to exercise the challenge; the remaining thirteen allow state prosecutors and district attorneys, as well as defendants, to remove the assigned judge.

Affidavits noting the existence of prejudice and the

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53. N.M. Stat. Ann. § 38-3-9 (1977).

54. N.D. Cent. Code § 29-15-21 (Supp. 1979).

55. Or. Rev. Stat. §§ 14.250-.270 (1971). See Project, Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status, and the Oregon Experience, 48 Or. L. Rev. 311 (1969).

56. S.D. Codified Laws Ann. §§ 15-12-20 to -37 (Supp. 1980).

57. Wash. Rev. Code Ann. § 4.12.050 (1962).

58. Wis. Stat. Ann. § 801.58 (West Supp. 1979-1980); Wis. Stat. § 971.20 (West Supp. 1979-1980).

59. Wyo. R. Civ. P. 40.1; Wyo. R. Crim. P. 23.

60. Ill. Rev. Stat. ch. 38, § 114-5 (1977). See Substitution of Judges in Illinois Criminal Cases, 1978 Univ. Ill. L.F. 519.

61. Nev. Rev. Stat. § 1.240 (1979).

belief that a fair trial cannot be obtained are required in California, Illinois, Missouri (criminal cases only), New Mexico, and Washington. Oregon and South Dakota require an affidavit of bias or prejudice as well as a statement that the request for change was made in good faith and not for reasons of delay. That statement is the only requirement in North Dakota. The remaining courts merely require the parties to file a "notice of change of judge" or a request for "substitution of the judge"; only Alaska, Nevada, and Wyoming, however, specifically label their challenge procedures peremptory.

Although both the language and the requirements of provisions for timely filing vary greatly, most of the procedures call for the request or the affidavit to be filed within a short period after the identity of the judge is known<sup>62</sup> or within a specific period before the trial commences.<sup>63</sup> With few exceptions, most states permit only one

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62. See, e.g., Alaska Stat. § 22.20.022(c) (1971): "The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later . . . ."

63. See, e.g., N.D. Cent. Code § 29-15-21(2) (Supp. 1979): "The demand is not operative unless it is filed with the clerk of the court at least three days before the matter is to be heard if upon a motion or upon arraignment, or ten days before the date the action or proceeding is scheduled for trial."

challenge per side;<sup>64</sup> however, several statutes provide that the judge may allow additional challenges whenever two or more parties on a side have adverse or hostile interests.<sup>65</sup>

Finally, several of the states have particular provisions that are noteworthy. In Arizona, for instance, once a change-of-judge notice is filed, the parties may agree "upon a judge who is available and is willing to have the action assigned to him."<sup>66</sup> If an additional notice of change is filed by a party entitled to do so, a conference of all parties' attorneys is convened; at that meeting, a judge is assigned "to whom the objections of the parties are least applicable."<sup>67</sup> Nevada also has a rule for multiparty situations; it reads, in part:

If one or two or more parties on one side of an action or proceeding files a challenge, no other

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64. Illinois permits two challenges in certain serious felonies; Montana, two in all civil cases; Oregon, two from each party in all cases.

65. See, e.g., Idaho R. Civ. P. 40(d): "In the event there are multiple parties plaintiff, defendant or otherwise, the trial court shall determine whether such coparties have an interest in common in the action so as to be required to join in a disqualification without cause, or that such coparties have an adverse interest in the action so that each adverse coparty will have the right to file one (1) disqualification without cause."

66. Ariz. R. Civ. P. 42(f)(1)(F).

67. Id.

party on that side may file a separate challenge, but each is entitled to notice of the challenge and may file the name of any other judge to whom he would object. When the action or proceeding is transferred, it shall be transferred to a judge to whom none of the parties has objected, or if there is no such judge . . . , then to the judge to whom the fewest parties on that side have objected.<sup>68</sup>

Further, Nevada has a procedure that seems to anticipate some of the fiscal problems of a peremptory system: the filing of a challenge must be accompanied by a \$100.00 fee; this fee is deposited in the state treasury as a credit to the fund that supports district judges' travel.<sup>69</sup> Although most statutes require the challenged judge to step aside immediately,<sup>70</sup> Washington's law permits the judge to hear arguments and rule upon any preliminary motions and other matters, upon stipulation by the parties.<sup>71</sup>

The states' experience will be important and instructive to the debate on developing a federal peremptory challenge system. Several of the state statutes have been in

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68. Nev. Rev. Stat. § 1.240(4) (1979).

69. Id. § 1.240(1).

70. See, e.g., S.D. Codified Laws Ann. § 15-12-22 (Supp. 1980): "th[e] named judge or magistrate shall proceed no further in said action and shall thereupon be disqualified as to any further acts with reference thereto . . . ."

71. Wash. Rev. Code Ann. § 4.12.050 (1962).



place for a long time,<sup>72</sup> but little has been written about them or their operation: there appears to be only one empirical study that is sufficiently thorough to be useful. That research was undertaken by the editors of the Oregon Law Review, and the results were published in 1969.<sup>73</sup> The Oregon study covers 259,200 cases filed during the thirteen-year period between May 2, 1955, and January 1, 1968, and affidavits filed between May 2, 1955, and July 1, 1968, in the state's circuit courts (trial courts of original and general jurisdiction.)<sup>74</sup>

In the more than one-quarter of a million cases filed during the study period, only 1,392 challenges were made, of which 1,282 resulted in a change of judge. That is, a challenge was made in one of every 186 cases filed (0.538 percent of the cases), and judges were disqualified and replaced in one out of every 202 cases filed (0.495 percent of the cases).<sup>75</sup> The authors concluded, not surprisingly,

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72. E.g., the Illinois law is based on an 1874 statute.

73. Project, Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status, and the Oregon Experience, 48 Or. L. Rev. 311 (1969).

74. Id. at 378.

75. Id. at 379, 380.

that "[t]hese do not appear to be alarming frequencies."<sup>76</sup>

There are other data of interest, particularly concerning law firms and attorneys. One law firm in the state made 433 (31.1 percent) of all the challenges (428 of which were directed toward one judge); six firms together made 49.6 percent of the challenges.<sup>77</sup> Thirteen attorneys, or one-half of 1 percent of all the active attorneys in Oregon, made 701 (50.3 percent) of all the challenges.<sup>78</sup> According to the study, these numbers indicate that once a firm or an attorney decides to disqualify a particular judge, "it is often thought necessary to continue to do so in the future."<sup>79</sup>

A judicial peremptory challenge system has greater potential use in small districts; because the pool of judges is smaller, the chances that the assigned judge will be perceived as objectionable are greater. Further, the smaller districts may lend themselves to use of the procedure for judge selection, rather than judge disqualification. In two-judge districts, for instance, the party making the

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76. Id. at 380.

77. Id.

78. Id. at 383.

79. Id. at 382. See notes 96 and 97 and accompanying text, infra.

challenge may be seeking the assurance that the case will be heard by the remaining judge. However, the Oregon study found little evidence of such disproportionate use or abuse. One-judge districts had 19.3 percent of the case filings and 22.3 percent of the challenges; two-judge districts had 18.8 percent of the filings and 12.3 percent of the challenges; and three-judge districts had 27.2 percent of the filings and 25.9 percent of the challenges.<sup>80</sup> Visiting judges were challenged with disproportionate frequency, however: they carried 7.0 percent of the judicial workload during the sample period but received 16.8 percent of the challenges.<sup>81</sup>

A final measure of the system's potential impact is the extent to which challenges necessitate reassignments to judges from outside the district. Although the study notes that 25.6 percent of the reassignments were made to "outside" judges,<sup>82</sup> the statistics developed do not distinguish between reassignments to visiting judges who may have already been sitting in the district and reassignments to outside judges that were caused purely by challenges. Since

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80. Id. at 392. As for larger districts, 15-judge courts had 12.2% of the filings and 14.8% of the challenges; 16-judge courts had 8.4% of the filings and 21.1% of the challenges. Id.

81. Id. at 388.

82. Id. at 395.

7 percent of the court's workload was carried by visiting judges, a more accurate measure of this impact would probably show that reassignments were often made to visiting judges who were not brought in specifically for that purpose.<sup>83</sup>

Other important findings of the study were:

1. The proportion of challenges in criminal cases was substantially<sup>84</sup> higher than in civil actions at law or in equity
2. During the period of the sample, eighty-nine judges held office--seventy-three of them were challenged at least once, thirty-seven were challenged five or more times<sup>85</sup> and eleven were challenged thirty or more times
3. As the annual case load increased, the proportion of challenges increased correspondingly<sup>86</sup>
4. Plaintiffs filed 39.0 percent<sup>87</sup> of the challenges; defendants filed 61.0 percent
5. Challenges noting bias against the attorneys made up a much higher proportion of the total number of challenges<sup>88</sup> than did those noting bias against the parties.

The scope and thoroughness of the Oregon study has not

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83. Id. at 395, 396.

84. Id. at 384.

85. Id. at 385.

86. Id. at 396.

87. Id. at 394.

88. Id. at 394, 395.

been duplicated elsewhere. However, one other state, California, has sought to develop data on the operation of its system. Significantly, the California study confirms some of the Oregon results (although an important caveat, discussed following a brief summary of the study, should be noted).

During the first six months of 1962, the Administrative Office of the [California] Courts, at the request of the state judicial council, collected reports on all peremptory challenges filed.<sup>89</sup> The total number of challenges filed during the period was 738;<sup>90</sup> the total number of cases handled by the courts and the proportion of challenges were not reported. Of the 738 challenges, 67 (9.1 percent) were filed in one-judge courts, and 48 (6.5 percent) were filed in two-judge courts;<sup>91</sup> however, less than 6 percent of the reassignments of judges from one district to another were necessitated by challenges.<sup>92</sup> Three-fourths of the challenges were filed in civil cases; 95 percent of the chal-

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89. Judicial Council of California, Nineteenth Biennial Report to the Governor and the Legislature 34-39 (1963).

90. Id. at 36.

91. Id. at 37. The report does not provide statistics for courts of any other size; the remaining challenges (623) came from courts with three or more judges. Id. at 38.

92. Id. at 36.

lenges in criminal cases were made by the defense.<sup>93</sup> During the six-month period, 111 judges, out of an unspecified total, received one or more challenges. One judge received 80 challenges, 69 of them from one law firm.<sup>94</sup> The authors of the study concluded that the use of peremptory challenge "did not cause any serious problems."<sup>95</sup>

This last statement and the data developed in the report must be discounted because of the practice of some California courts to routinely reassign a case at the request of a lawyer; no affidavit is ever filed in these circumstances.<sup>96</sup> Further, even the authors of the study reported that, in some instances, when it is known that a lawyer always challenges a particular judge, that lawyer's

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93. Id. at 39.

94. Id. at 38.

95. Id. at 34. But see notes 112-120 and accompanying text, infra.

96. See letter from Ralph N. Kleps (former administrative director of the California courts) to Honorable Robert F. Drinan (June 17, 1980) (copy on file at the Federal Judicial Center); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1438 (1966). The authors of the Oregon study found a similar practice in their state: "Many judges voluntarily disqualify themselves, without awaiting or requiring the filing of a motion and affidavit, upon consultation with a party or attorney. The extent of informal disqualification is not susceptible to measurement, but it definitely is not insignificant." Project, supra note 73, at n.423.

cases are simply never assigned to that judge.<sup>97</sup> These practices indicate that the amount of "judge-shopping" may be greater than the data would at first suggest.<sup>98</sup>

Although the extent of this practice was not measured (and probably could not be), it does have some consequences other than the distortion of the data. First, the court and court personnel are involved in this abuse of the statutory procedure. Next, it provides the parties with more opportunities for challenges than was contemplated by the law:<sup>99</sup> by avoiding the formal exercise of the challenge, the attorney "still ha[s] his 'one shot' disqualification to use

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97. See Judicial Council of California, supra note 89, at 37.

98. It is interesting to note the bar's perception of these practices. See Brosnahan, Trial Handbook for California Lawyers (1974). Immediately preceding discussion of the state's peremptory challenge statute, the handbook has a chapter entitled "Characteristics of Particular Judge." In this chapter, the author stresses the importance of being familiar with the judge assigned to one's case, particularly his temperament, predisposition toward or against certain types of litigation, and background and knowledge in certain types of actions. The author concludes that "this kind of knowledge can be invaluable in anticipating and eliminating problems." Id. at 72-73 (emphasis added).

99. See Caesar's Wife Revisited--Judicial Disqualification After the 1974 Amendments, 34 Wash. & Lee L. Rev. 1201, 1219 (1977): "In this manner the shrewd attorney could circumvent the statutory limitation of one challenge per lawsuit and effectively choose his favorite judge by threatening to challenge whichever judges were named by the clerk."

against the next assigned judge."<sup>100</sup> Further, one of the important deterrents against dilatory or capricious challenge of a judge is the lawyer's realization that he will have to practice before that judge in the future;<sup>101</sup> if no affidavit or notice of challenge is filed, this deterrent is weakened. Finally, supporters of the peremptory concept argue that it provides judges with candid feedback and with "information upon which a judge could reappraise his or her own style;"<sup>102</sup> if there is no affidavit or notice filed, the judge will not even know that he had, in effect, been disqualified.

Not only are there few and limited studies of state experience with the peremptory challenge procedure, there is also little pertinent information in the statistics kept by the states that would permit further, more precise research. Some states do not collect data on their challenge system,<sup>103</sup> and others that do keep records do not compile and

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100. Letter from Ralph N. Kleps, note 96 supra.

101. See Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1438 (1966).

102. See Letter from John J. Cleary to Judge Roszel C. Thomsen (Dec. 18, 1978) (copy on file at the Federal Judicial Center).

103. According to the former administrative director of the California courts, there are several reasons why that state decided not to collect peremptory challenge data on a continuing basis:



publish statistics on challenge activity.<sup>104</sup> Some statistical information is available, however. For instance, there was very little challenge activity in Nevada during the fiscal year ending June 30, 1980; only thirty-three fees (required to accompany a challenge) were deposited in the Office of the State Treasurer.<sup>105</sup> In New Mexico, during

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It was found, for example, that judges resented having reports compiled centrally because, for the most part, they believed the challenges to be without foundation. Cumulation of reported challenges, particularly in the Chief Justice's offices, tended to undermine confidence in them as judges, they believed, and were unfair. They were unfair, it was thought, in many cases where the judge knew of nothing upon which a valid challenge could be based or perhaps in situations where a judge had been especially firm in managing his courtroom. Presiding judges began to find ways to reassign cases when there was only a threat of disqualification, thus avoiding the challenge (and a report of it) but giving the lawyer the desired result. . . . In the end, it was believed that the statistics gathered on the use of the challenge procedure were both harmful and unreliable.

Letter from Ralph N. Kleps, note 96 supra. An informal survey conducted by the Federal Judicial Center revealed no formal record keeping of challenge activity in Arizona, Idaho, Indiana, Minnesota, Missouri, South Dakota, Washington, or Wyoming.

104. In Illinois, for instance, several divisions maintain docket books that contain entries concerning challenges of judges, but there is no centralized record keeping or publication of courtwide or statewide statistics on the procedure. See letter from William J. Martin, Esq. to Alan J. Chaset (Mar. 7, 1980) (copy on file at the Federal Judicial Center).

105. Letter from C.R. Davenport (clerk of the Nevada Supreme Court) to John Gordon (research assistant, Federal

1979, there were 2,199 disqualifications in 53,517 cases filed; about 10 percent of those disqualifications required designations of a judge from another district. About half of the challenges and most of the out-of-district designations occurred in districts with three or fewer judges.<sup>106</sup> And in Alaska, during 1979, 750 challenges were filed in the 40,813 cases handled by the state's district and superior courts.<sup>107</sup>

Another way to evaluate the states' experience with judicial peremptory challenge procedures is to sample the opinions and concerns of those who use the systems. Although such findings are not as objective as the data from empirical studies or statistical reports, they may be just as useful.

John P. Frank prepared such a sampling as part of his testimony supporting Senator Bayh's peremptory challenge proposal.<sup>108</sup> Mr. Frank assembled letters from the chief

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Judicial Center) (Aug. 18, 1980) (copy on file at the Federal Judicial Center).

106. See Judicial Dep't of the State of New Mexico, 1979 Annual Report of the Judiciary 26, 28.

107. Letter from Leanne C. Flickinger (research analyst, Alaska court system) to John Gordon (research assistant, Federal Judicial Center) (Sept. 3, 1980) (copy on file at the Federal Judicial Center).

108. See Hearing on S. 1064, supra note 23, at 63.

justices of nine states that have peremptory systems.<sup>109</sup> Eight of the letters favored the system. Justice Fred C. Struckmeyer of Arizona noted that he had had experience with it as both lawyer and judge; he wrote, "while it is seldom used, I believe it to have several virtues which justify its existence."<sup>110</sup> Justice Orris L. Hamilton of Washington wrote that the state's experience with the provision had been "extremely satisfactory"; he was sure that it was popular with the bar and was certain that "the vast majority of our trial judges are happy and content with the operation of the statute. . . ."<sup>111</sup> On the other hand, Justice Donald R. Wright of California said that his state's procedure had caused "a serious problem in court calendaring operations and has often interfered with the judiciary's effort to reduce court congestion and delay."<sup>112</sup>

With his letter, Justice Wright included a copy of a 1969 study prepared by the Administrative Office of the

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109. He received letters from Arizona, California, Minnesota, Missouri, Montana, Nevada, North Dakota, Washington, and Wyoming. Judge Jonathan P. Robertson of the appellate court of Indiana also testified during the hearings. He stated that the "system works well in Indiana. It is looked upon with favor . . . ." Id. at 69.

110. Id. at 66.

111. Id. at 57.

112. Id. But see text accompanying note 95, supra.

[California] Courts for the state judicial council.<sup>113</sup> This report contained the results of a questionnaire sent to the sole, senior, or presiding judge of each superior and municipal court, asking whether the peremptory challenge procedure was used properly by attorneys, and if not, what the abuses were.<sup>114</sup> The questionnaire produced 134 replies, 50 of which reflected the consensus of the court.<sup>115</sup> In answering one of the survey questions, slightly more than 50 percent of the respondents felt that the statute was "used properly."<sup>116</sup> However, in response to a second question, only 20 percent of all the respondents and 7.5 percent of

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113. Admin. Off. of the [California] Courts, Report and Recommendation Concerning Peremptory Challenge of Judges--C.C.P. § 170.6 (1969). The study was conducted in response to a request from Assemblyman James A. Hayes, chairman of the Judiciary Committee of the state legislature. Mr. Hayes was concerned about the use of the procedure "on a blanket basis." He had noted to the judicial council that his committee had studied a request for additional judgeships for a particular superior court and had found that the need for the positions was the result of repeated disqualifications of two of that court's judges, one by the district attorney and the other by the public defender. In spite of the disqualifications, the two judges remained in the criminal department and, therefore, were not able to assist the rest of the court in disposing of its case load. The end result was unwarranted expense to the county and considerable delay in the administration of justice. Id. at 1.

114. A copy of the questionnaire used is included in the report. Id. app.

115. Id. at 4.

116. Id. at 5.

the superior court judges felt that the procedure was not abused.<sup>117</sup> Although "proper use" might allow for some "abuse," the authors of the report did not explore the matter any further or attempt to explain the potential inconsistencies of those answers.

As to particular types of abuses found, 45.4 percent mentioned "judge-shopping"; 21.7 percent, effecting a continuance or delay; 14.4 percent, avoiding trial before a new or unknown judge; 10.3 percent, "blanket challenge"; and 8.3 percent, retaliation against a judge for a prior ruling.<sup>118</sup> Alluding to these findings, the report concluded that the manner in which the procedure is used in the state "seriously hinders and delays the administration of justice."<sup>119</sup> In addition, if a judge is continually challenged "merely because his decisions are not in accord with an attorney's desires, the judge's judicial independence, as well as his reputation in the community, might be unfairly attacked without any remedy."<sup>120</sup>

The various states' data and experience seem to give

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117. Id. at 5.

118. Id. at 7.

119. Id. at 8. But see note 95 and accompanying text, supra.

120. Admin. Off. of the [California] Courts, supra note 113, at 8.

some comfort to both opponents and proponents of the peremptory system. Generally, proponents seem able to conclude that use of the procedures is too limited to cause much of a problem,<sup>121</sup> while opponents find support for concluding that the statutes are unduly burdensome and invite misuse.<sup>122</sup>

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121. See Hearings on H.R. 7473, note 6 supra (statement of John J. Cleary); id. (statement of Richard J. Wilson); letter from William J. Martin, Esq. to Alan J. Chaset (Feb. 22, 1980) (copy on file at the Federal Judicial Center): "we unquestionably favor the . . . procedure and we believe that the Illinois system provides an excellent accommodation between the interests of the defendant and of judicial economy. The . . . procedure works no hardship in the administration of justice here and in our judgment facilitates it."

122. See letters from Judge Jack R. Levitt (Super. Ct., San Diego, Cal.) to Robert L. Winslow, Esq. (Apr. 29, 1976 and May 24, 1976) (Mr. Winslow was the attorney who filed an amicus brief on behalf of 20 California state judges in a suit challenging the constitutionality of the California procedure); letter from Ralph N. Kleps, note 96 supra; letter from Dave Shultz (Univ. of Wis., Dep't of Law) to Alan J. Chaset (Dec. 13, 1979) (copies on file at the Federal Judicial Center):

It was the general consensus . . . that the automatic substitution provision is unnecessary and that it is often used for delay. The biggest problems are found in the Wisconsin counties with low population. A fair number of such counties have only one judge. If that judge hears the preliminary examination, an out-of-county judge must be assigned for the trial. If a timely request for substitution is filed against that judge, another judge from another county must be assigned. Obviously this can cause considerable delay and travel. Such problems are also not limited to one-judge counties but are experienced to varying degrees in most areas. The group of judges on the Criminal Jury Instructions Committee would favor a system where substitution was not automatic.

## V. POTENTIAL ADMINISTRATIVE CONSEQUENCES OF PEREMPTORY CHALLENGE

Although the arguments of both the proponents and opponents are instructive, and the data on use and abuse are informative, whatever findings or conclusions one can make about the operation of state procedures may not apply directly to the potential functioning of a peremptory challenge procedure in the federal courts. The federal system is distinctly different from the state systems, and some of the distinct aspects may beget different results from those experienced by the states. It appears useful, therefore, to note some of those aspects and to explore the potential consequences of a federal peremptory challenge procedure.

The first distinct aspect of the federal system is related to the number of judgeships within each of the districts. Sixty-one of the ninety-one courts contain five or fewer judges; forty-one have three or fewer.<sup>123</sup> Furthermore, many of these smaller courts have only one judge sitting in a division or assigned to handle cases arising

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123. See 28 U.S.C. § 133. The numbers used here describe authorized judgeships and do not include the four territorial courts (Canal Zone, Guam, Northern Marianas, and Virgin Islands).

out of a place of holding court. Indeed, even some of the larger courts<sup>124</sup> have one or two judges assigned to hear cases from large geographical areas within the districts. The potential for abuse and judge-shopping is greater in the smaller courts and in the divisions with a small number of judges; that is why the 1979 ABA proposal and Congressman Drinan's bill, H.R. 7473, specified a minimum court size for the application of challenge procedures.<sup>125</sup> Thus any federal peremptory challenge system would have to either address the potential for serious abuse or limit the procedures' applicability. However, exempting from the rule districts with fewer than three or five judges would seriously invade the principle that justice should be administered uniformly throughout the country.<sup>126</sup>

Visiting judges might alleviate some of the difficulties the smaller courts would face. However, the present system of intracircuit and intercircuit transfer, as described in 28 U.S.C. §§ 291-296, is not very flexible and requires significant time and energy to implement; designation and assignment of an active judge may not be made without the consent of the chief judge or the judicial council

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124. E.g., M.D. Fla., N.D. Tex., W.D. Tex., E.D. Va.

125. See letter from Alan A. Parker, note 34 supra.

126. Id.



of the judge's home circuit.<sup>127</sup> If a peremptory challenge system were fully operational, the needs of a particular district or circuit to solve its own problems would militate against its judges' ready availability to aid other circuits. The design of a federal peremptory challenge system would require changing the present transfer statutes.

Furthermore, the use of visiting judges, even under a more liberal or flexible transfer system, would have other troublesome consequences for the federal courts. First, many types of federal cases are complex and protracted, taking several months to complete. Several types of cases require supervision and judicial effort beyond the actual trial of the issues; school desegregation suits, prison reform cases, and Title VII litigation might require a visiting judge to make a series of trips to the distant court. Such cases would entail significant costs for additional travel, per diem, and other expenses. It is in precisely those kinds of cases that challenges to the local judge could be expected. Also, one could argue that there

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127. 28 U.S.C. § 295. The lack of flexibility in these procedures reflects the fact that individual judges are appointed to represent and serve a particular geographic region--the district. Additional judgeships are created as the case load in a district increases. The federal judicial system does not embrace the concept of a national bench with central administrative authority to move judges around the country freely.

is a distinct value in having a judge familiar with the local area and its background decide the complex issues in these protracted cases; a visiting judge might lack that knowledge and understanding.

The present transfer system requires either the Chief Justice (intercircuit transfers) or the chief judge of the circuit (intracircuit transfers) to choose the judge to be assigned.<sup>128</sup> The discretion that may be exercised in choosing a visiting judge contradicts normal random assignment procedures. "Hand picking" a replacement judge would become problematic if peremptory procedures were used extensively. It would become even more so if the reason for the exercised challenge appeared obvious (e.g., prior liberal rulings in school desegregation cases). Any restructuring of the visiting-judge system should recognize this problem and require that transfer judges be chosen in as random a way as practicable.<sup>129</sup>

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128. 28 U.S.C. §§ 291, 292. For an example of the role of the Judicial Conference Committee on Intercircuit Assignments in the assignment process, see Report of the Proceedings of the Judicial Conference of the United States 49 (Mar. 5-6, 1980).

129. This is not to suggest that a totally random system is appropriate and necessary in all circumstances. For instance, in recent trials of public officials, assignments from outside a particular court were required because the judges in the district voluntarily recused themselves; the individuals making the reassignments wisely sought

A second set of issues that distinguishes the federal system concerns case assignment and management procedures. Essentially, the federal courts use two basic case assignment models: the individual and the master calendar systems. Under the master calendar system, when a case is filed, it enters a pool of cases awaiting further action. As motions are filed, the case is sent to the judge who is handling motions that day; after the motion is disposed of, the case returns to the pool until the next required action. On the trial date, the parties appear at an assignment office and are assigned to the first judge available to hear the case. Under the individual calendar system, when a case is filed, it is assigned (usually randomly) to a judge who handles all matters related to that case, including trials.

The master calendar system appears best suited to processing large numbers of similar cases that do not involve complex facts and legal questions.<sup>130</sup> But because the federal courts are relatively small--a six-judge court is considered large in the federal system--and because they tend

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judges with certain qualities to try those cases. Further, having panels of judges available for special assignment to particularly complex or protracted cases appears useful for the purposes of efficient management and economy.

130. M. Solomon, Caseflow Management in the Trial Court 12-13 (1973).

to handle more complex cases than state courts do, the overwhelming majority of federal courts have adopted the individual calendar system.<sup>131</sup>

The most significant advantage of this system seems to be that the judge to whom a case is assigned can become familiar with the facts and issues involved, and therefore needs less time to prepare adequately for motions and trial while taking an active role in narrowing and defining issues at the various stages of litigation. That active involvement may encourage earlier settlement by forcing counsel to explore issues and formulate positions on them before the eve of trial. Assigning each case to a specific judge, from filing to disposition, has the potential benefit of focusing responsibility for the case's progress. Each judge becomes accountable for his cases and, presumably, is accordingly motivated to manage his case load efficiently, reducing the number and age of his pending cases. The individual calendar system has also enhanced the development of innovative procedures for individual docket control.<sup>132</sup>

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131. See Hearings on H.R. 7473, note 6 supra (statement of Judge Walter E. Hoffman). Judge Hoffman noted that 82 of the districts use the individual calendar system.

132. See Renfrew, Management of Civil Case Flow from Filing to Disposition, in Seminars for Newly Appointed United States District Judges (Fed. Judicial Center 1974).

Over the past ten years, there has been a marked increase in dispositions per judgeship in the federal courts.<sup>133</sup> Some of this improvement has been attributed to the increased use of the individual calendar system.<sup>134</sup> Critics and opponents of a federal peremptory challenge procedure argue that its passage would interfere with the effective operation of the individual calendar system and might force a court to revert to the less efficient and more administratively burdensome master calendar system; they claim that the substantial improvements in the recent dispo-

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133. The average numbers of dispositions per judgeship for the ten-year period beginning in fiscal 1969 are as follows:

1969 - 311	1974 - 348
1970 - 345	1975 - 371
1971 - 315	1976 - 375
1972 - 358	1977 - 384
1973 - 354	1978 - 388

The data for fiscal 1979 should be viewed both before and after the large increase in the federal judiciary under the Omnibus Judgeship Act of 1978. Before passage of the legislation, there were 421 dispositions per judgeship; afterwards, the figure became 325 per judgeship. Admin. Off. of the U.S. Courts, Management Statistics for the United States Courts (1979); Admin. Off. of the U.S. Courts, Management Statistics for the United States Courts (1974).

134. See M. Solomon, Caseflow Management in the Trial Court 21 (1973); Cannon, Administrative Change and the Supreme Court, 57 Jud. 334, 341 (1974). See generally Remarks of Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary, ABA midyear meeting (Feb. 3, 1980).

sition statistics would be cancelled.<sup>135</sup>

Even if this dire prediction is unfounded, the possibility of peremptory challenge would inhibit the continued use and further development of case management techniques that emphasize early judicial involvement. It seems apparent that a case would see little or no judicial activity until the challenge date for both sides had passed, although the benefits of the individual calendar system could come into play after that point. Nevertheless, a peremptory challenge procedure would entail delay and resulting inefficiencies. This probable inhibition of the individual calendar system and related management techniques must be weighed against the benefits of peremptory challenge.

A third special aspect of the federal system concerns the fact that cases heard in federal courts are generally more complex than those heard in state courts. The legislation introduced in 1980, the prior Bayh bills, and most of the state statutes limit peremptory challenges to one per side; exceptions may be made if the parties on one or the other side have conflicting interests. That limit as well as the exception would be problematic for the federal

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135. See Resolution, note 1 supra; letter from Judge Frederick B. Lacey, note 2 supra; Resolution, note 4 supra; Hearings on H.R. 7473, note 6 supra (statement of Judge Walter E. Hoffman).

courts. Antitrust, patent, product liability, securities, and some contract cases can be extremely complex; they often have multiple parties and clearly conflicting interests among parties plaintiff or defendant. Determining how to group these parties as "sides" for challenge purposes would take considerable time and effort, particularly if a strict one-per-side rule were enforced. If, as would seem more logical and just, parties with common interests were grouped and each group were permitted a challenge of its own, then the number of challenges in the case would increase dramatically. That would further delay the proceeding and would exacerbate the previously discussed problems of small courts and the inflexibility of procedures for assigning visiting judges.

The one-per-side rule and its exception would affect the criminal docket as well. Federal criminal trials, particularly those involving drugs, racketeering, and conspiracy, can also be complex and protracted. Further, a large percentage of federal criminal cases involve more than one defendant. In fiscal 1980, for instance, 18,855 felony cases were filed; they involved 28,309 defendants.<sup>136</sup> If strict consensus among criminal defendants were required

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136. Admin. Off. of the U.S. Courts, 1980 Annual Report of the Director at A-56.

before they could exercise a challenge, the number of severance motions could be expected to increase dramatically. Even if additional challenges were provided and if severance motions were granted only because of conflicting interests, the system would suffer delay and the economies of multi-defendant trial would be diminished. Furthermore, today's large criminal docket and the pressures created by the Speedy Trial Act of 1974 pose a significant burden for many federal courts. If the system were pushed in the direction of single-defendant criminal trials, the problems could become monumental.

The Speedy Trial Act<sup>137</sup> is another unique aspect of the federal system that could be adversely affected by a peremptory challenge procedure. The act sets strict time limits within which indictments must be filed and trials begun. Providing each side in a criminal case with ten or twenty days in which to exercise a challenge would lead to either consumption of much of the time available under the act or modification of the statute. In small courts, even more of the limited time would be used up in arranging for visiting judges. Courts with a large volume of criminal cases would have significant administrative difficulties ensuring the

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137. 18 U.S.C. §§ 3161-3174.



availability of judges for all the cases coming due.

Section 3161(h) of the act provides periods of excludable time (not counted in the time limits) for certain delays in the course of the proceedings. As currently structured, none of these exclusions neatly accommodates the challenge situation. Although section 3161(h)(1)(F) does exclude pretrial motions, the filing of a peremptory challenge does not require a judicial officer to render a decision. Such a challenge is more like the filing of a jury demand; once made, the court is required to act accordingly. Section 3161(h)(1)(G) addresses transfers and removals, but its language seems directed to the movement of defendants from other districts rather than to a change of judges.<sup>138</sup> Finally, section 3161(h)(8)(A) provides a catchall exclusion for instances in which the judge determines that "the ends of justice served by taking [the delay] outweigh the best interest of the public and the defendant in a speedy trial." But this exclusion appears reserved for the exceptional case, not for a statutory action such as a peremptory challenge.

Even if the Speedy Trial Act were amended to include a

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138. 18 U.S.C. § 3161(h)(1)(G) reads: "delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;"

specific exclusion for judge reassignment time, a challenge system would make judges reluctant to act in a case before their status was settled. Some judges might think it best to do nothing at all that might influence the parties' use of the challenge. Others might go ahead and set motion schedules but refrain from making any rulings. Very few would want to make rulings or set trial dates. Such inactivity while the challenge process was being concluded would slow down criminal case processing considerably, in direct contradiction of the Speedy Trial Act's goal of prompt disposition.

An additional administrative consequence of a federal peremptory challenge system would be the system's effect on bankruptcy proceedings. Most of the negative consequences discussed in this chapter as applying to federal trial judges would apply to bankruptcy judges;<sup>139</sup> some of the problems would be exacerbated because there are fewer bankruptcy judges than district judges, and thus there are more districts with three or fewer bankruptcy judgeships (thirty-two districts with one bankruptcy judge, twenty-five with two, and fifteen with three). Further, these judges handle

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139. See letter from Bankruptcy Judge William J. Lasarow (C.D. Cal.) to Thomas E. Workman, Jr., Esq. (June 4, 1980) (copy on file at the Federal Judicial Center).

not only litigation, but also administrative determinations such as the allowance of fees and the confirmation of plans of reorganization. The number of interested parties in the administrative aspects of a bankruptcy case is large. Managing a challenge system in this context would be extraordinarily difficult.

## VI. PHILOSOPHICAL AND POLICY CONSIDERATIONS

Even if the unique aspects of the federal system discussed in chapter five could be accommodated with a well-structured, well-administered peremptory challenge procedure, other barriers remain. Beyond administrative difficulties, philosophical questions and issues of policy need to be addressed. Some of these matters are peculiar to the federal judiciary; others relate to the peremptory concept in general.

The proposals to provide a peremptory challenge of federal judges are grounded in the belief that present disqualification procedures fail to provide effective relief when parties believe that their assigned judge is biased or prejudiced. The current procedures are deemed unsatisfactory for three basic reasons: (1) proving bias or prejudice is too difficult; (2) the very allegation of bias or prejudice causes hostility in the judge against whom the challenge is directed; and (3) under current procedures, the judge rules on his own case. Secondly, proponents of peremptory challenge argue that present procedures provide no opportunity to seek disqualification for any other, unspecified conditions that may cause a party to prefer a

judge other than the one initially assigned to the case.

The proposals would meet all these deficiencies by providing a peremptory challenge procedure in which the challenger is not required to state the basis for the challenge. To the extent that the challengers' underlying reasons might be reasons that would never be recognized in any judicial proceeding, the procedure would actually give parties an opportunity to affect the outcome of cases in arguably unacceptable ways.

That unjustified reasons would in fact motivate challenges seems to be beyond question. A prime motive for exercising the challenge in criminal proceedings would doubtless be the perception of a judge as a severe or lenient sentencer--either in all cases or in particular types of cases. Statutes confer upon federal judges a wide range of discretion in sentencing. Whether that discretion should be narrowed is a major issue in congressional criminal law reform.<sup>140</sup> A peremptory challenge procedure would allow

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140. Efforts to codify and reform the federal criminal laws began more than 25 years ago, with the publication of the American Law Institute's first tentative draft of the Model Penal Code in 1953. The next significant step in the process occurred on November 8, 1966, when Congress established the National Commission on Reform of the Federal Criminal Laws (Pub. L. No. 89-801). Consistent with its mandate to make "a full and complete review and study of the statutory and case law of the United States," the commission issued its final report in the form of a draft criminal code

parties, rather than legislators, to narrow the exercise of judges' discretion. No court would disqualify a judge from sitting in a criminal case simply because he was more likely than another judge to hand down a legal but severe (or lenient) sentence. But the peremptory challenge procedure would allow parties to do just that. Worse, the parties could do so without ever specifying the reason for the disqualification.

A similar situation exists in certain civil cases. Judges, like all other persons, have varying perceptions of the justification that must be shown for government regulation of activities in the private sector. Congress has committed many of these questions to judicial discretion, subject only to limitations Congress has expressed in the jurisdictional statutes. Peremptory challenge procedures would in effect permit special interest groups to exclude certain judges from ever addressing issues committed to judicial discretion. The challenge proposals assert that they are aimed particularly at relief from bias and unfairness, but they would operate as a relief from a judicial

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on January 17, 1971. Over the next nine years, various bills were introduced and hearings held in both houses of Congress. But despite extensive hearings and legislative activity, no bill had been passed by either house when the 96th Congress adjourned in 1980.

determination that the challenger anticipates as unsatisfactory. "Unsatisfactory" is not necessarily the same as "unfair" or "biased"; a challenge procedure would introduce potentially dangerous new conditions regarding what kind of judge may sit in what kinds of cases.

The three basic complaints about present disqualification procedures as described at the beginning of this chapter should be examined in detail. Doing so seems to demonstrate that a peremptory challenge procedure is not the answer to those complaints.

1. Proving bias or prejudice is too difficult. Rather than advance new standards for assessing the existence of bias or prejudice, the challenge proposals would in effect create an irrebuttable presumption that it exists once a challenge is exercised. There are only two possible inferences to draw from the exercise of a challenge: (a) the party perceives the judge to be biased in some way that would be grounds for recusal under present procedures, or (b) the party perceives bias of some type that is not cognizable under present procedures. In either case, the peremptory challenge is an end run that subverts rather than serves the ends of justice and due process. Whatever problems exist will only be corrected for one party in one case. If the difficulty of proof is too great, that issue should

be addressed directly. Similarly, if certain judicial behavior is thought to warrant removal, but that behavior is not grounds for removal under present statutes and decisions, the statutes should be amended.

2. The allegation itself provokes the judge's hostility. An allegation of bias or prejudice might provoke other judges' hostility as well, according to proponents of this argument. Let us assume that the argument is valid. Judges, like other persons, are likely to resent charges of bias. Will they resent such a charge less if it is the basis for a peremptory challenge? Advocates of the challenge process argue that there will be less resentment because no reason is specified in the challenge. But challenges for unspecified reasons leave the impression that something is wrong with the judge--something prevents the judge from being impartial and fair. Being put on notice that he has some unspecified defect certainly will not sit well with the judge. Further, because the judge's being out of favor with the litigants or the bar might increase the burden on his colleagues, a peremptory challenge procedure might increase the hostility of the other judges as well as that of the individual judge who has been reassigned.

3. The judge rules on his own case. Under the present system, the allegations in the affidavit are taken as true;



the judge is not called upon to offer explanations, contrary facts, or arguments and then to decide which side has carried the burden of persuasion. The judge merely decides whether the facts as stated are legally sufficient to require disqualification. If the moving party disagrees, the issue is not over; appeal mechanisms exist. As with the argument that proving bias is too difficult, one should ask, if this feature of the system is troublesome, why not amend it rather than changing the whole system?<sup>141</sup>

Another prop supporting the peremptory concept--specifically, it supports permitting a challenge for reasons other than bias--is raised by proponents who analogize peremptory challenge of judges to the peremptory challenge of jurors in Federal Rule of Criminal Procedure 24(b).<sup>142</sup> But

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141. One potential change would be to have a judge other than the one challenged rule on the motion for disqualification. But see Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1439 (1966): "[W]hile this would be an improvement over the present system, a district judge passing on the disqualification of one of his colleagues would be in a sensitive position, and he might feel under pressure not to disqualify."; Note, Disqualification of a Federal Judge for Bias--The Standard Under Section 144, 57 Minn. L. Rev. 749, 767 (1973): "[M]any courts are understandably reluctant to disqualify a fellow judge since a finding of actual prejudice . . . impugns both that judge's qualifications and those of the system he represents."

142. Rule 24(b) reads as follows:

the analogy is a false one. A federal district judge is appointed to office by the President of the United States with the advice and consent of the Senate. He may have been reviewed by selection commissions; in any event, the judge is always investigated by the ABA and the FBI and is subjected to public scrutiny and confirmation hearings. Federal judges act in open court and on the record; their actions are subject to both public view and appellate review. Jurors, on the other hand, are an anonymous group chosen from the public for temporary duty; little is known about them and little is learned in the brief voir dire. Their determination of facts is performed collectively and in secret; their decisions are substantially immune from revision or review.<sup>143</sup>

Part of the justification for the elaborate procedure of federal judicial appointments is the fact that the ap-

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If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

143. See letter from Alan A. Parker, note 34 supra.

pointment is for a life term. The procedure removes judicial appointments from many of the political considerations that plague an election system, and it seems to enhance the goal of promoting "public confidence in the integrity and impartiality of the judiciary" as noted in canon 2 of the Code of Judicial Conduct.<sup>144</sup> Proponents of a peremptory challenge procedure argue the contrary; they note that federal judges are immune from feedback and are protected by their tenure.<sup>145</sup> They feel that only by giving parties a chance to choose freely, for whatever motives or reasons, will the confidence eroded by the present system be returned to individual litigants and the public at large.<sup>146</sup>

This argument, too, is flawed. Large numbers of automatic recusals would probably lead the public to infer that many federal judges are deficient in morals or competence.<sup>147</sup> Observers have noted that in the California pro-

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144. Canon 2A reads, "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

145. See Hearings on H.R. 7473, note 6 supra (statement of John J. Cleary).

146. See Caesar's Wife Revisited--Judicial Disqualification After the 1974 Amendments, 34 Wash. & Lee L. Rev. 1201, 1220 (1977).

147. Id. at 1221: "Creating a procedural formality that facilitates judge-shopping and delay can only exacer-

procedure, many of the challenges are tactical moves of litigants seeking to delay the judicial process or seeking some marginal benefit they perceive will accrue from having Judge X rather than Judge Y. The litigants are not required to give reasons for their challenges. The judges are precluded, even if they wish to, from demonstrating their qualification to remain on a case. Such a situation could well occur under a federal peremptory challenge procedure.

One can logically argue that the public would be most inclined to infer that challenged judges were deficient. Any other conclusion requires that the public understand and assess all the other reasons a litigant might have for exercising a challenge--reasons that have nothing to do with bias, prejudice, or incompetence. Without such knowledge, the public would be likely to draw the same inference they would under the present system if large numbers of judges were disqualified for cause. Such an inference would be clearly unwarranted and almost certain to erode public confidence in the bench. Moreover, no effective measures could

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bate the public's already dim view of the legal process." See Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1438 (1966): "[I]f disqualification were to become very common it might have an adverse effect on the reputation of particular judges and subvert public confidence in the impartiality of the judiciary as a whole."

be taken to counter inferences of judicial deficiency because those exercising a challenge would not have to explain the basis for it.

Far from increasing public confidence in the judicial system as a whole, a peremptory challenge procedure would serve to exacerbate any existing belief that judges are not to be trusted and that the system is an irrational one designed to allow legal maneuvering, manipulation, and sharp practice. Public frustration with the delays of justice would increase. Peremptory challenges, though potentially unsubstantiated, would go un rebutted, and so would give credence to a conclusion of "where there's smoke, there's fire." Furthermore, filing a challenge could become routine because lawyers might fear being charged with malpractice for failing to provide effective assistance.<sup>148</sup> The image of the individual judges and the courts as a whole would be demeaned.

Proponents argue that, apart from improving the public's perception, the right to challenge a judge peremp-

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148. Using a computerized legal research system, for instance, an attorney could fairly easily search out all the opinions in an area of law written by a particular judge. If the lawyer discovered that the assigned judge had decided in favor of the government in eight out of ten such cases, he might feel obligated to try to avoid that judge. See text accompanying notes 77-79, supra.

torily would assure individual parties that they will receive or have received a fair and impartial trial. But on the criminal side, for instance, there is no assurance that a defendant who has peremptorily challenged a randomly assigned judge will be satisfied with a second judge also assigned at random. If the defendant has acted on the advice of counsel, it is the attorney's perception rather than the defendant's that is being catered to. It would be deceptive to ascribe to the defendant the belief that the judge is unfair and will not treat him fairly. If the concern is with the defendant's feelings after trial, he would hardly be likely to consider a trial fair if he was convicted after his attorney advised him that he would win acquittal because the government had no case or because his defense was sound.<sup>149</sup>

A final but important set of considerations concerns judicial behavior and independence. Most judges can be expected to assert that the exercise of a challenge does not or would not affect the way they discharge their duties. Others will assert that judges subjected to frequent challenge do in fact modify their behavior to comport more closely with that of less frequently challenged col-

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149. See letter from Alan A. Parker, note 34 supra.

leagues.<sup>150</sup> The challenged judge may recognize that his behavior (including his judicial response to legal issues) has been sharply out of conformity with that of most of his colleagues, and he may find no adequate justification for the discrepancy. The judge's modifying his behavior in such a circumstance would not necessarily violate the mantle of independence.

On the other hand, a special interest group's ability to in effect exclude a judge from sitting on any case affecting that group's interest could cause a judge to modify his stance on those issues if he wishes to continue addressing them at all. He may have a choice, consciously or unconsciously, between meliorating his true views or being effectively silenced. The effect of those alternatives on judicial independence may be too high a price to pay for whatever benefits a peremptory system might provide.

Federal judges are appointed for life to insulate them from the pressures of making decisions that might be unpopular or unacceptable to some of their more powerful constituents. The strength and the independence of the judiciary require it to arrive at decisions that may indeed be unpopular and unacceptable to the parties or the populace. But,

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150. Interview with Judge Louis B. Garippo, Cook County Circuit Court, Chicago, Illinois (Jan. 16, 1980).

as Judge Hoffman stated in his remarks to the Drinan subcommittee:

We wonder how many Watergate cases would have been tried by Judge John Sirica had the peremptory challenge system been in effect. How many civil rights and related cases would Judge Frank M. Johnson of Montgomery, Alabama, have tried while serving as a district judge? If other school desegregation cases in Massachusetts come before the federal court, is it likely that Judge Arthur Garrity<sup>151</sup> would be permitted to proceed unchallenged?

Growth is essential to the continuing vitality of the law, and that growth occurs only through the imaginative and innovative insights of competent, independent judges. At times, new insights and novel interpretations prove unpopular, but constitutional necessity, not public appreciation, is the test. Peremptory challenge could well stunt the growth of the law and eliminate all but the most passive decision making.

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151. Hearings on H.R. 7473, note 6 supra (statement of Judge Walter E. Hoffman).



APPENDIX A

28 U.S.C. § 455

§ 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 ex-

pressed 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.

88 Stat. 1609.

APPENDIX B

H.R. 7165

A BILL

To amend title 28 of the United States Code to provide for reassignment of certain Federal cases upon request of a party.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Peremptory Challenge Act of 1980".

Sec. 2.(a) Chapter 21 of title 28 of the United States Code is amended by adding at the end the following:

"§ 462. Reassignment of cases for trial

"(a) (1) If all parties on one side of a civil or criminal case to be tried in a Federal district court or a bankruptcy court file an application requesting the reassignment of the case, the case shall be reassigned to another appropriate judicial officer for trial.

"(2) If any question arises as to which parties should be grouped together as a side for the

purposes of this section, the chief judge of the court of appeals for the circuit in which the case is to be tried shall determine that question.

"(b) No application under this section may be filed--

"(1) after the later of--

"(A) 20 days after the date of the initial assignment of the case to an appropriate judicial officer for trial; or

"(B) 20 days after the date of the service of process on the most recently joined party filing the application; or

"(2) if the parties on the side seeking to file the application have previously filed such an application in the case.

"(c) As used in this section, the term 'appropriate judicial officer' means--

"(1) a United States district court judge in a case before that court;

"(2) a United States bankruptcy judge in a case under title 11; and

"(3) a United States magistrate in a case referred to such a magistrate for trial.".

(b) The table of sections for chapter 21 of title 28 of the United States Code is amended by adding at the end the following new item:

"462. Reassignment of cases for trial.".

APPENDIX C

H.R. 7473

A BILL

To amend the Federal Rules of Criminal Procedure to provide  
a procedure through which certain criminal cases can be  
transferred to new judges.

Be it enacted by the Senate and House of Representa-  
tives of the United States of America in Congress assembled,  
That the Federal Rules of Criminal Procedure are amended by  
inserting immediately after rule 17.1 the following:

"Rule 17.2. Reassignment to New Judge

"(a) GENERAL RULE.--If all defendants in a criminal  
case in a United States district court having 3 or more  
judges in regular active service jointly file timely notice  
under this section, the judge presiding over such case shall  
not proceed further in such case and the case shall be  
assigned to another appropriate judge selected in random  
manner.

"(b) TIME LIMITS.--The notice required by this section  
may be filed not later than 14 days after any of the fol-  
lowing:



"(1) the date of the initial assignment of the case;

"(2) the date of the filing in the district court of an order having the effect of granting a new trial or reversing or modifying the judgment of the court so that further proceedings in the case are necessary; and

"(3) the date of the reassignment of the case to another judge, other than because of a notice under this rule.".

SEC. 2. The table of contents of the Federal Rules of Criminal Procedure is amended by inserting immediately after the item relating to rule 17.1 the following new item:

"17.2. Reassignment to New Judge.".

## APPENDIX D

### ABA RESOLUTION 102D (1979)

Be It Resolved, That the American Bar Association support either as legislation or as an amendment to the Federal Rules of Criminal Procedure the following:

#### Motion for Peremptory Transfer to Another Judge

(a) In a multi-judge district, within 14 days after the defendant has notice that a criminal case has been assigned to a particular judge, the defendant may file a written motion to peremptorily transfer the case to another judge. Upon the filing of this motion, the judge challenged shall not proceed further, and the case shall be assigned to a different judge in a random manner. Only one such transfer shall be allowed, except as provided in Section (f) hereof.

(b) In a multiple defendant case the defendants may unanimously and jointly file a motion of transfer to another judge in the manner provided in Section (a) hereof.

(c) This provision shall not apply to proceedings before the magistrate.

(d) This motion shall be made before the hearing of any other motions if the defendant has at least seven days notice of the particular judge scheduled to hear the motions, trial, or other disposition

(e) In a multi-judge district, after an appeal in which the defendant obtains relief, the defendant within 14 days after return to the trial court may file a written motion to peremptorily transfer the case to a judge other than the one whose decision was reversed, vacated, or otherwise modified. The motion and transfer shall be made in the same manner as if initiated at the commencement of a criminal case. Only one such transfer shall be allowed.

(f) If the defendant has not filed a motion for a peremptory transfer, and a different judge is assigned to the case at any stage of the proceeding, the defendant may file such motion at the first appearance before the different judge.

(g) For the purpose of this section the following words or phrases shall have the meaning indicated:

(1) "Multi-judge" district includes any district with three or more district judges.

(2) "Criminal case" includes the filing of any criminal charge by complaint, information, or indictment, petitions for the adjudication of juvenile delin-

quency, civil or criminal contempt except those in which the court may act summarily, appeal to the district court from an order or judgment of a magistrate, commitment of a person who is an addict or in danger of becoming a narcotics addict, extradition or rendition proceedings, and criminal forfeiture proceedings, and includes any stage of those proceedings. This term does not apply to petitions for a writ of habeas corpus (28 U.S.C. 2241-2254) or motions to vacate, set aside or correct sentence of a federal prisoner (28 U.S.C. 2255) when filed originally in the district court, but if the person restrained of his liberty is successful on appeal, then that person may invoke the provisions of subdivision (e).

APPENDIX E

ABA RESOLUTION 125 (1980)

BE IT RESOLVED, That the American Bar Association recommends to Congress the enactment of a statute permitting the peremptory challenge of a federal district court judge, magistrate or bankruptcy judge in civil cases.

ABA PROPOSED STATUTE

28 U.S.C. § 455a - Peremptory Disqualification of Judge

(a) Whenever in any proceeding in a district court or bankruptcy court a timely motion is filed stating that a party to the action wishes peremptorily to challenge the judge before whom a matter is pending, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

(b) (1) The motion may be made by any party, may be filed without notice, and must be filed with the court no later than twenty (20) days after

(A) the judge is assigned to hear the matter,

or

(B) process is served upon the movant, whichever comes later.

(2) If for any reason another judge is subsequently assigned to hear the matter, such motion must be filed no later than twenty (20) days after notice of the assignment is given to the movant or his attorney.

(c) (1) Upon timely filing of a motion under this section and without any further act or proof, another judge shall be assigned to try the cause or hear the matter.

(2) If the judge with respect to whom a motion is filed was assigned to the matter by a clerk or other court administrator,

(A) in courts having more than one active judge, the clerk or administrator shall assign another judge to the matter, or

(B) in other courts, and in cases where the remaining judges in a court are unable to hear a matter, the clerk shall transmit a copy of the motion immediately to the Chief Judge of the court of appeals which serves that court, and the Chief Judge of the court of appeals shall assign another judge to the matter.

(3) If the judge with respect to whom a motion is filed was assigned to the matter by a judge, the clerk shall

transmit a copy of the motion immediately to the assigning judge, who shall,

(A) in courts having more than one active judge, assign another judge to the matter, or

(B) in other courts, and in cases where the remaining judges in a court are unable to hear a matter, transmit a copy of the motion immediately to the Chief Judge of the court of appeals which serves that court, who shall assign another judge to the matter.

(d) (1) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the filing of a motion under this section. In no event shall a party be permitted to file more than one such motion in any one action.

(2) In the event that there are multiple plaintiffs, defendants, or adverse third parties, only one motion under this section for each side may be filed in any one action. In such event, the clerk shall not accept any motion for filing under this section unless it affirmatively appears that all parties aligned with the movant as plaintiffs, defendants, or adverse third parties have consented to the filing of such motion. Such consent shall be shown

by filing a stipulation, signed by all parties so aligned or by counsel for such parties. A motion which is presented without the required stipulation shall nevertheless be sufficient to toll the time limit presented in subsection (b) of this section, providing that the required stipulation is filed no later than twenty (20) days after presenting such motion.

(e) For purposes of this section, the term "judge" shall include a magistrate when such a person has been assigned to hear a matter. No matter shall be reassigned to a magistrate when there is a right of appeal from such magistrate's rulings or orders to a judge with respect to whom a motion under this section has been filed in the action.

(f) Nothing in this section shall be construed to limit or modify the right of any person to move that a judge recuse himself according to standards established by a statute or other rule of law.