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FEDERAL COURTS-DISQUALIFICATION OF DISTRICT JUDGE FOR PREJUDICE- SUFFICIENCY OF AFFIDAVIT

John C. Walker
University of Michigan Law School

FEDERAL COURTS—DISQUALIFICATION OF DISTRICT JUDGE FOR PREJUDICE—SUFFICIENCY OF AFFIDAVIT—Defendants were indicted in a federal district court for conspiring to organize as the Communist Party of the United States and to advocate overthrowing the government by force or violence in violation of a federal statute.[1] During argument on their motion for a 90-day extension, the judge remarked he thought "public policy might require that the matter be given prompt attention . . . when perhaps there may be some more of these fellows up to that sort of thing"; that "I am not going to give them anything like 90 days, I am going to tell you right now"; and, in answer to defense counsel's contention that the indictment failed to allege any acts of force or violence, "No they want to wait until they get everything set and then the acts will come." Defendants filed timely affidavits of personal bias and prejudice pursuant to section 144 of the new Judicial Code,[2] setting out the above facts as grounds for disqualification of the judge. The district judge refused to disqualify himself and defendants petitioned the United States Court of Appeals for a writ of mandamus requiring him to do so. *Held,* petitions dismissed. Taken in their context the remarks of the judge did not lend fair support to the charge that he had a personal bias or prejudice against petitioners; the affidavit was therefore legally insufficient. *Foster v. Medina,* (App. 2d, 1948) 170 F. (2d) 632.

[1] P.L. 772 (62 Stat. L. —) c. 115, p. 142 (1948); 18 U.S.C. §§ 2385, 2387 (1948 Revision).

[2] P.L. 773 (62 Stat. L. —) c. 6, p. 33 (1948); 28 U.S.C. § 144 (1948).

Disqualification of federal district judges because of personal bias and prejudice originated in 1911 with enactment of section 21 of the old Judicial Code.[3] Section 144 of the new code contains the same substantive provisions; failure of Congress to change the law in any material respect when it revised the Judicial Code indicates legislative approval of the strict construction which the courts placed on the old section. A leading decision is *Berger v. United States*,[4] relied on in the principal case, where strong remarks of a judge condemning the German-American element in this country during the First World War were held sufficient to disqualify him from hearing the trial of a German-American charged with espionage. The rule was laid down that the affidavit must state "facts and reasons, substantial in character and which, if true, fairly establish a mental attitude of the judge against the affiant which may prevent impartiality of judgment. . . ."[5] Numerous later decisions in the lower federal courts have adopted an interpretation much more strict than the language of the *Berger* decision would seem to require, but the Supreme Court has consistently declined to review them.[6] It has been held that previous adverse rulings by the judge in the same case or in similar cases do not tend to show a personal prejudice.[7] An allegation of judicial bias and prejudgment of the merits of the case has been held insufficient.[8] Most important, the facts contained in the affidavit must show a personal prejudice directed specifically against the affiant.[9] The motive behind these strict rules is the desire of the courts to prevent litigants from using the statute as a means to harass and delay jusice.[10] Tested by the foregoing rules it seems clear that the decision of Judge Medina

[3] 36 Stat. L. 1090 (1911); 28 U.S.C. § 25 (1927).

[4] 255 U.S. 22, 41 S.Ct. 230 (1921).

[5] Id. at 23.

[6] See for example Chafin v. United States, (C.C.A. 4th, 1925) 5 F. (2d) 592, cert. den., 269 U.S. 552, 46 S.Ct. 18 (1925); Morse v. Lewis, (C.C.A. 4th, 1932) 54 F. (2d) 1027, cert. den., 286 U.S. 557, 52 S.Ct. 640 (1932); Ryan v. United States, (C.C.A. 8th, 1938) 99 F. (2d) 864, cert. den., 306 U.S. 635 (1939), rehearing den., 306 U.S. 668 (1939). This strict attitude is reflected in holdings that technical requirements of the statute as to time of filing the affidavit and the accompanying certificate of good faith signed by counsel of record must be followed to the letter. See United States v. 16,000 Acres of Land, (D.C. Kan. 1942) 49 F. Supp. 645; Ex parte N. K. Fairbank Co., (D.C. Ala. 1912) 194 F. 978; Saunders v. Piggly-Wiggly Corp., (D.C. Tenn. 1924) 1 F. (2d) 581.

[7] United States v. 16,000 Acres of Land, supra, note 6; United States v. Fricke, (D.C. N.Y. 1919) 261 F. 541; Sacramento Suburban Fruit Lands Co. v. Tatham, (C.C.A. 9th, 1930) 40 F. (2d) 894.

[8] Henry v. Speer, (C.C.A. 5th, 1913) 201 F. 869, 120 C.C.A. 207; Craven v. United States, (C.C.A. 1st, 1927) 22 F. (2d) 605, cert. den., 276 U.S. 627, 48 S.Ct. 321 (1928); In re Beecher, (D.C. Wash. 1943) 50 F. Supp. 530.

[9] Henry v. Speer, supra, note 8; Ex parte N. K. Fairbank Co., supra, note 6; Hurd v. Letts, (App. D.C. 1945) 152 F. (2d) 121, 80 App. D.C. 233; Ryan v. United States, supra, note 6; United States v. Buck, (D.C. Mo. 1938) 23 F. Supp 508, appeal dismissed, 102 F. (2d) 976 (1938).

[10] This consistently maintained attitude toward the disqualification procedure was early expressed in Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007 (1913). See especially Henry v. Speer, supra, note 8, and Benedict v. Seiberling, (D.C. Ohio 1926) 17 F. (2d) 831.

and the court of appeals is amply supported by authority. While the report of the principal case contains only small portions of the affidavits, there is nothing to show that the judge had a personal prejudice or bias against the petitioners within the meaning of section 144. His remarks certainly indicate a strong dislike for those who conspire to overthrow the government by force, but they are too general and ambiguous to warrant the conclusion that he was speaking of the petitioners personally or that his mind was already convinced as to their guilt. The decision seems to recognize that a judge's prejudice against a class will not necessarily prevent his giving justice to a member of that class.[11]

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[11] In his dissent in the Berger case, Justice McReynolds pointed out this distinction between personal and class prejudice. While the cases seldom specifically mention the distinction, it is doubtless present in the minds of the judges. It has even been said that the absence of the word "personal" in the affidavit will be fatal. Henry v. Speer, supra, note 8.