June 15, 1981

Stock Ownership by Justices

Dear Barrett:

I deliver to you herewith a memorandum entitled "Background Memo on Disqualification".

In view of the continuing flurry of stories and commentary on the ownership of stock by Justices, it may be helpful— as background information— for reporters to have access to this memorandum. It is based specifically on facts concerning me for the 4-1/2 year period selected by the Des Moines Register for its "investigative" reporting. I think the memorandum is sufficiently general, however, to be informative to reporters who are interested in the facts. The memo also emphasizes that most disqualifications are unrelated to stock ownership. Indeed, stock ownership by a Justice rarely causes a problem— such as a 4-4 split.

The memorandum further explains that where Justices or their spouses are income beneficiaries of trusts, even the disposition of all stock would not meet the views of those who think federal judges should neither own nor benefit from securities in private companies.

I would like your opinion as to whether this memorandum will be helpful. If you think that it will, you are authorized to make it available, but only upon the conditions specified in the memorandum. It is provided for background information only. Reporters may read it but not copy it, or attribute its contents to me. You also will note that I will advise any reporter who covers the Court regularly as to why I disqualify, but again only as background information and as illustrative of the reasons for disqualification.

Sincerely,

Mr. Barrett McGurn

1fp/ss

bc: The Chief Justice
    Mr. Justice Stewart
June 15, 1981

BACKGROUND MEMO ON DISQUALIFICATIONS

Purpose

This memorandum is prompted by news stories and electronic media commentary based on financial disclosure reports filed this year and last pursuant to the Ethics in Government Act. Attention has focused on Justices and their spouses who own securities or derive income from trusts. There appears to be a rather general lack of understanding of why Justices disqualify (recuse) themselves and the effect of disqualification on the Court's work. In my view, much of what has been written and said is misleading. This could result in some loss of confidence in the integrity of Justices and, indeed, in the Court as an institution.
The misunderstanding may be caused in part at least by the tradition of not making public one's reason for recusal. I therefore have prepared this memorandum with the hope that it would afford helpful background information. I am authorizing Mr. McGurn to make this memorandum available to any reporter who is assigned regularly to cover the Court, provided it is understood that this is background information. The memorandum is not to be released for publication in whole or in part, nor is information herein to be identified as having been disclosed by me or a Justice. My sole purpose is to aid in understanding for the future; it is not to correct previous misinformation or to generate publicity. (As one holding judicial office, I have already had more than enough of this!)

The facts in this memorandum relate my own experience over a 4-1/2 year period: December 1, 1975-July 31, 1980. I choose this time span because some news stories and commentary have selected it for a critique of my record (the "survey years"). I will generalize, however, where this may be helpful to a broader understanding of why and when judges and Justices disqualify.
The Prescribed Standards

Title 28, § 455 of the United States Code, adopted in 1974, prescribes categories of circumstances in which a Justice must recuse himself. In addition to specific categories, § 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality reasonably might be questioned." Section 455(b)(1) provides that where a judge has a "personal bias or prejudice concerning a party" he should disqualify. As is evident, these sections require a judge to exercise what is usually a subjective judgment, often based on one's own sense of propriety.

Section 455 substantially codifies Canon 3(C) of the American Bar Association's Code of Judicial Conduct. Pertinent provisions of § 455 and Canon 3(C) are attached hereto.

The requirements of the statute, and the guidelines of the Canons, make clear that there may be numerous causes for recusal. These now will be illustrated by my own recusals over the 4-1/2 year survey period.

My Recusal Experience

My Chambers has made a study of the cases in
which I disqualified myself during the survey period, and the reasons therefor. I recused in only 109 of the approximately 18,000 civil and criminal cases filed here.\(^1\)

The causes for recusal can be classified three ways.

**Category A (80 cases).** Participation by (i) my former law firm, Hunton & Williams, or (ii) presence or interest of a former client. I, of course, remain "out" when my former firm is counsel in a case. But it is the latter subcategory that has been the single primary cause for recusal. When I came on the Court directly from an active practice, Hunton & Williams, and also I personally, represented a substantial number of major national

\(^1\)Published reports and commentary have stated that I recused myself in 196 cases during this time period, an error of nearly 50%. These reports inflated the number of recusals in two ways. First, the 196 figure included multiple recusals in the same case. The Court frequently records multiple votes in the same case (e.g., on the petition for certiorari, on a motion for divided argument, on a motion by amici curiae to participate, in the decision on the merits, and on a petition for rehearing). In Vermont Yankee Nuclear Power Corp. v. NRDC, 434 U.S. 519 (1978), for example, the Court entered—and I did not participate in—seven orders over an 18-month period. (My former law firm was counsel for a party.) Second, the reports apparently also included a few cases in which I took no part due to surgery in March, 1979.
corporations—some on retainer and some on a case-by-case basis. After consultation with other Justices, and absent any specific guidance in the Canons, I have set certain standards with respect to clients. In cases involving major retained clients of the firm, I remained out for specified periods.\(^2\) Where I personally was responsible for a major client's work (whether or not I own stock), I have continued to remain out.\(^3\) Thus, this category includes cases where the party was a personal client and we also owned stock in it.\(^4\) The client relationship alone

\(^2\)For example, even though I own no stock, I stayed out of Exxon Corporation cases for seven years. Hunton & Williams has been retained by Exxon and its predecessor corporations for more than 50 years.

\(^3\)For example, Southern Railway Company, for which I was a retained counsel for many years, has been the cause of a substantial number of disqualifications even though, again, I own no stock. I may decide to take part in Southern Railway cases after I have been here for ten years.

\(^4\)My wife and I each own stock in several companies that were my personal clients for many years. In each instance, we also have owned the stock for many years. I also served for years on the corporate boards of several of these companies, e.g., the Ethyl Corporation and Philip Morris, Inc. If we disposed of stock in these companies I would continue to disqualify. In view of years of personal association, my "impartiality might reasonably be questioned." § 455(a).
would have required recusal.

**Category B (20 cases).** Miscellaneous personal reasons, such as presence in or association with a case of close personal friends, the City of Richmond, or other entities with which I had been closely associated.

**Category C (9 cases).** Securities owned, or from which income was derived through trusts, by Mrs. Powell or me.

My 109 total disqualifications amount to only 1.5% of the approximately 7,500 civil cases that were filed during the survey period. The nine cases in which disqualification was caused solely by stock ownership constituted only .12% of the civil cases filed, and only two of these were in argued cases.5 Neither of these cases resulted in a 4-4 affirmance.6

Ownership of securities, therefore, only rarely

5As knowledgeable reporters are aware, the Court denies review in more than 95% of the petitions it receives.

6A 4-4 affirmance occurred in only one of the 109 cases in which I did not participate. I stayed out of that case because I was attending a funeral out of town when it was argued.
disturbs the normal functioning of the Court. News reports that the work of the Court has suffered are without foundation, except in the most occasional case when a 4-4 split is caused.

Problems of Failure to Disqualify

There is some risk of not disqualifying when this is required by § 455. As reported in some news stories last year, I inadvertently failed to disqualify in two petitions for certiorari. One involved a subsidiary of a company in which Mrs. Powell owned stock that we failed to identify as such. The other was a frivolous petition (a suit for less than $300), dismissed by both courts below for want of federal jurisdiction. My clerks, secretaries and I all simply missed it. Cert was denied in both cases, and in neither did my participation affect the outcome. With some 4,000 petitions filed here each Term, and with each Justice having to act on all of them, there always is some risk of error.7

7Since coming on the Court, my law clerks, secretaries, and I have maintained lists of our securities. Since the Court Rules were amended to require disclosure by parties of subsidiaries, our lists—based on new computer data—now also include subsidiaries. My
Steps to Minimize Disqualification

Canon 5C(3) provides that a judge "should divest himself of investments . . . that might require frequent disqualification." I have endeavored to comply with this requirement. After I came on the Court, my wife and I disposed of securities in companies that seemed likely to be frequent parties to litigation here, such as the large international oil companies, banks, and regulated public utilities. In addition, as my public reports state, we turned our financial affairs over to a bank. It cooperates in the effort to minimize possible conflicts by consulting me before purchasing a corporate security. The record during the 4-1/2 years of the survey period indicates that these efforts have been successful.

entire Chambers endeavors to avoid an error.

8Stories in the press have described me as an active "trader" in the financial markets, and have attributed to me a fictional "investment strategy." I have not been a "trader" in any sense of that term. As my published reports make clear to any knowledgeable person, the purchases and sales of corporate securities (as distinguished from municipal and U.S. government securities that rarely present any disclosure problems) are relatively few. Moreover, the bank is employed to hold and manage our investments, subject only to my veto for the purpose of minimizing disqualification.
The Propriety of Owning Securities

It has been suggested by at least one writer that Justices should not own securities in private companies. This has not been the judgment of Congress, or to my knowledge of any bar organization. Section 5C of the ABA Code of Judicial Conduct expressly provides that a "judge may hold and manage investments."9 As the facts above demonstrate, no need for changing this canon has been shown.

Moreover, both the wisdom and fairness of a law or canon proscribing ownership of corporate securities may be questioned. First, even if this restriction were imposed on the Justice, it hardly would be reasonable to impose a similar restriction on the spouse. Second, judges' salaries are fixed by law in most cases at far less than what could be earned in private practice, and the survivor's annuity for the widow of a deceased Justice

9The ownership of investments by Mrs. Powell and me was disclosed publicly before I came on the Court. The fact that my law firm and I personally had represented a substantial number of major corporations, both profit and nonprofit, and my membership on corporate boards, also were fully disclosed.
in some cases is not significantly above welfare status level. Thus, in an inflationary economy, the proscribing of equity investment opportunities would be a severe penalty for judicial service. Indeed, it would foreclose that service for many successful lawyers, and one reasonably could assume that it would lower the quality of the federal bench.

In any event, where trusts are involved (as is the case with respect to at least one Justice in addition to myself) proscription of securities ownership would not resolve the perceived problem. As my reports show, Mrs. Powell is the life beneficiary of a trust created in 1957, of which my four children and six grandchildren are remainder beneficiaries. A generally similar problem exists with respect to a trust under which Washington and Lee University is the remainder beneficiary. Trustees have fiduciary duties to invest trust assets wisely for the benefit of remaindermen as well as current income beneficiaries. These trust are irrevocable, and I have no control over them.¹⁰

¹⁰In an effort to minimize recusal, I have the present willingness of the trustees to coordinate
Public Disclosure

There is a tradition not to disclose publicly why one disqualifies oneself. In many if not most instances the reasons for disqualification are personal, subjective judgments. See §§ 455(a), 455(b)(1). Moreover, public disclosure often would be embarrassing to other persons, and also would invite inquiries as to why there is disqualification in one case and not in another. Even with respect to ownership of securities, a Justice may consider disqualification where the company owned is not a party but where it is thought best to disqualify because the issue in the case may control other litigation that does not involved owned companies. These cases, too, present questions of personal judgment.

Nevertheless, based on my confidence in the reporters who regularly cover the Court, I am willing to advise a reporter individually—as background information—why I disqualify in a particular case provided that the investments with our personal accounts to avoid companies that appear likely to be frequently involved in cases before us. But the trustees are free—and indeed obligated—to act as they deem best for all beneficiaries.
number of requests does not prove too burdensome.

**Purpose Served by the Stories and Commentary**

There is not the slightest evidence of a Justice knowingly sitting in a case in which he or his spouse had a financial interest, or in which his participation otherwise would constitute a breach of trust or ethics.\(^\text{11}\)

Nor, except in a very few cases, has disqualification due to stock ownership at all affected the work of the Court.

It therefore seems fair to ask whether any public interest is served by creating unjustified doubt in the public's mind as to the ethics and impartiality of Justices of the United States Supreme Court—an institution that over nearly 200 years has been faithful to its high responsibilities. Who else in our society has protected as consistently and fearlessly the rights of our people—including the right to criticize?

Lewis F. Powell, Jr.

\(^{11}\)Some stories and commentary have implied—wholly without facts to support the implication—a breach of ethics.