**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>v.<br><br>TÜRKIYE HALK BANKASI A.Ş.,<br><br>Defendant. | S6 15 Cr. 867 (RMB)<br><br>**DECLARATION OF RICHARD E. FLAMM** |

I, Richard E. Flamm, declare:

1. I am an attorney at law, duly licensed to practice before the state courts of California, as well as many federal courts, including the United States Supreme Court and the Southern District of New York.

2. I have been a practicing attorney for nearly four decades. Since 1995 I have had my own practice, in which I concentrate exclusively on matters of judicial and legal ethics.

3. I have often been asked to testify as an expert witness regarding such matters. This testimony has typically been by declaration, but I have also been qualified to testify as an expert at court hearings and trials. In addition, in December of 2009 I was invited to and did testify before a subcommittee of the House Judiciary Committee on judicial disqualification.

4. I have taught Professional Responsibility as an Adjunct Professor at both the University of California at Berkeley and Golden Gate University in San Francisco. I have also lectured on the subject of recusal and disqualification of judges at many educational events.

5. My first treatise, Judicial Disqualification: *Recusal and Disqualification of Judges* – originally published by Little, Brown & Company of Boston in 1996, and now in its Third Edition – has been relied on by a host of federal courts. *See, e.g.*, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1918 (2016) (Thomas, J., dissenting). The book has also been cited by the highest courts of many states. *See, e.g., Whitacre Inv. Co. v. State*, 946 P.2d 191, 198–99 n.6 (Nev. 1997), Springer, J. (referring to the undersigned as the nation's "leading authority on judicial disqualification" (internal quotation marks omitted)). I have also written, and annually prepare updates for, three other treatises. Of relevance to this matter, in 2018 I completed an extensive companion treatise to Judicial Disqualification, which is entitled Recusal and Disqualification of Judges, *For Cause Motions, Peremptory Challenges and Appeals*.

6. In addition to writing treatises on judicial ethics I have written books on legal ethics, including Lawyer Disqualification*: Disqualification of Attorneys and Law Firms* (Banks & Jordan Law Publishing Co. (2d ed., 2014), and Conflicts of Interest in the Practice of Law: *Causes and Cures* (2015). I have also authored a number of articles on disqualification, recusal and related topics which have appeared in law reviews and periodicals.

7. From 2000 until 2002 I served as Chair of the San Francisco Bar Association's Legal Ethics Committee. I have also served as a member of the Advisory Council for the American Bar Association's Commission on Evaluation of Rules of Professional Conduct ("Ethics 2000"), and as Chair of the Alameda County Bar Association's Ethics Committee.

8. An attorney for Defendant Türkiye Halk Bankasi A.Ş. ("Halkbank") recently informed me that it was considering moving to disqualify the Honorable Richard M. Berman ("the Court"). Counsel asked if I would be willing to review certain documents relating to this

matter and provide my opinion regarding the relevant ethical standards governing disqualification of federal judges. After reviewing those documents, I agreed to do so.

9. In order to be able to opine about this subject in a way that might be of most assistance to the Court I have undertaken to review a number of documents, including the Superseding Indictment of Halkbank (ECF No. 562) ("S.I."); the Motion to Recuse filed by defendant Reza Zarrab in a related case (ECF No. 80) ("Zarrab Motion") and related filings; the government's opposition to the Zarrab Motion (ECF No. 83) ("Opposition to Zarrab Motion"); the Court's Order denying Zarrab's motion (ECF No. 87) ("Zarrab Order"); and the Declaration of Michael A. Reynolds ("Reynolds Decl."), which I understand is being filed contemporaneously with this declaration.

10. Upon completing my review of these documents, and evaluating the applicable statutory and case law, I formed the opinion that a reasonable person, aware of all the relevant facts and circumstances, might question the ability of the Court to preside impartially over this case; and, therefore, that the Court is required to recuse pursuant to Title 28 U.S.C. § 455(a).

11. To understand how I arrived at these opinions it may be helpful to the Court for me to talk first about the standard governing disqualification of federal judges and how it has evolved over time; what the standpoint is for deciding who a "reasonable person" is; and what he or she "might" think about the ability of the Court to be impartial. In the belief that the Court will want to fully inform itself about all of these matters, I respectfully submit the following.

The History of Federal Disqualification Demonstrates the Liberal Standard for Recusal

12. The notion that judges should stand fair and detached between the parties who appear before them is as old as the history of courts, and edicts designed to ensure judicial impartiality have been recorded since ancient times. Pursuant to the Roman Code of Justinian,

for example, a party who believed that a judge was "under suspicion" was permitted to "recuse" that judge – so long as he did so prior to the time issue was joined. This expansive power to affect a judge's "recusal" still exists in civil law countries even today.

13. Although accepted elsewhere, the civil law "recusal" standard did not find favor in England. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). At English common law a judge was disqualified "'for direct pecuniary interest and for nothing else.'" *United States v. Williams*, 136 S. Ct. 1899, 1917–18, 195 L. Ed. 2d 132 (2016) (Thomas, J., dissenting) (quoting Richard E. Flamm, Judicial Disqualification: *Recusal & Disqualification of Judges* §1.4, at 7 (2d ed. 2007)). In a similar vein, the first federal judicial disqualification statute, which was enacted in 1792, did not require a judge to recuse even for actual bias; the statute allowed for disqualification only when a judge was "concerned in interest," had "acted in the cause," or had been "of counsel" in it. Act of May 8, 1792, ch. 36, §11, 1 Stat. 278, 279. But Congress subsequently amended the statute on several occasions, enlarging the grounds for seeking disqualification almost every time.

14. In the early 1800's the bench and bar were reminded that nonfinancial motives can also influence judges, and the original statute was amended to include relationship to a party as an additional ground for seeking to disqualify a federal judge. But the first major overhaul of the federal disqualification scheme did not take place until 1911, when Congress determined that federal district judges were subject to recusal for bias, as well as for interest. *Liteky v. United States*, 510 U.S. 540, 533 (1994) ("[n]ot until 1911 . . . was a provision enacted requiring district-judge recusal for bias in general" (emphasis omitted)). In 1911, also, the original federal disqualification framework was divided into two different statutes, §§ 20 and 21 of the United States Judicial Code.

15. Like its predecessor (as well as its eventual successor, Title 28 U.S.C. § 455), § 20 was a "challenge-for-cause" provision, which enumerated several circumstances in which a federal district judge was expected to stand down; however, parties who sought to disqualify a judge pursuant to § 20 faced a daunting task. For one thing, because the statute did not specify any procedure for moving to disqualify a judge it was largely viewed to be a "self-enforcing" provision. Even if a party was deemed to have standing to file a § 20 motion, moreover, the challenged judge was expected to decide for himself whether legally sufficient grounds for such a remedy existed; and, when the judge concluded that he was under no duty to voluntarily stand down, proving "legal sufficiency" was a hurdle that a litigant was unlikely to be able to clear.

16. Congress attempted to rectify these and other perceived shortcomings in the statute not by further amending § 20, but by enacting an entirely new provision, which became § 21. This statute provided, in pertinent part, that whenever a party to a proceeding filed an affidavit stating that the judge before whom the action or proceeding was to be tried or heard had a personal bias either against that party or in favor of his adversary, "such judge shall proceed no further therein." Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090. Section 21 differed markedly from section 20 in that it was clearly intended it to be a "peremptory challenge" provision; but Congress – recognizing that such a provision would be subject to abuse – imposed a number of procedural restrictions upon its use. Among other things, the allegations of bias that were offered in support of a § 21 motion had to be made in affidavit form, the affidavit had to be timely, and counsel for the moving party had to certify that the affidavit was made in good faith.

17. As it turned out, because of the manner in which the statute was interpreted by the United States Supreme Court, Congress's concerns about possible abuse of § 21 proved to be unwarranted. Section 21 first came before the Court in *Berger v. United States*. 255 U.S. 22

(1921). The Petitioners in that case had submitted an affidavit alleging that the district judge who had been assigned to preside over their case was biased against them because they were of German descent. From the comments the judge allegedly made in an earlier proceeding – to the effect that that one must have a "very judicial mind" not to be prejudiced against German-Americans, because "[t]heir hearts are reeking with disloyalty" – it could readily be inferred that he was, in fact, extremely hostile to German-American citizens, and the Supreme Court had little trouble concluding that the affidavit that had been filed in support of the disqualification motion in the case before it had given fair support to the moving party's partiality charge. *Id.* at 28 (quotation marks omitted).

18. The *Berger* Court recognized that a district judge who was called upon to decide a § 21 challenge was not permitted to pass on the truth of the contents of the statutorily prescribed affidavit; but must, rather, accept the moving party's supporting factual allegations as being absolutely true. The Court held, however, that the challenged judge could consider whether the alleged facts, if true, were "legally sufficient" to require that the judge be disqualified. *Id.* at 32. The *Berger* decision, in other words, invested district court judges with a large measure of discretion in deciding § 21 challenges; and, after that decision was handed down, most of the courts that had occasion to analyze whether judicial disqualification was warranted under § 21 construed that statute quite narrowly. The consequence of this was that disqualification under that statute never became the peremptory process that Congress had originally envisioned it would be.

19. The United States Supreme Court was criticized by some for its apparent attempt to judicially legislate the peremptory intent of § 21 out of existence. It responded to that criticism by explaining that Congress's failure to alter the statute after the Court had judicially

construed it in *Berger* – together with Congress' enactment of subsequent legislation that implicitly recognized the Court's judicial construction of § 21 – demonstrated that the Court's interpretation of the statute had been correct. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940). The accuracy of that assessment is subject to debate. The fact is, however, that when Congress next tinkered with § 21 in 1948 the statute was recodified as 28 U.S.C. § 144 without any significant changes, and with no discussion of the provision's original intent; and, since then, that statute has remained virtually unchanged.

20. Even after 1948, when § 20 was recodified as § 455 and § 21 was recodified as § 144, some courts continued to advert to the fact that the latter statute, on its face, appeared to be a peremptory challenge provision. *See, e.g.*, *Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1334, 1337 (N.D. Cal. 1977) (noting that § 144's language and legislative history is susceptible to the interpretation that, by filing an affidavit of bias, a party may make a peremptory challenge). But since the Supreme Court had interpreted the predecessor version of the statute to authorize the challenged judge to decide whether the moving party's affidavit is timely and legally sufficient most of the courts that had an occasion to consider the matter found that the statute did not permit a federal judge to be removed automatically. *See, e.g.*, *Williams v. N.Y. City Hous. Auth.*, 287 F. Supp.2d 247, 248 (S.D.N.Y. 2003) (though the language of § 144 "appears to indicate otherwise," submitting an affidavit to the court "does not yield automatic recusal").

21. By 1948, the federal judicial disqualification framework consisted of two independent statutes; one of which, § 455, was intended to be self-enforcing but rarely was; while the other, § 144, was intended to be peremptory, but never was. These problems were plain to see at the time, but the issue of judicial disqualification did not come into prominent national focus again until the late 1960's, when opponents of the United States Supreme Court

nomination of Judge Clement Haynsworth seized upon his failure to disqualify himself from presiding over a number of cases as the basis for denying him the appointment. Notoriety arising from this situation, as well as from a number of highly publicized cases involving other judges' refusal to recuse despite apparent conflicts of interest, began to kindle public sentiment for altering the standards for disqualifying federal judges. In response, Justice Lewis F. Powell Jr., who was then President of the American Bar Association, proposed that a new Judicial Code of Conduct be formulated, and a special ABA committee was appointed for this purpose.

22. In 1973 the ABA adopted the new Code; Canon 3C of which mandated – for the first time – that a judge must recuse himself not only when he is actually biased in a matter, but whenever his impartiality could "reasonably be questioned." *See U.S. v. Haldeman*, 559 F.2d 31, 132 n.279 (D.C. Cir. 1976) (en banc) (per curiam). The Code was subsequently adopted, with only slight modification, by the Judicial Conference of the United States as the governing standard of conduct for all federal judges except for those who sit on the United States Supreme Court. *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 114 (7th Cir. 1977) (per curiam).

23. Initially, some judges perceived no conflict between the Code of Conduct and 28 U.S.C. § 455; however, because the ethical imperatives enumerated in the Code were much more stringent than those that had been prescribed in the statutory standard that pre-existed it, following the Code's adoption, and prior to the passage of the 1974 amendments to § 455, federal judges who were called upon to decide questions of judicial disqualification were obliged to choose between inconsistent legal and ethical imperatives. In 1973, the House Judiciary Committee determined that this situation placed judges on the "horns of a dilemma."

24. Congress thereupon acted to reconcile the federal statutory scheme with the Judicial Code, as well as to broaden the grounds for disqualification, by altering the statute to the

point of virtual repeal. As many courts have noted, although the new law was expressly intended to substitute a "reasonable person" standard for the "duty to sit" criterion that had previously been used in determining whether a judge should recuse herself in a particular factual situation, *In re Acker*, 696 F. Supp. 591, 595 (N.D. Ala. 1988), the primary purpose of the amended statute was to enact a more comprehensive judicial disqualification law that would promote confidence in the judiciary by eliminating even the appearance of impropriety. *See, e.g.*, *Hardy v. United States*, 878 F.2d 94, 96 (2d Cir. 1989); *Arocena v. United States*, 721 F. Supp. 528, 530 (S.D.N.Y. 1989). It has been generally agreed, therefore, that in a situation where a motion to disqualify has been based on § 455(a) the judge who has been called upon to decide the motion is obliged to attempt to determine whether a "reasonable person" might harbor doubts concerning the ability of the challenged judge to be impartial. *See, e.g.*, *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995).

25. It bears emphasizing that while some have suggested that the proper test for recusal under § 455(a) is whether a reasonable person "would" question the ability of a judge to be impartial, that was not the Congressional intent. In amending § 455 in 1974, Congress could have left the "actual bias" standard intact; but, because its purpose in amending the statute was to enhance public confidence, a federal judge is required to recuse himself not only if he finds that a reasonable person *would* question his ability to be impartial, but whenever he comes to believe that there is a realistic chance that she *might*. *See United States v. Fazio*, 487 F.3d 646, 653 (8th Cir. 2007) ("the key ingredient in a [§] 455(a) . . . case is avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge's impartiality").

28 U.S.C. § 455 Eliminated the "Duty to Sit"

26. Because a judicial gloss on the pre-1974 amendments created a "duty to sit" in cases where there was not good cause for recusing, recusal questions were typically resolved, in all but the most blatant of cases, in favor of staying on the case. The 1974 amendments – which required recusal in cases where a judge's impartiality *might* reasonably be questioned – eliminated this "duty to sit."

27. The Code of Judicial Conduct (1973) was designed by its drafters to do away with the "duty to sit" as a constraint on a judge's exercise of discretion when he was called upon to decide whether to recuse himself. *See, e.g.*, *State v. Desmond*, 2011 WL 91984, at *9 & n.80 (Del. Super. Ct. Jan. 5, 2011) ("It has been stated that the [CJC] . . . mark[ed] the curtailment, if not the demise, of a notion previously expressed by some courts that judges had a 'duty to sit' that severely limited the boundaries of recusal.'" (alteration in original) (citation omitted)), *aff'd*, 29 A.3d 245 (Del. 2011); *see also United States v. Moskovits*, 866 F. Supp. 178, 182 n.4 (E.D. Pa. 1994). However, because the "duty to sit" doctrine was statutory in origin, the adoption of this Canon did not entirely solve the problem.

28. In 1974, Congress acknowledged the conflict between the Code and § 455 by changing the latter to conform to the former. As many courts subsequently recognized, by amending § 455 in the way that it did, Congress intended to harmonize the statute with the Code, thereby relieving the conflicting duties imposed on judges. The Second Circuit is among those who have made this point. *See United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981) ("As this court has said in the past, 'We recognize that [§] 455(a) is designed to negate the "duty to sit" notion and to allow "a greater flexibility in determining whether disqualification is warranted in particular situations."'"), *cert. denied*, 456 U.S. 916 (1982), quoting *United States v. Wolfson,*

558 F.2d 59, 63 & n.13 (2d Cir. 1977) ("Subsection (a) of the amended [§] 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned . . . The language also has the effect of removing the so-called duty to sit which has become a gloss on the existing statute"); then quoting H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354, 6355.

29. Courts in other jurisdictions also acknowledged that a federal judge's ability to recuse herself was no longer constrained by the duty to sit doctrine. By way of example, in 1992 the Third Circuit made it plain that, contrary to what some other courts had held, a district court in that circuit had no duty to sit on a case. *See In re Sch. Asbestos Litig.*, 977 F.2d 764, 784 (3d Cir. 1992). One court went so far, in fact, as to say that the "duty to sit" had been displaced by a "presumption of disqualification." *Desmond*, 2011 WL 91984, at *9; *see also U.S. v. Moskovits*, 866 F. Supp. 178, 182 n.4 (E.D. Pa. 1994).

30. In spite of the express intent of Congress to abolish the duty-to-sit construct as a restriction on a judge's discretion when deciding a judicial disqualification motion – and despite the acknowledgement by some courts, including the Second Circuit, that a federal judge no longer has a duty to sit – some courts have continued to rely on the doctrine. Even the Second Circuit – despite acknowledging the Congressional intent to remove the "duty to sit" as a constraint on a judge's ability to recuse – has alluded to such a duty in saying that where valid reasons for recusal have not been shown to exist, a judge is ordinarily expected to stay on the case. *See, e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 140 (2d Cir. 2007). As a result, some courts in this Circuit – including this one, in its disqualification order in the Zarrab case – have indicated that a court "has an affirmative duty not to disqualify itself unnecessarily;" and that, where "the standards governing disqualification have not been

met, disqualification is not optional; rather, it is prohibited." Zarrab Order at 12 (citations omitted).

31. It is certainly the case that a judge should not recuse himself lightly, when good cause for doing so does not appear; and, insofar as the Second Court may have sought to carve out a "limited," post-1974 version of the "duty to sit" rule by admonishing judges not to do so, such an admonishment would appear to be neither novel nor objectionable. But just as some courts have handed down decisions which could be taken to suggest that a party who moves to disqualify a judge pursuant to § 455(a) bears a burden of proving more than that a reasonable person might question his ability to be impartial, others (including this Court) have said things which could be taken to mean that a court's duty to not to recuse lightly makes the movant's burden on disqualification higher.

32. In my opinion, this is not so. On the contrary, as several courts have pointed out, for all practical purposes the primary – if not *only* – impact of the 1974 amendments to § 455 on a judge's "duty to sit" was to reverse the result in a situation where the judge who has been called upon to decide a disqualification motion determines that the question of whether he should sit or stay on the case is a "close" one. Whereas prior to the adoption of the 1974 amendments to the statute courts tended to deny disqualification motions in close cases because of their "duty to sit," following the amendments disqualification became the prescribed course of action for any judge whose examination of the facts led him to conclude that the question of whether a reasonable person, knowing all of the facts, might question the judge's ability to be impartial was a "close call." *See, e.g.*, *German v. Fed. Home Loan Mortg. Corp.*, 943 F. Supp. 370, 373 (S.D.N.Y. 1996) ("Under the rule, close calls are to be decided in favor of recusal.").

33. In this case the fact that a judge may have a duty not to recuse himself needlessly, if no enumerated bases for disqualification exist, is a matter of no moment. This is so because the existence of such a duty does not relieve a federal judge of the obligation to recuse himself in any situation in which a reasonable person might question his ability to be impartial; because a reasonable person might do so in this case; and because, in my view, this is not a close call.

The "Reasonable Person" Standard

34. Although it amended § 455 in 1974 to eliminate the duty to sit rule, and generally lessen the burden on the party who brings a § 455 motion, Congress did not specify from whose standpoint the determination of whether a judge's impartiality might "reasonably" be questioned is to be made.

35. As an initial matter, the appropriate standpoint is not that of the judge. While a judge is affirmatively obligated to recuse himself whenever he is not subjectively confident of his ability to be evenhanded in presiding over a matter, the drafters of §455(a) did not contemplate that the converse would be true – that a judge who is subjectively convinced of his ability to preside impartially may, for that reason, deny a § 455 motion. *In re IBM Corp*., 45 F.3d at 644 ("[B]ased on our knowledge of the Judge's long and distinguished career, we are prepared to assume that [his] subjective disposition is one of impartiality . . . . But the recusal question does not turn on his subjective state of mind").

36. The rationale for this rule is straightforward enough: a judge who is persuaded of his own impartiality may nonetheless act in a manner that would lead a reasonable person to think that he may not be. *Muhammad v. Rubia*, 2009 U.S. Dist. LEXIS 12307, *6 (N.D. Cal. Feb. 5, 2009) ("[I hold no bias against the plaintiff.] Nevertheless, as a reasonable person might

conclude that the facts alleged by plaintiff create an appearance of bias . . ., the Court, in an abundance of caution, will grant the motion.").

37. In deciding a recusal motion it is, therefore, "essential to hold in mind that [the reasonable person is] less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *see also United States v. Jordan*, 49 F.3d 152, 156–57 (5th Cir. 1995) (providing that while "judges sitting in review of others do not like to cast aspersions . . . we are mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary"). Stated simply, "the hypothetical reasonable person under §455(a)" must be someone "outside the judicial system." *See In re Kensington Int'l, Ltd*., 368 F.3d 289, 303 (3d Cir. 2004).

38. Because judges are charged with the affirmative duty of ascertaining what a "reasonable person" would think about the relevant facts, *see United States v. Jordan*, 49 F.3d at 156, the judge who has been called upon to decide a § 455 motion is obliged to carefully consider all of the facts that an objective observer would know. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). The court must then decide whether those facts, either alone or in combination, *might* cause such a person to question whether the judge might not be impartial in handling matters he has been called upon to decide. As a result, a § 455 inquiry will "always be fact-intensive." *United States v. Tucker*, 82 F.3d 1423, 1429 (8th Cir. 1996) (McMillan, J., dissenting). It follows that, while a court sometimes expects a party who makes a § 455 motion to support its motion not only with an affidavit attesting to the relevant facts, but with a brief discussing the applicable case law, "'the analysis of a particular [§] 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular

claim.'" *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citation omitted); *United States v. Honken*, 381 F. Supp. 2d 936, 971 (N.D. Iowa 2005) (§ 455 cases "'are extremely fact driven 'and must be judged on [their] unique facts and circumstances more than by comparison to situations considered in prior jurisprudence'" (alteration in original) (citation omitted)).

39. There is an eminently pragmatic reason why a § 455(a) inquiry should center on facts instead of a comparison to other cases: case law in the area paints an extremely misleading picture of the standard for recusal. In the vast majority of reported cases in which parties have moved to disqualify federal judges since the 1974 amendments to § 455 went into effect, their motions were predicated, in whole or in part, upon putative violations of § 455(a). But while published case law discussing § 455(a) is bountiful, any attempt to draw a definitive conclusion from these precedents about the merits of a specific disqualification motion would be ill-advised at best. This is the so because while, in an effort to insure public confidence in the legal system, judges often bend over backwards to step away from cases in situations in which they believe that a reasonable person might question their ability to be impartial, a judge who recuses himself in response to such a motion almost never issues an opinion explaining why he did so. *See, e.g.*, *Jonas v. Citibank, N.A.*, 414 F. Supp. 2d 411, 413 (S.D.N.Y. 2006) ("On January 25, 2005, Judge Berman filed a recusal and the action was reassigned.").

40. In contrast, judges who *decline* to recuse themselves often issue written – and often lengthy – opinions explaining why they believe that a reasonable person would not question their ability to be impartial. Thus, far from accurately portraying the full spectrum of judicial thinking on the merits of § 455(a) motions, or the factors that go into deciding them, the published opinions have tended to form what judicial ethics experts have referred to as "an

accumulating mound of reasons and precedents against withdrawal." *See, e.g.*, John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 244–45 (1987).

41. For two reasons this happenstance presents a serious – and often insurmountable – obstacle to any litigant who seeks to challenge a judge under § 455(a). First, while many courts have said that a judicial disqualification motion, like any other type of motion, must be accompanied by an analysis of the relevant legal precedents, because judges who recuse rarely write opinions explaining why they have done so, case precedents which a party who moves to disqualify a judge can rely on to support its motion tend to be few and far between.

42. In the few reported cases in which courts have found that disqualification was warranted, moreover, the facts have tended to be extreme. It is probably fair to say, in fact, that a very high percentage of the reported cases in which disqualification was determined to have been mandated involve facts that were egregious enough to implicate due process concerns. *See, e.g.*, *Walker v. Lockhart*, 726 F.2d 1238, 1243 (8th Cir. 1984) (the judge was alleged to have said, before trial, that it did not matter what legal arguments a criminal defendant had made because "he intended to burn the S.O.B." anyway (quotation marks omitted)); *Burrows v. Forrest City*, 543 S.W.2d 488, 490 (Ark. 1976) (a motion to recuse a judge from presiding over a revocation proceeding was based in part on the claim that the judge had told one of the attorneys of record to tell the appellant to "bring his toothbrush" to the hearing (internal quotation marks omitted)). As a practical matter what this means is that, when a party who moves to disqualify a judge in accordance with § 455(a) attempts to fulfill its obligation of drawing the relevant legal authorities to the court's attention, the court that has been called upon to decide the motion tends to have little difficulty finding that the cited precedents are "readily distinguishable" from the facts that have been alleged in the motion.

43. The obverse side of the coin can also present a challenge for the moving party. Because in almost all of the reported judicial disqualification decisions courts have found that disqualification was unwarranted on the facts of the case, a party who opposes a motion to disqualify typically encounters no problem finding authorities to string cite in support of its position. The fact is, moreover, that because the relevant jurisprudence largely discusses why a motion to disqualify a judge should be denied, and only rarely explains why it should be granted, parties who oppose judicial disqualification applications often espouse, sometimes inadvertently, debatable notions that have received little critical examination in the case law.

44. By way of example, while parties who oppose disqualification motions often advert to the unfortunately abundant authority standing for the proposition that, when mandatory grounds for a judge's disqualification have not been shown to exist, the judge has a "duty to sit" on the case as assigned, they typically do so without mentioning that one of Congress's primary goals in amending § 455 in 1974 was to remove the "duty to sit" as a constraint on a judge's ability to disqualify himself in appropriate cases, and without explaining if – much less how – the "duty to sit" in any way alters the relevant disqualification analysis.

Characteristics of the "Reasonable Person"

45. It has long been recognized that the person from whose standpoint the decision as to whether a judge's impartiality might reasonably be questioned is to be made is not only an objective observer, but a well-informed one. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). Since a reasonable person is presumed to be one who is well-informed about the applicable facts, the test is not whether a person who possessed a modicum of knowledge about the case, the judge, or the situation might believe the judge to be partial. Rather, the determination must be made from the point of view of a person who is thoughtful,

knowledgeable, and well-versed in all of the relevant facts and circumstances. *Federative Republic of Braz. v. Am. Tobacco Co.*, 535 U.S. 229, 232–33 (2002) (per curiam) (an appellate court must consider what a reasonable person, "'knowing all the circumstances,' would believe") (emphasis and citation omitted); *cf. Skoros v. City of New York*, 437 F.3d 1, 23 (2d Cir. 2006) ("[T]he intended recipient of a display message is a factor – undoubtedly an important factor – to be considered by the reasonable objective observer whose perceptions determine whether the government acts with a purpose and effect that violates the Establishment Clause …."). It is not enough, moreover, that a reasonable person has been apprised of the relevant facts and circumstances – that person must also fully understand them. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (the § 455(a) test "assumes that a reasonable person knows and understands all the relevant facts" (emphasis omitted)).

46. The reasonable person must not only know and understand the relevant facts and circumstances on which the motion to disqualify was based but must have examined them in their proper context. *See, e.g.*, *United States v. Pitera*, 5 F.3d 624, 626–28 (2d Cir. 1993) (concluding that the trial judge's comments, during a videotaped lecture she had given to members of a regional task force, when viewed in context, did not provide a basis for disqualification). It follows that where, as here, a motion to disqualify has been based upon a judge's comments, the determination of whether an appearance of judicial bias exists must be made from the point of view of a person who is not only thoughtful, knowledgeable, and well-versed in all of the relevant facts and circumstances of the case, but one who fully understands the *context* in which those comments were made.

A Reasonable Person Might Question the Court's Impartiality

47. I have studied this case extensively. Based on the facts as set forth in the Declaration of Michael A. Reynolds and its accompanying exhibits, I believe recusal is required because a reasonable person might question the Court's impartiality; indeed, I do not think this represents a close case.

48. In evaluating whether a "reasonable person" might question the Court's impartiality, it is important to consider *all the circumstances* surrounding the Court's comments. A reasonable person would know that the Court's comments were made against the backdrop of a contentious debate in Turkey. Reynolds Decl. ¶¶ 12–14. In the years leading up to the May 2014 Symposium at which the Court spoke on the "Rule of Law in Turkey," a conflict arose between the Turkish government and a group referred to as "FETO." *Id.* ¶¶ 8–17. Most Turks believe that members of FETO have attempted to subvert the Turkish government by becoming government officials and civil servants, hiring fellow FETO sympathizers, and finding ways to remove non-FETO officials from their positions. *Id.* ¶ 9. There are multiple alleged examples of this occurring in the years leading up to the Court's comments. *Id.* ¶ 11, Ex. 1.

49. From December 17 through 25, 2013, police officers, prosecutors, and judges facilitated the arrests of several Turkish government officials on charges of corruption. *Id.* ¶¶ 12–13. Included among those charged was Halkbank's former General Manager, who was alleged to have participated in a scheme to launder the proceeds from Iranian oil transactions in violation of U.S. sanctions. *Id.* ¶ 12; S.I. A reasonable person would understand these charges to be substantively identical to the charges against Halkbank in this case. Most in Turkey believe that the Turkish prosecutors and investigators who brought the charges against

Halkbank's General Manager and others were sympathizers of FETO, and that the charges were fabricated and brought for improper purposes. Reynolds Decl. ¶¶ 12–13.

50. The Turkish government responded to what it perceived to be an improper and malicious prosecution by firing and relocating a number of police officers and prosecutors based on their role in the investigation. *Id.* ¶¶ 14–15. While some viewed this response as the Turkish government interfering in an ongoing investigation, and an attack on the rule of law, most in Turkey perceived the government's actions to have been entirely proper – that law should not be used to remove a democratically elected government through corrupt means. *Id.* ¶ 14. A reasonable person would view the assigned judge's comments in the context of this contentious debate.

51. In May 2014, a law firm that has been associated with FETO hosted an event in Istanbul called the "Justice and Rule of Law Symposium." *Id.* ¶ 17. A reasonable person would understand that, despite its innocuous sounding name, a program discussing the "rule of law" in Turkey would be very likely to focus on the debate that was then raging in Turkey as to whether the termination and relocation of Turkish investigators based on the December 2013 arrests was an attack on the rule of law (especially given that the Symposium was hosted by a FETO-affiliated law firm). *See id.* ¶¶ 12–19. That this was the focus of the Symposium is confirmed by the fact that several speakers explicitly referenced the December 2013 events. *Id.* ¶ 18, Ex. 10.

52. A reasonable person would be particularly likely to expect that a panel about "the Rule of Law *in Turkey*" would focus on the December 2013 events, and that any comments the moderator of that panel made about that subject would concern the current state of the rule of law in Turkey as pertaining to those events.

53. It is within this context that a reasonable person would interpret the Court's comments on "the Rule of Law in Turkey." The Court's comment that the rule of law was under attack in Turkey would be understood by a reasonable person as taking sides with respect to the December 2013 events; and, specifically, as having rejected the Turkish government's view that its actions in firing and relocating prosecutors was an effort to preserve, rather than attack, the rule of law in Turkey. *Id.* ¶ 20–21. Indeed – particularly in light of its reference to the firing and relocation of prosecutors and police officers – there does not appear to be any other reasonable interpretation of his comments. *Id.* ¶¶ 20–22. Stated differently, a reasonable person would understand that, in making the comments it did in Istanbul, the Court had taken the side of the FETO supporters; and, thereby, uncritically accepted the version of events upon which the U.S. Attorney's Office's case against Halkbank rests.

54. A reasonable person would also view the Court's comments following the May 2014 symposium as taking sides in the contentious debate in Turkey. In its Order denying the Zarrab Motion, the Court pointed out that two of the remarks that were attributed to it appeared to "have been excerpted from comments made during the Symposium." Zarrab Order 16–17. A reasonable person would know, however, that the same day as its panel on "the Rule of Law in Turkey," the Court made comments to a FETO-affiliated newspaper, *Today's Zaman*. The author of the article expressly stated that the Court had "*told* Today's Zaman" that the rule of law was "under attack in Turkey because the independence of the judiciary has been challenged;" and that, in the same interview, the Court – referring to the "corruption probe that started on Dec. 17, 2013" – had said that "the legal proceedings have been interrupted," and that it was "inappropriate to the change the rules of the game while the game is taking place," thereby calling "attention to the changes that the Turkish government made to laws regulating the

judicial system" after the December 2013 investigation and the ensuing arrests. Reynolds Decl. Ex. 13 (emphasis added).

55. A reasonable person would be inclined to view any comments made to a FETO-affiliated newspaper following a panel about the state of the rule of law in Turkey as weighing in on the debate in Turkey, even if that was not the Court's intent. *Ligon v. City of New York*, 736 F.3d 118, 126–27 (2d Cir. 2013) ("Because there is no scienter requirement in section 455, the test is not how a judge intended his remarks to be understood, but whether, as a result of the interviews or other extra-judicial statements, the appearance of impartiality might reasonably be questioned."), *vacated in part on other grounds*, 743 F.3d 362 (2d Cir. 2014). This is particularly so given that the name of the article was "Rule of Law and Freedom of Press Under Attack in Turkey." Although it is unclear whether the Court knew about the name of the article at the time of the interview, a reasonable person would wonder whether that was the case, and would also query how the assigned judge ended up agreeing to the interview. *Id.* at 127 ("[W]hile one who gives an interview cannot predict with certainty what the writer will say, judges who affiliate themselves with news stories by participating in interviews run the risk that the resulting stories may contribute to the appearance of partiality."). A reasonable person would also question whether the assigned judge absorbed information skewed by the viewpoint of the author during the course of the interview. *See United States v. Microsoft*, 253 F.3d 34, 113 (D.C. Cir. 2001) (per curiam) ("We do not know whether he spent even more time in untaped conversations with the same reporter, nor do we know how much time he spent with others. But we think it safe to assume that these interviews were not monologues. Interviews often become conversations.").

56. In denying Zarrab's Motion, the Court criticized Zarrab's reliance on newspaper

articles, suggesting that they are unreliable. Zarrab Order at 16–18. But an objective observer would know that the *Today's Zaman* article the Court alluded to in its Order denying Zarrab's Motion purported to quote the words of the Court. *See United States v. S. Fla. Water Mgmt. Dist*., 290 F. Supp. 2d 1356, 1360–61 (S.D. Fla. 2003) (finding that statements attributed to a judge in the press would cause a disinterested observer to entertain doubts about the judge's impartiality). An objective observer would understand journalists do not always accurately quote their sources; so the possibility exists that what the paper reported the Court to have said was untrue. Such a person would also know, however, that in his Motion to Disqualify, Zarrab drew the Court's attention to the comments that were attributed to it by *Today's Zaman*; and that the Court did not say or suggest that its words had, in any way, been misconstrued.

57. Contrary to the Court's suggestion, media articles can be highly relevant to what a reasonable person would think about a case. In *United States v. Bayless*, 201 F. 2d 116 (2d Cir. 2000), the Second Circuit noted that, while the "circumstances under which criticism of a judge from . . . the media might be grounds for recusal under § 455(a) are anything but clear," many courts that have considered whether media criticism was grounds for recusal have "found that it was not." *Id.* at 29. In one of the cases the court cited for this proposition the First Circuit explained why this is so: "although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers. To find otherwise would allow an irresponsible, vindictive or self-interested press informant . . . to control the choice of judge.'" *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (citation omitted).

58. The *Bayless* court went on to cite *Drexel* in noting that this "circuit has expressly *urged caution* in allowing media accounts to become the focus of a recusal inquiry;" and noted that, in "doing so, our court emphasized one of the serious problems with ruling that media attacks on a judge can be readily made the basis for recusal: parties who are sophisticated in their dealings with the press might then be able to engineer a judge's recusal for their own strategic reasons." 201 F.3d at 129. As the Second Circuit put it the following year, in *In re Aguinda*, the test "is one of reasonableness, and the appearance of partiality portrayed in the media may be, *at times*, unreasonable. 241 F.3d 194 (2d Cir. 2001). In such cases, the requirements of [§] 455(a) are not met." *Id.* at 202 (emphasis added). The court went on to say a recusal motion should not be granted "simply because a claim of partiality has been given widespread publicity . . . To do so would unfairly allow those with access to the media to judge-shop. [Here], petitioners seek to benefit from CRC's rather ample access to the media." *Id.* at 206.

59. Two years later, in *Chase Manhattan Bank v. Affiliated FM Insurance*, the court cited both *Drexel* and *Aguinda* in noting that one danger of an "incautious" use of appearance as a disqualifying factor is that "a suspicious appearance of partiality can be manufactured by inspiring publicity of repeated claims of bias. A truly disqualifying appearance must thus be determined by a reasonable person standard and not by the ability of the complaining party to voice its concerns through the media;" 343 F.3d 120, 129 (2d Cir. 2003), and that, "with regard to the appearance of partiality, the appearance must have an objective basis beyond the fact that claims of partiality have been well publicized." *In re Aguinda*, 241 F.3d 201; *see also Chevron Corp. v. Donziger*, 783 F. Supp. 2d 713, 735 (S.D.N.Y. 2011) ("press reports have little if any bearing even where they support a litigant's position . . . [especially here] given the LAPs' ready access to the media").

60. From these teachings it would appear to follow that, while a court that has been called upon to decide whether an objective observer would question the ability of a judge to be impartial should not consider press reaction to the judge's comments to be the only "relevant metric," Opposition to Zarrab Motion at 12, opinions that have been voiced by members of the media about the judge's ability to be impartial are relevant to the inquiry. That is so, *a fortiori*, in a situation where there is no chance that the party seeking recusal influenced the journalist who wrote the media report in an effort to "engineer" that result; and where, therefore, the rationale for urging caution in looking to press accounts as a barometer of public opinion does not exist.

61. In this case a reasonable person would know that, while the Court said in its Order that that the "recusal motion, in substantial part, relies upon Turkish media (press) accounts," the only press account the Court specifically referred to in its Order denying Zarrab's Motion was the *Today's Zaman* article, and there are at least four reasons why there is no reason to discount what was said in that article as a possible indicator of what a reasonable person would be apt to believe. First, the author expressed no view about the judge or his comments; he merely recounted what the Court reportedly said. Second, the article was written in 2014 – long before this case was assigned to the Court and, therefore, at a time when there was no reason for Halkbank or anyone else to be looking for a way to "manufacture" grounds for the Court's recusal. Third, and perhaps most fundamentally, a reasonable person would know that *Today's Zaman* was not an ordinary objective outlet, but rather a well-known purveyor of a single viewpoint relevant to the case before the Court. Reynolds Decl. ¶ 25. Fourth, it appears that the

Court has never denied having made the comments that were attributed to it by the author of the *Today's Zaman* article.

62. In addition to the Court's comments themselves and the circumstances surrounding them, a reasonable person would also question how and why the Court came to be on the panel. A reasonable observer who was aware of all of the relevant facts would know that there would appear to be nothing in the publicly available profiles of the Court's background that reflect that it has any special expertise in, or knowledge about, Turkish history or politics. A reasonable person would also question how the Court came to form his articulated views which, he admitted, would require an understanding of the Turkish politics. Reynolds Decl. Ex. 10, at 168–69. At the Symposium the judge did not specify any information he had acquired that would allow him to knowledgeably "speak out" about "recent developments affecting the Rule of Law in Turkey," or, if he did, where he had acquired such knowledge – nor, in denying Zarrab's Motion, did the Court claim that it possessed any such knowledge.

63. In its opposition to Zarrab's recusal motion, the government said that the Court's comments were nothing but "noncontroversial statements" about "fundamental principles of law," that created "no appearance of partiality." Opposition to Zarrab Motion at 11–12. The Court agreed, referring to its statements as "proper." Zarrab Order at 16. Although the government's argument might have some appeal if the Court's comments existed in a vacuum – which, as the Court acknowledged in stating that an understanding of Turkish politics is necessary to opine on the rule of law in Turkey, they do not – it ignores the facts and circumstances surrounding those comments. Reynolds Decl. Ex. 10, at 168–69. In deciding whether an untoward appearance exists, what ultimately matters is neither the *subjective* view of the challenged judge nor that of a litigant. That is, the question presented by Halkbank's motion

is not whether the Court believes its comments were "proper," or the government thinks they were "uncontroversial." The question is, rather, whether an objective observer – who is knowledgeable about *all* of the relevant facts – "might" think that the Court's impartiality could be questioned in this case as a result of his having made those comments.

64. Even more fundamentally, a reasonable person would be apt to want to consider why the Symposium was held in the first place. Such a person would want to know, for example, whether the speakers had been invited to the conference merely for their expertise – to participate in what the drafters of the Code of Conduct for United States Judges have referred to as an "educational activity" – or whether the Symposium may had been staged for other reasons. In addition to knowing who organized the Symposium (and, in particular, who was paying the travel and lodging costs of the participants), a reasonable person would want to know when the idea for the Symposium had been conceived. Such a person would know that an International Symposium would ordinarily require a fairly significant amount of advance planning. I myself have been asked to speak at several conferences; in every case I can think of the invitation to participate came several months to a year before the event was scheduled to be held.

65. It would be curious therefore, to a reasonable person, that this does not seem to be the case here. In disclosing its participation in the Istanbul Symposium to the lawyers in the Zarrab case, the Court does not appear to have said when it received its invitation to attend, but it would appear that the event was put together on very short notice. According to a May 17, 2016 newspaper article, Cüneyt Yüksel, a partner at the FETO-affiliated law firm – in response to a question about whether the preparations for the symposium had "started before the Dec. 17, 2013, graft probe" – said that it "started later, we had a meeting on the issue in March."

Reynolds Decl. Ex. 8. In his follow-up article, the author pointed out that the IT manager for the firm had not "registered the website for the symposium until March 7, 2014." *Id.* Ex. 9.

66. From these facts a reasonable person would, in my opinion, be apt to suspect that the Symposium was not a well-planned attempt to conduct an "educational activity" focusing on what the government referred to, in its *Zarrab* Opposition brief, as "fundamental principles of law" – or even an attempt to present a balanced presentation regarding the competing views of FETO and the government regarding what was then transpiring in Turkey – but, rather, an attempt to bring together a group of prominent scholars, shortly before a Turkish national election, to legitimize FETO's version of the December 2013 events.

67. A reasonable person would also be apt to wonder whether the Court, before deciding whether it would be appropriate to fly to Turkey to "speak out" about "current events" and "legal developments" in a country that was then being roiled by upheaval, gave any consideration to whether the invitation had been extended by someone who truly expected the Court to make only "noncontroversial" comments about "fundamental principles of law." *See People v. Lester*, 2002 WL 553844, at *2 (N.Y. Just. Ct. Mar. 22, 2002) (attendance at "CLE programs, both locally and at exotic vacation spots," is "the Sodom & Gomorrah of the legal profession . . . free dinners or drinks, a round of golf, a cup of coffee or a free cigarette offered to an accepting jurist, may all be indicia of attempts to influence. Only a fool and no judge is a fool . . . would accept such emoluments and imagine that nothing is expected of them in return or that an imaginary [] wall exists between social contacts and judicial opinions").

68. A reasonable person would also know that, in denying Zarrab's Motion, the Court – immediately after saying that its remarks had been "entirely proper" because they "made no mention of Zarrab or the Turkish charges brought against him," and that "it would be objectively

unreasonable to conclude from these remarks that the Court was biased or partial against Mr. Zarrab" – wrote that engaging "in such law-related activities – including speeches that comment on current events and legal developments – is permitted not only because judges are citizens, but because they are particularly knowledgeable on such topics." Zarrab Order at 16. In my opinion, a reasonable person would be apt to be troubled by this statement for two reasons. First, such a person would know that the "current events" and "legal developments" the Court commented upon took place in a country in which the Court who made the comments was *not* a "citizen;" and that, because this is so, the Court had no reason to be "particularly knowledgeable" about them.

69. Yet another thing a reasonable person would know is that, just as there are certain types of extrajudicial activities that American judges are well-advised to eschew – including participating in conferences in which they are likely to be encouraged to express opinions that could call into question their ability to be impartial in presiding over matters that pertain to the opinions expressed – there are certain types of comments that judges are simply not permitted to make. Such a person would know, specifically, that as a general rule "public comment" by a sitting judge is expressly prohibited by Canon 3A(6) of the Code of Judicial Conduct ("A judge should not make public comment on the merits of a matter pending or impending in any court").

70. The government may contend that the Court did not violate Canon 3(A)(6) in making its comments at the Symposium or to the Turkish press because no case against Halkbank was pending at the time. A reasonable person would know, however, that by the time the judge made his comments the General Manager of Halkbank had been arrested and was being investigated in connection with the alleged sanctions-evasion scheme that is the focus of this case. A case against them was, therefore, pending at that time. Such a person would know,

too, that the "Public Comment" Canon prohibits federal judges from making comments not only about the merits of matters that are actually pending at the time, but to those that are "impending," and that the term "impending" has generally been interpreted to mean "reasonably foreseeable." Even if a matter was not then "pending," it was certainly foreseeable at the time the Court made its comments that the targets of the investigation would be tried in the United States – and if so, very likely in the Southern District of New York – for their alleged crimes.

71. A reasonable person would also know that nothing in Canon 3(A)(6) exempts comments that are made about a matter just because it happens to be pending or impending in a foreign country. Such a person would realize, moreover, that even if it would have been permissible for the Court to publicly comment about a case that was then pending or impending in Turkey, as long as it was not pending or pending in the United States, by the time the Court made its comments it was readily foreseeable that there would be an American case as well.

72. The focus of the Turkish prosecutions and the Turkish media was on the bribery allegations. But the ultimate purpose of the alleged bribes was to evade United States law, as it pertains to sanctions on Iran. It was foreseeable that United States law enforcement would be highly motivated to investigate the purported sanctions violations and charge any individuals involved. A reasonable person would expect, therefore, that if individuals had been convicted in Turkey, the United States would seek to prosecute them as well. A reasonable person would know, in other words, that the matter the Court commented about at the Symposium was not only "pending" in Turkey, but "impending" here.

73. Based on the record of the Atilla trial, a reasonable person would also know that it is highly likely that the prosecution will rely upon evidence obtained and handled by one of the investigators who had participated in the controversial December 2013 investigation, Huseyin

Korkmaz. A reasonable person would know that Korkmaz was one of the "relocated" police officers to whom the Court referred in his May 2014 comments; and that, in characterizing his relocation as "arbitrary," the Court expressed a belief that the December 2013 investigation was legitimate. A reasonable person would also know, based on the controversy surrounding the December 2013 events, that Halkbank will likely raise many evidentiary challenges to the Korkmaz evidence; including as to its authenticity, veracity and reliability. A reasonable person would have ample reason to question – and therefore might question – whether the assigned judge would be completely impartial in deciding these questions, when he has already explicitly taken sides on the issue of whether the evidence gathered by Korkmaz is legitimate.

74. It is notable that, at the time Zarrab moved to recuse, it likely would not have been known to a reasonable person that one of the police officers referenced in the Court's comments would feature in the government's case. Halkbank's motion is therefore made under significantly different circumstances than Zarrab's motion.

75. Based on my review of the Court's comments and their surrounding context, I believe that a reasonable person could question the Court's impartiality, and recusal is therefore required. In this case the average person on the street, aware of all the relevant circumstances, would not be apt to believe that the fact that the Court moderated a panel at a Symposium in Istanbul, standing alone, provides cause for questioning its ability to be impartial in this case. Such a person would know, however, that this fact does not stand alone. An objective observer would understand that the Court was invited by individuals critical of Halkbank's defense to participate in a Symposium which many believe was organized for the purpose of promoting a FETO agenda; that the Court had its travel expenses paid by the same persons; that the allegations underlying this case were hotly debated at the time of the Symposium and couched in

terms of their effect on "the rule of law;" that, at the Symposium, the Court did not confine itself to making "noncontroversial" statements about "fundamental principles of law," as the prosecution in the Zarrab case contended, but went far beyond that by espousing opinions about "current events" and "legal developments" in Turkey that were consistent with FETO's views and antithetical to those of Halkbank; that there was no judicial source for the Court's opinions and, therefore, its comments were derived from a distinctly "extrajudicial" source; that, in addition to making comments at the Symposium, the judge espoused anti-government sentiments in an interview with a FETO-affiliated publication; that it made those comments in spite of the Code of Judicial Conduct's admonition against making public comments about pending or impending matters; and that the evidence that had been gathered by Turkish prosecutors before their investigation was quashed by the Turkish government, in what the Court referred to as "changing the rules of the game" in the middle of the game, is the very same evidence that the United States government plans to use against Halkbank in this case. In my view, these facts, in their totality, would cause a reasonable person to question the ability of the Court to be impartial, and therefore require recusal.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on this 14th day of July 2020, in Berkeley, California.

Richard E. Flamm, Esq.