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# COMMENTS

## DISQUALIFICATION OF FEDERAL JUDGES: STATUTORY RIGHT TO RECUSAL AND THE 1974 AMENDMENTS TO TITLE 28

by Terri J. Lacy

The right to a trial before an impartial judge constitutes one of the basic aspects of procedural due process. Since 1792 the Federal Judicial Code has contained provisions for disqualification of federal judges unable to preside fairly and impartially over a trial. One statute, section 144<sup>1</sup> under the current Code, involves recusal<sup>2</sup> of a judge on motion by one of the parties to a pending action. Another provision, section 455,<sup>3</sup> deals with disqualification of the judge on his own initiative.

This Comment discusses the statutory right to recusal under both sections 144 and 455, with particular attention being paid to the 1974 amendments to section 455. Prior to the enactment of these amendments, courts experienced difficulty in achieving consistent application of the recusal statutes. Under section 144 a judge could be disqualified only by ruling on a motion made by a party for extrajudicial bias or prejudice, whereas under the original section 455 a judge could disqualify himself under circumstances often unrelated to bias or prejudice. Other difficulties in interpreting pre-amended section 455 further stifled uniform interpretation of the requirements for recusal.

These inconsistencies resulted in the 1974 amendment of section 455. The amendments attempt to create uniformity between sections 144 and 455.<sup>4</sup> Unfortunately, revision of the statute has aroused controversy: (1) the statute does not clarify whether the procedural requirements of section 144 must be met in order to perfect an appeal under the revised section 455; (2) the amendments fail to make apparent whether the requirement of *extrajudicial* bias or prejudice for recusal under section 144 is now applicable to the bias or prejudice provisions in the revised section 455; and (3) the definitions of "impartiality" and "interest" as used in the amended statute are unclear. Through an examination of the statutory history of section 455 and section 144 this Comment explores resolutions to the controversies surrounding these issues.

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1. 28 U.S.C. § 144 (1970).

2. The verb "to recuse" derives from the old English law, where persons who wilfully absented themselves from their parish churches were called "recusants." In both civil and common law jurisdictions today, it refers to the disqualification of a judge from hearing a case because of interest or prejudice. BLACK'S LAW DICTIONARY 1442 (4th ed. 1961).

3. 28 U.S.C. § 455 (Supp. V 1975).

4. The revised § 455 provides for disqualification of a judge in circumstances similar to those delineated in § 144.

## I. STATUTORY RIGHT TO RECUSAL: INTERPRETATION OF SECTIONS 144 AND 455 PRIOR TO THE 1974 AMENDMENTS

The early United States concept of recusal, borrowed from English common law,<sup>5</sup> disqualified a judge from hearing a case when he had a pecuniary interest in the outcome of the case, when he had a relationship to a party, or when he had previously acted as counsel in the case.<sup>6</sup> The statutory rights to recusal, however, broadened these categories<sup>7</sup> to include disqualification on the basis of bias. While at common law only certain types of facts which might be likely to *cause* bias could be alleged as a reason for disqualification, statutory protection made it possible to disqualify a judge on the basis of facts which might indicate the *possible presence* of bias. Thus, the appearance of impartiality, as well as impartiality in fact, was to be provided the litigant.<sup>8</sup> At present, sections 144 and 455 are the major statutory provisions for recusal in the federal courts.<sup>9</sup>

### A. Section 144: Procedural and Substantive Requirements

Section 144 provides for disqualification of a judge for bias or prejudice upon the filing of an affidavit by one of the parties to the suit in question.<sup>10</sup>

5. The fundamental principle that a man may not be a judge in his own case was recognized at common law as early as Coke's time and was later extended to include judges who had an economic interest in a case, even though not named as parties. *Dr. Bonham's Case*, 8 Co. Rep. 1136, 77 Eng. Rep. 646 (K.B. 1609). Eventually, however, English courts applied disqualification to cases when the judge was shown to have a "substantial," as opposed to a "pecuniary," interest in the outcome of the case. The meaning of "substantial interest" was illustrated in *The Queen v. Meyer*, 1 Q.B.D. 173 (1875).

6. In *Commonwealth v. McLane*, 70 Mass. (4 Gray) 427 (1855), a Massachusetts court held that a justice of the peace who ordered a defendant he recognized to appear in court at the next criminal term possessed pecuniary interest in the case and should have been disqualified. If the defendant had failed to make his appearance, the forfeiture incurred under recognizance would have been paid to the town in which the justice of the peace presided. In *Stuart v. Commonwealth*, 91 Va. 152, 21 S.E. 246 (1895), the judge had served as the attorney for the purpose of attaching the name of a surety to the bond of a county treasurer. The judge was held disqualified to approve the bond because he had served as "counsel in the case."

7. See note 9 *infra* and accompanying text. For a discussion of recusal provisions in various states see Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947). Frank compares contemporary New Mexico and Pennsylvania statutes, characterizing New Mexico as an "easy" disqualification state which did not allow the judge to determine whether to disqualify himself. The Pennsylvania legislature, on the other hand, emphasized a judge's duty to disqualify himself if his impartiality could be questioned. *Id.* at 609.

8. For example, the court in *Whitaker v. McLean*, 118 F.2d 596, 596 (D.C. Cir. 1941), states: "The policy underlying Section 21 is that the courts of the United States 'shall not only *be* impartial in the controversies submitted to them but shall *give assurance* that they are impartial'; i.e., shall appear to be impartial." (Emphasis added.)

9. The first federal provision to deal with disqualification was § 20 of the 1789 Judicial Code. Section 20 served as the predecessor for the existing § 455. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 279. Section 21, enacted in 1911, served as the model for § 144. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090. A third statute, § 47 of the 1948 Judicial Code, provides that no judge shall hear or determine an appeal from a decision of a case or issue tried by him on the lower level. 28 U.S.C. § 47 (1970). This section obviously applies only to appellate judges. Its meaning requires little interpretation. The statute has no effect on interpretation of the new § 455, and notice only is taken of it here.

10. 28 U.S.C. § 144 (1970). The statute reads:

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

There is some evidence that the predecessor of section 144, section 21 of the Old Judicial Code, was intended to make disqualification automatic upon the filing of an affidavit of bias or prejudice.<sup>11</sup> The Supreme Court, however, early held that the challenged judge may decide whether the affidavit meets the procedural requirements of the statute and whether the alleged facts give "fair support" to the charge of bias or prejudice.<sup>12</sup>

A strict application of the affidavit requirement ensures that the statute will not be abused by litigants who hope to paralyze court proceedings.<sup>13</sup> Protection from such procedural paralysis is the result of the requirement that the affidavit must state specific facts which support the allegations of bias and prejudice, must be filed within strict time limits, and that no litigant may file more than one affidavit.<sup>14</sup> Due to the problem of long court calendars, these precautions are essential to judicial efficiency.

Examination of the procedural provisions reveals further rationales for each. Specificity of facts in the affidavit is required to show that the litigant's fear of bias is well-founded.<sup>15</sup> Although the judge may not rule on the falsity of the allegations, and must accept them as true,<sup>16</sup> he has a duty to determine whether the affidavit states facts rather than conclusions:<sup>17</sup> rumors and gossip are insufficient.<sup>18</sup> Unfortunately, the degree of factual specificity required has not been determined.<sup>19</sup> The best approach is to avoid establishment of rigid guidelines by placing emphasis on whether the facts would fairly convince a sane and reasonable mind that a judge does in fact harbor personal bias or prejudice as the statute contemplates.<sup>20</sup>

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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.

11. See 46 CONG. REC. 2627 (1911) (remarks of Rep. Cullop).

12. *Berger v. United States*, 255 U.S. 22, 33-34 (1921). This holding has been followed consistently. See, e.g., *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944); *Curran v. Nourse*, 74 F.2d 273 (8th Cir. 1934), cert. denied, 294 U.S. 729 (1935). See Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1439 (1966), where the author suggests that this practice seems inconsistent with the rationale of § 144. He finds that the litigant's confidence in his chances for a fair trial may be undermined by the knowledge that the judge he believes to be biased against him is the judge ruling on the contention of bias. The author suggests that another district judge could rule on the affidavit's sufficiency; however, he notes the sensitive position in which this places the second judge. "A better procedure would be to have the affidavit filed directly with the circuit court of appeals for determination of its sufficiency." *Id.*

13. *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913); *United States v. Valenti*, 120 F. Supp. 80 (D.N.J. 1954).

14. 28 U.S.C. § 144 (1970).

15. See Note, *supra* note 12, at 1441.

16. *Berger v. United States*, 255 U.S. 22 (1921). See, e.g., *United States v. Parker*, 23 F. Supp. 880, 882-83 (D.N.J. 1938), *aff'd*, 103 F.2d 857 (3d Cir.), cert. denied, 307 U.S. 642 (1939).

17. *Berger v. United States*, 255 U.S. 22, 23 (1921). The Court in *Berger* did recognize that the affiant may not be able to ascertain the details of the facts which give rise to his apprehension. The Court therefore ruled that the affidavit may allege facts based upon information and belief. *Id.* at 34. It should be adequate for the affiant to state the facts and the source of his belief that they are true; however, some courts have gone so far as to find allegations based on newspaper and magazine reports unacceptable as "hearsay." See, e.g., *Tucker v. Kerner*, 186 F.2d 79, 84 (7th Cir. 1950).

18. Compare *United States v. Parker*, 23 F. Supp. 880 (D.N.J. 1938), *aff'd*, 103 F.2d 857 (3d Cir.), cert. denied, 307 U.S. 642 (1939), with *Nations v. United States*, 14 F.2d 507 (8th Cir.), cert. denied, 273 U.S. 735 (1926).

19. See, e.g., *United States v. Hoffa*, 245 F. Supp. 772, 778 (E.D. Tenn. 1965); *United States v. Gilboy*, 162 F. Supp. 384, 392 (M.D. Pa. 1958).

20. See note 12 *supra* and accompanying text.

Since the judge must accept the facts in the affidavit as true, protection from false allegation is supposedly provided by the requirement that counsel certify that the affidavit and application are made in good faith. It is not clear, however, as to whose good faith counsel certifies.<sup>21</sup> Since section 144 is intended to dispel the litigant's fear of bias, many courts have held that counsel need only certify a belief that the affiant is filing the affidavit in good faith.<sup>22</sup> Other courts, however, have ruled that counsel must certify his own good faith as well.<sup>23</sup> The latter view is preferable because it would prevent an attorney from convincing his client to file an affidavit for delay purposes and then certifying his belief in the affiant's good faith. Risk of personal reprimand to the attorney is likely to discourage use of a section 144 affidavit as a delay tactic.<sup>24</sup>

Another area of controversy centers around who may qualify as "counsel of record." Generally, the certifying attorney must have appeared in the case at an earlier stage,<sup>25</sup> but that appearance may not always be sufficient to make the attorney the counsel of record. In one case<sup>26</sup> the attorney had not been admitted to the federal bar at the time the affidavit was filed. He was, therefore, unable to be adjudged a proper certifying counsel, and the recusal motion was not entertained.<sup>27</sup> Although this result may seem harsh, an even harsher judgment has arisen when a litigant was without attorney at the time the affidavit was filed.<sup>28</sup> When the court does not inform itself whether a party is honestly without counsel, the litigant may be deprived unfairly of his rights under section 144.

The affiant must also file the affidavit in accordance with strict time limits.<sup>29</sup> This time requirement prohibits the use of section 144 as a delaying tactic<sup>30</sup> and is, therefore, construed as strictly as the other procedural provisions of the statute.<sup>31</sup> The statutory deadline of ten days has become obsolete, however, with the abolition of formal terms of court.<sup>32</sup> Obsolescence of the deadline provision weakens the force of the entire statute in the administration of efficient justice. Section 144 should be amended to permit district courts to set deadlines suitable to their own schedules.<sup>33</sup> Such a

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21. See Orfield, *Recusation of Federal Judges*, 17 BUFFALO L. REV. 799, 810-11 (1967).

22. See, e.g., *Flegenheimer v. United States*, 110 F.2d 379 (3d Cir. 1936).

23. See, e.g., *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961).

24. See Note, *supra* note 12, at 1443.

25. See, e.g., *Currin v. Nourse*, 74 F.2d 273 (8th Cir. 1934), *cert. denied*, 294 U.S. 729 (1935); *Saunders v. Piggly Wiggly Corp.*, 1 F.2d 582 (W.D. Tenn. 1924).

26. *Currin v. Nourse*, 74 F.2d 273 (8th Cir. 1934), *cert. denied*, 294 U.S. 729 (1935).

27. *Id.* at 275-76.

28. *Mitchell v. United States*, 126 F.2d 550 (10th Cir.), *cert. denied*, 316 U.S. 702 (1942). In *Mitchell* the litigant had been represented by counsel earlier in the case. The counsel had withdrawn, but had not formally notified the court. The court therefore ruled that the litigant was not officially without attorney at the time the affidavit was filed.

29. Section 144 provides that "the affidavit . . . 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."

30. See *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913).

31. See *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944).

32. 28 U.S.C. § 138 (1970).

33. Some courts have already set up second deadlines on their own to meet this dilemma. See, e.g., *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944) (court requires filing before participation in proceedings); *United States v. Gilboy*, 162 F. Supp. 384 (M.D. Pa. 1958) (court requires filing before participation in proceedings).

process would lend flexibility to the statute in that each district would be allowed to determine its own time needs and would thus be able to increase the effectiveness of this statutory process.

Whatever the deadline may be, it is inevitable that some affiants will argue they have "good cause" for filing late.<sup>34</sup> "Good cause" would seem to be a discretionary matter,<sup>35</sup> determined by the same judge the affiant is attempting to disqualify. The practicality of such discretionary measures, when balanced against the burden of formulating a rigid test, would seem to outweigh any inconsistencies that might appear in judicial definitions of "good cause." Moreover, the appellate procedure should correct any abuse of discretion by a judge unwilling to entertain an affidavit which questioned his fitness to hear a case.

Since only one affidavit may be filed by a litigant, a second judge's bias or prejudice may not be questioned under section 144 by the party who disqualified the first judge.<sup>36</sup> This puts a burden on the substitute judge to disqualify himself if there is any chance that he may not be entirely impartial; a litigant may be prejudiced if the second judge fails to disqualify himself even though he may be biased in his disposition of the case.

The burden of disqualification that falls on the first judge under section 144 has been given two primary interpretations. While some courts hold that the judge may use his discretion as to disqualification even if the affidavit is found insufficient,<sup>37</sup> other courts state that it is the *duty* of the judge to hear the case if he finds himself unbiased and unprejudiced.<sup>38</sup> The meaning of "personal" bias or prejudice has aroused much discussion in section 144 litigation.<sup>39</sup> The basic rule is that personal bias or prejudice must go directly to the judge's personal appraisal of the party, and cannot relate merely to the judge's background and associations.<sup>40</sup> What constitutes this personal

34. Even if "good cause" is found for missing the deadline, reasonable diligence must be used in filing the affidavit.

35. *Hibdon v. United States*, 213 F.2d 869 (6th Cir. 1954) (failure of uncounselled, but experienced, defendant to meet the requirement not valid reason); *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948), *appeal dismissed*, 338 U.S. 883 (1949) (death of brother of one of the litigant's attorneys insufficient for late filing); *Hurd v. Letts*, 152 F.2d 121 (D.C. Cir. 1945) (discovery after the deadline of facts which indicate bias or prejudice valid reason for late filing); *Morris v. United States*, 26 F.2d 444 (8th Cir. 1928) (refusal of counsel to follow litigant's request to file an affidavit sufficient reason).

36. *See United States v. Hoffa*, 245 F. Supp. 772, 775-76 (E.D. Tenn. 1965) (held that when defendant had filed affidavit against the first judge, who had withdrawn from case, defendant could not attempt to recuse second judge).

37. *United States v. Quattrone*, 149 F. Supp. 240 (D.D.C. 1957). The judge's use of discretion in disqualification could be viewed as an application of § 455 rather than § 144.

38. *See Benedict v. Seiberling*, 17 F.2d 831, 841 (N.D. Ohio 1926), where the court stated that it was improper to withdraw voluntarily when challenged under § 144 because "to allow a disinclination to further sit in this case to work our voluntary retirement would permit the authors of this attack . . . to gain unlawfully that which they are not justly entitled to have." *See also Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Simmons v. United States*, 302 F.2d 71 (3d Cir. 1962); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961); *Morse v. Lewis*, 54 F.2d 1027 (4th Cir.), *cert. denied*, 286 U.S. 557 (1932); *Klose v. United States*, 49 F.2d 177 (8th Cir.), *cert. denied*, 284 U.S. 626 (1931); *Harris v. Britton*, 361 F. Supp. 528 (W.D. Okla. 1973); *Carpenter v. Hall*, 352 F. Supp. 806 (S.D. Tex. 1972); *Saunders v. Piggly Wiggly Corp.*, 1 F.2d 582 (W.D. Tenn. 1924).

39. The Court in *Berger v. United States*, 255 U.S. 22, 33-34 (1921), provides an excellent study of the meaning of this phrase.

40. *See, e.g., Eisler v. United States*, 170 F.2d 273, 278 (D.C. Cir. 1948), *appeal dismissed*, 338 U.S. 883 (1949) (trial judge in case involving Communist defendant alleged to have

appraisal of the defendant has, however, proven difficult to define. One of the most important guidelines developed by the courts is that allegations that the judge has made rulings adverse to the affiant are not sufficient to require disqualification.<sup>41</sup> Rather, the bias or prejudice must be extrajudicial in origin.<sup>42</sup> The reasoning behind the guideline is based on the theory that an affiant may actually be dissatisfied with the decisions rather than the judge.<sup>43</sup> Such decisions should be questioned through the appellate process rather than by disqualification.<sup>44</sup> The guideline has been extended beyond decisions, however, to statements made by the judge at earlier stages of the case.<sup>45</sup> Although most courts are cautious about disqualifying a judge on the basis of his conduct during these early proceedings,<sup>46</sup> a judge should be disqualified if his language and actions in the courtroom indicate that he has formed such a strong opinion against the litigant as to impair his judgment.<sup>47</sup> At least one court has recognized the validity of this argument. In *Knapp v. Kinsey*<sup>48</sup> a party had questioned the judge's impartiality on the basis of his actions during interrogation of witnesses and his participation in the proceedings.<sup>49</sup> The court noted that "the trial judge in the federal court is more than a mere arbitrator to rule upon objections and to instruct the jury."<sup>50</sup> He had the right to conduct the trial in such a way that the issues were clear and

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particular interest in deportation of Communists and to have advised investigator in same investigation); *Price v. Johnston*, 125 F.2d 806, 811 (9th Cir.), cert. denied, 316 U.S. 677 (1942) (trial judge associated with bank in vicinity of bank where robbery was committed by the defendant).

41. See, e.g., *Palmer v. United States*, 249 F.2d 8 (10th Cir. 1957), cert. denied, 356 U.S. 914 (1958) (judge made adverse rulings in criminal proceeding); *Littleton v. DeLashmutt*, 188 F.2d 973 (4th Cir.), cert. denied, 342 U.S. 897 (1951) (judge had made adverse rulings against farmer-debtors in bankruptcy proceedings); *In re J.P. Linahan, Inc.*, 138 F.2d 650 (2d Cir. 1943) (Special Master in bankruptcy proceedings had entered orders adverse to appellants); *Refior v. Lansing Drop Forge Co.*, 124 F.2d 440 (6th Cir.), cert. denied, 316 U.S. 671 (1942) (petitioner filed affidavit after judge ruled adversely to his cause); *Walker v. United States*, 116 F.2d 458 (9th Cir. 1940) (judge had asked another judge to try contempt proceeding in case because he would have to "lean too far backwards"). The rule was first stated by way of dictum in *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913).

42. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). In *Tynan v. United States*, 376 F.2d 761 (D.C. Cir.), cert. denied, 389 U.S. 845 (1967), it was held that a distinction must be drawn between judicial determination derived from evidence and lengthy proceedings before the court and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have origins outside the courtroom.

43. See Note, *supra* note 12, at 1447. Such reasoning was applied in *Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954), rev'd per curiam, 348 U.S. 961 (1955), where the Tenth Circuit held that imposition of sentences which are very severe, but which are within legal limits, does not, by itself, establish personal bias or prejudice. The Supreme Court reversed this decision, however, and remanded the case for retrial under a different judge.

44. A severe limit on the power of appeal exists, however, since many rulings are made under the trial court's discretionary powers.

45. See, e.g., *Chessman v. Teets*, 239 F.2d 205, 215 (9th Cir. 1956), rev'd on other grounds, 354 U.S. 156 (1957).

46. The judge must be allowed to perform his judicial function, a function which involves forming an opinion about the case before him. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943).

47. See *Whitaker v. McLean*, 118 F.2d 596 (D.C. Cir. 1941) (judgment reversed where judge had made hostile remarks about plaintiff and directed verdict for defendant). This argument is particularly forceful early in a trial before the judge has an opportunity to form opinions about the parties.

48. 232 F.2d 458 (6th Cir.), cert. denied, 352 U.S. 892 (1956).

49. The trial judge in *Knapp*, a stockholders' suit, frequently threatened the defendants with the possibility of criminal proceedings, and often offered advice to the plaintiffs in the preparation of their case.

50. *Id.* at 466.

the evidence understood, and might interrogate witnesses for such a purpose.<sup>51</sup> The court noted, however, that these rights were limited; remarks of a judge clearly manifesting his hostility to one of the parties indicates a personal bias or prejudice.<sup>52</sup> In *Knapp* the trial judge was viewed by the appellate court as having "stepped down from the bench to assume the role of advocate for the plaintiff."<sup>53</sup> These actions were held to have demonstrated personal bias or prejudice.<sup>54</sup>

A second guideline established by the courts is that personal bias or prejudice is rarely found on the basis of allegations that a judge has predetermined the merits of a case. The Fifth Circuit indicated in *Henry v. Speer*<sup>55</sup> that preconceived opinions on the facts in issue does not mean a judge is personally biased and prejudiced against any of the parties.<sup>56</sup> In that case the trial judge had expressed an opinion concerning the facts of the litigation to a local newspaper. The correctness of the reasoning in *Henry v. Speer* has been and should be questioned.<sup>57</sup> When the judge's opinions are specifically related to the litigants or issues in the case before him, an allegation of personal bias or prejudice would be proper. Such a view would certainly be supported by the desire not only for impartiality in fact, but for an appearance of impartiality as well.

The problem of predetermination by a judge can be analyzed in three ways: (1) where the judge has previously tried a case involving one of the parties to the present case; (2) where the judge has tried a case involving the same issue as in the pending case; (3) where the judge has expressed some opinion concerning a class to which the party belongs.<sup>58</sup> In cases where the judge has previously tried a case involving one of the parties, arguably the party has already had his "day in court" in the first proceeding; the second case thus represents an entirely distinct "day in court." Nonetheless, an unfavorable opinion formed in an earlier case may carry over into the later case. In fact it would seem difficult for a judge not to allow such an opinion to affect his reasoning. The courts, however, have failed to find that such an unfavorable opinion constitutes personal bias or prejudice.<sup>59</sup> In *Barry v. Sigler*<sup>60</sup> the trial judge was familiar with a party and his legal difficulties from

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51. *Id. See, e.g.,* *Fidelity & Deposit Co. v. Bates*, 76 F.2d 160, 170 (8th Cir. 1935); *Lewis v. United States*, 11 F.2d 745, 747 (6th Cir. 1926).

52. 232 F.2d at 466.

53. *Id.* at 467.

54. *Id.*

55. 201 F. 869 (5th Cir. 1913).

56. *Id.* at 871. *See also* *Parker v. New England Oil Corp.*, 13 F.2d 497 (D. Mass. 1926) (judge expressed opinion of person in open court prior to said person's entry into case as defendant).

57. Although some courts may be able to distinguish between "personal bias and prejudice" and prejudgment on the merits, it would be difficult to say that a litigant who fails to make the same distinction is being unreasonable. For a good discussion of this problem, see Note, *supra* note 12, at 1449.

58. Instances where personal bias or prejudice have not been found after allegation of predetermination include a case involving the communication of prejudice from another judge to the presiding judge and prejudicial statements of a third person not made to the defendants or the judge in the case. *See, e.g.,* *Wilkes v. United States*, 80 F.2d 285 (9th Cir. 1935).

59. See cases cited in Ratner, *Disqualification of Judges For Prior Judicial Actions*, 3 How. L.J. 228 (1957), for a discussion of this failure in both federal and state courts.

60. 373 F.2d 835 (8th Cir. 1967).



prior cases. The party claimed that the judge's familiarity with him caused personal bias or prejudice and that citation of the party for contempt in the pending case was the result of the bias. According to the Eighth Circuit, familiarity with a litigant did not imply *personal* feelings toward that individual.<sup>61</sup> Another case involved a special master who had made several adverse rulings against a party in earlier actions in a bankruptcy proceeding.<sup>62</sup> The party filed an affidavit to disqualify the same judge in the latest action. The appellate court upheld the judge's decision not to disqualify himself, noting that "[t]he standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of [basic predilections inhering in our legal system]."<sup>63</sup>

The court in *Craven v. United States*<sup>64</sup> commented that recusal procedures were not developed to cripple courts by disqualification of a judge solely on the basis of a bias against wrongdoers acquired from evidence in the course of judicial proceedings before him.<sup>65</sup> This is a valid argument, not only for efficient judicial organization, but also because judges, as human beings, are to some degree biased. In this case the bias is productively channeled toward protection from wrongdoers. Open and obvious bias for past wrongs, however, may prevent the litigant who has appeared before a judge in a prior proceeding from receiving a fair trial in a pending case. Such a litigant deserves a more careful determination of that judge's bias or prejudice than often occurs. A bias not extrajudicial in origin could be as detrimental to the litigant's rights as the most inflammatory personal bias. A balancing approach, which would weigh the interests of the judge, other litigants in the case, and society as a whole against those of the affiant would be appropriate in this situation.

A similar problem arises when the judge has previously tried a case which involved facts in issue identical to those in a pending case. No one would claim that a party in a patent infringement action could disqualify the judge simply because he had heard other patent infringement actions. When the judge has already determined the validity of the patent in question in a prior proceeding, however, an affiant's fear that the judge will not approach the issues with an open mind seems reasonable. The issue is whether this fear is sufficient cause for disqualification of a judge. In *Denis v. Perfect Parts*<sup>66</sup> the court did not so find. According to the court "[section 144] is directed to personal bias, not to previous judicial exposure to the same or similar questions."<sup>67</sup> Concern that the appearance of impartiality is not protected by this reading of the statute is well-founded; a balancing test would meet such a concern.

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61. *Id.* at 836.

62. *In re J.P. Linahan, Inc.*, 138 F.2d 650 (2d Cir. 1943). The case was a continuation of the bankruptcy proceedings.

63. *Id.* at 652.

64. 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928).

65. *Id.* at 607-08.

66. 142 F. Supp. 263 (D. Mass. 1956). The trial judge in that case had previously determined the validity of the patent involved in the pending infringement action.

67. *Id.*

Finally, a similar problem arises when a party claims that a judge may be biased or prejudiced against an affiant because he is a member of a particular class. Although the Supreme Court in *Berger v. United States* found the trial judge disqualified to hear cases of Germans accused of espionage because he had expressed strong anti-German sentiment,<sup>68</sup> most courts hold that a judge's feelings toward a class do not represent *personal* bias or prejudice against the affiant himself. *United States v. Fujimoto*<sup>69</sup> involved a Smith Act<sup>70</sup> prosecution in which it was alleged by affidavit that the defendant had made prior attacks against the judge in a newspaper, that the judge had made previous statements concerning the Smith Act, and that the judge had once objected to a speaker at a dedication ceremony because of the speaker's connection with Communist groups. The trial judge held that no personal bias or prejudice against the defendant had been demonstrated.<sup>71</sup> In *Eisler v. United States*<sup>72</sup> the District of Columbia Circuit found that the judge's prior activities in investigation of Communists and sponsorship of legislation for the deportation of Communists did not demonstrate personal bias toward the affiant, an alien Communist.<sup>73</sup> In *Foster v. Medina*<sup>74</sup> an affidavit was filed which alleged that the judge had refused to grant the defendant's motion for continuance when there might be more Communists up to the same "sort of thing" as those before the court. Moreover, in answer to the argument that the indictment alleged no acts of violence, the judge replied, "No, they want to wait until they get everything set and then the acts will come."<sup>75</sup> These allegations were ruled insufficient for stating personal bias or prejudice; the court found that such remarks were aimed at a class to which the defendants belonged and not at the defendants themselves.<sup>76</sup>

The best example of narrow and unreasonable definitional limits of bias under section 144 is found in *Cole v. Loew's, Inc.*<sup>77</sup> Cole, a motion picture script writer, had been suspended by his employer following an appearance before the House Committee on Un-American Activities. He subsequently brought suit against the employer. The defendants sought to disqualify the judge on the grounds that he had a personal bias against them. They filed an affidavit stating that in a discussion at the home of friends the judge had said that he felt there was no legal justification for suspension of employees brought before the House Committee and that he hoped none of the cases

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68. 255 U.S. at 33-34.

69. 101 F. Supp. 293 (D. Hawaii 1951).

70. 18 U.S.C. § 2385 (1970). The act prohibits advocacy of the overthrow of the United States Government by force or violence.

71. 101 F. Supp. at 295.

72. 170 F.2d 273 (D.C. Cir.), *cert. granted*, 335 U.S. 857 (1948), *cert. dismissed*, 338 U.S. 883 (1949). See Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. PITT. L. REV. 415, 421-23 (1950), for a critical discussion of the case. Schwartz finds that the appearance of impartiality was inadequately protected under *Eisler*.

73. 170 F.2d at 278. The Supreme Court granted certiorari, but when the defendant became a fugitive, the court left the case off the docket, 338 U.S. 189 (1949), and then dismissed the petition, 338 U.S. 883 (1949).

74. 170 F.2d 632 (2d Cir.), *cert. denied*, 335 U.S. 909 (1949).

75. *Id.* at 633.

76. *Id.* at 633-34.

77. 76 F. Supp. 872 (S.D. Cal. 1948).

stemming from such suspensions came before him because he would be obliged to render judgments for the plaintiffs. The judge, treating these statements as true,<sup>78</sup> found the facts insufficient to show personal bias.<sup>79</sup> He classified the statements merely as preconceived ideas of the law.<sup>80</sup>

The holding in *Loew's* has been cogently criticized. One author found that the lack of a requirement in section 144 to prove prejudice serves as notice that the intent of the statute is to relieve the litigant of a judge in whom he has no confidence, rather than only to provide a remedy against actual bias. The decision in *Loew's* had not relieved the litigant of such a judge.<sup>81</sup> Not only did the court's opinion in the case reflect a lack of open-mindedness, it also impaired the appearance of a fair trial, the precise protection the statute was designed to provide. The *Loew's* holding demonstrates the extreme results which a narrow construction of section 144 can produce. Such a construction may seem to eliminate "an intolerable obstruction to the efficient conduct of judicial proceedings,"<sup>82</sup> but at the same time it appears to create an "intolerable obstruction" to a litigant's desire for judicial impartiality. If the courts cannot expand their interpretation of "bias or prejudice" to the limits of the present statute, a balancing test would provide better protection.

#### B. Section 455: Interest of Justice or Judge

The other major statutory method of recusal, prior to its 1974 amendment, provided for disqualification by the judge himself in a proceeding in which he had a substantial interest, had been of counsel, was or had been a material witness, or was so related or connected to any party or attorney as to render it improper, in his opinion, for him to serve as judge.<sup>83</sup> Section 455 consisted of two major provisions: mandatory circumstances under which a judge should disqualify himself, and circumstances under which a judge had discretion. The discretionary part of section 455 provided that the judge might in his discretion recuse himself if he felt so related to or connected with a party or an attorney as to render it improper for him to sit. The mandatory provision required that the judge must disqualify himself if he had a substantial interest in the case, had been of counsel, or had served as a material witness in the case.

*Mandatory Disqualification.*<sup>84</sup> Each of the three categories of mandatory disqualification has been the subject of judicial interpretation. "Substantial

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78. See note 16 *supra* and accompanying text.

79. 76 F. Supp. 872, 881 (S.D. Cal. 1948).

80. *Id.* at 876. The expression of opinion was, however, in effect an opinion on the merits and thus the affiant should have been entitled to relief.

81. See Note, *Disqualification of Federal Judges for Personal Bias*, 16 U. CHI. L. REV. 349, 351 (1949), for a good discussion of this case.

82. *Craven v. United States*, 22 F.2d 605, 608 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928).

83. Act of June 25, 1948, ch. 646, 62 Stat. 908 (current version at 28 U.S.C. § 455 (Supp. V 1975)).

84. See *Ex parte N.K. Fairbark Co.*, 194 F. 978, 987-90 (M.D. Ala. 1912), for a discussion of the mandatory nature of this branch of § 455. Failure of the judge to disqualify himself was error which would normally be corrected on appeal from a final judgment, although in some cases a writ of mandamus might be considered proper. See, e.g., *United States v. Vasilick*, 160 F.2d 631 (3d Cir. 1947); *In re Honolulu Consol. Oil Co.*, 243 F. 348 (9th Cir. 1917).

interest" has been interpreted to refer to pecuniary or beneficial interest.<sup>85</sup> As in *Adams v. United States*,<sup>86</sup> the phrase's meaning has also been held to include the interest that a lawyer has in "pushing" his case to a successful outcome. The court in *Adams* still did not find, however, that "substantial interest" existed in the case. The trial judge had been employed as the United States Attorney when the defendant in the pending perjury case had been tried for a liquor violation. It was during the first trial that the defendant had committed the alleged perjury. The judge had no knowledge that the first trial had occurred when he was connected with the United States Attorney's office. It was held, therefore, that no "substantial interest" existed, since there was neither prior knowledge of the facts involved in the perjury case nor prior interest in an issue arising out of the facts.<sup>87</sup> Such a decision is proper under the facts of the case. In other holdings under the "substantial interest" provision it has been found that a judge who was a depositor in a bank, the stock of which was held in a trust, did not possess "pecuniary interest" in a suit for an accounting of the trust estate and for damages for maladministration of the trust.<sup>88</sup> A judge has been disqualified, however, for owning stock in oil companies against which suits had been brought to recover possession of land and judgments for the value of extracted oil.<sup>89</sup> An interest such as the latter is more direct and, therefore, more likely to influence the judge's decision in the case. The appearance of impartiality thus seems to have been adequately protected under the "substantial interest" branch of the statute.

The mandatory provision of section 455 which originally required disqualification by a judge who had been of counsel in the case has also been analyzed by the courts. This provision was directed primarily at judges who had been attorneys in a case prior to their judicial appointment. It has thus been interpreted not to affect the jurisdiction of a judge who has merely reviewed and made suggestions concerning papers prepared by an attorney acting on the judge's behalf in a mandamus proceeding which arose from the pending case.<sup>90</sup> "Counsel in the case" has definitely been interpreted, however, to include United States Attorneys in criminal prosecutions. In *United States v. Vasilick*<sup>91</sup> a judge was held disqualified to hear a motion to vacate

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85. *United States v. Bell*, 351 F.2d 868, 878 (6th Cir. 1965), *cert. denied*, 383 U.S. 947 (1966).

86. 302 F.2d 307 (5th Cir. 1962).

87. *Id.* at 310. It was similarly determined unnecessary to require disqualification in *Neil v. United States*, 205 F.2d 121 (9th Cir. 1953), where the judge before whom a couple was seeking to recover federal income taxes had been the Collector of Internal Revenue when the allegedly incorrect returns were filed. The judge knew nothing about the case prior to the trial. See *Roberson v. United States*, 249 F.2d 737 (5th Cir. 1957), *cert. denied*, 356 U.S. 919 (1958), where the test of prior knowledge or interest was delineated.

88. *Long v. Stites*, 63 F.2d 855 (6th Cir.), *cert. denied*, 290 U.S. 640 (1933).

89. *In re Honolulu Consol. Oil Co.*, 243 F. 348 (9th Cir. 1917). *But see* *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d (5th Cir. 1968) (stock ownership must be *substantial* under 1948 revision of § 455); Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43 (1970).

90. *General Tire & Rubber Co. v. Watkins*, 363 F.2d 87, 89 (4th Cir.), *cert. denied*, 385 U.S. 899 (1966). In *Popkin v. Eastern Air Lines, Inc.*, 236 F. Supp. 645 (E.D. Pa. 1964), the court reached a similar interpretation, strengthening the argument by noting that the judge had held only one meeting, mainly social, with the attorney.

91. 160 F.2d 631 (3d Cir. 1947).

judgment because he had been the district attorney when the defendant was tried and the judgment entered.<sup>92</sup> Similarly, in *United States v. Maher*<sup>93</sup> the court found the fact that the judge had been a United States Attorney in prior proceedings of the same case sufficient interest for disqualification even though the defendant had pleaded guilty. These two cases reflect the necessity for a direct involvement by the judge in the pending case while still a United States Attorney.<sup>94</sup> The same factor of directness was required in the above determination of what constitutes "substantial interest" for purposes of disqualification. The requirement of direct involvement assures the litigant an appearance of impartiality under both provisions.

The third circumstance requiring disqualification is where a judge has been a "material witness" in the case. This condition has been interpreted by the courts as narrowly as the first and second provisions. The provision was construed so that a judge passing upon a motion to vacate a sentence imposed by him was not a "material witness" within the meaning of the statute.<sup>95</sup> Neither was a judge before whom a motion was heard to withdraw a guilty plea in a pending case.<sup>96</sup>

*Discretionary Disqualification.* As originally written, section 455 provided the judge with discretion to recuse himself if he felt that he was so related to or connected with a party or an attorney as to render it improper for him to decide a case. In *Harris v. United States*<sup>97</sup> it was determined not to be an abuse of discretion to hear a case to vacate a judgment convicting a bankrupt of concealing property from his bankruptcy estate and giving false testimony before the bankruptcy court, even though the judge's brother-in-law was trustee of the bankruptcy estate. In *Voltmann v. United States*<sup>98</sup> the court found it unnecessary for a judge to recuse himself because his son-in-law was a member of the firm representing the defendant, when the son-in-law had nothing to do with the case. Further, it has been held no abuse of discretion to hear a case in which a professional acquaintance is one of the

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92. *Id.* at 632. The writer of the opinion in *Vasilick* noted that a judge would not be disqualified when he had been of counsel for one of the parties, but in a different case. *Id.* at 632. See *The Richmond*, 9 F. 863, 864 (E.D. La. 1881), in which the court stated: "The decisions . . . are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist." In *Carr v. Fife*, 156 U.S. 494 (1895), recusal was held to be discretionary where the judge had served the defendant as an attorney in matters unrelated to the pending case.

93. 88 F. Supp. 1007 (N.D. Me. 1950).

94. Compare the results in *Vasilick* and *Maher* with those in *Roberson v. United States*, 249 F.2d 737 (5th Cir. 1957), *cert. denied*, 356 U.S. 919 (1958) (held insufficient for disqualification that judge had been United States Attorney when one of witnesses in case before him had been prosecuted), and *Rose v. United States*, 295 F. 687 (4th Cir. 1924) (held insufficient for disqualification when judge had no recollection of signing indictments as United States Attorney). In these cases, the involvement of the judge as a United States Attorney had been indirect. Thus, a valid distinction explains the different results in the four cases discussed here.

95. *United States v. Smith*, 337 F.2d 49 (4th Cir. 1964), *cert. denied*, 381 U.S. 916 (1965).

96. *United States v. Hughes*, 325 F.2d 789 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964).

97. 338 F.2d 75 (9th Cir. 1964). See *In re Fox West Coast Theatres*, 25 F. Supp. 250 (S.D. Cal. 1936) (in a regular bankruptcy proceeding, there is no contest, and, thus, relationship to a party would be of little significance).

98. 147 F.2d 514 (2d Cir. 1945).

litigants.<sup>99</sup> In *MacNeil Bros. v. Cohen*<sup>100</sup> the First Circuit agreed with the chief justice of the circuit that he could hear a case in which the dean of a law school where the judge had been a lecturer was involved.<sup>101</sup>

These cases imply that the discretionary powers of the judge under the original section 455 were virtually absolute. The cases also indicate, however, that such power has not been abused; all the cases maintain a reasonable appearance of impartiality. Recusal of judges under the discretionary provision of section 455 was sought for other interests in addition to those stated, however, and the discretion of the judge did not always provide the litigant with as much confidence as the above decisions might have.

In *Hobson v. Hansen*<sup>102</sup> the plaintiffs were contesting the selection of a school board as unconstitutional. They challenged the propriety of the judge's hearing the case on the grounds that he had assisted in the selection of the board in question. The court on appeal upheld the judge's decision that he need not recuse himself if he felt it would be proper for him to preside over the proceedings. This decision, however, overlooks the factor of direct involvement found to be so significant under the mandatory provisions of section 455. Furthermore, in *Coltrane v. Templeton*<sup>103</sup> the court held that a judge who had filed a suit against the defendant in state court possessed discretion whether to recuse himself.<sup>104</sup> The appearance of impartiality in such a case is difficult to uphold. Differences in these two rulings and the other cases discussed under the discretionary provision of section 455 exemplify the internal vagueness of the original section 455, which, along with discrepancies between the statute and section 144, provoked much criticism of the statute.

## II. IMPACT OF THE 1974 AMENDMENTS TO SECTION 455

*Criticism of Section 144 and the Original Section 455.* Several discrepancies in the operation of sections 144 and the original section 455 are apparent from the above discussion of the two statutes. These discrepancies were criticized before the revision of section 455.<sup>105</sup> While it was held that interest was a sufficient ground for disqualification under section 455,<sup>106</sup> prejudice, other than personal, was inadequate to require recusal under section 144.<sup>107</sup> A judge could be held competent to hear a case under section 144 although he had expressed a premature opinion on the merits<sup>108</sup> and yet he could be

99. See *Weiss v. Hunna*, 312 F.2d 711, 714 (2d Cir. 1963), where the judge and litigant shared common membership in certain international legal associations. This was held insufficient to deem recusal necessary. The Tenth Circuit, however, required a judge to disqualify himself in a case where one of the attorneys had acted as the judge's counsel in other pending litigation. The fact that the judge had been a litigant here was an added factor to consider. *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

100. 264 F.2d 186 (1st Cir. 1959).

101. *Id.* at 189.

102. 265 F. Supp. 902 (D.D.C. 1967).

103. 106 F. 370 (4th Cir. 1901).

104. *Id.* at 376.

105. See, e.g., Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78 (1927).

106. See notes 85-89 *supra* and accompanying text.

107. See note 40 *supra* and accompanying text.

108. See notes 58-82 *supra* and accompanying text.

disqualified under section 455 for an interest as small as being a stockholder of a company litigant.<sup>109</sup> The justification for such discrepancies appeared to be the desire to avoid unwarranted attacks and needless delay by narrow application of recusal statutes. "It is hardly an adequate reason [,however,] to reject a . . . rule merely because there may be an abuse."<sup>110</sup> This narrow construction of sections 144 and 455 provided little protection for litigants desiring judicial impartiality and the appearance of impartiality.

As mentioned above, section 455 by itself was justifiably criticized for providing insufficiently detailed and concrete standards to guide judges in their decisions as to disqualification.<sup>111</sup> At its annual meeting in August 1969 the American Bar Association decided to formulate the new Code of Judicial Conduct. This Code, with newly drafted recusal provisions, was suggested as a replacement for section 455.<sup>112</sup> The Code formulation is an imperfect solution for protection of the possible presence of bias because "personal bias or prejudice" is used as a standard. It serves as a better reasoned statute than the original section 455, however, since the guidelines for recusal are more firmly established.

*Statutory Revision.* In December 1974, section 455 was radically modified by the Congress<sup>113</sup> to conform with the provisions of the Code of Judicial Conduct.<sup>114</sup> The revised section 455(a)<sup>115</sup> states that any justice, judge,

109. See note 89 *supra* and accompanying text.

110. Note, *supra* note 105, at 82.

111. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 741 (1973).

112. *Id.* at 745.

113. Pub. L. No. 93-512, § 1, 88 Stat. 1609 (1974).

114. ABA CODE OF JUDICIAL CONDUCT No. 3C(1)(a) (1972). Note, however, a significant difference between the statute and the Code. The Code states:

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
  - (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding

*Id.*, whereas the new § 455 states:

- (a) A judge should disqualify himself in a 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 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;

magistrate, or referee in bankruptcy should disqualify himself in any proceeding in which impartiality might reasonably be questioned. Five other situations are described under section 455(b) in which a judge should disqualify himself: where he has a personal bias or prejudice concerning a party;<sup>116</sup> where in private practice he served as a lawyer in the matter in controversy; where he has served as a government employee as counsel or advisor in the proceeding; where 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, where he or his spouse, or a person within third degree of relationship to either of them, is a party, lawyer, or material witness in the proceeding. Although there can be no waiver of these section 455(b)<sup>117</sup> grounds for a disqualification, waiver may result under section 455(a) in situations in which a judge's impartiality might reasonably be questioned.

The provisions of section 455 as amended are now similar to those contained in section 144. It is not obvious, however, that the procedural requirements of section 144 discussed above must be met in order to perfect an appeal under section 455.<sup>118</sup> The meaning of "interest" and "impartiality" is not apparent. Further, it is not clear whether the requirement of extrajudicial bias or prejudice under section 144 is now applicable to the bias or prejudice provisions under the revised section 455.<sup>119</sup>

*Procedural Requirements of Section 144 Apply to Section 455.* Before 1948 a party alleging bias or prejudice under section 455 was required to file an affidavit to that effect.<sup>120</sup> The 1948 revision<sup>121</sup> of section 455 discarded this requirement. This clearly indicates that the judge should disqualify himself

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(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.

(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.

28 U.S.C. § 455 (Supp. V 1975).

115. *Id.*

116. This is the same language as found in § 144.

117. Under the former § 455 waiver was held to have occurred in several of the situations which are now included in § 455(b). In *Neil v. United States* the plaintiffs had consented to a judge, the former Collector of Internal Revenue, hearing their action to recover federal income taxes. Waiver of any objection on the grounds of "substantial interest" was therefore held to have occurred. 205 F.2d at 125. Waiver was also held to have occurred in *Adams v. United States*, where the defendants' counsel raised no timely objection to the fact that the judge had been the United States Attorney when the defendant was tried for a liquor violation, at which trial the alleged perjury in *Adams* took place. 302 F.2d at 309-10.

118. See notes 13-35 *supra* and accompanying text.

119. See note 40 *supra* and accompanying text.

120. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090 (current version at 28 U.S.C. § 455 (Supp. V 1975)).

121. Act of June 25, 1948, ch. 646, 62 Stat. 908 (current version at 28 U.S.C. § 455 (Supp. V 1975)).



on his own initiative, without the filing of section 144 affidavits. In *United States v. Vasilick*,<sup>122</sup> as in other cases, an appeal based on section 455 alone was allowed where the judge was the district attorney who had signed an indictment against the defendant. A 1974 decision, *Shadid v. Oklahoma City*,<sup>123</sup> found no error in considering the applicability of section 455 disqualification on appeal without affidavits having been filed at the trial level. In *United States v. Seiffert*<sup>124</sup> the Fifth Circuit determined on appeal whether the trial judge should have disqualified himself as "counsel of the case"; this case has been cited as authority to allow an appeal based on section 455 alone in decisions where the substantive arguments for disqualification are grounded in the 1974 amendments. Thus, in *Davis v. Board of School Commissioners*<sup>125</sup> the court found that revised section 455 could be asserted on appeal by itself.<sup>126</sup> It can, therefore, be determined that the revised section 455, just as the 1948 model, does not require filing a section 144 affidavit to be used as a basis for assignment of error on appeal. Such a determination is wise; the judge wishing to disqualify himself, whether or not a party files an affidavit, should obviously be allowed to do so in the interest of justice. Furthermore, section 455 would be totally ineffective as the sole basis of appeal if section 144 requirements had always to be met in order to utilize section 455 during the appellate process.

*Bias or Prejudice Test Under Section 455.* It is not as simple to determine the intended meaning of "impartiality," "financial interest," or "bias or prejudice" under section 455. One helpful guide to the interpretation of "impartiality" is the intent of the ABA in formulating the Code provision from which section 455 is taken. The *Code's* general test for disqualification is whether the judge's impartiality "might reasonably be questioned." Use of the word "might" was intended to indicate that disqualification should follow if the "reasonable man," were he to know "all the circumstances," would harbor doubts about the judge's impartiality.<sup>127</sup> The same intent was noted by the Congress in its adoption of section 455.<sup>128</sup> Congress also apparently intended, as did the ABA,<sup>129</sup> to guarantee not only that a biased

122. See notes 91-92 *supra* and accompanying text.

123. 494 F.2d 1267 (10th Cir. 1974).

124. 501 F.2d 974 (5th Cir. 1975).

125. 517 F.2d 1044 (5th Cir. 1975).

126. *Id.* at 1051 (appeal in *Davis*, however, was based on both §§ 144 and 455). There is evidence that the ABA recommended that § 455 be amended to ensure that applications be filed under time requirements as provided for in § 144. No such suggestion would have been necessary if it had been intended that the procedural requirements of § 144 apply automatically. H.R. Rep. No. 93-1453, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6351, 6358.

In *Ross v. Houston Ind. School Dist.*, Civ. No. 10,444 (S.D. Tex., motion to disqualify denied, June 6, 1977), the HISD asked that United States District Judge Noel disqualify himself from hearing the desegregation case because of incidents involving his own children and the HISD, including the transfer of his sons out of the HISD and into the SBISD near the time of an earlier desegregation order against HISD. In Judge Noel's opinion, in which he refused to disqualify himself, the judge noted that a § 144 affidavit would improperly limit § 455, arguing that under § 144 the judge is limited to review of the facts presented him in said affidavit, whereas under the amended § 455 the judge must consider all the facts and circumstances known to him. Judge Noel subsequently retired from the case before it was disposed of on the merits.

127. *Reporter's Notes to the ABA CODE OF JUDICIAL CONDUCT* 60 (1973).

128. H.R. Rep. No. 93-1453, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6351, 6355. The "abuse of discretion" test, however, continues to be used as a criterion for reversal on appeal. *Id.*

129. *Reporter's Notes to the ABA CODE OF JUDICIAL CONDUCT* 61 (1973).

judge would not participate in a case, but in addition that no reasonable person would suspect as much since the appearance of impartiality is an important goal.<sup>130</sup> There are only a few cases under the former section 455 which seem to provide protection for this appearance of impartiality.<sup>131</sup> These cases are significant since they are likely to influence the application and construction of the new section 455. In *Davis v. Board of School Commissioners* the court underscores the significance of the appearance of impartiality in its recognition of the "reasonable man" test.<sup>132</sup> Such recognition is likely to be contrasted with the section 144 "personal bias or prejudice" test, particularly as that test is expanded in use under the revised recusal statute.

Unlike the above provision of section 455, a case concerning the "financial interest" provision has not yet been reported. The legislative history of section 455, however, implies that the possible presence of bias will be protected here. A judge will be required to disqualify himself, no matter how small the interest involved, if that interest is direct.<sup>133</sup> Such an interpretation is consistent with readings of the earlier statute, and should eliminate any ambiguity as to disqualification which could possibly have existed.<sup>134</sup> Additional support for this interpretation comes from the holding in *Commonwealth Coatings v. Continental Casualty Co.*<sup>135</sup> which suggests that a judge's direct economic or financial interest, even though small, may be inconsistent with due process.

The Fifth Circuit in *Davis* notes the significance of interpretation of "personal bias or prejudice" in section 455.<sup>136</sup> The court finds no suggestion in the legislative history that any meaning other than that of "personal bias or prejudice" in section 144 was intended. It therefore held that revised section 455 focuses on a judge's personal feeling toward a party, and that the feeling must be extrajudicial in nature, as under section 144.<sup>137</sup> The 1975 decision in *Bowling v. Mathews*<sup>138</sup> follows this interpretation. The Fifth Circuit there states: "[The appellant] likewise appeals from the refusal of the district judge to disqualify himself. An examination of his affidavit of disqualification establishes that its asserted grounds are limited to actions of the judge in the case at bar. These will not suffice."<sup>139</sup> Such a view of "personal bias or prejudice" is not consistent with the intent of the ABA, nor with the above interpretation of the term "impartiality." By following section 144 here, the courts only heighten already inadequate protection of a litigant's confidence in the appearance of impartiality.

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130. See H.R. Rep. No. 93-1453, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6351, 6355, where the unpopular "duty to sit" doctrine is discussed.

131. See, e.g., *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); *In re Eatonton Elec. Co.*, 120 F. 1010 (S.D. Ga. 1903).

132. 517 F.2d at 1052.

133. H.R. Rep. No. 93-1453, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6351, 6356.

134. *Id.* at 6352.

135. 393 U.S. 145 (1968).

136. 517 F.2d at 1052.

137. *Id.*

138. 511 F.2d 112 (5th Cir. 1975).

139. *Id.* at 114.

While the "financial interest" and "impartiality" provisions of the revised section 455 appear to protect a litigant not only from actual bias, but from the mere possibility of bias as well, the term "personal bias or prejudice" as interpreted by the courts offers no such protection. Thus, the revision of section 455 has not resolved ambiguity within the statute, nor does it assure litigants of a fair trial under a judge in whom they have confidence. Such assurance should be made either by interpreting "personal bias or prejudice" broadly or, preferably, by the use of a balancing test to determine the judge's impartiality. Factors to be weighed should include the interests of the judge, the interests of other litigants in the case, the interests of society as a whole, and the concern of the affiant in a trial by an impartial judge.

### III. CONCLUSION

The revision of section 455 solves problems of internal ambiguity and discrepancy between section 144 and section 455. The personal bias or prejudice test is now applied identically under both statutes. Although this application under the two statutes provides uniformity, it increases the effect of the ambiguity of the phrase "personal bias or prejudice." The courts should reconsider the present interpretation of the phrase in the light of the need not only to provide impartiality, but also the *appearance* of impartiality.