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# JUDICIAL BIAS AND FINANCIAL INTEREST AS GROUNDS FOR DISQUALIFICATION OF FEDERAL JUDGES

*Seth E. Bloom\**

*Federal judges may be disqualified if they are biased against or in favor of the parties before them or if they have a financial interest in the case being heard. The author examines the statutory framework for disqualification and analyzes the courts' approach to enforcing these statutes. He concludes that the courts have taken an overly rigid approach—confining judicial bias disqualification to cases of personal bias but requiring disqualification for remote and insubstantial financial interests in a party to the case. He proposes more flexible standards that would allow disqualification based on the appearance of bias even though a judge is not prejudiced against or in favor of a party and that would allow waiver of disqualification for financial interests if the parties believe that those interests do not affect the judge's impartiality.*

## INTRODUCTION

ONE OF THE most fundamental and self-evident principles of any fair system of justice is that judges must be neutral and impartial. In the United States, the Constitution requires that a "neutral and detached judge" preside over judicial proceedings.<sup>1</sup> Not surprisingly, determining when a judge is truly impartial and the circumstances under which disqualification<sup>2</sup> is required often have

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1. *Ward v. Village of Monroe*, 409 U.S. 57, 62 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955).

2. At the outset, it should be noted that the term "recusal" has a technical definition different than that of "disqualification." "Disqualification" refers to statutorily mandated removal of a judge, while "recusal" refers to a judge's voluntarily standing down on his own initiative. Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978). This distinction is of little importance today because "[u]nder current statutes, disqualification is mandated in virtually all cases where recusal is appropri-

been difficult.

This Article focuses on two important topics in modern federal judicial disqualification law: judicial bias, especially situations where a judge has formed an opinion about a legal issue in dispute or the subject matter of a case before hearing it, and disqualification for financial interest in the litigation. These subjects reflect a fundamental tension inherent in judicial disqualification law: the conflict between the basic due process mandate of an impartial judiciary and the need for efficient administration of justice and conservation of judicial resources. Current law is deficient because its rigid approach frequently fails to accommodate these sometimes incompatible interests.

This Article first summarizes modern federal judicial disqualification standards.<sup>3</sup> It then analyzes the current approaches to judicial bias and financial interest, sets forth deficiencies of these approaches, and suggests reforms.<sup>4</sup>

## I. MODERN FEDERAL JUDICIAL DISQUALIFICATION LAW

### A. *The Purposes of Judicial Disqualification*

The Supreme Court has found that the Constitution's due process guarantee<sup>5</sup> requires that an impartial and detached judge preside over judicial proceedings.<sup>6</sup> While an obvious goal of judicial disqualification law is to ensure that fair and impartial judges hear every case, this body of law serves an even more fundamental purpose: that of maintaining public confidence in the integrity of the judicial system. Public confidence is essential to effective functioning of the judiciary because, "possessed of neither the purse nor the sword," the judiciary depends primarily on the willingness of members of society to follow its mandates.<sup>7</sup> The judiciary could not

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ate." *Id.* In addition, "judge" is used to refer to both federal judges and Justices of the Supreme Court, unless otherwise indicated.

3. See *infra* notes 5-112 and accompanying text.

4. For the judicial bias discussion, see *infra* notes 113-208 and accompanying text; for the financial interest discussion, see *infra* notes 209-52 and accompanying text.

5. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

6. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); see also *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

7. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970) (quoting *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting)).

function as a viable institution in a democracy if the public lost faith in the impartiality and integrity of its judges.

Despite the importance of an impartial judiciary, there are strong countervailing reasons for limiting disqualification of judges. First, if the standards for disqualification are too easily met, "the increasing frequency of disqualification . . . might arguably tend to undermine public confidence in the judiciary by disparaging the general impartiality of judges."<sup>8</sup> A second and more important reason is that excessive disqualification would seriously damage the efficient administration of justice. If a judge is disqualified after the litigation is well along, the costs of delay and waste of judicial resources may be very high. These costs are especially apparent in lengthy and complex civil litigation, where disqualification may result in the loss of a judge who is thoroughly familiar with the complicated factual details of a case or who has become expert in a highly technical field. Motions to disqualify are often made a considerable time after the case is assigned to a judge because it is not until then that the parties learn of possible bias or a conflict of interest.<sup>9</sup> Moreover, if an appellate court rules that the trial judge should have recused himself, the time and expense of the entire original proceeding have been wasted.

A third concern is avoidance of "judge shopping." If disqualification is easily achieved, litigants may attempt to manipulate the procedure to their advantage. That is, they may seek to disqualify one judge so the case will be heard by a judge they believe is more favorable to their side. This practice also would erode public confidence in the judiciary.

Finally, if an overly strict disqualification standard were applied at the Supreme Court level, it could result in vitally important legal issues not being decided. Six Justices are needed for a quorum in the Supreme Court<sup>10</sup> and substitute Justices are not available. In most circumstances where a quorum does not exist, the Court must affirm the judgment below "with the same effect as upon affirmance by an equally divided court,"<sup>11</sup> that is, the affirmance has no prece-

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8. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 747 (1973).

9. *E.g.*, *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir.) (request for disqualification based on judge's wife's small ownership interest in a party not made until five years after trial judge assigned to case), *aff'd mem. sub nom.* *Arizona v. United States Dist. Court*, 459 U.S. 1191 (1982).

10. 28 U.S.C. § 1 (1982).

11. *Id.* This is true except for the unusual case of a direct appeal from a district court. In a direct appeal, the statute provides that the case may be remitted to the court of appeals

dential value. The only other option is for a majority of qualified Justices to vote to hear the case at the next term.<sup>12</sup>

In summary, disqualification law must avoid excessive removal of judges, which may do serious harm to public confidence and judicial efficiency and promote judge shopping. These considerations conflict with the goal of achieving complete judicial impartiality. Therefore, a compromise between concerns is necessary. The disqualification statutes need to be examined to determine if they strike a proper balance.

### B. *The Federal Statutory Scheme*

Even though impartial judges are constitutionally required,<sup>13</sup> disqualification determinations very rarely are made on constitutional grounds. The Supreme Court has held that "most matters relating to judicial disqualification [do] not rise to a constitutional level."<sup>14</sup> Instead, several statutory provisions and the case law interpreting them provide the basis for federal disqualification law.

There are three main provisions. The first, section 47, states a narrow and simple prohibition: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."<sup>15</sup> The second, section 144, provides a procedure for litigants to seek dis-

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in the circuit in which the district court sat. The decision of that court of appeals is final. *Id.* A leading commentator discussed the conflicting policies implicated, particularly at the Supreme Court level:

All courts want justice done, but the conflict of values comes over method; if disqualification of judges is too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly but unfairly. Nowhere is that conflict of values more glaring than in the United States Supreme Court, where the cases are usually important. If a justice sits who should not, great interests may be jeopardized; but if a justice disqualifies who should not, vital questions may be needlessly left without authoritative decision. For under existing law, there is no procedure for replacing a disqualified justice of the Supreme Court even when his non-participation deprives the litigants of the statutory quorum necessary for decision.

Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 608-09 (1947).

12. 28 U.S.C. § 2109 (1982).

13. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.").

14. *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *accord Tumey*, 273 U.S. at 523.

15. 28 U.S.C. § 47 (1982). The phrase "case or issue" has been construed to mean "a final Order of the lower court which may be appealed to a higher court." *United States v. Garramone*, 374 F. Supp. 256, 258 (E.D. Pa. 1974). *Cf. Swann v. Charlotte-Mecklenburg Board of Educ.*, 431 F.2d 135, 136 (4th Cir. 1970) (disqualification arises when judge has tried or heard any question which the appeals court will consider). *See generally* 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3545, at 595-97 (1984) [hereinafter cited as WRIGHT & MILLER] (judge disqualified to sit on the court of

qualification by filing an affidavit stating the trial judge is "personally biased" against or in favor of a party.<sup>16</sup> Finally, section 455 delineates the situations requiring self-imposed disqualification by a federal judge.<sup>17</sup> The latter two statutes warrant separate discussion.

### 1. *Section 144*

Section 144 provides a procedure for disqualifying federal district court judges<sup>18</sup> because of personal bias or prejudice. This statute was first enacted in 1911 and remains relatively unchanged. The section's language could be interpreted to provide for peremptory and automatic removal of judges on a party's motion. It states:

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.<sup>19</sup>

The legislative history of section 144 lends support to an automatic removal interpretation.<sup>20</sup> However, the courts consistently construe the statute narrowly, which makes disqualification difficult. This narrow interpretation draws from the arguments that it protects the judiciary from "frivolous attacks upon its dignity and integrity," it prevents abuse of the disqualification laws, and it en-

appeals if he has heard the whole case or a particular issue, but he may sit on appeal for issues other than those on which he has ruled).

16. 28 U.S.C. § 144 (1982).

17. *Id.* § 455.

18. By its terms, § 144 applies only to district court judges. *See id.* § 144 (providing procedure for seeking removal of judges in "any proceeding in a district court"); *see also* *Millslagle v. Olson*, 128 F.2d 1015 (8th Cir. 1942) (holding § 144 inapplicable to circuit courts of appeal). In contrast, § 455 applies to all federal judges. *See infra* note 49.

19. 28 U.S.C. § 144 (1982).

20. When the House of Representatives was considering the legislation, Representative Cullop of Indiana was asked whether the statute would allow district court judges discretion to determine the sufficiency of affidavits of bias. He answered:

Mr. Cullop: No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

Mr. Cox of Indiana: [S]uppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

Mr. Cullop: No; it expressly provides that the judge shall proceed no further.

46 CONG. REC. 2627 (1911). "An automatic disqualification process apparently was the goal of Congress in enacting the original recusal legislation." Note, *Caesar's Wife Revisited: Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1216 (1977).

tures "orderly functioning of the judicial system."<sup>21</sup>

Disqualification under section 144 is not initiated by the judge. Instead, the party alleging bias must file an affidavit with the challenged judge stating "the facts and the reasons for the belief that bias or prejudice exists."<sup>22</sup> Judges examining a section 144 affidavit are precluded from evaluating the truth or falsity of the facts alleged but instead must accept all of them as true.<sup>23</sup> However, since the 1921 Supreme Court ruling in *Berger v. United States*,<sup>24</sup> it has been well settled that a judge is *not* automatically disqualified by the allegations of bias in the affidavit even though they are presumed to be true.<sup>25</sup> The judge first must determine if the allegations are "legally sufficient" to prove bias. If so, then he is disqualified. The Court in *Berger* held that to be legally sufficient, the affidavit "must give *fair support* to the charge of a bent of mind [on the part of the judge] that may prevent or impede impartiality of judgment."<sup>26</sup> The Court believed that automatic disqualification had too much potential for abuse and could lead to judge shopping.<sup>27</sup> The obligation to consider the legal sufficiency of the allegations of bias thus makes disqualification under section 144 far from automatic. Moreover, requiring the allegations to be legally sufficient renders the prohibition against the judge's examining their truth much less important.

The judiciary's strict construction of the affidavit requirement limits the scope of disqualification under section 144. A party seeking to remove a judge bears a heavy burden, because the affidavit "is strictly construed against the party seeking disqualification."<sup>28</sup> To

21. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. KAN. L. REV. 255, 256 (1982).

22. 28 U.S.C. § 144 (1982).

23. See, e.g., *Berger v. United States*, 255 U.S. 22, 36 (1921); *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1983); *Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344, 1348 (2d Cir. 1971). The statute requires that a § 144 affidavit "be accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. § 144 (1982). The purpose of this certificate is to prevent abuse of the affidavit and to discourage false accusations in it. *United States v. Hanrahan*, 248 F. Supp. 471, 475 (D.D.C. 1965). It is assumed that in filing the affidavit, an attorney will not recklessly disregard the truth. *Morrison v. United States*, 432 F.2d 1227, 1229 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971).

24. 255 U.S. 22 (1921) (interpreting § 21 of the Judicial Code, predecessor to § 144).

25. See, e.g., *Resident Advisory Bd. v. Rizzo*, 510 F. Supp. 793, 796 (E.D. Pa. 1981).

26. 255 U.S. at 33-34 (emphasis added).

27. *Id.* at 33.

28. 13A WRIGHT & MILLER, *supra* note 15, § 3551, at 631-33; see *Beland v. United States*, 117 F.2d 958, 960 (5th Cir.), *cert. denied*, 313 U.S. 585 (1941). For a discussion of the standard of proof required under § 144, see *infra* notes 44-46 and accompanying text.

be legally sufficient, the affidavit must contain specific facts and circumstances demonstrating bias.<sup>29</sup> Mere allegations, rumors, gossip, or suppositions are not sufficient.<sup>30</sup> The policy of not allowing the affiant's conclusions, inferences, or speculations conclusively to demonstrate bias further undermines the admonition that the court accept the affidavit as true.<sup>31</sup>

Section 144 requires disqualification only if the affidavit shows that the judge has "personal bias or prejudice" toward a party.<sup>32</sup> Courts have developed a considerable jurisprudence as to what constitutes personal bias. They have placed great emphasis on the fact that the statute does not provide for disqualification on the basis of general or judicial bias.<sup>33</sup> Personal bias usually refers to bias in favor of or against a specific party, in contrast to judicial bias, which refers to prejudgment of the legal issues or the merits. According to the Supreme Court, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."<sup>34</sup> In application, the extrajudicial source rule has led to decisions that prior rulings in the case that are adverse to the moving party do not constitute personal

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29. *United States v. Azhocar*, 581 F.2d 735, 739-40 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

30. *United States v. Sibra*, 624 F.2d 864, 868 (9th Cir. 1980); *United States v. Halde- man*, 559 F.2d 31, 134 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

31. *United States v. Platschorn*, 488 F. Supp. 1367, 1368-69 (S.D. Fla. 1980); *see* Com- ment, *Disqualification of Federal Judges: Statutory Right to Recusal and the 1974 Amend- ments to Title 28*, 31 Sw. L.J. 887, 889 (1977). The statute also provides that a party may file only one § 144 affidavit in any one case. 28 U.S.C. § 144.

32. 28 U.S.C. § 144.

33. It is beyond the scope of this Article to explore the judicial definitions of "personal bias or prejudice" in great detail. For thorough analyses of the interpretations, *see* Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966); Note, *Disqualification of a Federal District Judge—The Standard Under Section 144*, 57 MINN. L. REV. 749 (1973); Comment, *supra* note 31; Comment, *supra* note 2.

34. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). An early leading case discussed the notion of personal bias. "'Personal' is in contrast with judicial; it characterizes an attitude of extrajudicial origin, derived *nom coram iudice*. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute." *Craven v. United States*, 22 F.2d 605, 607-08 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928). There is an exception to the rule that, to mandate disqualification, bias must stem from an extrajudicial source. That is when the judicial conduct shows "pervasive bias." *Whitehurst v. Wright*, 592 F.2d 834 (5th Cir. 1979). However, this exception is rarely applied. In *Whitehurst*, a relative of a person shot by a policeman sued the officer. The trial judge said in a pretrial hearing that "it bothers me a great deal that people get sued for doing their duty." The court of appeals held that this statement did not show pervasive bias and thus the trial judge was not disqualified. *Id.* at 838 n.5.



bias.<sup>35</sup> Nor is an opinion on the merits of a case that a judge acquires from the evidence considered to be personal bias.<sup>36</sup> Furthermore, a judge's past exposure to a current party generally is not considered grounds for disqualification.<sup>37</sup>

Most courts will not disqualify a judge because of statements made during the proceedings that are adverse to a party or attorney, or favorable to the other side.<sup>38</sup> This is consistent with the requirement that only extrajudicial conduct can show personal bias. The rule does not prohibit examination of any courtroom activity.<sup>39</sup> The Second Circuit Court of Appeals has said that "[c]omments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice."<sup>40</sup>

Courts rarely find personal bias in allegations that a judge has predetermined the merits of a case or previously formed an opinion on issues currently before the court.<sup>41</sup> Courts also refuse to accept a judge's background or associations as grounds for finding personal bias.<sup>42</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 his background and associations."<sup>43</sup>

The amount of evidence necessary to prove bias under section 144 is determined under a "bias-in-fact" standard. "The allegations must be sufficient to support a conclusion that bias *actually ex-*

35. *In re IBM Corp.*, 618 F.2d 923 (2d Cir. 1980); *Johnson v. Trueblood*, 629 F.2d 287 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

36. *Grinnell*, 384 U.S. at 583; 13A WRIGHT & MILLER, *supra* note 15, § 3542 at 559-60.

37. *Barry v. Sigler*, 373 F.2d 835 (8th Cir. 1967).

38. *See, e.g., Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 825 (5th Cir. 1969); 13A WRIGHT & MILLER, *supra* note 15, § 3542, at 573.

39. *See* 13A WRIGHT & MILLER, *supra* note 15, § 3542, at 573-75 ("However the rule that bias to be disqualifying must be extrajudicial in origin does not mean that nothing that happens in the courtroom is relevant. The judge's behavior during the trial may demonstrate the existence of a personal basis.").

40. *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968).

41. *E.g., Henry v. Speer*, 201 F. 869, 872 (5th Cir. 1913). *See also* 13A WRIGHT & MILLER, *supra* note 15, § 3542, at 568 ("Disqualification is not required because the judge has definitive views as to the law of a particular case.").

42. *E.g., Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.); *State of Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981) (legal philosophy of judge insufficient to disqualify if no other factors present); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (being female and having worked with blacks not disqualifying in civil rights case); *Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974) (background of judge insufficient to require recusal if no other factors indicate prejudice to a party), *aff'd*, 478 F.2d 1398 (3d Cir.), *cert. denied*, 421 U.S. 999 (1975). *See infra* notes 113-208 and accompanying text for a discussion of the issues of personal background and legal philosophy.

43. Comment, *supra* note 31, at 891.

ists."<sup>44</sup> The Fifth Circuit Court of Appeals has stated that this requires the moving party to show that "the facts be such, their truth being assumed, as would convince a reasonable man that bias exists."<sup>45</sup> The Third Circuit has incorporated this bias-in-fact standard into its three-part test for disqualifying a judge under section 144.<sup>46</sup>

In summary, disqualification under section 144 places a great burden on the party seeking to remove a judge. The affiant must allege specific facts showing bias, must prove those facts amount to personal bias, and must show the facts are sufficient to convince a reasonable person that bias actually exists. This is difficult to accomplish, especially when the affidavit is construed against the party seeking disqualification.<sup>47</sup> A different and much broader approach to disqualification is taken under section 455.

## 2. Section 455

Section 455 states the circumstances under which all federal judges must disqualify themselves.<sup>48</sup> Unlike section 144, it is not

44. *Freeman*, 507 F. Supp. at 723 (emphasis added). One commentator has stated that to satisfy his burden of proof under § 144, "the party must allege that the judge *has* the bias and must present facts and reasons for a belief that bias *exists*." Comment, *supra* note 2, at 243.

45. *Parrish v. Board of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975) (en banc) (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir. 1973)), *cert. denied*, 425 U.S. 944 (1976).

46. The affiant has the burden of showing three elements:

1. The facts must be material and state particularity;
2. The facts must be such that, if true they would convince a reasonable man that a bias exists;
3. The facts must show the bias is personal, as opposed to judicial, in nature.

*Thompson*, 483 F.2d at 528 (footnote omitted).

47. See *supra* note 28 and accompanying text.

48. 28 U.S.C. § 455 (1982). Section 455 provides:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or 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;

restricted to cases of personal bias or prejudice. The present section 455, as rewritten in 1974, is mandatory; if any of the specified circumstances are present, the judge must recuse himself.<sup>49</sup> In contrast to section 144, the statute is self-enforcing. No motion or affidavit need be filed by a party, but rather the judge must recuse himself *sua sponte* whenever any of the circumstances listed in section 455 are present.

Prior to 1974, section 455 was quite different. It required a federal judge to disqualify himself only in certain specified situations in which he had a "substantial interest" in the outcome of a case or if, "in his opinion," he was so related to a party or attorney that his

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

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

- (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
- (2) the degree of relationship is calculated according to the civil law system;
- (3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
- (4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

- (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
- (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
- (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
- (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate 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.

49. Under certain circumstances, the parties may agree to waive the judge's disqualification. 28 U.S.C. § 455(e) (1982); see *infra* notes 109-11 and accompanying text. Unlike § 144, which applies only to district court judges, § 455 applies to all federal judges and justices. See *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980); 13A WRIGHT & MILLER, *supra* note 15, § 3551, at 630.

participation was rendered improper.<sup>50</sup> The pre-1974 statute was widely criticized,<sup>51</sup> in part because the requirement of "substantial interest" was ill-defined.<sup>52</sup> In addition, several prominent cases of questionable judicial ethics had been widely reported in the late 1960's and early 1970's.<sup>53</sup> The Watergate scandal also brought demands for improved ethical standards in government.

In an effort to "broaden and clarify the grounds for judicial disqualification,"<sup>54</sup> Congress in 1974 adopted the American Bar Association's Code of Judicial Conduct, Canon 3C, which governed judicial disqualification.<sup>55</sup> Congress made few changes in codifying Canon 3C as section 455.<sup>56</sup> One of the main purposes of the new section 455 was to make the statute conform to the Code of Judicial Conduct and thus eliminate the "dual standards, statutory and ethical [that] . . . had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril."<sup>57</sup>

The current section 455 is divided into two parts. Section

50. Section 455 prior to the 1974 revision stated:

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

28 U.S.C. § 455 (1970) (amended 1974).

51. See Note, *supra* note 8, at 736-37; Comment, *supra* note 2, at 238-39.

52. The committee report accompanying the bill amending § 455 stated that the standards under the previous statute were generally "indefinite and ambiguous." H.R. REP. NO. 1453, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6351, 6352.

53. See cases collected in Note, *supra* note 8. For example, Justice Fortas resigned from the Supreme Court in 1969 because of a scandal involving allegations that he received improper extrajudicial compensation. *Id.* at 736 n.1. Also, the Senate's rejection of the nomination of Clement Haynesworth as the replacement for Justice Fortas was based partially on the belief that Judge Haynesworth should have recused himself in several cases involving potential conflicts of interest. *Id.* at 736 n.2. In one case, *Brunswick Corp. v. Long*, 392 F.2d 337 (4th Cir.), cert. denied, 391 U.S. 966 (1968), Judge Haynesworth was alleged to have joined in an opinion even though he owned \$16,000 worth of stock in the prevailing corporation. Another controversy surrounded Justice Rehnquist's refusal to recuse himself in *Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.). See *infra* notes 89-91 and accompanying text; see also Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973) (concluding that Justice Rehnquist did not violate § 455, but that his participation was inconsistent with the goal of an impartial judiciary).

54. H.R. REP. NO. 1453, *supra* note 52, at 6351.

55. CODE OF JUDICIAL CONDUCT Canon 3 (1980). The Judicial Conference of the United States already had adopted Canon 3C. See 69 F.R.D. 273, 277 (1975).

56. One significant change from the Code was to make clear that disqualification under section 455 was to be *mandatory*. The statute accomplished this by stating that a judge "shall disqualify himself" under the circumstances listed. 28 U.S.C. § 455 (1982) (emphasis added). Canon 3C, however, states that a judge "should disqualify himself" in the same situations. CODE OF JUDICIAL CONDUCT Canon 3 (1980) (emphasis added).

57. H.R. REP. NO. 1453, *supra* note 52, at 6351-52.

455(a) states the general disqualification standard. It provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>58</sup> Subsection (b) then enumerates specific circumstances in which a judge must recuse himself.<sup>59</sup>

According to the legislative history, the general language of section 455(a) was intended to replace the subjective standard of the pre-1974 statute with a purely *objective* test.<sup>60</sup> Previously, a judge was required to recuse himself if he had a substantial interest in the case or "in his opinion" it was improper for him to hear the case.<sup>61</sup> The new standard was "designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."<sup>62</sup> Heeding this legislative history, the courts generally have adopted an objective standard in deciding whether recusal is required under section 455(a).<sup>63</sup>

The amended section 455 made another important change in the law by removing the "duty-to-sit" rule. The prior rule was that a judge had a duty to hear a case if the alleged statutory grounds for disqualification, including bias, had not been proven.<sup>64</sup> By providing that a judge would be automatically disqualified whenever his "impartiality might reasonably be questioned," the amendments effectively removed the duty-to-sit concept.<sup>65</sup>

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58. 28 U.S.C. § 455(a) (1982).

59. *Id.* § 455(b).

60. H.R. REP. NO. 1453, *supra* note 52, at 6354-55.

61. *See supra* note 50.

62. H.R. REP. NO. 1453, *supra* note 52, at 6355.

63. As the Sixth Circuit Court of Appeals explained, "[t]he standard to be applied under section 455(a) is an objective one: whether the reasonable person, knowing all of the surrounding circumstances, would consider the judge to be impartial." *United States v. Norton*, 700 F.2d 1072, 1075 (6th Cir.), *cert. denied*, 461 U.S. 910 (1983).

64. *See, e.g., In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961) (there is as much obligation upon a judge not to recuse himself when there is no reason, as there is for him to do so when there is a reason), *cert. denied*, 368 U.S. 927 (1962); 13A WRIGHT & MILLER, *supra* note 15, § 3549, at 609.

65. The report concluded that this provision removed the duty to sit concept. *See* H.R. REP. NO. 1453, *supra* note 52, at 6355. Most courts have agreed that the duty to sit was abolished by the 1974 statute. *See, e.g., United States v. Wolfson*, 558 F.2d 59, 63 (2d Cir. 1977) (new rule designed to give more flexibility); *United States v. Haldeman*, 559 F.2d 31, 139 n.360 (D.C. Cir. 1976) (purpose of new rule was to eliminate duty to sit), *cert. denied*, 431 U.S. 944 (1977); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (the new language was intended to overrule the duty to sit decisions). Some courts, however, still attempt to articulate a limited version of the duty. *See, e.g., Simonson v. General Motors Corp.*, 425 F. Supp. 574, 579 (E.D. Pa. 1976) (recusal and reassignment is not to be taken

One of the most important questions faced by the courts after the 1974 amendments was the amount of evidence necessary to show that the judge's impartiality might reasonably be questioned. The traditional rule in reviewing allegations of bias under section 144 was the bias-in-fact standard—the allegations had to be sufficient to show that bias actually existed.<sup>66</sup> However, the broad language of section 455(a) suggests a different test that is easier to satisfy. Section 455(a) calls for an appearance-of-bias standard, requiring only that the allegations support a reasonable suspicion of bias.<sup>67</sup>

The drafters of Canon 3C of the Code of Judicial Conduct clearly intended such an appearance-of-bias standard. The Reporter's Notes to the Code state that "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."<sup>68</sup> Further, the Notes indicate that disqualification would be required if "participation by the judge in the proceeding . . . creates the appearance of a lack of impartiality."<sup>69</sup> The legislative history of the 1974 amendments also supports the use of an appearance-of-bias standard.<sup>70</sup>

Given this background, the courts generally have applied an appearance-of-bias test under section 455(a). The Fourth Circuit Court of Appeals has stated that "the question is not whether the judge is impartial in fact" but whether a reasonable person might doubt the judge's impartiality on the basis of all the circumstances.<sup>71</sup> This standard makes disqualification more likely than

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lightly; there is an obligation not to recuse oneself absent a valid reason for recusal); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497, 526-27 (D.S.C. 1975) (the duty to sit obligation is still present when the duty is "especially strong" as where disqualification was requested only after the judge had acquired thorough knowledge in the case); *Lazofsky v. Sommerset Bus Co.*, 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975) (new test should not be used by judges to avoid sitting on difficult or controversial cases).

66. See *supra* note 44 and accompanying text; see also Comment, *supra* note 2, at 242-43 and cases cited at 242-43 n.37.

67. Under § 455(a), of course, a judge is not limited to considering the facts alleged on any affidavit—no affidavit is necessary—but may consider *all* the facts and circumstances. See 28 U.S.C. § 455(a) (1982); *infra* notes 68-71 and accompanying text.

68. E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60 (1973) (quoting 28 U.S.C. § 455(a)).

69. *Id.* at 61.

70. See H.R. REP. NO. 1453, *supra* note 52, at 6354-55.

71. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *accord* *United States v. Ritter*, 540 F.2d 459, 461-62 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976); *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir.), *cert. denied*, 430 U.S. 909 (1976).

the bias-in-fact test,<sup>72</sup> and therefore is consistent with one of the main purposes of the 1974 amendments—to broaden the grounds for judicial disqualification.<sup>73</sup>

Nevertheless, not all courts agree that the appearance-of-bias standard is proper. Both the Fifth<sup>74</sup> and the Ninth Circuits<sup>75</sup> employ the more difficult to satisfy bias-in-fact test in all cases in which the judge's impartiality is questioned, whether under section 455 or section 144. This view is based on subsection (b)(1) of section 455, which provides that a judge must recuse himself when he has "personal bias or prejudice."<sup>76</sup> The Ninth Circuit interprets section 455(b)(1) as "simply provid[ing] a specific example of a situation in which a judge's 'impartiality might reasonably be questioned' pursuant to section 455(a)."<sup>77</sup> Therefore, the court reasons, "it would be incorrect as a matter of statutory construction to interpret section 455(a) as setting up a different test for disqualification for bias or prejudice from that in section 455(b)(1)."<sup>78</sup> Since section 455(b)(1) uses the same language as section 144, the court has concluded that the section 144 bias-in-fact standard must apply to section 455(b)(1) and therefore to section 455(a).<sup>79</sup>

This approach has been sharply criticized<sup>80</sup> and seems incorrect. First, it directly contradicts the language of section 455(a) and its legislative history. The committee report explicitly states that section 455(a) was intended not only to broaden the grounds for disqualification, but to establish grounds for disqualification distinct from those in subsection (b).<sup>81</sup> Second, in order to find that section 455(a) and section 144 demand the same standard, the statutes must

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72. For example, consider a situation where the judge's former law firm is representing the plaintiff before the judge but the firm was not involved with the case or the client while the judge was affiliated with the firm. It would be difficult to show that the judge *actually had* bias in favor of the plaintiff. However, a reasonable person might doubt the judge's ability to remain impartial. In this situation, disqualification would be required only if the appearance-of-bias standard was applied.

73. H.R. REP. NO. 1453, *supra* note 52, at 6351.

74. *E.g.*, *Parrish v. Board of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (en banc).

75. *E.g.*, *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980); *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978) (en banc).

76. 28 U.S.C. § 455(b)(1) (1982).

77. *Sibla*, 624 F.2d at 867.

78. *Olander*, 584 F.2d at 882.

79. *Id.*

80. *See, e.g.*, Comment, *supra* note 2, at 248-49.

81. H.R. REP. NO. 1453, *supra* note 52, at 6355.

be construed *in pari materia*.<sup>82</sup> Such a statutory analysis is inappropriate since the statutes—one enacted in 1911 and the other amended in 1974—can hardly be considered companion legislation that should be read together.<sup>83</sup>

Employment of the more stringent appearance-of-bias standard, as the statute and legislative history apparently demand, renders the bias-in-fact test of section 144 nearly irrelevant. Section 455(a) applies to all cases of bias and its stricter standard of disqualification necessarily prevails. Of course, a party can disqualify a judge by proving bias actually exists under section 144. However, if a party cannot meet the section 144 test, but can demonstrate a reasonable appearance of lack of impartiality, the judge will be disqualified under section 455(a).<sup>84</sup>

Section 455(b) lists specific circumstances under which the judge must disqualify himself. Subsection (b)(1) states that a judge shall disqualify himself if "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>85</sup> Since it uses the "personal bias or prejudice" language, the subsection uniformly has been held to be governed by the judicial definition of personal bias developed under section 144.<sup>86</sup> Prior personal knowledge of disputed evidentiary facts also is a ground for disqualification under subsection (b)(1) because such knowledge reduces "the judge's ability to be impartial."<sup>87</sup>

Subsection (b)(2) requires recusal if the judge had served in private practice as a lawyer "in the matter," was associated with another lawyer who had worked on the matter, or was a material witness concerning it.<sup>88</sup> Subsection (b)(3) disqualifies a judge if, while in prior governmental employment, the judge participated as counsel, advisor, or material witness in the matter, or "expressed an

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82. The Fifth Circuit does so explicitly. *Davis*, 517 F.2d at 1052. The Ninth Circuit has done so implicitly, as indicated by its decisions. See *supra* note 75 and accompanying text.

83. As one commentator concluded, "reading the two sections *in pari materia* violates the usual rules of statutory construction. Section 144 was enacted in 1911 and section 455(a) was amended in 1974, thus there can be no argument that the sections were pieces of companion legislation and thus should be read together." Hjelmfelt, *supra* note 21, at 262.

84. Presumably in every case where bias actually exists, there is an appearance of bias, but not vice versa.

85. 28 U.S.C. § 455(b)(1) (1982).

86. 13A WRIGHT & MILLER, *supra* note 15, § 3542, at 555-56; see, e.g., *Sibla*, 624 F.2d at 867; *United States v. IBM*, 475 F. Supp. 1372, 1389 (S.D.N.Y. 1979).

87. 13A WRIGHT & MILLER, *supra* note 15, § 3543, at 584; E. THODE, *supra* note 68, at 62.

88. 28 U.S.C. § 455(b)(2) (1982).



opinion" on the merits of the case.<sup>89</sup>

The issue of previous government service drew widespread public attention in the early 1970's when Justice Rehnquist refused to recuse himself in *Laird v. Tatum*.<sup>90</sup> Prior to his appointment to the Supreme Court, Rehnquist had worked for the Justice Department. During that time, he appeared before a Senate committee and expressed opinions about an issue to be decided in *Laird*: the statutory and constitutional authority of the executive branch to engage in the gathering of secret information. He briefly mentioned *Laird v. Tatum*, then before a court of appeals, in his testimony, but did not address its merits. Despite this activity, Justice Rehnquist decided that he was not disqualified because he never participated in any way in the Justice Department's conduct of the case.<sup>91</sup> The writers of the leading treatise on federal civil procedure contend that "this rather imprecise rule [non-disqualification unless the official actively participated in the case before becoming a judge] appears to be consistent with the [amended] statute."<sup>92</sup>

Section 455(b)(4) disqualifies a judge if he knows that he, his spouse, or minor children living with him has a "financial interest in the subject matter in controversy or in a party to the proceeding."<sup>93</sup> The statute defines "financial interest" as "ownership of a legal or equitable interest, *however small*."<sup>94</sup> The courts have scrupulously followed the statutory definition. If a judge or member of his immediate family has *any* direct financial interest, no matter how small, in a party, the judge must disqualify himself. As one court stated, "[R]ecusal would be required if the judge owned even one share of

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89. *Id.* § 455(b)(3). With respect to expressing opinions, the subsection does not require recusal "because of opinions on general propositions of law but only those that go to the merit or lack of merit of a specific case." 13A WRIGHT & MILLER, *supra* note 15, § 3544, at 588.

90. 409 U.S. 824 (1972) (memorandum of Rehnquist, J.). See *infra* notes 115-21 and accompanying text.

91. *Laird*, 409 U.S. at 828 (memorandum of Rehnquist, J.). In his opinion, Justice Rehnquist relied on a memo prepared by the Office of the Legislative Counsel of the Justice Department, which stated that a former Justice Department official was not disqualified from hearing a case as a judge unless he "actively participated in [the] case or signed a pleading or brief." *Id.*

92. 13A WRIGHT & MILLER, *supra* note 15, § 3544, at 589-90.

93. 28 U.S.C. § 455(b)(4) (1982). Thus, if a judge or a member of his immediate family has any direct financial interest in the case, the judge must recuse himself. 13A WRIGHT & MILLER, *supra* note 15, § 3546, at 600-01; *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1308 (9th Cir. 1982) (judge recused himself because his wife's stock ownership constituted a financial interest in a party within § 455(b)(4)), *aff'd mem. sub nom. Arizona v. United States Dist. Court*, 459 U.S. 1191 (1982).

94. 28 U.S.C. § 455(d)(4) (1982) (emphasis added).

stock in a party to the litigation.”<sup>95</sup> This rigid per se rule is a sweeping change from the pre-1974 statute, which required a judge to disqualify himself only if his financial interest was “substantial.”<sup>96</sup>

Subsection (b)(4) also provides that a judge is disqualified if he has “any other interest that could be substantially affected by the outcome of the proceeding.”<sup>97</sup> Nonfinancial interests—that is, any interest other than an ownership interest—in a case or party thus are disqualifying only if substantial. Some commentators have argued that this provision should apply only to pecuniary interests. They have argued that “[n]oneconomic interests may affect a judge’s ability to be, or to seem, impartial, but they can be handled adequately under the general provision [section 455(a)] calling for disqualification if the judge’s impartiality might reasonably be questioned.”<sup>98</sup> However, not all courts accept this analysis; some have held that substantial noneconomic interests require disqualification under section 455(b)(4) itself.<sup>99</sup>

The second approach appears better, since the first does not address all situations deserving disqualification. A judge could have a noneconomic interest that would be substantially affected by the outcome of the case, but that would not cause his impartiality to be questioned because it is known only by the judge and his immediate family. For example, a judge hearing a school desegregation suit in which the plaintiffs request busing as a remedy might be the parent of a child who likely would be bused under the requested remedy. This fact might not come to anyone’s attention, yet it would clearly cause the judge to have a substantial interest in the outcome of the litigation.

For a nonfinancial interest to require disqualification under section 455(b)(4), it probably must be unique to the judge or to a distinct group, rather than an interest shared equally with the general public. A good example is *In re New Mexico Natural Gas Litiga-*

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95. *In re New Mexico Natural Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980).

96. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 908 (current version at 28 U.S.C. § 455 (1982)); see, e.g., *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d 437 (5th Cir. 1968) (judge who held 100 of 36,000,000 issued shares of stock in a party was not disqualified).

97. 28 U.S.C. § 455(b)(4) (1982).

98. E. THODE, *supra* note 68, at 63, 66.

99. E.g., *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980) (“noneconomic interests may affect a judge’s bias or prejudice”), *cert. denied*, 449 U.S. 820 (1981). See also 13A WRIGHT & MILLER, *supra* note 15, § 3547, at 605.

tion.<sup>100</sup> There, a class of plaintiffs alleged that the defendants were overpricing natural gas and sought a rollback in natural gas prices. The trial judge recused himself, citing the latter part of section 455(b)(4). He reasoned that if the plaintiffs won, natural gas prices would be reduced, and he would benefit as a consumer of natural gas. The court of appeals held the recusal to be in error because any benefit would be shared by the judge and the community.<sup>101</sup> When a judge shares an interest in the outcome of a case with a large segment of the public, the court stated, public confidence in the judicial system does not suffer if the judge hears the case. Further, since so many litigated issues affect judges as members of the public, it would be impractical to disqualify judges for this reason.<sup>102</sup> The expense of assigning a new judge to the case also troubled the court since the proceedings already were very lengthy.<sup>103</sup>

In one special circumstance, a judge's interest in a case can never result in disqualification. This occurs when a judge must sit because of the common law "rule of necessity." The rule of necessity requires the interested judge to hear the case if no other forum is available and disqualification would result in the case not being heard.<sup>104</sup> The rule of necessity operates, for example, when a case affects the entire judiciary.

In *United States v. Will*,<sup>105</sup> the Supreme Court found that section 455 did not abolish the rule of necessity.<sup>106</sup> In that case, several federal judges challenged the constitutionality of statutory limitations on federal judicial salaries. All article III judges had an

100. 620 F.2d 794 (10th Cir. 1980).

101. *Id.* at 796.

102. *Id.* at 796-97.

103. *Id.* Cf. *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1977). In *Virginia Electric*, a power company sued to recover overcharges it allegedly paid to suppliers of components for its nuclear power plants. If the plaintiff prevailed, it would pass on the savings to all of its customers. Since the trial judge was a power company customer, he held himself disqualified under § 455(b)(4). The court of appeals reversed, holding the "expectancy" of a refund or cost savings in the future to be too remote and insubstantial to require disqualification. See also *Town of East Haven v. Eastern Airlines, Inc.*, 293 F. Supp. 184 (D. Conn. 1968) (overruling disqualification because the benefit was frivolous).

The approach taken by the drafters of the Code of Judicial Conduct to the provision that was to become section 455(b)(4) was somewhat different. The Reporter's Notes state:

[A]t some point a relationship to a party as a utility customer, taxpayer, or premium payer should disqualify a judge. The test is that a judge should disqualify himself if the outcome of the proceeding could substantially affect his interest as a customer of the utility, as a taxpayer, or as a premium payer.

E. THODE, *supra* note 68, at 66-67.

104. *United States v. Will*, 449 U.S. 200, 213 (1980).

105. *Id.*

106. *Id.* at 217.

interest in the outcome, as the Court pointed out, and all would be disqualified by section 455 because of their interest in the subject matter.<sup>107</sup> If section 455 disqualification applied, the case could not be heard and the plaintiffs would be denied a forum. Therefore, the rule of necessity demanded that *no* federal judge was disqualified. The Court reasoned that section 455 had not abolished the rule.

The declared purpose of section 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have contrary effect, for, without the Rule, some litigants would be denied their right to a forum.<sup>108</sup>

Finally, section 455(b)(5) mandates disqualification if the judge, his spouse, or any of certain relatives is involved in the proceeding before the judge.<sup>109</sup> This includes situations in which the judge, spouse, or relative is a party or an officer of a party, is known by the judge to have an interest that would be substantially affected by the outcome, or is likely to be a material witness in the proceeding.<sup>110</sup>

Section 455 precludes a judge from accepting from the parties a waiver of disqualification for any of the specific grounds listed in subsection (b). Waiver is allowed if the disqualification is based on the general provision of section 455(a), but such a waiver must be "preceded by a full disclosure on the record of the basis for disqualification."<sup>111</sup> These provisions are a dramatic change from pre-1974 law, which allowed a party to waive disqualification by express consent or by failure to request disqualification in a timely manner.<sup>112</sup>

## II. JUDICIAL BIAS AS A BASIS FOR DISQUALIFICATION

### A. *The Courts' Approach*

Courts generally refuse to disqualify on the basis of "judicial bias," that is, on the grounds a judge should be removed because of his judicial philosophy, personal background, or prior opinions on legal issues or the subject matter of the lawsuit.<sup>113</sup>

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107. *Id.* at 212.

108. *Id.* at 217.

109. 28 U.S.C. § 455(b)(5) (1982). The statute applies to relatives within the third degree of relationship. *Id.*

110. See 13A WRIGHT & MILLER, *supra* note 15, § 3548, at 607-09.

111. 28 U.S.C. § 455(e) (1982).

112. See 13A WRIGHT & MILLER, *supra* note 15, § 3552, at 648-49. See also Thomas v. United States, 363 F.2d 849 (9th Cir. 1966) (upholding defendant's waiver of objections to sentencing judge's qualifications).

113. In this Article "judicial bias" is distinguished from bias toward or against a specific party, which is termed "personal bias."

### 1. *General Legal Outlook and Judicial Philosophy*

Before the 1974 amendments, it was well settled that federal judges were free to decide cases involving legal issues or policy questions on which they already had formed opinions. The judge's general judicial philosophy also was not considered to be a basis for disqualification.<sup>114</sup>

A prominent example of these principles was Justice Rehnquist's opinion in *Laird v. Tatum*.<sup>115</sup> In *Laird*, the plaintiffs challenged the constitutionality of the Army's collection of information about activities believed to have potential for civil disorder. The Supreme Court, by a five-to-four vote with Justice Rehnquist in the majority, held that the jurisdiction of a federal court could not be invoked by a plaintiff who claimed that the exercise of his first amendment rights was chilled by the mere existence of an allegedly unconstitutional government investigative activity not directed against him.<sup>116</sup>

Following the Court's decision, the petitioners asked that Justice Rehnquist recuse himself, *nunc pro tunc*, because of earlier statements he had made to the Senate Judiciary Committee on the constitutionality of government surveillance. These earlier statements were contrary to the plaintiff's position. Justice Rehnquist rejected this contention, saying, "none of the former Justices of this Court since [the enactment of the judicial disqualification statute in] 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."<sup>117</sup>

Justice Rehnquist's reliance on specific situations involving other Supreme Court Justices as precedent for his action has been criticized. The critics focus on the length of time between those Justices' involvement in the subject and their decisions on the Court

114. See cases cited in *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); 13A WRIGHT & MILLER, *supra* note 15, § 3542, at 557-58.

115. 409 U.S. 824 (1972) (memorandum of Rehnquist, J.).

116. *Laird v. Tatum*, 408 U.S. 1, 10 (1972).

117. 409 U.S. at 831 (memorandum of Rehnquist, J.). For support, Justice Rehnquist cited the prior conduct of several Supreme Court Justices. Justice Black, for example, was one of the principal authors of the Fair Labor Standards Act. "Nonetheless, he sat in the case that upheld the constitutionality of the Act . . . and in later cases construing it." *Id.* at 831. Justice Frankfurter participated in several important labor law cases although he had written extensively in the field and played a large part in the drafting of the Norris-LaGuardia Act. *Id.* at 832. Rehnquist also cited the participation of Justice Jackson in a case even though it raised exactly the same issue he had decided as Attorney General. *Id.*

and point out that none of those Justices had "been involved with, or suggested the proper resolution of, a specific case upon which they eventually ruled."<sup>118</sup> Justice Rehnquist, on the other hand, publicly expressed his opinion on the issue to be decided in *Laird* less than two years before the Supreme Court decision.

Further, his refusal to disqualify himself has especially troublesome implications for the integrity of the judiciary as an institution. Justice Rehnquist expressed his opinion on the issue as a member of the political branch of government and on behalf of the government. He then, as a member of the judiciary, ruled on the same issue in favor of the government. Such actions may cause "[r]easonable men [to] question not only the impartiality of judges but also the independence of courts from the political branches and the ability of the judiciary to perform its role of protecting against abuses of power by those branches."<sup>119</sup>

Justice Rehnquist argued that disqualification of a Justice for prior legal opinions would be improper and nonsensical. He noted that Supreme Court Justices normally have formed and presented opinions concerning constitutional issues before coming to the Court. Indeed, he said, "Proof that a Justice's mind at the time he joined the court was a complete *tabula rosa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."<sup>120</sup>

The need to avoid inefficiencies in the administration of the judicial system, especially at the Supreme Court level, also played a role in Justice Rehnquist's decision to participate. He noted that disqualification of one Justice would result in affirmance of the lower court opinion by an equally divided court, leaving the principle of law in the case unsettled. To Justice Rehnquist, "The undesirability of such a disposition is . . . a reason for not 'bending over backwards' to deem oneself disqualified."<sup>121</sup>

Justice Rehnquist certainly was not the first to refuse to disqualify himself on the grounds of prior legal opinion and judicial philosophy. Judge Jerome Frank of the Second Circuit Court of Appeals in 1943 wrote an eloquent defense of this principle:

If . . . "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even

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118. Note, *supra* note 53, at 123.

119. Note, *supra* note 8, at 764 n.120.

120. *Laird*, 409 U.S. at 835 (memorandum of Rehnquist, J.).

121. *Id.* at 837-38.

at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired "slants," pre-conceptions, life could not go on. . . . The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

In addition to those acquired social value judgments, every judge, however, has many unavoidable idiosyncratic "learnings of the mind," uniquely personal prejudices which may interfere with his fairness. . . . The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.<sup>122</sup>

Disqualifying a judge because of his general legal philosophy or point of view is clearly impractical and nonsensical. All judges have acquired predispositions and philosophies that affect their behavior on and off the bench. Such predispositions should not be grounds for disqualification. As one commentator stated: "[I]nsofar as a judge has developed a consistent judicial philosophy, he might be said to have prejudged the legal issues involved in a particular case. Arguably, under these circumstances his impartiality could reasonably be questioned. . . . [but disqualification for this reason] would preclude consistent and rational functioning by the judiciary."<sup>123</sup>

That judges have developed legal philosophies and opinions is accepted and inherent in the judicial system. Indeed, those nominated to become federal judges often are chosen precisely because they are believed to have certain legal philosophies and outlooks. Once a judge is in office, it is expected, and in fact desired, that he will develop an individual outlook and point of view, a general judicial philosophy. Yet any "consistent and predictable judicial philosophy demands that a judge have certain preconceptions on matters of legal principle, even though they may disadvantage a party."<sup>124</sup> Disqualification, then, cannot be the solution in the ordinary situation of predisposition due to a judge's general legal philosophy. However, this conclusion that refusal to disqualify on the basis of general judicial philosophy is sensible does not validate Jus-

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122. *In re J.P. Linahan*, 138 F.2d 650, 651-53 (2d Cir. 1943) (footnotes omitted).

123. Note, *supra* note 8, at 757 (footnotes omitted).

124. Comment, *supra* note 2, at 252.

tice Rehnquist's action in *Laird*. The problem presented there—whether a judge should disqualify himself when he has formed an opinion on specific legal issues as applied in a specific factual context before hearing a case—is much more difficult to resolve. That issue will be referred to shortly.

## 2. *The Judge's Personal Background and Experience*

A judge's personal background or previous associations generally are not considered to show bias requiring disqualification. "[A] judge is not prevented from sitting because he comes into every case with a background of general personal experiences and beliefs."<sup>125</sup> *Pennsylvania v. Local 542, International Union of Operating Engineers*<sup>126</sup> provides a good example. There, the plaintiffs filed a civil rights suit challenging alleged employment discrimination against blacks in the construction industry.<sup>127</sup> The trial judge, Judge A. Leon Higginbotham, Jr., was black. Moreover, he had studied and written extensively in the field of race relations before and while on the bench.<sup>128</sup> The defendants moved to disqualify him for bias, based on a speech in which he stated his strong support for the civil rights movement.<sup>129</sup>

Judge Higginbotham refused to recuse himself, stating that he was not biased for or against any of the parties to the lawsuit.<sup>130</sup> If black judges could be disqualified from hearing racial discrimination suits brought by blacks because of presumed bias in favor of the plaintiffs, he said, then only white judges could hear such suits.<sup>131</sup> Then, however, the white judges would be open to the charge that they were biased in favor of the white defendants.

Very similar was *Blank v. Sullivan & Cromwell*.<sup>132</sup> In *Blank*, the plaintiff applied for a position as an attorney with the defendant law firm but was not hired. She sued on the grounds of sex discrimination. The trial judge was a black woman who previously had worked as a plaintiff's attorney in civil rights litigation.<sup>133</sup> Before coming to the bench, the judge had made public statements oppos-

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125. *In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961).

126. 388 F. Supp. 155 (E.D. Pa. 1974).

127. *Id.* at 157.

128. *Id.* at 157, 168.

129. *Id.* at 157.

130. *Id.* at 160.

131. *Id.* at 165.

132. 418 F. Supp. 1 (S.D.N.Y. 1975).

133. *Id.* at 2.



ing both racial and sex discrimination.<sup>134</sup> This judge also refused to recuse herself, holding that her personal background was an insufficient ground.<sup>135</sup>

The 1974 statutory revision did not change this principle of refusing to disqualify because of personal background. Some might argue that certain aspects of a judge's personal background create an appearance of bias in certain cases, for example, when a former civil rights attorney hears an employment discrimination case. However, the courts have not adopted that approach. The First Circuit Court of Appeals, for example, stated that "all judges come to the bench with a background of experiences, associations and viewpoints. This background alone is seldom sufficient in itself to provide a reasonable basis for recusal."<sup>136</sup>

A prominent example of the unchanged judicial approach was *State of Idaho v. Freeman*.<sup>137</sup> The plaintiffs challenged the constitutionality of Congress' extension of the date for ratification of the Equal Rights Amendment (ERA).<sup>138</sup> The district court judge hearing the case had been an executive officer of the Mormon Church until six months after the suit was filed.<sup>139</sup> The Mormon Church not only strongly and publicly opposed the adoption of the ERA, but also "opposed . . . the propriety of the extension of the ratification period."<sup>140</sup> The party seeking disqualification, contending that the extension was constitutional, argued that Judge Callister's former position in the Mormon Church created a reasonable question of his impartiality.<sup>141</sup> The judge refused to recuse himself, stating that he never publicly revealed his feelings about the ERA nor promoted the church's position.<sup>142</sup> He analogized his situation to the general principle that a consistent legal philosophy developed through experience and training that results in "preconceptions regarding matters of legal principle . . . should not be taken as demonstrating a disqualifying bias nor as an appearance of impartiality."<sup>143</sup> This principle is only partially persuasive in *Free-*

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134. *Id.* at 4.

135. *Id.* at 5.

136. *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981) (trial judge graduated from university that was the defendant in the case; recusal not required), *cert. denied*, 455 U.S. 1027 (1982).

137. 507 F. Supp. 706 (D. Idaho 1981).

138. *Id.* at 710.

139. *See id.* at 731.

140. *Id.* at 731.

141. *Id.* at 710.

142. *Id.*

143. *Id.* at 728.

*man*, since it was the judge's religious background and beliefs, not his legal philosophy, that the party asserted as the basis for disqualification.<sup>144</sup> Judge Callister also claimed that section 455(a) required a narrow reading to prevent judge-shopping and to promote judicial economy.<sup>145</sup>

Judge Callister was correct that religious background alone should not be a proper basis for disqualification. Otherwise, a Jewish judge, for instance, could not hear cases affecting Jewish interests, such as the constitutionality of Sunday closing laws, nor could Catholic judges sit in cases affecting Catholics as a group. A judge's religious background, like his race or ethnic background, should not be *presumed* to affect his ability to execute his judicial duties faithfully and impartially.<sup>146</sup>

The issue of a judge's personal background also was addressed in *Paschall v. Mayone*.<sup>147</sup> A black prisoner brought a civil rights suit as a result of beatings he allegedly had received in jail.<sup>148</sup> The defendant requested that the trial judge recuse herself because she was a former general counsel of the NAACP.<sup>149</sup> The judge denied the disqualification motion.<sup>150</sup> She ruled that disqualification was inappropriate in such circumstances because it "would require a judge to disqualify himself in any suit dealing with the *general* subject matter with which he dealt in practice prior to ascending the bench."<sup>151</sup>

The refusal to disqualify for personal background, like the refusal to disqualify for general judicial philosophy, is sensible. As one commentator stated: "The theory of de facto bias has no place in

144. *Id.* at 710.

145.

[A] broad or liberal application of section 455(a) appears to be against the spirit of section 455. For example, if a judge disqualifies himself on mere application, or mere allegation that his appearance of impartiality might be questioned, it would make the nonpreemptive statute in effect preemptive and encourage judge-shopping which is clearly against the mandate of the statute's legislative history.

507 F. Supp. at 733.

146. These comments assume the judge is not actually biased because of his religion. If he is, disqualification obviously is proper.

It also must be remembered that the statute, to preserve public confidence in the judiciary, requires disqualification *whenever* a reasonable person, knowing all of the circumstances, would question the judge's impartiality. See *supra* notes 71-84 and accompanying text. In certain cases, it may be possible for a judge to have religious beliefs that would lead a reasonable person to doubt his impartiality.

147. 454 F. Supp. 1289 (S.D.N.Y. 1978).

148. *Id.* at 1292-93.

149. *Id.* at 1299.

150. *Id.*

151. *Id.* at 1301 (emphasis in original).

disqualification law . . . . Such simplistic allegations of bias would reduce the judicial system to a shambles and have rightfully been given short shrift by judges so challenged."<sup>152</sup> Disqualification is unnecessary as long as judges disregard whatever special interests they represented before coming to the bench. Prior experiences merely shape a judge's general legal and political outlook, and as such are insufficient to support disqualification.

### 3. *Prior Views on Legal Issues and the Merits of the Case*

A much more difficult issue is involved when a judge previously has formed a specific opinion about some aspect of the case in dispute. Prior judicial views on pending litigation take several different forms. The judge's views may or may not be publicly known and may have been expressed in a formal judicial opinion or in an out-of-court speech, writing, or testimony. They may relate to specific disputed legal issues or to the overall subject matter of the case.

The most serious situation is one where a judge has prior, publicly known views on the law as applied to the specific factual setting of an upcoming case. Such a circumstance seems not only to deny the party opposed to the judge's stated views the appearance of an impartial tribunal, but to undermine public confidence in the judiciary. Yet traditionally, even this type of predisposition does not disqualify the judge, being merely judicial and not personal bias.<sup>153</sup>

The Supreme Court in *Federal Trade Commission v. Cement Institute*<sup>154</sup> followed this principle. The Federal Trade Commission (FTC) had ruled that the defendant's pricing system violated the Sherman Act. Prior to the FTC's decision, several Commissioners testified before a congressional committee that they believed such pricing systems generally were illegal restraints of trade. The Supreme Court, applying judicial disqualification standards, held that the prior opinions did not disqualify the Commissioners. The Court maintained that disqualifying the Commissioners for their past opinions would effectively make experience a handicap instead of an advantage and thus discourage development of expertise.<sup>155</sup> Justice Black, writing for the Court, concluded:

[No decision] of this Court would require us to hold that it was a

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152. Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1461 (1981).

153. See, e.g., *Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.).

154. 333 U.S. 683 (1948).

155. *Id.* at 702.

violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact.<sup>156</sup>

The general attitude of the courts has been that a judge is never disqualified for his prior judicial views. This principle partially reflects a desire to develop a more expert judiciary that will decide cases more efficiently.<sup>157</sup>

Another example of the refusal to recuse when a judge has stated his views on the subject matter of the suit in a prior case occurred in *Deal v. Warner*.<sup>158</sup> The plaintiff filed suit alleging that hair length regulations imposed on persons serving in the military were unconstitutional.<sup>159</sup> In a previous case, the trial judge had stated that lawsuits about hair length did not belong in the federal courts. Denying the plaintiff's request that he recuse himself, the judge held that "prior adverse judicial determinations involving . . . the same issue in question are insufficient as a basis for disqualification."<sup>160</sup>

A more extreme example is found in *Antonello v. Wunsch*.<sup>161</sup> The plaintiff was in federal court attacking the constitutionality of a doctrine adopted by the Kansas Supreme Court rejecting governmental immunity for negligence in proprietary state activities. The trial judge had been a member of the Kansas Supreme Court and voted in the majority when it handed down the decision in dispute. If there ever was a situation when disqualification was appropriate for a prior in-court judicial opinion, surely this was such a case.<sup>162</sup> The trial judge was being asked to determine the constitutionality of his own past decision. Yet the Tenth Circuit Court of Appeals affirmed the trial judge's decision not to recuse himself. The court simply restated the proposition that "the fact that a judge has previously expressed himself on a particular point of law is not sufficient

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156. *Id.* at 702-03.

157. *See, e.g., In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961) ("[I]t would be strange if a judge became less qualified the greater his judicial experience.").

158. 369 F. Supp. 174 (W.D. Mo. 1973).

159. *Id.*

160. *Id.* at 177.

161. 500 F.2d 1260 (10th Cir. 1974).

162. This case was not governed by § 47 because that section only forbids situations where a judge hears a *direct appeal* of a case already heard by him. *See* 13A WRIGHT & MILLER, *supra* note 15, § 3545, at 595.

to show personal bias or prejudice.”<sup>163</sup> This stark case demonstrates that a judge will almost never be disqualified on the basis of a previous in-court opinion.

In *Lawton v. Tarr*,<sup>164</sup> the judge’s views were expressed in an out-of-court speech. The plaintiff challenged the legality of his being drafted into the military, claiming exemption under the selective service law. The trial judge previously had stated his “vehement opposition” to the Vietnam War.<sup>165</sup> Based on that statement, the defendant draft board requested that the judge recuse himself. The trial judge denied the motion, saying “[t]he beginning of intellectual honesty in a judge is the recognition that, like other men, he has his own predilections and preferences and intellectual and philosophical attitudes that color and influence his viewpoints.”<sup>166</sup> He added that “it is hornbook law” that the attitudes or feelings a judge has toward the subject matter of a case should not disqualify him.<sup>167</sup>

These cases occurred before the 1974 amendments. The amendments to section 455 could be construed to compel changes in the doctrine of not requiring recusal on the grounds of a judge’s prior beliefs relevant to the case before him. Intended to broaden the scope of disqualification, section 455(a) requires disqualification whenever the judge’s “impartiality might reasonably be questioned.”<sup>168</sup> Certainly the existence of a previously stated opinion on an important issue to be decided in the current case or an opinion concerning the case’s subject matter could lead a reasonable person<sup>169</sup> to question the judge’s impartiality. Since section 455(a) is an independent ground for judicial disqualification, personal bias

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163. 500 F.2d at 1262.

164. 327 F. Supp. 670 (E.D.N.C. 1971).

165. *Id.* at 671.

166. *Id.* at 671-72.

167. *Id.* at 673; accord *United States v. Bray*, 546 F.2d 854, 857 (10th Cir. 1976) (district judge not disqualified on motion that simply established that affiant did not like the judge and had publicly expressed his dislike; mere showing of judge’s prior expression on particular law also not sufficient to show personal bias); *Goodpasture v. TVA*, 434 F.2d 760, 765 (6th Cir. 1970) (action by property owner challenging eminent domain power of TVA; trial judge not disqualified although he had written law review article about federal and state condemnation proceedings); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 430 (10th Cir. 1966) (“[I]t is not sufficient [to require disqualification] to show that there exists a prejudice or bias based on the judge’s previously expressed view of the law.”); *Loew’s Inc. v. Cole*, 185 F.2d 641, 646 (9th Cir. 1956) (proof of judge’s prior expression of opinion on a legal question, without showing particular facts indicating personal bias against a party, insufficient to disqualify under § 144).

168. 28 U.S.C. § 455(a) (1982).

169. Disqualification is supposed to be evaluated from the perspective of a reasonable person. See *supra* note 63 and accompanying text.

need not be found for disqualification under the amended statute.<sup>170</sup>

In addition, while refusal to recuse on the basis of prior opinion as to the issues or subject matter in dispute is well established, it is not unchallenged. A different approach was taken in a seldom-cited opinion by Justice Frankfurter in *Public Utilities Commission v. Pol-lak*.<sup>171</sup> The case involved a first amendment challenge to the playing of radio programs on loudspeakers installed in Washington public buses and streetcars. Justice Frankfurter recused himself sua sponte and wrote a separate opinion explaining his reasons.<sup>172</sup> He said he strongly disliked the piped-in radio programs on buses and street cars and believed he was therefore biased against the defendants. Justice Frankfurter said:

When there is ground for believing that . . . unconscious feelings may operate in the ultimate judgment, or may . . . unfairly lead others to believe they are operating, judges recuse themselves . . . . The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.<sup>173</sup>

The principle Justice Frankfurter articulated is sound, but whether other judges follow it is doubtful. In *United States v. Townsend*,<sup>174</sup> a conscientious objector was convicted of failing to report for military induction. The trial judge stated at a pretrial conference that he had a policy of sentencing all selective service violators, whether conscientious objectors or not, to thirty months in prison as a way of inducing them to enlist. In a rare instance of a court taking an approach similar to Justice Frankfurter's, the Third Circuit Court of Appeals reversed the conviction on the grounds that the comments showed the judge was biased and should have recused himself.<sup>175</sup> As the other cases previously discussed indi-

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170. The Fifth and Ninth Circuits, however, have ruled that § 455(a) must be governed by the same standard as § 144 and § 455(b)(1). See *supra* notes 74-78 and accompanying text. Under such a view only personal bias is a proper basis for disqualification. This approach, though, is probably an incorrect interpretation of the statute. See *supra* notes 80-83 and accompanying text.

171. 343 U.S. 451 (1952).

172. *Id.* at 466-67 (statement of Frankfurter, J.). Frankfurter said that he believed judges should state reasons when they recuse themselves. *Id.* at 467 (statement of Frankfurter, J.). This practice has not been followed among Supreme Court Justices, who very rarely state their reasons for disqualifying themselves.

173. *Id.* at 467 (statement of Frankfurter, J.).

174. 478 F.2d 1072 (3d Cir. 1973).

175. *Id.* at 1074.

cate, however, courts seldom follow Frankfurter's approach favoring recusal.

The drafters of the Code of Judicial Conduct, on which the amended section 455 is based,<sup>176</sup> rejected any change in the principle that a judge's prior opinion on the issues in dispute or subject matter of the case is insufficient to require disqualification. At one stage in its drafting, Canon 3C(1)(a) required disqualification if a judge "had a fixed belief concerning the merits."<sup>177</sup> The drafters were concerned that this language could be interpreted to require a judge's recusal if he had a fixed belief about the law applicable to a case.<sup>178</sup> They believed that such a requirement would conflict with the necessity for judges to have established opinions concerning many areas of the law, and consequently they removed the language.<sup>179</sup> The standard they adopted was that of personal bias or prejudice.<sup>180</sup>

This history should not be given too much significance, however, because it is attributable to Canon 3C(1)(a), the subsection Congress enacted as section 455(b)(1), which contains the "personal bias" language. Congress made a significant change in Canon 3C by enacting section 455(a) as an independent general standard. The legislative history explicitly states that section 455(a) was set apart from section 455(b) to provide an *independent ground* for judicial

176. See *supra* notes 56-58 and accompanying text.

177. E. THODE, *supra* note 68, at 61. Canon 3C(1)(a) as adopted provides:

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 proceedings . . . .

CODE OF JUDICIAL CONDUCT Canon 3C (1980).

178. E. THODE, *supra* note 68, at 61. The Reporter's Notes stated:

Subsection (a) has gone through several formulations in drafting. At one time the language provided for disqualification if a judge "had a fixed belief concerning the merits." It was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case. The Committee was confronted, however, by the interpretation of many able judges and law professors that that would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case. For example, it was argued that a judge with a fixed belief that the First Amendment precludes libel action by a public official against a newspaper in the absence of proof of malice should disqualify himself in a libel case of that general character. This interpretation was not intended; indeed, the Committee recognized the necessity and the value of judges' having fixed beliefs about constitutional principles and many other facets of the law. As a result of the apparent ambiguity of the proposed language, the Committee adopted instead the standard of "personal bias or prejudice."

*Id.*

179. *Id.*

180. *Id.*

disqualification.<sup>181</sup> The specific circumstances listed in section 455(b) were not intended to be exclusive. Instead, a judge also may be disqualified in *any* situation, in the language of section 455(a), in which his impartiality might reasonably be questioned.<sup>182</sup>

Despite this broad language, federal judges have continued to refuse to disqualify themselves for their prior views no matter what the circumstances. This is illustrated by the 1981 decision of the Fifth Circuit Court of Appeals in *Phillips v. Joint Legislative Committee*.<sup>183</sup> *Phillips* was a class action in which the plaintiffs claimed that the defendants, various Mississippi state agencies, discriminated against blacks in employment. One of the plaintiffs moved to disqualify the trial judge on the grounds he was biased against blacks and hostile to civil rights suits. The moving party cited several of the judge's rulings, quotations from his opinions, and remarks from the bench. The trial judge refused to disqualify himself.<sup>184</sup>

On appeal, the court of appeals admitted that "at times . . . [the trial judge's] remarks reflected racial reactions not only outmoded but improper."<sup>185</sup> The court nevertheless held that the trial judge acted within his discretion in denying the motion to recuse, citing the rule that ordinarily a judge is not disqualified for his judicial tendencies or attitudes.<sup>186</sup> The court said the rule was necessary to insulate judges from repeated successful disqualification motions. The court feared that if a judge were confronted with such a possibility, his actions would not be governed solely by the cases before him.<sup>187</sup> Noting that judges' prior views inevitably affect their decisions, the court concluded that "[a] judge is not a computing machine, and the judicial system is not constructed so that each judge must reach the same result as all other judges in a given case."<sup>188</sup>

The court's holding in *Phillips* reveals an important reason for the courts' extreme reluctance to disqualify for prior in-court statements. Judges should not be afraid to act in a consistent manner in

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181. H.R. REP. NO. 1453, *supra* note 52, at 6355. In regard to the legislation enacted as section 455 in 1974, the report stated that "[t]hese specific situations in subsection (b) are in addition to the general standard set forth in subsection (a)." *Id.*

182. 28 U.S.C. § 455(a) (1982).

183. 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 971 (1982).

184. *Id.* at 1018.

185. *Id.* at 1020.

186. *Id.*

187. *Id.*

188. *Id.*



similar cases. Indeed, consistency is desirable because it helps promote stability in law and predictability of result. Further, judges should decide cases on their merits, rather than try to balance out their decisions on cases raising similar legal issues. The *Phillips* court, however, added a caveat. “[We do not] say that a clearly evinced policy of disregarding the merits in any class of cases can withstand a recusal motion . . . . [We merely] caution against a district judge disqualifying himself on the basis of an allegation of a perceived history of rulings that a moving party dislikes.”<sup>189</sup>

Still another example of the continuing vitality of the principle of nondisqualification based on a judge’s prior views<sup>190</sup> is the holding of the Eighth Circuit in *Johnson v. Citizens Bank & Trust Co.*<sup>191</sup> In that case, the issue was whether a “loan guarantee fee” charged by a bank actually represented interest and therefore violated the Arkansas usury statute. The trial judge’s remark that he believed the state usury statute to be “harsh” was held not to have disqualified him.<sup>192</sup> “The judge merely expressed a viewpoint concerning a legal issue . . . and nothing from an extrajudicial source occurred which could taint his viewpoint.”<sup>193</sup>

In *Smith v. Danyo*,<sup>194</sup> the trial judge refused to recuse himself in a personal injury suit, even though he previously had stated that he did not believe that diversity personal injury litigation belonged in the federal courts. He relied on the traditional doctrine that a previous expression of opinion concerning a point of law or the subject

189. *Id.* at 1021.

190. See, e.g., *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) (trial judge not required to recuse himself from case in which he decided how much to award in contingent attorney’s fees when he had previously written and spoken on the subject); *United States v. Allen*, 675 F.2d 1373, 1385 (9th Cir. 1981) (appeal of conviction for possession of marijuana with intent to distribute; trial judge’s statement that marijuana has a “cancerlike” effect on society did not mandate disqualification), *cert. denied*, 454 U.S. 833 (1982); *United States v. Serrano*, 607 F.2d 1145, 1149-50 (5th Cir. 1979) (judge’s past in-court statements regarding displeasure with marijuana traffickers was merely judicial, not personal, bias which did not require recusal); *United States v. Gignax*, 605 F.2d 507, 514 (10th Cir. 1979) (trial judge not disqualified from tax evasion trial even though defendant alleged the judge strongly disliked tax protesters); *United States v. Carroll*, 567 F.2d 955, 958 (10th Cir. 1977) (same); *United States v. Conforte*, 457 F. Supp. 641, 652 (D. Nev. 1978) (“[T]he judge’s views on particular legal issues do not support an inference of bias against a party sufficient to require recusal.”), *aff’d*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1981); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497, 517-18 (D.S.C. 1955) (neither a judge’s prior expression of judicial opinion nor expressions of personal opinions in current case warrant recusal).

191. 659 F.2d 865 (8th Cir. 1981).

192. *Id.* at 869.

193. *Id.*

194. 441 F. Supp. 171 (M.D. Pa. 1977), *aff’d*, 585 F.2d 83 (3d Cir. 1978).

matter of a case is insufficient grounds for disqualification.<sup>195</sup> The judge's prior opinion did not go to the merits of the case, but to the advisability of diversity jurisdiction in general. In affirming, the Third Circuit Court of Appeals recognized this and said "there is a world of difference between a charge of bias against a party as a member of a class and a bias in favor of a particular legal principle."<sup>196</sup>

### B. *Deficiencies of the Present Approach and Suggested Reforms*

Despite the broad language of section 455(a), courts have continued to distinguish between judicial and personal bias, and have generally refused to recuse for any form of judicial bias.<sup>197</sup> The question remains whether this approach is ethically proper and comports with the mandate of section 455(a). Refusal to recuse because of a judge's general legal philosophy and personal background is clearly appropriate; every judge inevitably develops some general judicial outlook and undergoes some relevant prior personal experiences. In addition, a strong argument can be made that disqualification is improper when a judge has previously stated his opinion on a legal issue *in court* while deciding a previous case. Stating an opinion on a legal issue, whether or not as part of a formal written opinion, and then following it is nothing more than a form of precedent. The American judicial system encourages adhering to precedent in order to promote stability in the law, principled decisionmaking, and predictability of result. Even though a party may believe that by adhering to his previous in-court opinions a judge is prejudiced against that party's legal position, such concerns are outweighed by the benefits of following precedent.<sup>198</sup>

However, the proper approach for dealing with other types of

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195. "The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice . . . . An attitude or feeling a judge may entertain towards the subject matter of a case does not disqualify him." 441 F. Supp. at 180.

196. 585 F.2d at 87.

197. The D.C. Circuit Court of Appeals succinctly summarized the basic rule against recusal for any form of judicial bias. "[J]udges are free to decide cases involving policy questions on which they previously have expressed a view . . . . [A] federal judge will not be disqualified pursuant to [§ 144 or § 455] because of prior expression of views on a legal question." *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1171-72 n.51 (D.C. Cir. 1979) (dictum), *cert. denied*, 447 U.S. 921 (1980).

198. This does not mean that previous in-court statements can never be a basis for disqualification. As the court in *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020-21 (5th Cir. 1981), *cert. denied*, 456 U.S. 971 (1982), pointed out, if such statements show a judge is likely to disregard the merits of a case, he should be disqualified.

judicial bias is not as clear nor as simple to resolve as current doctrine holds.<sup>199</sup> The problem is most difficult when the judge previously has formed an opinion on an issue to be litigated, and his view is publicly known. The judge's predisposition will cause the party asserting the adverse proposition to doubt the judge's impartiality. It likely would have the same effect on a reasonable observer aware of the situation.<sup>200</sup>

While avoidance of judge-shopping, protection of judicial resources, and maintenance of an expert judiciary are goals well served by the courts' present approach, another fundamental interest should not be ignored. This is the need to ensure public confidence in the judicial system.<sup>201</sup> Since the judiciary's authority depends on public confidence in the impersonality and reasoned foundation of judicial decisions, it is essential that judges be disqualified whenever the public may reasonably question their impartiality.<sup>202</sup> This principle was codified in section 455(a).<sup>203</sup> The federal courts' present approach to judicial bias, that even prior out-of-court opinions on an issue being litigated are not sufficient for disqualification, frequently appears to conflict with this goal of ensuring the appearance of judicial impartiality. This approach is inconsistent with the spirit, and arguably the terms, of section 455(a).<sup>204</sup>

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199. As one commentator has said: "[T]he rules for disqualification for bias have introduced the most difficult question in disqualification law: How human may a judge be and still be allowed to judge?" Note, *supra* note 152, at 1461.

200. For example, a reasonable person probably would not think the judge in *Deal v. Warner*, 369 F. Supp. 174 (W.D. Mo. 1973), was impartial toward the merits of the case. After all, he had stated that he did not think that cases involving challenges to hair length regulations belonged in the federal courts, and he inevitably would have to decide exactly this issue during the litigation.

201.

The protection of judicial integrity and dignity from any hint or appearance of bias is the foundation of our judicial system. Therefore, it is imperative that a judge withdraw when there is the slightest suspicion of bias, rather than continue and possibly jeopardize the judicial process. To preserve public confidence in the judiciary, "justice must satisfy the appearance of justice."

Note, *Idaho v. Freeman: Judicial Disqualification: The Effect of Religious Leadership on Judicial Impartiality*, 14 J. MAR. L. REV. 243, 254-55 (1981) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

202. Note, *supra* note 8, at 764.

203. See *supra* notes 58-63 and accompanying text.

204. As one commentator noted:

Can it be contended that full confidence on the part of litigants is present where the case is tried before a judge who has prejudged the issues? If the element of public confidence in the administration of justice is important . . . then there is every reason for concluding that a judge who has prejudged is a biased judge . . . . While a judge should not be disqualified merely because he has expressed opinions

The present approach simply labels as nondisqualifying judicial bias everything a judge has said or believed about legal issues, no matter how closely connected to the issues or subject matter in dispute. Such an approach is unsatisfactory from either an ethical or statutory point of view. It ignores the essential need to maintain public confidence in the judiciary by achieving the appearance of judicial impartiality. A different approach is necessary to meet this fundamental consideration as well as to comply with the intent and language of section 455(a).

Prejudgment of the legal merits of the case is the easiest situation to resolve. When the prejudgment involves the application of law to specific facts in a particular case, disqualification is appropriate. "Unlike the development by judges of consistent views on legal principles, prior formulation or expression of opinion on the merits of a pending case is not an activity which the public expects of

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on a legal subject, still where his opinions relate to the very case he is to try, the appearance of full impartiality is not present.

Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. PITT. L. REV. 415, 420 (1950). An interesting example of the difficulties presented by the current approach is found today in the Supreme Court. Whenever the Supreme Court refuses to hear an appeal of a criminal defendant given the death penalty, for whatever reason, Justices Brennan and Marshall dissent from the denial of certiorari with the following statement: "Adhering to our views that the death penalty is *in all circumstances* cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1971), we would grant certiorari and vacate the death sentence in this case." *E.g.*, *McDougall v. North Carolina*, 104 S. Ct. 197 (1983) (emphasis added). *See also* cases reported in 104 S. Ct. 198-204 (1983).

The Justices clearly have prejudged the issue of the constitutionality of the death penalty. Some might contend that this is just a reflection of their political philosophy and thus is not disqualifying. Another argument could be that since it is an official judicial opinion, it is akin to precedent, albeit in a dissenting opinion. On the other hand, it might be argued that this is a prejudgment of the legal issues to be decided and raises questions of impartiality. The contention that it is not disqualifying is correct if the issue being appealed is the constitutionality of the death penalty. Supreme Court Justices frequently adhere to constitutional opinions in dissent after dissent that a majority of their brethren will not adopt. However, if the subject in such a case were not the merits of the death penalty itself but rather, for example, the legality of the jury selection at the defendant's trial, the two Justices' views as to the constitutionality of the death penalty clearly affect their decision on whether to grant certiorari. In such a circumstance, serious questions could be raised as to the two Justices' impartiality.

*See also* Comment, *Disqualification of Judges for Bias or Prejudice—A New Approach*, 1972 UTAH L. REV. 448, 451.

Assuming . . . that public confidence in the judiciary is a proper objective of a disqualification procedure, then it is no answer to a litigant that the alleged bias or prejudice is not "personal." Bias is an elusive attitude and a judge may not be aware of its effect. Since a judge's inability to abstract evidence from preconceived opinion may be too subtle for him to detect or for a litigant to prove, a litigant's reasonable apprehension, based on the facts, should be sufficient for disqualification.

*Id.*

judges or has reason to encourage."<sup>205</sup>

While prejudgment of the merits of the case clearly should disqualify a judge, it is more difficult to resolve the situation where a judge holds an opinion prior to the litigation about specific legal issues in dispute. Rather than the current blanket refusal to consider this a basis for disqualification, a case-by-case approach to determine whether an appearance of bias exists is preferable. Factors that should be considered in determining whether recusal is appropriate include whether and how widely the judge's views are publicly known, how strongly the views are held, whether the proper resolution of the legal issue is unsettled, and whether his views relate to the legal issue as applied in the specific factual context of the case or the law in a more general sense.

Such cases also could be referred to a different judge to determine if disqualification is warranted.<sup>206</sup> Currently the courts discourage referral, citing the delay and administrative inconvenience, and arguing that the challenged judge is more familiar with the alleged bias.<sup>207</sup> Yet referral in cases of a judge's prior views would comport more closely with the objective standard of section 455(a).<sup>208</sup> The appearance of impartiality also would be enhanced if another judge found that his colleague would be able to set aside his prior views and adjudicate fairly in the current case. Even if referral would cause delay and administrative burdens, the price may be worth paying to enhance the appearance of judicial impartiality. It is doubtful that a party requesting disqualification is ever convinced by a judge's own ruling that he is impartial. Because parties probably would be less likely to appeal findings of impartiality made independently by another judge, the overall administrative burden in fact might not increase.

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205. Note, *supra* note 8, at 758.

206. Several commentators have advocated this reform. See, e.g., Comment, *Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and a Proposed Procedure*, 46 ALB. L. REV. 229, 247 (1981); Note, *Disqualification of Judges for Bias in the Federal Courts*, *supra* note 33, at 1439.

207. E.g., *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1983).

208. H.R. REP. NO. 1453, *supra* note 52, at 6354-55. As a practical matter, it is difficult to imagine how any judge can be truly objective in determining whether his *own* conduct creates an appearance of impartiality in a reasonable person.

### III. FINANCIAL INTEREST AS A BASIS FOR JUDICIAL DISQUALIFICATION

#### A. *The Present Statutory Approach*

The disqualification statute treats recusal based on financial interest directly opposite from the courts' approach to disqualification for judicial bias. If a judge has any "financial interest,"<sup>209</sup> *however small*, in a party to the proceeding or the subject matter in controversy, he is automatically disqualified.<sup>210</sup> The ownership of even one share of stock in a corporation that is a party to a case requires disqualification.<sup>211</sup> This strict rule applies as well to any member of the judge's immediate family who has such a financial interest.<sup>212</sup>

While a judge is disqualified only for financial interests that he *knows* exist,<sup>213</sup> the statute provides that "[a] judge should inform himself about his personal and fiduciary interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."<sup>214</sup> The legislative history specifically affirms that a federal judge is free to invest, but warns that he should follow the guidelines of Canon 5C(3) of the ABA Code of Judicial Conduct<sup>215</sup> and invest in companies "which are not likely to become litigants in his court."<sup>216</sup> Obviously, if such a company appeared before the judge, he would have to disqualify himself.<sup>217</sup>

When Congress adopted this per se rule, it suggested that the

209. "Financial interest" is defined by the statute to mean "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party." 28 U.S.C. § 455(d)(4) (1982).

210. *Id.* § 455(b)(4); *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir.), *aff'd mem. sub nom. Arizona v. United States Dist. Court*, 459 U.S. 1191 (1982); *In re New Mexico Natural Gas Antitrust Litig.*, 620 F.2d 794 (10th Cir. 1980); H.R. REP. NO. 1453, *supra* note 52, at 6356; 13A WRIGHT & MILLER, *supra* note 15, § 3546, at 600-01.

This strict rule is a sharp change from the rule that existed prior to the 1974 amendments, which employed a substantial interest test to determine if disqualification was warranted. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 908 (current version at 28 U.S.C. § 455 (1982)).

211. *New Mexico Natural Gas*, 620 F.2d at 796.

212. "Immediate family" refers to a judge's spouse and minor children living with him. 28 U.S.C. § 455(b)(4) (1982).

213. *Id.* § 455(b)(4).

214. *Id.* § 455(c).

215. Canon 5C(3) provides: "A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification." CODE OF JUDICIAL CONDUCT Canon 5C(3) (1980).

216. H.R. REP. NO. 1453, *supra* note 52, at 6357.

217. *Id.*

rule was constitutionally mandated.<sup>218</sup> In 1927, the Supreme Court found that a criminal defendant's due process rights are violated if the presiding judicial officer has "the slightest pecuniary interest" in the outcome.<sup>219</sup> This ruling, however, came in a case where the facts were rather extreme—the presiding officer, also the town mayor, received a portion of the court fees only if the defendant was convicted.<sup>220</sup> It is doubtful that a per se rule of disqualification for a judge's minor financial interest in a party is constitutionally required in an ordinary civil case. Until the 1974 amendments, disqualification was required only if the judge's financial interest in the case was "substantial."<sup>221</sup> In the many cases applying the pre-1974 rule, the substantial interest test was never held unconstitutional.<sup>222</sup>

A more compelling reason for rejecting the substantial interest test was stated in the committee report to the 1974 amendments. The change, according to the report, was made to avoid "the uncertainty and ambiguity about what is a 'substantial interest.'"<sup>223</sup> Similarly, the drafters of the Code of Judicial Conduct found this consideration important.<sup>224</sup>

Automatic disqualification avoids the problems of ambiguity and uncertainty. A per se rule provides administrative ease by eliminating the need to determine when interests are large enough to influence a judge's decisions. Proponents of such a rule argue that it does not impose any hardships on a judge when the financial interests are small, since he has the option of divestment to avoid disqualification.<sup>225</sup>

218. *Id.* at 6356.

219. *Tumey v. Ohio*, 273 U.S. 510, 524 (1924). *See also* *Commonwealth Castings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (holding that arbitrators must disclose to parties dealings that might create an impression of possible bias in order to avoid later invalidation of decision).

220. 273 U.S. at 524.

221. *See supra* note 95 and accompanying text.

222. *See, e.g.*, cases collected in Comment, *supra* note 203, at 382-83.

223. H.R. REP. NO. 1453, *supra* note 52, at 6356.

224. E. THODE, *supra* note 68, at 65-66.

A further reason for rejecting the "substantial interest" test was its ambiguity. Does "substantial" mean that the judge's financial interest in the party is to be compared to the total of all financial interests in the party? On such a basis, one hundred shares of AT&T stock compared to the total number of shares outstanding might well be considered insubstantial. But what if the one hundred shares represent all of the judge's assets? Surely this is substantial from the judge's point of view . . . . Administering the "substantial interest" standard could result in great uncertainty or an invasion of the personal financial privacy to which the Committee felt a judge is entitled.

*Id.*

225. Note, *supra* note 8, at 752.

Another motivation for adoption of the per se rule may have been the Watergate scandal. Although the scandal did not involve judicial wrongdoing, it did create strong public demand for a higher standard of ethics in government generally. Demands for reform also followed the controversy surrounding the nomination of Judge Clement Haynesworth to the Supreme Court. The Senate refused to confirm the appointment, in part because of Judge Haynesworth's participation in several cases involving companies in which he had financial interests.<sup>226</sup>

### B. *Deficiencies of the Present Approach and Suggested Reforms*

The rigid per se disqualification rule has been criticized for its inflexibility, which may cause illogical and unjust results in particular cases.<sup>227</sup> For example, under the current rule, a judge with a tiny ownership interest in a party to a case over which he is presiding is disqualified, regardless of whether the interest actually would affect impartiality or even the appearance of impartiality.<sup>228</sup> The rule is not only inflexible, but ignores the important concerns of avoiding waste of judicial resources and preventing unnecessary delays in litigation. This is particularly true because disqualification motions often are made after the litigation is well under way.<sup>229</sup> The rule also hampers administration of the federal judicial system by hindering the ability of the courts of appeals to conduct en banc reviews of panel decisions. En banc reviews are difficult in many circuits because the per se rule frequently disqualifies so many circuit judges that not enough remain to grant a rehearing. As a recent article reported:

In most circuits judges who recuse themselves are in effect counted as voting "no" on the rehearing request.

As a result, the self-correcting mechanism of the federal appeals courts is defeated. Because the U.S. Supreme Court reviews only a tiny fraction of the cases brought before it, an erroneous ruling by a three-judge panel can remain in force, with

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226. One commentator, referring to the automatic disqualification for financial interest rules, stated that "their rigidity may be simply an overreaction to the Haynesworth controversy." Note, *supra* note 152, at 1545 n.50. See *supra* note 53 for a description of the controversy. See also Harper, *The Breakdown in Federal Appeals*, A.B.A. J., Feb. 1984, at 56.

227. Comment, *Disqualification of Federal Judges—The Need for Better Guidelines*, 13 WAKE FOREST L. REV. 353, 363 (1977).

228. See Note, *supra* note 151, at 1545 n.50. The per se rule "has the definite advantage of clarity, but it is difficult to see why a judge who owns ten or twenty shares of AT&T should automatically be branded as partial to AT&T as a party." *Id.*

229. For a discussion of why disqualification motions often are made late, see *supra* note 9 and accompanying text.



no possibility of prompt correction.<sup>230</sup>

Another deficiency in the financial interest disqualification rule, section 455(b)(4), is that it does not allow the parties to waive disqualification.<sup>231</sup> This is contrary to the rule under the Code of Judicial Conduct and the pre-1974 section 455. Even if the parties are convinced that the judge's small financial interest will not render him biased and agree that he should be allowed to hear the case, the judge still must disqualify himself. The refusal to permit waiver in the amended statute was opposed by the Administrative Office of the United States Courts.<sup>232</sup> The Office preferred a waiver option, pointing out that in specific cases waiver may "be advantageous to the litigants and in the best interests of the administration of justice."<sup>233</sup> Several members of Congress also objected to the inflexibility of a per se rule that did not permit waiver. They complained that this provision was "unreasonable and unrealistic."<sup>234</sup>

230. Harper, *supra* note 226, at 56. See also *Hall v. Federal Energy Regulatory Comm'n*, 700 F.2d 218, 218 (5th Cir. 1983) (Clark, C.J., dissenting) (dissent from denial of panel rehearing since required disqualifications prevent rehearings and give improper implication of agreement).

Harper also indicated that not only commentators, but many federal judges are dissatisfied with the strict financial interest disqualification rule.

Many judges privately complain that these rules are "too Draconian." They describe them as overreactions to the Watergate scandal and to the U.S. Senate's rejection of Clement Haynesworth as a nominee to the Supreme Court in 1969 after criticism of him for sitting in cases in which he had a financial interest . . . . Indeed, it is a standing joke among judges in some circuits that the way to stay off a particularly tough case or class of cases is to buy some stock in a company involved.

Harper, *supra* note 226, at 57.

231. 28 U.S.C. § 455(e) (1982).

232. Canon 3D of the Judicial Code, which the Administrative Office preferred, allows waiver of disqualification when the judge has a financial interest if he discloses

on the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

CODE OF JUDICIAL CONDUCT Canon 3D (1980).

233. H.R. REP. NO. 1453, *supra* note 52, at 6361.

234. *Id.* at 6362 (individual views of Representative Dennis of Indiana on S. 1064, concurred in by Representative Butler of Virginia).

The necessary effect of this inflexible provision is that, by legislative enactment, we could have a true Daniel come to judgment—or a Learned Hand upon the bench—and if the case involved, let us say, the Exxon Corporation, and the judge owned 20 shares of common stock, which he had inherited from his parents many years before and had never particularly thought of since, he absolutely could not sit, even though both parties to the cause preferred him—because of his expertise, learning, and integrity—to any and all available members of the judiciary.

To me, an inflexible provision of this kind does not make good sense, does not make for the highest quality of justice, and represents an over-reaction to a problem which . . . is largely nonexistent.

Clearly the potential loss of capable, experienced judges, the disruption of litigation, and the resulting waste of judicial resources are serious problems inherent in the per se rule. The combination of disqualification for a tiny financial interest and the no-waiver rule may damage public confidence in the federal judicial system by unnecessarily requiring a judge to recuse himself even when the parties have "unshaken confidence in a judge's neutrality."<sup>235</sup> In sum, the per se financial interest disqualification rule has the opposite problem from the judicial bias disqualification rule—it is unresponsive to the need for efficient administration of justice.

A case that illustrates the problems of the strict rule is *In re Cement Antitrust Litigation*.<sup>236</sup> A class action was filed alleging a conspiracy among various cement and concrete producers to fix prices in violation of antitrust laws. The plaintiff class had 210,235 members. The trial judge's wife held stock in seven of the plaintiff class members with a total value of \$29.70. Because of his wife's small ownership interest, the trial judge ruled that he was required to recuse himself.

On interlocutory appeal to the Ninth Circuit Court of Appeals, the court unanimously held that class members should be viewed as parties for the purpose of section 455(b)(4) and thus the judge correctly recused himself for having financial interests in a party to the proceeding.<sup>237</sup> In lengthy dicta, the court made clear its unhappiness with the result, but said the decision was mandated by the statute.<sup>238</sup> "Thus after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plain-

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*Id.* at 6363. See also 120 CONG. REC. 36,269 (1974).

The House Judiciary Committee defended the provision by arguing "[w]hile the ABA Canon on disqualification would permit waiver in these . . . instances, the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." H.R. REP. NO. 1453, *supra* note 52, at 6357.

235. Note, *Judicial Disqualification in the Federal Courts: Maintaining An Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 880-81.

The parties may not waive disqualification in such a situation [when the judge has a small financial interest] despite an unshaken confidence in a judge's neutrality. Under such circumstances, the parties and the public may find this requirement both inconvenient and unnecessary. Confidence in the operation of the federal judicial system may thus be damaged and not enhanced . . . . The combination of section 455(b) requirements with the strict waiver prohibition of section 455(b) . . . may go beyond the Congressional goal of the appearance of justice to hamper the operation of the federal judicial system.

*Id.*

236. 688 F.2d 1297 (9th Cir.), *aff'd mem. sub nom. Arizona v. United States Dist. Court*, 459 U.S. 1191 (1982).

237. *Id.* at 1307-13.

238. *Id.* at 1313.

tiffs, grinds to a halt over Mrs. Muecke's \$29.70."<sup>239</sup>

In general, the court noted, the per se financial interest disqualification rule could "lead to major disruption of litigation and to the loss of the judge with the most experience in the given matter, even where the judge's financial interest in the party was insubstantial."<sup>240</sup> These problems are especially likely in class actions because of the large number of parties. The court also pointed out the difficulties resulting from mandatory recusal based on the financial interests of the judge's spouse. First, with respect to male judges, wives today are more likely to be independent in financial matters than in the past. As a result, male judges are less able to avoid being disqualified because they cannot control the finances or investments of their spouses.<sup>241</sup> Second, the court noted that as increasing numbers of women become federal judges, there will be more "judicial husbands" with similarly independent careers, plans, and control of investments. "[F]rom a practical standpoint, federal judges lack control over a significant area of potential conflict under section 455."<sup>242</sup>

The *Cement* court concluded that applying the per se rule in class action cases might seriously disrupt the efficient administration of justice.<sup>243</sup> The court implied that a substantial interest test may be more satisfactory in class action cases. It also proposed that another tribunal, not the judge being challenged, should determine whether recusal is warranted under a substantial interest test. "Such a procedure would satisfy the concern that a judge not be the arbiter of questions involving his own self-interest, yet would prevent disruption of major litigation where the public interest so dictates."<sup>244</sup>

239. *Id.*

240. *Id.*

241.

[T]he judge may be unable to control the financial holdings or investment activities of a spouse. The day has passed when a husband can order his wife to arrange her financial affairs to suit his convenience. As increasing numbers of women establish careers, the likelihood that judges' wives will insist on asserting the right to maintain independent judgment and control over their investments also increases.

*Id.* at 1314.

242. *Id.*

243.

[I]t now appears that the *per se* rule may give rise to a greater number of conflicts—and a different kind—than initially anticipated by Congress . . . . [We] question whether the actual benefits of applying the *per se* rule in class action cases outweigh the resultant disruption to the orderly and efficient administration of the judicial system.

*Id.* at 1314-15.

244. *Id.* at 1315 n.19.

The history of this case on appeal to the Supreme Court confirms the fears of the rule's critics. On petition for writ of certiorari, four members of the Supreme Court disqualified themselves and thus a quorum<sup>245</sup> of six Justices was not present. Therefore, without considering the merits of the case, the Court affirmed the judgment of the Ninth Circuit.<sup>246</sup> While no reasons for recusal were stated, it is a reasonable inference that the four Justices, or their spouses, also had ownership interests in some of the plaintiff class members. This case thus demonstrates that the rigid per se rule of disqualification for financial interest may force the Supreme Court to fail to decide important legal questions for lack of a quorum.

The *Cement* case illustrates the range of problems inherent in the per se rule of section 455(b)(4): disqualification of capable judges due to insignificant financial interests, lack of control over spousal assets, waste of judicial resources, delay in already lengthy and complex litigation, and failure to address substantive issues because of lack of a Supreme Court quorum. Another important problem is that the financial interest disqualification standard discourages well-qualified persons from entering the judiciary. Given relatively modest judicial salaries, many potential judicial nominees do not want to rid themselves of investments intended to provide security for their family's future. The rule, therefore, may have the unintended effect of jeopardizing the long-term caliber of the federal judiciary.

In response to these problems, the Judicial Conference of the United States has proposed that the current section 455 be amended.<sup>247</sup> The proposed amendment would allow the parties to waive a judge's disqualification if the reason for disqualification did not arise until after "substantial judicial time had been devoted to the matter" and the judge's interest would not be substantially affected by the outcome of the case.<sup>248</sup> The proposal provides that even "in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion."<sup>249</sup> These

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245. 28 U.S.C. § 1 (1982) (quorum requires six Justices).

246. *Arizona v. United States Dist. Court*, 459 U.S. 1191 (1982) (mem.). 28 U.S.C. § 2109 (1982) provides that when there is no quorum, the court must affirm the judgment below "with the same effect as upon affirmance by an equally divided court."

247. 1980 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 81.

248. *Id.*

249. *Id.*

proposed amendments show the Judicial Conference's concern about the potential for harm to judicial efficiency in the current law.

Several other reforms would lessen these problems. At a minimum, the parties should be allowed, on their own initiative, to waive disqualification for financial interest as the Code of Judicial Conduct provides.<sup>250</sup> If the parties voluntarily agree that the judge should participate, no harm can be done to their confidence in the integrity of the judicial system by permitting them to waive disqualification.<sup>251</sup> Another desirable reform would be to set a minimum value of financial interest, for example \$1,000, below which disqualification would not be required. This would prevent trivial interests from disqualifying a judge, but still avoid the uncertainty of the substantial interest standard. Given the judicial oath of impartiality,<sup>252</sup> such a rule should not present serious dangers of biased adjudication and would permit efficient administration of justice.

#### IV. CONCLUSION

Current federal judicial disqualification law continues to reflect tensions between seemingly incompatible goals. The Constitution requires that "neutral and detached judge[s]" preside over cases.<sup>253</sup> In a democracy, the judiciary's authority ultimately depends on public confidence in the integrity of the system and the impartiality of its judges. However, these concerns must be balanced against considerations of judicial efficiency and discouraging judge-shopping by litigants. Judicial resolution of this tension has been difficult; the disqualification statutes often have been construed in accord with the principle that disqualification should not be too

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250. See *supra* notes 231-34 and accompanying text.

251. Waiver of disqualification was not permitted in the 1974 amendments, in part because of the litigants' understandable reluctance to insist that a judge recuse himself for fear of alienating him by impliedly questioning his integrity. This problem arose because, under the previous statute, a judge who knew about a potential disqualification situation often would ask the parties if they wished that he recuse himself.

This concern cannot be used to defend the absence of waiver in a Code of Judicial Conduct-type system. Under the ABA Code and the reform suggested here the parties must *independently*, on their own initiative, agree to waive disqualification in writing. Otherwise, the judge is required to disqualify himself. See Note, *supra* note 20, at 1205 n.26 (1972).

252. The judicial oath states:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

28 U.S.C. § 453 (1982).

253. See *supra* note 6.

readily achieved. Thus, despite the broader grounds for disqualification resulting from the 1974 amendments, disqualification for judicial bias is extremely rare. Cases involving financial interest have been treated differently. The 1974 statutory changes have made it very easy to disqualify on this basis.

Both situations demonstrate the deficiencies of an absolutist approach to judicial disqualification. In cases of judicial bias, the goal of avoiding the appearance of bias has been ignored. This is especially true when a judge holds publicly known, prior out-of-court opinions on issues to be decided in the litigation pending before him. On the other hand, the *per se* rule requiring disqualification for a judge's financial interest in a case ignores the damage done to the administration of justice through waste of judicial resources, delay and expense in deferred litigation, and loss of well-qualified judges.

The 1974 amendments attempted to provide more certain standards for disqualification in instances of both judicial bias and financial interest. Better solutions to the inherent problems in disqualification law are available, however. More flexible approaches should be taken in both judicial bias and financial interest cases. When there is a reasonable question of a judge's impartiality because of his prior views on disputed legal issues or the subject matter of the case, disqualification should be seriously considered. This case-by-case approach is far better than the current, automatic rejection of recusal because the claim falls under the rubric of "judicial bias." In addition, it is consistent with the spirit and language of section 455(a) and protects public confidence in the judiciary. Referral of claims of judicial bias to another judge also would enhance public confidence. Reform in the financial interest disqualification rule should include authorizing the parties to waive disqualification and establishing a minimum financial interest for which disqualification is required. These more flexible approaches will allow disqualification law to be more responsive to the two fundamental interests of an impartial judiciary and judicial efficiency.