UIC Law Review

Volume 14 | Issue 1 Article 10

Fall 1980

Idaho v. Freeman - Judicial Disqualification: The Effect of Religious Leadership on Judicial Impartiality, 14 J. Marshall L. Rev. 243 (1980)

Gwenda M. Burkhardt

*IDAHO V. FREEMAN**
JUDICIAL DISQUALIFICATION: THE EFFECT OF RELIGIOUS LEADERSHIP ON JUDICIAL IMPARTIALITY

The fundamental principle that a man may not be a judge in his own case was recognized by the common law as early as Coke's time.[1] The English courts extended this principle to include judges who had an economic interest in the case,[2] even when that interest was quite remote.[3] The first indication of possible disqualification[4] for actual bias rather than for economic interests appeared in 1865.[5] Under this expanded doctrine, disqualification was required when the litigant showed that a judge possessed a substantial interest, whether economic or otherwise, in the outcome of the litigation.[6]

Statutory law in the United States did not follow the English precedent of recognizing a right to disqualification based on bias alone.[7] Congress enacted the first statute governing disqualifi-

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* 478 F. Supp. 33 (D. Idaho 1979).

1. Dr. Bonham's Case, 77 Eng. Rep. 646 (K.B. 1609), also reported as College of Physicians Case, 123 Eng. Rep. 928.

2. *E.g.*, Dimes v. Proprietors of Grand Junction Canal, 10 Eng. Rep. 301 (H.L. 1852) (Lord Chancellor disqualified from reviewing trespass action because he held a substantial amount of stock in plaintiff company).

3. The Queen v. Justices of Hertfordshire, 115 Eng. Rep. 284 (Q.B. 1845) (Magistrate disqualified from hearing case involving money dispute because a party to the suit owed the Magistrate a small amount of money).

4. The term recusal is sometimes used in place of disqualification. Although courts and writers do not consistently differentiate between the terms, one commentator has suggested that disqualification occurs because of a statutory mandate, whereas recusal is a voluntary act on the part of the judge. *See* Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW AND CONTEMP. PROB. 43, 45 (1970). This note will use the term disqualification exclusively.

5. The Queen v. Rand, L.R. 1 Q.B. 230 (1866) ("Though any pecuniary interest, however small, in the subject matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shewn at least to be real.").

6. The Queen v. Meyer, 1 Q.B.D. 173, 177 (1875) ("In the case of a justice having any pecuniary interest the Court [is] compelled to quash the conviction; but though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial.").

7. *See, e.g.*, Jones v. State, 61 Ark. 88, 32 S.W. 81 (1895) (Defendant in a murder trial moved to disqualify the trial judge on the ground that he had already formed an opinion as to the guilt of the defendant and was therefore biased. The judge held that no statute required disqualification of

cation of federal judges in 1792.[8] This statute required disqualification when a district judge was in any way "concerned in interest" or had been "of counsel."[9] Recognizing the inadequacy of this statute, Congress subsequently passed several amendments which provided new grounds for disqualification.

In 1821, relationship or connection to a party was made an additional basis for disqualification.[10] A 1911 amendment provided that a judge was disqualified if he was or had been a material witness in the case.[11] The statute was again amended in 1948 to require disqualification when a judge had a substantial interest or a connection with a party's attorney.[12] This statute, with its numerous amendments, remained in effect until it was completely rewritten in 1974. The new statute, 28 U.S.C. § 455(a),[13] is currently the governing provision for disqualification of federal judges on the basis of bias.

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judges based on bias.); Clyma v. Kennedy, 64 Conn. 310, 29 A. 539 (1894) (justice of the peace was not subject to disqualification in criminal libel action, though he was the person libeled; there was no statute forbidding him to act).

8. 36 U.S.C. § 11 (1792) (current version at 28 U.S.C. § 455 (Supp. V 1975)).

9. *Id.* The statute required the judge to transfer the case to the next circuit in the district if he was in any way concerned in interest or had been of counsel in the case.

10. 51 U.S.C. § 9 (1821) (current version at 28 U.S.C. § 455 (Supp. V 1975)). Several courts interpreted this statute following its enactment. *See, e.g., Ex Parte* N.K. Fairbank Co., 194 F.978 (M.D. Ala. 1912) (disqualification based on judge's previous representation as counsel in the case); Commonwealth v. McLane, 70 Mass. 427 (4 Gray 1855) (disqualification based on judge's pecuniary interest in the litigation); Paddock v. Wells, 2 Barb. Ch. 331 (N.Y. 1847) (disqualification based on judge's relationship to a party).

11. 231 U.S.C. § 20 (1911) (current version at 28 U.S.C. § 455 (Supp. V 1975)).

12. 646 U.S.C. § 62 (1948) (current version at 28 U.S.C. § 455 (Supp. V 1975)). This statute provided for a judge's disqualification in any case in which he had a substantial interest, had been of counsel or a material witness, or was so related to or connected with any party or his attorney as to render it improper, in his opinion, to hear the case.

13. 28 U.S.C. § 455 (Supp. V 1975). Section 455(a) governs disqualification on the basis of bias; however, there are five additional situations described in section 455(b) in which a judge should disqualify himself: (1) where he has a personal bias or prejudice concerning a party; (2) where in private practice he served as a lawyer in the matter in controversy; (3) where he has served as a government employee as counsel or advisor in the proceeding; (4) where he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy; or (5) where he or his spouse, or a person within third degree relationship to either of them, is a party, lawyer, or material witness in the proceeding.

Additionally, two other provisions relate to disqualification of federal judges. 28 U.S.C. § 144 (1949) establishes a procedure by which a party may move that a district judge disqualify himself because of bias or prejudice against the party, and 28 U.S.C. § 47 (1970) provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." For a discussion of these statutes, *see* Comment, *Disqualification of*

The radical change in the existing statute appeared in the phrase, "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[14] This new language was intended to remedy contemporary dissatisfaction with existing statutory standards by broadening and clarifying the grounds for disqualification.[15] Additionally, section 455(a) was intended as a general or catch-all provision to cover those areas which the old statute did not specifically address.[16]

Section 455(a) was intended to promote public confidence in the impartiality of the judicial process. Congress attempted to achieve this goal by replacing the subjective standard expressed in the old statute with an objective standard for disqualification.[17] Additionally, section 455(a) eliminated the so-called "duty to sit."[18] Previously, a judge faced with a close question of disqualification was urged to resolve the issue in favor of hearing the case. By eliminating the duty to sit, Congress intended to allow judges greater flexibility in determining whether to withdraw in questionable cases.[19]

As Congress broadened the grounds for disqualification under section 455(a), litigants correspondingly broadened their reasons for requesting disqualification. Two recent cases in which litigants based their motions to disqualify on grounds of bias because of the judges' sex[20] or race[21] illustrate this trend.

Federal Judges: Statutory Right to Recusal and the 1974 Amendments to Title 28, 31 Sw. L. J. 887 (1977).

14. *Compare* 28 U.S.C. § 455 (Supp. V 1975) *with* note 12 *supra* (The phrase "in his opinion" has been eliminated by the amendment.).

15. *To Broaden and Clarify the Grounds for Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice*, 93rd. Cong., 2d Sess. 39 (1974) (statement by the Honorable Robert J. Traynor).

16. S. REP. No. 93-419, 93rd Cong., 1st Sess. 1, 5 (1973), *reprinted in* [1974] U.S. CODE & AD. NEWS 6351, 6354.

17. *Id.* at 6355 ("This general standard is 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.").

18. *Id.* The duty to sit concept had been widely criticized by legal writers, and witnesses at the hearings unanimously agreed that eliminating this mandate would enhance public confidence in the impartiality of the judicial system.

19. *Id.* For a thorough analysis of Congress' goals in revising section 455(a), see United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977).

20. Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975). *See* text accompanying notes 108-10 *infra*.

21. Paschall v. Mayone, 454 F. Supp. 1289 (S.D.N.Y. 1978). *See* note 110 and accompanying text *infra*.

However, not until *Idaho v. Freeman*[22] had any litigant sought to disqualify a judge because of his religious convictions or affiliations.

FACTUAL BACKGROUND

On May 9, 1979, the Idaho and Arizona Attorney's General filed suit in the federal district court in the state of Idaho on behalf of their respective state legislatures. The plaintiffs challenged congressional authority to extend the ratification deadline for the proposed Equal Rights Amendment (ERA),[23] and sought to validate Idaho's rescission of its prior approval of the ERA.[24] The defendant was the General Services Administrator, whose statutory duty is to tabulate adopting votes and proclaim an amendment as part of the Constitution.[25]

The plaintiffs alleged that all state approvals became ineffective as of March 22, 1979, the expiration of the original ratification period.[26] Moreover, the plaintiffs argued that adopting states had approved the ERA based on the original ratification deadline of seven years.[27] Hence, the plaintiffs contended that Congress was unable to extend the ratification deadline for an additional three years without making a new proposal to these states.[28] Alternatively, the plaintiffs maintained that Idaho's rescission was effective, and, therefore, the defendant could not count Idaho as an adopting state. Thus, the plaintiffs sought a

22. 478 F. Supp. 33 (D. Idaho 1979).

23. U.S. CONST. proposed amend. XXVIII provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

24. Idaho v. Freeman, 478 F. Supp. 33, 34-35 (D. Idaho 1979) (Arizona alleged that the defendant's refusal to count Idaho's rescission harmed its policy that the ERA not be adopted.).

25. 1 U.S.C. § 112 (1951). Formerly, official notice from a state legislature that it had ratified a proposed amendment went to the Secretary of State.

26. H.R.J. Res. 208, 92d Cong., 1st Sess. (1972). When the amendment was proposed by Congress on March 22, 1972, it was given a seven year ratification deadline. In 1978, Congress extended the deadline until June 30, 1982. H.R.J. Res. 638, 95th Cong., 2d Sess. (1978).

27. Letter from Maxwell A. Miller (March 7, 1980), attorney for the Mountain States Legal Foundation, a public interest law center that instituted the suit. Reprints may be obtained by writing to Maxwell A. Miller at Mountain States Legal Foundation, 1845 Sherman St., Denver, Colo. 80203.

28. *Id.*

declaratory judgment proclaiming Idaho's rescission valid and declaring the extension unconstitutional.[29]

On August 8, 1979, the Justice Department, representing the defendant, filed a motion to disqualify Judge Marion Callister from hearing the case.[30] The defendant contended that because Judge Callister held a prominent position within the Church of Jesus Christ of Latter-day Saints (Mormons),[31] which officially opposes both the ERA and the extension of its ratification deadline, there existed a reasonable basis to conclude that his ability to impartially consider the action might be or appear to be impaired.[32]

The motion to disqualify marked the first time the Justice Department sought a judge's withdrawal based on his religious affiliations.[33] On October 4, 1979, Judge Callister denied the disqualification motion.[34] He held that a reasonable person would not have concluded that impartiality was foreclosed because of his position in the Church.[35] No appeal has been taken from the Judge's decision.

The Mormon Opposition to the ERA

The Mormon opposition to both the ERA and to Congress' extension of the ratification deadline formed the first basis of the defendant's disqualification motion.[36] The Mormon Church has characterized the ERA as a moral issue rather than a political one.[37] The significance of this distinction strengthened the

29. Idaho v. Freeman, 478 F. Supp. 33, 34-35 (D. Idaho 1979).

30. *Id.* at 34.

31. The Church of Jesus Christ of Latter-day Saints is commonly known as the Mormons, however, it is occasionally referred to as LDS.

32. Motion to Disqualify at 1-2. Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979).

> The ground for this motion is that, because this Court presently holds a prominent position within the hierarchy of the Church of Jesus Christ of Latter-day Saints, which organization officially opposes both the ratification of the Equal Rights Amendment and the extension of the Amendment's ratification period, there exists a reasonable question concerning the ability of the Court to render an impartial decision in this matter within the meaning of section 455.

33. Nat'l L.J., Oct. 15, 1979, at 1, col. 1.

34. Idaho v. Freeman, 478 F. Supp. 33, 37 (D. Idaho 1979).

35. *Id.*

36. *See* note 33 *supra.*

37. "The moral obstacles associated with the ERA are overwhelming; they require our firm conclusion that the ERA is a serious moral issue and its passage could significantly affect the standards of right and wrong that are vital to us as a religious people." *The Church and the Proposed Equal Rights Amendment, A Moral Issue*, ENSIGN MAGAZINE (Feb. 1980) at 8 (pamplet devoted entirely to Mormon position on the ERA).

defendant's argument that Judge Callister might be or appear to be partial.[38]

The Mormons identify a moral issue as one to which "God has given applicable standards of right and wrong."[39] Church leaders have stressed that passage of the ERA would "stifle many God given feminine instincts and lead to a unisex society."[40] Therefore, church leaders determined that the ERA was an issue of morality. Other issues identified by the Church as moral have included homosexual and lesbian activities, abortion, and the failure of fathers to care for their families.[41] The Church's characterization of the ERA as an issue of morality, with these traditionally sensitive issues, is significant since members must adhere to Church doctrine on moral issues, but may exercise their own discretion in following the Church's political views.[42]

Furthermore, the Mormons have formally announced their opposition to House Joint Resolution 638 which extended the ERA's ratification period.[43] Church leaders stated that their opposition to the ERA had intensified because Congress had tampered with the amendment process.[44] They reasoned that Congress' extension of the ratification deadline while denying states the right to rescind was unfair. Additionally, the leaders asserted that "any such gross abuse of the democratic process and of the process of amending the Constitution could send a surge of cynicism through the land which might damage the Constitution itself."[45]

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38. *See* Brief in Support of Motion to Disqualify at 4, Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979).

39. *The Church and the Proposed Equal Rights Amendment, A Moral Issue*, ENSIGN MAGAZINE (Feb. 1980) at 8.

40. ENSIGN MAGAZINE (Oct. 1978) at 63. This article, devoted to questions Mormon members had regarding the Church's opposition to the ERA, stressed the Morman view that the ERA would strike at the family, "humankinds" basic institution. The author maintained that passage of the ERA would carry with it the risk of extending constitutional protection to immoral lesbian and homosexual marriages.

41. *The Church and the Proposed Equal Rights Amendment, A Moral Issue*, ENSIGN MAGAZINE (Feb. 1980) at 8.

42. Statement of the First Presidency read in Mormon sacrament meetings on July 1, 1979. For an explanation of the Mormon hierarchy and the position of the First Presidency, *see* text accompanying notes 51-62 *infra*.

43. 124 CONG. REC. S8442 (1978). In Sept. 1976, the First Presidency of the Mormons issued a statement announcing the Church's opposition to the ERA. This statement was reprinted in the Congressional Record.

44. *Id.* It was their position that Congress had the ability to resolve any inequality and unfairness to women without abusing the amendment process and undermining the Nation's most basic institution—the family.

45. *Id.* (It would be tragic if an amendment which claims to bring constitutional equality to women ended up injuring the Constitution.).

Finally, Church leaders stated that the Church as an institution rarely commits itself to the defeat of proposed legislation.[46] Church members have been urged to exercise their "civil rights and duties" and to "make their influence felt" by working together to reject the ERA.[47] The Justice Department contended that Judge Callister could not realistically ignore the Church's position when deciding the issues.[48] Moreover, the defendant argued that although the Judge might remain impartial, an appearance of partiality would result if he continued to hear the case.[49]

The Mormon Hierarchy and Judge Callister's Role as Regional Representative

The second argument advanced by the Justice Department in its disqualification motion concerned Judge Callister's position within the Mormon Church. The defendant asserted that Judge Callister was not an ordinary member of the Church, but rather a representative of its top echelon.[50] As such, he was duty bound to follow the Church's directives and policies. To fully comprehend the basis of this contention, it is necessary to understand the position Judge Callister held within the Church hierarchy.

The First Presidency, composed of the Church President and two counselors, heads the Mormon Church with the assistance of the Quorum of Twelve and the First Quorum of Seventy.[51] The First Presidency and the Quorum of Twelve set church policy and elevate church members to leadership posi-

46. *Id.*

47. *The Church and the Proposed Equal Rights Amendment, A Moral Issue*, ENSIGN MAGAZINE (Feb. 1980) at 16 (The author stated that the First Presidency had repeatedly encouraged Church congregations to join state coalitions in an effort to increase their efficiency in working to defeat the passage of the ERA.).

48. Brief in Support of Motion to Disqualify at 7, Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979).

49. Idaho v. Freeman, 478 F. Supp. 33, 35 (D. Idaho 1979).

50. Brief in Support of Motion to Disqualify at 7, Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979). The defendant contended that the Morman Church had mounted a full-scale institutional effort to defeat ratification of the ERA and to invalidate the extension of the ratification period. Although ordinary Church members are instructed to follow Church doctrine on moral issues, the defendant stressed that Judge Callister's responsibility was to assist the First Presidency in the implementation of its vigorous anti-ERA policy.

51. THE MORMONS 1 (Deseret Book Co. 1978) ("The head of the Church is Jesus Christ, the redeemer of all mankind. Under his will an earthly prophet serves as president of the Church on earth. This prophet holds all keys of priesthood authority on the earth and authorizes the work of the Church to be done.").

Only the First Presidency and Quorum of Twelve can declare a particular issue to be "moral," and therefore, worthy of full institutional involve-

tions.[52] The First Quorum of Seventy supervise the worldwide activities of 4.2 million Church members.[53] These eighty-five men hold the only full-time paid positions within the Church hierarchy.[54]

The Church is divided into geographical zones. These zones are subdivided into areas according to the number of members within each zone.[55] Each member of the First Quorum of Seventy supervises an area or a zone.[56] The areas are divided into regions which are directed by "a select group of priesthood leaders known as Regional Representatives."[57] Their authority extends to approximately 18 to 40 congregations with 15,000 to 20,000 members within each region.[58]

Judge Callister is a Regional Representative of the Boise Idaho Region.[59] His responsibilities include regularly visiting the congregations within his region to coordinate church activities.[60] He also serves as an adviser to congregation presidents and acts as a liaison officer between the Church's local units and its governing body.[61] The function of a Regional Representative is to interpret church policy for local congregations within his region.[62]

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ment. J. ALLEN AND M. LEONARD, THE STORY OF THE LATTER-DAY SAINTS (1976) [hereinafter cited as ALLEN AND LEONARD].

52. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL HANDBOOK OF INSTRUCTIONS No. 20, at 10 (1968) [hereinafter cited as HANDBOOK].

53. *Id.*

54. THE MORMONS 1 (Deseret Book Co. 1978).

55. *Id.*

56. HANDBOOK, *supra* note 52, at 10.

57. *Id.*

58. ALLEN AND LEONARD, *supra* note 51, at 42. The position of Regional Representative was created in 1967. Originally, sixty-nine men were appointed; today, there are approximately 130 Mormons holding this position.

59. Idaho v. Freeman, 478 F. Supp. 33, 35 (D. Idaho 1979).

60. THE MORMONS 1 (Deseret Book Co. 1978). On a local level, the Mormons are organized into stakes which are composed of small congregations called wards. A stake president and two counselors, assisted by twelve men known as the stake high council, preside over each stake. A bishop or ward president also assisted by two counselors preside over each ward.

61. HANDBOOK, *supra* note 52, at 10.

62. Idaho v. Freeman, 478 F. Supp. 33, 35 (D. Idaho 1979). Although Judge Callister explained that his position did not involve the establishing of Church policy, the media has compared his position to a Cardinal or Archbishop in the Catholic Church. "[Judge] Callister is a regional representative in the Mormon Church, reporting directly to the Church's ruling Council of 70. This position is comparable to a Cardinal in the Roman Catholic Church." Wash. Post, Dec. 7, 1979, at 7 (statement by Rep. Don Edwards, D-Calif.).

> A regional representative in the Mormon Church is not an ordinary member of the congregation; he is a direct representative of the uppermost echelons of the Church hierarchy, and his charge is to oversee the

JUDGE CALLISTER'S OPINION

In a brief overview of the law of disqualification, Judge Callister noted that the test under section 455(a) was not the subjective belief of the defendant or the judge, but whether the facts would lead a reasonable person to infer that bias or prejudice existed.[63] Although the Judge acknowledged that several cases have indicated that even the appearance of partiality was enough to require disqualification, he rejected this standard.[64] Instead, he asserted that the test required balancing the right of every litigant to have his cause decided by a fair and impartial tribunal against the presumption of qualification and the policy against allowing litigants to engage in judge shopping.[65]

In response to the defendant's contentions, Judge Callister stated that his church position did not distinguish him from any other church member. He explained that every member held some position of trust within the Church.[66] Additionally, the Judge reasoned that the defendant had misconceived the relationship between church and state when he alleged that the Church would influence the Judge in his interpretation of the law. Judge Callister stressed that the Church's jurisdiction over its members extended only to their standing in the Church, not to their civil responsibilities in the community.[67]

Judge Callister recognized a "sense of . . . dual citizenship in [his] church and in the Nation, with obligations running to

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propagation of the church's doctrines and the implementation of its programs. He is the ecclesiastical equivalent of at least an Archbishop in the Catholic Church.

N.Y. Times, Dec. 19, 1979, at A 30, col. 1.

Judge Callister has also been characterized as "a church decision maker" and as "part of the inner circle that has already passed judgment on the extension & rescission issues." Wash. Post, Dec. 15, 1979, at 12, col. 2.

63. Idaho v. Freeman, 478 F. Supp. 33, 35 (D. Idaho 1979).

64. *Id.* at 35-36. *See* text accompanying notes 82-95 *infra*.

65. Idaho v. Freeman, 478 F. Supp. 33, 35-36 (D. Idaho 1979). In denying the disqualification motion, Judge Callister relied heavily on warnings issued by the Senate Judiciary Committee. *See* text accompanying notes 96-100 *infra*.

66. Idaho v. Freeman, 478 F. Supp. 33, 35-36 (D. Idaho 1979). Since all members have the same obligation to uphold the Christian doctrines, the Judge concluded that the defendant's motion, if granted, would proscribe any lay member of the Church from presiding in the case.

67. *Id.* at 36.

> [T]he only authority which the churches claim is the right to represent the God they worship, in matters pertaining to His kingdom as they see and understand them. They have a right to expect that their members conform to church teachings and standards in matters of religious worship and moral conduct. . . . However, societies have never claimed, nor have they been given the right to interfere with the relationship between government and their citizens. . . .

each;"[68] nevertheless, he maintained that his ability and training as a judge enabled him to separate his religious obligations from his judicial duty to uphold the Constitution.[69] Judges are trained to uphold a law although they may disagree with its validity.[70] Moreover, Judge Callister stated that he had never publicly advocated the Church's opposition to the ERA, nor had he ever voiced any opinion regarding the amendment.[71]

In further support of Judge Callister's determination that his Church position would not prejudice him, he concluded that the merits of the ERA were not at issue in the lawsuit. Alternatively, the Judge stated that even if they were at issue, his decision could be reviewed anew on the appellate level and "utterly disregarded."[72] Therefore, Judge Callister refused to grant the disqualification motion.[73]

ANALYSIS

Religious Freedom and Public Office

The Supreme Court has stated that the first amendment's religion clauses were based on Jefferson's Bill for Establishing Religious Freedom.[74] Jefferson's Bill provided that "no one shall suffer on account of his religious opinions or belief; but that all men shall be free to maintain their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities."[75] Although the issue of a judge's disqualification on the basis of his religious affiliations is one of

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68. *Id.*

69. *Id.* at 37. The Judge relied on his oath of office to support this contention. Every federal justice or judge is required to take the following oath before performing the duties of his office:

> 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. So help me God.

28 U.S.C. § 453 (1948).

70. Idaho v. Freeman, 478 F. Supp. 33, 36-37 (D. Idaho 1979).

71. *Id.*

72. *Id.* at 37. The Judge noted that in cases in which the undisputed evidence consists almost entirely of public documents and records, appellate court procedure permits reviewing courts to consider the evidence and the law as if the case had been initially tried before them. The Judge concluded that in this case it was apparent that the district court was only a "conduit for passing these issues on to the circuit court and ultimately, the Supreme Court of the United States."

73. *Id.*

74. Everson v. Board of Educ., 330 U.S. 1 (1947).

75. J. BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 77-78 (1964).

first impression in the federal courts, the premise that religious beliefs can interfere with civil duties was a question contemplated by the founding fathers.

The Supreme Court addressed this concern in *McDaniel v. Paty*.[76] In *McDaniel*, a candidate for delegate to a Tennessee constitutional convention sought a declaratory judgment proclaiming that an opponent, a Baptist minister, should be disqualified from serving due to a Tennessee constitutional provision. This provision barred ministers and priests of any denomination from holding public office.[77] The Court held that the provision violated the minister's first amendment right to free exercise of religion. The Court reasoned that disqualification was not justified merely on the ground that ministers in public office would exercise their powers and influence to promote the interests of one sect or thwart the interests of another.[78] The Court concluded that case precedent provided no support for the fear that clergymen in public office would be less mindful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.[79]

Justice Brennan concurred, noting that the first amendment protects a person's religious beliefs even when held with such sincerity as to impel the person to join the ministry. Justice Brennan believed that the government could not prohibit a person whom it regarded as over-involved in religion from holding public office.[80] Thus, it would appear that a judge may not be disqualified from performing his judicial duties because he holds a leadership position in a church.

However, the propriety of a church leader presiding over a case which involves issues that his church has strongly opposed entails more than a determination of the judge's first amendment right to be a religious leader. This question centers on the effect that his religious activities will have on his ability to remain impartial. Judge Callister stressed that the position he

76. 435 U.S. 618 (1978).

77. *Id.* at 621 n.1 (1978). In its first Constitution in 1796, Tennessee disqualified ministers from serving as legislators. TENN. CONST. art. VIII, § 1 (1796). The state legislature applied this provision to candidates for delegate to the State's 1977 limited constitutional convention when it enacted 1976 Tenn. Pub. Act ch. 848, § 4. This act provided: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention . . . ."

78. McDaniel v. Paty, 435 U.S. 618, 629 (1978).

79. *Id.*

80. *Id.* at 631 (Brennan, J., concurring).

held would not affect his impartiality.[81] However, he failed to address the other factor which must be considered: whether an appearance of partiality might result from his refusal to withdraw.

The Appearance of Partiality

A majority of courts have interpreted section 455(a) to require disqualification based on either an appearance of partiality or partiality in fact.[82] Although Judge Callister recognized that several courts have held that even the appearance of partiality was enough to require disqualification,[83] he did not accept this view. Instead, he held that partiality in fact was the governing standard under section 455(a). Consequently, Judge Callister failed to consider the effect that his refusal to disqualify could have on fostering public disenchantment in the judiciary.[84]

The overriding concern with an appearance of partiality, which also pervades the Code of Judicial Conduct,[85] stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence.[86] "Possessed of

81. Idaho v. Freeman, 478 F. Supp. 33, 36 (D. Idaho 1979). *See* text accompanying notes 66-68 *supra.*

82. *E.g.*, Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (The goal of the disqualification statute is to foster the appearance of impartiality, and therefore the existence of bias in fact is not required for section 455(a) to apply); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978) (Congress was concerned with the appearance of impartiality to the public when enacting section 455(a). Therefore, the trial judge should have disqualified himself because as chief justice of the state he had participated in the state supreme court's adjudication of the same claims.); Bell v. Chandler, 569 F.2d 556, 560 (10th Cir. 1978) ("The appearance of impartiality is virtually as important as the fact of impartiality."); Smith v. Pepsico, Inc., 434 F. Supp. 524 (S.D. Fla. 1977) (Section 455(a) is governed by an appearance of partiality test; however, plaintiff's attorney's previous position as law clerk for the court is an insufficient basis to require the judge to disqualify himself.). *Contra*, United States v. Olander, 584 F.2d 876 (9th Cir. 1978) (court rejected appearance-of-bias test and held that bias in fact governs all motions for disqualification under section 455(a)).

The Ninth Circuit's position is in the minority and contrary to the appearance-of-bias test established by the Code of Judicial Conduct. E. W. THOADE, REPORTER'S NOTES TO THE ABA CODE OF JUDICIAL CONDUCT 61 (1973).

83. Idaho v. Freeman, 478 F. Supp. 33, 35-36 (D. Idaho 1979).

84. *See* note 82 *supra.*

85. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (Trial judges failure to disqualify himself in case in which his father was a partner in the law firm representing the plaintiff constituted an abuse of sound judicial discretion. The appearance of bias that resulted from the judge's participation in the case endangered the public confidence in the impartiality of the judicial process.).

86. *Id.*

neither the purse nor the sword, the judiciary depends primarily on the willingness of members of society to follow its mandates."[87] The judiciary would not survive if the public lost faith in the impartiality of judges.

Judge Callister failed to address these public policy considerations when he stated his reasons for denying the disqualification motion. Furthermore, he failed to distinguish his decision from the numerous cases in which judges have disqualified themselves although expressly finding no bias or prejudice.[88] These judges explained that the protection of judicial integrity and dignity from any hint or appearance of bias is the foundation of our judicial system.[89] 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.[90] To preserve public confidence in the judiciary, "justice must satisfy the appearance of justice."[91] Judge Callister's reasoning lacks the requisite emphasis on the appearance of partiality necessary to preserve public confidence in the judiciary.

87. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROB. 3,5 (1970). For a thorough examination of the importance of public confidence in the judiciary, *see* Comment, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

88. *E.g.*, United States v. Moore, 405 F. Supp. 771, 772 (S.D.W.Va. 1976) (trial judge disqualified himself because of his personal relationship with a United States Senator whose political interests were opposed to the defendants; however, the judge expressly stated that he had no prejudice and did not doubt that the defendants would receive a fair trial in his court); Smith v. Sikorsky Aircraft, 420 F. Supp. 661, 662 (C.D. Cal. 1976) ("[T]he undersigned Judge, although he expressly finds that he has no personal bias or prejudice, . . . nevertheless finds that his impartiality 'might reasonably be questioned,' as set forth in 28 U.S.C. § 455(a).").

89. Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980); *accord*, Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (In withdrawing from this case, Justice Frankfurter stated: "[T]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact.").

90. United States v. Zarowitz, 326 F. Supp. 90 (C.D. Cal. 1971) (Defendants charged with using interstate facilities to aid in racketeering activities, alleged bias of the judge on the basis of his participation in pre-indictment investigations. The judge withdrew, holding that confidence in the judiciary is essential to the successful functioning of our democratic form of government); *accord*, Bradley v. Milliken, 426 F. Supp. 929, 942 (E.D. Mich 1977) ("The foundation of our adversary system is strengthened by the public's confidence in the judiciary. Nothing undermines that foundation more than a presiding judge who gives the appearance of partiality.").

91. *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW & CONTEMP. PROB. 69, 79 (1970) ("The point is *not* whether justice is in fact done; that is important but only half the picture. Also necessary is a belief—read confidence—that judges are rendering justice.") (emphasis in original).

Judge Callister maintained that his judicial training would enable him to remain impartial despite Church influence and his role as a Regional Representative.[92] The difficulty with challenging a judge's subjective belief that he can be fair and impartial is apparent. Thus, reliance on this subjective belief to deny the disqualification motion displays a misinterpretation of section 455(a). Congress replaced the subjective standard for disqualification, which had allowed the judge to decide whether to withdraw, with the present objective standard requiring disqualification whenever a judge's impartiality "might reasonably be questioned."[93]

Many courts have stated that the proper test under section 455(a) is whether the facts presented would lead a reasonable person to infer that bias or prejudice existed thereby foreclosing impartiality of judgment. These courts maintained that the subjective belief of the judge did not govern disqualification.[94] Judge Callister recognized the reasonable person standard but determined that a reasonable person would not have concluded that his impartiality was affected by his position in the Mormon Church.[95] This application of the reasonable person standard demonstrates a perspective not reflective of Congress's overall intention in enacting section 455(a).

The Committee Comments to Section 455(a)

Congress's elimination of the subjective standard was designed to promote public confidence in the impartiality of the judicial process. The committee comments explained that the objective standard required a judge to withdraw if there was a reasonable basis for doubting his impartiality. Moreover, the committee urged judges to withdraw when confronted with a close question on disqualification.[96]

Although broadening the grounds for disqualification under section 455(a), the committee also expressed its concern over potential abuse of the statute by litigants engaging in judge shopping.[97] This practice has been universally viewed as a

92. *See* text accompanying notes 69-70 *supra*.

93. 28 U.S.C. § 455 (Supp. V. 1975). *See* note 17 and accompanying text *supra*.

94. *E.g.*, United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977); United States v. Corr, 434 F. Supp. 408, 412-13 (S.D.N.Y. 1977).

95. Idaho v. Freeman, 478 F. Supp. 33, 37 (D. Idaho 1979).

96. *See* text accompanying notes 14-18 *supra*.

97. This occurs when a party attempts to have his case tried before a particular judge who he feels will render the most favorable judgment or verdict. *See* S. REP. NO. 93-419, 93rd Cong., 1st Sess. 1, 5 (1973), *reprinted in* [1974] U.S. CODE & AD. NEWS 6351, 6355.

threat to the proper functioning of the judicial system.[98] The committee warned judges to be alert to this practice, and it advised that a litigant's fear of an adverse decision was not a "reasonable fear" that a judge would be partial.[99]

In analyzing section 455(a), Judge Callister followed many judges who relied on the committee's cautionary statements to deny disqualification motions.[100] However, these judges weighed the congressional purpose in enacting the statute against the cautionary statements, and it was only after a thorough analysis of both did they deny the disqualification motion. Judge Callister did not examine the congressional purpose but merely quoted the cautionary statements. These statements alone lead to the conclusion that Congress was more concerned with narrowing the grounds for disqualification rather than broadening and clarifying them. Thus, reliance solely on the cautionary statements without consideration of the congressional purpose presented a distorted view of the statutory intent.

Despite Judge Callister's tenuous reasoning, his decision is supportable if the consequences of granting the disqualification motion are examined. If section 455(a) required disqualification based on religious affiliations, Catholics would be proscribed from presiding over abortion cases[101] and Jews would be pro-

98. Blizard v. Fielding, 454 F. Supp. 318, 321 (D. Mass. 1978). *See generally* Rademacher v. City of Phoenix, 442 F. Supp. 27 (D. Ariz. 1977).

99. S. REP. No. 93-419, 93rd Cong., 1st Sess. 1, 5 (1973), *reprinted in* [1974] U.S. CODE & AD. NEWS 6351, 6355. The committee stated:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice (emphasis in original).

100. *E.g.*, United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977) (*Coram nobis* petitioner, who had been tried twice on separate criminal charges by the same judge who heard *coram nobis* petition, made an insufficient showing of a reasonable suspicion of bias on the part of the judge to require his disqualification); United States v. Conforte, 457 F. Supp. 641 (D. Nev. 1978) (allegations that judge made derogatory statements about defendant at a cocktail party four years before present suit held insufficient to require disqualification under section 455 (a)); United States v. Corr, 434 F. Supp. 408 (S.D.N.Y. 1977) (statements of judge during the proceeding in which he questioned the defendant's credibility were held insufficient to require the judge's disqualification).

101. Justice Brennan, who is Catholic, concurred in the opinion written by Justice Blackmun in Roe v. Wade, 410 U.S. 113 (1973), the leading abortion case.

scribed from presiding over prosecutions for violating Sunday closing laws.[102] Furthermore, such an interpretation could conceivably require blacks to withdraw from civil rights actions[103] and require women to withdraw from sex discrimination suits. Although there are no reported cases in which disqualification was sought on the basis of a judge's religious affiliations, two judges have held that sex or race cannot form the basis of a disqualification motion.

Disqualification Based on Sex or Race

Commonwealth v. Local 542, International Union of Operating Engineers[104] involved a civil rights suit arising from alleged discrimination in employment practices by the construction industry. The defendants' disqualification motion was based on their contention that a black judge who was a prominent leader of the civil rights movement would be unable to maintain his impartiality.[105] The judge denied the motion and held that neither his race nor his civil rights activities required his disqualification. The judge stated that "[i]t would be a tragic day for the nation and the judiciary if a myopic vision of a judge's role prevailed" which required judges to refrain from participating in religious and community activities.[106] This language supports the view that religion cannot form the basis of a disqualification motion. This case, however, was decided under the "duty to sit" concept expressly discarded by section 455(a).[107] Therefore, *Local 542* does not persuasively support Judge Callister's decision.

In *Blank v. Sullivan & Cromwell*,[108] a woman brought a civil rights action against a law firm alleging sex discrimination in the firm's employment practices. The defendants' disqualification motion was based on their contention that a female judge would

102. Justice Frankfurter, who is Jewish, concurred in McGowan v. Maryland, 366 U.S. 420, 459 (1961), a criminal case involving violations of Sunday closing laws.

103. Justice Marshall of the Supreme Court has devoted most of his professional life advocating black interests. More specifically, as a lawyer for the NAACP and other black groups he had argued literally dozens of racial discrimination cases before the United States Supreme Court. C. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 105-09 (1978). Justice Marshall's prominence as a black leader has not meant that he has been required to disqualify himself in any cases involving racial discrimination against blacks. *E.g.*, Keyes v. Denver School Dist., 413 U.S. 189 (1973) (busing).

104. 388 F. Supp. 155 (E.D. Pa. 1974).

105. *Id.* at 159.

106. *Id.* at 181.

107. *See* text accompanying note 18 *supra*.

108. 418 F. Supp. 1 (S.D.N.Y. 1975).

be biased toward the plaintiff.[109] In denying the disqualification motion, the judge stated that if sex was a sufficient ground for disqualification, no judge could hear the case because a male judge might be prejudiced toward the male defendants.[110]

Although *Sullivan & Cromwell* was decided under section 455(a), it did not present a novel constitutional question. Congressional authority to extend a ratification deadline of a proposed amendment is an issue of first impression in the federal courts.[111] Considering the emphasis placed on the ERA by the media,[112] Judge Callister's decision will undoubtedly receive a disproportionate amount of publicity compared to other federal court decisions.[113] Therefore, it is imperative in these circumstances that "the judicial system maintain an *unquestionable* appearance of fair, even-handed justice."[114]

The Justice Department based its motion on Judge Callister's prominent position in the Mormon Church.[115] If the Judge

109. *Id.* at 2. The defendant also claimed that the judge's involvement in civil rights litigation prior to ascending to the bench added to her possible prejudice toward the plaintiff.

110. *Id.* at 4. *Cf.* Parrish v. Board of Comm'rs of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975) (In suit in which plaintiff claimed discrimination in the administration of the Alabama State Bar examination, it was held that the judge's impartiality could not reasonably be questioned by virtue of allegations that he had been president of a local bar association in which black lawyers were denied membership); Paschall v. Mayone, 454 F. Supp. 1289 (S.D.N.Y. 1978) (defendants in a civil rights action were not entitled to disqualification of the trial judge where alleged bias of judge stemmed from his civil rights involvement prior to ascending to the bench).

111. In Dillon v. Gloss, 256 U.S. 368 (1921), the Supreme Court held that the controlling test for ratification by the states of a proposed amendment is whether there has been a reasonably contemporaneous consensus by the state legislatures. Pursuant to this standard, the Supreme Court in Coleman v. Miller, 307 U.S. 433 (1939), held that initial state rejection of a proposed amendment does not preclude subsequent state approval. The Court has never passed on the counterpart issue: whether a state may rescind its prior adoption of a proposed amendment, so long as it does so prior to final adoption of the amendment. *See* H.R.J. Res. 638, 95th Cong., 2d Sess. (1978).

112. Since Congress proposed the ERA in 1972, there have been literally hundreds of articles written about it. *See, e.g.*, U.S. NEWS & WORLD REPORT, March 28, 1977, at 53; NEWSWEEK, July 31, 1978 at 24; TIME, March 26, 1979 at 25.

113. Judge Callister's decision to remain on the case has already received an abundance of publicity. As of March 10, 1980, approximately 36 articles and editorials have appeared in major newspapers and magazines. *See, e.g.*, N.Y. Times, Dec. 13, 1979, at A 30, col. 1. *See* note 62 *supra.*

114. Mitchell v. Sirica, 502 F.2d 375, 391 (D.C. Cir. 1974) (MacKinnon, J., dissenting) (emphasis added). In the "Watergate cover-up" case, Judge Sirica allegedly acted in an accusatory manner toward the petitioner, John Mitchell, the former Attorney General of the United States. Judge MacKinnon stated that this was the most important criminal case in American judicial history and therefore much publicity will surround the controversy. Thus, the Judge contended, "in a case as momentous as this, Judge Sirica should be disqualified."

115. *See* note 33 *supra.*

was merely a church member, it would be improper to question his objectivity. However, the propriety of a judge holding a leadership position in a religious organization which advocates staunch policies on issues that arise before him merits examination.

Extra-Judicial Activities

Recently, the extra-judicial activities of the judiciary and the extent to which these activities interfere with a judge's capacity to perform his duties have been widely discussed.[116] Judges throughout the country actively participate in non-judicial organizations.[117] In an effort to advise judges on the propriety of their participation in outside activities, the Interim Advisory Committee on Judicial Activities was established.[118] Additionally, the American Bar Association revised its Code of Judicial Conduct to include canons and commentary on extra-judicial activities.[119]

Several of the new canons stress the importance of a judge regulating his extra-judicial activities to minimize the risk of any conflict with his judicial duties.[120] To that end, the commen-

116. *See Nonjudicial Activities of Supreme Court Justices & Other Federal Judges: Hearings on S.1097 & S.2109 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROB. 9, 11 (1970); Ringold, *Canons of Judicial Ethics—By Their Good Deeds Shall They Be Known*, 1972 UTAH L. REV. 402.

117. For a discussion of the off-bench activities of federal judges, *see* The University of Chicago Law School's Conference on Judicial Ethics (Oct. 22, 1964) *reprinted in* CONFERENCE ON JUDICIAL ETHICS, CONFERENCE Series No. 19 (1965). *See also* J.P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974).

118. The Interim Advisory Committee on Judicial Activities was established on Dec. 5, 1969. The Committee stated that it would "be available for consulations with, and to give advisory opinions to, the several circuit judicial councils of the United States courts and to individual federal judges, upon request, about off-bench activities by judges."

The following is an example of an advisory opinion:

> Inquiry has been made as to a judge serving without compensation upon the managing boards of religious, fraternal & charitable organizations. We believe that membership without compensation within these organizations is not improper provided the judge does not engage in solicitation of funds for such organization or permit the influence of his name or office to be used in such solicitation, and provided the service will not interfere with the prompt and proper performance of his judicial duties.

Advisory Committee on Judicial Activities, Advisory Opinion No. 12 (Jan. 21, 1970).

119. ABA CODE OF JUDICIAL CONDUCT (1972). For a discussion of the Code, *see* Thoade, *The Code of Judicial Conduct—The First Five Years in The Courts*, 1977 UTAH L. REV. 395.

120. ABA CODE OF JUDICIAL CONDUCT Nos. 2, 5 (1972). Canon 2 advises judges to "avoid impropriety and the appearance of impropriety in all [their] activities." The commentary to this Canon suggests "that public

tary to Canon 5B states: "[a] judge should regularly re-examine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it."[121] This commentary does not suggest that a judge should relinquish his religious affiliations when his leaders take an official stand on issues being litigated.[122] However, an appearance of bias may result when a prominent official in the religion adjudicates those issues.[123]

Canon 5B requires judges to avoid areas of interest which may conflict with their impartial determination of controversies.[124] In his analysis, Judge Callister did not address this issue directly; he merely concluded that his position would not affect his judicial obligations.[125] The Judge did not consider the impact his participation would have on the appearance of judicial objectivity. By reaching his conclusion without a thorough analysis, he failed to allay the considerable doubts concerning his impartiality.

CONCLUSION

Judge Callister's decision to remain on this case will result in undermining public confidence in the judiciary. His analysis lacks the requisite emphasis on public policy considerations. The Judge's determination that a prominent church leader may hear a case despite the church's strong opposition to the issues being adjudicated represents a step backward from the recent trend toward liberalizing the grounds for disqualification.

Judge Callister's refusal to step down has been widely criticized. The media has seized this situation as another opportunity to attack the judicial system.[126] This publicity will increase

confidence in the judiciary is eroded by irresponsible or improper conduct by judges."

121. ABA CODE OF JUDICIAL CONDUCT No. 5B (1972).

122. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664, 670 (1970) (The Court stated: "Adherants of particular faiths and individual churches frequently take strong positions on public issues including . . ., vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies & private citizens have that right.").

123. The ABA Code has adopted the "appearance of bias" as the standard for judicial disqualification. E. W. THOADE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 61 (1973).

124. Ringold, *Canons of Judicial Ethics—By Their Good Deeds Shall They Be Known*, 1972 UTAH L. REV. 402, 403.

125. Idaho v. Freeman, 478 F. Supp. 33, 37 (D. Idaho 1979). *See* text accompanying notes 66-67 *supra*.

126. The media has characterized Judge Callister's position as one that involves the *setting* of Church policy, however this does not appear to be true. *See* note 62 *supra*.

Moreover, the First Presidency relieved Judge Callister of his post as

public disenchantment with the judicial process, causing what Congress attempted to eliminate by broadening the grounds for disqualification.

Evidently, section 455(a) is ineffective in guiding judges confronted with motions to disqualify based on allegations not specifically addressed by the statute.[127] This case demonstrates that additional reform is necessary before congressional goals are met. One solution to this problem is to have a different judge rule on the disqualification motion.[128] Alternatively, the question could be presented to an advisory panel composed of judges and laymen. Another possibility is to allow each litigant one peremptory challenge.[129] Whatever system is ultimately chosen, the overall goal is to have "a judge who is neutral but not neutralist, impartial but not unconcerned, dispassionate but not uncommitted, disinterested but not indifferent. The ultimate is as the Greeks have said, the highest good. And what is that here except the judge do right?"[130]

Gwenda M. Burkhardt

Regional Representative on Oct. 31, 1979. N.Y. Times, Jan. 5, 1980, at A 8, col. 3. This too has been distorted. The media maintained that Judge Callister was relieved of his post so that his decision to remain on the case will not be appealed. *E.g.*, N.Y. Times, Jan. 5, 1980, at 8, col. 3. Furthermore, President Carter received over 17,000 letters and telegrams urging the Justice Department to appeal the Judge's decision. N.Y. Times, Dec. 7, 1979, at A 23, col. 1. Evidently the media's interpretations of these events have convinced the public that Judge Callister should have disqualified himself.

127. For a discussion of other inadequacies of the statute, *see* Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612 (1976); *see also* Comment, *Disqualification of Federal Judges for Bias under 28 U.S.C. § 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1976).

128. In a few cases, the challenged judge adopted such a procedure, referring the motion to another district judge for determination. *E.g.*, United States v. Grinnell Corp., 384 U.S. 563, 582 n. 13 (1966).

129. This system has been suggested by many legal commentators. *E.g.*, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 633 (1976).

130. Address by the Honorable Charles D. Breitel, The University of Chicago Law School's Conference on Judicial Ethics (Oct. 22, 1964), *reprinted in* CONFERENCE ON JUDICIAL ETHICS, CONFERENCE SERIES No. 19, 64, 80-81 (1965).