DISQUALIFICATION OF FEDERAL DISTRICT JUDGES—PROBLEMS AND PROPOSALS

INTRODUCTION

Few conceptions regarding the legal system of our nation are more ingrained in the mind of the American public than the right to a fair trial. While there may be much room for debate as to what constitute the elements of a fair trial, it is beyond doubt that an impartial judge is an indispensable prerequisite. To ensure that this right will be preserved, mechanisms have been developed for challenging judges in individual cases in which litigants doubt their impartiality. These procedures for disqualifying or recusing judges were historically applicable only to certain narrow situations in which the judge was personally interested in the result.[1] However, more recent legislation has greatly broadened the categories of conduct which require disqualification.

The federal statutes providing the means and standards for disqualification of judges are codified at 28 U.S.C. §§ 144 and 455.[2] Under section 144, a party must file an affidavit certified by counsel of record, moving that the judge be disqualified for personal prejudice or bias for or against one of the parties.[3] Although most com-

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[1] Traditionally, there has been a distinction between recusal and disqualification. *Compare* recusation, BALLENTINE'S LAW DICTIONARY 1071 (3d ed. 1969) *and* BLACK'S LAW DICTIONARY 1442 (4th ed. rev. 1968) *with* disqualify, *id.* at 558. In modern usage, however, the terms recusation and recusal are seldom employed, and disqualification appears almost exclusively. *See* Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 45 & n.7 (1970). Thus, recusal will be used in this Comment only when the age of the particular opinion or the language of a court make it appropriate.

Originally, a judge's interest had to be either proprietary or pecuniary to warrant disqualification. For discussions of the historical concept of disqualification see Frank, *supra*, at 43–50; Symposium, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and The Oregon Experience*, 48 ORE. L. REV. 311, 315–32 (1969); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1435–36 (1966).

[2] 28 U.S.C. § 144 (1970); 28 U.S.C. § 455 (Supp. IV, 1975).

[3] 28 U.S.C. § 144 (1970). This section provides:

> 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.

mentators have observed that section 21, the predecessor statute to section 144, intended the automatic disqualification of a judge upon filing of a motion, judicial interpretation of section 21 established that the challenged judge must first determine whether the allegations in the affidavit are legally sufficient to warrant disqualification.[4]

Section 455 provides the standards for judging the legal sufficiency of the affidavit, and also lists situations in which judges are required to disqualify themselves sua sponte.[5] In April 1973, a new *Code of Judicial Conduct* was adopted by the Judicial Conference of the United States.[6] Canon 3C of the code contains more stringent standards for disqualification of judges than had previously existed, and in 1974 Congress reenacted section 455 to substantially incorporate them.[7] The new version of section 455 provides that the "judge

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> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id.

[4] The original intent behind the statute may be inferred from its language, Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090, and from the remarks by Representative Cullop, sponsor of the bill, 46 CONG. REC. 2627 (1911). Since the decision in Berger v. United States, 255 U.S. 22, 33–34, 36 (1921), it has been established, however, that before the judge is disqualified, the determination must be made whether the affidavit is legally sufficient to require disqualification. This interpretation of the statute was apparently adopted by Congress when section 144 was enacted. See 28 U.S.C. § 144 (1970) (party must file a "sufficient affidavit"). For discussions of the congressional intent behind section 21 and its subsequent judicial interpretation see Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. PITT. L. REV. 415, 424 (1950); Note, *Disqualification of a Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749, 753–54 (1973).

[5] "Section 455 is the statutory standard for disqualification of a judge," and is "self-enforcing" on his or her part. Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975) (footnote omitted). Thus, the occurrence of one of the proscribed circumstances may be the basis of a disqualification motion. In addition, the standards enumerated in section 455 are the background against which appellate courts must determine whether a judge's refusal to step aside was incorrect. *See id.* For the text of section 455 see note 7 *infra*.

[6] CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, Canon 3C; *see* H.R. REP. No. 1453, 93d Cong., 2d Sess. 2–5 (1974).

[7] 28 U.S.C. § 455 (Supp. IV, 1975). The following portions of amended section 455 are pertinent to the material discussed in this Comment:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:

. . . *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned"[8] as well as in those cases where a listed condition is found to exist.[9] The goal of the framers of this statute was

> 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.[10]

Clearly, to effect the goal of securing fair trials in federal courts these statutes must work for those attempting to use them, while at the same time protecting the court system from abuse by those merely seeking to cause delay or harassment. It is the purpose of this Comment to discuss the inadequacies of the currently available federal disqualification mechanisms. After a survey of the problems at the trial level, the focus will be on the means available for appellate review of a trial judge's refusal to step aside, and why these seldom succeed. The author will then discuss various approaches for improving the federal disqualification process with the intention of showing

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(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

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

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(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.

[8] *Id.* § (a) (emphasis added).

[9] *Id.* § (b). This disqualification is required by law should one of the conditions be present and involves no discretion on the judge's part.

[10] H.R. REP. No. 1453, 93d Cong., 2d Sess. 5 (1974) (emphasis added). The implication is that the judge must only reasonably *appear* to the movant to be biased.

that "depersonalization" of procedures is desirable. To achieve increased objectivity, a comprehensive approach will be proposed, incorporating currently existing disqualification methods and other suggested reforms. The goal will be to propound an effective combination of remedies from the trial level through the appellate courts, so that the litigant who suspects bias may have this apprehension reviewed impartially regardless of when it arises.

PROBLEMS AT THE TRIAL LEVEL

That there are many undesirable features of the current federal disqualification procedure in the district courts is illustrated by the fact that, although the filing of disqualification motions is not uncommon, success is rare.[11] The movant's inability to obtain relief is due to several factors: narrow statutory interpretation by judges; the requirement in many courts that actual bias, and not merely an appearance of bias, be alleged; and the fact that the challenged judge rules on the sufficiency of the affidavit.[12]

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[11] For example, in one case the judge stated that "a successful disqualification motion has been . . . an unusual and extraordinary occurrence." Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 513 (D.S.C. 1975). *See* Note, Mitchell v. Sirica: *The Appearance of Justice, Recusal, and the Highly Publicized Trial*, 61 VA. L. REV. 236, 251 (1975).

[12] *See* Note, *supra* note 11, at 247–52. A rigid construction of the personal bias requirement is unsound as a general rule, *id.* at 247, since it eliminates the possibility of disqualifying the judge in many instances where there is a strong impression that he will not be impartial. However, judges typically refuse to disqualify themselves because they interpret the type of prejudice alleged as insufficient. *See, e.g.*, Eisler v. United States, 170 F.2d 273, 278 (D.C. Cir. 1948), *cert. dismissed*, 338 U.S. 883 (1949) ("impersonal prejudice resulting from a judge's background or experience is not . . . within the purview of the statute," even though in this prosecution of a Communist alien for contempt of Congress the judge had been an anti-Communist investigator for the FBI and was a long-time friend of the FBI director, an allegedly ardent anti-Communist); Craven v. United States, 22 F.2d 605, 607–08 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928) (strong views expressed by judge that requirement of bias alleged must have an extrajudicial source, as well as specific argument in favor of a narrow interpretation of the statute); *cf.* Berger v. United States, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting) (an "[i]ntense dislike of a class" of which movant is a member should not be a basis for disqualifying the judge).

Construction of the grounds in section 455 under which disqualification is mandatory and which, on their face, do not seem open to conflicting interpretation, has diminished the likelihood of obtaining a new judge on these grounds. Thus, it has been held that the only "of counsel" relationship between the judge and a party which will demand the judge's disqualification is when the judge was of counsel in the specific case at bar. United States v. Vasilick, 160 F.2d 631, 632 (3d Cir. 1947); *see* Carr v. Fife, 156 U.S. 494, 498 (1895). The "substantial interest" ground under section 455 has been stated to pertain only to a "direct pecuniary stake in the outcome." *See* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 740

To disqualify a judge under section 144, an affidavit must be "timely and sufficient."[13] Although the timeliness requirement proves to be a substantial handicap to many movants,[14] the sufficiency requirement presents an even greater problem. The only guidance afforded by the statute in determining whether or not allegations are sufficient is the specification that the bias or prejudice must be "personal."[15] Judicial construction of this standard has often been so narrow that only a personal enmity against the actual movant will suffice.[16] As a result, it has been suggested that bias against a party's attorney[17] or against a class of which the party is a member[18] may be an insufficient ground for disqualification. Yet these are types of bias which, depending upon the degree, may become equally pernicious and be transferred to the litigant.[19]

(1973). It is important to note that these constructions were expressed prior to the amendment of section 455 in 1974. The new version more specifically defines these terms and will hopefully result in less narrow interpretations. For a discussion of the amended section 455 see notes 46–51 *infra* and accompanying text.

[13] *See* text of section 144 reprinted at note 3 *supra*.

[14] Section 144 provides no guidance as to what is timely; it merely provides that the filing of the motion be "not less than ten days before the beginning of the term at which the proceeding is to be heard." 28 U.S.C. § 144 (1970). This requirement is no longer applicable, however, due to the abolishment of formal terms for district courts. 28 U.S.C. § 138 (1970). Courts tend to construe very narrowly what constitutes "timely" filing and what is "good cause" for failure to do so. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 509–10 (D.S.C. 1975). In Samuel v. University of Pittsburgh, 395 F. Supp. 1275, 1279 (W.D. Pa. 1975), the judge stated that

> the affidavit will be considered untimely if the affiant, after knowledge of the facts showing the supposed bias, has sought to invoke the court's affirmative action in his behalf before filing the affidavit.

[15] *See* text of section 144 reprinted in note 3 *supra*.

[16] *See, e.g.*, Henry v. Speer, 201 F. 869, 871–72 (5th Cir. 1913); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 513–14 (D.S.C. 1975).

[17] *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 522–23 (D.S.C. 1975). Judge Hemphill stated that

> [i]t is only when the judge's "antipathy has crystalized to a point where the attorney can do no right" that he no longer will be able to impartially try the case.

Id. at 523 (footnote omitted) (quoting from Rosen v. Sugarman, 357 F.2d 794, 798 (2d Cir. 1966) (Friendly, J.)). This point of view fails to take note of the fact that a strong emotion which has not reached this degree might well have a subconscious effect on the judge's feelings toward the client. *Cf.* Forer, *Psychiatric Evidence in the Recusation of Judges*, 73 HARV. L. REV. 1325, 1330 (1960).

[18] Note, *supra* note 1, at 1449–50. In arguing against this approach, the author pointed out that "general bias is likely to be transferred to the individual and thus become personal." *Id.* at 1450. This point of view was also impliedly recognized in Berger v. United States, 255 U.S. 22, 28–30, 36 (1921), when the Supreme Court held sufficient an affidavit alleging bias against defendants based on general anti-German expressions made by the judge.

[19] In discussing whether bias against "a class of persons of which the party is a

Another problem that can be seen at the trial level is that, instead of confining themselves to a consideration of whether the legal sufficiency standard is met and thereby addressing the true question in the case, many judges quibble over the source and nature of the bias. Thus, in most instances a bias must have developed from an extrajudicial source, rather than from any proceedings in the present case.[20] In addition, many courts will not recognize a litigant's allegations of bias if manifested solely by the rulings and behavior of the judge during the trial.[21] As a result, what might be interpreted as clear overreaction by a district court judge during pretrial proceedings has been held not to require disqualification on the ground that it was "judicial" conduct.[22] Moreover, prejudgment on the merits,

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member" ought to be a basis for disqualification, one author has suggested basically a case-by-case approach which would consider "the vehemence of the expression of bias toward the class . . . [and] the subject matter of the expression" as indicative of "whether the statements or activities would . . . give rise to a personal bias against a party in court who is a member of that class." Note, *supra* note 12, at 756; *see* Note, *supra* note 1, at 1450.

[20] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 580–83 (1966) (disqualifying bias requires "extrajudicial source" causing "opinion on the merits on some basis other than . . . participation in the case") (citation omitted); United States v. Franks, 511 F.2d 25, 37 (6th Cir.), *cert. denied*, 422 U.S. 1042, 1048 (1975) (distinguishing between judicial and personal bias); United States v. Falcone, 505 F.2d 478, 485 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975) ("An allegation of 'judicial' bias is not grounds for a motion to recuse"); United States v. Board of School Comm'rs, 503 F.2d 68, 81 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975) (statements made by judge in newspaper interview and based on findings in prior phase of case found not grounds for disqualification); Hanger v. United States, 398 F.2d 91, 101 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969) ("to constitute disqualifying personal bias or prejudice" statements must arise other than "from proceedings had before the court"). *See also* Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 511–12 (D.S.C. 1975).

[21] *See, e.g.*, Curl v. IBM, 517 F.2d 212, 214 (5th Cir. 1975) (only allegations "related . . . to the judge's conduct of the case"); Sperry Rand Corp. v. Pentronix, Inc., 403 F. Supp. 367, 373 (E.D. Pa. 1975) ("§ 144 was . . . [not] a substitute for an appeal . . . [of] adverse rulings or decisions"); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 514–15, 517 (D.S.C. 1975) ("facts . . . establishing the alleged bias and prejudice of the trial judge must be based on something other than rulings in the particular case"; "adverse rulings in previous proceedings . . . are insufficient").

[22] Pfizer, Inc. v. Lord, 456 F.2d 532, 537–44 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972). The affidavit charged Judge Lord with various prejudicial actions, including refusal to approve settlements and urging the creation of a new class of litigants to further sue defendants. *Id.* at 536, 540. The court of appeals, on a mandamus petition, rejected all the charges as being insufficient to require disqualification, even though the court chastised Judge Lord for "his shortcomings in this case" and commended to him "the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." *Id.* at 543–44.

Clearly, even if the court did not feel that Judge Lord was biased, it would have been best to remove him from the case to maintain the appearance of justice. For a discussion of this case see Note, *supra* note 4, at 760–63.

based upon exposure to related cases or manifested by out-of-court statements of the judge, has also been held legally insufficient.[23]

A particular source of confusion is whether the affidavit must allege facts which indicate actual bias on the judge's part, or which merely reflect a reasonable appearance of bias. Under an appearance-of-bias standard, a finding of legal sufficiency is merely an indication that something the judge has done reasonably gives the impression that bias exists; it is not an actual finding that the judge is biased.[24] Yet most courts do require that the affidavit sufficiently allege actual bias on the judge's part.[25] In view of the highly subjective nature of bias, it is extremely difficult to show facts indicating actual bias, since litigants rarely have sufficient acquaintance with a judge's private life to have such information.[26] In addition, even where actual bias does not exist, a litigant's real apprehension of judicial bias may have a deleterious effect on a trial.[27] Thus, while it may be argued that it is necessary only that the judge *actually be* impartial, it is important to recognize that the proper functioning of the court system requires that the judge also *appear* to be impartial.[28]

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[23] *Compare* Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913), *and* Note, *supra* note 1, at 1448, *with* United States v. Grinnell, 384 U.S. 563, 583 (1966), *and* Curl v. IBM, 517 F.2d 212, 214 (5th Cir. 1975), *and* Note, *supra* note 12, at 751, 757–58.

[24] Note, *supra* note 4, at 767. Under a proper application of section 144 the finding does not really indicate *actual* bias since the allegations may not be disputed. However, where the bias-in-fact standard is applied, courts do feel that "a finding of actual prejudice under the *bias in fact* standard impugns both that judge's qualifications and those of the system he represents." *Id.* (emphasis in original).

[25] *See, e.g.*, Parrish v. Board of Comm'rs of Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975). *But see id.* at 104 (Brown, C.J., concurring); *id.* at 106 (Gee, J., concurring); *id.* at 107–09 (Tuttle, J., dissenting).

Some courts have reasoned that if the judge is not "actually prejudiced," but merely appears prejudiced, his presiding over the trial will not adversely affect the litigants' interests. As a result, they allow disqualification only where bias in fact is shown. Note, *supra* note 4, at 758–59 & n.59.

[26] Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109, 126–27 (1974). It would be difficult for the majority of litigants to evaluate the possibility that the judge is actually biased. In addition, the bias-in-fact standard requires "subjective speculation as to the source and nature of a judge's prejudice and mental state." Note, *supra* note 4, at 764.

[27] A good example of this problem is provided by the recent Watergate trials in which the impartiality of Judge Sirica was questioned. Although there were many other reasons for the fear on the part of the Watergate defendants that they could not obtain a fair trial, the conduct of the case by Judge Sirica was itself a focus of attention by the defendants and the public. For a specific discussion of the disqualification question in this instance see Note, *supra* note 11.

[28] *See, e.g., id.* at 250. That author suggested that

> [j]ust as litigants have a right to a fair trial, the public requires a judicial system that maintains the appearance of fairness. Indeed, the appearance of justice may

Perhaps the greatest problem, and the source of much judicial recalcitrance in dealing with disqualification affidavits, is the fact that it is generally the challenged judge who rules on the motion.[29] The judge may decide only whether the facts alleged are legally sufficient on their face to require disqualification, not whether they are actually true.[30] Because judges must rule on these motions without exercising their fact-finding function and without rebutting the allegations made—even where the statements are blatantly distortive of the truth—it is not surprising that emotional responses often result.

Sometimes the mere filing of a disqualification motion precipitates an extraordinarily nonjudicial response on the part of judges,

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well be even more important in the long run than the fact of impartiality. Courts depend for their power almost entirely on the *perceived* legitimacy of their activities.

Id. (emphasis in original) (footnotes omitted). In the leading federal case on recusal, Berger v. United States, 255 U.S. 22 (1921), the Court suggested such an approach by indicating that courts must "give assurance that they are impartial." *Id.* at 36. For additional discussions of this question see Schwartz, *supra* note 4, at 422; Note, *supra* note 4, at 765.

A general concern that court proceedings appear fair may be indicated by the failure of Judge Haynsworth's nomination to the Supreme Court to be confirmed by Congress. His defeat in the Senate was apparently made possible by "the swing votes" of those senators who did not otherwise oppose him, but "who were troubled by the conflict of interest questions" raised by his failure in several cases to disclose *minor* shareholdings in corporations which were litigants in his court. Comment, *supra* note 26, at 117 & n.40.

[29] One of the principal problems with this system is that

[t]his procedure by its very nature undermines the appearance of justice. In short, judges rarely disqualify themselves for bias or prejudice. And while a judge's decision not to disqualify himself may be completely justified, it may not appear so.

Note, *supra* note 11, at 251 (footnotes omitted); *accord*, Schwartz, *supra* note 4, at 429. *But cf.* Craven v. United States, 22 F.2d 605, 607 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928), wherein it was said that "[t]he presiding judge, under a fitting and common practice, referred the sufficiency of [the] affidavit to another District Judge."

[30] In Berger v. United States, 255 U.S. 22, 32–34 (1921), the Supreme Court indicated that "the affidavit . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." While this interpretation may conflict with the original notion that the filing of a motion and affidavit resulted in a peremptory recusation of the judge, such a position is sound since an affidavit containing nothing "more than scurrilities and generalities" should not be an adequate basis for disqualification. Griffith v. Edwards, 493 F.2d 495, 496 (8th Cir.), *cert. denied*, 419 U.S. 861 (1974). Otherwise, a mere statement that "The judge does not like me" would warrant disqualification even though no reasons for the charge were given. While it is debatable whether section 21 of the Judicial Code of 1911 (Ch. 231, 36 Stat. 1090, adding § 21 to the Judicial Code), the provision considered in *Berger*, was intended to require a decision of legal sufficiency, Congress did ratify that interpretation in enacting the Revised Code of 1948 which required the filing of a "timely and sufficient affidavit." Act of June 25, 1948, ch. 646, 62 Stat. 898 (codified at 28 U.S.C. § 144 (1970)). *See* Schwartz, *supra* note 4, at 425.

who may regard the affidavit as an attack on their general competence and as an attempt to deprive them of their "right" to hear the particular case.[31] As a result, some judges ignore the mandate of *Berger v. United States* that they not look to the truth of the allegations.[32] Instead, they attempt to place their remarks or acts into context before judging their legal sufficiency,[33] or hold hearings on the question of disqualification.[34] The judicial hostility often caused by the filing of the motion thus hinders its impartial disposition. And, if the motion is denied, the ensuing trial may also be afflicted with an emotional atmosphere. Thus, the continued hostility of the judge, subconscious or otherwise, due to the fact and nature of the challenge, may be pitted against the continuing belief on the part of the movant, possibly enhanced by denial of the motion, that the judge is biased.[35]

Although it does seem unfair to disqualify a judge who knows the allegations filed to be a sham, this overlooks a much more important consideration: It is not the judge who is on trial, nor does a judge have any legal right or interest in hearing a particular case.[36] Instead, the focus should be on the timing of the motion and the complexity of the case. Whether the motion is filed prior to trial and prior to the

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[31] *See* United States v. Parker, 23 F. Supp. 880, 882–83 (D.N.J. 1938), *aff'd*, 103 F.2d 857 (3d Cir. 1939), *cert. denied*, 307 U.S. 642 (1939), wherein the judge stated that by not allowing a judge to delve into the truth of the allegations, the system deprived him or her of a " 'day in court.' " In commenting on this view, one author has noted, however, that

> while a litigant is entitled to a "day in court" so that he will have a chance to establish the rights he is asserting or which are being challenged, a judge has no such right or interest in trying a particular case, and it is therefore misleading to speak of his right to a "day in court" in this context.

Note, *supra* note 1, at 1437.

[32] 255 U.S. 22, 36 (1921).

[33] *See, e.g.*, Foster v. Medina, 170 F.2d 632, 633–34 (2d Cir. 1948), *cert. denied*, 335 U.S. 909 (1949); Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1043–44 (E.D.N.Y. 1975).

[34] *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 503–04 (D.S.C. 1975) (hearings and extended opinion); *cf.* Note, *supra* note 1, at 1437 (discussion of state use of disqualification hearings and why these are undesirable).

[35] Note, *supra* note 1, at 1439. The observation was made by that author

> that the damage resulting from a trial conducted by a biased judge who is later disqualified goes deeper than the wasted time and effort . . . and that even if the judge is later upheld in declaring the affidavit insufficient, the fact that the issue was still open may have had a harmful effect on the trial.

Id. at 1440 (footnote omitted). *Accord*, Comment, *supra* note 26, at 126.

[36] *See* 255 U.S. at 35, wherein Justice McKenna queried:

> [O]f what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?

decision of other motions,[37] in the middle of a case,[38] after judgment,[39] or before retrial after a mistrial or remand by an appellate court,[40] has great bearing on whether disqualification should be readily granted, or whether the degree of bias is outweighed by any advantages gained by keeping the same judge. In the early stages of a proceeding, disqualification should be little more than an administrative matter, since there is at that point no legitimate reason for the opposing party to dispute the motion.[41] As the proceedings progress, countervailing considerations do arise. In complex cases embracing matters such as patents and antitrust[42] or school desegregation,[43] which are likely to last many months or even years, the need to avoid relitigation due to reversal is much greater than in short, uncomplicated disputes.[44] Yet it may be in those complex cases that retention of the same judge is most imperative, since even prior to trial the judge may have absorbed much information which it would take a new judge months to review.[45] In these situations, it might not be unreasonable to require more stringent procedures, and possibly even a higher standard of bias, than in less complicated cases or those in

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[37] *E.g.*, Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 502–04 (D.S.C. 1975).

[38] *E.g.*, Samuel v. University of Pittsburgh, 395 F. Supp. 1275, 1280 (W.D. Pa. 1975), wherein the court stated that "the motion appears to be a classic instance of a lawyer's attempt to mitigate his 'fear that a judge may decide a question against him.' "

[39] *E.g.*, Kent v. Northern Cal. Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1330 (9th Cir. 1974).

[40] *E.g.*, Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1042 (E.D.N.Y. 1975). In view of the fact that this was not an extremely complex case (personal injury suit arising out of an automobile/bus collision), it seems unreasonable not to have transferred the case to another judge. This is especially true since the first trial ended in a mistrial when the plaintiff's lawyer broke down during the trial because of the particular poignancy of his client's situation. *Id.* at 1042, 1043–44.

[41] Although it is common knowledge that attorneys often prefer one judge over another for a particular type of suit, there is no legal right to have a specific judge try any given case. United States v. Devlin, 284 F. Supp. 477, 482 (D. Conn. 1968).

[42] *E.g.*, Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497 (D.S.C. 1975).

[43] *E.g.*, Davis v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975); United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

[44] *Cf.* Pfizer, Inc. v. Lord, 456 F.2d 532, 537, 542–43 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972), wherein the court noted the position taken by respondent, United States, that due to " 'the complexity, number and probable duration of the cases involved,' " mandamus was an appropriate remedy when the judge refused to disqualify himself.

[45] *See* Pfizer, Inc. v. Lord, 456 F.2d 532, 542 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 502 (D.S.C. 1975).

which a significant portion of the proceedings has not yet occurred.

Although the ostensible incorporation of the appearance-of-bias test into the new section 455(a)[46] should help to alleviate some of the difficulties discussed above, the few cases decided under this general ground for disqualification indicate that the purpose of the statute continues to be circumvented. For example, the determination whether the judge's impartiality might reasonably be questioned is still to be decided by the challenged judge.[47] Furthermore, while the specifically expressed intention of Congress is to eliminate the duty-to-sit concept,[48] *i.e.*, the notion that in a close case the judge must resolve the question in favor of not stepping aside, some courts still rely upon that rationale.[49] Perhaps this is due to judicial reliance on case law interpreting the prior statutes, without truly differentiating the language or intent of the new statute.[50] For whatever reason, judges are very quick to emphasize that

> the language of § 455(a) that disqualification is called for "in any proceeding in which [the judge's] impartiality might reasonably be

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[46] *See* Note, *supra* note 12, at 745. Although the author's discussion refers to the new Code of Judicial Conduct, it is equally applicable to the new version of section 455, since the two are virtually identical. *Compare* H.R. REP. No. 1453, 93d Cong., 2d Sess. 3–5 (1974), *with* 28 U.S.C. § 455 (Supp. IV, 1975).

[47] 28 U.S.C. § 455 (Supp. IV, 1975).

[48] "The language [of section 455(a)] also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute." H.R. REP. No. 1453, 93d Cong., 2d Sess. 5 (1974).

[49] *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 526–27 (D.S.C. 1975); Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1045 (E.D.N.Y. 1975). The judge in *Lazofsky*, however, certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), specifically so that the intended modification of "the 'duty-to-sit' concept" could be interpreted by a higher court. Judge Platt was of the opinion that this issue met the requirements of section 1292(b) for certification of an interlocutory appeal. See notes 68–77 *infra* and accompanying text.

[50] In Davis v. Board of School Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975), referring to various cases which it had cited, the court said:

> We find no suggestion in the legislative history that these decisions were being overruled or in anywise eroded. The new language was designed to substitute the reasonable factual basis—reasonable man test in determining disqualification for the subjective "in the opinion of the judge" test in use prior to the amendment. . . . It was also intended to overrule the so-called duty to sit decisions. . . . The abuse of sound judicial discretion test continues to obtain on appellate review.

(Citations omitted.) In view of the fact that judges are likely to consider themselves reasonable people, this interpretation of the statute virtually amounts to the same standard as before.

In Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1044–45 (E.D.N.Y. 1975), the judge stated that he must rely on "the consistent rulings of the Supreme Court . . . over the years," thereby refusing to give effect to the obvious intent of Congress in enacting section 455(a) that there be an appearance of justice.

> questioned," does not amount to a grant of automatic veto power in order that counsel might choose a judge who meets with their approval.[51]

From this discussion it should be clear that current disqualification mechanisms at the trial level are essentially ineffectual.[52] Even though the present system may protect the courts from being imposed upon by litigants whose affidavits are blatantly dilatory or distortive of the real facts, the system is damaged in the end when sincere and genuinely concerned movants are unable to convince a judge to step aside. The next section will address the efficacy of the remedies available to such a party at the appellate level.

PROBLEMS IN THE APPELLATE COURTS

There are three principal methods by which unsuccessful disqualification motions may be brought to the attention of a higher authority: appeal from a final judgment, interlocutory appeal, or petition for a writ of mandamus or prohibition. Appellate courts are in general accord that denial of such a motion may be assigned as error on a final appeal, but that it is not in itself a final, appealable order.[53] However, courts of appeals differ widely as to whether the appropriate means of interlocutory review should be by appeal or by extraordinary writ.

The basic policy behind the final judgment rule is to prevent piecemeal appeals of different rulings in a case, essentially to avoid crowding court calendars and delaying the ultimate termination of litigation.[54] In many instances this premise is well justified, since many erroneous rulings, such as those on evidentiary questions, may

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[51] Samuel v. University of Pittsburgh, 395 F. Supp. 1275, 1277 (W.D. Pa. 1975); *cf.* Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975).

[52] For example, it has been said that

> [a]ttorneys who appear in federal district court are virtually powerless to remove a judge from a particular case when they personally believe, rightly or wrongly, that justice will not be done by that individual judge.

Comment, *supra* note 26, at 109.

[53] *See, e.g.*, Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958); Collier v. Picard, 237 F.2d 234, 235 (6th Cir. 1956) (per curiam); Skirvin v. Mesta, 141 F.2d 668, 671 (10th Cir. 1944); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[10], at 187 (2d ed. 1975). Denial of disqualification may also be reviewed on the appeal of another interlocutory order which is itself appealable. Skirvin v. Mesta, *supra* at 671; J. MOORE, *supra* ¶ 110.13[10], at 187. *Contra*, General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 198 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964).

[54] Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351–52 (1961); *see* Note, *supra* note 1, at 1440 (the author stated that most federal courts do not feel that disqualification cases should be an exception to this policy).

be held harmless error in the midst of an otherwise sound trial.[55] Furthermore, with the possible exception of situations such as contempt of court, trial judges generally are not ruling on issues which may be viewed as personal to them.[56] Disqualification motions, however, present a totally different picture. The personal involvement of the judge in these rulings makes the usual judicial detachment difficult to achieve. In addition, in any case in which an appellate court later declares disqualification to have been warranted, the entire trial which occurred under the aegis of the challenged judge will have been a nullity.[57] As a result, application of the final judgment rule in such cases creates "the spectacle of a labor saving device which causes more labor than it saves."[58] Since the issue of disqualification is separate from the merits of the case and involves purely a question of law,[59] there appears to be no other reason for postponing its review.

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[55] Chapman v. California, 386 U.S. 18, 21–24 (1967) (even "federal constitutional errors" not basis for reversal of criminal conviction when their "likelihood of having changed the result" is minimal); Fahy v. Connecticut, 375 U.S. 85, 86 (1963) ("question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"); Kotteakos v. United States, 328 U.S. 750, 762–65 (1946) (the error must have had "substantial influence" on the verdict to warrant reversal); Prater v. Sears, Roebuck & Co., 372 F.2d 447, 448 (6th Cir. 1967) (per curiam) (reversal only where error will cause denial of "substantial justice"). *See generally* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2883, at 275–80 (1973).

[56] FED. R. CRIM. P. 42(b) requires the disqualification of a judge from hearing a criminal contempt charge against a defendant in cases wherein the basis of the charge is "disrespect to or criticism of" that judge.

[57] *See* Mims v. Shapp, No. 75–2174 at 3 (3d Cir., Sept. 1, 1976). Another authority is of the opinion that

> [t]here should be no room in this context for the concept of harmless error . . . nor for arguments to be made that in fact the judge acted in an impartial manner. . . . Failure of a judge to step aside if he is disqualified under one of the . . . statutes always should require reversal.

13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3553, at 385 (1975) (footnote omitted). However, if the party moving for disqualification subsequently wins the case, no harm has been done even if the judge was biased. Thus, courts correctly reverse in such a case only where the verdict has been adverse to the party against whom the judge is biased. *E.g.*, Knapp v. Kinsey, 232 F.2d 458 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941) (per curiam) (the court reversed because there had been an appearance of bias, even though the judges felt that the plaintiff's claim probably lacked merit); *cf.* Gulf Research & Dev. Co. v. Leahy, 193 F.2d 302, 304–05 (3d Cir. 1951), *aff'd by an equally divided Court*, 344 U.S. 861 (1952) (while concluding remedy by final appeal adequate regarding venue questions, the court indicated that an erroneous transfer order did invalidate the whole trial which followed).

[58] Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 558 (1932).

[59] *See* Berger v. United States, 255 U.S. 22, 36 (1921). Since the Court held that the challenged judge may not pass on the truth of the allegations, the only decision left —sufficiency of the affidavit—was a legal one. *But see* Korer v. Hoffman, 212 F.2d 211,

The remedy of appeal after a final judgment proves to be inadequate for other reasons as well. Because of the inherent value of an impartial judge in our legal system, it is imperative that the "charge of partiality in the administration of justice . . . initiated by a formal affidavit of prejudice against a judge . . . receive final adjudication" as soon as possible.[60] Since, as has already been discussed, a trial before an unsuccessfully challenged judge may well proceed in an atmosphere of tension, "[o]nly a final ruling on the matter by a disinterested higher court before trial can dispel this unwholesome aura."[61]

These objections to waiting for a final judgment before appealing the denial of a disqualification motion are buttressed by the fact that few final appeals are successful. Applying the same criteria used by trial courts to defeat these motions, courts of appeals generally require that bias in fact, and not merely an appearance of bias, be shown,[62] and that the source of the bias be extrajudicial, not acquired through the proceedings in the case.[63] Use of these standards permits the ready conclusion by appellate courts that the allegations in most affidavits are insufficient. This result is further facilitated when the trial judge's alleged remarks and actions are put into context through appellate review of the record or of the extrajudicial situations in which they were made.[64] Although a trial judge who places the allegations into context is violating the command of section 144,[65] such action by the appellate court may be justified, since the question on final appeal is whether the person actually received a fair trial.[66] How-

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213 (7th Cir. 1954) (although acknowledging that the sufficiency of the affidavit is a legal question, the court concluded that for that very reason it should wait for final appeal).

[60] Green v. Murphy, 259 F.2d 591, 595 (3d Cir. 1958) (Hastie, J., concurring); *In re* Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961).

[61] Green v. Murphy, 259 F.2d 591, 595 (3d Cir. 1958) (Hastie, J., concurring).

[62] *E.g.*, Craven v. United States, 22 F.2d 605, 608 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928). *But see* Berger v. United States, 255 U.S. 22, 35–36 (1921).

[63] Oliver v. Board of Educ., 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Craven v. United States, 22 F.2d 605, 607–08 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928).

[64] *See, e.g.*, Berger v. United States, 255 U.S. 22, 42–43 (1921) (McReynolds, J., dissenting) (final appeal); Wolfson v. Palmieri, 396 F.2d 121, 125 (2d Cir. 1968) (mandamus); Cuddy v. Otis, 33 F.2d 577, 578 (8th Cir. 1929) (mandamus).

[65] *See* note 3 *supra*. This has been the rule since Berger v. United States, 255 U.S. 22 (1921), the leading case on recusal, which established that the predecessor statute to section 144 did not allow the judge to determine the truth or falsity of the allegations. 255 U.S. at 36.

[66] Under the federal harmless error statute, 28 U.S.C. § 2111 (1970), judgment on appeal is to be made "after an examination of the record without regard to errors or

ever, certain manifestations of unfairness which exist in a trial before a biased judge or a judge irritated by the movant's challenge to his or her impartiality are elusive of such appellate review, since they may consist of a tone of voice, mannerisms or facial expressions, which are not preserved by the record.[67] Finally, a reluctance by appellate judges to find partiality in one of their colleagues at the trial level may be compounded by the predilection to let a final decision stand whenever possible. For these reasons, litigants have sought, and some appellate courts have attempted to provide, methods for reviewing unsuccessful disqualification motions at an earlier stage in the proceedings.

Finding a means of securing interlocutory review when disqualification is refused is not an easy task, even though interlocutory appeals are specifically provided for in 28 U.S.C. § 1292.[68] Prior to 1958, the statute allowed such appeals only in cases involving injunctions, receivership, admiralty, and patents.[69] In that year subsection (b) was added to allow the interlocutory appeal of other orders, provided the district judge certifies that they

> involv[e] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .[70]

If the judge does certify the ruling for immediate appeal, it is then within the absolute discretion of the court of appeals to decide whether or not it will hear the case. A refusal to take the appeal may

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defects which do not affect the *substantial* rights of the parties." (Emphasis added.) *See* FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a); *Ex parte* Glasgow, 195 F. 780, 782 (N.D. Ga. 1912).

Where the error alleged is a wrongful denial of a disqualification motion, the court of appeals ought not to overturn a judgment based on a spurious affidavit of bias. *See, e.g.*, United States v. Trevithick, 526 F.2d 838, 839 n.1 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 1475 (1976). However, under an appearance-of-bias standard all that should be necessary is that the facts alleged in the affidavit and the context in which they were made could reasonably have created a belief that the judge was biased. *See* United States v. Amerine, 411 F.2d 1130 (6th Cir. 1969). In that case, even though the Sixth Circuit felt that the defendant had actually received a fair and impartial trial, it vacated the judgment since the judge had been the United States Attorney when the original complaint was filed and preliminary hearing took place. *Id.* at 1133.

[67] In Gladstein v. McLaughlin, 230 F.2d 762, 763 (9th Cir. 1955), the court stated that on final appeal it would have to "consider the record made up by a judge we know to be prejudiced and which well could be infected with his prejudice."

[68] 28 U.S.C. § 1292 (1970).

[69] Act of Oct. 31, 1951, ch. 655, § 49, 65 Stat. 726–27.

[70] Act of Sept. 2, 1958, Pub. L. No. 85–919, 72 Stat. 1770.

be based on any reason whatsoever, including an overcrowded calendar, and no explanation of this decision need be given.[71] In addition, the proceedings below are not automatically stayed by the filing of an appeal under section 1292(b). The trial proceedings will be halted pending the outcome of the appeal only when this is specifically ordered by either a district or appellate judge.[72] These three requirements—certification by the district judge, discretion as to acceptance of the appeal by the court of appeals, and continuation of the trial absent an order to the contrary—are viewed as safeguards against abuse of the procedure.[73]

For the unsuccessful movant, however, these safeguards may be formidable obstacles. Persuading the judge that certification is warranted may be a difficult chore. First, it may be debated whether the disqualification of a judge is a "controlling question of law." The observation has been made that this requirement may be met if a wrong ruling on the motion would require reversal of the judgment.[74] On the other hand, it has been conjectured that a question may not be controlling unless it is related to the merits of the controversy.[75] Second, the judge who must be persuaded to certify the question is the very judge who has been challenged and has denied the motion.[76] The stronger the judge's conviction that the affidavit is insufficient, the less likely it is that he or she will find the "substantial ground for difference of opinion" required by the statute for certification.[77] Even if the motion is certified, however, the purpose of the interlocutory appeal will be defeated if the proceedings are not also stayed, as the premise upon which such an appeal is sought is that a trial before the particular judge will not be just.

Since the interlocutory remedy provided by section 1292(b) is so cumbersome, many movants attempt to secure prompt relief by initiating a petition for mandamus or prohibition. While the propriety of using mandamus[78] to compel a judge's disqualification may be

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[71] S. REP. NO. 2434, 85th Cong., 2d Sess. 3 (1958).

[72] 28 U.S.C. § 1292(b) (1970); Note, *supra* note 54, at 378.

[73] *See* S. REP. NO. 2434, 85th Cong., 2d Sess. 3–4 (1958); Note, *supra* note 54, at 378–79.

[74] Note, *supra* note 54, at 379.

[75] Note, *supra* note 1, at 1441.

[76] *Id.*

[77] 28 U.S.C. § 1292(b) (1970). In Freed v. Inland Empire Ins. Co., 174 F. Supp. 458, 465 (D. Utah 1959), the judge stated that he

> would hardly be in a position to certify that there was any real question concerning the insufficiency of the showing made . . . on the question of disqualification, believing that there is not.

[78] In the disqualification context, writs of mandamus and prohibition have the same

questioned on historical grounds,[79] eight of the eleven circuits con-

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effect: Mandamus would direct the judge to step aside, whereas prohibition would order the judge to proceed no further. *Compare* mandamus, BLACK'S LAW DICTIONARY 1113 (4th ed. rev. 1968), *with* prohibition, *id.* at 1377. As a result, further discussion of these writs in this Comment will refer only to mandamus.

[79] Traditionally, writs of mandamus have been issued by superior courts to inferior courts to compel them to perform a legitimate duty which they are delaying or refusing to perform. J. HIGH, EXTRAORDINARY LEGAL REMEDIES, §§ 150–51 (1874) [hereinafter cited as HIGH]; *see* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Moreover, it had generally been held

> that in all matters resting within the jurisdiction of an inferior court, and upon which it [had] acted in a judicial capacity, mandamus [would] not lie to review its proceedings, or to revise its rulings . . . .

HIGH, *supra* § 150. This principle has been expressed as leaving unreviewed, except by appeal from a final judgment, any matter legitimately within a lower court's power and discretion to decide. *Id.* § 156. Thus, if a court had discretion to act, "[t]he most that [could] be urged is that the order was . . . an abuse of discretion," reviewable on final appeal, not by mandamus. United States v. Bondy, 171 F.2d 642, 644 (2d Cir. 1948) (per curiam); *accord*, La Buy v. Howes Leather Co., 352 U.S. 249, 261 (1957) (Brennan, J., dissenting); Green v. Murphy, 259 F.2d 591, 593–94 (3d Cir. 1958); Howes Leather Co. v. La Buy, 226 F.2d 703, 712 (7th Cir. 1955) (Major, J., dissenting), *aff'd*, 352 U.S. 249 (1957); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 773–74 (1957). The reasoning behind the rule is that the remedy on appeal will be sufficient to correct any errors made, and that mandamus is not a substitute for appeal. Will v. United States, 389 U.S. 90, 97 (1967); Parr v. United States, 351 U.S. 513, 520–21 (1956); *Ex parte* Fahey, 332 U.S. 258, 260 (1947); HIGH, *supra* §§ 188–89.

Thus, in the disqualification context, it is arguable that mandamus, as traditionally defined, would not be an appropriate device to review the trial judge's denial of the motion. Passing on a disqualification motion is a legitimate judicial function of the trial judge. Green v. Murphy, *supra* at 593. As a result, even a wrong decision would be no more than an error as to a matter within the judge's jurisdiction, which arguably should await final appeal. *Id.* at 593–94.

In the federal courts, however, the modern trend has been toward a liberalization of the conditions which must be met before mandamus will be granted. The authority to issue writs of mandamus is generally grounded upon the All Writs Statute, 28 U.S.C. § 1651(a) (1970): "[A]ll courts established by . . . Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." Modern interpretation of what constitutes appellate jurisdiction for the purposes of the All Writs Statute has

> establishe[d] that [it] is not determined by the circumstance of an actual pendency of an appeal . . . but *solely* by the dispositive factor whether the proceeding in the lower court which is sought to be affected by the writ of mandamus or prohibition is ultimately reviewable by the appellate court.

Green v. Murphy, *supra* at 598 (Kalodner, J., dissenting) (emphasis in original); *accord*, La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957); Roche v. Evaporated Milk Ass'n, *supra* at 25; *cf. Ex parte* United States, 287 U.S. 241, 246 (1932). Consequently, a court of appeals has power to issue the writs, whenever appropriate, in cases within its jurisdiction. Roche v. Evaporated Milk Ass'n, *supra* at 25.

Further broadening of the scope of mandamus powers has occurred because of the higher courts' willingness to use mandamus as a tool to effectuate their supervisory powers. For example, in Howes Leather Co. v. La Buy, 226 F.2d 703 (7th Cir. 1955), *aff'd*, 352 U.S. 249 (1957), the Seventh Circuit granted mandamus in a case in which it believed that the trial judge, in exercising a legitimate discretion, had made a decision

sider such use appropriate.[80] Yet there is general confusion as to what requirements must be met before mandamus will lie. Few courts of appeals have actually granted mandamus in such a case, typically finding that their prerequisites for issuance of the writ are not satisfied.[81] Those circuits which refuse mandamus review in disqualification cases rely on its traditional use as an extraordinary remedy, confined to situations wherein final appeal will be unavailable or inadequate and the trial judge has totally exceeded any legitimate jurisdiction he or she had in the case.[82]

An excellent example of the quandary in which the courts of appeals find themselves regarding mandamus is the Third Circuit case of *Green v. Murphy*.[83] In *Green*, a mandamus petition requesting the

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so outrageous as to be "an abuse of discretion," and thus not allowable even within "the permissive scope of the rule" involved. 226 F.2d at 707, 711. In affirming this decision, the Supreme Court adopted the same rationale. *See* 352 U.S. at 255–56.

The La Buy decisions by both the Seventh Circuit and the Supreme Court have been severely criticized by Charles Alan Wright, who termed their "potential consequences" as "truly breathtaking." Wright, *supra* at 775. Professor Wright indicated that even if Judge La Buy's order referring the case to a master was not justified, it should have been reviewed only after a final judgment, not on a petition for mandamus. *Id.* at 772–74. Wright personally opposed any erosion of the traditional prohibition of piecemeal appeals. However, he felt that if such a development were to occur, it should be "by way of legislation or court rule," and not "through a device so unclear and so unconfined as judicial liberalization of . . . mandamus and prohibition." *Id.* at 777–78.

[80] *See In re* Union Leader Corp., 292 F.2d 381 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.), *cert. denied*, 385 U.S. 899 (1966) (propriety assumed but not discussed); Henry v. Speer, 201 F. 869 (5th Cir. 1913) (propriety assumed but not discussed); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934); Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960); Hurd v. Letts, 152 F.2d 121 (D.C. Cir. 1945). For cases denying the propriety of using mandamus to review denial of a disqualification motion see Green v. Murphy, 259 F.2d 591 (3d Cir. 1958) (concurring and dissenting opinions endorse pro-mandamus position); Albert v. United States Dist. Ct., 283 F.2d 61 (6th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954).

[81] Only the Ninth and Tenth Circuits appear to have gone beyond merely endorsing the use of mandamus in disqualification cases and actually issued the writ. Connelly v. United States Dist. Ct., 191 F.2d 692 (9th Cir. 1951); *In re* Honolulu Consol. Oil Co., 243 F. 348 (9th Cir. 1917); United Family Life Ins. Co. v. Barrow, 452 F.2d 997 (10th Cir. 1971); Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

[82] Green v. Murphy, 259 F.2d 591, 593–94 (3d Cir. 1958); Korer v. Hoffman, 212 F.2d 211, 213–14 (7th Cir. 1954). In Albert v. United States Dist. Ct., 283 F.2d 61 (6th Cir. 1960), the court stated that to be reviewable by mandamus, the judge's duties must be "ministerial, plainly defined and peremptory," and that it must be "clear and undisputable that there is no other legal remedy." *Id.* at 62.

[83] 259 F.2d 591 (3d Cir. 1958).

court of appeals to order Judge Murphy's disqualification was denied en banc, with two judges concurring and one dissenting.[84] The basis of the motion in this case was fairly unusual. The defendant, a long-time political and social intimate of the judge, feared that Judge Murphy, because of his desire to show that friendship would not affect his impartiality, would favor the prosecution.[85] In declining to issue the writ the majority made several statements which may be viewed as the basis for its holding: (1) there was an adequate remedy by appeal in the case; (2) the writs might "be issued only in aid of [the] court's appellate jurisdiction"; (3) these extraordinary remedies were justified "only when rare and exceptional circumstances [were] present"; and (4) no special circumstances existed in the case warranting issuance of the writ.[86]

The precise meaning of *Green* is difficult to determine, as the conflicting interpretations by the concurring and dissenting judges well illustrate. Judge Hastie's concurring opinion emphasized the lack of extraordinary circumstances as the reason for the decision, stating that the majority would have allowed mandamus where a judge was "arbitrarily or scandalously disregarding his plain duty to disqualify himself . . . but that such circumstances do not appear in this case."[87] This reading of the opinion seems fallacious since, as pointed out by Judge Kalodner in his dissent, the majority specifically stated that it was not even considering the affidavit in reaching its decision,[88] and could not, therefore, have decided whether these were special circumstances. Judge Kalodner's view, that the majority's holding was based "on the specific absence of 'appellate jurisdiction,' "[89] seems more correct. Thus, the implication of the holding is that the remedy by appeal is adequate in any disqualification case because the judge's strictly legal decision may be reviewed on appeal.[90] Consequently, it may be inferred from the majority opinion that courts of appeals lack

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[84] *Id.* at 594, 595 (Hastie, J., concurring), 596 (Kalodner, J., dissenting).

[85] *Id.* at 593, 595 (Hastie, J., concurring), 596–97 (Kalodner, J., dissenting).

[86] *Id.* at 594. Chief Judge Biggs considered the remedy of appeal to be adequate because the court would be able to overturn an adverse judgment on appeal if it found that the trial judge should have disqualified himself. *Id.* No direct explanation was given of the aid of jurisdiction requirement. *See id.* Judge Biggs did state, however, that the desire to avoid an entire trial which would be reversed if the judge's denial of the motion were found to be erroneous was not an extraordinary circumstance. Nor would a wrongful refusal to disqualify constitute an abuse of the trial court's power warranting mandamus, since the court did have jurisdiction to make the decision. *Id.*

[87] *Id.* at 595.

[88] *Id.* at 594, 603.

[89] *Id.* at 603.

[90] *See id.* at 593–94.

appellate jurisdiction to review denial of a disqualification motion by mandamus.[91] In addition, the majority also relied on the fact that the trial judge does have jurisdiction to pass on the affidavit—rightly or wrongly;[92] hence, the function of mandamus—to confine a judge to the exercise of his or her legitimate powers—is not called into play.[93]

Judge Hastie, concurring, agreed that the petition in this case should be denied, since he felt that "possible psychological overcompensation for an inclination favorable to a party" did not constitute the type of bias required by section 144.[94] However, he did feel that mandamus was an appropriate method of review, and that the disqualification question should be decided on the merits of the affidavits.[95] He also indicated that it might be best under these circumstances if the judge voluntarily "stepp[ed] aside" in order to maintain the appearance of justice.[96] The dissenting opinion shared the legal conclusion that mandamus does lie to review a refusal to disqualify.[97] Judge Kalodner differed only in that he felt that the particular facts clearly warranted the issuance of mandamus.[98]

The different *Green* opinions are illustrative of the positions taken, and the problems encountered, by other circuits. For example, the First Circuit, in deciding *In re Union Leader Corp.*,[99] has adopted the view of the concurring opinion in *Green* that all disqualification cases pose an extraordinary situation because of "the right to be tried before an unbiased judge."[100] On the other hand, the Sixth and

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[91] *See id.* (semble).

[92] *Id.* at 593.

[93] *See id.* at 594.

[94] *Id.* at 595.

[95] *Id.*

[96] *Id.* at 595–96.

[97] *Id.* at 597–602 (Kalodner, J., dissenting).

[98] *Id.* at 596–97, 602–05.

[99] 292 F.2d 381 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961).

[100] *See* 292 F.2d at 384. The petition was denied, however, since the movant, who had suffered an adverse verdict, deliberately published articles denigrating the judge's ethics. *Id.* at 387.

Where the movant's own calculated behavior is the basis of the charge of prejudice, a finding that the affidavit does not allege facts sufficient to require disqualification is clearly warranted, since it would be an outrage to permit parties to successfully engage in such bad faith practices. But even when no bad faith is apparent, mandamus is still denied on the grounds of the legal insufficiency of the affidavit or the absence of extraordinary circumstances. *See, e.g.*, Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934), in which the court held that a receivership proceeding was not inherently an exceptional case. *Id.* at 547. In addition, the court ruled that even if it were a special situation, the affidavit was insufficient because of untimely filing and failure to adequately state facts warranting disqualification. *Id.* No specific references to the affidavit were made to indicate which portions were deficient.

Seventh Circuits share the conviction of the *Green* majority that mandamus is not an appropriate remedy for denial of a disqualification motion.[101] A third viewpoint is presented by the Ninth Circuit cases. In *Gladstein v. McLaughlin*,[102] that circuit endorsed a different interpretation of the extraordinary circumstances requirement for mandamus in disqualification cases, *i.e.*, that the nature of the harm which may arise out of the particular case may warrant granting the writ.[103] Finally, a number of courts seem to treat the petition as an appeal, looking to whether the trial judge's decision as to legal sufficiency was correct.[104]

In Occidental Petroleum Corp. v. Chandler, 303 F.2d 55, 56–57 (10th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963), the trial judge was removed from the case because of improper actions in bankruptcy proceedings. That court emphasized that the judge's alleged actions clearly demonstrated bias and that failure to remove him would result in denial of a fair trial. Authority to grant relief in a disqualification case was premised on United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960), which stated that regardless of the source of the power, the court had the " 'inescapable duty . . . to effectuate what seems . . . to be the manifest ends of justice.' " Occidental Petroleum Corp. v. Chandler, *supra* at 56–57. Thus, disqualification itself appears to be an extraordinary situation in the opinion of the Tenth Circuit.

[101] *See* note 82 *supra* and accompanying text.

[102] 230 F.2d 762 (9th Cir. 1955).

[103] *See id.* at 763–64. The *Gladstein* court was ready to grant the writ because of the possibility of irreparable harm to attorney Gladstein's reputation pending the outcome of a disbarment proceeding initiated against him in the District of Hawaii by Judge McLaughlin. Gladstein was representing Communist defendants in various federal district courts, and Judge McLaughlin, a fervent anti-Communist, sought his disbarment after Gladstein had been jailed for contempt in New York. *Id.* The writ was not issued, however, since the court preferred to rely on the judge's integrity in following its unofficial mandate. *Id.* at 764. *But see* United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960), in which the trial judge had refused to comply with such a suggestion, and the court of appeals was then forced to issue the writ.

In two other Ninth Circuit cases the writ was actually granted, although the court's jurisdiction to issue the writ was not discussed. *See* Connelly v. United States Dist. Ct., 191 F.2d 692 (9th Cir. 1951) (based on strong anti-Communist bias of judge, with this the trial of a Communist); *In re* Honolulu Consol. Oil Co., 243 F. 348 (9th Cir. 1917) (based on judge's former, minor stock ownership in a corporate party).
judge stated in a footnote that the propriety of mandamus or prohibition had not been challenged. He indicated that he believed it was appropriate. *Id.* at 693 n.1. *But see* 230 F.2d at 764 (Pope, J., concurring) (expressing view that footnote "misconstrued the language of" *Berger*).

Other circuits appear to apply an analysis similar to that of the *Gladstein* court. *See, e.g.*, Hurd v. Letts, 152 F.2d 121, 122 (D.C. Cir. 1945) (recusal question should be "reserved for appeal . . . unless there are special circumstances" (citation omitted)); *In re* Lisman, 89 F.2d 898, 899 (2d Cir. 1937) (per curiam) (even where appeal possible, original writs available "where special circumstances exist"); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545, 547 (8th Cir. 1934) (appeal of recusal denial available, but a writ may issue in "a 'rare and exceptional' case").

[104] *See, e.g.*, Foster v. Medina, 170 F.2d 632, 633–34 (2d Cir. 1948), *cert. denied*, 335 U.S. 909 (1949); Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913).

Thus, it is apparent that when a disqualification motion is denied, the movant has no clear avenue by which to take his fears to an appellate court and avoid the problems of an unsatisfactory trial situation. Final appeal comes too late in most cases; attempts to secure an interlocutory appeal rarely succeed; and mandamus is generally denied. Combined with the difficulties at the trial level, these problems highlight the need for a different system which can better protect litigants who fear a judge to be biased.

PROPOSALS FOR REFORM

Many authors have addressed the problems in the disqualification system and have endorsed particular remedies for its amelioration. What will be helpful at this point is an overview of these proposals, combining the most useful of them with some new suggestions, toward the end of improving the system as a whole.

One method of disqualification reform which is discussed frequently is the peremptory challenge.[105] Under such a system, the filing of an affidavit would require the judge's disqualification, much in the same way a peremptory challenge would disqualify a juror.[106] As this was arguably the original intent of section 144, although never implemented, the statute would have to be amended to clearly provide for an automatic disqualification upon filing of a motion.[107]

Opponents of this system advance many objections to it. Some feel that it vests litigants with too much power in the selection of a judge to sit on a particular case, possibly resulting in many situations in which no judge in the district would be able to hear a case.[108] Another objection is that judges would be deprived of work.[109] There

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[105] *See, e.g.*, Frank, *supra* note 1, at 65–67; Schwartz, *supra* note 4, at 427; Comment, *supra* note 26.

Some states, *e.g.*, Oregon and California, are currently utilizing a peremptory disqualification procedure. For an extremely thorough discussion of Oregon's experience, as well as a survey of the systems in use in all of the states, see *Symposium*, *supra* note 1, at 332–400. *See also* Note, *supra* note 1, at 1437–38.

[106] Frank, *supra* note 1, at 65–66.

[107] *See* note 4 *supra* and accompanying text.

[108] *See, e.g.*, Davis v. Board of School Comm'rs, 517 F.2d 1044, 1050 (5th Cir. 1975), wherein the court expressed the concern that

> [r]ead broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will.

See Schwartz, *supra* note 4, at 426.

[109] *Cf.* Schwartz, *supra* note 4, at 426. The author also discussed the possible burden which a peremptory challenge system might impose on the courts, especially in those districts having only one judge. *Id.*

is also great apprehension that a peremptory system would be used as a dilatory tactic by disingenuous litigants.[110]

All of these concerns are certainly valid, but they are easily rebutted. A party who challenges a judge will not have a choice as to his or her replacement. This system, therefore, does not permit unwarranted exercise of control by litigants in choosing a judge. Since most districts today have more than one judge, and since rapid transportation makes the services of other judges much more readily available than in earlier times, it would be quite rare that peremptory disqualification of a judge leaves no other judge in the district to try the case.[111] With the backlog of cases in most courts today, any judge who is disqualified from a case will have more than enough other cases waiting to be tried. Those who fear delay under this system overlook the safeguards against potential abuse. Proponents of peremptory challenge generally suggest that only one be available per side.[112] However, this would not hamper those seeking to disqualify a second judge, since there is no limit to the number of motions that can be filed under section 455's grounds for disqualification.[113] Moreover, the factor with the greatest potential for preventing abuse of the peremptory system is the requirement of timely filing.[114]

Use of the peremptory challenge would have to be strictly limited to the earliest stages of a proceeding. Thus, it should always be available where the case has merely been assigned to a judge who has taken no action therein. Past that point an appropriate cut-off time

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[110] It has been suggested that in the criminal context such delay might result in " 'a substantial denial of justice.' " *Id.* (quoting from 46 CONG. REC. 2627 (1911) (remarks of Representative Bennett opposing the predecessor bill to section 144)).

[111] Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538, 565 (1973). This author pointed out that many years ago

> there were no multijudge districts, only limited provision for the use of visiting judges, and poor communication and transportation systems. Consequently, if one judge could not hear a case a considerable delay might ensue before another judge could be obtained to hear it.

Id. (footnote omitted). Since these conditions no longer exist, replacing a disqualified judge is generally a simple and rapid procedure. *Id. See* Note, *supra* note 12, at 747–48.

[112] *See, e.g.*, S. 1886, 92d Cong., 1st Sess. (1971); S. 4201, 91st Cong., 2d Sess. (1970). These identical bills were introduced by Senator Birch Bayh as proposed amendments to existing disqualification statutes. If passed, these bills would have allowed "one peremptory challenge" by any party and "only one affidavit" per side. *See also* Frank, *supra* note 1, at 65–66; Comment, *supra* note 26, at 135–36. *But see* ORE. REV. STAT. § 14.260 (1963) (two challenges per party).

[113] *See* 28 U.S.C. § 455 (Supp. IV, 1975).

[114] Timely filing is already required under section 144; however, as presently worded the standard has little meaning. *See* note 14 *supra*.

would best be determined by the judiciary themselves, taking into account the pretrial complexity of different types of cases.[115] It would seem most desirable for such standards to be established for the whole federal court system by the Supreme Court in its supervisory capacity, aided by the input of the Judicial Conference of the United States.[116] Such a cut-off point should probably be expressed in terms of a maximum period which will be allowed for filing the motion after the bias is perceived, but with a terminal point in the proceedings after which it will never be permitted.[117] Once this early stage of the proceedings has passed and the judge has invested considerable time on the case, peremptory challenges should no longer be permitted.[118] A peremptory system has many advantages. It avoids any discussion of whether the judge actually is or even appears to be biased; it is merely the expression by the movant of a preference that another judge try the case.[119] Such a method is protective of judges' reputations, since no finding of the sufficiency of the allegations need be made.[120] Nor would it be damaging to the courts, since under this

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[115] *See* notes 42–45 *supra* and accompanying text. If the procedures were established by the judiciary, great flexibility could be provided for accommodating considerations of local practice. *See Symposium*, *supra* note 1, at 402.

[116] Such an approach was suggested in Comment, *supra* note 111, at 567–68. Since the members of the judiciary have been part of the system as both judges and lawyers, they seem to be in the best position to balance the considerations on both sides of the question.

[117] Such a system would disable those who wait for a number of routine rulings to be made merely to see whether things are going in their favor. *See, e.g.*, *Symposium*, *supra* note 1, at 403. This would also acknowledge that a reasonable amount of time is needed after the intial perception of bias to perhaps investigate further and prepare a proper affidavit. It would take into account as well that there are both routine and extraordinary factors which may arise in an attorney's schedule which prevent *immediate* filing of an affidavit. Current narrow interpretation of section 144's timely filing requirement has resulted in some arbitrary rulings. For example, in Eisler v. United States, 170 F.2d 273, 277–78 (D.C. Cir. 1948), *cert. dismissed*, 338 U.S. 883 (1949), a nine-day lapse between the movant's learning the judge's identity and filing of the affidavit was held to be untimely, even though the chief attorney's brother had died in the interim. The court found such reason unpersuasive, pointing out that two other counsel were of record.

[118] Ruling on pretrial motions and overseeing depositions and discovery may well involve extensive involvement by the judge. *See, e.g.*, Pfizer, Inc. v. Lord, 456 F.2d 532, 541–42 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 502, 505 (D.S.C. 1975).

[119] Frank, *supra* note 1, at 65–66.

[120] The Bayh bills, discussed at note 112 *supra*, would require no explanation for the movant's belief that the judge is biased. While the Bayh proposal would be beneficial by eliminating judicial testing of the legal sufficiency of the allegations of prejudice, it does not go far enough in the peremptory challenge context. Judges often oppose liberal recusal systems because of their fear that granting the motion will be a

method disqualification would be basically an administrative matter. Moreover, there is no legitimate basis for objection by the opposing party—except perhaps in one-judge districts—since neither side has a "right" to have a particular judge try the case.[121]

Besides adoption of a peremptory challenge provision, other reforms are needed. We have seen that the current system is fraught with difficulties, because in most districts it is the challenged judge who rules on the motion.[122] A solution which has often been suggested is that a different judge make this ruling.[123] It has alternatively been proposed that the affidavit be submitted to another district judge[124] or to the court of appeals.[125]

For the greatest protection of the litigant, and to create a more cooperative trial atmosphere should the motion be denied, it would seem most effective for the ruling to be made by a three-judge panel. If three judges have ruled on the *sufficiency* of the affidavit, it would be much more reasonable to require the movant to wait for final appeal to assign the ruling as error.[126] Thus, the affidavit could initially be submitted to the challenged judge. If he or she decided to step

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reflection on their competence. Since the Bayh bill would require the peremptory motion to be phrased in terms of prejudice, and no scrutiny would be made of this bare allegation, this concern would remain. A better approach would be to merely require a statement that the movant desires to have a different judge without any mention of prejudice. This would liberalize the system considerably by allowing requests for a new judge for any reason whatsoever. *See* Frank, *supra* note 1, at 67.

[121] *See* note 41 *supra*. Moreover, the judge "has no vested right to sit in [a particular] case." Rapp v. Van Dusen, 350 F.2d 806, 814 (3d Cir. 1965); Note, *supra* note 1, at 1437.

In any system that is adopted, special provisions could be made for districts having only one judge, including stricter standards or a balancing of the amount of delay against the degree of prejudice. In addition, there are currently only ten districts having one judge with no additional roving judge. 401 F. Supp. at VII–XXI.

[122] *See* notes 29–35 *supra* and accompanying text. *But see, e.g.*, Craven v. United States, 22 F.2d 605, 607 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928) ("presiding judge, under a fitting and common practice, referred the sufficiency of [the] affidavit to another District Judge").

[123] One commentator has observed that referral of the affidavit to a different judge would be "[a] remedy not quite as drastic as the automatic disqualification procedure." Schwartz, *supra* note 4, at 429. Another author has pointed out that "if there is real prejudice, another judge is less likely to err and unnecessary litigation may be avoided." 13 CORNELL L.Q. 454, 458 (1928); *see also* Note, *supra* note 11, at 251.

[124] Note, *supra* note 1, at 1439.

[125] *Id.* at 1439, 1441.

[126] Under such a system the ruling to be made would be the same as it is now: Are the allegations in the affidavit a sufficient indication of bias to require the judge's disqualification? In order to make this determination, these judges would need only the affidavit itself and a knowledge of pertinent disqualification law. No evidence or testimony would need to be reviewed. Thus, a prompt ruling would be possible.

aside, no further action would be necessary.[127] Should the motion be denied, however, it would then be sent on to the three-judge panel, not to review the challenged judge's ruling, but merely to make an independent finding as to the legal sufficiency of the affidavit. The decision to be made would be whether the allegations in the affidavit reasonably support a belief that the judge is biased.[128] If the panel denies the motion as well, the litigant should feel comforted by the fact that the motion has received impartial consideration by three judges other than the challenged one. The challenged judge should be less likely to harbor hostility toward the movant in conducting the ensuing trial, since the denial of the motion by the panel can be seen as vindicating his or her impartiality.

The decision of who should comprise this panel is crucial to effective reform. It seems best that it not be composed of district court judges, since they would be passing upon one of their peers.[129] If three court of appeals judges made the determination, this problem would be diminished. There might still be difficulties with this composition of the panel, however, since appellate judges are likely to be quite familiar with many of the district judges in their circuits and the cases those judges are hearing. One way to counteract this difficulty would be to have the affidavits drawn up giving the allegations in a hypothetical form, without giving the names of the judge or parties involved. If this method were used, the personal aspect of the ruling might be alleviated.[130]

Another possibility would be to have a panel of retired judges in each circuit available to rule on disqualification affidavits. Each affidavit could be mailed to three members of this panel, on a rotating basis, who would consider it and return their votes to be compiled by

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[127] An initial ruling by the challenged judge would conserve judicial time and effort, facilitating an immediate resolution in cases where the judge agrees that bias is apparent from the allegations. This ruling should simply be a grant or denial of the motion without written opinion, hearings, or fact-finding. Strict time limits should be set within which the ruling must be made.

[128] This approach incorporates the appearance-of-bias standard discussed at notes 24–28 *supra* and accompanying text.

[129] It has been noted that even though referral to a different district judge

> would be an improvement over the present system, a district judge passing on the disqualification of one of his colleagues would be in a sensitive position, and . . . might feel under pressure not to disqualify.

Note, *supra* note 1, at 1439; *see* Comment, *supra* note 26, at 141 n.148.

[130] This system would not be foolproof either. Since many cases in which disqualification motions are filed may be notorious in the district, the description of certain facts might not permit sufficient anonymity even where names are omitted.

the chief judge.[131] The imposition upon these retired jurists would seem to be minimal: The number of motions filed subject to this system would not be great;[132] the test of legal sufficiency would be on the face of the affidavit and would not require review of the record; and, this task could be performed in their own homes.

Regardless of who is passing on the motion, the use of clearer standards is necessary. Under the amended section 455, the standards are very definite for certain types of interest. Thus, even if the judge does not determine sua sponte that disqualification is required, he or she will surely step aside when a direct financial interest or close familial relationship with a party is alleged.[133] But for the more nebulous sorts of bias, review by three disinterested judges may not be adequate reform if old case law definitions of sufficiency continue to be applied.[134] Here, too, it would be best for the Supreme Court to promulgate guidelines for judging the sufficiency of "personal" bias or prejudice alleged in an affidavit. The emphasis should be on the reasonableness of the movant's belief that the judge is biased, not on the source or nature of the bias. If this appearance-of-bias standard were emphasized by the Supreme Court as a guiding principle for the lower courts, this alone would do much towards improving our federal disqualification system.

Of course, there are those who fear abuse of a more lenient sys-

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[131] After compiling the results, the chief judge would issue an order in accordance with the majority vote and would assign a new judge if disqualification is ordered.

[132] It is interesting to note at this point that there do not appear to be any records kept by the federal district courts or the Administrator of the United States Courts regarding disqualification motions. The only federal recusal statistics which this author was able to find are those in Comment, *supra* note 111, at 568–70. The author of that Comment wrote to the chief judges of all the federal district courts, asking for responses to six questions on the use of section 455 in their districts. *Id.* It seems likely, however, that their answers are applicable as well to motions under section 144, since motions under the two statutes are often joined. Although the number of disqualifications per judge per year varied among the districts, the average number was three and one-half, and the median two. *Id.* at 569. Out of forty-two districts responding, twenty-seven indicated that *all* disqualifications under section 455 "were on the judges' own motions." *Id.* If self-disqualification under section 455 is prevalent in such a large percentage of districts, it is probable that the number of motions which are filed under section 144 will not be large.

[133] 28 U.S.C. §§ 455(b)(4), (5) (Supp. IV, 1975). For text of section 455 see note 7 *supra*. Disqualification is also required when the judge, either in private practice or as a government attorney, has been directly related to the matter in suit as a material witness or as a lawyer. 28 U.S.C. §§ 455(b)(2), (3) (Supp. IV, 1975).

[134] Sections (a) and (b)(1) of section 455 still fail to give guidelines as to what might lead to reasonable questioning of the judge's impartiality or what might constitute "personal bias or prejudice" sufficient to require disqualification. For text of section 455 see note 7 *supra*.

tem. It must be recognized, however, that many other devices are available to those who wish to harass their opponents or impose upon the court system. Disqualification motions are only one weapon in this arsenal of delay. In addition, sanctions are available against parties and attorneys who file motions in bad faith, and it would seem only fair that any proposal which suggests a more liberal procedure for motions emphasize that those who abuse the system be strictly penalized. Since the motion must be certified by counsel, the charge of perjury is available when an affidavit seems clearly false.[135] Another remedy for the judge who feels that the movant has unconscionably distorted his or her remarks or actions is a contempt citation.[136] Moreover, independent disciplinary action may be taken against the attorney.[137] All of these methods should be used by judges when they sense ill motive on the part of the movant, rather than adopting a blanket hard-line attitude against all movants, regardless of their sincerity.[138]

One last problem to be addressed in this proposed scheme for disqualification reform is the motion brought after trial has commenced. The probable length of trial is a major factor to be considered in deciding whether the movant will be seriously prejudiced by having to wait for final judgment or whether the motion should be

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[135] Berger v. United States, 255 U.S. 22, 35 (1921). Justice McKenna also pointed out that if an attorney is a party to the perjury, disbarment may result. *Id.* Certainly, a lesser form of disciplinary action would be available.

[136] Orfield, *Recusation of Judges in Federal Courts*, 17 BUFFALO L. REV. 799, 808 (1968). Professor Orfield stated:

> An affidavit obviously malicious and scandalous toward the judge may constitute contempt of court. Similarly, an attorney who certifies to the good faith of [such] an affidavit . . . may be prosecuted for contempt. Also, filing a belated affidavit against a judge before whom matters in litigation are pending undecided may be contempt of court as constituting an improper effort to influence a judicial decision.

Id. (footnotes omitted).

[137] Various sections of the *ABA Code of Professional Responsibility* provide a basis for the discipline of lawyers who knowingly file frivolous or harassing affidavits. The preliminary statement to the code indicates that "[t]he Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." While not itself prescribing penalties for violations, the Code recommends punishment commensurate with "the character of the offense and the attendant circumstances." Thus, any range of penalties would be available for bad faith use of disqualification motions under a number of Disciplinary Rules. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102; DR 7-102(A)(1), (4), (5), (7), (8); DR 7-106(C)(6), (7).

[138] Even if the judge does not feel bad faith is involved, but merely wishes to state his or her view as to the matters alleged in the affidavit, it is always possible to insert an explanation into the record. Note, *supra* note 1, at 1437.

immediately reviewed pursuant to the above-described proposal. In a case lasting no longer than a few days, the desire to avoid delay may outweigh any detriment to the litigant. Hence, when a litigant develops a fear that the judge is biased on the second or third day of a probable four- or five-day trial, it does not seem unreasonable to insist that the proceedings be completed prior to review.

In cases which are likely to extend for a long period of time, it is more reasonable to demand immediate review of the disqualification motion by the disinterested panel. Especially in those cases which are tried before a judge without a jury, the prejudice engendered by a continuance will not be substantial. Even in cases tried before a jury, the considerable degree of time and expense which will be consumed by the trial militates against requiring litigants to engage in efforts which will be futile should the judge be disqualified on subsequent appeal.[139] The decision as to whether the trial will be lengthy enough to warrant its disruption for immediate review of the disqualification motion should be left to the discretion of the trial judge. However, guidelines should be furnished by the Supreme Court to enable the trial judge to make a reasonable, non-arbitrary decision.

CONCLUSION

As we have seen, disqualifying a judge is a nearly impossible task. Judges are subject to the same human foibles as the rest of us, hence they dislike being challenged regarding the most basic qualification for their position—their impartiality. For this reason, the author has suggested a new disqualification mechanism having the principal goal of putting the disqualification motion in a more impersonal light.

To this end, a universal system of peremptory challenge should be adopted for the earliest stages of the proceeding, within a time

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[139] It seems ironic for judges to complain about crowded court calendars while also stating that the inconvenience of a lengthy and wasted trial is insufficient reason for permitting appellate review before final judgment. *Compare* General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 198 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964) *with* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30–31 (1943).

Professor Rosenberg has observed that

> [w]hatever reasons there are for non-reviewability of wrong trial court decisions, shortage of judicial machinery is apparently not a significant one. We have plenty of appellate courts, waiting . . . for mistaken calls by trial judges. Their whole reason for existence it might be argued, is to reverse erroneous decisions by lower courts. Why should they abstain from their duty?

Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 645 (1971).

limit designated by the Supreme Court in its supervisory power. Only after such time would a motion be subject to a finding of legal sufficiency by the trial judge. Should the motion be denied, the affidavit should be immediately forwarded to the proposed three-judge panel, except in those cases in which the trial judge, in his or her discretion, and subject to Supreme Court guidelines, determines that the trial will be too short to warrant use of this procedure. Moreover, such a system must have as its linchpin a firm commitment by courts at all levels that the appearance-of-bias standard will be applied. Not only would the foregoing system have the advantage of making disqualification more impersonal, but it would eliminate the problems present in waiting for review of the motion until the close of a lengthy case. In addition, this system would avoid the problems which surround the use of mandamus and other interlocutory review procedures, thus giving more security to the litigant and to counsel.

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