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Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455

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DISQUALIFICATION OF FEDERAL JUDGES FOR BIAS UNDER 28 U.S.C. SECTION 144 AND REVISED SECTION 455

I. INTRODUCTION

Disqualification of federal judges is governed by two provisions[1] of the Judicial Code. Section 144[2] establishes a procedure by which a party may move that a district judge recuse[3] himself because of bias or prejudice against the party. Section 455[4] establishes the criteria for judicial self-disqualification

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1. A third, related, provision, 28 U.S.C. § 47 (1970), provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."

2. 28 U.S.C. § 144 (1970). The statute is set out at note 13 infra.

3. Although technically "disqualification" has been deemed to be statutorily mandated, while "recusal" is a voluntary act by a judge, Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43, 45 (1970) [hereinafter cited as Frank, Bayh Bill], this Note will follow the general usage of employing the two words interchangeably.

4. 28 U.S.C. § 455 (Supp. IV, 1974). The statute provides:

(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.

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

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

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

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

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

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

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

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

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

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

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

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or

for all federal judges. The current section 455, adopted in 1974,[5] was intended to remedy contemporary dissatisfaction with the existing statutory standards by "broaden[ing] and clarify[ing] the grounds for judicial disqualification."[6] It is submitted, however, that the amendment to section 455 has failed to achieve its objective and that further congressional action is warranted.

II. The Development of Federal Standards for Judicial Disqualification

In 1911, Congress adopted legislation which established the modern standards[7] for judicial disqualification in the federal courts. One statute,[8] the precursor of section 455 of the Judicial Code,[9] set out the narrow circumstances in which a judge was to disqualify himself from a proceeding:[10] when

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a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

5. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609.

6. Id.

7. Statutory procedures for federal judicial disqualification were first enacted in 1792. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. The grounds for disqualification under the original federal statute were an interest in the litigation or representation of either party as counsel. Id. These strict standards developed on the basis of the early English common law, which had held that a judge should be disqualified only in the event of direct pecuniary interest in a case. Frank, Disqualification of Judges, 56 Yale L.J. 605, 609-10 (1947) [hereinafter cited as Frank, Disqualification]. Since the nineteenth century, when the English courts extended the requirement of disqualification to judges who had even a remote proprietary interest in a case, the British attitude toward recusal has been progressively more liberal and flexible. For a discussion of the English case law development see Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966) [hereinafter cited as Disqualification for Bias]. The federal standards for disqualification, once enacted, did not follow the liberal development of the English system. See notes 18-43 infra and accompanying text.

8. Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090.

9. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.

10. Although, by contrast with section 144, section 455 is phrased in terms of judicial self-disqualification, a party could obtain indirect recourse to its provisions by simply informing

he had a substantial interest in the case,[11] when he had been of counsel or a material witness in the case, or when, in his opinion, he was so related to or associated with any party or attorney as to render it improper for him to sit in the case.

The companion statute,[12] the predecessor of section 144,[13] enabled a party to raise the issue of judicial disqualification when he believed that the assigned judge had a personal bias or prejudice against him. Prior to this enactment, a federal litigant who believed that the assigned trial judge was prejudiced against him had no recourse for relief.[14] The professed purpose of the statute was to remedy this inequity[15] through adoption of a procedure which would make recusal mandatory when a party filed an affidavit in good faith alleging that the judge was biased.[16]

The system of recusal for bias envisioned by the drafters was analogous to the peremptory challenge of a juror.[17] However, some courts soon interpreted the provision as vesting discretion in the trial judge.[18] Relying on those decisions, the Government argued in *Berger v. United States*[19] that before a

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the judge that his participation in the case violated the statute. See text accompanying notes 98-101 infra.

11. However, there is a rule of judicial construction which states that if every judge would be disqualified for interest, no judge should be disqualified. Evans v. Gore, 253 U.S. 245, 247-48 (1920). This rule should be applicable in the recent suit filed in the Court of Claims by forty-four federal judges for a pay increase and back pay. For a discussion of the judges' suit see N.Y. Times, Feb. 11, 1976, at 1, col. 1.

12. Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090.

13. 28 U.S.C. § 144 (1970) 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.

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.

14. 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop); Frank, Disqualification, supra note 7, at 629.

15. 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

16. The statute provided that upon the filing of an affidavit of bias, "such judge shall proceed no further therein, but another judge shall be designated . . . ." Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090.

17. The act was modeled on an Indiana statute which made disqualification automatic upon the filing of a proper affidavit. Orfield, Recusation of Federal Judges, 17 Buff. L. Rev. 799, 804 (1968) [hereinafter cited as Orfield]; Schwartz, Disqualification for Bias in the Federal District Courts, 11 Pitt. L. Rev. 415, 424 (1950) [hereinafter cited as Schwartz]. That a peremptory system was the intention of the statute's drafters is evident from the congressional debate on the proposed act. See 46 Cong. Rec. 2626-27 (1911).

18. E.g., Henry v. Speer, 201 F. 869 (5th Cir. 1913); Ex parte N.K. Fairbank Co., 194 F. 978 (M.D. Ala. 1912).

19. 255 U.S. 22 (1921).

judge was disqualified under the statute, he had to conclude that he was biased in fact.[20] The Supreme Court rejected this contention and held that, for purposes of the motion to disqualify, the allegations contained in the affidavit were to be accepted as true.[21] However, the judge was required to pass on the affidavit's sufficiency.[22] It was his responsibility to decide whether the affidavit met the procedural requirements of the statute and whether the facts alleged the requisite personal bias or prejudice.[23] While *Berger* said that the truth or falsity of the allegations was not a matter for judicial consideration, the lower courts continued to circumvent the intended peremptory system by finding affidavits legally insufficient.[24] Motions were defeated if they alleged "mere conclusions."[25] "Time, place, persons, occasions and circumstances"[26] had to be stated with at least the degree of specificity required in a bill of particulars.[27] Affidavits were also held insufficient on the basis of procedural technicalities.[28] Despite the holding of *Berger*, some cases went so far as to demand proof of bias in fact.[29]

An escape from the statute was also effected by finding that the bias charged was not "personal." Although *Berger* seemed to say that an affidavit was sufficient so long as its allegations were not "frivolous or fanciful,"[30] some

20. Id. at 24, 30-31.

21. Id. at 32-33, 36. "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed." Id. at 36.

22. See id. at 32.

23. Sufficient allegations were ones which gave "fair support to the charge of a bent of mind that [might] prevent or impede impartiality." Id. at 33-34.

24. Frank, Disqualification, supra note 7, at 629-30; Note, Disqualification of a Federal District Judge for Bias—The Standard Under Section 144, 57 Minn. L. Rev. 749, 755, 758 (1973) [hereinafter cited as Minn. Note].

25. Inland Freight Lines v. United States, 202 F.2d 169, 171 (10th Cir. 1953); accord, United States v. Anderson, 433 F.2d 856, 860 (8th Cir. 1970); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R. Co., 380 F.2d 570, 576 (D.C. Cir.), cert. denied, 389 U.S. 327 (1967); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962).

26. United States v. Gilboy, 162 F. Supp. 384, 392 (M.D. Pa. 1958); accord, United States v. Parker, 23 F. Supp. 880, 884 (D.N.J. 1938); Johnson v. United States, 35 F.2d 355, 357 (W.D. Wash. 1929).

27. Wilkes v. United States, 80 F.2d 285, 289 (9th Cir. 1935); Morse v. Lewis, 54 F.2d 1027, 1032 (4th Cir.), cert. denied, 286 U.S. 557 (1932); United States v. Gilboy, 162 F. Supp. 384, 392-93 (M.D. Pa. 1958).

28. E.g., affidavits insufficient because not certified by "counsel of record" within the meaning of the statute: Currin v. Nourse, 74 F.2d 273, 275 (8th Cir. 1934), cert. denied, 294 U.S. 729 (1935); Ormento v. United States, 328 F. Supp. 246, 260-61 (S.D.N.Y. 1971); United States v. Gilboy, 162 F. Supp. 384, 391 (M.D. Pa. 1958); motions supported by affidavit of attorney rather than affidavit of party held insufficient: United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973); Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970); certificate of good faith which attested only to good faith of affidavit and did not specify good faith of application held insufficient: United States v. Gilboy, supra at 391-92.

29. Minn. Note, supra note 24, at 758; see, e.g., Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir.), cert. denied, 406 U.S. 976 (1972); United States v. Gilboy, 162 F. Supp. 384, 393 (M.D. Pa. 1958) ("A prima facie case will not suffice.").

30. 255 U.S. at 33-34; Frank, Disqualification, supra note 7, at 629; see Minn. Note, supra note 24, at 755.

courts interpreted the statute as requiring the affiant to demonstrate that the judge disliked him personally.[31] Under this interpretation, bias against a litigant's cause or type of case—a more prevalent variety of prejudice than personal enmity[32]—was not recognized as a ground for disqualification.[33] Even when the bias met the narrow definition of personal, it was difficult for a party to substantiate the allegations with the required detail because the bias was unlikely to be demonstrated in tangible acts or utterances of the judge.[34]

The Supreme Court's only opinion on the matter following *Berger* has been read as endorsing the prevailing judicial interpretation. In *United States v. Grinnell Corp.*,[35] the Court held that a bias was not personal if it did not "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[36] *Grinnell* may be read as merely rejecting adverse evidentiary rulings as an indication of bias,[37] but the case has been cited as holding insufficient

31. E.g., Cole v. Loew's Inc., 76 F. Supp. 872, 876 (S.D. Cal. 1948), rev'd on other grounds, 185 F.2d 641 (9th Cir. 1950), cert. denied, 340 U.S. 954 (1951) ("a personal attitude of enmity directed against the suitor"); Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924) ("such personal dislike of a litigant as an individual or a party to the suit"); Schwartz, supra note 17, at 418; Minn. Note, supra note 24, at 756.

32. Letter from Judge Fred C. Struckmeyer, Jr. to Mr. John P. Frank, June 28, 1971, in Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 66 (1973) [hereinafter cited as Sen. Subcomm. Hearings].

33. Minn. Note, supra note 24, at 755-56. An early case held that even prejudgment on the merits was insufficient to meet the statutory requirement of "personal" bias or prejudice. Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913).

34. Particularly among educated persons such as judges, intangibles such as bias or prejudice are likely to be unconscious or subconscious in nature. Forer, Psychiatric Evidence in the Recusation of Judges, 73 Harv. L. Rev. 1325, 1330 (1960). Justice Frankfurter once noted that "judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process." Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (concurring opinion). However, most courts have been reluctant to accept expert psychiatric opinion regarding the likely existence of bias. For example, in Green v. Murphy, the defendant attempted to disqualify the assigned judge, who was a personal friend of the defendant and an ex-fellow Congressman. He alleged that the judge was personally " 'prejudiced against me by reason of our long continued and close political and social relationship and that by reason of his desire to prove his integrity and lack of favoritism, he will be unable to afford me a fair and impartial trial . . .' " 259 F.2d 591, 593 (3d Cir. 1958) (en banc). The defendant supported his allegations with the affidavit of a psychiatrist, which stated that the alleged circumstances would result in a subconscious bias on the part of the judge because of gratitude for favors the defendant had done for him. Forer, supra at 1325 & n.3. The trial court held the psychiatric conclusion unpersuasive. United States v. Gilboy, 162 F. Supp. 384, 399 n.26 (M.D. Pa. 1958). The court of appeals considered the defendant's petition for mandamus, but refused to reverse the trial judge's ruling on the motion. Green v. Murphy, supra at 594.

35. 384 U.S. 563 (1966).

36. Id. at 583.

37. The case was a civil action brought by the Government, alleging violations of the Sherman Act by Grinnell Corporation and three affiliates. Id. at 566. The district court held for the Government, and the Supreme Court affirmed the holding that the corporations had illegally

any allegation emanating from events occurring within the courtroom.[38] The Court's consistent denial of certiorari to cases challenging the narrow construction of the statute since *Grinnell* could also be interpreted as evidence that the Court supported the status quo.[39]

Judicial interpretation of section 455 was as restrictive as that of section 144. While two of the statute's criteria for disqualification—prior participation in the case as counsel or a material witness—were fairly specific, the remaining categories were vague.[40] This left the judge wide discretion in deciding whether his interest in the case was "substantial,"[41] and whether "in his opinion" his relationship with party or counsel made it "improper" for him to sit.[42] The courts intepreted the statute strictly, with most interests and relationships deemed insufficient to require recusal.[43]

One possible explanation for the strict construction of the statutes was the courts' sensitivity to the opportunities for asserting perjurious claims. Since under section 144 the facts purporting to demonstrate bias were to be taken as true,[44] the litigant intent on disqualifying a judge could easily abuse the provision by asserting false allegations which made the judge appear biased. Although the statute attempted to guard against such abuse by requiring that the affidavit be accompanied by a certificate of good faith,[45] the chances of actual prosecution for perjury were slight in view of the statement in *Berger* that assertions made on mere information and belief would satisfy section

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monopolized burglary and fire protection services. Id. at 570-71, 576. The Court's ruling that the district judge had not erred in failing to recuse himself might have been based on a desire not to overrule a complex and lengthy case on a collateral issue.

38. See, e.g., Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 96 S. Ct. 1685 (1976); Pfizer Inc. v. Lord, 456 F.2d 532, 542 (8th Cir.), cert. denied, 406 U.S. 976 (1972); Sperry Rand Corp. v. Pentronix, Inc., 403 F. Supp. 367, 371-72 (E.D. Pa. 1975). See also Minn. Note, supra note 24, at 756, 762-63.

39. A congressional ratification of the strict judicial construction of section 144 was seen in the failure of Congress to alter the 1911 statute in any material way when the Judicial Code was reenacted in 1948. Orfield, supra note 17, at 805; Schwartz, supra note 17, at 425.

40. Sen. Subcomm. Hearings, supra note 32, at 2; see Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 741 (1973) [hereinafter cited as Disqualification of Judges].

41. H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 2 (1974) [hereinafter cited as House Report]; S. Rep. No. 93-419, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as Senate Report]; Disqualification of Judges, supra note 40, at 742. As a result of the statutory opacity, the term "substantial interest" was subject to various interpretations by the courts. In the majority of circuits, a judge was disqualified for any pecuniary interest whatever. However, in the Fifth and Eighth Circuits, he was disqualified only if it appeared his decision could have a significant effect on his interest. In the Fourth Circuit, if the judge disclosed his interest, he could hear the case if the parties waived any objection to his sitting. Sen. Subcomm. Hearings, supra note 32, at 11.

42. Disqualification of Judges, supra note 38, at 741-42; Comment, Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455, 71 Mich. L. Rev. 538, 559 (1973) [hereinafter cited as Mich. Comment].

43. Schwartz, supra note 17, at 420; Disqualification of Judges, supra note 40, at 740.

44. See text accompanying note 21 supra.

45. See note 13 supra.

144.[46] The ineffectiveness of the perjury sanction reinforced the judges' inclination to read the affidavits strictly.[47]

Judges also felt compelled to construe the statutes narrowly because of their belief that they had a "duty to sit." This judicially-created theory was that "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is."[48] The source of the duty was purported to be the judge's oath[49] "faithfully and impartially [to] discharge and perform all the duties incumbent upon [him]."[50] The duty to sit created a troublesome dilemma for judges who wished to withdraw from a case for reasons which did not coincide with any of the narrow grounds specified in the statutes. The duty compelled judges to resolve such dilemmas in favor of continuing in the case, often at the cost of personal criticism and loss of public confidence in the judiciary.[51] Congressional attention became focused on the judges' predicament during the hearings on Judge Haynsworth's nomination to the Supreme Court in 1969. The Senate hearings revealed that Judge Haynsworth had not disqualified himself in several cases involving potential conflicts of interest.[52] Instead, having concluded that his interests were not "substantial," he had resolved the questions in favor of his

46. 255 U.S. at 35.

47. Concern for such opportunity to assert perjurious claims was expressed by Judge Gee, concurring with the majority, in Parrish v. Board of Comm'rs, 524 F.2d 98, 105-06 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976) (joint application for certiorari with Davis v. Board of Comm'rs, under which name denial of certiorari to both cases has been reported). Judge Gee noted a failure to uncover any cases in which a perjury charge stemming from a section 144 affidavit had even been prosecuted since Berger. Id. at 106 n.3. For a discussion of the Parrish decision see notes 85-94 infra and accompanying text.

48. In re Union Leader Corp., 292 F.2d 381, 391 (1st Cir.), cert. denied, 368 U.S. 927 (1961). The cases denying recusal motions on the basis of the duty to sit are legion. E.g., United States v. Ming, 466 F.2d 1000, 1004 (7th Cir.), cert. denied, 409 U.S. 915 (1972); United States v. Tropiano, 418 F.2d 1069, 1077 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); Hall v. Burkett, 391 F. Supp. 237, 240 (W.D. Okla. 1975). For a further listing by circuit of cases enunciating the duty to sit see Frank, Bayh Bill, supra note 3, at 51 n.35. See also Laird v. Tatum, 409 U.S. 824, 837 (1972) (mem. of Rehnquist, J.).

49. Sanders v. Allen, 58 F. Supp. 417, 420 (S.D. Cal. 1944); Mich. Comment, supra note 42, at 566.

50. 28 U.S.C. § 453 (1970).

51. The most frequently cited case is Edwards v. United States, 334 F.2d 360 (5th Cir. 1964) (en banc), cert. denied, 379 U.S. 1000 (1965). There Judge Rives had been one of an original three judge panel to review the case. When the court decided to rehear the case en banc, Judge Rives wished to disqualify himself. He believed that since the other two members of the original panel would not be participating in the rehearing, he should recuse himself to ensure "the appearance of fairness to the appellants." However, after consulting with his fellow judges, he concluded that he had no choice but to sit: "While . . . [I] prefer not to sit, I have not found that it furnishes me any legal excuse." Id. at 362-63 n.2.

52. Frank, Bayh Bill, supra note 3, at 51. For a discussion of Judge Haynsworth's interest in the cases in question see id. at 52-58. It appears that the charges of conflict of interest were initiated by civil rights and labor factions opposed to Judge Haynsworth's nomination on other grounds. These groups turned their attention to the conflict of interest charges to muster enough additional votes to defeat Judge Haynsworth's nomination. Id. at 51.

duty to sit.[53] Although Judge Haynsworth's actions were in conformity with prevailing judicial interpretation of the statutory standards,[54] the rejection of his nomination indicated that the Senate believed he should have recused himself,[55] and, thus, that the statutory standards were insufficient.[56]

The need for statutory reform was also underscored by the pending revision of the ABA Canons of Judicial Ethics that would broaden the grounds for recusal. The new ABA Code of Judicial Conduct would require disqualification of a judge whenever "his impartiality might reasonably be questioned."[57] Amendment of the statutory grounds for recusal was necessary to avoid confronting federal judges with two conflicting standards for disqualification.[58] Several senators submitted proposals for a new Judicial Disqualification Act which would substantially alter both sections 144 and 455.[59] The purpose of the new act was "to broaden and clarify the grounds for judicial disqualification."[60]

The amendment to section 455 proposed to clarify the grounds for disqualification by replacing the vague "substantial interest" standard for recusal with a list of specific circumstances when disqualification would be mandatory.[61] Among the situations in which a judge was to recuse himself under section 455(b) were: when he had a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts;[62] when he or his associate attorney had, during their association, served as counsel in the matter in controversy;[63] when he or a relative to the third degree had been a party or attorney or was likely to be a material witness in the proceeding; or when he or such relative had an interest that could be substantially affected by the outcome of the case.[64] Based on the Haynsworth experience, a

53. Sen. Subcomm. Hearings, supra note 32, at 28.

54. See id. at 26.

55. Disqualification of Judges, supra note 40, at 736.

56. Sen. Subcomm. Hearings, supra note 32, at 26, 60; Frank, Bayh Bill, supra note 3, at 43.

57. ABA Code of Judicial Conduct, Canon 3C(1).

58. Even prior to the revision of the ABA canons, there was latent conflict between the statutory and ethical standards for disqualification. The canons required disqualification when the judge's "personal interests" were involved, while the statute made disqualification appropriate only for "substantial interest." House Report, supra note 41, at 2.

The decision to revise the statutory standards was also influenced by the Supreme Court's decision in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), which suggested that even a relatively small financial interest by a judge in the outcome of a case might be inconsistent with due process. See note 133 infra.

59. Proposals by Senators Hollings (S. 1553) and Bayh (S. 1886) were submitted to the Senate Committee on the Judiciary in 1971. Sen. Subcomm. Hearings, supra note 32, at 3, 6. The proposal that was eventually adopted was sponsored by Senator Burdick in 1973. Id. at 130.

60. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609, amending 28 U.S.C. § 455 (1970) (codified at 28 U.S.C. § 455 (Supp. IV, 1974)).

61. House Report, supra note 41, at 5; Senate Report, supra note 41, at 5.

62. 28 U.S.C. § 455(b)(1) (Supp. IV, 1974).

63. Id. § 455(b)(2).

64. Id. § 455(b)(5)(i-iv). It is questionable whether the standard of the new section 455(b)(5)(iii) ("an interest that could be substantially affected by the outcome of the proceeding") is

financial interest was defined to include any ownership interest, however small.[65]

The other major revision of section 455 was intended to broaden the grounds for disqualification by replacing the old subjective standard for disqualification for relationship with the objective standard established in the new ABA Code.[66] Rather than leave the decision regarding disqualification to the judge's own opinion, new section 455(a) required that a judge recuse himself "in any proceeding in which his impartiality might reasonably be questioned."[67] Implicit in this language is the aboliton of the duty to sit; the inference is expressly supported by the *Senate* and *House Reports* which state that no duty to sit exists when there is a reasonable question of the judge's impartiality.[68]

The proposed amendment to section 144 was a complement to the revision of section 455 and, according to Senator Bayh, its sponsor, "a necessary part of any complete approach to the problem," for "[n]o statute creates more distrust than does the section 144 procedure for disqualification for prejudice."[69] The revision of section 144 proposed to eliminate appearances of partiality which were the result of a narrow substantive standard for disqualification under a procedure which required a judge to evaluate his own alleged bias.[70] These deficiencies were to be remedied by a provision that would divest the judge of discretion to deny recusal. Each side of every case would be allowed to challenge one district judge peremptorily.[71] Senator Bayh's proposal received strong endorsement from Mr. John Frank,[72] an authority on judicial disqualification, and from many state judges and attorneys who had practiced under systems with similar procedures.[73] However,

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any clearer than the old substantial interest standard, as the imprecise words "interest" and "substantial" have been retained but not defined. The failure to clarify the meaning of this new statutory language has already led to confusion in its application. See note 144 infra.

65. Id. § 455(d)(4). Ownership in a mutual fund is not a financial interest unless the judge participates in management of the fund. An office in an educational, religious, charitable, or civic organization is not a financial interest in the investments of such organization. The proprietary interest of a policyholder in a mutual insurance company or of a depositor in a mutual savings association is not a financial interest in the organization unless the outcome of the proceeding could substantially affect the value of the interest. Ownership of government securities constitutes a financial interest in the issuer only if the outcome of the proceeding could have a substantial effect on the value of the securities. Id.

66. Compare Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908, with ABA Code of Judicial Conduct, Canon 3C(1).

67. 28 U.S.C. § 455(a) (Supp. IV, 1974).

68. House Report, supra note 41, at 5; Senate Report, supra note 41, at 5. However, the Reports also caution that "the new test should not be used by judges to avoid sitting on difficult or controversial cases." House Report, supra note 41, at 5; Senate Report, supra note 41, at 5.

69. Sen. Subcomm. Hearings, supra note 32, at 12-13.

70. Id.

71. S. 1886, 92d Cong., 1st Sess. § 144 (1971).

72. Sen. Subcomm. Hearings, supra note 32, at 40-41, 65; Frank, Bayh Bill, supra note 3, at 65-67.

73. See, e.g., Sen. Subcomm. Hearings, supra note 32, at 57-58, 66-67, 68-71.

the proposal was apparently more controversial than the amendment to section 455.[74] As a result, Senator Bayh withdrew the portion of his bill dealing with section 144.[75] While the amendment to section 455 was overwhelmingly approved in 1974,[76] efforts to revise section 144 were dropped and have not been revived.

III. Deficiencies of Revised Section 455

In the short time since the enactment of revised section 455, it has become evident that the amendment has failed to achieve either of its stated purposes. Problems of clarity are compounded by questions regarding the relationship between section 144 and the revised section 455.[77] Even if the substantive limitations read into section 144 are not applied to new section 455, contrary to one court's holding,[78] the requirement that the challenged judge decide the need for his own recusal prevents the new statute from achieving the broad ground for disqualification contemplated by its drafters.[79]

A. *Failure to Achieve Clarity*[80]

One ambiguity which the amendment failed to resolve is the question of from whose perspective the evidence of bias is to be weighed. To disqualify a judge under section 455(a), there must be facts which raise a reasonable question of the judge's partiality.[81] The judicial gloss on section 144, and presumably on the bias provision of section 455(b),[82] also demands a test of reasonableness.[83] What is unclear under both statutes is whether the require-

74. Id. at 76 (statement of Senator Birch Bayh).

75. Id.

76. The Senate passed the bill by voice vote on October 4, 1973. On November 18, 1974, the House of Representatives approved its version of the bill by a vote of 317 to 31. The Senate concurred in the House amendments on November 21, 1974. 32 Cong. W. Rep. 3226 (November 30, 1974).

77. See notes 97-109 infra and accompanying text.

78. See notes 113-19 infra and accompanying text.

79. See notes 120-32 infra and accompanying text.

80. The focus of this section is on the failure of the statutory amendment to clarify the substantive and procedural standards for judicial disqualification for bias. However, it appears that the amendment's attempts to specify when a judge should be disqualified for interest have been equally unsuccessful. See Virginia Elec. & Power Co. v. Sun Shipbldg. & Dry Dock Co., 407 F. Supp. 324 (E.D. Va.), vacated, No. 76-1070 (4th Cir., May 24, 1976); note 144 infra.

81. House Report, supra note 41, at 5; Senate Report, supra note 41, at 5.

82. 28 U.S.C. § 455(b)(1) (Supp. IV, 1974). Since the phrase "personal bias or prejudice" in this provision was taken verbatim from section 144, and there is nothing to the contrary in the legislative history of the new statute, presumably, section 144 will be deemed controlling in interpreting the meaning of "personal bias or prejudice" under section 455(b)(1). 13 E. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3542 (1975) [hereinafter cited as Wright, Miller & Cooper]. It would seem that the Fifth Circuit has equated the two provisions. See Parrish v. Board of Comm'rs, 524 F.2d 98, 103 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976).

83. See, e.g., Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976); id. at 104 (concurring opinion); id. at 108 (dissenting opinion).

ment of reasonableness is to be considered from the vantage point of the litigant who has a stake in the outcome or from that of the uninvolved observer. The former point of view focuses on the litigant's fear of not receiving a fair hearing;[84] the latter takes no account of the effect a party's emotional involvement may have on his perspective.

Uncertainty as to which of these approaches is appropriate under the statutes was a chief point of dispute between the majority and dissenting judges in a recent en banc Fifth Circuit opinion, *Parrish v. Board of Commissioners*.[85] In *Parrish*, the petitioners, who claimed discrimination in the administration and grading of the Alabama state bar examination,[86] filed a section 144 motion[87] to disqualify the trial judge.[88] The motion was based on the judge's former position as president of the local bar association at a time when blacks were excluded from membership and on his friendship with some of the defendants and with the defendants' counsel. The petitioners' affidavit asserted that the judge had openly acknowledged a predisposition to trust key defense witnesses.[89] The majority, applying the test of the detached person, held that neither section 144 nor section 455[90] required disqualifica-

84. See Disqualification for Bias, supra note 7, at 1446-47.

85. 524 F.2d 98 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976). This case was originally brought to the court of appeals as a certified question from the trial judge under 28 U.S.C. § 1292(b). A three judge panel ruled that the trial judge had erred in failing to disqualify himself. 505 F.2d 12 (5th Cir. 1974). The Fifth Circuit then withdrew the panel opinion sua sponte, 509 F.2d 540 (5th Cir. 1975) (per curiam), and reheard the case en banc.

86. 505 F.2d at 14.

87. At the time, no claim for disqualification was made under section 455 because the section 144 motion was filed on January 19, 1973, 505 F.2d at 16, and the amendment of section 455 to provide an additional statutory basis for disqualification for personal bias or prejudice was not enacted until December 5, 1974.

88. The attorneys for the plaintiffs informally discussed the question of recusal with the trial judge a month after the complaint was filed. The judge later convened a hearing to discuss the matter. Prior to permitting the plaintiffs' counsel to question him on occurrences from which an inference of bias might be drawn, the judge stated at the hearing: " 'Heretofore, I had felt that a judge should recuse himself very quickly because it made the court appear more fair, but there are other obligations that the court owes and I am afraid that I shan't recuse myself but I want to give you an opportunity to put anything on record that you would like to put on record.' " 505 F.2d at 16. This statement gives the impression that the judge had decided not to recuse himself even before the facts possibly supportive of an allegation of bias had been explored at the hearing. At that time no section 144 affidavit had been filed. Thus, it appears that the judge's decision on disqualification was based on his personal belief that he was not biased, and not on the affidavit's allegations taken as true as demanded by the statute. Id. at 19.

89. 524 F.2d at 101. At the hearing on disqualification, the judge had stated that " 'of the people I know here, I have no reason to think any of them would intentionally misrepresent anything.' " 505 F.2d at 18. At another point, the plaintiffs' attorney asked the judge whether his twenty-year friendship with the former bar association secretary, a key witness, would influence the weight he might attach to the witness' testimony. The judge replied: " 'I don't think so. I will say this, I think [he] is an honorable man but I don't think his memory is infallible. I think he would try to tell you the truth in his answers. But if he appeared to evade I think I could detect it.' " Id.

90. The amendment to section 455, requiring disqualification in situations such as those

tion.[91] The dissent,[92] considering reasonableness from the point of view of the litigants[93]—blacks who had been denied admission to the Alabama bar—maintained that the trial judge should have recused himself.[94]

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alleged by the plaintiffs, had been passed in the time since the plaintiffs' section 144 affidavit had been filed. See note 85 supra. The court considered that the Act's instructions that: "[t]his Act shall not apply to the trial of any proceeding commenced prior to the date of this Act [December 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act," (Act of Dec. 5, 1974, Pub. L. No. 93-512, § 3, 88 Stat. 1609) could be read to require that its review of the trial judge's failure to recuse himself be governed by the new section 455 grounds, as well as those of section 144. This belief was based on the fact that the case had not been "fully submitted" to appellate review by December 5, 1974. 524 F.2d at 102-03. However, it would seem that this interpretation of the statutory language is incorrect. As Judge Roney pointed out in his concurring opinion, the intention was not to provide one standard of recusal for the trial judge to apply to himself and a different standard by which to review his failure to recuse himself, but rather to subject appellate judges' consideration of the appropriateness of their own disqualification to the new standards as of the date of the statute's enactment. Id. at 105.

91. The majority held that the claim of bias based on the judge's past activities in the bar association were "general or impersonal at best," and hence insufficient under section 144. Id. at 101. The majority also found that the judge's statements regarding the credibility of defense witnesses "were no more than an acknowledgement of friendship or acquaintanceship, and a refusal to condemn these persons as unworthy of belief in advance of whatever their testimony might prove to be," and thus insufficient under section 144. Id. at 102. The court's conclusion that disqualification was not warranted by new section 455 was influenced by the fact—brought out at the hearing and hence, included in the affidavit—that the trial judge had, during his tenure as bar association president, appointed the committee which recommended an end to the association's segregated policy. Id. at 103. The majority found that the plaintiffs' allegations failed to support an inference of lack of impartiality under section 455(a). Id. at 104. The majority also held that the judge's preconceptions of the witnesses' credibility were not " 'personal knowledge of disputed evidentiary facts' " under section 455(b)(1), and that the judge's identification with the bar association and the association's potential liability for attorneys' fees in the instant lawsuit did not constitute a substantial or financial interest in the case under section 455(b)(4). Id.

92. The dissenters were Judges Goldberg, Tuttle, and Wisdom. Judges Tuttle and Wisdom were two of the judges on the original circuit panel. The third member of the original panel, Judge Gee, concurred with the majority in the en banc opinion. Id. at 105-07. He advocated the overruling of Berger and believed that the standard for disqualification under section 144 should be proof of bias in fact. Id. at 106-07.

93. Id. at 108-09.

94. The dissent pointed to the cumulative effect of the following facts on the perceptions of the plaintiffs: (1) Once it was apparent that he was being considered for a position on the federal bench, the judge had appointed a commission to review the bar association by-laws, but had given no direction or recommendation that the racial restrictions be changed; (2) the likelihood of the plaintiffs', as non-lawyers, confusing the segregated local bar association and the judge's position therein with the state association which administered the bar examination; (3) the judge's acquaintance with ten of the thirteen defendants and his "strong feeling of confidence in the veracity and trustworthiness of his friends" in general and of the prior secretary of the association, custodian of all the documents, in particular. Id. at 110-11. The dissent also believed that the judge's seeming reliance on the now repudiated concept of duty to sit (see notes 48-51 & 68 supra and accompanying text) and his apparent regard for the truth of the allegations rather

The proper perspective for evaluating the charge of bias depends upon the intended benefits and beneficiaries of the legislation. If the statutes are supposed to reassure litigants that there is no bias and no appearance of bias, the allegations should be considered from the affiant's point of view. This perspective should also prevail if the statutes are to protect the public by ensuring that litigants do not question the impartiality of judges. If, however, the statutes are intended to protect litigants against actual bias, by ensuring that a reasonable person would not question the judge's impartiality,[95] the allegations should be viewed from the vantage point of the disinterested observer. This same test is sufficient if the purpose of the statutes is to reassure the public that its judges are impartial. The legislative history of section 455 provides support for each of these approaches,[96] and nothing in

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than the sufficiency of the affidavit as the basis for his decision (see note 88 supra) also constituted reversible error. 524 F.2d at 111. But see note 90 supra as to the questionable appropriateness of applying the new section 455 standards to appellate review of the judge's decision in the instant case.

Another point of conflict among the judges in the Parrish decision was what the section 144 affidavit must show. The majority believed that, taken as true, the facts in the affidavit must convince a reasonable person that the judge was biased. 524 F.2d at 100. This requirement was part of the following three-tier test adopted by the majority: (1) the facts alleged in the affidavit had to be material and stated with particularity; (2) the facts had to be such as would convince a reasonable person of the existence of bias; (3) the facts had to allege a bias which was personal, rather than judicial, in nature. Id. This tripartite test was originally formulated by the Third Circuit in United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973).

Judge Brown, concurring in the result, considered this standard to be too strict. He believed that an affidavit was sufficient if, on the basis of its allegations, "a reasonable person could reasonably have a *belief* of bias." 524 F.2d at 104 (emphasis in original). This test seems to hold an affidavit sufficient if it presents facts which could support a finding of bias.

The dissent submitted that the test of sufficiency was whether the affidavit taken as true presents facts "as would convince a reasonable man that the affiant reasonably *believed* that bias exists." Id. at 108 (emphasis in original). In other words, an affidavit is sufficient if it presents facts which could support a finding that the affiant believed bias exists. The Parrish court's articulation of three tests of sufficiency is another illustration of the confusion that surrounds the disqualification statutes.

95. It seems that the Tenth Circuit has adopted this statutory construction. See United States v. Ritter, No. 76-1248, at 12 (10th Cir., July 14, 1976) (the question under section 455(a) is whether "there exists reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court").

96. E.g., "The effect of the [pre-amendment] situation . . . [was] to weaken public confidence in the judicial system." House Report, supra note 41, at 2; Senate Report, supra note 41, at 3; "This general standard [of section 455(a)] is designed to promote public confidence in the impartiality of the judicial process . . . ." House Report, supra note 41, at 5; Senate Report, supra note 41, at 5; "Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." House Report, supra note 41, at 5; Senate Report, supra note 41, at 5. (This language implies that the standard is "whether the litigant has a 'reasonable fear' that the judge will not be impartial." Parrish v. Board of Comm'rs, 524 F.2d 98, 110 (5th Cir. 1975) (en banc) (Tuttle, J., dissenting), cert. denied, 96 S. Ct. 1685 (1976)).

The legislative history of section 144 provides no insight into this question, since the intent of

the statutory language itself mitigates the confusion. The resulting ambiguity creates a danger that application of the new statutory standards will be plagued by the same uncertainty as accompanied the old.

The amendment has also raised questions of how section 144 relates to revised section 455 and whether and when it is advisable for a party to use section 144 at all. Prior to the amendment of section 455, section 144 served a useful purpose because it was the only statutory provision which included bias against a party as a ground for judicial disqualification. The section 144 ground of recusal for personal bias or prejudice has now been incorporated verbatim in section 455(b)(1).[97]

An additional distinction between the original two statutes was that a party initiated disqualification under section 144, while section 455 was raised by the judge sua sponte.[98] However, since a judge had a duty to disqualify himself under section 455 upon information that his continued participation in the case would violate the statute,[99] it was possible even before the section was amended for a party to invoke it by simply informing the judge of the violation by a motion in the trial court.[100] If the judge failed to recuse himself, the party could seek interlocutory review of this decision,[101] as he could under section 144.

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its drafters was to provide for a peremptory challenge system. See note 17 supra and accompanying text. Clearly, however, such intention conforms most closely to the test of the Parrish dissent, since, of the proposed interpretations, that test makes disqualification easiest. The Supreme Court's language in Berger that "the reasons and facts for the belief the litigant entertains . . . [in] the affidavit . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," 255 U.S. 22, 33-34 (1921), also seems to support the interpretation of the Parrish dissent. Accord, Disqualification for Bias, supra note 7, at 1446-47 ("A formulation . . . in keeping with the purpose of the statute would require only that the facts alleged must justify a reasonable apprehension on the part of the affiant that the judge may be biased. This formulation shifts the emphasis from the judge's actual state of mind to the reasonableness of the litigant's fear, an emphasis at least supported, and possibly required, by the statutory language . . . ." Id. (footnote omitted)).

97. See text accompanying note 62 supra.

98. See note 10 supra.

99. Wright, Miller & Cooper, supra note 82, § 3550; Mich. Comment, supra note 42, at 542.

100. Wright, Miller & Cooper, supra note 82, § 3551; e.g., Rapp v. Van Dusen, 350 F.2d 806, 809 (3d Cir. 1965).

101. The Supreme Court noted in Berger that appeal from final decision is an inadequate remedy. "It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." 255 U.S. 22, 36 (1921).

It seems that the Fifth Circuit permits interlocutory appeal under 28 U.S.C. § 1292(b) as a matter of course. See Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 96 S. Ct. 1685 (1976). A recent Fourth Circuit decision also granted interlocutory review under section 1292(b), but the court's rationale there was that the unclear standards for disqualification under amended section 455 presented a controlling question of law as to which there was substantial ground for difference of opinion. Virginia Elec. & Power Co. v. Sun

The new section 455 states that a judge shall recuse himself, but like its predecessor, does not specify whether a party may invoke the section, and if so, what procedural restrictions are applicable.[102] The first question, whether a party may raise section 455, seems to have resolved itself. Even decisions which have interpreted the new statute narrowly have presumed that the party retains this right.[103] The second question, regarding the limitations, if any, on party use of section 455, is as yet unanswered and is likely to be more controversial. Although there is no cross-reference in the statute to section 144, the courts may use the latter statute to supply the procedural framework lacking in amended section 455. Such an interpretation is likely to be prompted by the realization that a litigant who wishes to disqualify the assigned judge for bias could circumvent the section 144 restrictions on such matters as timing and the number of permissible challenges[104] simply by employing section 455 in its stead.[105]

In view of the legislative history of both statutes, however, importing the procedural limitations into the new statute seems unreasonable. The procedural requirements of section 144 were originally included in that statute as a safeguard against abuse of a peremptory system of recusal.[106] As applied to the discretionary system which section 144 became through judicial construction, they caused an unsatisfactory limitation on the use of the recusal remedy.[107] The purpose of amending section 455 was to rectify this situation by broadening the grounds for disqualification.[108] Thus, it seems a fair inference that application of the new statute was not intended to be restricted by the procedures of section 144.

Because section 455, at least on its face, does not present the litigant raising recusal with the procedural obstacles of section 144, it is unclear what

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Shipbldg. & Dry Dock Co., No. 76-1070, at 11-15 (4th Cir., May 24, 1976). On the other hand, the Fifth Circuit's position can be read as holding that factual allegations of disqualification in themselves present such controlling questions. Davis v. Board of School Comm'rs, supra at 1051. One commentator reasoned that section 1292(b) should be available to litigants who are unsuccessful in their attempts to disqualify a judge. Disqualification for Bias, supra note 7, at 1441. However, once the statute's scope is clarified, it seems that disqualification would present a question of fact, not a controlling question of law within the intended purview of section 1292(b). See Wright, Miller & Cooper, supra note 82, § 3553. The common route of appeal from a denial of a disqualification is mandamus. For a discussion of the availability of mandamus see id.; Mich. Comment, supra note 42, at 547-50.

102. Wright, Miller & Cooper, supra note 82, § 3550.

103. E.g., Parrish v. Board of Comm'rs, 524 F.2d 98, 102 & n.8 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976); Davis v. Board of School Comm'rs, 517 F.2d 1044, 1056 (5th Cir. 1975), cert. denied, 96 S. Ct. 1685 (1976); cf. Virginia Elec. & Power Co. v. Sun Shipbldg. & Dry Dock Co., No. 76-1070, at 4, 7-11 (4th Cir., May 24, 1976).

104. A section 144 affidavit must be filed at least "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 is limited to one such affidavit per case. 28 U.S.C. § 144 (1970).

105. See Wright, Miller & Cooper, supra note 82, § 3551, at 381.

106. 61 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

107. See notes 51-58 supra and accompanying text.

108. See text accompanying note 60 supra.

function, if any, section 144 serves since enactment of the amendment to section 455. Under revised section 455(a), which requires that a judge be disqualified in any proceeding in which his impartiality might reasonably be questioned, charges of bias which fail to meet the requirements of section 144 or section 455(b)(1) will still compel the judge to recuse himself if they raise a reasonable question of his partiality.[109] Thus, both the substantive and procedural standards for disqualification under section 455 have become more attractive to the challenging party. It appears there is no longer any reason to use section 144 at all, and that the section is only statutory detritus.

B. *Failure to Broaden the Grounds for Disqualification*

Another Fifth Circuit opinion has raised a serious question as to whether section 455 will achieve its second purpose of broadening the grounds for disqualification to require recusal whenever the judge's impartiality might reasonably be questioned. In *Davis v. Board of School Commissioners*,[110] the petitioners alleged that the trial judge was biased, primarily because of attacks he had made on the petitioners' lawyers in another case one month earlier. Their affidavits stated that the judge believed that plaintiffs in civil rights actions represented by the petitioners' attorneys did not have valid grievances, but rather had been solicited by the attorneys to present unwarranted claims in furtherance of those attorneys' various unconscionable purposes.[111] The trial judge denied the motion,[112] and the Fifth Circuit upheld the decision, applying the traditional, strict section 144 standards. The court held that since the allegations stemmed from the judge's statements in court and in a judicial opinion, they did not derive from the required extrajudicial source.[113] Nor was the alleged bias sufficiently personal, since it was directed at the petitioners' attorneys and not at the petitioners themselves.[114] The court then concluded that because the allegations of judicial bias and bias against a party's attorney were insufficient under section 144, they were a fortiori insufficient under the reasonable question standard of section 455(a).[115] It claimed to base this conclusion on the failure to find any suggestion in the legislative history of revised section 455 of an intent to remove the gloss on section 144, and "impliedly"[116] on section 455:

> Construing §§ 144 and 455 *in pari materia* we believe that *the test is the same under both*. . . . This means that we give §§ 144 and 455 the same meaning legally . . . ,

109. United States v. Ritter, No. 76-1248, at 7 (10th Cir., July 14, 1976); Wright, Miller & Cooper, supra note 82, § 3542, at 345-46.

110. 517 F.2d 1044 (5th Cir. 1975), cert. denied, 96 S. Ct. 1685 (1976).

111. Id. at 1053-54.

112. Id. at 1048.

113. Id. at 1051. See notes 35-36 supra and accompanying text.

114. Id. at 1050-51.

115. However, this rationale was rejected by the Tenth Circuit in United States v. Ritter, No. 76-1248 (10th Cir., July 14, 1976). There the trial judge was held disqualified under section 455(a) based on his courtroom behavior toward the attorneys in the case.

116. 517 F.2d at 1052.

whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.[117]

It is difficult to understand how the court failed to find any evidence that section 144's judicial gloss was being overruled, since it was dissatisfaction with the application of the existing statutory standards that had prompted the movement to "broaden and clarify" the federal provisions for disqualification.[118] By applying to section 455 all the limitations appended to section 144 over the years, many of which were premised on the now-repudiated duty to sit,[119] the *Davis* opinion rendered the intended statutory reform ineffective in the Fifth Circuit less than one year after its enactment.

To the extent *Davis* is followed in other circuits, the policy the amendment was intended to promote will be frustrated. Even assuming the other circuits reject the *Davis* opinion,[120] it is doubtful that the new statute can achieve the broadened standard for disqualification that its drafters intended. The reason the statutory reform seems doomed is that any procedure which designates the trial judge the evaluator of his own disqualification violates the appearance of impartiality.

One problem created by the trial judge's role is that parties with legitimate questions about the impartiality of the assigned judge may hesitate to raise them for fear of possible negative repercussions in the event the judge fails to recuse himself.[121] Attorneys may have a similar concern, heightened by the knowledge that they may have to face the same judge many times in the future.[122] The drafters of the amendment to section 455 made it clear that the imposition of such pressure on the decision of whether to seek disqualification was unacceptable. While the amended statute parallels the new ABA Code in almost all respects, its drafters refused to adopt the code's procedure[123]—also

117. Id. (emphasis added); accord, Parrish v. Board of Comm'rs, 524 F.2d 98, 103 (5th Cir. 1975) (en banc), cert. denied, 96 S. Ct. 1685 (1976).

118. See text accompanying notes 52-60 supra.

119. See text accompanying notes 47-51 supra.

120. The Tenth Circuit has been the first to contest the Fifth Circuit's interpretation of the new statute. In United States v. Ritter, No. 76-1248 (10th Cir., July 14, 1976), the court found that the allegations that the judge was biased in fact were not supported by the evidence. Nevertheless, "considering the broad language of Section 455(a)," it concluded that "the interests of justice require[d] that the cause be tried by another judge . . . ." Id. at 12. The Tenth Circuit may have misconstrued section 144, however, by requiring proof of bias in fact as the standard for disqualification under that statute. See id. at 8-10.

121. "Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias." Sen. Hearings, supra note 32, at 12 (statement of Senator Birch Bayh).

122. "[W]aiver really is a function of a velvet blackjack. . . . [P]eople push young lawyers around, who have timidity." Id. at 42 (statement of John P. Frank, attorney); Comment, Disqualifying Federal District Judges Without Cause, 50 Wash. L. Rev. 109, 126 (1974).

123. Canon 3D of the Code of Judicial Conduct provides: "A judge disqualified by the terms of Canon 3C(1)(c) [financial interest] or Canon 3C(1)(d) [party or relative to third degree is party or attorney in the proceeding] may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is

the general practice under the old section 455[124]—of permitting a party to waive recusal of a judge who met one of the specific statutory grounds for disqualification. "When a waiver is put to a lawyer, he is then in a position where if he refuses to waive, he implies that the judge is somehow wanting in integrity or objectivity because the judge is willing to sit despite the fact that he has an interest. . . . We should not nullify the standard we are applying by then putting the squeeze on the lawyer to have him relinquish the right to have a judge who does not have an interest."[125]

In recognition of this danger, the new statute does not permit waiver of disqualification by a party under section 455(b).[126] However, this provision addresses the problem of waiver only as it relates to judicially-initiated disqualification. Since the judge retains the prerogative to refuse to recuse himself when a party submits a motion to disqualify, the pressure to remain silent, and thus to waive recusal, persists whenever the matter of disqualification is raised by a litigant. In this respect, the statute does not provide the safeguard demanded by its drafters.

It is also questionable whether the challenged judge can accurately apply whichever of the *Parrish* tests[127] was intended by Congress. The judge is certain to have an opinion about his alleged prejudice against the litigant. Therefore, the requirement that he totally divorce his own evaluation of the allegations from his deliberations and that he instead base his decision on the perceptions of either an *uninvolved* reasonable person or the reasonable person in the shoes of the *affiant* may prove an impossible task.[128] The difficulty of excluding extrajudicial knowledge from judicial deliberations was dealt with by the drafters of section 455 to the extent of including the possession by a judge of "personal knowledge of disputed evidentiary facts" as

immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding."

124. Wright, Miller & Cooper, supra note 82, § 3552, at 382; e.g., Thomas v. United States, 363 F.2d 849, 851 (9th Cir. 1966); Adams v. United States, 302 F.2d 307, 309 (5th Cir. 1962). But see United States v. Amerine, 411 F.2d 1130, 1134 (6th Cir. 1969).

125. Sen. Subcomm. Hearings, supra note 32, at 42.

126. 28 U.S.C. § 455(e) (Supp. IV, 1974). Waiver is permissible under section 455(a) "provided it is preceded by a full disclosure on the record of the basis for disqualification." Id. Waiver under section 455(a) seems to have been the result of legislative compromise with those who doubted the necessity of mandating disqualification for mere technical violations of the statute in view of the administrative difficulties recusal would cause in one judge districts. See Sen. Subcomm. Hearings, supra note 32, at 42-43, 48-49, 83-84, 90-91. However, the desirability of permitting any waiver is questionable. See Comment, The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455, 25 DePaul L. Rev. 104, 121-25 (1975).

127. See notes 90-96 supra and accompanying text.

128. "The judge in determining the sufficiency of the affidavit alleging his own bias, is bound to be predisposed against the affiant on that question. 'Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.' " Schwartz, supra note 17, at 427-48, quoting In re Linahan, 138 F.2d 650, 652-53 (2d Cir. 1943); Mich. Comment, supra note 42, at 542 & n.22.

a specific ground for recusal.[129] When the disputed facts about which the judge possesses extrajudicial knowledge concern his own feelings toward a litigant, the danger of that knowledge subconsciously influencing the decisionmaking process seems even greater than when the facts involve third persons. Nevertheless, the statute requires the judge to determine his own qualification.

The appearance that the judge's decision on recusal has been influenced by extrajudicial factors will be heightened if the judge explains or denies the charge of bias in conjunction with a decision against disqualification. Despite this danger, it is not unusual for a judge who considers the allegations false to disavow them in this manner[130] because under current procedures there is no other forum in which to do so. The judge's rebuttal of facts contained in the party's sworn affidavit can be seen as evidence of a dispute between the judge and litigant and thus tends to have the inadvertent effect of bolstering the party's contention that the judge is biased against him.

The greatest obstacle that the judge's role poses to the appearance of impartiality is that the procedure seems to violate the cardinal principle that no person should be a judge in his own case.[131] The judge may fear that a decision to disqualify himself upon a party's challenge will be viewed as an admission that he had intended to sit despite actual or apparent bias and thus had failed to discharge his judicial duties "faithfully and impartially."[132] It is submitted that a judge has a strong interest in avoiding such an appearance and hence an interest in ruling against a party's motion for recusal. Although most judges would not consciously be influenced by this interest, its existence prevents the appearance of impartiality.

To the extent that the current procedures for judicial disqualification do not satisfy the appearance standard, they fall short of the congressional intent. This deficiency suggests that the amendment to section 455 was insufficient and that further statutory revision is required if the goals of the Judicial Disqualification Act are to be attained. The need for additional congressional action has been emphasized by several recent Supreme Court opinions which have held that the appearance of impartiality is a component of due process, suggesting that disqualification procedures which do not meet this standard are constitutionally offensive.[133]

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129. 28 U.S.C. § 455(b)(1) (Supp. IV, 1974). The rationale was that "a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute." E. Thode, Reporter's Notes to Code of Judicial Conduct 62 (1973).

130. Disqualification for Bias, supra note 7, at 1437, 1439; e.g., United States v. Hoffa, 382 F.2d 856, 858-59 (6th Cir. 1967), cert. denied, 390 U.S. 924 (1968); Town of East Haven v. Eastern Airlines, Inc., 304 F. Supp. 1223 (D. Conn. 1969); United States v. Parker, 23 F. Supp. 880, 883-86 (D.N.J. 1938), aff'd 103 F.2d 857 (3d Cir.), cert. denied, 307 U.S. 642 (1939).

131. Dr. Bonham's Case, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1609); Schwartz, supra note 17, at 427, quoting U'ren v. Bagley, 118 Ore. 77, 245 P. 1074, 1076 (1926) (en banc).

132. 28 U.S.C. § 453 (1970).

133. Although it was not clear from the language of the opinion whether the Supreme Court considered the need to preserve the appearance of justice a matter of due process, its decision in

The constitutional standard for disqualification was enunciated by the Supreme Court in *Tumey v. Ohio*.[134] Not only was the absence of actual bias—"[a] fair trial in a fair tribunal"[135]—an essential element of due process, but, in addition,

> [e]very procedure which would offer *a possible temptation* to the average man as a judge to forget the burden of proof required . . . , or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[136]

Tumey involved adjudication by a judge who had a small, but direct, financial interest in the outcome of the case.[137] Subsequent to *Tumey*, the Court explicitly rejected the argument that due process requires disqualification only where the judge's interest in the outcome is direct.

> [N]o man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. . . . [The *Tumey*] rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."[138]

Among the situations in which the Court has recently held that the judge's interest in the outcome violated due process are those in which the adjudicator has had only a remote pecuniary interest[139] or in which the judge has been subjected to contumacious conduct by a party.[140] It is arguable that

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Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) (arbitration award set aside though no actual impropriety alleged, where one of three arbitrators had in the past performed professional services for a party to the arbitration, and neither the arbitrator nor the party informed the other party of this) influenced Congress' decision to amend the statutory provisions for judicial disqualification. House Report, supra note 41, at 7; Senate Report, supra note 41, at 6.

134. 273 U.S. 510 (1927).

135. In re Murchison, 349 U.S. 133, 136 (1955).

136. Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphasis added).

137. The Court held it was unconstitutional for a justice of the peace to impose fines when he kept a percentage of them as part of his salary. Id. at 531-32.

138. In re Murchison, 349 U.S. 133, 136 (1955), quoting Offutt v. United States, 348 U.S. 11, 14 (1954).

139. Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (administrative proceeding; Court held Board of Optometry constitutionally disqualified from hearing charges against appellees, based on finding that aim of Board, consisting solely of optometrists in private practice, was to revoke licenses of all optometrists such as appellees, who were employed by business corporations); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (village mayor's general interest in village prosperity made his presiding at trials of traffic violations a denial of due process although fines imposed went into village treasury, and not to mayor personally); cf. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), discussed at note 133 supra.

140. Taylor v. Hayes, 418 U.S. 488, 501 (1974) (Court found judge had become embroiled in running controversy with petitioner and that there was sufficient likelihood of bias or an appearance of bias to require that contempt issue be adjudicated by a different judge. Id. at 501-03); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (where contemnor reviled judge with highly personal aspersions, even "fighting words," due process required contempt proceedings

a judge's interest in preserving his judicial reputation for impartiality against a party's contention that he is biased is of comparable significance to the judge. If so, his ruling on a motion to disqualify despite his interest in the outcome destroys the appearance of justice necessary to satisfy due process.

IV. A PEREMPTORY SYSTEM

One solution to some of the most serious inadequacies of the federal system for judicial disqualification would be to have another judge rule on the motion to disqualify.[141] However, such a procedure would put judges in the awkward position of evaluating the appearance of each other's conduct.[142] Furthermore, appellate review of disqualification denials has demonstrated that judges are extremely reluctant to find that allegations of impropriety on the part of their brethren warrant disqualification.[143] Replacing the decision maker also fails to address many of the other deficiencies of the current statutes. Some of these could be remedied by legislative or judicial elucidation, but neither the results of the legislative amendment to section 455[144] nor

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before a different judge). But see the dissenting opinion of Justice Rehnquist in Taylor v. Hayes, supra at 525-31.

Most recently, the Court may have retreated somewhat from its position. In Winthrow v. Larkin, 421 U.S. 35 (1975), the Court held that a doctor was not denied due process when his license was temporarily suspended by the same medical board that had investigated and brought charges against him. Id. at 46. The Court's due process consideration seemed to focus on the necessity of preventing actual bias, and to neglect the requirement that the appearance of impropriety be avoided as well, in its language that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Id. at 47. See also Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 96 S. Ct. 2308 (1976) (upon failure of collective bargaining negotiations between school board and teachers, board fired striking teachers; held dismissal of teachers by board after notice and hearing did not violate due process because board members did not have "the kind of personal or financial stake in the decision that might create a conflict of interest . . . ." Id. at 2314.)

141. Orfield, supra note 17, at 805. In a few cases, the challenged judge has adopted such a procedure, referring the affidavit to another district judge for determination. E.g., United States v. Grinnell Corp., 384 U.S. 563, 582 n.13 (1966) (Supreme Court noted that district judge had deferred judgment to chief district judge); Craven v. United States, 22 F.2d 605, 607 (1st Cir. 1927), cert. denied, 276 U.S. 627 (1928); Tenants & Owners in Opposition to Redev. v. United States Dep't of HUD, 338 F. Supp. 29 (N.D. Cal. 1972). See also Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (en banc), cert. denied, 379 U.S. 1000 (1965), discussed at note 51 supra; United States v. Irving, 241 F.2d 306, 307 (7th Cir.), cert. denied, 353 U.S. 983 (1957) (section 144 affidavit referred to executive committee of district for evaluation).

142. Sen. Hearings, supra note 32, at 13; Disqualification for Bias, supra note 7, at 1439.

143. See Wright, Miller & Cooper, supra note 82, § 3553.

144. See text accompanying notes 77-109 & 120-33 supra. A recent district court opinion criticized the failure of the amendment to section 455 to clarify the grounds for judicial disqualification on the basis of interest. In Virginia Elec. & Power Co. v. Sun Shipbldg. & Dry Dock Co., 407 F. Supp. 324 (E.D. Va.), vacated, No. 76-1070 (4th Cir., May 24, 1976), the defendant moved to disqualify the district judge, contending that if the plaintiff utility company was fully successful in its action, the outcome could result in a general reduction in utility rates, including a personal benefit to the judge, a resident of the area, of approximately $100. Id. at

the courts' implementation of the legislative intent as demonstrated by *Davis*,[145] bode well for such a solution. Instead, it seems that the best way to rectify the existing deficiencies would be to adopt a peremptory system.[146]

Allowing each side of a case one peremptory challenge would alleviate many of the shortcomings of the current system. In asserting a peremptory challenge, the question of from whose perspective bias is to be weighed[147] would not arise, nor would it be necessary to have the challenged judge,[148] or anyone else, evaluate the sufficiency of the litigant's assertions. A peremptory challenge would provide a means to disqualify a judge for a personal bias that could not be documented with specificity[149] and to replace a judge for other non-personal,[150] but not less prejudicial, biases as well.

Some state peremptory systems require an affidavit alleging bias, as under section 144, but the assertion of bias is purely a legal fiction.[151] The modern trend has been to dispense with any requirement that bias be alleged.[152] The latter type of statute removes the existing invitation to perjury[153] and the dilemma of the judge confronted with false allegations.[154] Since a judge is perhaps less likely to be offended by an unobtrusive request for a change of decision maker than by a detailed statement of facts allegedly constituting

326. In his decision against disqualification, the district judge found most troublesome the question of whether he had "any other interest that could be substantially affected by the outcome of the proceeding," under section 455(b)(4). Id. at 329-30. He found that neither the "infinitely expandable concept of 'interests' " nor the equally nebulous standard of "substantially affected" provided adequate guidelines to a judge in assessing his alleged disqualification. Id. at 330. Because the judge "[could] not decipher the intent . . . as to what [were] the operative words of the new test, how those words operate[d] and indeed what [were] the necessary consequences of their operation," id. at 333, he certified the question of his disqualification to the court of appeals for its review. Id. at 334. The judge reproved Congress, stating that "the amendment [to section 455], intended to remove uncertainty, has not accomplished its purpose so far as this Court is concerned. . . . The efficient administration of justice would be severely hampered if judges are forced to engage in musical chairs in order to insure the attainment of a standard which, on its face, exacts a level of compliance that ignores the realities of human interaction." Id.

145. See text accompanying notes 110-19 supra.

146. The ABA Commission on Standards of Judicial Administration has recommended a peremptory challenge system for judicial disqualification in its proposed Standards Relating to Trial Courts § 2.32 (1975) [hereinafter cited as ABA Standards].

147. See text accompanying notes 84-96 supra.

148. See text accompanying notes 121-33 supra.

149. See note 32 supra and accompanying text.

150. See text accompanying notes 30-33 supra.

151. Sen. Subcomm. Hearings, supra note 32, at 63 (statement of John P. Frank, attorney). Senator Bayh's proposed amendment to section 144 would have retained the pro forma requirement of an affidavit, in the belief that this resemblance to the former procedure would provide some reassurance to congressmen unfamiliar with the peremptory system. Id. at 40.

152. N.D. Cent. Code § 29-15-21 (1974); Wis. Stat. Ann. § 261.08 (Supp. 1975) (civil); id. § 971.20 (1971 & Supp. 1975) (criminal). The ABA standards would also dispense with the need for an affidavit because "[t]his practice unjustifiably impugns the integrity of the judge to whom such a challenge is addressed and perverts the procedure of recusal for cause." ABA Standards, supra note 146, at 49.

153. See text accompanying notes 44-47 supra.

154. See text accompanying note 130 supra.

bias, adoption of such a procedure would have the further salutary effect of reducing antagonism between judges and litigants.

Granting one peremptory challenge should satisfy the needs of most litigants. Beyond this, the right to challenge a judge for specified grounds, such as those enumerated in section 455(b), would be retained. Since a party would have already been granted one peremptory challenge, it would seem that disqualification for cause should require factual proof of the allegations.[155] While the challenged judge might be authorized to decide whether a litigant's challenge for cause is valid on its face, *i.e.*, whether its allegations meet one of the criteria specified as a challenge for cause, the factual issues involved in ruling on the challenge should be determined by another judge.[156]

Several arguments have been asserted against the institution of a peremptory system. When section 144 was initially enacted, some courts contended that to construe the statute as providing a peremptory challenge would be to render it unconstitutional as vesting the courts' judicial power in the litigants.[157] This argument has been abandoned,[158] and modern criticism has focused on the possibilities for abusing the peremptory system by asserting perjurious or frivolous claims[159] for purposes of judge shopping[160] or delay.[161] Another concern has been for the administrative difficulties a peremptory system would pose.[162]

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155. ABA Standards, supra note 146, § 2.32(a).

156. This is the procedure proposed by the ABA Standards, supra note 146, § 2.32(a).

157. E.g., Ex parte N.K. Fairbank Co., 194 F. 978, 996 (M.D. Ala. 1912). A few state decisions were in accord with this view. E.g., Austin v. Lambert, 11 Cal. 2d 73, 77, 77 P.2d 849, 852 (1938) (per curiam); Diehl v. Crump, 72 Okla. 108, 110, 179 P. 4, 6 (1919). However, a majority of state decisions upheld the constitutionality of the peremptory system. E.g., State v. Dirlam, 28 Ohio C.C.R. (n.s.) 69 (1906); State v. District Court, 30 Mont. 547, 77 P. 318 (1904). The leading case was U'ren v. Bagley, 118 Ore. 77, 245 P. 1074 (1926) (en banc). The court there held that the argument of usurpation of judicial power was fallacious in its assumption that the statute enabled a party or attorney to establish the factual question of the judge's bias conclusively by affidavit. The court noted that there was no factual determination of the allegations contained in the affidavit. The judge simply stepped aside. Nor did the statute deprive courts of their jurisdiction, as no judge had a right to sit in any particular case. Id. at 1076.

158. However, the reluctance of Congress to place even constitutional restraints on the operation of a coordinate governmental branch may be the chief, though unpronounced, reason for the legislative hesitation to adopt a peremptory system.

159. See Disqualification of Judges, supra note 40, at 747. Seemingly frivolous claims have been encountered even under the existing system. E.g., Weiss v. Hunna, 312 F.2d 711 (2d Cir.), cert. denied, 374 U.S. 853 (1963) (judge and party members of same legal society); MacNeil Bros. Co. v. Cohen, 264 F.2d 186 (1st Cir. 1959) (judge lectured at law school while defendant's partner was dean); Millslagle v. Olson, 128 F.2d 1015 (8th Cir. 1942) (per curiam) (party requested disqualification of numerous judges, one of whom had been dead for more than three years); Town of East Haven v. Eastern Airlines, 304 F. Supp. 1223 (D. Conn. 1969) (case concerning airport noise; judge often ate lunch with another judge who lived near airport).

160. Schwartz, supra note 17, at 426.

161. Sen. Subcomm. Hearings, supra note 30, at 20. Concern for the delay which could result from abuse of the peremptory system was voiced in Congress during the 1911 debates on the predecessor of section 144. See 46 Cong. Rec. 2627 (1911) (remarks of Rep. Bennett).

162. See Disqualification of Judges, supra note 40, at 747.

Judge shopping can be minimized by limiting the number of peremptory challenges permitted in each case to one per side.[163] It is not clear that the appearance of justice is satisfied when, for example, the length of sentence given a criminal defendant depends on which judge's name is drawn from a drum.[164] Thus, it may be better to allow judge shopping to the extent of permitting a litigant to replace one judge who he feels is not favorably disposed to his case.[165]

A safeguard against delay may be provided by requiring that the peremptory challenge be exercised immediately upon the parties' being notified that the matter has been assigned to a particular judge and before the judge has made any decision regarding it.[166] Moreover, assuming a new judge would be assigned expeditiously, a peremptory system could actually prevent

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163. Oregon's system of judicial disqualification permits each side two peremptory challenges. Ore. Rev. Stat. §§ 14.250-.270 (1969). California's procedure, recognizing that there may be conflicting parties on a side, permits each of those parties a challenge. Cal. Civ. Pro. Code § 170.6 (West Supp. 1976). However, with the existing number of federal judges, it has been suggested that one challenge per side is the maximum the federal system can afford. Sen. Subcomm. Hearings, supra note 32, at 64 (statement of John P. Frank, attorney).

164. See Sen. Subcomm. Hearings, supra note 32, at 27.

165. Cf. ABA Standards, supra note 146, at 49.

166. Id. § 2.32(b)(2). Such a procedure would be essential to prevent abuse of the peremptory system. Ideally, the selection of judge should be made and announced by the clerk of the court upon filing of a complaint. Plaintiffs should be required to assert the peremptory challenge at that time. If the challenge is exercised, a new judge should be assigned immediately. Defendants should be required to assert the challenge before filing any motion or answering the complaint. If possible, the request for recusal should be returned directly to the clerk, under a procedure in which the trial judge would never even know he had been assigned to or removed from the case. Under the master calendar system, both parties should be required to exercise their challenge immediately upon announcement of the identity of the judge. Although the challenge could be exercised before commencement of any stage of the proceeding, the limit of one peremptory challenge for the entire case should be retained. Comparable procedures should apply to criminal proceedings.

The problem of judicial disqualification in appellate proceedings remains a troublesome question. Since a party is afforded review by a multi-judge court on appeal, a peremptory challenge seems unnecessary. The best system might be to limit a party to the challenge for cause on grounds such as those in section 455(b), with factual proof of the allegations required for disqualification and with the determination made by another judge. While this system is stricter than that afforded under the revised section 455, it avoids the problems of application and clarity posed by the new statute, some of which appear to have no adequate solution. Such a procedure would not permit a party to challenge an appellate judge when there is only an appearance of impropriety. However, it is submitted that the participation of additional judges in the review of the case is sufficient to retain the appearance of an impartial decision and to satisfy due process requirements (Commonwealth Coatings, discussed at note 133, supra, is distinguishable in that there each of the parties had personally selected one of the other two arbitrators, so that one in question was actually to have the role of the *sole* impartial decision-maker.). Since congressional repudiation of the duty to sit has eliminated problems of conflicting ethical and statutory standards, the appearance of impartiality would continue to be fostered by the Code of Judicial Conduct's requirement that a judge disqualify himself when his impartiality might reasonably be questioned.

delay more often than it would create it by dispensing with the need for consideration of an affidavit's sufficiency and for interlocutory review in the event of an adverse decision.

The other situation in which delay poses a serious problem is in one-judge districts. Of the ninety-one United States district courts,[167] only five are served by a single district judge.[168] In the event of disqualification in those districts, it should be possible to replace a challenged judge efficiently by use of the statutory provisions[169] for visiting judges.[170] Two of the five one-judge districts have additional districts within their very state.[171] In addition, senior judges are available for assignment to cases in such districts.[172] Statutory provisions also enable the chief judge of any circuit to assign temporarily any circuit judge to preside in a district within the circuit.[173] Since the reason that these districts have only one judge is that they handle a relatively small amount of litigation,[174] the provisions for visiting judges should adequately solve the personnel problem.

That the peremptory system can work is attested to by the experience of the approximately twenty states which operate under some form of the peremptory system. Convincing documentation of the successful experience with the peremptory system in these states was presented at the Senate subcommittee hearings on the proposed amendment to section 144.[175] Since, despite the recent congressional reforms, the federal system for judicial disqualification has remained ineffective, Congress should once again reassess whether, with the suggested controls, the possibilities for abusing a peremptory challenge are not outweighed by the benefits of such a system. At the very least, Congress should revoke vestigial section 144 and attempt to clarify revised section 455.

Ellen M. Martin

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167. This includes Puerto Rico, but not the Canal Zone, Guam, or the Virgin Islands, which, apparently, are not controlled by the federal disqualification statutes. See Virgin Islands v. Gereau, 502 F.2d 914, 931 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975).

168. 28 U.S.C. § 133 (1970 & Supp. I, 1971). The five districts are the District of New Hampshire, the Middle District of Louisiana, the District of Maine, the Western District of Wisconsin, and the District of Wyoming. Id.

169. 28 U.S.C. §§ 291-96 (1970).

170. Mich. Comment, supra note 42, at 565.

171. There are thirteen additional district court judges in Louisiana, and three additional district judges in Wisconsin. 28 U.S.C. § 133 (1970 & Supp. I, 1971).

172. Id. § 294 (1970).

173. Id. § 291(c).

174. See Sen. Subcomm. Hearings, supra note 32, at 33, 40.

175. See id. at 65; note 73 supra and accompanying text. See also Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311 (1969).