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CAESAR'S WIFE REVISITED*—JUDICIAL DISQUALIFICATION AFTER THE 1974 AMENDMENTS

The due process clause of the Constitution guarantees every litigant the unqualified right to have controversies determined by an impartial tribunal.¹ When prejudice on the part of a judge has prevented a fair and impartial hearing, the litigant is entitled to a new trial before a different judge.² In federal courts, relief from possible judicial prejudice also may be available to litigants upon a motion urging disqualification of a judge.³ Recent changes in the federal disqualification statutes⁴ have precipitated reexamination of recusal⁵ principles in view of the goals sought by the new legislation and the results obtained.⁶ Some commentators have urged the institution of automatic disqualification procedures in federal courts as the best method for assuring an impartial hearing.⁷ An examination of present

* "Courts, like Caesar's wife, must be not only virtuous but above suspicion." U'Ren v. Bagley, 118 Ore. 77, 82, 245 P. 1074, 1075 (1926).

¹ U.S. CONST. amend. V; see Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

² See, e.g., *Killilea v. United States*, 287 F.2d 212 (1st Cir.), cert. denied, 366 U.S. 969 (1961).

³ 28 U.S.C. § 144 (1970); 28 U.S.C. § 455 (Supp. V 1975). This remedy is available in federal courts as well as in most state courts. For a listing of the type of law each state has, see Project, *Disqualification of Judges For Prejudice or Bias - Common Law Evolution, Current Status, and the Oregon Experience*, 48 ORE. L. REV. 311, 347 (1969) [hereinafter cited as *Oregon Project*].

⁴ Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 278 (codified at 28 U.S.C. § 455 (Supp. V 1975)), amending 28 U.S.C. § 455 (1970). See text accompanying notes 19-29 *infra*.

⁵ Although originally there was a technical distinction between disqualification and recusal—the former meaning exclusion by force of law, the latter, withdrawal at the judge's discretion—this distinction is no longer generally recognized. See Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 45 (1970) [hereinafter cited as Frank]. Accordingly, the terms are used interchangeably in this article.

⁶ See, e.g., Note, 7 CUM. L. REV. 185 (1976); Comment, *The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455*, 25 DEPAUL L. REV. 104 (1975); Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1975) [hereinafter cited as FORDHAM Note]; Comment, *Disqualification of Federal District Judges - Problems and Proposals*, 7 SETON HALL L. REV. 612 (1976); Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1975); Note, *Judicial Ethics - Recusal of Judges - The Need for Reform*, 77 W. VA. L. REV. 763 (1975).

⁷ See, e.g., Frank, *supra* note 5; *Oregon Project*, *supra* note 3; FORDHAM Note, *supra* note 6; Comment, *Disqualifying Federal District Judges Without Cause*, 50

disqualification law as applied, in conjunction with the problems inherent in the proposed automatic procedures, however, compels a contrary conclusion favoring the present statutory scheme.

The federal judicial disqualification statutes derive from the early English common law,⁸ where pecuniary interest and blood relationship were grounds for recusal of judges.⁹ This common law practice was adopted in the eighteenth century American courts¹⁰ and was codified in 1792.¹¹ The fundamental principle behind disqualification was expressed by Lord Coke, "*aliquis non debet esse judex in propria*

WASH. L. REV. 109 (1974); Note, *Judicial Ethics—Recusal of Judges—The Need for Reform*, 77 W. VA. L. REV. 763 (1975).

⁸ As early as 1250, a statement of the common law rule for disqualification was set out by Bracton:

A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or in another, or in any such like capacity.

6 BRACTON, LEGIBUS ET CONSUEUDINIBUS ANGLIE 249 (Twiss ed. 1883).

The basis for civil law disqualification statutes dates from the Code of Justinian: "Although a Judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before issue joined, so that the cause go to another. . . ." *Corpus Juris Civilis*, Codex, lib. 3, tit. 1, no. 16, translated in Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923).

⁹ *Hearings on S. 1064 Before the Subcomm. on Improvements In Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 61 (1973) (statement of John P. Frank) [hereinafter cited as 1973 *Hearings*].

¹⁰ At the time of the colonization of America, English recusal law had contracted from the broad earlier standard, see note 7 *supra*, to where the only basis upon which a judge could be disqualified was financial interest. *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609). Blackstone seems to indicate that in the eighteenth century there were no grounds for disqualifying a judge, 3 W. BLACKSTONE, COMMENTARIES *361, but this statement has been interpreted as merely rejecting all bases for disqualification besides that of financial interest. Frank, *supra* note 5. For an American case from this early period, see *Board of Justices v. Fennimore*, 1 N.J.L. 190 (1793).

¹¹ Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. In the original federal statute, the only grounds for disqualification were an interest in the litigation, or representation of either party as counsel. *Id.* These strict standards resulted from the influence of the early English common law recusal practice. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-10 (1947). In the nineteenth century, when the British attitude became progressively more liberal and flexible, the English courts expanded the disqualification requirement to include even judges who had only a remote proprietary interest in a case. The federal standards for disqualification did not follow the English pattern of liberal development. See generally *Oregon Project*, *supra* note 3; Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966).

causa," "no man may be a judge in his own case."¹²

Present standards for disqualification in federal courts are mandated by 28 U.S.C. sections 144 and 455. Section 144 has remained virtually intact since its original enactment in 1911,¹³ and provides that a district court judge shall disqualify himself when a litigant files an affidavit alleging facts sufficient to indicate bias.¹⁴ Although the facts alleged in the affidavit must be accepted as true, the judge still must pass on the sufficiency of the allegations to determine whether bias can be established from those facts.¹⁵ Section 455 is of much broader application and requires disqualification in certain instances upon judicial initiative.¹⁶ Prior to 1974, this section provided that a judge must disqualify himself from a proceeding when he had a substantial interest in the case,¹⁷ he had been a material witness or of

¹² 1 COKE, INSTITUTES *141a. See *In re Murchison*, 349 U.S. 133, 136 (1955), where Justice Black uses similar language.

¹³ Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090. The statute was altered slightly in 1949 when the phrase "in any case" replaced "as to any judge," which resulted in limiting litigants to one recusal motion per case rather than per judge. Act of May 24, 1949, Pub. L. No. 80-72, c. 139, § 65, 63 Stat. 99 (codified at 28 U.S.C. § 144 (1970)).

¹⁴ 28 U.S.C. § 144 (1970). The statute further provides that the affidavit must state facts and reasons for the belief that bias or prejudice exists, and must be accompanied by a certificate of counsel stating that the motion is made in good faith. *Id.* Each party to a case is limited to one such affidavit, and an additional safeguard provides a strict time requirement for filing. *Id.* See generally Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966).

¹⁵ *Berger v. United States*, 255 U.S. 22, 32 (1921). Although the challenged judge may not pass on the truth of the alleged facts, he may decide whether the affidavit meets the procedural requirements of the statute and whether the facts alleged give "fair support" to the charge of bias. *Id.* at 33-34.

¹⁶ Congress originally enacted § 455 in 1911, Act of March 3, 1911, c. 231, § 20, 36 Stat. 1090, and revised it in 1948, Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 908. The 1948 revision extended applicability of the section to all federal judges instead of district judges alone; the phrase "in which he has a substantial interest" replaced "concerned in interest in any suit;" the additional recusal ground of relationship to a party's attorney was added; slight phraseology changes were made.

¹⁷ 28 U.S.C. § 455 (1970) (amended 1974). The "substantial interest" contemplated in § 455 usually was construed as financial interest. *In re Grand Jury Investigation*, 486 F.2d 1013 (3d Cir. 1973), cert. denied, 417 U.S. 919 (1974); *United States v. Bell*, 351 F.2d 868 (6th Cir. 1965); cert. denied, 383 U.S. 947 (1966); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 324 F. Supp. 1371 (S.D. Tex. 1969), aff'd, 441 F.2d 631 (5th Cir.), cert. denied, 404 U.S. 941 (1971). In cases where the interest is such that every judge would be disqualified for interest, no judge should be disqualified. *Evans v. Gore*, 253 U.S. 245, 247-48 (1920) (federal judge challenged the constitutionality of taxing the income of federal judges); *United States v. Whitsel*, 543 F.2d 1176 (6th Cir. 1976) (Supreme Court and all other sitting judges named defendants);

counsel in a case, or, in his opinion, he was so closely related to or associated with any party or attorney as to render it improper for him to sit in the case.¹⁸

Congress amended section 455 in 1974¹⁹ upon determining that the existing statutory standards were inadequate in view of conflicting standards in the revised American Bar Association Code of Judicial Conduct.²⁰ As amended, the statute not only enumerates specific situations in which disqualification is mandatory,²¹ but also provides

Turner v. American Bar Ass'n, 407 F. Supp. 451 (N.D. Tex. 1975) (entire federal judiciary named as defendants).

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

¹⁹ Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609 (codified at 28 U.S.C. § 455 (Supp. V 1975)), amending 28 U.S.C. § 455 (1970).²⁰ ABA CODE OF JUDICIAL CONDUCT, Canon 3C(1). See H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6351, 6352 [hereinafter cited as *House Report*]. The newly revised (1972) ABA CODE OF JUDICIAL CONDUCT requires disqualification of a judge whenever "his impartiality might reasonably be questioned." ABA CODE OF JUDICIAL CONDUCT, Canon 3C(1). Even before the canon revision, ethical and statutory standards conflicted; the Canon required disqualification for "personal interest," while the statute mandated recusal for "substantial interest." The earlier statutory standard required a judge to disqualify himself in cases where he had a "substantial interest," had been of counsel, had been a material witness, or was connected with a party or his attorney. 28 U.S.C. § 455 (1970). Prior to revision, the Canons provided that: "a judge should not act in a controversy where a near relative is a party," Canon 13, and "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved," Canon 29.

In discussing the 1974 changes to § 455, the *House Report* pointed out the difficulties of having two sets of standards:

The existence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.

House Report, supra, at 6352. The language of the Report apparently was directed to Senate rejection of the nomination of Judge Haynsworth to the Supreme Court in 1969. See Frank, *supra* note 5, at 51. Haynsworth had declined to disqualify himself in several cases where potential conflict of interest problems were present; Haynsworth had held stock in parties' parent companies or in contractually related companies. Although his actions conformed with prevailing judicial interpretation of the current statutory standards, Haynsworth's involvement in these cases prompted the Senate to disapprove his nomination. HAYNSWORTH REPORT, S. EXEC. REP. NO. 91-92, 91st Cong., 1st Sess. (1969).

²¹ 28 U.S.C. § 455(b) (Supp. V 1975). The statute provides that a judge shall disqualify himself where: he has a personal bias or prejudice concerning a party; he has personal knowledge of disputed evidentiary facts; in private practice he served as lawyer in the matter; a lawyer with whom he previously practiced law served during

that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."²² This "appearance to the community" test replaced the "substantial interest" standard of the former statute.²³ In addition, the appearance test was intended to overrule the so-called "duty to sit" gloss given to the earlier version of section 455.²⁴ Under the "duty to sit" rule, a judge faced with a close question on disqualification was urged to resolve it in favor of a "duty to sit."²⁵ Finally, the amendments eliminate in most situations the possibility of counsel waiver of judicial disqualification.²⁶

Congress amended section 455 in order "to broaden and clarify the grounds for judicial disqualification."²⁷ However, judicial interpretation of the amended statute since its effective date²⁸ generally does

such association as a lawyer in the matter; he has been a material witness in the matter; while governmentally employed he participated in such capacity as counsel, advisor or material witness in the matter, or expressed an opinion concerning the merits of the particular case; he has a financial interest in the outcome; he has any other interest that could be affected substantially by the outcome; he is related within the third degree to a person who is (1) a party, (2) counsel, (3) interested in the outcome, or (4) likely to be a material witness in the proceeding. *Id.* Where any of the foregoing situations obtain, the judge may not accept a waiver by counsel of his disqualified status. *Id.* at § 455(e). Waiver is permissible, however, when the only basis for disqualification is that the judge's impartiality "might reasonably be questioned." *Id.* See *Id.* at 455(a).

²² *Id.* at § 455(a).

²³ The statutory language has been explained as creating an "appearance of impropriety" test in both the ABA Judicial Code, Thode, *Reporter's Notes to Code of Judicial Conduct* at 60-61 (1973), and in § 455 as amended in 1974, 1973 *Hearings*, *supra* note 9, at 40 (statement of John P. Frank).

²⁴ *House Report*, *supra* note 20, at 6355.

²⁵ The case most often cited as an example of the "duty to sit" rule is *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965), where Judge Rives stated:

[W]hether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, I have no choice in this case. . . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

See *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Tynan v. United States*, 376 F.2d 761 (D.C. Cir. 1967); *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *Tucker v. Kerner*, 186 F.2d 79 (7th Cir. 1950).

²⁶ The purpose of prohibiting waiver is to avoid placing counsel in a position where he must agree to waive a claim of prejudice in order to avoid alienating a judge in future matters. 1973 *Hearings*, *supra* note 9, at 14 (statement of Sen. Birch Bayh); see note 21 *supra*.

²⁷ *House Report*, *supra* note 19, at 6351.

²⁸ The Act became effective on December 5, 1974, and by its terms was not applic-

not reflect attainment of these goals. Although the courts considering the statute²⁹ have attempted to apply a broadened standard for disqualification, the varying interpretations and inconsistent results

able to trial proceedings commenced before that date, nor to appellate proceedings where the entire case had been submitted before that date. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 3, 88 Stat. 1609. This provision has been interpreted by the Fifth Circuit to allow application of the amendments by an appellate court to trial proceedings that had terminated completely before the Act's effective date. *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 924 (1976). *But see In re VEPCO*, 539 F.2d 357 (4th Cir. 1976); text accompanying notes 73-74 *infra*.

²⁹ Since the effective date of the statute, several district courts have confronted the problem of disqualification but have failed to apply the new amendments. A black female judge presiding over *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975), a class action by women against a law firm allegedly engaged in discriminatory hiring practices, was urged to recuse herself on the basis of her sex, race, and background of dedication to civil rights and affirmative action. *Id.* at 4-5. The judge denied the motion for disqualification on the basis of pre-amendment law, including the "duty to sit," and wholly failed to consider the amendments or their implications. *Id.* at 2. For a description of the melee between the judge and the attorneys in this case, see Kwitney, *Bar None: Law Firm is Stung by Hiring-Bias Suit Filed by Woman Lawyer and Heard by Woman Judge*, Wall St. J., Aug. 8, 1975, at 22, col. 1. The application of the amendments to this case might have been technically improper since the original complaint was one of a dozen filed with the EEOC in 1972—two years prior to the effective date of the statute. However, the amendments logically should apply because the controversy did not reach the federal courts until 1975. Nevertheless, apparently neither the parties nor the judge raised the issue of the amendments, and so the judge may have proceeded oblivious to her obligation under the revised § 455(a) to recuse herself where her impartiality may reasonably be questioned. *See* text accompanying note 16 *supra*.

Similarly, in *United States v. Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1976), the judge relied solely upon pre-amendment case law, including "duty to sit" cases, to find the allegations in defendant's affidavit insufficient to warrant recusal. *Id.* at 1332. The defendant had alleged prejudice primarily upon the basis of the judge's unsympathetic attitude toward the defendant who had a serious heart condition. *Id.* *See also* *Andres, Mosburg, Davis, Elam, Legg & Bixler, Inc. v. General Ins. Co. of Am.*, 418 F. Supp. 304 (W.D. Okla. 1976) (where pre-amendment law was also relied upon).

Finally, in a North Carolina district court, the judge not only failed to apply present recusal law, but also failed to rely upon pre-amendment law. In *Reddy v. Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976), the judge's law clerk had accepted an employment offer from a law firm representing one of the litigants in an action before the court. The judge cited his customary practice of immediately taking clerks off cases in which future employers are involved and stated that he had never had difficulties with such matters before. This was the sole authority for his decision, for he cited neither cases, nor statutes, nor Judicial Canons in his terse one-page opinion. Indeed, the court appeared disgruntled that such an allegation was made at all: "[M]otions to disqualify should not be lightly filed; this one is not lightly considered by the court; it has no merit and is denied." 419 F. Supp. at 1391.

indicate that the objective of clarification was not achieved.

In *Davis v. Board of School Commissioners*,³⁰ the Fifth Circuit considered a section 144 motion for disqualification as well as the provisions of the amended section 455. Plaintiffs in *Davis* sought to have the trial judge recuse himself on the basis of remarks directed at plaintiff's counsel in a court opinion for a different case decided one month earlier.³¹ The plaintiff's section 144 affidavits asserted that these remarks reflected the judge's belief that the civil rights claimants represented by plaintiff's attorneys did not have valid grievances, but rather had been solicited by the attorneys to present unwarranted claims.³² The trial court denied the motion for disqualification, and the Fifth Circuit affirmed, applying the traditional strict section 144 standard. The court of appeals held that because the bias alleged did not stem from an extra-judicial source outside the context of the immediate case,³³ that the alleged bias was not personal but judicial in nature, and hence, insufficient to require disqualification.³⁴ Moreover, since the affidavit asserted that the judge was biased against an attorney rather than a "party,"³⁵ the court found the recusal remedy inappropriate.³⁶

Upon considering the 1974 amendments, the Fifth Circuit determined that Congress did not intend the amendment of section 455 to overrule judicial interpretations of section 144 requiring bias to be "extra-judicial" and against a "party."³⁷ The court interpreted the "might reasonably be questioned" language of section 455 to mean only that the prior subjective standard for determining judicial bias

³⁰ 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

³¹ The comments about plaintiffs' counsel appear in the court's opinion in *Robinson v. Union Carbide Corp.*, 380 F. Supp. 731, 733-34 (S.D. Ala. 1974).

³² 517 F.2d at 1053-54.

³³ Traditionally, the bias alleged "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell*, 384 U.S. 563, 583 (1966). This personal/judicial dichotomy has been extended so that any "inferences drawn from prior judicial determinations are insufficient grounds for recusal. . . ." *United States v. Partin*, 312 F. Supp. 1355, 1358 (E.D. La. 1970). *Accord*, *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976); *Scarrella v. Midwest Fed. Sav. & Loan*, 536 F.2d 1207 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 237 (1976); *United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976), (all three cases were pre-amendment cases).

³⁴ 517 F.2d at 1051.

³⁵ The language of § 144 states that whenever a "party" to any proceeding files a sufficient affidavit alleging that the judge has a personal bias against him or in favor of an adverse party, such judge shall proceed no further. 28 U.S.C. § 144 (1970).

³⁶ 517 F.2d at 1050-51.

³⁷ *Id.* at 1052.

had been replaced by an objective standard.³⁸ This interpretation ignored the drafters' intent to mandate recusal whenever there is even an appearance of partiality.³⁹ Under this appearance test, the technical requirements that were formerly necessary to render allegations sufficient, such as the extrajudicial and party requirements, are no longer determinative.⁴⁰ Rather, courts now must look beyond the sufficiency of allegations to the broader standard of whether the proceedings have an appearance of impartiality.⁴¹ The Fifth Circuit, however, failed to interpret the amendments in this manner, causing them to fall short of their intended goal of broadening the statutory standard.⁴²

In another Fifth Circuit case involving the new amendments, *Parrish v. Board of Commissioners of Alabama State Bar*,⁴³ the court again construed section 455 narrowly. The plaintiff, who claimed discrimination against blacks in the administration of the Alabama bar examination, moved that the trial judge recuse himself because he had been president of a county bar association during a period when blacks were barred from membership.⁴⁴ Plaintiff further alleged that the judge was acquainted with several defendants and all de-

³⁸ *Id.*

³⁹ See Thode, *Reporter's Notes to Code of Judicial Conduct* 60-61 (1973).

⁴⁰ Decisions prior to the 1974 amendments to § 455 which construed "sufficient" in § 144 may have been effectively overruled by the amendments. Although § 455 provides only for *sua sponte* disqualification, see text accompanying note 16 *supra*, the amendments have incorporated verbatim the § 144 ground of recusal for personal bias or prejudice. 28 U.S.C. § 455(b)(1) (Supp. V 1975). Prior to 1974, § 144 was the only statutory provision that included bias against a party as a ground for recusal. Under the new provisions the judge bears the responsibility of disqualifying himself if his impartiality may be reasonably questioned. Consequently, a judge may no longer refuse to disqualify himself simply on the basis that an affidavit is technically insufficient. See, e.g., *Pfizer, Inc. v. Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949); *Price v. Johnson*, 125 F.2d 806 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942). Exactly how § 144 relates to revised § 455 is a question that remains unanswered.

⁴¹ *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert. denied*, 97 S. Ct. 370 (1976); see text accompanying notes 60-61 *infra*.

⁴² See generally FORDHAM Note, *supra* note 6.

⁴³ 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 924 (1976). Although the effective date of the amendments fell between the close of the trial proceedings and complete submission of the case to the appellate court, the Fifth Circuit concluded that the amendments applied to the district court proceedings. *Id.* at 102-03. See note 28 *supra*.

⁴⁴ 425 F.2d at 101-02. The affidavit further asserted that the judge had not invited any black lawyers whom he knew at the time of his holding office to join the bar association. *Id.*

fense counsel, and that the judge had stated that he did not believe the defendants would intentionally misrepresent any matters related to the lawsuit.⁴⁵ Finally, plaintiff contended that the judge, as a member of the bar association, had a financial interest in the outcome of the case since the bar association could be forced to pay attorneys' fees.⁴⁶

The Fifth Circuit held that the trial judge's refusal to disqualify himself in this case was proper. Upon considering the sufficiency of the affidavit filed under section 144, the court of appeals determined the applicable test to be whether the facts alleged would "convince a reasonable man that a bias exists."⁴⁷ The court cited the Supreme Court's decision in *Berger v. United States*⁴⁸ as authority for this test. The *Berger* Court, however, required only that the allegations give "fair support" to the charge of bias.⁴⁹ Thus, the Fifth Circuit's standard requiring convincing proof of bias in fact was not warranted even under pre-amendment principles.

The *Parrish* court also considered the effect of the recent section 455 amendments on motions made under section 144. As in *Davis*, the *Parrish* court focused upon the "might reasonably be questioned" language of section 455(a), and held that the judge's impartiality could not be reasonably questioned in this case.⁵⁰ The congressional intent to overrule the "duty to sit" decisions as well as to replace the subjective analysis with objective analysis was recognized by the court.⁵¹ Nevertheless, the court found that in this instance the judge's behavior did not warrant questioning his impartiality.⁵²

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 100, quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir. 1973).

⁴⁸ 255 U.S. 22 (1921). *Berger v. United States* involved the prosecution for espionage of five defendants, three of whom were of German descent. The judge had made some highly prejudicial statements to the effect that the hearts of German-Americans were "reeking with disloyalty." *Id.* at 28. Defendants moved the judge to disqualify himself, filing an affidavit in compliance with the predecessor of § 144. The Supreme Court held that the trial judge may not pass on the truth of the facts alleged, but only on the sufficiency of such facts. In making this determination, the judge should consider whether the facts "give fair support" of the charge of bias. *Id.* at 32-34.

⁴⁹ *Id.* at 33. See note 15 *supra*.

⁵⁰ 524 F.2d at 103.

⁵¹ *Id.* See text accompanying notes 38-39 *supra*.

⁵² 524 F.2d at 103-04. Three judges dissented from the en banc decision, urging that the trial judge's impartiality was not beyond reasonable question in this instance. *Id.* at 108-10 (Tuttle, J., dissenting). Furthermore, the dissenters noted that the trial judge showed an inclination to recuse himself but was deterred by his perception of a "duty to sit," *id.* at 112, a concept overruled by the 1974 amendments. *House Report*, *supra* note 20, at 6355. See text accompanying notes 24-25 *supra*.

Finally, the Fifth Circuit rejected the plaintiff's assertion that the judge was financially interested in the disposition of the case. Without explaining its reasoning, the appellate court stated that the potential obligation of the Board of Commissioners for attorneys' fees did not fall within the statutory definition of "financial interest."⁵³ The court thereafter affirmed the denial of the motion for disqualification.⁵⁴

Subsequent to the Fifth Circuit decisions, three other courts of appeals construed the amended disqualification statute. In *United States v. Cowden*,⁵⁵ the First Circuit upheld the trial judge's decision not to recuse himself. The defendant had alleged that because the judge already had presided over the trials of other individuals indicted simultaneously with the defendant, the judge's impartiality regarding the issues in this trial "might reasonably be questioned."⁵⁶ The appellate court relied upon the expressed congressional reservation that litigants are not entitled to have a judge disqualify himself merely because they fear an adverse decision.⁵⁷ The court analogized the knowledge the judge would have gleaned from previous trials to information that may be gained by a judge in ruling on admissibility of evidence.⁵⁸ The court's decision was based upon a test derived from language in the legislative history encouraging disqualification where a reasonable basis exists for doubting a judge's impartiality.⁵⁹ In this

⁵³ 524 F.2d at 104. The amended statute defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party. . . ." 28 U.S.C. § 455(d)(4) (Supp. V 1975).

⁵⁴ 524 F.2d at 104.

⁵⁵ 524 F.2d 257 (1st Cir. 1976).

⁵⁶ *Id.* at 265. The defendant relied solely on the new language of § 455(a) requiring a judge to disqualify himself if his impartiality might be open to question. *Id.*

⁵⁷ *Id.*; see *House Report*, *supra* note 20, at 6355, which states: "[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision."

⁵⁸ 545 F.2d at 265-66. *But see* *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976), where in reassigning a case to another judge, the appellate court in dictum stated that a judge outside the district must be found because the other district judge "presided at the companion trial. . . which grows out of the same factual. . . transactions."

⁵⁹ 545 F.2d at 265. The pertinent language in the committee report explains: "This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." *House Report*, *supra* note 20, at 6355.

case the court determined that such a reasonable basis was not present.⁶⁰

The Tenth Circuit has taken a more liberal approach in interpreting the statute. In *United States v. Ritter*,⁶¹ the affiant alleged that Judge Ritter was biased in favor of opposing counsel, as evidenced by the judge's statements and actions in the case.⁶² The court of appeals was unconvinced that the affiant had shown sufficient bias to amount to judicial misconduct. However, the court interpreted the broad language of section 455 and considered all relevant facts to find a reasonable likelihood that the case might not be tried "with the impartiality litigants have a right to expect. . . ."⁶³ In reaching this result the court openly disagreed with the Fifth Circuit decision in *Davis*.⁶⁴ The Tenth Circuit asserted that the basic proposition in

⁶⁰ 545 F.2d at 265-66. Upon amending § 455, Congress apparently left for judicial determination the question of what standard should be used in determining reasonable doubt of judicial impartiality. Neither the statute nor its legislative history clearly indicates whether reasonableness is to be determined from the perspective of the litigant or from the point of view of an uninvolved observer—the reasonable man. Both the First Circuit in *Cowden* and the Fifth Circuit in *Parrish* held that the uninvolved observer test was the most appropriate objective standard. *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98, 100 (5th Cir. 1975). However, a strong dissent in *Parrish* urged that Congress intended the reasonableness test to go to the question of whether the litigant's fear of bias has a reasonable basis; the test should not inquire into what a disinterested observer would consider bias. *Id.* at 108 (Tuttle, J., dissenting). The Tenth Circuit in *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976), appears to have adopted the latter approach. See note 63 *infra*. This position is advocated in FORDHAM Note, *supra* note 6, at 148-54; Note, *Disqualification for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1446-47 (1966).

⁶¹ 540 F.2d 459 (10th Cir. 1976).

⁶² The appendix to the court opinion, 540 F.2d at 465, gives examples of the judge's sarcasm toward the government attorneys as contrasted by the extreme politeness he showed defense counsel. While arguing to prevent discovery of certain correspondence, government counsel concluded: "[W]e are extremely concerned that it will curtail the vigorous enforcement of the anti-trust laws." The court responded, "Well, isn't that too damn bad. . . ." *Id.* The government felt that the judge's bias in favor of the defense attorney could have resulted from counsel's position as chairman of the Board of Commissioners of the State Bar Association. The Commission was considering action on five resolutions which were before it during the trial in question. All five resolutions dealt with various means of barring Judge Ritter from presiding over further cases. See *id.* at 460 n.2.

⁶³ *Id.* at 464. The *Ritter* court impliedly held that the reasonableness standard is to be measured from the litigant's vantage point and not simply an impartial observer's: "The final question. . . is whether. . . there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect. . . ." *Id.* This position conflicts with the approach of the Fifth Circuit in *Parrish* and the First Circuit in *Cowden*. See note 60 *supra*.

⁶⁴ 540 F.2d at 462. See text accompanying notes 35-42 *supra*.

Davis, that disqualification is not required when the bias alleged pertains to an attorney rather than a party, is not strictly true.⁶⁵ Rather, the *Ritter* court recognized that bias for or against an attorney can result in bias toward a party. In such a situation, the court concluded that the impartiality of a judge toward a party may reasonably be questioned.⁶⁶

The Fourth Circuit confronted recusal issues involving the 1974 amendments in two cases: *In re VEPCO*,⁶⁷ and *In re Rodgers*.⁶⁸ In *VEPCO*, federal district Judge Warriner raised *sua sponte* the disqualification issue because of his status as a VEPCO customer. Since the lawsuit could result in a \$70-\$100 rebate to Judge Warriner,⁶⁹ the judge reluctantly⁷⁰ recused himself on the basis of the amended section 455 and Canon 3C of the Code of Judicial Conduct, and immediately certified the issue for appeal.⁷¹ He did not believe that his impartiality was reasonably questionable under section 455(a), but considered section 455(b)(4) applicable to his circumstance, characterized by "any other interest that could be substantially affected by the outcome of the proceeding."⁷²

⁶⁵ 540 F.2d at 462. See text accompanying notes 35-42 *supra*.

⁶⁶ 540 F.2d at 462.

⁶⁷ 539 F.2d 357 (4th Cir. 1976).

⁶⁸ 537 F.2d 1196 (4th Cir. 1976).

⁶⁹ 539 F.2d at 360. VEPCO brought suit against a contractor to recover damages for faulty fabrication of pump supports in VEPCO's North Anna nuclear power station. VEPCO had surcharged its customers for an amount which VEPCO now claimed as an element of its \$152 million damage claim. The disqualification problem arose through a series of conditional occurrences: if VEPCO won the lawsuit (and was awarded the entire amount claimed, if defendants satisfied the judgment, and if the Virginia State Corporation Commission decided that VEPCO must disperse to customers that part of the award for which ratepayers had been surcharged, then the trial judge stood to gain between \$70 and \$100 as a VEPCO customer. *Id.*

⁷⁰ Judge Warriner had orally denied the motion (which had been made upon Warriner's suggestion) and had indicated that a written opinion would follow. *Id.* at 361. In his written opinion he reversed himself, though only with hesitation: "Although the Court is of the firm conviction that whatever interest it may have. . . will not affect its objectivity. . . , the Court, if err it must, wants to err on the side of the consensus as articulated in the language of the amended statute." *Id.* at 363.

⁷¹ 539 F.2d at 364. Judge Warriner relied upon the Code of Judicial Conduct, the original § 455, and the amended § 455 in formulating a five step test. The judge considered whether the court had: (1) a financial interest in the subject matter, (2) a direct and personal pecuniary interest, (3) a substantial interest, (4) any interest of such a nature that its impartiality may reasonably be questioned, (5) any other interest that could be substantially affected by the outcome of the case. *Id.* at 361. The third factor came from the unamended statute and was included because the case had begun prior to the effective date of the Act. See note 28 *supra*. The other tests derived jointly from amended § 455 and the identical Judicial Canon 3C. 539 F.2d at 361-62.

⁷² 539 F.2d at 362, quoting 28 U.S.C. § 455(b)(4) (Supp. V 1975).

The Fourth Circuit disagreed with the trial judge's application of the 1974 amendments because the action had commenced prior to their effective date.⁷³ The appellate court held that this was error in view of the explicit provision in the Act limiting its application to proceedings commenced after the effective date.⁷⁴ However, the court found that since Canon 3C of the ABA Code of Judicial Conduct is identical to the amended statute, and since the trial judge properly examined the Canon as a guideline in exercising his discretion,⁷⁵ the consequences of applying the amended statute were insignificant.⁷⁶ Accordingly, the Fourth Circuit chose to review Judge Warriner's application of amended section 455 under the guise of Canon 3C.⁷⁷ The appellate court agreed with Judge Warriner's finding that the bare expectancy that he might receive a rebate was an "other interest" within the meaning of the statute.⁷⁸ However, the court strongly suggested that it considered this interest *de minimus*,⁷⁹ and therefore not sufficient to require recusal. Judge Warriner's decision was not considered an abuse of discretion but rather a "failure to exercise his informed discretion;"⁸⁰ thus the case was remanded to allow the judge

⁷³ 539 F.2d at 363; see note 28 *supra*.

⁷⁴ 539 F.2d at 366. Under the Fifth Circuit's *Davis* interpretation of the date limitation, Judge Warriner's action could have been reviewed under the standards of the 1974 amendments. See note 28 *supra*.

⁷⁵ Traditionally, a trial judge's decision with respect to disqualification is reviewed on the basis of whether the judge abused the exercise of his sound discretion. *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975). The legislative history of the 1974 amendments indicates that this standard was intended to continue. *House Report*, *supra* note 20, at 6355.

⁷⁶ 539 F.2d at 366.

⁷⁷ *Id.*

⁷⁸ See text accompanying note 72 *supra*.

⁷⁹ 539 F.2d at 367-68; see note 80 *infra*. The court relied upon C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3547, at 365 (1975), for the proposition that "any other interest" is not an absolute standard, but includes only interests substantial enough to bring the impartiality of the judge into question. See also Thode, *Reporter's Notes to Code of Judicial Conduct* at 66-67 (1973) which addresses the problem specifically:

Although being a ratepayer does not involve "ownership of a legal or equitable interest" in the party to whom the judge made such payments, the Committee concluded that at some point a relationship to a party as a utility customer. . . should disqualify a judge. The test is that a judge should disqualify himself if the outcome of the proceeding could substantially affect his interest as a customer of the utility. . . .

⁸⁰ 539 F.2d at 363-64. In exercising his "informed discretion" on remand, Judge Warriner may find helpful guidance from the Fourth Circuit's opinion: "when the possibility of recovering that amount is [so remote]. . . we doubt that anyone other than Jimmy the Greek would offer anything for the judge's chance. A reasonable man

to reconsider.⁸¹

*In re Rodgers*⁸² involved only one of the specifically enumerated grounds⁸³ for disqualification under amended section 455(b). The defendants based their motion for disqualification upon their intention to call a former law partner of the judge to testify about events that had occurred before the judge had left the firm. The former law partner had represented a client, Pimlico race track, engaged in activity similar to the defendant's.⁸⁴ In a brief opinion, the Fourth Circuit held that the situation fell within amended section 455(b)(2), which requires a judge to disqualify himself "where in private practice . . . a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter. . . ."⁸⁵ Although the law partner was not involved in the litigation, his activity as counsel for Pimlico was viewed by the court as sufficiently linked to *Rodgers* as to be a part of the "matter."⁸⁶ The court held that since defendants intended to rely on the law partner's testimony as their primary defense, the testimony necessarily was part of the "matter in controversy." As the court explained, the "matter" included not only the charges brought by the government, but the defense asserted by defendants as well.⁸⁷

Although Congress intended to clarify section 455 to assure uniform application, the First, Fourth, Fifth, and Tenth Circuits have

would doubtless prefer a \$2 ticket at Churchill Downs on the first Saturday in May." *Id.* at 368.

⁸¹ *Id.* at 368-69.

⁸² 537 F.2d 1196 (4th Cir. 1976).

⁸³ The portion of the statute in question provides in part:

[The judge] shall also disqualify himself. . . (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."

28 U.S.C. § 455(b)(2) (Supp. V 1975).

⁸⁴ *In re Rodgers* was a criminal prosecution under mail fraud and anti-racketeering statutes. The defendants in the case, as well as the client of the judge's former law partner, were interested in purchasing Marlboro track. Some of the defendants eventually acquired the track. In addition, the law partner participated in drafting a bill consolidating Maryland's one-mile race tracks and defendants were charged with using unlawful means to secure the passage of this bill. 537 F.2d at 1197-98.

⁸⁵ 28 U.S.C. § 455(b)(2) (Supp. V 1975); see note 83 *supra*.

⁸⁶ 537 F.2d at 1198.

⁸⁷ *Id.* The Fourth Circuit might have rested its decision upon other language in § 455(b)(2) as well: ". . . or such lawyer has been a material witness concerning [the matter]." 28 U.S.C. § 455(b)(2) (Supp. V 1975). Although the lawyer had not yet been a witness, counsel clearly intended to call him as a witness.

developed inconsistent constructions of the statute.⁸⁸ The courts concur without exception that section 455(a) replaces the subjective discretionary standard with an objective reasonableness standard.⁸⁹ However, they disagree as to whether the judge should apply this reasonable man test from the position of the impartial observer or from the more sensitive viewpoint of the litigant.⁹⁰ The First and Fifth Circuits in *Cowden* and *Parrish* applied the impartial observer test,⁹¹ while the Tenth Circuit in *Ritter* and the dissent in *Parrish* viewed reasonableness from the affiant's position.⁹²

The courts also have exhibited various degrees of sensitivity to preventing the appearance of impropriety; the Fifth Circuit failed to mention the appearance standard,⁹³ while the Tenth Circuit based its decision upon it.⁹⁴ These same two circuits have expressed contradictory views as to whether an allegation of bias toward an attorney is sufficient to require recusal or whether the allegation must be directed specifically toward a "party." The Fifth Circuit held that "party" status was necessary,⁹⁵ while the Tenth Circuit held that bias against an attorney was sufficient to render reasonably questionable the judge's impartiality toward a party.⁹⁶

The issue of judicial acquaintance with counsel and witnesses was raised in *Parrish* and *Rodgers*, and different analyses again produced inconsistent results. The Fourth Circuit in *Rodgers* stretched the statutory language to cover the circumstances and to require recusal,⁹⁷ while the Fifth Circuit in *Parrish* strictly construed section 455 and held the judge's friendship with counsel and witnesses was not determinative.⁹⁸ Finally, the Fourth and Fifth Circuits analyzed

⁸⁸ See *House Report*, *supra* note 20, at 6352.

⁸⁹ See *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976); *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976); *In re VEPCO*, 539 F.2d 357, 362 (4th Cir. 1976); *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98, 103 (5th Cir. 1975); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975).

⁹⁰ See notes, 60 & 63 *supra*.

⁹¹ *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976); *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98, 102 (5th Cir. 1975).

⁹² *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976); *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98, 108 (5th Cir. 1975) (Tuttle, J., dissenting).

⁹³ See text accompanying notes 42-43, 50 *supra*.

⁹⁴ See text accompanying note 63 *supra*.

⁹⁵ See text accompanying notes 39-40 *supra*.

⁹⁶ See text accompanying notes 65-66 *supra*. The Tenth Circuit stated in *Ritter* that "bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party." 540 F.2d at 462.

⁹⁷ See text accompanying notes 84-87 *supra*.

⁹⁸ See text accompanying notes 47-52 *supra*.

"financial" or "other" interests differently in *Parrish* and *VEPCO*, although both achieved the same practical result in this context.⁹⁹ Consequently, despite the recognition by all four circuits that the statutory standard has been broadened,¹⁰⁰ the failure to achieve consistent interpretations and results indicates that little has been clarified by the amendments.

Numerous commentators are dissatisfied with the present recusal procedures and advocate a change to an automatic disqualification system.¹⁰¹ An automatic disqualification process apparently was the goal of Congress in enacting the original recusal legislation.¹⁰² In 1921,

⁹⁹ See text accompanying notes 53-54, 78-79 *supra*; note 79 *supra*. In *Parrish*, the court held that the judge's membership in the bar association, coupled with the possibility that the bar association might have to pay attorney's fees, was not a "financial interest" within the meaning of the statute. 524 F.2d at 104. The Fourth Circuit held in *VEPCO* that the ratepayer judge probably did have an "interest," but that the interest was so small that it probably should be considered *de minimus*. 539 F.2d at 367-68.

¹⁰⁰ Two district court decisions in the Ninth Circuit also reflect the broadened statutory standard, and indeed, seem to be paradigm cases of the proper operation of the amended disqualification statute. In *Spires v. Hearst Corp.*, 420 F. Supp. 304 (C.D. Cal. 1976), the plaintiff urged recusal on the basis that defendant's newspaper had run an article on the judge which was personally very complimentary. This, plaintiff asserted, was sufficient to bring the judge's impartiality reasonably into question. The trial judge found that he had no such alleged bias or prejudice, but disqualified himself because of a possible appearance of impropriety. Similarly, the district judge in *Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976), recused himself when he discovered that an attorney who had represented him in the past had become associated with the law firm representing the plaintiffs. The judge expressly found that he had no personal bias, personal knowledge of evidentiary facts, or personal interest in the proceedings, but nonetheless found that his impartiality might reasonably be questioned.

¹⁰¹ See authorities cited in note 7 *supra*.

¹⁰² The original purpose of the recusal statutes is indicated by the remarks of Representative Cullop of Indiana in reply to the question of whether the statute allowed district judges discretion to determine the sufficiency of affidavits:

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

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

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

46 CONG. REC. 2627 (1911), quoted in Orfield, *Recusation of Federal Judges*, 17 BUFFALO L. REV. 799, 803-04 (1968).

however, the landmark case of *Berger v. United States*¹⁰³ required the sitting judge to pass on the sufficiency of the facts in the affidavit of disqualification.¹⁰⁴ Congress revised the statutes in 1948, but made no changes intended to overrule *Berger*; Congress apparently acquiesced to the Supreme Court's statutory construction in *Berger*.¹⁰⁵ The idea of automatic recusal in federal courts was not seriously considered again until the proposed revisions of the statutes in the early 1970's.

Between 1970 and 1973 Senator Birch Bayh twice proposed amending section 144 to provide litigants a peremptory challenge directed to judicial disqualification.¹⁰⁶ Congress, however, enacted only the revision of section 455 and left section 144 unaltered.¹⁰⁷ Advocates of the peremptory challenge have criticized that congressional decision, and have emphasized problems under pre-amendment law or ill considered decisions under the amendments, as evidence of the present system's failure to assure an impartial tribunal.¹⁰⁸ In addition, nineteen states now have peremptory challenge statutes or the equivalent established in their state judiciaries.¹⁰⁹ Use of the peremp-

¹⁰³ 255 U.S. 22 (1921).

¹⁰⁴ The *Berger* Court held that allegations in an affidavit for disqualification must be accepted as true, but that the judge must pass upon the sufficiency of the allegations to determine whether bias could be established from the facts alleged. *Id.* at 32.

¹⁰⁵ The Supreme Court has explained with regard to statutory construction that the "failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (in reference to Sherman Act).

¹⁰⁶ Senator Bayh's proposal to amend § 144 provided in part:

Whenever a party to any proceeding in a district court makes and files a timely 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.

Frank, *supra* note 5, at 66, quoting the proposed Bayh revision of 28 U.S.C. § 144. The proposal differs from the present statute's language only in that the proposal does not require the affidavit to be sufficient. See 28 U.S.C. § 144 (1970). Senator Bayh indicated that his proposal was intended to provide a peremptory-type challenge: "my bill's allegation of bias . . . is clearly pro forma." 1973 *Hearings*, *supra* note 9, at 12-15.

¹⁰⁷ 28 U.S.C. § 455 (Supp. V. 1975), amending 28 U.S.C. § 455 (1970).

¹⁰⁸ See authorities cited in note 7 *supra*.

¹⁰⁹ The nineteen states with disqualification or change of venue devices which allow automatic transfer of a case to a new judge are: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Washington, Wisconsin, Wyoming. 1973 *Hearings*, *supra* note 9, at 65. (Statement of John P. Frank).

tory challenge system on the state level has been lauded by its proponents as an indication of the feasibility of the system in federal courts.¹¹⁰

Advocates of automatic recusal believe that objections to such a scheme are sufficiently answered by years of "successful" state experience with the system.¹¹¹ However, surveys conducted in states having such systems have produced statistics to the contrary. In California, questionnaires were sent to superior court judges across the state to elicit feedback on the automatic challenge system.¹¹² In reply to the question of whether the system was abused, only seven of ninety-three superior court judges who answered the question responded that the "peremptory challenge statute is not abused."¹¹³ The California system is similar to that proposed by Senator Bayh. A litigant need merely allege bias or prejudice and the judge must immediately disqualify himself from that controversy.¹¹⁴ Each party is permitted one such challenge per lawsuit.¹¹⁵

In addition to the superior court judges' general responses of dissatisfaction with peremptory challenge abuses, the California survey reported other problems with the system. Several judges complained that peremptory disqualifications were being made "purely for reasons of trial strategy" rather than because of possible judicial prejudice.¹¹⁶ Other judges were concerned about the accumulation of such motions against them, particularly since they have no opportunity to deny the allegations.¹¹⁷ The survey further reported excessive and persistent use of the disqualification procedure by certain lawyers against certain judges.¹¹⁸ Finally, the most serious abuse cited was the

¹¹⁰ *Id.* at 40-65.

¹¹¹ In the Senate Hearings on the Bayh bill, Mr. Frank presented the committee with letters from chief justices in 8 states in which automatic disqualification systems exist. Each judge highly praised the system and told how satisfied his respective state bar was with the system. *Id.* at 40.

¹¹² The survey was conducted by the Judicial Council of California. The Report is reprinted in 1973 *Hearings*, *supra* note 9, at 54.

¹¹³ 1973 *Hearings*, *supra* note 9, at 54 (1970 Report of the Judicial Council of California). Of the remaining judges, 33 indicated that the procedure was abused for the purpose of judgeshopping, 18 replied that it was used as form of continuance, 14 found it being used to avoid an unknown judge, 7 thought it was being used for retaliatory purposes, and 7 suggested it was being used for blanket challenges. *Id.*

¹¹⁴ CAL. CIV. PRO. CODE § 170.6 (West Supp. 1977).

¹¹⁵ *Id.*

¹¹⁶ 1973 *Hearings*, *supra* note 9, at 53 (1970 Report of the Judicial Council of California). See note 110 *supra*.

¹¹⁷ 1973 *Hearings*, *supra* note 9, at 53 (1970 Report of the Judicial Council of California).

¹¹⁸ *Id.*

"widespread practice of circumventing the statutory procedure by informing the presiding judge or his calendar clerk that if a certain judge or any of several judges is assigned to the trial of the case he will be challenged at the commencement of trial."¹¹⁹ In this manner the shrewd attorney could circumvent the statutory limitation of one challenge per lawsuit and effectively choose his favorite judge by threatening to challenge whichever judges were named by the clerk. Thus, the California challenge system seems to be used as a procedural device to effect delay, to procure sympathetic judges, or perhaps to avoid judges whose attitudes are unknown.¹²⁰

Another survey made in Oregon also indicated abuse of a peremptory challenge system. The Oregon automatic disqualification procedure differs from the Bayh proposal and the California scheme, in that it allows each side two peremptory challenges per lawsuit.¹²¹ During the thirteen year period¹²² covered by the survey, one firm challenged a single judge 428 times, making that judge the target for 98.8% of the firm's total disqualification motions.¹²³ Other Oregon firms followed a similar pattern.¹²⁴ This practice of wholly avoiding a particular judge, an abuse also reported in California,¹²⁵ could cause considerable administrative delay in the federal court system. Far fewer federal judges preside in each geographical region than state judges, and peremptory challenges could result in greater travel and inconvenience to replacement judges. The smaller one and two judge districts might find such abuse especially burdensome.

The objection that abuse would accompany the institution of a federal peremptory system is not the only obstacle to its enactment, however, for a question remains concerning the constitutionality of peremptory procedures. Upon enactment of section 144 in 1911, one court determined that construction of the statute to permit peremptory challenges would render the statute unconstitutional.¹²⁶ The argument, based upon a separation of powers theory, asserted that a

¹¹⁹ *Id.*

¹²⁰ See note 109 *supra*.

¹²¹ OR. REV. STAT. §§ 14.250-270 (1975).

¹²² The study covered the period from May 2, 1955 to July 1, 1968. *Oregon Project*, *supra* note 3, at 378.

¹²³ *Id.* at 381.

¹²⁴ *Id.* at 381-83. Individual attorneys also utilized the disqualification procedures to avoid particular judges. *Id.*

¹²⁵ See text accompanying note 118 *supra*; note 113 *supra*.

¹²⁶ *Ex parte N.K. Fairbank Co.*, 194 F. 978, 996 (M.D. Ala. 1912). Cf. *Austin v. Lambert*, 11 Cal. 2d 73, 77, 77 P.2d 849, 852 (1938); *Diehl v. Crump*, 72 Okla. 108, 110, 179 P. 4, 6 (1919) (state peremptory challenge statutes held unconstitutional).

peremptory system vests judicial power in the litigant.¹²⁷ Although no federal courts have held a peremptory challenge statute constitutional,¹²⁸ several state courts have so held.¹²⁹ Some state court decisions holding their respective statutes constitutional, however, have directed their analysis to the specific statutes in a manner that would render a "pure" peremptory statute unconstitutional.¹³⁰ These decisions essentially have held that peremptory challenge statutes would be unconstitutional but for the requirement that an affidavit alleging bias be filed.¹³¹ But since the affidavit requirement is clearly pro forma in some states anyway, the "but for" rationale supporting the constitutionality of the statute is tenuous. Thus, the constitutionality of peremptory challenge legislation is not completely settled.¹³²

Advocates of a new attempt to amend section 144 to create a peremptory challenge statute contend that the public's lack of confidence in the judiciary, as well as the reluctance of judges to construe recusal statutes broadly, require such a change.¹³³ However, a per-

¹²⁷ The court in *Ex parte N.K. Fairbank Co.*, 194 F. 978, 996 (M.D. Ala. 1912), stated that § 144 operates to arm the litigant with the judicial power of the court, leaving the litigant the absolute power to decide that a judge is disqualified.

¹²⁸ Since the *Berger* decision in 1926, no federal courts have had occasion to question whether § 144 was a peremptory statute. Thus, federal courts have not had to determine the constitutionality of a federal peremptory statute.

¹²⁹ The landmark case was *U'Ren v. Bagley*, 118 Ore. 77, 245 P. 1074 (1926), which held that automatic disqualification upon filing an affidavit does not raise separation of powers problems resulting from legislative infringement of the judicial province. The court analogized the disqualification of a judge on the mere fact of objection to a peremptory challenge of a juror, which is within the legislative "necessary and proper" power. *Id.* at 1076. See *Hulme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972); *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570 (Alas. 1969); *State ex rel. Wulle v. Dirlam*, 28 Ohio C.C. 69 (1906); *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 30 Mont. 529, 77 P. 312 (1904).

¹³⁰ See *Hulme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972); *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570 (Alas. 1969); see also *U'Ren v. Bagley*, 118 Ore. 77, 245 P. 1074 (1926).

¹³¹ *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570 (Alas. 1969). *Accord*, *Hulme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972). A possible contrary argument can be made that in requiring a judge automatically to disqualify himself upon allegations of bias or prejudice, the judge is unable to deny or refute the allegations. As a result, the judge is denied due process and is left without recourse to remove a possible taint on his integrity. See text accompanying note 117 *supra*. This argument would favor a "pure" peremptory system.

¹³² More subtle intra-governmental pressures also should be considered. The reluctance of Congress to impose even constitutional restraints on the operation of a coordinate governmental branch may be a major, though unpronounced, reason for the legislature's hesitation to adopt a peremptory system. See FORDHAM Note, *supra* note 6, 161 n.158.

¹³³ *Id.* at 159-61.

emptory challenge statute may well cause more problems than it solves. The chief goals of any disqualification statute are to assure due process of law and to foster confidence in the judiciary.¹³⁴ The ability of a peremptory statute to better attain these goals is questionable. Due process is threatened by delays¹³⁵ resulting from the abuses that apparently accompany such a procedure,¹³⁶ and public confidence is likely to be further eroded by the use of this important due process safeguard as a mere instrument of trial strategy.¹³⁷ Creating a procedural formality that facilitates judge-shopping and delay can only exacerbate the public's already dim view¹³⁸ of the legal process.

Congress implicitly recognized the need to improve public confidence in the judiciary and legal system by amending section 455 and creating an appearance of impartiality test. However, the Fifth Circuit's *Davis* decision was an extremely narrow reading of this statute that was intended to broaden substantially the existing disqualification standards. The Fifth Circuit failed sufficiently to accommodate congressional intent in amending section 455. The *Davis* court's interpretation of the amendments alone, however, does not warrant dismissing the appearance of impropriety test as unworkable.¹³⁹ The Fourth and Tenth Circuits have demonstrated that the present legislation is suited both to according litigants due process and to avoiding situations which may be suspect in the public eye. The eventual solution for eliminating the inconsistencies in statutory interpretation and effectively implementing congressional intent is uniform federal court application of the 1974 amendments in a manner similar to the construction found in *Ritter*. The Tenth Circuit in *Ritter* based its decision ordering disqualification on the possible appearance of partiality, even though the court explicitly found bias could not be

¹³⁴ See Note, *Disqualification of a Federal District Judge for Bias - The Standard Under Section 144*, 57 MINN. L. REV. 749, 764 (1973).

¹³⁵ Undue delay has been held to lead to a greater denial of justice than a judge sitting on a case in which he has an interest. *In re Sime*, 22 F. Cas. 145 (C.C.D. Cal. 1872) (No. 12,860).

¹³⁶ See note 113 *supra*; text accompanying note 120 *supra*.

¹³⁷ See text accompanying note 116 *supra*.

¹³⁸ One source has described local courthouses as "a haven for vagrants sleeping in corridors, incompetent lawyers and bail bondsmen swarming about like vultures, and hack political appointees clothed in the robes of justice destroying lives through prejudice, whim, and limited legal ability." L. DOWNIE, *JUSTICE DENIED* 16 (1972). Additionally, Roscoe Pound pointed to delay as the greatest factor for discontent of the public in the courts. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

¹³⁹ See, e.g., FORDHAM Note, *supra* note 6.

inferred from the affiant's allegations.¹⁴⁰ This appearance of impartiality test created by the 1974 amendments is not prone to the abuse accompanying a peremptory system and, properly applied, insures due process and public confidence in the judiciary.

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¹⁴⁰ See text accompanying notes 63-66 *supra*.