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OBJECTIVITY AND HABEAS CORPUS:
SHOULD FEDERAL DISTRICT COURT JUDGES
BE PERMITTED TO RULE UPON THE VALIDITY
OF THEIR OWN CRIMINAL TRIAL CONDUCT?

Marilyn L. Kelley*

Title 28 U.S.C. § 2255 was adopted in 1948 with the avowed purpose of providing an expeditious remedy for correcting erroneous federal sentences without resort to habeas corpus.¹ The major innovation of section 2255 is its jurisdictional limitation that "[a] prisoner . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."² Prior to this enactment, the proper forum for federal prisoners seeking collateral review of their judgments of conviction was the district in which they were incarcerated.³ But the tremendous burden placed upon the few federal judges sitting in those districts,⁴ certain abuses of the writ of habeas corpus by petitioners,⁵ and the cost and inconvenience of requiring sentencing judges and assistant United States attorneys to appear as witnesses at habeas hearings in distant forums⁶ led to the adoption of section 2255. Thereafter, only where the statutory remedy proved "inadequate or ineffective" to test the legality of the incarceration was a federal prisoner to be permitted to seek a writ of habeas corpus.⁷ Commentators soon expressed fears that the new statute would impinge upon the right to the writ of habeas corpus,⁸ and in 1950 the Court of Appeals for the Ninth Circuit held section 2255 void as a suspension of the writ in violation of Article

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⁵See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 171-74 (1948).
An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
I, § 9 of the Constitution. To avoid reaching this constitutional issue, the Supreme Court held that the statute is a complete substitute for the constitutional right of habeas corpus, and that it maintains as broad a scope, procedurally and substantively, as that guaranteed by habeas corpus. In construing section 2255, the Court declared that the statutory remedy does not impinge upon the right of habeas corpus, since it affords "the same rights in another and more convenient forum."

On April 26, 1976, the Supreme Court prescribed rules to govern collateral proceedings in United States district courts brought by federal prisoners pursuant to section 2255. Rule 4(a) provides that the motion to vacate shall be heard by the judge who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall be heard by the judge who presided over that part of the proceedings being attacked by the movant. Thus, rule 4(a) restricts the jurisdictional provision of section 2255 to refer to the specific judge who imposed sentence or who presided over that part of the criminal proceedings being collaterally attacked. The result is that the 2255 judge will now issue an order to show cause why petitioner is being incarcerated when, in fact, it was that judge's own order, entered at the criminal trial, that incarcerated the petitioner.

Neither the legislative history nor the evils that section 2255 was intended to cure require the procedure imposed by rule 4(a). It should also be recognized that rule 4(a) goes further than the statutory language or the former practice of the federal courts. The statute only requires the petition to be filed in "the sentencing court," and while several of the circuit courts of appeals had interpreted "sentencing court" to mean "sentencing judge," the
sentencing judge may or may not have been the criminal trial judge. Furthermore, in the event that the sentencing judge had also been the criminal trial judge, he was expected to recuse from the 2255 proceeding where, for example, he was to be a witness,15 or where his past knowledge might affect his independent judgment.16 In contrast, rule 4(a) specifically requires the petition to go to the judge who presided over that part of the proceedings being attacked (whether he be the sentencing judge or some other) with no apparent discretion to recuse.

Since rule 4(a) provides a procedure significantly different from common law habeas corpus and from previous 2255 practice, consideration should be given to whether the rule provides an adequate basis for collateral review, or whether it impinges upon the right of petitioners to have the independent and impartial review anticipated by the constitutional right of habeas corpus.17

In addition, a substantial question may be raised concerning the lack of administrative efficiency in following the procedure of rule 4(a). Though rule 4(a) provides no exceptions to the same judge’s presiding, statutory recusation requirements for bias or prejudice,18 or for interest,19 or for judges called as witnesses20 ought to be applicable to 2255 proceedings. Additional hearings would necessarily be required to resolve these issues before reaching the merits of the motion to vacate. Although these issues might be raised no matter which judge presides, it seems far more likely that they would be raised (perhaps even encouraged) where the criminal trial judge presides over the subsequent 2255 hearing. It is also likely that the presiding judge would have personal knowledge of the events challenged collaterally and thus would frequently be

16See United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973); Battaglia v. United States, 390 F.2d 256, 259 (9th Cir. 1968).
17Habeas corpus is a civil proceeding. See Kaufman v. United States, 394 U.S. 217, 224 (1969); Townsend v. Sain, 372 U.S. 293, 311 (1963); Fisher v. Baker, 203 U.S. 174, 181 (1906); Cross v. Burke, 146 U.S. 82, 88 (1892); Farnsworth v. Montana, 129 U.S. 104, 113 (1889); Kurtz v. Moffitt, 115 U.S. 487, 494 (1885). It is independent of the criminal proceeding. See Kaufman v. United States, 394 U.S. at 224; Townsend v. Sain, 372 U.S. at 311-12; Riddle v. Dyche, 262 U.S. 333, 335-36 (1923); Ex parte Tom Tong, 108 U.S. 556, 559 (1883). The question of illegal incarceration is to be considered independently of any question of guilt, and entitlement to challenge illegal incarceration is not contingent upon proving one’s innocence. Ex parte Tom Tong, 108 U.S. at 559. This notion merely expresses that a person should not be deprived of life or liberty without due process of law and that guilt or innocence has no bearing upon this determination. But see Stone v. Powell, 96 S. Ct. 3037, 3050 (1976).
called as a witness. \(^{21}\) Where the 2255 judge erroneously elects not to disqualify himself from hearing the petition, the entire proceedings before that judge would be reversed and assigned to a different judge to hear all over again.\(^{22}\)

These problems are unnecessary since the jurisdictional limitation of section 2255 does not require the same judge to preside, nor has the statute ever been so interpreted.\(^{23}\) It is the purpose of this article to explore the consequences that rule 4(a) engenders by requiring the criminal trial judge to preside over the collateral attack and to rule upon the validity of his own work product.

I. LEGISLATIVE HISTORY OF SECTION 2255

At common law, the habeas judge could not examine a conviction for any purpose other than to verify that the committing court had jurisdiction to try the matter.\(^{24}\) This limited use of habeas corpus, adopted into the United States Constitution, was viewed as a privilege that extended only to federal court prisoners.\(^{25}\) In 1867, however, Congress granted to prisoners detained by authority of state courts the right to seek habeas corpus in federal district courts.\(^{26}\) More significantly, Congress provided an expansive subject matter jurisdiction clause permitting state court prisoners to

\(^{21}\) See Juelich v. United States, 342 F.2d 29 (5th Cir. 1965), where the original trial judge, after refusing to entertain the motion and being reversed, see Juelich v. United States, 300 F.2d 381 (5th Cir. 1962), and after refusing to produce petitioner at the subsequent required hearing and being reversed, see Juelich v. United States, 316 F.2d 726 (5th Cir. 1963) (per curiam), finally recused upon motion by the petitioner because the petitioner intended to call the judge as a witness. 342 F.2d at 31. By then, more than a year had elapsed from the first hearing required after reversal until the second subsequent hearing before a different judge. Id. at 30, 31. See also, United States v. Valentino, 283 F.2d 634, 636 (5th Cir. 1960); United States v. Halley, 240 F.2d 418, 419 (2d Cir. 1957), cert. denied, 353 U.S. 967 (1957).

\(^{22}\) See Halliday v. United States, 380 F.2d 270, 272-74 (1st Cir. 1967). See also, Battaglia v. United States, 390 F.2d 256, 259 (9th Cir. 1968).

\(^{23}\) The procedure has simply been viewed as "highly desirable." Carvell v. United States, 173 F.2d 348 (4th Cir. 1949).

\(^{24}\) See Ex parte Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830), where Chief Justice Marshall wrote:

The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be . . . . [A]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

See generally, Cohen, Some Considerations on the Origins of Habeas Corpus, 16 CAN. B. REV. 92 (1938); Cohen, Habeas Corpus Cum Causa — The Emergence of the Modern Writ —I, 18 CAN. B. REV. 10 (1940); Jenks, The Story of the Habeas Corpus, 18 LAW Q. REV. 64 (1902).


raise not only jurisdictional claims but also federal constitutional and statutory claims.\textsuperscript{27} Subsequently, this statutory provision was construed to apply to federal criminal adjudications as well,\textsuperscript{28} thereby expanding the issues subject to collateral attack by federal prisoners. In addition, habeas corpus was made available to challenge matters dehors the record.\textsuperscript{29} This extension of habeas review to include deprivation of constitutional rights, even those not of record, was made without adequate procedural controls. The inevitable result was a dramatic increase in habeas litigation,\textsuperscript{30} much of it without merit.\textsuperscript{31} For example, habeas proceedings could be invoked merely by petitioner's oath that the judgment was in violation of his constitutional rights.\textsuperscript{32} Since matters not contained in the record could be asserted, much time and expense were involved in bringing witnesses from a distant forum to testify with respect to those matters. Even where records and files were available, they were located, more often than not, in a district other than the one in which the petition was filed; therefore, much time

\textsuperscript{27}\textit{Id.} The Habeas Corpus Act of 1867 reads in part that the privilege of the Writ shall extend to "all cases where any person may be restrained of his or her liberty in violation of the constitution . . . ."

\textsuperscript{28}See Kaufman v. United States, 394 U.S. 217, 221 (1969). Prior to the \textit{Kaufman} decision, the development of the right of federal prisoners to challenge deprivation of constitutional rights had been hindered by contorted attempts to fit constitutional violations into the stringent test of "void for lack of jurisdiction." In 1879, the Supreme Court had expanded the definition of lack of jurisdiction to include unconstitutional acts of Congress. A conviction resting upon an unconstitutional statute was considered null and void since the trial court really acquired no jurisdiction of the cause. \textit{See Ex parte Siebold}, 100 U.S. 371, 376 (1879). In 1938, the Supreme Court again found a jurisdictional bar to a conviction based upon failure to appoint counsel where there was no showing that there had been intelligent waiver of that right. \textit{See} Johnson v. Zerbst, 304 U.S. 458 (1938). In 1942, the Supreme Court held that an allegation of a coerced guilty plea could be challenged on habeas corpus. The Court stated that

\begin{quote}
the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.
\end{quote}

\textit{Waley v. Johnston}, 316 U.S. 101, 104-05 (1942). After \textit{Waley}, federal district courts applied this standard on a case-by-case basis, rejecting certain constitutional claims as not cognizable on habeas corpus. \textit{See} Kaufman v. United States, 394 U.S. 217, 220, 220 n.3. In \textit{Kaufman}, the Court held that deprivation of all constitutional rights, even those rendered by courts of competent jurisdiction, may be challenged on habeas corpus. \textit{Id.} at 221, 223, 231. The Court relied directly upon the Habeas Corpus Act of 1867 for this interpretation. \textit{Id.} at 221.


\textsuperscript{31}See United States v. Hayman, 342 U.S. at 212, 212 n.14.

\textsuperscript{32}See Walker v. Johnston, 312 U.S. 275, 283 (1941).
and expense were involved in ordering and producing them. Habeas corpus procedure was also complicated by the common law rule that res judicata is not applicable to issues raised in habeas corpus proceedings, permitting habeas litigation to be renewed any number of times, and thereby increasing the burden of transferring records and requiring witnesses to appear in distant forums. Finally, the ever-expanding notion of due process has provided innumerable issues potentially cognizable in habeas proceedings, likewise increasing the burden of habeas litigation, and the transfer of records and appearance of witnesses.

In response to these problems, the Judicial Conference of the United States appointed a committee, chaired by Chief Judge Parker of the Court of Appeals for the Fourth Circuit, to examine and recommend changes in the habeas procedures. In 1944, the Conference submitted two bills to Congress to revise habeas corpus procedures for both state and federal petitioners. With respect to federal petitioners, the most significant proposal concerned a change in the appropriate forum for hearing collateral petitions. In a statement prepared by Circuit Judge Stone and submitted to Congress by the Conference, the proposed jurisdictional bill was described as follows:

This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, coram nobis. The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus.

Judge Stone's statement also explained the problems that the jurisdictional bill was intended to remedy:

Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal . . . [is] required to attend the habeas corpus hearing as [a witness]. Such attendance is sometimes necessary to refute particular

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34 See 1942 REPORT OF THE JUDICIAL CONFERENCE 18.
38 Id. at 216-17.
testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witnesses present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. 39

While the proposed bills of the Judicial Conference were pending, the Committee on Revision of the Laws of the House of Representatives drafted a bill revising the entire Judicial Code. 40 Portions were drafted in conformity with the bills of the Judicial Conference, in particular, the jurisdictional bill affecting federal habeas corpus petitioners. 41

Subsequent to the revision of the Judicial Code, Judge Parker wrote an article 42 listing the major abuses of the writ and giving his impression of what the new legislation was intended to accomplish. He asserted that the former procedure provided no opportunity for the trial judge to supplement the record or to furnish a statement of what had occurred at trial; that if heard, the trial judge was required to be heard in the capacity of an ordinary witness; and that this practice resulted in the "unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction ...." 43 Judge Parker believed that the new statute would resolve these problems, and noted that "in the case of federal prisoners, provision is made for relief by motion before the sentencing judge and right to habeas corpus in such cases is greatly limited ...." 44

Nothing in the legislative history, however, suggests that the petition should be filed before the very judge who tried and sentenced the petitioner. In fact, the precise argument presented to Congress for the necessity of enacting the jurisdictional bill was to permit trial judges to appear as witnesses in their own districts for the sake of convenience. 45

Shortly after the adoption of section 2255, in Carvell v. United States, 46 the Court of Appeals for the Fourth Circuit considered the propriety of the criminal trial judge’s presiding at the hearing of a motion brought pursuant to section 2255 to vacate his own prior

39 Id. at 217 n.25.
40 Id. at 218.
41 Id.
42 See Parker, supra note 5.
43 Id. at 172-73.
44 Id. at 174 (emphasis added). The notion that the criminal trial judge is the appropriate judge to preside at the collateral hearing attacking the validity of his own prior judgment appears to have been conceived in this article.
46 173 F.2d 348 (4th Cir. 1949).
sentence. In a per curiam opinion, in which Chief Judge Parker participated, the court ruled that:

Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that section 2255 of Title 28 was inserted in the Judicial Code.\textsuperscript{47}

Since Judge Parker was chairman of the committee appointed by the Judicial Conference to study the problems of habeas litigation and to make recommendations for correcting those problems, much deference has been accorded to this opinion in the belief that it represents Judge Parker's understanding of section 2255 and that it is good evidence of the legislative intent.\textsuperscript{48} Only the Court of Appeals for the First Circuit has taken issue with this statement of statutory purpose.\textsuperscript{49}

It has already been suggested that one of the main purposes of section 2255 was to provide a convenient forum in which the trial judge might testify, if necessary. That purpose is, obviously, contrary to the interpretation rendered in \textit{Carvell}.

Beyond this inconsistency, \textit{Carvell} suggests two significant issues: first, that it is highly desirable that the motions be passed upon by the judge who is familiar with the facts; and second, that the criminal trial judge is not likely to be misled by allegations in the 2255 petition as to what had occurred. The first issue raises the question of the proper function of the 2255 judge. Since \textit{Carvell} was decided before the landmark decision of \textit{Townsend v. Sain}\textsuperscript{50} (which set forth explicit criteria mandating factfinding by the habeas judge), it is appropriate to reconsider the validity of the rationale that there is no impropriety in permitting the judge who tried the criminal case to preside over a 2255 evidentiary hearing attacking the validity of that trial. The second issue raises by implication the question of the propriety of the trial judge's acting as both witness and trier of fact in the same proceeding. These issues

\textsuperscript{47}See \textit{Id.} at 348-49.


\textsuperscript{49}See \textit{Halliday v. United States}, 380 F.2d 270, 273 (1st Cir. 1967), where the court said "'[W]e find nothing . . . to indicate that 'court' was used in the restrictive sense of a specific judge.'"

\textsuperscript{50}372 U.S. 293 (1963).
should be considered in light of the functions and discretionary powers of the 2255 judge.

II. THE FUNCTIONS AND POWERS OF THE 2255 JUDGE

A. Factfinding: The Townsend Guidelines

The statute of 1867\(^{51}\) enlarged the habeas court’s functions to include the power to order evidentiary hearings and to “try the facts anew.”\(^{52}\) In *Townsend v. Sain*,\(^{53}\) the Supreme Court asserted that evidentiary hearings are mandatory where:

1. the merits of the factual dispute were not resolved in the state hearing;
2. the state factual determination is not fairly supported by the record as a whole;
3. the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
4. there is a substantial allegation of newly discovered evidence;
5. the material facts were not adequately developed at the state-court hearing; or
6. for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.\(^{54}\)

All of these guidelines (except the third) have been held applicable to section 2255 proceedings.\(^{55}\) Reading these guidelines in light of the procedure required by rule 4(a), it is doubtful that a 2255 review will be more than pro forma. Can the same judge determine objectively his own fairness and completeness in the criminal proceedings, particularly where the 2255 judge’s ruling will be based upon his own subsequent factfinding and where the adequacy of that factfinding will thereafter be subject only to limited appellate review?

\(^{51}\) Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.


\(^{54}\) *Id.* at 313. Even the dissent agreed that the district court had the power to receive evidence and try the facts anew. *Id.* at 326 (Stewart dissenting, with whom Justices Clark, Harlan and White joined). Moreover, the dissent agreed that “[w]here the facts are in dispute, the federal court . . . must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . . .” *Id.* at 327.

\(^{55}\) See Kaufman v. United States, 394 U.S. 217, 227 (1969), where the Court said that “only the duty of the federal habeas court to scrutinize ‘the fact-finding procedure’ under (3) does not apply in the case of a federal prisoner; federal factfinding procedures are by hypothesis adequate to assure the integrity of the underlying constitutional rights.”
It seems unlikely that such a review will be adequate to insure the underlying integrity of the prior criminal proceeding. This problem is well demonstrated in *McDonald v. United States*,\(^{56}\) where the trial judge who originally took petitioner's guilty plea dismissed a subsequent motion to vacate without a hearing, even though petitioner had alleged his own mental incompetence at the time he entered the guilty plea.\(^{57}\) The dismissal was reversed on appeal, and the case remanded with a direction to the trial judge to hold an evidentiary hearing.\(^{58}\) The 2255 judge then held the obligatory hearing, made a finding that petitioner was competent at the time his plea was entered, and again dismissed the motion.\(^{59}\) On appeal, the judgment was affirmed for the reason that "the trial court's findings are well supported by the evidence and they are conclusively binding here."\(^{60}\) The net result of this procedure is that it permits the trial judge to find as true those facts which support his own prior ruling.

### B. Discretionary Powers

A conviction carries with it the presumption of regularity,\(^{61}\) and the burden of proving its irregularity rests upon the petitioner.\(^{62}\) While a motion to vacate under section 2255 is a civil proceeding,\(^{63}\) requiring proof by a preponderance of the evidence,\(^{64}\) the burden of proving irregularity apparently may increase simply by the passage of time from the entry of sentence to the filing of a motion.\(^{65}\) Even where evidence is undisputed, the court may choose to disbelieve the petitioner's evidence,\(^{66}\) and that disbelief may be

\(^{56}\)341 F.2d 378 (10th Cir. 1965), dismissal aff'd on remand, 356 F.2d 980 (10th Cir. 1966) (per curiam), cert. denied, 385 U.S. 936 (1966).
\(^{57}\)Id. at 378.
\(^{58}\)Id.
\(^{59}\)See *McDonald v. United States*, 356 F.2d 980, 981 (10th Cir. 1966) (per curiam), cert. denied, 385 U.S. 936 (1966).
\(^{60}\)Id. at 982.
\(^{61}\)Johnson v. Zerbst, 304 U.S. 458, 468 (1938); Cuddy, *Petitioner*, 131 U.S. 280, 286 (1889); Hilliard v. United States, 345 F.2d 252, 255 (10th Cir. 1965) (presumption of validity); Simpson v. United States, 342 F.2d 643, 645 (7th Cir. 1965) (presumption that the court acted reasonably).
\(^{64}\)See Johnson v. Zerbst, 304 U.S. at 469.
\(^{66}\)See Hawk v. Olson, 326 U.S. 271, 279 (1945).
based upon the mere passage of time,\textsuperscript{67} leading the court to find that the petition "lacks merit"\textsuperscript{68} or that it lacks "good faith and credibility."\textsuperscript{69}

The 2255 judge is empowered to make value judgments concerning petitioner's motion,\textsuperscript{70} and relying upon those judgments, to grant or deny varied forms of assistance to petitioner in challenging the conviction.\textsuperscript{71} The judge may, for example, find the petition factually insufficient on its face\textsuperscript{72} and summarily dismiss it,\textsuperscript{73} without requiring the Government to respond.\textsuperscript{74} The court may permit

\textsuperscript{67}See Raines v. United States, 423 F.2d 526, 531 (4th Cir. 1970) (The delay in filing merits consideration.); Morse v. United States, 304 F.2d 876, 877 (8th Cir. 1962) (per curiam) (A claim filed at such a late date was "suspect."); Malone v. United States, 299 F.2d 254, 256 (6th Cir. 1962) (The failure to assert a claim earlier raises a strong inference of invalidity.); Bishop v. United States, 223 F.2d 582, 586 (D.C. Cir. 1955) (The burden of proof was magnified by the lapse of time.); United States v. Lowe, 173 F.2d 346, 347 (2d Cir. 1949) (The allegations were considered a "mere afterthought."); Daughtry v. United States, 242 F. Supp. 771, 774 (E.D.N.C. 1964), cert. denied, 385 U.S. 881 (1966), rehearing denied, 385 U.S. 965 (1966) (The allegations might have credence, but were adduced only after trial and sentence; therefore, they were considered "self-serving."). Contra, Sturrup v. United States, 218 F. Supp. 279, 281 (E.D.N.C. 1963); Allen v. United States, 102 F. Supp. 866, 869 (N.D. Ill. 1952), where the court stated, "No aging process, whereby a void judgment improves as to stature and validity by the passage of time, can properly be interposed."

\textsuperscript{68}See Sanders v. United States, 373 U.S. 1, 21 (1963), where the Court said that "the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing." See also Johnson v. United States, 239 F.2d 698, 699 (6th Cir. 1956), cert. denied, 354 U.S. 940 (1956), where the court asserted, in affirming the denial of an evidentiary hearing, "[W]e cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for rehearings based on obviously nebulous and false accusations."

\textsuperscript{69}Aiken v. United States, 191 F. Supp. 43, 50 (M.D.N.C. 1961), aff'd, 296 F.2d 604 (4th Cir. 1961).

\textsuperscript{70}See Sanders v. United States, 373 U.S. 1, 21 (1963), where the Court said that "it is not the law that in every case where the movant may set forth a claim which appears to be good on paper although manifestly false in fact and frivolous, the District Court is nevertheless obliged to grant him an oral hearing .... It is necessary that the movant substantiate his conclusions by allegations of fact with some probability of verity.

\textsuperscript{71}See Malone v. United States, 299 F.2d 254, 255-56 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962) where the court said:

It is not the law that in every case where the movant may set forth a claim which appears to be good on paper although manifestly false in fact and frivolous, the District Court is nevertheless obliged to grant him an oral hearing .... It is necessary that the movant substantiate his conclusions by allegations of fact with some probability of verity.

\textsuperscript{72}See United States v. Mathison, 256 F.2d 803, 805 (7th Cir. 1958) (petition requires more than "wild and unsupported charges"); Nemirka v. United States, 234 F. Supp. 463, 466 (S.D.N.Y. 1964) (not entitled to a hearing if the assertion is "incredible").

\textsuperscript{73}See Sanders v. United States, 373 U.S. 1, 19 (1963); Aebly v. United States, 409 F.2d 1, 2 (5th Cir. 1969) (allegation of prejudicial remarks was a "mere conclusion"); Benthiem v. United States, 403 F.2d 1009, 1011, 1011 n.5 (1st Cir. 1968), cert. denied, 396 U.S. 945 (1969) (specificity of fact required to justify furnishing petitioner a transcript); United States v. Lowe, 367 F.2d 44, 45-46 (7th Cir. 1966) (allegation that petitioner pleaded guilty because of "threats and promises" held too vague to require inquiry); Hammond v. United States, 309 F.2d 935, 936 (4th Cir. 1962) (per curiam) (petitioner's allegation of knowing use of perjured testimony legally insufficient, so summary dismissal not error).

\textsuperscript{74}See Wilkins v. United States, 258 F.2d 416, 417 (D.C. Cir. 1958), cited with approval by the Supreme Court in Sanders v. United States, 373 U.S. 1, 19 (1963), though the Court noted that "the better course might have been to direct petitioner to amend his motion .... See also Stephens v. United States, 246 F.2d 607 (10th Cir. 1957) (per curiam).

\textsuperscript{75}See Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970); Conway v. California Adult Auth., 396 U.S. 107, 109-10 (1969) (per curiam). See also Rule 3(b) governing 2255 Proceedings, 96 S. Ct. 27 (yellow pages) (1976).
petitioner to amend his petition to set forth facts more specifically in order to avoid dismissal, but it is not error to deny the opportunity to amend and to dismiss summarily. The court may dismiss a petition, moreover, upon the value judgment that petitioner probably has no set of facts other than unsupported conclusions to demonstrate his entitlement to a hearing.

It is well-recognized that lay people, not adept at pleading and unaware of the significance of pleading particular facts, may plead conclusory allegations that are insufficient on their face. Because of this, district courts have been admonished to construe pleadings liberally. Yet, permitting amendment of conclusory allegations is discretionary and, since the statute permits successive similar applications, courts frequently dismiss rather than permit amendment, noting that the dismissal is without prejudice to the bringing of a subsequent petition. This is unfortunate not only because it wastes time and encourages repetitious applications, but also because it subjects the petitioner to the discretionary power of the court to dismiss a second or successive petition seeking similar relief. This should not be; dismissal for insufficient pleadings is not a dismissal on the merits. Nonetheless, courts become impatient, and petitioners get caught in the maze of rules and discretionary powers of the courts. Thus conclusory pleadings result in dismissal; subsequent and belated pleadings of fact become "suspect," magnifying petitioner's burden of proof. The petitioner may then be required to demonstrate that his belated pleadings are not "an abuse of the writ or motion remedy."

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75See Stephens v. United States, 246 F.2d 607 (10th Cir. 1957) (per curiam).
76Id.
77United States v. Mathison, 256 F.2d 803, 805 (7th Cir. 1958).
78Sanders v. United States, 373 U.S. 1, 22 (1963), where the Court stated that "[a]n applicant . . . ought not to be held to the niceties of lawyers' pleadings . . . ."
7928 U.S.C. § 2255 (1970), which reads in part "[a] motion for such relief may be made at any time." This has been interpreted to mean that "as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable." Heflin v. United States, 358 U.S. 415, 420 (1959) (concurring opinion).
80See, e.g., Raines v. United States, 423 F.2d 526, 531, 531 n.5 (4th Cir. 1970); Aeby v. United States, 409 F.2d 1, 2 (5th Cir. 1969); Oliver v. United States, 398 F.2d 353, 355-56, 356 n.5 (9th Cir. 1968).
8128 U.S.C. § 2255 (1970), reads in part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."
83See Martinez v. United States, 344 F.2d 325, 326 (10th Cir. 1965) (per curiam), where the court said in discussing petitioner's motion that it "def[ied] intelligent analysis"; Heisler v. United States, 321 F.2d 641, 642-43 (9th Cir. 1963), where the court said in dismissing petitioner's motion and denying him an opportunity to amend, "[i]f this be appellant's meaning, however, in our judgment it is not demanding too much of him to ask that he take the responsibility of coming right out and saying so in a recital of facts . . . ."
84Morse v. United States, 304 F.2d 876, 877 (8th Cir. 1962) (per curiam).
85See Bishop v. United States, 223 F.2d 582, 586 (D.C. Cir. 1955).
86Sanders v. United States, 373 U.S. 1, 17 (1963). It should be noted that in Sanders the Court placed the burden of pleading abuse of the writ on the Government. Id. at 17. Under rule 9(a) governing § 2255 proceedings, however, the burden appears to be shifted to the
Ultimately, the court may simply make the value judgment that petitioner must surely have known of the significance of the facts belatedly pleaded and therefore dismiss his petition (for intentionally splitting his cause of action or for vexing, harassing, and delaying the court’s administration) without ever deciding the merits.

The 2255 court has discretion to appoint counsel, and may do so upon a conclusion that the petition is not frivolous. Yet it is very likely that a petition will appear frivolous due to petitioner’s inability to plead his own cause effectively, which only demonstrates the need for professional assistance in preparing his petition.

The court also has discretion to grant or deny a transcript to a petitioner. While many claims may not be based upon occurrences that would appear in a transcript, denial of a transcript requires petitioner to plead matters to the best of his recollection, and thus he may fail to raise all claims known to him. Again, an initial failure to raise all claims subjects petitioner to the discretion-
The court has the further discretion to grant or deny leave to appeal in forma pauperis from a ruling adverse to petitioner. Denial of leave to appeal in forma pauperis is based upon the trial judge’s certification that the petition is without merit and not taken in good faith. This denial may thus foreclose review on the simple ground that there was no abuse of discretion in denying an appeal in forma pauperis.

The court also has discretion to determine whether a claim is "substantial" before granting a full evidentiary hearing. Thus even when not required under the Townsend guidelines, the court may choose to grant an evidentiary hearing whenever it believes the claims are substantial or meritorious. Where the court determines that a hearing will be granted, it has the further discretion to determine whether petitioner’s presence will be ordered; whether counsel will be appointed; whether certain witnesses will be subpoenaed; whether continuances will be granted or

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96 Id. at 261. See also 28 U.S.C. § 1915(a)(1970).  
98 See Sanders v. United States, 373 U.S. 1, 21 (1963). Compare Turner v. United States, 271 F.2d 855, 856 (8th Cir. 1959) (per curiam), where petitioner’s claimed denial of effective assistance of counsel was dismissed as a "self-serving unsupported and belated declaration ...." with United States v. Hayman, 342 U.S. 205, 223 (1952), where the Court said that "where ... there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.", and Walker v. Johnston, 312 U.S. 275, 287 (1941), where the Court said "[t]he Government’s contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.", and Machibroda v. United States, 368 U.S. 487, 495 (1962), where the Court said, "We cannot agree with the Government that a hearing ... would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged, other than the petitioner himself and the Assistant United States Attorney." (emphasis added).  
99 See Townsend v. Sain, 372 U.S. 293, 318 (1963). See also Johnson v. United States, 239 F.2d 698, 699 (6th Cir. 1956) (per curiam), cert denied, 354 U.S. 940 (1956), where the court in affirming the denial of petitioner’s motion said, "His allegations seem to follow a pattern which has become prevalent to enable convicts under long-time sentences to obtain vacations from imprisonment by trumped-up charges against their attorneys and court officials, even including district judges."  
101 See Day v. United States, 428 F.2d 1193, 1195 (8th Cir. 1970) (appointment of counsel discretionary, and not constitutionally required); Ford v. United States, 363 F.2d 437 (5th Cir. 1966) (per curiam); Thomas v. United States, 308 F.2d 369, 371 (7th Cir. 1962). There is no longer any discretion where an evidentiary hearing is required, see rule 8(c) governing 2255 proceedings, or where discovery is necessary, see rule 6(a) governing 2255 proceedings.  
102 See Goldsby v. United States, 160 U.S. 70, 73 (1895) (criminal trial); Bistram v. United States, 248 F.2d 343, 347 (8th Cir. 1957) (2255 proceeding).  
discovery permitted;\textsuperscript{104} whether evidence will be taken by oral testimony, affidavits,\textsuperscript{105} or depositions;\textsuperscript{106} and further, which rules of procedure (civil or criminal) will govern the proceedings.\textsuperscript{107}

Finally, trial courts are placed in the position not only of protecting the criminal judgments (which have a presumption of validity and are not lightly set aside)\textsuperscript{108} but also of protecting counsel who are under attack for incompetency.\textsuperscript{109} This protective position of the court certainly makes the preponderance-of-the-evidence test a heavier requirement than in other civil proceedings. When it is the same judge presiding, who may wish to protect a conviction which he believes to have been fairly proved beyond a reasonable doubt, and who, having heard the evidence, is convinced of petitioner's guilt, he may find it difficult to view petitioner's claims objectively and independently of the prior criminal proceeding.\textsuperscript{110} He may, in his desire to protect the judgment, exercise his discretionary and evaluative powers to diminish petitioner's ability to mount a successful attack, or to enhance the judgment's chances of surviving the attack.

This exercise of discretionary powers may not constitute overt bias or prejudice sufficient to require statutory recusation,\textsuperscript{111} but it may destroy the independence and objectivity contemplated by the right to the writ of habeas corpus.\textsuperscript{112} The basic concern must be

\textsuperscript{104}Rule 6(c) governing 2255 proceedings provides in part that "[a] party may invoke . . . discovery . . . if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

\textsuperscript{105}See Phillips v. United States, 533 F.2d 369, 371 (8th Cir. 1976); Johnson v. United States, 239 F.2d 698, 699 (6th Cir. 1956) (per curiam), cert. denied, 354 U.S. 940 (1956).

\textsuperscript{106}See Kimbrough v. United States, 226 F.2d 485, 488 (5th Cir. 1955).

\textsuperscript{107}Rule 12 governing 2255 proceedings provides that:

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.


\textsuperscript{109}See Busby v. Holman, 356 F.2d 75, 79 (5th Cir. 1966), where the court said: "It is not counsel who is on trial."; Scherck v. United States, 242 F. Supp. 445, 450 (N.D. Cal. 1965), aff'd sub nom. Scherck v. United States, 354 F.2d 239 (9th Cir. 1965) (per curiam), cert. denied, 382 U.S. 882 (1965); United States v. Edwards, 152 F. Supp. 179, 185 (D.D.C. 1957), aff'd, 236 F.2d 707 (D.C. Cir. 1958), where the district court said, "[T]he courts are equally bound to protect members of the bar appearing before them against unjust and unwarranted attacks." See also id. at 186.

\textsuperscript{110}See, e.g., Johnson v. United States, 239 F.2d 698, 699 (6th Cir. 1956) (per curiam), cert. denied, 354 U.S. 940 (1956), where the court in affirming the denial of petitioner's motion referred to the district judge's written order, which asserted "his conviction that [petitioner] had been fairly tried, was ably represented by highly experienced counsel, and that the judge was convinced of [petitioner's] guilt . . . ."


\textsuperscript{112}See notes 288-96 and accompanying text infra.
whether permitting a 2255 judge to exercise these discretionary powers in order to control the extent of review of his own prior criminal trial conduct provides an adequate collateral review.

C. Limited Appellate Review

Where the motion to vacate is ineffective to test the validity of the judgment, one may theoretically seek a writ of habeas corpus before a different judge. This right is merely theoretical. Since the Supreme Court decided in United States v. Hayman that section 2255 is a complete substitute for habeas corpus, section 2255 has been treated as the exclusive remedy for petitioners seeking to attack their convictions collaterally. Thus, the sole remedy for denial of relief under section 2255 is by appeal, not by petition for writ of habeas corpus.

Refusal of the 2255 judge to exercise his discretionary powers is reversible on appeal only for abuse of discretion, and his findings of fact and evaluations of the merits and credibility of petitioner's claims are reversible only when clearly erroneous.

114 See, e.g., Madigan v. Wells, 224 F.2d 577 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956), where the court reversed the grant of a writ of habeas corpus by the district court for the reason that petitioner had previously been denied similar relief under § 2255 by the sentencing court, and that there was no allegation in the habeas petition that the remedy by motion to vacate was inadequate or ineffective to test the validity of the sentence. Id. at 577-78. This decision was rendered in spite of the fact that the court agreed with the lower court's legal conclusion regarding the validity of petitioner's claim. The reversal appears to have been grounded solely on the appellate court's conclusion that the district court was without jurisdiction to hear the petition.
116 Id. at 219.
117 See Hill v. United States, 368 U.S. 424, 427 (1962); Heflin v. United States, 358 U.S. 415, 421 (1959) (concurring opinion); Brown v. United States, 351 F.2d 564, 568 (7th Cir. 1965); Williams v. United States, 283 F.2d 59, 60 (10th Cir. 1960).
118 See Cagle v. Humphrey, 112 F. Supp. 846, 847 (M.D. Pa. 1953), where the court said in denying habeas corpus:
This remedy [§ 2255] is not an intermediate step but an exclusive substitute except in those rare situations where the remedy by motion would be inadequate or ineffectual. Since the remedy under § 2255 is exclusive, if applicant is unsuccessful on such motion, it does not entitle him to a reconsideration by habeas corpus in another district. His remedy is by appeal from the judgment on the motion.
119 The mere denial of relief under § 2255 does not demonstrate the inadequacy or ineffectiveness of the motion remedy, entitling one to seek a writ of habeas corpus. See Walker v. United States, 429 F.2d 1301, 1302-03 (5th Cir. 1970) (per curiam); Sanchez v. Taylor, 302 F.2d 725, 726 (10th Cir. 1962) (per curiam), cert. denied, 371 U.S. 864 (1962); United States v. Anselmi, 207 F.2d 312, 314 (3d Cir. 1953), cert. denied, 347 U.S. 902 (1954); Jones v. Squier, 195 F.2d 179, 180 (9th Cir. 1952); Martin v. Hiatt, 174 F.2d 350, 352 (5th Cir. 1949).
120 See, e.g., Irwin v. United States, 414 F.2d 606 (9th Cir. 1969) (per curiam); Parsons v. United States, 404 F.2d 888 (5th Cir. 1968) (per curiam); Dillon v. United States, 307 F.2d 445, 448 (9th Cir. 1962); McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961); Beck v. Wings Field, Inc., 122 F.2d 114, 116 (3d Cir. 1941).
121 See Lucero v. United States, 425 F.2d 172, 173 (10th Cir. 1970) (per curiam); Martin v. United States, 399 F.2d 708 (5th Cir. 1968) (per curiam).
Thus, the appellate checks upon the 2255 judge are extremely limited, leaving the right of collateral review (pursuant to rule 4(a)) subject to the power of the very judge whose rulings are being attacked.

III. PRACTICE IN THE FEDERAL COURTS PRIOR TO THE PROMULGATION OF RULE 4(a)

A. The Supreme Court

The Supreme Court has never squarely considered the issue of the propriety of the same judge’s presiding at both the criminal trial and the subsequent hearing attacking the validity of that trial. It has, however, implicitly approved the practice by acknowledging its use in three major cases,\(^{122}\) two of which provide interesting, if not lucid, dicta touching on the issue.

In *Machibroda v. United States*,\(^ {123}\) petitioner pleaded guilty to two informations and was given consecutive sentences of twenty-five and fifteen years.\(^ {124}\) Three years later, petitioner filed a motion to vacate sentence before the same judge who had sentenced him, on the ground that the pleas had been induced by promises of the assistant United States attorney that petitioner would receive a maximum sentence of not more than twenty years.\(^ {125}\)

The Government admitted that the assistant United States attorney had visited petitioner in jail before sentencing and had told him the court might well take his refusal to talk into consideration, but denied that he had made any promises or threats.\(^ {126}\) Without an evidentiary hearing, the judge determined that petitioner’s allegations were false and denied the motion.\(^ {127}\) The Court of Appeals for the Sixth Circuit affirmed.\(^ {128}\)

\(^{122}\) See *Kaufman v. United States*, 394 U.S. 217, 219 (1969); *Sanders v. United States*, 373 U.S. 1, 20 (1963); *Machibroda v. United States*, 368 U.S. 487, 495 (1962) & 496 (dissenting opinion). In *Kaufman*, the trial judge dismissed the petition because he believed that the issue of illegal search and seizure was not cognizable on a motion to vacate. Therefore, the issue of the same judge’s presiding was not relevant to the Supreme Court’s decision on that issue.


\(^{124}\) Id. at 488.

\(^{125}\) Id. at 488, 489.

\(^{126}\) Id. at 491-92.


On certiorari, the Supreme Court vacated the judgment and remanded for a hearing, stating that the district court had not proceeded in conformity with 28 U.S.C. § 2255 when it made findings on controverted issues of fact without an evidentiary hearing. Since the petition alleged occurrences outside the courtroom, there was no record. Thus, "[t]his was not a case [which could be] conclusively determined either by the motion . . . or by the 'files and records' in the trial court." Despite the clear language of the statute that only those cases which can conclusively be decided by the motions, files, and records require no hearing, the Supreme Court intimated that there might be yet other cases which the 2255 judge could resolve without a hearing by "drawing upon his own personal knowledge or recollection." The Court did not spell out, however, what circumstances would create such a case, concluding obliquely that:

What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense.

The dissent contended that the majority had rejected the inferences drawn from the files and records by the courts below and had substituted its own finding that "these materials do not conclusively belie petitioner's story . . . ." According to the dissent, the opinion represents a failure to give due deference to the inferences drawn by the two lower courts, and unwarrantedly restricts the summary disposition provision of section 2255.

Whether one agrees with the dissent or not, it seems safe to say that the majority’s proposed standard of "palpably incredible" allegations is too vague to be helpful. Moreover, the entitlement of the trial judge to rely upon his personal knowledge to defeat a 2255 petition is not necessarily limited by this standard. Even though the allegations are precise and are not palpably incredible, the Court

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130 Id. at 494.
131 Id.
132 See 28 U.S.C. § 2255 (1970), which reads in part that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ."
133 Machibroda v. United States, 368 U.S. at 495.
134 Id.
135 Id. at 497 (dissenting opinion).
seems to say that the trial judge may still use his personal knowledge to defeat a 2255 petition.\textsuperscript{137} If the trial judge may so use his personal knowledge, it is not clear under the language of \textit{Machibroda} whether the trial judge may rely upon this knowledge in order to dismiss a petition without holding any evidentiary hearing at all, or whether the judge must hold a hearing, at which time he may interject his personal knowledge to defeat petitioner's claims. However the problem is viewed, neither procedure suggested would be satisfactory. Were the judge permitted to avoid an evidentiary hearing altogether, the procedure would contradict the holding of \textit{Machibroda} that the 2255 judge may not make findings on controverted issues of fact without an evidentiary hearing. On the other hand, were the judge permitted to be the State's material witness, and then to rule on the truth and veracity of his own testimony in order to defeat petitioner's claims, the court would be embroiled in a conflict of interests, thereby giving rise to due process issues.\textsuperscript{138}

The question of whether a trial judge may rely upon his personal knowledge to defeat a petitioner's claim was addressed again in \textit{Sanders v. United States}.\textsuperscript{139} There, petitioner, without assistance of counsel, pleaded guilty to a charge of robbery.\textsuperscript{140} At the sentencing, petitioner requested that the court send him to an institution for treatment of drug addiction, stating, "I have been using narcotics off and on for quite a while."\textsuperscript{141} Several months later, petitioner filed a motion to vacate alleging that when he pleaded guilty and was sentenced he was mentally incompetent because narcotics were administered to him by the medical authorities at the jail while he awaited his appearance in court.\textsuperscript{142} The judge who had received his guilty plea and sentenced him denied the motion without a hearing, stating that "petitioner's complaints are without merit in fact."\textsuperscript{143} The Court of Appeals for the Ninth Circuit

\textsuperscript{137}Id. at 495, where the majority said: "Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection."

\textsuperscript{138}See Part III C I & IV B infra.

\textsuperscript{139}373 U.S. 1 (1963).

\textsuperscript{140}Id. at 4.

\textsuperscript{141}Id.

\textsuperscript{142}Id. at 5.

\textsuperscript{143}Unreported opinion, quoted in Sanders v. United States, 373 U.S. at 6. The denial of a hearing in the lower court was also based upon the trial judge's opinion that § 2255 gave him discretionary power to refuse a hearing where petitioner could have raised the claim on a prior motion, but had failed to do so. Id. at 6. The Supreme Court reversed and remanded for a hearing, after having noted both grounds for denial of the hearing. The Court's opinion, however, deals more extensively with the trial judge's discretionary power to deny hearings on subsequent petitions than it does with the trial judge's power to rely on his personal knowledge to defeat petitioner's claim.
affirmed; the Supreme Court reversed and remanded for a hearing.

Significantly, the Supreme Court recognized that certain facts outside the record might be known to the judge who had received petitioner's guilty plea and sentenced him, but observed that the facts alleged in this particular petition could not have been known to the trial judge. Therefore, the judge's impression that the petitioner acted with intelligence and understanding in responding to the judge's inquiries "[could not] 'conclusively show,' as the statute requires, that there [was] no merit in [petitioner's] claim." This statement suggests by negative implication that were the facts of the petition within the personal knowledge of the judge, his impressions would be treated as part of the "files and records" for purposes of determining whether to grant or deny an evidentiary hearing. Since those impressions are, in fact, unrecorded memories of the judge, their use under the guise of "files and records" would not only defeat petitioner's right to an evidentiary hearing whenever the facts are in dispute, but also would defeat the plain meaning of the statute that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing . . . ." In addition to this potential use of the trial judge's past observations as "records and files," it is also possible that past observations may be used by the judge to determine that a claim is "insubstantial" and therefore within the trial judge's discretionary power to grant or deny an evidentiary hearing. In Sanders, the Court recognized that the sentencing judge "has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing," but declined to accept the trial judge's finding that the complaints lacked merit. Instead, the Court reconsidered the files, records, and the facts alleged in the petition, and, drawing its own inferences, concluded that no answer could be deduced from the files and that the statute therefore required a hearing. The Court thereby precluded the trial judge's exercise of discretion, and his use of common sense, past observations, and inferences reasonably drawn therefrom as factors to be weighed in the final decision to grant or deny an evidentiary hearing.

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144 See Sanders v. United States, 297 F.2d 735 (9th Cir. 1961) (per curiam), rev'd, 373 U.S. 1 (1963).
146 Id. at 20.
147 Id.
149 Id. at 20.
150 Id. at 21.
From Machibroda and Sanders one may infer that there are limited circumstances when the trial judge presumably may use common sense, past observations, and discretion to deny 2255 petitions. But neither of these opinions is helpful since neither establishes a clear standard, or involves facts that would permit the use of common sense or reasonable inference based upon past observations. Moreover, no specific situation was suggested in either opinion as being an appropriate one for summary disposition, without an evidentiary hearing, based upon the judge’s personal knowledge. The extent to which a trial judge may use his past observations in evaluating 2255 petitions is thus unresolved.

B. The Courts of Appeals

Since the adoption of section 2255, it has never been error per se for the same judge to rule upon the correctness or fairness of his own judgment of conviction. There have been, however, various exceptions to this general rule, the broadest of which was created by the Court of Appeals for the First Circuit.

In Halliday v. United States, the trial court accepted defendant’s guilty plea without inquiring into the voluntariness of his plea or his understanding of the charges. Twelve years later, defendant filed a motion to vacate, requesting that he be permitted to change his plea because he did not understand the significance of the proceeding. The original sentencing judge heard the motion despite defendant’s request that a different judge preside. Following the hearing, the court ruled that the original proceeding was sufficient, since there was nothing to indicate that defendant had not acted voluntarily or had not understood the significance of the proceeding.

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151 Arguably, the Court of Appeals for the First Circuit has held this procedure to be error per se. See Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972) (per curiam); Halliday v. United States, 380 F.2d 270, 272-73 (1st Cir. 1967), petition denied, 274 F. Supp. 737 (D. Mass. 1967), aff'd, 394 F.2d 149 (1st Cir. 1969) (per curiam); Haverhill Gazette Co. v. Union Leader, 333 F.2d 798, 808 (1st Cir. 1964), cert. denied, 379 U.S. 931 (1964).

The general rule as stated in Haverhill was that where a second trial is required, a different judge should preside. Since a motion to vacate is a different cause of action and not a continuation of the criminal proceeding, it is a different trial falling within the rule of Haverhill. See Halliday v. United States, 380 F.2d at 272. In Halliday, however, the court distinguished factfinding from rulings of law. Id. at 272-74. Therefore, the rule of the First Circuit may be that it is not error per se for the same judge to rule only upon a question of law, which is subject to review by appeal; whereas, it would be error per se for him to take evidence and make findings of fact.

152 380 F.2d 270 (1st Cir. 1967).
153 Id. at 271.
154 Id. at 271-72.
155 Id. at 272.
156 Id.
The Court of Appeals for the First Circuit reversed, holding that Federal Rule of Criminal Procedure 11 imposes a burden of inquiry into the facts. The necessity of a factual inquiry raised the further issue of the propriety of allowing the same judge, who had already made a finding of voluntariness on inadequate evidence, to review the correctness of that determination. The court of appeals held that this was not proper, since the 2255 court was "re-weighing factual inferences and credibility, as distinguished from applying rulings on issues of law." In ruling, the court expressly rejected Judge Parker's thesis that the purpose of section 2255 was to permit the trial judge to review his own proceedings. Moreover, the court rejected the contention that "it would be unseemly for a judge to testify in contradiction to a defendant as to a past occurrence in his courtroom," and asserted that "it [would be] far worse that he should be the trier of fact to determine his own credibility." Nevertheless, the court found no constitutional compulsion for its ruling; rather, the decision was premised upon a "conviction that the best practice dictates such a policy."

Beyond this broad exception requiring recusation where the court is engaged in factfinding, the practice of returning to the same judge was generally approved before the adoption of rule 4(a). It was not considered to be a violation of any notion of objectivity under the due process clause, and even where the trial judge had referred to the petition as "scurrilous," it was held not to be a prejudgment that denied petitioner a fair hearing. The practice

157 Id.
158 Id. at 272-73.
159 Id. at 273. The court stated "[W]e are not persuaded ... that the judge's connection with the drafting of section 2255 should supplement legislative history that contains no such suggestion, and which demonstrates concern with quite a different matter."
160 Id. at 273.
161 See also note 166 infra.
162 See, e.g., Mirra v. United States, 379 F.2d 782, 788 (2d Cir. 1967), cert. denied, 389 U.S. 1022 (1967); United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954); Carvell v. United States, 173 F.2d 348, 348-49 (4th Cir. 1949); Guerra v. United States, 447 F.2d 457 (5th Cir. 1971); United States v. Osborn, 415 F.2d 1021, 1025 (6th Cir. 1969), cert. denied, 396 U.S. 1015 (1970); Simpson v. United States, 342 F.2d 643 (7th Cir. 1965); Davis v. United States, 210 F.2d 118, 122 (8th Cir. 1954) (by implication); Reiff v. United States, 299 F.2d 366, 367 (9th Cir. 1962), cert. denied, 372 U.S. 937 (1963); Wrone v. United States, 367 F.2d 169 (10th Cir. 1966) (per curiam); Clark v. Memolo, 174 F.2d 978, 982 (D.C. Cir. 1949).
was also held not to violate the prohibition against suspension of the writ of habeas corpus;\textsuperscript{165} and, finally, it was held not to invoke the exception under section 2255 that when the motion remedy is “inadequate or ineffective” to test the validity of the judgment, petitioner may seek a writ of habeas corpus in the district of confinement.\textsuperscript{166}

A number of limited exceptions to the general rule are, however, imposed by statute and case law, although there is no general agreement among the circuits as to when any of them is to be invoked. The statutory exceptions are: (1) that the same judge is not permitted to preside where he would have to appear as a witness;\textsuperscript{167} (2) that the same judge is not permitted to preside where specific bias or prejudice is asserted in an affidavit timely filed,\textsuperscript{168} and (3) that the same judge is not permitted to preside where interest in the cause is alleged.\textsuperscript{169} Although rule 4(a) says that the same judge “shall” sit, and provides no exceptions other than “unavailability” of that judge,\textsuperscript{170} these statutory exceptions should be read into the rule. Section 2255 is not expressly excepted from any of these statutory recusation requirements; there is therefore no good reason why any of these statutory provisions governing judicial behavior should not be considered to govern 2255 proceedings.

The courts have required recusation under other limited circumstances, for example, where hearsay matters, such as presentence reports, might affect the judge’s objectivity;\textsuperscript{171} where the judge is accused of having threatened to give petitioner a more severe sentence were he to go to trial rather than plead guilty;\textsuperscript{172} or where the petition seeks reduction of a sentence.\textsuperscript{173} These excep-

\textsuperscript{165}See Cantu v. Markley, 353 F.2d 696, 698 (7th Cir. 1965).
\textsuperscript{166}See Stirone v. Markley, 345 F.2d 473, 474 (7th Cir. 1965), cert. denied, 382 U.S. 829 (1965); Madigan v. Wells, 224 F.2d 577 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956); United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954); United States v. Anselmi, 207 F.2d 312, 314 (3d Cir. 1953), cert. denied, 347 U.S. 902 (1954).

This argument rests upon the tenuous proposition that since there are single-judge districts, Congress must certainly have anticipated that the same judge would hear motions to vacate sentences that he had already entered. See United States v. Smith, 337 F.2d 49, 53 (4th Cir. 1964); United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954). This conclusion is unwarranted in light of the ample statutory provisions for reassignment of judges to different districts. See 28 U.S.C. §§ 291(c); 292(b); 292(c); 294(d); 296 (1970).

\textsuperscript{168}See 28 U.S.C. § 144 (1970). This statute may not, however, be invoked in § 2255 proceedings on the sole ground that the court rendered an adverse ruling in the prior criminal proceeding. See Deitle v. United States, 302 F.2d 116, 118 (7th Cir. 1962).
\textsuperscript{170}Rule 4(a) governing 2255 proceedings. Order of April 26, 1976, 96 S. Ct. at 27 (yellow pages) (1976).
\textsuperscript{171}See Battaglia v. United States, 390 F.2d 256, 259 (9th Cir. 1968).
\textsuperscript{172}See Matthews v. United States, 533 F.2d 900, 901, 901 n.2 (5th Cir. 1976) (No rationale was given for the recusation.).
\textsuperscript{173}See United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973) (per curiam).
tions have been justified for policy reasons, such as the "appearance of justice," or for the "sake of the judge." 174

To the extent that rule 4(a) may be considered declarative of prior practice, these exceptions can be read into the rule by construing it to permit recusation where necessary under the rubric that the judge is deemed "unavailable" to preside. The language of the rule, however, does not lend itself easily to such an interpretation. Moreover, to construe the rule so liberally would destroy the presumed advantages that Judge Parker envisioned by permitting the same judge to preside.

C. The Judge As Witness and Trier of Fact

1. Personal Observations: Error—The Supreme Court ruled in Sanders v. United States 175 that the judge's impressions or personal observations of the defendant were not conclusive of the issue of defendant's competency to stand trial. 176 This limitation has been followed in the courts of appeals, 177 narrowly construed to apply only to the issue of competency to stand trial. 178 But, as suggested before, the Court in Sanders did not explain why the trial judge's observations were not conclusive; and even if not conclusive, why they were not at least entitled to weight in determining whether to deny an evidentiary hearing. In any event, it does not seem likely that the decision in Sanders rested upon the premise that the judge should not inject himself at all as a witness in the determination of fact issues.

Certainly, where the judge is to provide information as a formal witness, he is not permitted to act both as a witness and as a trier of those facts which he introduces into the record. 179 The propriety of such a practice would certainly be at issue. Yet even if the judge's honesty or integrity were not at issue, the procedure would still be highly improper. A judge's sense perceptions and memory are as subject to failure as those of any other witness. It would be highly questionable that a judge as the trier of fact could properly give his own recollections more credibility than those of other witnesses, so that he could determine whose testimony is correct and whose

174See United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973) (per curiam); Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972).
176Id. at 20.
177See United States v. Collier, 399 F.2d 705, 707 (7th Cir. 1968); Floyd v. United States, 365 F.2d 368, 378 (5th Cir. 1966); Roe v. United States, 325 F.2d 556, 558 (8th Cir. 1963) (per curiam).
178See United States v. Collier, 399 F.2d at 707; Floyd v. United States, 365 F.2d at 378; Roe v. United States, 325 F.2d at 558.
incorrect, since this presumes that there is no weakness in his own recollections.

Under Judge Parker's conception of 2255 proceedings, the sentencing judge would not be called as a formal witness, but would be permitted to remain on the bench, casually interjecting his past recollections into the proceedings, either by commenting or simply by privately corroborating the testimony of certain witnesses and discounting the testimony of others. This procedure would be comparable to one which permitted a judge to be called as a formal witness, only to return to the bench to declare his testimony credible and the testimony of those whom he refuted not credible. Clearly, this latter procedure would be inappropriate under 28 U.S.C. § 455, if not a denial of due process of law. Yet, even this procedure provides more protection than the informal witness procedure envisioned by Judge Parker. As a formal witness, the judge is at least subject to cross-examination, and his past recollections are made part of the record for appeal. Where he remains on the bench as an informal witness, however, neither of these protections remains.

The difficulties with permitting the judge to act as both witness and trier of fact in the same proceeding are well demonstrated by the case of Aebv v. United States.\(^{180}\) In 1952, Aebv was convicted after a jury trial and sentenced to twenty years imprisonment.\(^{181}\) Over the next seventeen years, he filed a number of motions to vacate his sentence.\(^{182}\) In his fourth motion, petitioner alleged that both the trial judge and the United States attorney had made prejudicial remarks before the jury during closing arguments. In particular, the judge had allegedly remarked that petitioner had previously appeared before the judge on similar narcotics charges, that the judge had personally sentenced petitioner on those violations, and that the judge was personally aware of petitioner's use of narcotics. The United States attorney had allegedly made prejudicial remarks in his closing argument concerning petitioner's prior record, his failure to testify, and his association with a known narcotics violator.\(^{183}\) No record of closing arguments was then in existence.\(^{184}\)

The 2255 judge denied the motion without a hearing and entered an order that stated in part:

\(^{180}\) 425 F.2d 717 (5th Cir. 1970) (per curiam).
\(^{181}\) Id. at 718.
\(^{182}\) Id. See Aebv v. United States, 255 F.2d 847 (5th Cir. 1958); Aebv v. United States, 267 F.2d 540 (5th Cir. 1959) (per curiam); Aebv v. United States, 409 F.2d 1 (5th Cir. 1969) (per curiam).
\(^{183}\) See Aebv v. United States, 425 F.2d at 718-19.
\(^{184}\) Id. at 718.
The undersigned presided at both the trial and sentencing of this Petitioner . . . .

The Court recalls all of the proceedings therein and hereby finds and certifies that the arguments and statements alleged by Petitioner to have been made by this Court and the prosecuting attorney in the presence of the jury were not made and there was no reference in the presence of the jury to any of the matters so alleged by Petitioner.185

The Court of Appeals for the Fifth Circuit reversed and remanded for an evidentiary hearing on the basis that the district judge’s recollections, nearly seventeen years after the trial, were not part of the record for the purpose of determining whether an evidentiary hearing was required.186 The court, citing *Halliday v. United States*,187 also ordered the hearing to be held before a different judge.188

The court in *Aeb v.* did not consider the question of denial of due process or of the impropriety of the 2255 judge’s interjection of his personal recollections as an informal witness and ruling on his own credibility in opposition to that of petitioner. The holding was simply that seventeen years is too long a time to qualify the judge’s recollections as part of the “records and files.” Reliance upon *Halliday* was not explained. The Court in *Halliday* had simply held that it was the better practice, where factfinding was involved, to require a different judge to preside.189 In an *Aeb* situation, however, it would seem to be necessary as a matter of due process to remand to a different judge. Where the judge by formal order of the court expresses his firm belief that his recollections of an unrecorded event occurring seventeen years before are flawlessly intact, and that none of the petitioner’s claims are true, the court is hopelessly entwined in a dual role of being a witness to events and a trier of fact to determine the truth of those events. Moreover, since the trier of fact has already made up his mind with respect to the ultimate facts to be found, any subsequent evidentiary hearing would be meaningless.

What should be of concern here is that remand to a different judge, under circumstances like the *Aeb* case, is no longer permissible under a strict reading of rule 4(a).190 Upon remand, such a case would go to the very same judge who had already made up his mind about the facts; any subsequent evidentiary hearing would be

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185 *Id.* at 719.
186 *Id.*
187 380 F.2d 270 (1st Cir. 1967).
188 380 F.2d 270, 274 (1st Cir. 1967).
189 See notes 12-13 and accompanying text *supra.*
little more than pro forma, and would appear to be a farce in terms of due process.

2. Personal Observations and Prior Knowledge—There are many cases in which the practice of returning to the same judge has been challenged. Various objections have been raised, but the

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191 A. Request for different judge denied: Hoffa v. United States, 471 F.2d 391 (6th Cir. 1973), cert. denied, 414 U.S. 880 (1973); Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972); Odom v. United States, 455 F.2d 159 (9th Cir. 1972) (per curiam); United States v. Delsanter, 433 F.2d 972 (2d Cir. 1970) (per curiam); Morrison v. United States, 432 F.2d 1227 (5th Cir. 1970) (per curiam), cert. denied, 401 U.S. 945 (1971); Davis v. United States, 424 F.2d 1061 (5th Cir. 1970) (per curiam), cert. denied, 400 U.S. 836 (1970); Burris v. United States, 430 F.2d 399 (7th Cir. 1970), cert. denied, 401 U.S. 921 (1971); Lucero v. United States, 425 F.2d 172 (10th Cir. 1970) (per curiam); Panico v. United States, 412 F.2d 1151 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970); Wagner v. United States, 418 F.2d 618 (9th Cir. 1969); Dukes v. United States, 407 F.2d 863 (9th Cir. 1969), cert. denied, 396 U.S. 897 (1969); King v. United States, 402 F.2d 58 (9th Cir. 1968); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967), cert. denied, 389 U.S. 1022 (1967); Wrone v. United States, 367 F.2d 169 (10th Cir. 1966) (per curiam); United States v. Smith, 337 F.2d 49 (4th Cir. 1964), cert. denied, 381 U.S. 916 (1965); United States v. Hughes, 325 F.2d 789 (2d Cir. 1964), cert. denied, 377 U.S. 907 (1964); Deitke v. United States, 302 F.2d 116 (7th Cir. 1962); Simmons v. United States, 302 F.2d 71 (3d Cir. 1962); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (by implication); Reiff v. United States, 299 F.2d 366 (9th Cir. 1962) (per curiam), cert. denied, 372 U.S. 937 (1963); United States v. Halley, 240 F.2d 418 (2d Cir. 1957) (per curiam) (dictum), cert. denied, 353 U.S. 967 (1957); Carvell v. United States, 173 F.2d 348 (4th Cir. 1949) (per curiam).

B. Request for different judge granted: United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973) (per curiam) (The failure of the Government to keep its bargain that it would not oppose defendant's request for probation required rehearing before a different judge to determine "whether or not the sentencing judge was influenced by that failure," for the sake of the "appearance of justice."); Mawson v. United States, 463 F.2d 29 (1st Cir. 1972) (per curiam) (The failure of the Government to keep its promise to recommend a more lenient sentence required resentencing before a different judge for the "appearance of justice."); Durant v. United States, 410 F.2d 689 (1st Cir. 1969) (Where a rehearing was necessary to determine the voluntariness of a guilty plea, a different judge was required.); Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), petition denied, 274 F. Supp. 737 (D. Mass. 1967), aff'd, 394 F.2d 149 (1968) (per curiam), aff'd, 394 U.S. 831 (1969) (per curiam) (It was improper for the sentencing judge, once having made a finding of voluntariness on inadequate evidence, to preside over a 2255 proceeding to determine the voluntariness of a guilty plea.); United States v. Valentino, 283 F.2d 634 (2d Cir. 1960) (per curiam) (The judge was disqualified where he was called as a material witness.). See also, Battaglia v. United States, 390 F.2d 256, 259 (9th Cir. 1968), where the court of appeals reversed and remanded for a hearing, leaving the decision of whether to recuse to the district judge. The court said:

If, however, the judge discovers that he cannot avoid the consideration of material contained in the presentence report, or any other hearsay information not disclosed to a party to the § 2255 hearing, the preservation of the proper image of justice requires that he do one of two things. He should either excuse himself from conducting the hearing, or he should reveal the particular information to the parties.

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192 See Hoffa v. United States, 471 F.2d 391 (6th Cir. 1973) (prior adverse ruling); Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972) (motion under 28 U.S.C. § 455 for interest where presiding judge was listed as "of counsel" at criminal trial); Morrison v. United States, 432 F.2d 1227 (5th Cir. 1970) (per curiam) (motion under 28 U.S.C. § 144 for bias where judge had observed a presentence report); Davis v. United States, 424 F.2d 1061 (5th Cir. 1970) (per curiam) (knowledge gained at trial before the judge without a jury); Wagner v. United States, 418 F.2d 618 (9th Cir. 1969) (prior adverse ruling); Dukes v. United States, 407 F.2d 863 (9th Cir. 1969) (motion under 28 U.S.C. § 144 for bias arguing that a hearing before the same judge was per se improper); Panico v. United States, 412 F.2d 1151 (2d Cir. 1969) (motion under 28 U.S.C. § 455 for interest where the judge was a material witness); King v. United States, 402 F.2d 58 (9th Cir. 1968) (motion under 28 U.S.C. § 144
majority of the cases hold that there is no error in the practice.\textsuperscript{193} These holdings generally rely upon the claimed statutory purpose espoused by Judge Parker that it was the intent of section 2255 to permit the trial judge to use his personal observations and recollections of the trial to refute false claims of petitioners brought in collateral proceedings.\textsuperscript{194}

Prior adverse rulings alone are not considered sufficient to disqualify the judge from presiding over the 2255 hearing.\textsuperscript{195} Where the judge has gained knowledge about petitioner from hearsay contained in presentence reports, this knowledge is not considered prejudicial even though the source of that knowledge is not introduced into evidence and is not discoverable by the petitioner.\textsuperscript{196} Personal observations of the judge that counsel did not appear incompetent at the criminal trial have been used to refute petitioners' claims of incompetency of counsel.\textsuperscript{197} In addition, judicial notice has been taken of the general competency of counsel to reject a claim of incompetency.\textsuperscript{198} Finally, the court's\textsuperscript{198} inability to have any personal recollections at all of biased statements al-

\textsuperscript{193}See cases cited in note 191 A. \textit{supra}.

\textsuperscript{194}See Panico \textit{v.} United States, 412 F.2d 1151, 1155-56 (2d Cir. 1969); King \textit{v.} United States, 402 F.2d 58, 60 (9th Cir. 1968); Mirra \textit{v.} United States, 379 F.2d 782, 788 (2d Cir. 1967); Wrone \textit{v.} United States, 367 F.2d 169, 170 (10th Cir. 1966) (per curiam); United States \textit{v.} Smith, 337 F.2d 49 (4th Cir. 1964) (motion under 28 U.S.C. § 455 arguing that the judge had an interest in protecting the criminal judgment); United States \textit{v.} Hughes, 325 F.2d 789 (2d Cir. 1964) (motion under 28 U.S.C. § 455 where the judge was a material witness); Deitle \textit{v.} United States, 302 F.2d 116 (7th Cir. 1962) (motion under 28 U.S.C. § 44 for bias on the basis of a prior adverse ruling); Simmons \textit{v.} United States, 302 F.2d 71 (3d Cir. 1962) (denial of due process); Dillon \textit{v.} United States, 307 F.2d 445 (9th Cir. 1962) (by implication: material witness); Reiff \textit{v.} United States, 299 F.2d 366 (9th Cir. 1962) (per curiam) (judgment before hearing); United States \textit{v.} Halley, 240 F.2d 418 (2d Cir. 1957) (per curiam) (material witness); Carvell \textit{v.} United States, 173 F.2d 348 (4th Cir. 1949) (per curiam) (propriety of the procedure).

\textsuperscript{195}See Deitel \textit{v.} United States, 302 F.2d 116, 118 (7th Cir. 1962); Simmons \textit{v.} United States, 302 F.2d 71, 75 (3d Cir. 1962), where the court stated that disqualification for prejudice “was never intended to enable a discontented litigant to oust a judge because of adverse rulings . . . .” See also, Hoffa \textit{v.} United States, 471 F.2d 391 (6th Cir. 1973) (not disqualification for prejudice despite judge's having a "judicial predilection" obtained from hearing the criminal case).

\textsuperscript{196}Compare Morrison \textit{v.} United States, 432 F.2d 1227, 1229 (5th Cir. 1970) (per curiam); \textit{with} Dillon \textit{v.} United States, 307 F.2d 445, 450 (9th Cir. 1962) (the court sustained an objection to inquiry concerning the presentence report), \textit{and} Battaglia \textit{v.} United States, 390 F.2d 256, 259 (9th Cir. 1968).


\textsuperscript{198}See United States \textit{v.} Summerlin, 298 F. Supp. at 930.
legedly made by him in the course of the trial has been used to reject a claim that such statements were ever made.\textsuperscript{199}

In \textit{Burris v. United States},\textsuperscript{200} the Court of Appeals for the Seventh Circuit imputed personal knowledge to the trial judge in order to affirm the trial judge's denial of a 2255 hearing. In that case, petitioner had alleged (1) that the trial judge had denied him a fair trial by telling the jurors a story about children who were addicted to narcotics, (2) that the trial judge had coerced the jurors into returning a verdict by sending a verbal instruction through the United States Marshal to "[t]ell the jury if they can't reach a verdict in the next 30 minutes I will be compelled to lock them up for the weekend," (3) that two agents and the United States Attorney had discussed the case in the corridor in the presence of several members of the jury, and (4) that two agents had conducted private conversations with members of the jury.\textsuperscript{201}

The 2255 judge, without requesting a response from the Government or holding an evidentiary hearing, summarily denied the motion,\textsuperscript{202} noting in his memorandum opinion that the first two allegations were not reflected in the record, and that the last two "allegation[s] . . . [were] untrue . . . ."\textsuperscript{203} The court of appeals affirmed, holding that the 2255 judge was entitled to discount the first two claims based upon the records and his own personal knowledge,\textsuperscript{204} and that the dismissal of the last two claims could be justified on the presumption that the trial judge found them "incredible" since "[j]urors are closely supervised . . . ."\textsuperscript{205}

In \textit{Dillon v. United States},\textsuperscript{206} the Court of Appeals for the Ninth Circuit did not consider it error for the 2255 judge to act as the presiding judge and as a formal witness where he was merely asked one question which he refused to answer.\textsuperscript{207} Petitioner attempted in that case to demonstrate that a promise had been made to him by the United States Attorney that he would recommend to the judge a reduced sentence in exchange for a guilty plea.\textsuperscript{208} He then called

\textsuperscript{199} Id. at 930.
\textsuperscript{200} 430 F.2d 399 (7th Cir. 1970), cert. denied, 401 U.S. 921 (1971).
\textsuperscript{201} Id. at 400.
\textsuperscript{202} Id. at 401.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 402.
\textsuperscript{206} 307 F.2d 445 (9th Cir. 1962).
\textsuperscript{207} Since the Court of Appeals reversed the district court's denial of counsel and remanded for a hearing, the majority did not consider it necessary to reach petitioner's second claim that the 2255 judge should not have presided because he had taken the witness stand. Nonetheless, the court implicitly rejected the claim by remanding to the same judge for further proceedings, saying only that "[o]ther grounds urged for reversal by the appellant are unlikely to arise at a second hearing prepared and conducted by an attorney." 307 F.2d at 451.
\textsuperscript{208} Id. at 446, 448.
the judge to the witness stand and asked him whether he had been given impressions of such a promise by the presentence report.209 When the Government objected to this question, the judge sustained the objection and then, following his own ruling, refused to answer the question.210 At the conclusion of the hearing, "[t]he court found that there was no absolute promise that a recommendation would be made, and that appellant knew a recommendation might not be requested."211

The dissent asserted that "[a]ny error that could be attached to the trial judge acting both as presiding judge and witness could not have been prejudicial, particularly here where but one question was asked of the judge and none answered."212 He justified this procedure on the basis of the presumed historical purpose of section 2255 to permit the same judge to preside.213

Finally, the Court of Appeals for the Eighth Circuit held, in Davis v. United States,214 that where the judge’s recollections differ from petitioner’s, petitioner has the right to an evidentiary hearing before that judge to try to convince him that his recollections are faulty.215 In 1935, petitioner Davis, without assistance of counsel, pleaded guilty to a charge of kidnapping and was sentenced to life imprisonment.216 Fifteen years later, he filed a motion to vacate the sentence before the same judge alleging, among other things, that he had been sentenced without advice of counsel and without knowing that he had a right to counsel.217

The 2255 judge denied his motion without a hearing, basing the denial upon the conclusiveness of the files and records, which showed that petitioner was not entitled to relief,218 and upon his own personal recollections, which were “corroborated” by the record.219 The memorandum opinion found that petitioner had been fully apprised of his right to counsel, and that he had intelligently waived that right.220 The record of the original guilty plea, however, reflected only that upon being questioned by the court the defendant had “stated that he did not desire the advice of

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209 Id. at 453 n.2 (dissenting opinion); and at 450 (question paraphrased in the majority opinion).
210 Id. at 450-51.
211 Id. at 449.
212 Id. at 453 (dissenting opinion).
213 Id.
214 210 F.2d 118 (8th Cir. 1954).
215 Id. at 122.
216 Id. at 119.
217 Id.
218 Id. at 120.
219 Id. at 122.
220 Id.
counsel and entered a plea of guilty of the charge in the indictment. 221

The court of appeals stated that while the 2255 judge had denied petitioner the evidentiary hearing contemplated by section 2255, it would appear to be "a comparatively useless expenditure of time and money to hold a hearing" in order to give a convicted person an opportunity to convince the trial judge that his recollection was faulty. 222 Nonetheless, the court reversed and remanded to the same judge for the required hearing, saying, "there is no good reason why [the petitioner] should not have the same opportunity to correct what he believes to be a faulty recollection of the judge."

Burris, Dillion, and Davis were decided under a procedure analogous to that now imposed by rule 4(a); they demonstrate clearly the improbability that 2255 proceedings pursuant to the rule 4(a) procedure will be anything more than a pro forma review.

3. Statutory Disqualification Where the Judge is or may be a "Material Witness"—Prior to its revision in 1974, 28 U.S.C. § 455 provided in part that a federal judge must recuse "in any case in which he . . . is or has been a material witness . . . ." 224 In United States v. Smith, 225 petitioner argued that the judge who took his guilty pleas and sentenced him should not be permitted to rule on his motion to vacate since the judge had been a "material witness" to the events that transpired in the criminal proceedings, and thereafter had relied upon his memory of those events to supplement the record at the 2255 hearing. The Court of Appeals for the Fourth Circuit rejected this argument, saying that the judge was not a "material witness" within the meaning of section 455. 226 This conclusion was based upon the Carvell decision 227 and Judge Parker's view of the purpose of section 2255. 228 The court reasoned that the purpose of section 2255 was to permit the trial judge, because he was familiar with the prior proceedings and was able to supplement the record, to pass upon 2255 motions, and that it would be anomalous to disqualify that same judge under section 455 because of his familiarity with the proceedings. 229

221Id. at 121 n.2.
222Id. at 122.
223Id.
226337 F.2d at 53.
227Carvell v. United States, 173 F.2d 348 (4th Cir. 1949).
228Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 172-73 (1948), cited as support for the holding in United States v. Smith, 337 F.2d at 52.
229Id. at 53.
There is no basis for this result. The legislative intent of section 2255 does not disclose any such purpose; on the contrary, it discloses an intent to place the hearing in a convenient forum to permit easy access to records and witnesses, including the trial judge if he is called to testify. Nonetheless, since 28 U.S.C. § 455 has been completely revised to expand the coverage of the recusation requirement, the question should be reconsidered. Section 455 now provides that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." One of the purposes of this revision is to remove the supposed "duty to sit" even though actual bias or impartiality cannot be demonstrated. The other purpose is to establish an objective "reasonableness" test, eliminating the subjective test based upon the judge's "own opinion" of the propriety of his presiding.

The revised statute also sets forth explicit categories in which a judge must recuse and which may not be waived by the parties. One nonwaivable category is the required recusation of the judge who is a "material witness." There are two "material witness" provisions. The first is section 455(b)(2), which states that the judge "shall . . . disqualify himself . . . where . . . the judge . . . has been a material witness concerning [the matter in controversy]." The only apparent difference between this provision and the prior one is that the new section is governed by the no-waiver clause.

The second provision dealing with "material witness" is section 455(b)(5)(iv), which states that the judge "shall . . . disqualify himself [where] [h]e . . . [i]s to the judge's knowledge likely to be a material witness in the proceeding." This provision is entirely new. It goes beyond the old statute by requiring the judge to anticipate the likelihood of his being a witness. If he considers it likely, then presumably he must recuse even before he is called as a witness. This section seems to be addressed both to the impropri-
ety of a judge's presiding over a matter in which his impartiality might reasonably be questioned, and to the lack of judicial economy in presiding over a matter where he might ultimately be required to recuse. Where the judge has knowledge of certain facts, making it likely that he will ultimately be called as a witness, it would seem inappropriate for him to preside over the initial portions of the hearing, to control the introduction of evidence, to limit or expand the right to examine or cross-examine, and to make initial findings of fact, and then to participate as a material witness, presumably to refute certain evidence or testimony upon which he has entered preliminary rulings. There is no reason to presume that a judge's impartiality may only be questioned where he is first a material witness and then a factfinder; the potential for bias can be as acute where he is first the presiding judge and then the material witness.

Where the judge participates as an informal witness, pursuant to Judge Parker's notion of a 2255 proceeding, it would be equally prejudicial. Because it is clearly the policy of Congress to encourage judicial integrity (three statutes govern the subject of judicial disqualification), there is no merit in the contention of the Court of Appeals for the Fourth Circuit that section 455 does not apply to 2255 proceedings. Section 455 excepts no judicial proceeding, expressly or impliedly, from its requirement that no judge may preside over any hearing where he was, is, or is likely to be a "material witness" in that same hearing. Moreover, section 2255 does not, expressly or impliedly, require or permit the presiding judge to participate as a witness, nor does it exempt the presiding judge from any statutory recusation requirement. It is submitted that no exemption should be implied by the courts.

IV. DUE PROCESS CONSIDERATIONS

A. Contempt and Habeas Corpus

The question whether it is a denial of due process to permit the same judge to rule upon the validity of his own prior sentence and criminal trial conduct has never been fairly considered by any federal court. An analogous question has, however, been considered in the law of contempt. In contempt proceedings, the same judge who charged a person with contempt is generally permitted

to preside over the trial to determine whether that person was indeed contumacious. In that situation, the Supreme Court has ruled in *Ungar v. Sarafite* that a judge is not presumed to be biased, requiring his recusation, unless the allegedly contumacious behavior was "so probably productive of bias that the judge must disqualify himself to avoid being the judge in his own case . . . "

The initial question, whether it is a denial of due process to permit the criminal trial judge to preside at the hearing on motion to vacate, was raised in *United States v. Smith.* While petitioner's appeal was pending, however, *Ungar v. Sarafite* was decided by the Supreme Court. Petitioner then withdrew his due process claim, apparently in the belief that *Ungar* was controlling, and the Court of Appeals for the Fourth Circuit, also of the opinion that *Ungar* was dispositive of petitioner's due process claim, commented in a footnote to its opinion that *Ungar* "rejected the contention of a defendant in a contempt proceeding that he had been denied due process of law because the judge who presided at the contempt hearing was the same judge who had presided at the trial in which defendant's contemptuous conduct occurred."

This is not an accurate statement of the *Ungar* decision; but, even if it were, the law of contempt should not be applied to the law of habeas corpus for several reasons. First, the two situations are not analogous. In order for a contempt proceeding to be analogous to a habeas or 2255 proceeding, there would have to be a judgment of contempt already entered against the defendant, which was then attacked in a subsequent proceeding on the basis of some infirmity or irregularity. Obviously, if the judge who found the defendant in contempt and sentenced him were then to rule upon the validity of his own sentence, the review would be considered inadequate; indeed, no such procedure exists in the law of

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238 *Id.* at 583.
239 337 F.2d 49, 51 n.4 (1964).
240 376 U.S. 575.
241 United States v. Smith, 337 F.2d at 51 n.4.
243 Review of contempt proceedings is by appeal. 28 U.S.C. § 47 (1970) prohibits a trial judge from sitting as an appellate judge to review decisions which he entered while sitting as a trial judge.
contempt, nor has any such procedure ever been considered or approved.

Second, the apparent analogy that judges in both contempt and habeas proceedings use their past personal observations in order to decide issues of fact in the subsequent proceeding does not hold in light of the differing functions served by the two proceedings. A contempt proceeding is an attempt to impose the court's immediate authority and power to conduct its business unobstructed by outbursts or intimidation, and to punish for any such interference. It is not a review of a final judgment, and does not purport to insure the validity of prior court rulings as does habeas corpus. Since it is the trial judge's immediate authority which is in jeopardy, it is presumed that the same judge will enforce his right to control the conduct of his court, unless he is otherwise disqualified. In contrast, habeas corpus presents no issue that requires the trial judge to act immediately. Rather, it is the trial judge's conduct or rulings that at some later time are called into question, and there is no reason to presume that the same judge may insure the integrity of that proceeding better than any other judge.

Third, there are seemingly better checks upon the accuracy of the personal observations made by a judge presiding over contempt proceedings. Contempt involves personal observations of the court upon which it acts immediately by giving instructions and warnings, calling for a recess, or removing persons from the court, and ultimately charging one with contempt. The behavior charged as contemptuous is thus made a matter of record in the first proceeding contemporaneously with the observation. The 2255 judge's personal observations, on the other hand, are not challenged immediately; attention is not drawn to the behavior that may constitute a ground for a later motion to vacate. Thus, the judge's observations are not made a part of the record in the prior proceeding, and there is therefore no certitude that the judge's observations are accurate when later recalled. Additionally, in contempt proceedings, even where personal observations of the judge are reserved and introduced at a later hearing, the judge is aware that the incident will result in a hearing. He will schedule the hearing promptly at the close of the main trial, and he will set forth the

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244 See Harris v. United States, 382 U.S. 162, 164 (1965); Cooke v. United States, 267 U.S. 517, 534 (1925).
245 See Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971), where the Court said that the outbursts which took place entitled the trial judge to use a variety of weapons to keep order in his courtroom, but that in the instant case, the outbursts so "vilified" the judge that due process required a hearing before a different judge. Id. at 465, 466.
specific acts considered contemptuous in written specifications,\textsuperscript{247} giving notice of the pending hearing to defendant.\textsuperscript{248} It is the judge who takes the initiative in deciding to proceed on contempt, and who, having made the charge of contempt, is thus likely to keep the incident fresh in his mind. Habeas corpus, on the other hand, may be brought at any time,\textsuperscript{249} not at the judge's instance, but at the petitioner's. The motion may concern any number of issues that the court may or may not have considered at one time or another. Thus, there is less likelihood that the judge will keep all possible issues and all past occurrences in all the criminal proceedings conducted before him fresh in his mind in anticipation of some later hearing.

Since the contempt and habeas procedures are so distinct, it may therefore be concluded that the law of contempt should not glibly be applied to the law of habeas corpus.

\textbf{B. Nemo Debet Esse Judex in Propria Causa}

The maxim that no man ought to be the judge of his own cause is fundamental to the notion of due process of law. Where one has a financial interest in a matter, it becomes his own cause;\textsuperscript{250} due process requires that where a judge has even a de minimis financial interest in a matter being litigated before him he must recuse.\textsuperscript{251} While some have urged that the definition of "cause" or "interest" should be limited solely to financial matters,\textsuperscript{252} it is obvious that judges have many interests that may affect the objectivity of their judgments, and the Supreme Court has not so limited the definition.\textsuperscript{253} Thus, one's own cause may be emotional as well as financial.\textsuperscript{254} When a judge becomes "personally embroiled" in a matter that initially was not his own, it becomes his cause, requiring recusation.\textsuperscript{255} Moreover, where a judge does not actually make a cause his own, but it \textit{appears} to be his, recusation may also be required. This is generally grounded upon a notion of propriety.\textsuperscript{256}

\begin{thebibliography}{99}
\item \textsuperscript{247}See Fed. R. Crim. P. 42(a) & (b).
\item \textsuperscript{248}See Fed. R. Crim. P. 42(b).
\item \textsuperscript{249}See 28 U.S.C. § 2255, the relevant part set out at note 79 \textit{supra}.
\item \textsuperscript{250}See Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).
\item \textsuperscript{251}See Ward v. Village of Monroeville, 409 U.S. at 60 (even when there was "no direct sharing" in funds, there was a "possible temptation" to be partial).
\item \textsuperscript{252}See \textit{In re} Murchison, 349 U.S. 133, 142 (1955) (dissenting opinion).
\item \textsuperscript{253}Id. at 136-39.
\item \textsuperscript{254}See Ungar v. Sarafite, 376 U.S. 575, 600 (1964) (dissenting opinion).
\item \textsuperscript{255}See Offutt v. United States, 348 U.S. 11 (1954); Cooke v. United States, 267 U.S. 517 (1925).
\item \textsuperscript{256}See Offutt v. United States, 348 U.S. at 14.
\end{thebibliography}
Some relationships create such an appearance of impropriety that due process requires recusation. For example, the Supreme Court held in the case of *In re Murchison*\(^{257}\) that due process requires recusation even in contempt proceedings (where recusation is not normally required) when there is a conflict of interest in the roles the judge performs in the adjudicatory process.\(^ {258}\)

The Court in *Murchison* reviewed a Michigan statute which provided that any judge of a Michigan court of record may act as a "one-man grand jury" to take evidence in secret concerning suspected crimes. The Court held that it violated due process for the judge, who first presided as the grand jury and charged defendant with contempt, to preside over the required public trial on the contempt charge.\(^ {259}\)

The *Murchison* opinion reflects a multifaceted rationale involving the notion of interest,\(^ {260}\) the appearance of propriety,\(^ {261}\) and the right to examine and cross-examine witnesses.\(^ {262}\) The Court, relying heavily upon the notion of "interest" and upon the case of *Tumey v. Ohio*,\(^ {263}\) commented that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."\(^ {264}\) By the very nature of the procedure, the judge would not be considered a "wholly disinterested" party.\(^ {265}\) Of particular importance to the Court was the high probability that the trial judge’s recollections of the grand jury proceeding would "weigh far more heavily with him" than the testimony in the subsequent open hearing.\(^ {266}\) The Court reasoned that it would be difficult for a judge to free himself from the influence of the grand jury proceedings,\(^ {267}\) and said:

\[^{257}349\text{ U.S.} 133 (1955).\]
\[^{258}\text{Id.} \text{ at } 138-39.\]
\[^{259}\text{Id.} \text{ at } 139.\]
\[^{260}\text{Id.} \text{ at } 136, \text{ citing Tumey v. Ohio, } 273\text{ U.S.} 510, 532 (1927).\]
\[^{261}\text{Id.}, \text{ citing Offutt v. United States, } 348\text{ U.S.} 11, 14 (1954).\]
\[^{262}\text{Id.} \text{ at } 138-39.\]
\[^{263}273\text{ U.S.} 510 (1927).\]
\[^{264}\text{in re Murchison, } 349\text{ U.S.} \text{ at } 137.\]
\[^{265}\text{Id.}\]
\[^{266}\text{Id.} \text{ at } 138.\]
\[^{267}\text{Id.} \text{ The Court then quoted from the trial judge’s findings as an example of the judge’s lack of objectivity:}\]

[T]here is one thing the record does not show, and that was [defendant’s] attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand . . . . Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record.\(^ {\text{Id.}}\)

\[^{\text{Id.}}\text{ In response to defense counsel’s request that this comment be stricken from the record since it was not contained in the original record, the judge continued, “That is something . . . that wouldn’t appear on the record, but it would be very evident to the court.”}\]

Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.268

Of course, one of the factors in the Court's determination that the procedure was inappropriate under due process standards was the secrecy of the first proceeding;269 there were thus no public witnesses to give "disinterested" testimony.270 But also important, and given the greater consideration, was the fact that the judge was a "very material witness"271 in the contempt proceeding. Thus, the Court concluded:

The result would be either that the defendant must be deprived of examining or cross-examining [the judge] or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.272

Not unlike the judicial procedure condemned by the Supreme Court in Murchison, rule 4(a) creates conflicting roles to be performed by the 2255 judge by placing him in the position of being both a witness to past events and a judge deciding the truth concerning those past events. Rule 4(a) therefore does not provide a procedure that imparts an appearance of propriety; it provides no checks upon the accuracy of the court's past recollections; it provides no opportunity for the petitioner to examine or cross-examine the witnesses against him; it permits the court to be a "material witness" in a proceeding upon which it must pass judgment; and it places the court in a position of weighing more heavily its past recollections than the testimony in the proceeding before it. Thus, rule 4(a) does not satisfy the due process standards established for judges by the Supreme Court in Tumey and Murchison.

268Id.
269Id.
270Id. The court stated, "If there had been [public witnesses], they might have been able to refute the judge's statement . . . ."
271Id.
272Id. at 139.
V. SUSPENSION OF THE WRIT BY VARIANCE OF ITS PROCEDURE

A. The Real Party in Interest

It has long been said that habeas corpus is an independent civil remedy brought by a detained person to assert his right to personal liberty, to inquire not into the criminal act for which he is detained, but into his right to liberty notwithstanding that act.\textsuperscript{273} Upon an allegation of unlawful detention, a court having jurisdiction to issue the writ would order the jailor to deliver the body of petitioner before the court and show cause why the prisoner was being detained.\textsuperscript{274} It is significant that the writ issued from a superior court to inquire into the exercise of jurisdiction by an inferior court,\textsuperscript{275} so the habeas corpus review was traditionally conducted by a judge who had no prior knowledge or connection with the court whose judgment was under attack. Moreover, from the time of its development as a means of challenging the validity of detention until very recently, habeas corpus was used to challenge detention prior to trial, rather than after trial.\textsuperscript{276} Thus, demonstration to the habeas court that petitioner was detained by the final judgment of another court was sufficient cause to dismiss the petition, unless it could also be shown that the inferior court had entered the judgment without jurisdiction to do so.\textsuperscript{277} The real party in interest in pretrial habeas proceedings was the jailor whose right to custody was at issue; the real party in interest where final judgment was pleaded as cause for detention was the inferior court whose power to enter the judgment was being challenged.

In contrast, the American habeas remedy has evolved into an essentially post-trial remedy,\textsuperscript{278} calling into question more than the simple custody of the jailor or the power of an inferior court to try the petitioner. The issues subject to challenge include the criminal

\textsuperscript{274}See Cohen, \textit{Habeas Corpus Cum Causa-The Emergence of the Modern Writ-I}, 18 CAN. B. REV. 10, 12-13 (1940).
\textsuperscript{275}See \textit{Id.} at 14 which states \\"[T]he corpus cum causa was itself employed to defeat causes in inferior courts.\" See also Cohen, \textit{Some Considerations on the Origins of Habeas Corpus}, 16 CAN. B. REV. 92, 112 (1938); R. Sokol, \textit{Federal Habeas Corpus}, § B, at 4-5, 7 (2d ed. 1969).
\textsuperscript{277}See \textit{Ex parte} Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830).
court's conduct and rulings prior to, during, and after trial that have arguably deprived petitioner of some constitutional right.\footnote{See 28 U.S.C. §§ 2241 & 2255 (1970).}
The habeas remedy thus places the acts of the criminal trial judge at the very center of the inquiry, making him the real party in interest. And even though the jailor (the Government) is named on a motion to vacate sentence, it is but a nominal party, because its detention of petitioner is by order of the criminal trial judge. To say that this same judge will issue an order to show cause why petitioner is being detained seems absurd. If anyone knows, it must certainly be the judge who ordered petitioner detained.

Despite the long tradition that a different judge conduct the habeas review, it has more recently been suggested that the trial judge ought to be given the first opportunity to pass upon a motion attacking the validity of his sentence, just as he is given first opportunity to pass upon a motion to recuse for bias or prejudice.\footnote{See Note, Processing A Motion Attacking Sentence Under Section 2255 Of The Judicial Code, 111 U. PA. L. REV. 788, 801 (1963).} On motion to recuse for bias or prejudice, however, the trial judge must accept the facts alleged in the affidavit of bias as true,\footnote{See Berger v. United States, 255 U.S. 22, 36 (1921); Tynan v. United States, 376 F.2d 761, 764 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962); Mitchell v. United States, 126 F.2d 550, 552 (10th Cir. 1942).} and then simply rule on the legal sufficiency of the affidavit.\footnote{See notes 120-21 and accompanying text supra.} In contrast, review on habeas corpus (or on a motion to vacate) involves the exercise of a vast array of discretionary powers, frequently involves factfinding, and may require the criminal trial judge to participate as a witness to the matter being challenged. Factfinding and the exercise of discretionary powers are subject to limited appellate review,\footnote{See Tynan v. United States, 376 F.2d 761, 764 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1942); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962); Mitchell v. United States, 126 F.2d 550, 552 (10th Cir. 1942).} whereas the legal sufficiency of an affidavit of bias is fully subject to appellate review.

One might also consider collateral review to be analogous to the trial judge's first opportunity to rule upon trial errors by some post-trial motion, such as a motion for a new trial, a motion in arrest of judgment, or a motion to correct or reduce sentence. This analogy would be sound if habeas corpus (or a motion to vacate) functioned simply to permit the trial judge to correct his own trial errors. But if this is the purpose of habeas corpus, then it is redundant, adding nothing to the procedures already available for review by post-trial motions except to avoid the time limitations imposed upon them.
In *Townsend v. Sain*, the Supreme Court asserted that habeas corpus "is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments," the validity of the incarceration. In *Kaufman v. United States*, the Court reiterated the function of habeas corpus as stated in *Townsend* adding that "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake." What does it mean to say that habeas corpus is different from direct appeal in a criminal proceeding? Or that it is an independent review? Or that it exists to insure the integrity of the criminal proceeding? Surely the criminal trial judge, having heard testimony and being, perhaps, convinced of petitioner's guilt, will find it difficult to view the 2255 petition without taking the fact of guilt into consideration. The court may consider itself a protector of the criminal judgment, thereby destroying the objective and independent qualities anticipated in habeas corpus review. Thus, where the criminal trial judge, by his rulings, becomes the real party in interest, he should not preside over the collateral review challenging the validity of those rulings.

### B. Procedural Character of the Writ

Article I, § 9 of the United States Constitution, by providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended . . . .," asserts that there is some protected privilege that cannot be taken away. Presumably, the privilege of the writ was so well known to the framers of the Constitution that they saw no need to define it; it was later deemed sufficient to "resort . . . to the common law" to determine the meaning and extent of habeas corpus.

Examination of common law notions of the writ of habeas corpus *cum causa* reveal that by the fourteenth century the writ issued to order the body of the one detained to be brought before the court, and to require the custodian to declare by what authority he detained the prisoner. This review by habeas corpus included the power to release the prisoner whenever the jailor's justification was legally insufficient. The definition of legal sufficiency has,

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285 Id. at 311-12.
287 Id. at 225.
288 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).
290 Id. at 13.
291 Id. at 19-20.
of course, fluctuated over the centuries, but the unique and simple
procedure by which one court reviewed the validity of another
court's power (or the jailor's power) to imprison a person has made
the writ of habeas corpus a time-honored symbol of freedom. It has
been lauded and esteemed as the "great writ,"\textsuperscript{292} as the "best and
only sufficient defense of personal freedom,"\textsuperscript{293} and as the "prin­
cipal bulwark of English liberty."\textsuperscript{294} It may be presumed that it
would not have been worthy of inclusion in the United States
Constitution were it not valued both as a symbol and as an effective
remedy for the protection of individual liberty.

Preservation of the privilege of the writ requires more than
protecting the right to raise the same substantive issues by motion
to vacate as were available by habeas corpus. The substantive
issues cognizable by habeas corpus merely determine the occa­
sions upon which habeas corpus may be invoked. Habeas corpus is
essentially "a procedural device";\textsuperscript{295} it is thus irrelevant that the
meaning of "validity" of incarceration has changed since the four­
teenth century. The underlying function of the habeas remedy has
remained the same: to challenge the exercise of power denying a
person his liberty.\textsuperscript{296} Preservation of the privilege of the writ of
habeas corpus necessarily requires the protection of this basic
procedural character.

Section 2255, like habeas corpus, is supposed to provide a re­
view of the criminal trial judge's rulings on jurisdictional and con­
stitutional issues and the adequacy of his factfinding upon which
those rulings are based. Section 2255 is considered the equivalent
of habeas corpus, and is the substituted remedy for federal prison­
ers to the privilege of habeas corpus preserved by the Constitu­
tion.\textsuperscript{297}

In Judge Stone's statement of purpose to Congress, he asserted
that section 2255 was "in the nature of, but much broader than,
coram nobis . . . . As a remedy, it is intended to be as broad as

\textsuperscript{292}See \textit{Ex parte} Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).
\textsuperscript{293}\textit{Id.} at 95. See also Brown v. Allen, 344 U.S. 443, 512 (1953) (concurring opinion).
\textsuperscript{294}See Brown v. Allen, 344 U.S. at 512 (concurring opinion).
\textsuperscript{295}Peyton v. Rowe, 391 U.S. 54, 58 (1968). See D. Meador, \textit{Habeas Corpus and}
\textsuperscript{296}See Cohen, \textit{supra} note 274, at 12-13:
It will be remembered that the earliest writs of \textit{habeas corpus . . . . had only a
single purpose in view, to have a desired party before the court. As yet there was
nothing to suggest that the cause of the arrest or detention be given to the courts

\textit{Habeas corpus cum causa . . . . may have made its appearance in the first years of
the 14th century . . . . The significance of this wording is two-fold: it presumes that
there is detention, and it asserts the court's right to inquire into the case . . . .
See also R. Sokol, \textit{supra} note 275; Cohen, \textit{supra} note 275; Jenks, \textit{supra} note 24.
A reasonable construction of this statement is that the remedy of habeas corpus should be provided in a more convenient forum, that is, where the records, files, and witnesses are located, or in the jurisdiction where the criminal judgment was rendered; the Supreme Court has so construed the statute in United States v. Hayman. The Court thought that no constitutional question of suspension of the writ was raised by section 2255 because the Court deemed the statutory provision to be a complete and effective substitute for habeas corpus, providing "the same rights in another and more convenient forum."

Section 2255 has nevertheless been considered a "hybrid" remedy, incorporating not only the notions of the writ of habeas corpus, but also the notions of the writ of error coram nobis. Coram nobis and remedies in the nature of the ancient writ of error coram nobis provide a form of self-review to permit the court that entered judgment to correct its own errors. Historically, the review seems to have been limited and technical, correcting matters not known to the judge at the time of entry of the judgment, and correcting clerical errors of the record. No question of the judge's fairness was at issue, nor was the judge considered to have been in error by rendering his first judgment. With respect to such technical matters, self-review seems adequate.

Habeas corpus, however, was never a form of self-review as was coram nobis; review was by some independent authority. Had habeas corpus procedure ever required the petitioner to go to the jailor to plead the jailor's error in incarcerating him, or to go to the criminal trial judge to plead that the judge's exercise of power was beyond his jurisdiction, the writ of habeas corpus would certainly have fallen into oblivion. It is the requirement of accountability by the jailor or by the court for taking away a person's liberty that has

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298 U.S. at 216-17.
299 U.S. 205 (1952).
300 Id. at 219 (emphasis added).
302 Id. at 776-78.
303 See United States v. Morgan, 346 U.S. 502 (1954), where the Supreme Court discussed the nature of the writ of error coram nobis, quoting a commentator as follows:

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed and in the same court, by writ of error coram nobis. . . . For error in fact is not error of the judges, and reversing it is not reversing their own judgment. So, upon a judgment in the King's Bench, if there be error in the process, or through the default of the clerks, it may be reversed in the same court, by writ of error coram nobis . . . .

See also, Burns v. United States, 321 F.2d 893, 896 (8th Cir. 1963), cert. denied, 375 U.S. 959 (1963); Lipscomb v. United States, 273 F.2d 860, 865 (8th Cir. 1960), cert. denied, 364 U.S. 836 (1960).
made the writ great. Self-review is simply not enough to protect that constitutional privilege.

The independence of the habeas proceeding from the prior criminal proceedings and the irrelevance of the question of guilt to the issues raised by the writ have long been considered essential to the privilege of the writ of habeas corpus. To the extent that the presiding judge permits the criminal proceeding to control his impressions of the habeas petition or his analysis of the issues raised, the petitioner's right to the independent civil proceeding contemplated by the writ of habeas corpus is jeopardized.

Rule 4(a) is obviously more than procedural; it provides a drastic substantive change in the concept of habeas corpus. The rule substitutes the notion of coram nobis review (a form of self-review) for habeas corpus review, traditionally a review of one court by another. In so doing, the rule effectively destroys the traditional notions attached to habeas review.

Ultimately, there must be some point at which the variance in procedure causes section 2255 no longer to reflect the habeas remedy. To the extent that section 2255 is an incomplete substitute for habeas corpus, its exclusive use thereby effectively suspends the privilege of the writ of habeas corpus for federal prisoners.

CONCLUSION

Beneath all the efforts of the federal judiciary to revise the habeas procedures and to regulate the great volume of post-conviction petitions brought by state and federal prisoners lies a sense of frustration. As Mr. Justice Jackson wrote in Brown v. Allen: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

The adoption of rule 4(a) reflects an attitude that petitions are bound to be false, frivolous, and abusive of the collateral process, and that review must therefore be limited and tightly controlled by the criminal trial judge to inhibit abuses and avoid the "unseemli-

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ness” of that judge’s work product being reviewed by another judge. Rule 4(a) imposes upon federal district judges the responsibility of holding evidentiary hearings to develop sufficient facts to permit them to determine the correctness of their own prior rulings. Where the judge interjects his own recollections into the hearing, he inevitably provides facts upon which he may then rule. Rule 4(a) thus permits the judge to create his own record to demonstrate the validity, integrity, and fairness of his own prior rulings.

It has been argued that section 455 is applicable to 2255 proceedings, and requires the judge to recuse where he is to be a formal witness.\textsuperscript{308} Necessarily, it is as crucial to the appearance of justice that the judge not be permitted to act as an informal witness, avoiding the recusation requirement simply by not formally taking the witness stand. Permitting the court to proceed in this manner effectively destroys the objective and impartial review anticipated by both due process of law, and the privilege of the writ of habeas corpus. Review by motion to vacate must be effective and fair in appearance as well as in fact. A meritorious petition is clearly worth the search. The search should therefore be adequate to discover it.

\textsuperscript{308}See notes 224-36 and accompanying text \textit{supra}. 