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Disqualification of a judge occurs when he is ineligible by law to sit in a particular case. At the Supreme Court level, disqualification is a personal decision of the individual justice, who seldom records the reasons for his decision. Thus, there is little material on the Court's disqualification practices that can be subjected to legal analysis. However, substantial case law on disqualification has developed in the lower federal courts, where the decision of a trial judge to sit or step down in a case may appear in the trial record and is subject to review by a court of appeals. In addition, disqualifications in the lower courts may have many important ramifications for the parties, the judicial system, and the individual judges. This Comment will discuss the laws and doctrines that relate to the disqualification of federal judges because they have, or appear to have, an interest in the case before them.

I. HISTORICAL BACKGROUND AND CURRENT STATUTORY STANDARDS

While the civil law recognized broad grounds for disqualification, the common-law approach to the subject was relatively narrow.

1. The term "recusal" is sometimes used in place of the word "disqualification." Although courts and writers do not always seem to differentiate between the two terms, John Frank has written that disqualification occurs because of a statutory mandate, while recusal is a voluntary act on the part of the judge. See Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Probs. 45, 46 (1970). This Comment will use the term "disqualification" exclusively.


3. Disqualification of Supreme Court justices is most recently discussed in Note, Justice Rehnquist's Decision to Participate in Laird v. Tatum, 73 Colum. L. Rev. 106 (1973), See also Frank, supra note 1; Frank, Conflict of Interest and U.S. Supreme Court Justices, 18 Am. J. Comp. L. 744 (1970); Frank, Disqualification of Judges, 56 Yale L.J. 605 (1948); Nadelman, Disqualification of Constitutional Court Judges for Alleged Bias, 52 Judicature 27 (1968).

4. The judge's decision may create or add to grounds for appeal, see, e.g., Adams v. United States, 302 F.2d 307 (5th Cir. 1962), or mandamus, see, e.g., Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965). It may also necessitate a retrial of the case, the usual result when a judge's decision not to disqualify is overturned on appeal, See, e.g., United States v. Amerine, 411 F.2d 1190 (6th Cir. 1969). The decision may also affect the judge's chances for "promotion" to a higher court. John Frank believes that the failure of the Senate to consent to the nomination of Judge Haynsworth to the Supreme Court was due partly to his disqualification practices as a member of the Court of Appeals for the Fourth Circuit. See Frank, supra note 1, at 60.

5. Perhaps the earliest provision disqualifying judges for interest is found in the Code of Justinian:
Although a judge has been appointed by imperial power yet because it is our
The leading English case was *Dr. Bonham’s Case,* in which Lord Coke ruled that members of a board that determined physicians’ qualifications could not both impose and personally receive fines. Several years later, Lord Coke uttered what has become the classic statement of disqualification—“No man can be a judge in his own cause.” As these cases indicate, the common law called for disqualification when a judge was involved in a case as a party or had a direct financial interest in the outcome.

In the United States, Congress at an early date adopted standards for judicial disqualification. In 1792 it enacted a statute requiring disqualification in cases where a district judge was in any way “concerned in interest” or had “been of counsel.” In 1821, an additional ground—relationship or connection to a party—was added. A 1911

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6. 77 Eng. Rep. 646 (K.B. 1609). Earlier, English statutes had recognized one special ground for disqualification. In order to prevent favoritism, no judge was permitted to try cases in the county wherein he was born. Statute, 8 Rich. 2, c. 2 (1384). Similar provisions are found in Statute, 13 Hen. 4, c. 2 (1411) and Statute, 33 Hen. 8, c. 24 (1541). These statutes were not repealed until 1739. Statute, 12 Geo. 2, c. 27.

7. Earl of Derby’s Case, 77 Eng. Rep. 1390 (K.B. 1614). A similar case, in which a judge was imprisoned for attempting to try a case in which he was a party, was recalled by Lord Holt while announcing the decision in Wright v. Crump, 87 Eng. Rep. 1055, 1056 (K.B. 1702).

8. Bracton and Fleta, two early English legal writers, recognized broader grounds for disqualifying judges. See 3 W. Blackstone, Commentaries *361. When Blackstone wrote his treatise in the eighteenth century, he seemed to indicate that there were no grounds for disqualifying a judge. Id. His statement has been variously interpreted as simply declaring Bracton in error on the extent to which there were grounds available for disqualification, see Frank, supra note 1, at 43 n.3, or as denying that judges could be disqualified on any grounds whatever, see Comment, Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311, 316 (1969). Blackstone’s undoubted awareness of Lord Coke’s decisions, cited in notes 6 & 7 supra, support the former interpretation, but several American courts have been persuaded by the latter. See, e.g., Duncan v. Atlantic Coast Line R.R., 223 F. 446 (S.D. Ga. 1915); The Richmond, 9 F. 863 (C.C.E.D. La. 1881). After Blackstone’s time, disqualification of judges became more common in England as eminent judges voluntarily disqualified themselves when they were connected with a case and thereby established precedents. See Ex parte N.K. Fairbank Co., 194 F. 978, 987 (M.D. Ala. 1912).

9. *And be it further enacted,* That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79.

amendment provided that a judge was disqualified if he was or had been a material witness in the case. As part of the general revision of the Judicial Code in 1948 the disqualification statute was altered, making the interest necessary for disqualification a “substantial” interest, adding relationship with or connection to a party’s attorney as a ground for disqualification, eliminating the need for a party to request disqualification, and extending the statute to all United States justices and judges. The statute, which is now section 455 of title 28, reads:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

While this Comment will focus on section 455, there are two other statutes that provide for disqualification of federal judges. First, no judge sitting on a court of appeals is permitted to hear an appeal from a decision of a case or issue tried by him, and second, a judge before whom a matter is pending in a district court must disqualify himself if a party files a legally sufficient affidavit alleging that the judge has a personal bias or prejudice against him or in favor of one of the adverse parties. In addition, the Federal Rules of Criminal Procedure require a judge to disqualify himself in criminal contempt cases if he was the object of the disrespect or criticism that is the basis of the contempt charge.

Guidelines for disqualification have also been supplied by the American Bar Association’s Canons of Judicial Ethics and Code of Judicial Conduct. The Canons were adopted in 1924 and estab-
lished general standards of proper judicial behavior. They called for disqualification when a judge had a personal interest in a suit or was a near relative of a party. The Code, which supersedes the Canons, establishes more detailed disqualification standards.

18. Canons 29 & 13. Tangentially related are Canon 4, which counsels against impropriety or the appearance of impropriety on the part of a judge, and Canon 85, which warns a judge to take care in his social relations in order to avoid the appearance of favoritism. Generally speaking, the Canons were too vague and general to be of much practical use. See Miller, Public Confidence in the Judiciary: Some Notes and Reflections, 35 Law & Contemp. Probs. 69, 71 (1970).

19. Canon 3 of the Code provides in part:

3C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

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

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

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

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

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

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

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

(iv) is to the judge’s knowledge likely to be a material witness in the proceeding;

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

(3) For the purposes of this section:

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

(b) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;

(c) “financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

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

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

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

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

3D. Remittal of Disqualification.

A judge disqualified by terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge’s participation, all agree in writing that the judge’s relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.
II. DISQUALIFICATION FOR INTEREST: LOWER FEDERAL COURT PRACTICE

Since the basic federal law regarding disqualification for interest is found in section 455, a careful analysis will be made of that statute. The discussion will focus on three general topics—procedure for disqualification, substantive interpretation of section 455, and policy considerations relevant in the implementation of the statute.

A. Procedure Under Section 455

Several aspects of procedure under section 455 have thus far caused little controversy. First, the statute does not preclude a person who is not a party in a case from requesting that the judge disqualify himself. Under the pre-1948 statute, only a party could move for disqualification, and a nonparty, even one who had a personal stake in the outcome of the case, could not ask a judge to step down. The 1948 revision embodied in section 455 eliminated this restriction, so that now when a judge learns that grounds for his disqualification exist, he should disqualify himself regardless of the source of his information.

Second, since section 455 calls upon the judge to "disqualify himself," it is clear that the judge who is challenged should decide whether he is disqualified. This conclusion is supported by the absence of any procedure under the statute for having another judge rule on the disqualification request and the lack of any cases suggesting that the self-disqualification procedure can be varied.

20. In re Milwaukee & Sawyer Bldg. Corp., 79 F.2d 478 (9th Cir. 1927) (creditor in bankruptcy proceeding) and cases cited therein.

21. Some districts allow a party to waive a disqualification and keep the judge on the case. In these districts, fairness dictates that the judge bring the relevant facts to the attention of the parties so that they can decide whether they wish to waive the disqualification. It appears from the cases that judges often follow this practice. See, e.g., Neiman-Marcus Co. v. Lait, 107 F. Supp. 96 (S.D.N.Y. 1952); Lampert v. Hollis Music, Inc., 105 F. Supp. 3 (E.D.N.Y. 1952).

22. It can be argued that if a judge is partial he cannot make a fair decision on whether he should disqualify himself. Perhaps in recognition of this possibility, other systems for handling disqualification requests have evolved. For example, under 28 U.S.C. § 144 (1970), relating to disqualification for bias or prejudice, the challenged judge rules only on the legal sufficiency of the affidavit alleging prejudice. He must accept the facts in the affidavit as true, even if he knows they are false. Berger v. United States, 255 U.S. 22 (1921). In some states a party is allowed to have a judge replaced without giving any reason. The party simply files a statement indicating that he does not think the judge would give him a fair trial. Upon filing of the statement, the judge cannot take further action in the case. See, e.g., Mont. Rev. Codes Ann. §§ 89-901 (Supp. 1971), 85-1709(a) (1969); N.M. Stat. Ann. § 21-5-8 (1970). In some other states, another judge is brought in to rule on disqualification challenges. See, e.g., Mich. Cr. R. 405.2. Similarly, the Judicial Conference of the United States once endorsed a bill, S. 2478, 87th Cong., 1st Sess. (1961), that would have allowed section 144 motions to be heard by another judge. Judicial Conf. of the U.S., Proceedings 69-69 (1961).

These alternatives, however, may raise problems of their own. Automatic disqualification could result in abuse unless a limit were placed upon the number of judges
Finally, once a judge is disqualified he remains so and cannot later withdraw the disqualification. Consequently, after disqualification a judge is limited to performing ministerial acts such as making preliminary orders and taking the necessary action to transfer the case to another judge.

However, while no notable problems have arisen with respect to the foregoing matters, some procedural issues have generated controversy. These issues are discussed below.

1. Can Disqualification of a Judge Be Waived?

Under the prevailing interpretation of the pre-1948 statute, if a party, after learning of the facts that allegedly disqualified the judge, failed to request disqualification in a timely manner or knowingly consented to the judge's remaining on the case, he was deemed to have waived his right to raise the disqualification issue on motion for a new trial or on appeal. The 1948 revision of the disqualification statute eliminated the requirement that a party raise the issue. Since the statute now reads "Any ... judge ... shall disqualify himself in any case in which [he falls within the statute's terms]," it can be argued that disqualification is now unwaivable. However, most reported decisions have not considered the effect of the 1948 language change and have continued to allow waiver. The only who could be rejected. This has been done in section 144, which limits a party to one disqualification request per case. See 28 U.S.C. § 144 (1970). A ruling by another judge involves some delay, as the new judge must take time to familiarize himself with the factual situation on which the request is based. Furthermore, some judges feel strongly that individual judges should retain the right to rule on disqualification motions. See, e.g., Adams v. United States, 302 F.2d 307, 314 (6th Cir. 1962) (Brown, J., dissenting).

23. Stringer v. United States, 233 F.2d 947 (9th Cir. 1956). An exception to this rule may occur if the cause of the judge's disqualification is removed. See, e.g., In re Sine, 22 Fed. Cas. 145 (No. 12,860) (C.C. Cal. 1872) (judge sold his claim against bankrupt and heard case since no other judge was obtainable). But see In re Honolulu Consol. Oil Co., 243 F. 348 (9th Cir. 1917).

Probably the most notable example of withdrawal of disqualification occurred when Chief Justice Stone did so in a case before the Supreme Court so that a quorum could be assembled. Frank, supra note 1, at 47.


26. Kramer v. United States, 166 F.2d 515 (9th Cir. 1948) (untimely motion); Utz & Dunn Co. v. Regulator Co., 213 F. 315 (6th Cir. 1914) (consent); Coltrane v. Templeton, 106 F. 370 (4th Cir. 1901) (untimely motion).


28. Thomas v. United States, 308 F.2d 249 (9th Cir. 1962); Harris v. United States, 339 F.2d 75 (8th Cir. 1965); Adams v. United States, 302 F.2d 307 (9th Cir. 1962); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961); Neil v. United States, 205 F.2d 121
exception is the Sixth Circuit, which has most recently considered the waiver issue. That court held in United States v. Amerine\textsuperscript{29} that the statutory change eliminated the possibility of waiver:

[While logical force the waiver argument might have otherwise, we believe it is completely negated by the fact that the statute originally required one of the parties to move for disqualification . . . but in 1948 Congress amended the statute, removing this feature entirely. . . . As the statute now stands, the duty to disqualify is placed solely upon the District Judge. Burdensome as the duty may occasionally prove to be . . . we think the statutory mandate must be observed.]

While the Amerine decision may seem persuasive, the waiver issue is still open because the alteration of the disqualification statute was part of the 1948 general revision of title 28 of the United States Code, and there is virtually no legislative history giving any reason for the change.\textsuperscript{31} When a general revision amends statutory language, courts may not alter their former interpretation of the law unless they are satisfied that Congress intended the revision to change the effect of the law.\textsuperscript{32} This rule of statutory construction (9th Cir. 1953); Neiman-Marcus Co. v. Lait, 107 F. Supp. 96 (S.D.N.Y. 1952); Lampert v. Hollis Music, Inc., 105 F. Supp. 8 (E.D.N.Y. 1952).

In all the cases where the courts have recognized waiver the parties had knowledge of the facts that disqualified the judge and either failed to request disqualification in a timely manner or affirmatively indicated to the judge that they wanted him to remain on the case. The only possible exception is Ramirez, which is not clear about whether the defendant had prior knowledge of the matters that allegedly disqualified the judge. No court has indicated that it would hold a party to have waived a disqualification if the party did not know the facts that allegedly disqualified the judge. Since waiver has been characterized by the United States Supreme Court as an intentional abandonment of a known right or privilege, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), it is doubtful whether waiver would ever be possible under such circumstances.

For an indication of current waiver practice in federal district courts, see the results of the author's questionnaire survey in Appendix infra.

\textsuperscript{29} 411 F.2d 1130 (1969).
\textsuperscript{30} 411 F.2d at 1134. The same conclusion was urged by Judge Brown, dissenting, in Adams v. United States, 302 F.2d 307, 313 (5th Cir. 1962). The Adams majority recognized that an "absolute technical disqualification" may be unwaivable, but did not indicate whether such circumstances could arise under section 455. 302 F.2d at 309. The position taken by the Amerine court and the Adams dissent is supported by William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtiss Marine Turbine Co., 228 U.S. 645 (1913), which held that rights under what is now 28 U.S.C. \textsection 47 (1970), prohibiting a judge from hearing an appeal of a case tried by him below, were not waivable. But see Lee v. United States, 91 F.2d 326 (5th Cir.), cert. denied, 302 U.S. 745 (1937); Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1936), cert. denied, 301 U.S. 689 (1937). Both cases held that the challenged appellate judge was not disqualified under section 47, but in dicta they stated that waiver was possible.

\textsuperscript{31} The Reviser's Notes do not indicate why the requirement that a party request disqualification was dropped. See H.R. REP. No. 308, 80th Cong., 1st Sess. A53 (1948).
\textsuperscript{32} In Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222 (1957), a case arising out of the 1948 revision and involving another provision of title 28, the Supreme Court stated that "it will not be inferred that Congress, in revising and consolidating the
could support allowing waiver under section 455, and as a result the pre-1948 cases on the subject may still be good law.

However, even if waiver is still possible under the statute, one important question remains: Should courts recognize waiver as a matter of policy? Since the goal of disqualification rules is to ensure fair trials by an impartial judge, it might be contended that the primacy of that goal should preclude a person from waiving his right to such a trial. While it may seem that disqualification should be waivable as are other important rights, in the disqualification context there are unique factors that must be considered. First, even if a disqualification would be in the best interests of his client, an attorney may hesitate to request disqualification in order not to alienate a judge before whom he may frequently appear. In such cases waiver operates as a penalty by turning the lawyer's hesitation into irrevocable loss of a right by his client. Second, the question


[N]o changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.

More changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised. See 353 U.S. at 227 n.8. This position has most recently been affirmed by the Supreme Court in Tidewater Oil Co. v. United States, 41 U.S.L.W. 4053 (U.S., Dec. 5, 1972). In the case of section 455, some change in procedure was probably intended, since deleting the requirement that a party request disqualification is certainly more than a change in phraseology. It is not clear, however, that the change was motivated by anything more than a desire to let a judge act on his own motion, if he wished to do so, in disqualification matters. See, e.g., Orfield, Recusation of Federal Judges, 17 Buffalo L. Rev. 799, 800 (1968).

33. Waiver of constitutionally protected rights is usually allowed as long as proper procedures are followed. See, e.g., D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972) (allowing waiver of notice and hearing before entry of a civil judgment); Stoner v. California, 376 U.S. 483, 489 (1964) (waiver of right against search and seizure must be made or authorized by defendant); Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) (allowing waiver of right to jury trial and right to counsel); Fed. R. Crim. P. 23(a) (allowing waiver of right to jury trial).

34. John Frank concluded on the basis of extensive communication with lawyers that most of them regard any sort of waiver system as a "velvet blackjack." Frank, supra note 1, at 64. See also ABA Code of Judicial Conduct, Canon 3D, Commentary, referring to the possibility of lawyers feeling coerced into waiving a disqualification.

35. Cf. Fed. R. Evid. 605, Advisory Committee's Note, in 93 S. Ct. No. 5, Jan. 1, 1973 (effective July 1, 1973). In connection with rule 605, providing that a presiding judge may not testify in a trial as a witness, the advisory committee noted that the attorney is not required to object in order to preserve the point for appeal, since he would be placed in the untenable position of having to choose between allowing the admission of excludable evidence or making an objection that the judge might consider an attack on his integrity.

One device appellate courts could use to prevent harm to a party from his lawyer's timidity is a requirement that the party have knowledge of the facts giving rise to a possible disqualification claim. See Adams v. United States, 502 F.2d 397, 314 (5th Cir. 1962) (Brown, J., dissenting). It would, of course, be difficult to ascertain whether a party
of disqualification may have implications for interests beyond those of the parties, for it may involve the integrity of the judicial system. Thus, it is arguable that disqualification should not be raised solely at the discretion of the parties. The Michigan supreme court once noted:

'The Court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim ["No man can be a judge in his own cause"] when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.\(^{36}\)

On the other hand, elimination of waiver offers potential for abuse. If a party is interested only in delay or wants to determine first whether a judge's decision will be favorable to him, he may not raise the disqualification issue until after trial.\(^{37}\) This could, of course, work considerable hardship on the opposing party and would also cause inefficiency in the administration of justice. Furthermore, it may be inappropriate to force a judge to disqualify himself when he and the parties have manifested agreement that he should hear the case.

In spite of these competing arguments over the desirability of waiver, it appears that the pressure that may be perceived by an attorney who must maintain a continuing relationship with the judge is the paramount factor to be considered. This conclusion would support an elimination or tight restriction of the use of waiver. It is therefore to be hoped that other circuits will follow the lead of the Sixth Circuit in refusing to impose or accept waivers. While the Code of Judicial Conduct would allow express waivers in cases involving financial interest or relationship,\(^{38}\) the possibility of had such knowledge unless he were required affirmatively to waive the disqualification claim. The Code of Judicial Conduct, Canon 3D, would require such action by a party for effective waiver. See note 19 supra. Thus far, no court has held that there was no waiver on the ground that the party did not personally waive disqualification.


\(^{37}\) See Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962). Opportunities for this type of abuse may be rare, since in order to avoid the possibility of a new trial both the judge and opposing lawyer would want to make sure at the outset that the judge was qualified to hear the case. Flagrant abuse, if it did occur, could probably be controlled by other means, such as sanctions against the offending attorney. Cf. FED. R. CIV. P. 11. See also text accompanying notes 141-43 infra.

\(^{38}\) ABA Code of Judicial Conduct, Canon 3D & Commentary. The Code allows waiver in these circumstances only under procedures designed to minimize the possibility of judicial coercion. The Reporter's Notes indicate that the drafters of the Code felt that the prescribed procedures—requiring both the lawyers and parties to sign a waiver outside of the judge's presence—would eliminate any coercion problems and at the same time reduce the chance of hardship caused by delay in obtaining another judge. See ABA Special Comm. on Standards of Judicial Conduct, Reporter's Notes, 51-55, on file with the Michigan Law Review [hereinafter ABA Reporter's Notes].
the lawyer feeling judicial coercion suggests that waiver should not be permitted at all. 39

2. Timing and Mode of Appeal in Disqualification Cases: Is Mandamus Available?

When the issue of possible disqualification arises at trial, a judge's refusal to disqualify himself may not be reviewed by interlocutory appeal. 40 Normally, a claim that a judge should have disqualified himself is raised on appeal after entry of final judgment. 41 However, there is a wide spectrum of opinion among the various courts of appeals over whether a party can use a petition for a writ of mandamus as a vehicle for obtaining prejudgment appellate review of a judge's disqualification decision. 42 Some circuits have

39. See Frank, supra note 1, at 63-64.

A special situation may arise in the Supreme Court with respect to waiver. If a justice is not asked to disqualify himself until after the decision is announced and if the case is close, a justice's disqualification decision may be the difference between, for example, a five-to-four reversal of a lower court's decision and a four-to-four affirmance. It is questionable whether a justice should be put into a position in which he is virtually asked to decide the case himself. Thus, in the Supreme Court there would be reason for holding that a party had waived the disqualification if he did not request it before the decision was announced.

40. The appellate jurisdiction of United States Courts of Appeals is limited to appeals from final judgments and from certain interlocutory decisions involving injunctions, receiverships, and under some circumstances admiralty and patent disputes. The courts of appeals also have the discretion to decide questions of law certified to them by a district judge. See 28 U.S.C. §§ 1291-92 (1970). For cases applying these statutes to disqualification, see Collier v. Picard, 287 F.2d 284 (6th Cir. 1966); Baltuff v. United States, 35 F.2d 507 (9th Cir. 1929); McColgan v. Lineker, 289 F. 253 (9th Cir. 1923); In re Wingert, 22 F. Supp. 484 (D. Md. 1938). Collier and McColgan apparently concerned the bias and prejudice statute, now 28 U.S.C. § 144 (1970). Because of the abbreviated opinions, it is not clear that Wingert and Baltuff arose under what is now section 455; but in each case the court intimated that the judge was a witness, which is one of the grounds for disqualification under section 455. In all of these cases interlocutory appeals of denials of motions for disqualification were not allowed.

41. If the appellate court finds the judge was disqualified, the judgment in the case is reversed and the case is remanded, presumably for retrial before another judge. See, e.g., United States v. Amerine, 411 F.2d 1130 (6th Cir. 1969).

42. This issue is more often discussed in cases involving section 144. However, since essentially the same issues are involved in section 455 cases, both types of cases will be cited in discussing the general problem of whether mandamus is an appropriate method for reviewing a judge's decision not to disqualify himself. The similarity of the issues is evidenced by the fact that the Third Circuit, explaining the decision of a section 455 case that appeared inconsistent with the result in an earlier section 144 case, did not attempt to distinguish the cases on the basis that different statutes were involved. Compare Rapp v. Van Dusen, 389 F.2d 806 (3d Cir. 1965), with Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).

Presently eight circuits have been willing to entertain requests for writs of mandamus in disqualification cases. Hurd v. Letts, 152 F.2d 121 (D.C. Cir. 1945); In re Union Leader Corp., 292 F.2d 381 (1st Cir.), cert. denied, 369 U.S. 927 (1961); Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968); General Tire & Rubber Co. v. Watkins, 368 F.2d 87 (4th Cir.), cert. denied, 355 U.S. 889 (1966); Henry v. Spear, 201 F. 869 (5th Cir. 1918); Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972); Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955); United Family Life Ins. Co. v. Barrow, 432 F.2d 997 (10th Cir. 1971). Three circuits have indicated that they do not think mandamus is appropriate in dis-
refused even to consider such petitions in disqualification cases, while the other circuits will entertain applications for the writ upon a showing of "exceptional circumstances." Those circuits that refuse to consider the writ defend their position with three basic arguments. First, they characterize a judge's decision not to disqualify himself as a discretionary act and note that mandamus is only proper to order a judge to perform ministerial, not discretionary, actions. Second, they argue that the congressional policy against piecemeal appeals overcomes any claim that early review would be desirable in order to prevent unnecessary expense and hardship from befalling litigants. Finally, they contend that mandamus is not appropriate because the remedy of appeal after final judgment is adequate. The essential point that these courts stress is the limited and exceptional nature of the mandamus remedy.

qualification cases. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958); Albert v. United States District Court, 283 F.2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954).

It should be mentioned that no court has refused to consider a request for a writ of mandamus in a section 455 case. See United Family Life Ins. Co. v. Barrow, 452 F.2d 997 (10th Cir. 1971); Wollson v. Palmieri, 396 F.2d 121 (2d Cir. 1968) (primarily concerned with section 144); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.), cert. denied, 385 U.S. 899 (1966); Texaco, Inc. v. Chandler, 254 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); In re Honolulu Consol. Oil Co., 243 F. 348 (9th Cir. 1917). This is explained by the fact that no section 455 cases have arisen in circuits that refuse to consider writs in section 144 cases except for Rapp v. Van Dusen. In that case, the Third Circuit did not abandon or modify its usual position against considering requests for mandamus in disqualification cases. It issued a writ of mandamus only on the basis of two unusual facts—first, the case was about to be transferred out of the circuit, and mandamus was the only opportunity for review of the transferring judge's refusal to disqualify himself; second, the alleged disqualification arose from circumstances created by a previous Third Circuit ruling in the case, and thus the court felt an obligation to grant mandamus under its general supervisory powers. 350 F.2d at 810.

43. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958), is an example of the various positions that can be taken by a court. The Third Circuit sitting en banc split three ways—the majority of four refused to consider the application for the writ, two concurring judges considered the application and urged its rejection, while the dissenting judge considered the request and voted to issue the writ.

44. It is generally accepted that mandamus is a writ to be used for ordering a public official (including a judge) to perform a ministerial duty he owes the petitioner. Albert v. United States District Court, 283 F.2d 61, 62 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961). See also Green v. Murphy, 259 F.2d 591, 593 (3d Cir. 1958); Korer v. Hoffman, 212 F.2d 211, 213 (7th Cir. 1954).

45. Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958); Korer v. Hoffman, 212 F.2d 211, 215 (7th Cir. 1954).

46. Typically mandamus, as an extraordinary writ, is available only when no adequate remedy exists at law. Albert v. United States District Court, 283 F.2d 61, 62 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958); Korer v. Hoffman, 212 F.2d 211, 213 (7th Cir. 1954).

47. The Seventh Circuit recently noted that this is a minority view in disqualification cases, but still adhered to it. Nevertheless, the court did look at the mandamus petition and determined that no exceptional circumstances were present. Action Realty Co. v. Will, 427 F.2d 845 (7th Cir. 1970).
The circuits that are willing to entertain petitions for the writ reject this restrictive view. They argue that in exceptional circumstances, they should consider an application for the writ in the interests of justice. An example of exceptional circumstances is the situation in which the judge in a disbarment proceeding has manifested such a degree of bias against the challenged attorney that the judge's continued involvement in the case would result in "the likely irreparable unjust smearing of [the lawyer's] reputation during the course of the proceeding below and the months of appellate procedure . . . ." Another example is a case in which delaying appeal of a disqualification decision until after final judgment would entail the risk of having to retry a very complex antitrust case. In general, however, an "exceptional circumstances" test may not be particularly difficult to meet in disqualification cases since such cases, by their nature, potentially involve exceptional circumstances. As Judge Hastie of the Third Circuit noted in his concurring opinion in *Green v. Murphy*:

[A] trial is not likely to proceed in a very satisfactory way if an unsettled claim of judicial bias is an ever present source of tension and irritation. Only a final ruling on the matter by a disinterested higher court before trial can dispel this unwholesome aura . . . . Such considerations far outweigh the objections to piecemeal appeals which ordinarily militate against deciding on mandamus an issue which can be reviewed after trial.

Such factors as these are believed by the circuits that consider requests for mandamus in disqualification cases to establish the inadequacy of review by appeal after final judgment. Generally speak-
ing, once a court decides to consider an application for a writ of mandamus, it will apply the same tests as it would on final appeal to determine whether there is in fact a disqualification.\textsuperscript{54}

\textbf{B. Statutory Interpretation of Section 455}

A request for disqualification requires that the judge (or appellate court) determine whether the judge falls within one of the statute's four classifications—of counsel, substantial interest, material witness, and relation to or connection with a party or his attorney. Such a determination necessarily involves interpreting the statute in light of the facts in the individual case. This section will examine the activities that have been held to disqualify a judge under section 455.

Throughout most of the statute's history the phrase "of counsel" has been construed literally. Unless the judge was an attorney for one of the parties in connection with the specific case before him, he would not be regarded as having been "of counsel."\textsuperscript{55} A broader standard has been applied to United States attorneys who have been appointed to district judgeships. Since United States attorneys are required by law to prosecute all criminal offenses against the United States,\textsuperscript{56} courts have held them "of counsel" in all federal prosec-

\textsuperscript{54} See Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972); United Family Life Ins. Co. v. Barrow, 452 F.2d 997 (10th Cir. 1971); Wolson v. Palmieri, 396 F.2d 121 (2d Cir. 1968); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.), cert. denied, 385 U.S. 899 (1966); Rosen v. Sugarman, 397 F.2d 794 (2d Cir. 1968); Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 385 U.S. 927 (1968); In re Union Leader Corp., 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961); United States v. Ritter, 273 F.2d 90 (10th Cir. 1959); Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955); In re Lisman, 89 F.2d 898 (2d Cir. 1937); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934); Henry v. Speer, 201 F. 869 (6th Cir. 1913); United States v. Gross, 298 F. Supp. 449, 457 (N.D. Iowa 1968).

\textsuperscript{55} Carr v. Fife, 156 U.S. 494 (1895); Rose v. United States, 295 F. 687 (4th Cir. 1924); In re Nevitt, 117 F. 448 (8th Cir. 1903); Duncan v. Atlantic Coast Line R.R., 223 F. 446 (S.D. Ga. 1915); The Richmond, 9 F. 863 (C.C.E.D. La. 1881) (reviewing earlier decisions).

tions that were commenced in their districts during their tenures as United States attorneys. As a consequence they have not been eligible to sit on trials of those cases even if the case was handled entirely by one of their assistants.\(^{57}\)

While it is clear that a judge is "of counsel" when he participated formally in a case by signing papers or by appearing in court, there is recent support for the view that an informal advisor can also be "of counsel." The Code of Judicial Conduct calls for disqualification if a judge served as a "lawyer in the matter in controversy."\(^{58}\) This wording seems to include a legal advisor, even one who did not appear in court or on the briefs. A memorandum prepared for Justice White by the Department of Justice also reaches this conclusion.\(^{59}\) Treating a legal advisor as "of counsel" is sensible because a judge who has given legal advice to a party regarding a specific case may be as likely to be partial as an attorney who has formally represented that party in court.\(^{60}\)


In United States v. Wilson, 426 F.2d 268 (6th Cir. 1970), however, the court was unwilling to extend this interpretation to nonprosecutorial functions of United States attorneys and refused to hold a judge disqualified when a defendant had been the subject of a federal investigation while the judge was United States attorney. The court felt that his general supervisory responsibility for investigations was not enough to call for disqualification, and that the crucial factor, at least for purposes of the "of counsel" provision, was the time when formal prosecution began. The court remanded for further findings of fact on this issue and for a determination of whether other possible grounds for disqualification under section 455 could have arisen from the judge's involvement. But see United States v. Ryan, 455 F.2d 728 (9th Cir. 1972). The defendant in Ryan had been a witness in an earlier related trial, which had taken place when the judge was United States attorney. The appellate court did not order disqualification, but stated that for the sake of appearance the court assumed that the judge would not participate in any further proceedings in the case. An argument similar to that accepted in Ryan was rejected by the Fifth Circuit. Roberson v. United States, 249 F.2d 737 (5th Cir. 1957), cert. denied, 356 U.S. 919 (1958).

\(^{58}\) ABA Code of Judicial Conduct, Canon 3C(1)(b), set out in note 19 supra.

\(^{59}\) It seems clear that a government attorney is "of counsel" within the meaning of section 455 with respect to any case in which he signs a pleading or brief, even if this was merely a formal act, and probably should be regarded as "of counsel" if he actively participated in any case even though he did not sign a pleading or brief.

Office of Legal Counsel, Dept. of Justice, Disqualification of Supreme Court Justices Because of a Prior Participation in a Case as a Government Attorney or Official, April 9, 1962, at 3 (memorandum prepared for Justice White), on file with the Michigan Law Review [hereinafter White Memorandum]. Justice Rehnquist has endorsed the memorandum's interpretation of the "of counsel" provision. Laird v. Tatum, 41 U.S.L.W. 3208, 3209 (U.S., Oct. 10, 1972) (memorandum of Rehnquist, J.). See also I.C.J. Stat. art. 17, para. 2, providing that no member of the International Court of Justice may participate in any case in which he has taken part as agent, counsel, or advocate for one of the parties.

\(^{60}\) At a minimum, a judge who has served as a legal advisor to one of the parties may be unable to maintain an appearance of impartiality. For the argument that ap-
There is one other interpretative problem that often arises in determining whether a judge was "of counsel." Since the statute provides that a judge "shall disqualify himself in any case in which he has . . . been of counsel," it is sometimes necessary to decide what constitutes a "case." There are two problems in this regard. First, when does a case begin for purposes of the statute? The Sixth Circuit has held that a case does not begin until prosecution commences—that is, until an indictment is returned. The second problem, which is more complex, is whether two separate proceedings should be considered as one case. In this connection, the Fifth Circuit has held that a judge, who while United States attorney had prosecuted a "liquor violation," was not of counsel in a perjury prosecution based on the "liquor violation" trial because the perjury action was commenced after he had become a judge. It would seem to be the better view that the word "case" refers to any group of suits arising out of the same factual setting, especially when the same parties are involved. If a judge presides at a second suit involving the same factual setting as an earlier suit in which he participated as an attorney or prosecutor, his preconceptions of the facts based on his experience in the earlier suit may preclude him from being, or appearing to be, impartial. In such a situation, a judge appearance should be a factor in a judge's disqualification decision, see notes 113-20 infra and accompanying text.

64. This result was strongly urged by Judge Brown, who filed a vigorous dissent in Adams focusing on the virtual identity of the issues involved in the two proceedings. 302 F.2d at 310-14. The Fifth Circuit had earlier indicated that identical fact situations would be sufficient to require disqualification. See Roberson v. United States, 249 F.2d 737 (5th Cir. 1957), cert. denied, 356 U.S. 919 (1958). Support for the Adams majority position can be found in Rose v. United States, 295 F. 687 (4th Cir. 1924), finding that a judge was not disqualified even though the indictment on which the defendant was tried contained several offenses identical to those charged in an earlier indictment prepared while the judge was United States attorney. The Court held that the two indictments did not constitute a single case. However, some support for the Adams dissent exists in Moran v. Dillingham, 174 U.S. 153 (1899), in which the Court, construing what is now 28 U.S.C. § 47 (1970) (disqualification of appellate judge from hearing appeal from trial he conducted), rejected a narrow interpretation of the statute and held that a judge was disqualified if he had participated at any stage of the lower court proceedings, even if he had not ruled on the precise question presented on appeal.
65. See notes 83-85 infra and accompanying text.

One other aspect of the "case" question deserves mention. When one party in a lawsuit applies to a court of appeals for a writ of mandamus, the action is nominally against the district judge, although the relief requested will normally be adverse to the interests of the opposing party in the case. Occasionally, the judge's responsive pleading is prepared by that opposing party, and it is likely that the attorneys will consult with the judge on whose behalf the answer is being filed. The party that applied for mandamus may therefore claim that the judge is disqualified because his consultation with opposing counsel has made him "of counsel" in the case. This argu-
should disqualify himself on the ground that he was of counsel in the case before him.

The second ground for disqualification is that the judge has a "substantial interest" in a case. Interest was the basic ground for disqualification at common law, and it has been adopted by the United States Supreme Court in cases challenging state court proceedings under the due process clause of the fourteenth amendment.

Courts have typically equated substantial interest with financial interest. An example of such an interest is that of a judge who has a financial stake in a similar case that has not yet been tried. How-

ment was basically accepted in Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965). The court ordered the trial judge not to sit in subsequent phases of the litigation because of his use of counsel for defendants to prepare his response to the mandamus petition submitted by plaintiffs. The court stated that it was basing its decision on its supervisory powers over the district courts rather than on section 455, 350 F.2d at 810, 814, but Judge Kalodner, concurring, 350 F.2d at 814-15, thought section 455 the proper ground. The argument was rejected in General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.), cert. denied, 385 U.S. 899 (1966). To the extent that a judge's reliance on a party's counsel is a problem, it can be easily solved by a court rule requiring that the opposing party in interest, instead of the judge, respond to a request for mandamus. This solution was adopted in both Rapp v. Van Dusen and General Tire & Rubber. Accord, In re Union Leader Corp., 292 F.2d 381 (1st Cir.), cert. denied, 358 U.S. 927 (1961).

A somewhat analogous situation arose in the Ninth Circuit when a defendant, in an attempt to cause the judge's disqualification for interest or connection with the opposing party, sued jointly both his opponents and the judge in a counterclaim. The court rejected the disqualification claim, although it suggested that the judge could disqualify himself if he wished to be rid of the case. Ely Valley Mines, Inc. v. Lee, 385 F.2d 188 (9th Cir. 1967). However, it has been held that when a judge has been sued in a civil action, it is a ground for disqualification if his lawyer in the civil action appears before him as an attorney in another unrelated case. Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

66. See text accompanying note 8 supra. Section 455 formerly required disqualification if a judge was in "any ways, concerned in interest." See note 9 supra. In 1948 this was changed to "substantial interest." 28 U.S.C. § 455 (1970), set out in text accompanying note 12 supra. As was the case with the other changes in the statute made at that time, there is no legislative history explaining the reason for the revision. Thus, courts can conclude that no change in substantive law was intended. See text accompanying notes 31-32 supra. Since prior to 1948 this section of the statute usually was construed to deal with financial interest, see note 68 infra, perhaps the change was intended to make it clear that a judge can hear a case if he has only a minor stockholding in a party. See Lampert v. Hollis Music, Inc., 105 F. Supp. 3, 5 (E.D.N.Y. 1952), But see note 72 infra and accompanying text.

67. "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955). Cf. text accompanying note 7 supra.


ever, the substantial interest provision does not extend so far as to disqualify a judge who owns stock in a bank from sitting at the trial of a defendant accused of robbing that bank.70 Generally a minor stockholding in a party has not been regarded as grounds for disqualification,71 but in recent years the practice of a judge hearing a case in which he has any financial interest, even an infinitesimal stockholding, has been the subject of considerable criticism.72 Moreover, the Code of Judicial Conduct calls for the disqualification of a judge who has a “legal or equitable interest, however small” in a party.73

70. United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970). See also Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972) (judges of Tenth Circuit not disqualified in appeal from actions they had taken as members of the Judicial Conference of the Tenth Circuit); Long v. Stites, 63 F.2d 855 (6th Cir.), cert. denied, 290 U.S. 640 (1933) (judge not disqualified in suit involving trust owning stock in bank where he was depositor); Epstein v. United States, 196 F. 354 (7th Cir. 1912) (judge not disqualified in a trial resulting from his having previously directed the prosecutor to find and prosecute persons who had looted an estate); United States v. Deardorff, 343 F. Supp. 1045 (E.D.N.Y. 1971) (judge not disqualified in a case involving a company to whom she had voted to give a franchise while President of the Borough of Manhattan, where that franchise was not involved in the case).


72. This trend was highlighted by the criticism directed at Judge Haynsworth, during the debate on his nomination to the Supreme Court, for hearing cases despite his indirect financial interest in a party. See Frank, supra note 1, at 51-60; Frank, 18 AM. J. COMP. L. '744, supra note 3, at 753-61.

One result of this controversy was evidenced by events in the Fifth Circuit. In the Southern Louisiana Area Rate Cases, 428 F.2d 407 (5th Cir.), cert. denied, 400 U.S. 929 (1970), two members of the original three-judge panel held stock, individually or as trustees, in several of the forty-five corporate parties. The judges notified counsel of these holdings and gave them a fixed time to request disqualification. After mounting pressure, both judges disqualified themselves without request before the deadline they had established. See Holloman, The Judicial Reform Act: History, Analysis, and Comment, 35 LAW & CONTEMP. PROB. 128, 139 (1970).

Another result was a resolution of the Judicial Conference of the United States requiring federal judges to file annually with the Conference a statement of investments and income. The report is to be made public upon filing. JUDICIAL CONF. OF THE U.S., PROCEEDINGS 42-43 (1969). The report form, set out in Judicial Conf. of the U.S., Proceedings 7-9 (1970), requires a statement of whether the judge has participated in any case in which he or a member of his immediate family had a financial interest in one of the named parties. If he has, the judge must detail the nature and amount of the interest, the amount at issue in the case, and the reasons why he deemed it proper to participate.

A third result was the introduction of several bills in Congress to broaden the disqualification laws. See, e.g., S. 3055, 90th Cong., 2d Sess. tit. 4 (1968); S. 4201, 91st Cong., 2d Sess. (1970). For a discussion of these and other proposals, see Frank, supra note 1; Holloman, supra. Neither of these bills has been enacted into law.

73. ABA CODE OF JUDICIAL CONDUCT, Canon 3C(3)(c), set out in note 19 supra. The matter of financial interest is covered in detail by the Code. The Canons of Judicial Ethics did not deal specifically with this question, but they were interpreted to require disqualification if a judge owned stock in a party. ABA OPINIONS, supra note 16, No. 170.

A judge is not held to have a disqualifying financial interest because of his status as a taxpayer. Wade v. Travis County, 72 F. 985 (W.D. Tex. 1896), affd., 81 F. 742 (5th
A significant question in the area of "substantial interest" is whether a judge who was connected with a case as a lawyer, prosecutor, or advisor should be deemed to have a "substantial interest" in the outcome of the case even if his connection with the case would technically not be sufficient to categorize the judge as "of counsel." The crux of the issue is whether a lawyer who took part in the formulation or advocacy of a party's legal arguments without formally representing the party can be, or appear to be, impartial when he later weighs these arguments as a judge.\(^{74}\)

Justice Frankfurter once pointed out that we know very little about the psychology of decision-making, but that we do know enough to be fairly certain that unconscious factors can be critical in arriving at a decision.\(^{75}\) In Adams v. United States,\(^{76}\) Judge Brown of the Fifth Circuit wrote in dissent:

> It is probably true that lawyers, from discipline and training, have an intellectual capacity to view objectively that which they formerly maintained, personally or vicariously, as partisans. But our system does not work that way. Our system frees the person of such a new-made umpire of that awful responsibility. Doing so, it insures that the mind of the Judge, as the mind of the juror, has not been affected or even possibly influenced by former positions taken concerning the very transaction and issue upon which he must now pass.\(^{77}\)

Similarly, the Adams majority, though it found no basis for disqualification on the facts of the case, indicated that the court would

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74. See Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962):

[B]ecause this case was not commenced until months after [the judge] had resigned as United States Attorney . . . it is clear, we think, that the judge was not disqualified on the ground of having "been of counsel in" the case which he was then trying.

This, of course, does not dispose of the case, for the trial judge is still subject to disqualification if he had "a substantial interest" in the case which he was then trying. Although it is doubtless true that the term "substantial interest" normally refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer has in pushing his case to a successful conclusion.

75. "[J]udges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process." Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (concurring opinion).

76. 302 F.2d 307 (5th Cir. 1962).

77. 302 F.2d at 313 (emphasis added).
interpret the substantial interest clause of section 455 as encompassing "the interest that any lawyer has in pushing his case to a successful conclusion." The United States Supreme Court reached an analogous conclusion in *In re Murchison*, a due process case involving a Michigan circuit court judge who attempted to try a person for a criminal contempt allegedly committed during a one-man grand jury proceeding conducted by the same judge. Speaking for the Court, Justice Black wrote:

A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.

The language in these cases suggests that a judge who has actively participated in a case by advising one of the parties or by acting as an advocate for that party is probably more likely to be swayed by arguments that he helped to devise or expound than by other arguments. This psychological attachment of a judge to his own arguments may be viewed as a "substantial interest" requiring his disqualification.

Another possible form of substantial interest that could arguably

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78. 302 F.2d at 310.
80. 349 U.S. at 137. The Court was also concerned about the judge's reliance on his recollection of facts that did not appear in the record and the problem that "[t]here were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge." 349 U.S. at 138.
81. A judge may be aware of the possibility of his acting partially and attempt to bend over backwards to avoid doing so. This, of course, simply changes the direction of the partiality and would be unfair to the side the judge had advised. For an example of a party who felt that the judge might behave in this manner, see Green v. Murphy, 259 F.2d 591, 593 (3d Cir. 1958).
82. This interest should be distinguished from the situation where the judge has previously ruled on a point of law or has presided at a different trial involving one of the parties. These are not advocate roles because the judge's opinion is the result of deliberation, not an attempt to influence deliberation. Judges are therefore not barred from hearing cases because the same parties have previously appeared before them or because they have ruled or written on similar legal questions. Goodpasture v. TVA, 434 F.2d 760 (6th Cir. 1970); Smith v. United States, 360 F.2d 590 (5th Cir. 1966); Barnes v. United States, 241 F.2d 252 (9th Cir. 1965). Similarly, the fact that a judge has expressed a general feeling toward a governmental policy does not disqualify him from sitting in cases where that policy is only a tangential issue. In Lawton v. Tarr, 327 F. Supp. 670 (E.D.N.C. 1971), a judge who was publicly opposed to the Vietnam War declined to disqualify himself in a selective service case. The judge felt he could properly apply the relevant statutes and stressed that the government had never before objected to his presiding over such trials. The judge's decision in Lawton finds support in the practice of Supreme Court justices who have not disqualified themselves in cases involving legislation that they had helped to draft or on which they had publicly expressed an opinion. See Laird v. Tatum, 41 U.S.L.W. 3208, 3209-10 (U.S., Oct, 10, 1972) (memorandum of Rehnquist, J.); Frank, supra note 1, at 50.
lead to disqualification is that arising when a judge has some prior knowledge of disputed facts in a case. In such a situation the judge's recollections may handicap a party in attempting to establish its version of the facts. The appropriateness of this argument has been recognized by the Code of Judicial Conduct. The committee that drafted the Code felt that a judge could not be, or at least could not appear to be, impartial if he had such knowledge. While no cases have been decided on this ground, the argument has been approved by the Fifth Circuit.

There are relatively few cases involving the "material witness" provision of section 455. There is, however, general agreement that the provision does not apply unless one of the parties actually calls

83. In addition, our adversary system presupposes that a neutral umpire will decide the case on the basis of evidence presented to it by the parties. If that decision maker has prior knowledge of the facts of a case, the decision may be based on something not formally presented to the court and thus not on the record for appeal. As Chief Justice Marshall stated in United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833): "The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause."

84. ABA Code of Judicial Conduct, Canon 3C(1)(a), set out in note 19 supra.

85. ABA Reporter's Notes, supra note 38, at 36. The rules of the Securities and Exchange Commission also recognize this: "[A commissioner] should disqualify himself in the event he obtained knowledge prior to becoming a member of the facts at issue before him in a quasi-judicial proceeding . . . . " 17 C.F.R. § 200.60 (1972).

86. "A prior knowledge of the facts or a prior interest in an issue arising out of them may be a ground for disqualification." Roberson v. United States, 249 F.2d 737, 741 (1957), cert. denied, 356 U.S. 919 (1958).

Section 455 does not apply to regulatory commissions, but courts have applied similar standards to them under the due process clause of the fifth amendment. American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966) (commissioner who had been chief counsel to Senate subcommittee investigating drug industry held disqualified in Commission proceeding involving the facts and parties that were subject to investigation); Amos Treat & Co. v. SEC, 306 F.2d 269 (D.C. Cir. 1962) (commissioner who had worked on case while staff member held disqualified from participating in decision); Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958) (member of CAB who had signed brief in case disqualified from participating in decision). See also SEC v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir.), cert. denied, 375 U.S. 943 (1963). But see Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962).

87. This provision has frequently been raised by motions to vacate sentence under 28 U.S.C. § 2255 (1970). In these cases, courts have ruled that Congress intended to allow the trial judge to pass on such motions and have rejected the claim that the judge is a material witness. United States v. Smith, 337 F.2d 49, 53-54 (4th Cir. 1964), cert. denied, 381 U.S. 916 (1965); Mirra v. United States, 225 F. Supp. 870, 882-83 (S.D.N.Y. 1966), aff'd, 379 F.2d 782 (2d Cir.), cert. denied, 393 U.S. 1022 (1969). But see Halliday v. United States, 359 F.2d 270 (1st Cir. 1966), aff'd, 394 U.S. 831 (1969) (decision that trial judge should not hear motion based on appellate court's general supervisory powers over district courts). See also Eaton v. United States, 458 F.2d 704 (7th Cir. 1972); Lucerno v. United States, 425 F.2d 172 (10th Cir. 1970); Simmons v. United States, 302 F.2d 71 (5th Cir. 1962).

The Ninth Circuit has ruled that a trial judge who hears a motion to vacate sentence cannot base his decision on hearsay information, such as a presentence report, unless he discloses the information to the defendant. Battaglia v. United States, 390 F.2d 258 (9th Cir. 1968).
the judge as a witness. While it is not clear what is meant by "material witness," at least it probably means that the judge is not disqualified unless his testimony would be admissible. In addition, there may be a requirement that it be necessary for the judge to testify; in other words, if another witness could supply the same evidence, the judge would not be a material witness. The Code of Judicial Conduct would expand the current statutory provisions to require disqualification when a member of a judge's family or a former law partner is a material witness.

Disqualification under section 455 can also occur when a judge is "so related to or connected with any party or his attorney as to render it improper, in [the judge's] opinion, for him to sit on the trial, appeal, or other proceeding therein." Cases arising under this clause generally involve a familial relationship between the judge and a party or his attorney. For example, in one case a judge disqualified himself because he was related within the fourth degree of consanguinity to a person who had an interest in the case. In another case, however, a judge did not disqualify himself although he belonged to the same international legal society as one defendant, and the appellate court sustained his decision to sit. Other cases have upheld decisions of a district judge not to disqualify himself when he had sold his stock in one party twenty-five years prior to the trial and when he had worked as a lawyer for one party earlier in his legal career. Since the Code of Judicial Conduct lays down spe-


90. See Borgia v. United States, 78 F.2d 550, 554 (9th Cir.), cert. denied, 296 U.S. 615 (1935).


93. In re Eatonton Elec. Co., 120 F. 1010 (S.D. Ga. 1903). But see In re Fox West Coast Theatres, 25 F. Supp. 250 (S.D. Cal. 1936), affd., 88 F.2d 212 (9th Cir.), cert. denied, 301 U.S. 710 (1937). In Fox, the judge declined to disqualify himself, in part because his relationship was to someone not technically a party but merely a recent officer of the corporate party. This was probably an overly strict reading of the word "party" in the statute. ABA Code of Judicial Conduct, Canon 3C(1)(d)(iv), set out in note 19 supra, includes such relationships among the grounds for disqualification.


cific guidelines for these situations, it is hoped that in the future judges will follow these standards in the interest of uniformity.

The final point to be noted in interpreting the statute's language is that the judge's discretion varies depending on the nature of the alleged disqualification. If the disqualification request is based on his relation to or connection with a party, the judge has discretion in determining whether he should disqualify himself because the statute expressly allows him to decide whether "in his opinion" it is "improper . . . for him to sit on the trial." As a result, appellate courts give considerable deference to the trial judge's decision so long as it is not arbitrary or capricious. However, if the alleged disqualification is based on one of the first three statutory grounds—of counsel, substantial interest, or material witness—the judge's discretion is more limited in two respects. First, if the judge determines that he falls within one of these three categories, he must disqualify himself regardless of whether in his opinion it is proper for him to sit. Second, a judge's determination that he does not fit in one of these categories should receive no more deference on appeal than any other legal conclusion.

C. Policy Considerations in Applying Section 455

The main problem for the challenged judge or reviewing appellate court when the possibility of disqualification arises is how to handle the close cases. For example, it is generally agreed that a

97. ABA Code of Judicial Conduct, Canons 3C(1)(b), 3C(1)(d), 3C(3)(a), set out in note 19 supra.

98. The Code is concerned with the appearance as well as the fact of impartiality, and adoption of its standards would also be desirable from this standpoint. See notes 113-20 infra and accompanying text.

99. So far as I can ascertain, [the words "in his opinion"] have never been construed to leave it to the judge's option whether he should retire from the case if he were in truth interested in the suit, or had been of counsel or advised to matters involved in it, . . . but only leave it to his conscience and judgment to sit or not when from other causes he is "so connected" with either party "as to render it, in his opinion, improper for him to sit on the trial" of the case.


100. United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970); Volkmann v. United Fruit Co., 147 F.2d 514 (2d Cir. 1944).

101. Compare Edwards v. United States, 354 F.2d 560 (5th Cir. 1964), cert. denied,
judge should disqualify himself at the trial of a defendant whose prosecution was commenced while the judge was serving as United States attorney for the district. A more difficult question is presented by a case such as Adams v. United States, in which the judge presided at a trial for perjury arising out of an earlier trial in a district for which the judge was then United States attorney. Since section 455 provides for disqualification "in any case" in which a judge has been of counsel, there is no question that the trial judge in Adams would have been disqualified in any proceeding directly connected with the initial prosecution. The essential issue, however, was whether the word "case" in the statute should be interpreted so as to embrace both the original trial and the subsequent perjury prosecution. The narrow interpretation adopted in Adams allowed the judge to hear the perjury trial while a more expansive definition would have required him to disqualify himself. Thus, Adams was a close case whose outcome might have been determined by the court's weighing of the various policies underlying the disqualification statute. While courts do not always give detailed reasons for their disqualification decisions, the major factors that are often mentioned and that should be considered will be discussed in the following pages.

The basic goal of disqualification for interest is to ensure that a litigant receives a fair trial. This means that there is a close connection between disqualification standards and the requirements of due process of law. Little has been said in the cases about the relationship between due process and disqualification of federal judges because there have been statutes governing disqualification at the federal level since 1792. The cases that involve disqualification for interest of federal judges usually turn solely on interpretation of section 455. There has been, however, a development of the due process approach in Supreme Court cases in which the Court scrutinized state court decisions under the fourteenth amendment and reviewed federal regulatory agency action under the fifth amendment. In In re Murchison, the Court stated that a "fair trial in a fair tribunal, with United States v. Zarowitz, 326 F. Supp. 90 (C.D. Cal. 1971) (judge disqualified himself to avoid possible appearance of prejudice despite belief that his situation was not within the statute). A good exposition of the various factors to be considered by a judge in deciding whether he should disqualify himself can be found in United States v. Quattrone, 149 F. Supp. 240, 242 (D.D.C. 1957).

102. See notes 56-57 supra and accompanying text.
103. 302 F.2d 307 (6th Cir. 1962).
104. See notes 61-65 supra and accompanying text.
105. See 302 F.2d at 310-15 (Brown, J., dissenting).
is a basic requirement of due process." In reaching this conclusion the Court reaffirmed its earlier decision in *Tumey v. Ohio* in which it held that it was unconstitutional for a justice of the peace to impose fines when he received a percentage of the fines. In that case Chief Justice Taft, speaking for a unanimous Court, made the sweeping pronouncement that

> every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of the law.

Similar requirements of fairness and due process have been applied in regulatory agency cases under the fifth amendment.

As a result of these cases a judge must be aware of the constitutional ramifications of his disqualification decisions. This is particularly true because *Tumey* and other due process cases appear to apply a standard that in some instances may go beyond the minimal requirements of section 455. Thus, a too literal interpretation of the statute may not meet constitutional due process requirements. In order to avoid facing such a constitutional problem, a judge or appellate court may find it necessary to read section 455 expansively to require disqualification in close cases.

Another factor to be considered in a judge's decision to disqualify is the contention that the appearance of impartiality is as important, if not more so, than actual impartiality. In 1952, Justice Frankfurter explained his disqualification in a case by stating that "justice should reasonably appear to be disinterested as well as be so in fact." The Supreme Court gave support to this view in the

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107. 349 U.S. at 136.
109. 273 U.S. at 532.
110. See cases cited in note 86 supra.
111. In *Ward v. Village of Monroeville*, 41 U.S.L.W. 4011 (U.S., Nov. 14, 1972), the Court applied the *Tumey* test to hold that the mayor of a village could not preside at trials of traffic violations when the fines imposed went into the village treasury. This holding makes it unnecessary that the financial interest be a personal one to disqualify a judge on due process grounds. Since the historical equation of "substantial interest" under section 455 with a personal financial interest, see notes 68-73 supra and accompanying text, may not be as broad a standard as *Ward* and *Tumey* apparently require, the "substantial interest" provision of section 455 is an example of due process requirements that are broader than the traditional, narrow reading of the statute.
due process context when in *Murchison* Justice Black wrote for the Court:

> Fairness of course requires an absence of actual bias. . . . But our system of law has always endeavored to prevent even the probability of unfairness. . . . That it perform its high function in the best way "justice must satisfy the appearance of justice."114

More recently the Court set aside an arbitration award and stated that "[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."115 A number of lower federal courts have applied these statements of the Supreme Court to section 455 cases.116

The unique power enjoyed by the judiciary in the United States is due in large part to the high esteem in which the courts are held.117 That esteem is dependent to a great extent on the appearance of impartiality that the courts put forward. As a federal judge wrote in 1940:

> There is perhaps no more important right to which litigants are entitled than they be given such a trial [free from bias]. Its impairment, ipso facto, brings the court, and administrative bodies as well, into public disrepute, and destroys the esteem and confidence which they have enjoyed so generally. Time and experience have demonstrated that the public, as well as litigants, will tolerate the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality."


Circumstances requiring recusation.

The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned.


> [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

393 U.S. at 149.


For the attitude of federal district courts toward the appearance factor, see survey results in Appendix infra.

honest mistakes of those who pass judgment, but not the biased acts of those who would deprive litigants of a fair and impartial trial. Foremost among the responsibilities imposed upon a reviewing court, is to make sure that this foundation of our judicial system be not undermined.\footnote{118}

If public confidence in the judicial system is to be maintained, the courts should strive to avoid any suggestion of impropriety. One way to accomplish this is to avoid the appearance of partiality.\footnote{119}

This argument in effect urges a judge to disqualify himself in close cases.\footnote{120}

Another important factor in a judge’s decision to disqualify himself should be the recently adopted Code of Judicial Conduct. It contains detailed provisions to guide judges in resolving challenges to their qualifications.\footnote{121} In part the Code, with official Commentary, provides:

A judge should ... observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.\footnote{122}

\footnote{118. Inland Steel Co. v. NLRB, 109 F.2d 9, 29 (7th Cir. 1940) (Major, J.)}
\footnote{119. See United States v. Quattrone, 149 F. Supp. 240, 241-42 (D.D.C. 1957): In these times in which the Judiciary has been recklessly attacked and its integrity wrongly challenged, it is particularly important that the problem of voluntary disqualification be carefully considered . . . .}
\footnote{120. It can be argued that Congress intended the courts to avoid the appearance of partiality as well as the fact thereof: [T]he language of the statute is mandatory: “Any ... judge of the United States shall disqualify himself in any case in which he ... has been of counsel ...” As to this feature of the statute, prejudice is presumed whether actually present or not. We believe that the language employed by Congress compels the conclusion that Congress was concerned with avoiding the appearance of partiality as well as avoiding the fact. United States v. Amerine, 411 F.2d 1130, 1133 (6th Cir. 1969) (emphasis original).}
\footnote{122. ABA CODE OF JUDICIAL CONDUCT, Canon 1.}

\footnote{121. See note 19 supra.}
A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.\(^{123}\)

A judge must avoid all impropriety and appearance of impropriety.\(^{124}\)

While the Code (and its predecessor the Canons of Judicial Ethics) may not be binding on a court of law, it is strong authority because it serves as a statement by the legal profession of what is proper conduct for a judge. The Supreme Court has recognized this and quoted the Canons in support of its decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*\(^{125}\) Because in certain instances the Code's standards are broader than the literal terms of section 455\(^{126}\) and because the Code stresses the importance of the appearance of impartiality, it would resolve close cases by calling upon the judge to disqualify himself.

Weighing in the opposite direction is the argument that frequent disqualification would cause highly qualified men who have been active in law and politics to decline judicial appointments. The rationale of this argument is that such individuals would feel that they could not contribute to the judicial system because their prior activities would result in frequent disqualification.\(^{127}\) The only federal court to face such an argument rejected it in the context of reviewing a federal administrative proceeding.\(^{128}\) Since federal judgeships are quite prestigious, it does not seem that a particular interpretation of the disqualification statute would dry up the supply of qualified persons willing to accept judicial appointment. Additionally, disqualification for interest is normally a problem only for the new judge—the longer a judge is on the bench, the less likely it is that he will face disqualifying situations.\(^{129}\)

\(^{123}\) *Id.,* Canon 2A.

\(^{124}\) *Id.,* Canon 2, Commentary.

\(^{125}\) 393 U.S. 145, 149-50 (1968). Congressmen have indicated that they expect members of the federal judiciary to follow the Canons of Judicial Ethics. See *H.R. Res. 922, 91st Cong., 2d Sess.* (1970), calling for an investigation of Justice Douglas, in part because of alleged violation of the Canons. This resolution, along with several others, was considered by a special subcommittee of the House Judiciary Committee, which recommended that he not be impeached. See *STAFF OF SPECIAL SUBCOMM. ON H.R. RES. 920 OF THE HOUSE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., FINAL REPORT: ASSOCIATE JUSTICE WILLIAM O. DOUGLAS* (Comm. Print 1970).

\(^{126}\) *See* text accompanying note 58 *supra.*

\(^{127}\) A variation on this theme is the argument that the President would be deterred from appointing such people to the bench because their frequent disqualification would dilute the impact that his appointees would otherwise have on the judicial system.

\(^{128}\) American Cyanamid, Inc. v. FTC, 363 F.2d 757, 768 (6th Cir. 1966). The court vacated an FTC order on the basis that the Commission's chairman should have disqualified himself under section 7(a) of the Administrative Procedure Act, now 5 U.S.C. § 556(b) (1970).

\(^{129}\) ABA Reporter's Notes, *supra* note 38, at 37.
Another argument against frequent disqualification is that it will lead, in the words of one United States circuit court, to "clogged courts" and "intolerable delays." However, such fears have been expressed only by courts sitting in the Far West over sixty years ago. At that time there were no multijudge districts, only limited provision for the use of visiting judges, and poor communication and transportation systems. Consequently, if one judge could not hear a case a considerable delay might ensue before another judge could be obtained to hear it. This is not frequently true today. We live in an era of almost instant communication and transportation. In addition, most districts have several judges and there are procedures for using visiting judges. Thus, a disqualified judge usually can be easily and quickly replaced. Not surprisingly the delay argument does not appear to have figured in any reported disqualification cases since 1914.

One of the major arguments against disqualification is that a judge has a duty to hear cases. There are two aspects to this duty—a duty to the litigants and a duty to the judicial system. If disqualification would result in the inability of a litigant to have an expeditious hearing from a trial court or in the inability of an appellate court to gather a quorum, a judge may feel an obligation to interpret the statute so as to avoid disqualifying himself. Actually these situations should be relatively rare because of the numerous procedures available to replace disqualified judges. If such a situation does arise, however, it certainly justifies a narrow interpretation of the statute in order to avoid injustice.


131. In 1891, there were 63 district judges, but no multijudge districts. 44 F. iv-vi (1891). There were limited procedures for the use of visiting judges starting in the latter half of the nineteenth century. See Act of July 29, 1850, ch. 30, 9 Stat. 442; Act of April 2, 1852, ch. 20, 10 Stat. 5. The lack of adequate transportation and communication facilities made extensive use of these provisions difficult. These provisions have been gradually expanded over the years. See, e.g., Act of March 3, 1911, ch. 231, §§ 13-19, 36 Stat. 1089-90; Act of October 3, 1913, ch. 18, 38 Stat. 203. Current statutes dealing with visiting judges are codified in 28 U.S.C. §§ 291-96 (1970).

132. Congress has provided for 391 district judges (not counting senior district judges), and only 5 districts out of 90 had but one judge. 28 U.S.C. § 133 (1970), as amended, (Supp. I, 1971).


134. "The result [of the radical expansion in the number of federal judges] both can and should be that the standard of disqualification goes up; it is so easy to put someone else on the case." Frank, supra note 1, at 44. See also United States v. Quatrone, 149 F. Supp. 240, 242 (O.D.C. 1957); JUDICIAL CONF. OF THE U.S., PROCEEDINGS 16, 48 (1971); 1971 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 400-12; Appendix infra.

135. However, there are still instances in which delay may be a factor, especially in single judge districts. See survey results in Appendix infra.

136. Chief Justice Stone once withdrew his disqualification so that the Supreme
The source of the assertion that a judge has an obligation to the judicial system to hear cases is the judge's oath of office, in which he pledges to "faithfully and impartially discharge and perform all duties incumbent upon" him. This oath has been cited to support the argument that a judge's duty to the judicial system requires him to sit unless he is clearly disqualified. Proponents of the opposing view argue that greater emphasis should be given to the part of the oath that requires a judge to be impartial.

In analyzing the judge's duty to sit, it is important to recall that in most cases, disqualification of a judge will not result in harm to the parties or disrupt the judicial system. Hence, it would seem that ensuring fairness in fact and the appearance of impartiality should be given greater consideration in deciding whether disqualification is required than any duty to sit.

Another argument against resolving close cases in favor of disqualification is the possibility that more frequent disqualification will encourage litigants to abuse the statute by advancing frivolous claims. While this argument has some merit, the weight to be accorded to it depends on how effectively the courts can deal with abuse of section 455. If a disqualification question is raised along with other issues on appeal from final judgment, little additional effort is needed to consider the disqualification claim. If the matter

Court could assemble a quorum. See note 23 supra. A trial judge in a single-judge district may feel obliged to sit in most cases because of the difficulty and delay that his replacement by another judge would entail. See Appendix infra.


140. The duty to sit is, of course, more important on the Supreme Court level, for the failure of a justice to participate can prevent the Court from deciding, or even hearing, some cases. A disqualification could also lead to conflicting rulings from different circuits being affirmed by an equally divided Court, thus creating "one rule in Athens, and another rule in Rome." Laird v. Tatum, 41 U.S.L.W. 3208, 3211 (U.S., Oct. 10, 1972) (memorandum of Rehnquist, J.).

141. Examples of frivolous claims probably include Weiss v. Hunna, 312 F.2d 711 (2d Cir.), cert. denied, 374 U.S. 853 (1963) (judge and a party belonged to the same international legal society); McNeil Bros. Co. v. Cohen, 264 F.2d 186 (1st Cir. 1959) (judge had been lecturer at law school while partner of defendant was Dean); Town of East Haven v. Eastern Air Lines, 304 F. Supp. 1228 (D. Conn. 1969) (in suit involving airport noise, trial judge often ate lunch with another judge who lived near the airport). In McNeil, the petitioner also sought to have the judge's colleagues on the circuit court disqualified because of their connection with the allegedly disqualified judge.
is raised by way of the mandamus procedure, the appellate court can handle the issue without significant delay or cost. Abuse is most likely to be a problem when disqualification is the only ground for appeal after final judgment. But it may be assumed that the courts can sift the frivolous claims from the substantial ones and thereby minimize any delay. Thus, while abusive claims probably cannot be prevented, the courts can effectively deal with such claims without excessive loss of time, money, or energy.

Those factors that weigh against disqualification generally arise only in exceptional circumstances. But when they do arise, a judge should consider the potential injustice to the parties that may flow from his disqualification. On the other hand, there are strong arguments in favor of a judge disqualifying himself in close cases. Such action is in accordance with fundamental notions of due process and with the provisions of the Code of Judicial Conduct. In addition, it would help maintain the appearance of impartiality in our judicial system. Questions of disqualification should be resolved so as to remove any shadow of doubt as to the impartiality of a judge.

III. CONCLUSION

As this Comment demonstrates, courts often disagree on what procedures and standards are proper under the disqualification for interest statute. Since consistent application of laws is desirable in any judicial system, it could be argued that more precise disqualification standards should be established. There are three ways in which this could be accomplished. First, Congress could make section 455 more detailed; second, the courts could informally adhere to the Code of Judicial Conduct; third, the Supreme Court could adopt rules for the lower federal courts under its general supervisory powers. All of these alternatives have the potential of creating

142. See note 55 supra.

143. The Code of Professional Responsibility and the Federal Rules of Civil Procedure have provisions that could be invoked against an attorney who was abusing the statute. Fed. R. Civ. P. 11; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon DR 7-102(A)(2). In addition, a lawyer would probably be hesitant to advance a frivolous claim if he thought he might have to appear before the presiding judge in the future. Cf. notes 34-35 supra and accompanying text. For the view of district judges on abuse of section 455, see Appendix infra.


145. One such proposal has been introduced by Senator Birch Bayh. See S. 4201, 91st Cong., 2d Sess. (1970). His proposal, written in consultation with John Frank, would eliminate the possibility of waiver, require disqualification if the judge owns any stock in a corporate party, require disqualification if there is an appearance of partiality, and allow the judge to disqualify himself in any case in which he feels he should. The bill is set out and discussed in Frank, supra note 1.

inflexibility, which could result in grave injustice in individual cases. Strict statutory rules would be particularly vulnerable to this criticism. Additionally, it might be questioned how much detailed interference by Congress in this aspect of court procedure is desirable.\textsuperscript{147} Since the Code of Judicial Conduct is the product of a non-governmental body, it may not be an appropriate source of statutory law.\textsuperscript{148}

Court rules represent probably the best of the three proposals. Allowing the judiciary to govern itself in such matters as disqualification would cultivate desirable independence on the part of the judicial branch.\textsuperscript{149} Furthermore, it would avoid possible conflicts between Congress and the courts over what constitutes impermissible congressional meddling in the affairs of the judicial branch. To avoid injustice, such rules should be sufficiently flexible to take account of cases that may arise under special circumstances and require individualized treatment. The Code of Judicial Conduct might be valuable as a prototype for such rules.

If disqualification standards were determined by the judiciary, they could be modified in light of practical experience. Working within the bounds of section 455, an elaboration of disqualification standards in the form of court rules would allow the federal courts to maintain both judicial prestige and consistent, fair procedures for litigants, and might make resort to the tedious process of case-by-case review less frequent.

**APPENDIX**

In connection with this Comment, the author sent brief questionnaires to the chief judges of the ninety United States District Courts. Completed responses were received from forty-four of those judges.\textsuperscript{150} Each judge was asked to respond to six specific questions and to add any other comments or thoughts he had concerning the

\textsuperscript{147} The separation of powers question has never been an issue in the disqualification area. This is probably due in large part to general agreement by most courts on the minimal standards that section 455 imposes. A law seeking to force changes in current judicial practice might make some courts more willing to sustain a challenge to a disqualification statute on the grounds that it is an unconstitutional breach of the separation of powers doctrine. For a discussion of the general issue, see Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121-27 (1970).

\textsuperscript{148} Miller, supra note 18, at 71. See also Order Prescribing Federal Rules of Evidence, 41 U.S.L.W. 4021 (U.S., Nov. 29, 1972) (Douglas, J., dissenting).

\textsuperscript{149} Miller, supra note 18, at 72-73.

\textsuperscript{150} The response rate was highest from smaller districts. Responses were received from 22 of the 37 districts with two or fewer judges, 14 of the 28 districts with two to four judges and 8 of the 26 districts with more than four judges. Geographically, the districts responding ranged from 6 of 18 in the Fifth Circuit and 4 of 13 in the Ninth to 5 of 7 in the Seventh and 8 of 10 in the Eighth Circuit. In most of the other circuits responses were received from at least one half of the districts.
operation of section 455 in his district. The responses are on file with the Michigan Law Review. A summary of the information received follows.

1. The approximate number of disqualifications/year/judge which would fall under 28 U.S.C. § 455 in your district. (Even a rough estimate would be very helpful.)

The range of responses to this question was broad. One chief judge replied that none of the judges in his district had been disqualified in over ten years. At the other extreme, six chief judges reported that their judges disqualified themselves ten or more times per year. The median number of disqualifications per year per judge was two, while the average was approximately three and one half.

2. The percentage of the disqualifications in your district that are requested by the parties (as contrasted with those on the judge's own motion).

Twenty-seven of forty-two chief judges who responded to this question stated that all of the disqualifications in their districts were on the judges' own motions. Eight responses indicated that motions by parties prompted at least one quarter of the district's disqualifications.

3. Do judges in your district allow parties to voluntarily waive a disqualification?

The responses to this question were almost equally divided. Thus, while only one court has held in a reported decision that waiver is not allowed under the 1948 revision of section 455,151 in practice many trial courts apparently do not allow waiver of a disqualification.

It is perhaps ironic to note that although the Code of Judicial Conduct seems designed to reduce the number of situations in which waiver can occur,152 one judge stated that prior to the adoption of the Code his district did not allow waiver in any instances, but now will allow waiver when the Code permits it.

4. If a party does not raise the issue of disqualification in a timely fashion, will judges in your district hold that party to an "involuntary" waiver?

Only five chief judges replied that their district practice was to impose "involuntary" waivers, while thirty-one reported that they do not impose such waivers. Again the case law does not seem to coincide with actual practice.153

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152. See ABA Code of Judicial Conduct, Canon 3D, set out in note 19 supra.
153. See text accompanying notes 25-28 supra.
5. Does the replacement of a disqualified judge typically involve any significant delay in the ultimate resolution of a case?

All but one of the responses from districts with just one full-time judge indicated that disqualifications significantly delay trials in those districts.154 One respondent said that he was hesitant to disqualify himself because of the delay factor.

The overwhelming majority of the respondents from multijudge districts replied that there was no significant delay in the replacement of a disqualified judge. Only three judges stated that the delay would amount to more than three months. One judge estimated that the “delay” is normally no longer than the few minutes it takes to dictate a letter reassigning the case. Another suggested that it takes a few days for a replacement judge to familiarize himself with a case after the original judge has disqualified himself. The complexity of a case may affect the length of the delay caused by disqualification. For example, one judge mentioned that it took him several months to familiarize himself with an antitrust case that was transferred to him after a colleague had disqualified himself.

6. Based on the experience of your district, do you feel that section 455 is frequently abused?

All but one respondent to this question indicated that litigants do not often abuse section 455.

7. Do you have any other comments on the operation or significance of section 455 in your district? I would be especially interested in whether judges in your district disqualify themselves to avoid a possible appearance of partiality even if they do not believe they fall within any of the statute’s proscriptions.

Twenty-four responses indicated that judges often disqualify themselves if there might be a possible appearance of partiality even though they did not fall within the statute’s proscriptions. Only six respondents indicated that judges in their districts did not usually do so.

154. Responses were received from all five one-judge districts and from three of six districts with one full-time judge and the services of a roving judge.