

4-1-2000

Judicial Process at Risk: Scales of Justice Unequal Under Present Federal Judicial Disqualification Statutes

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JUDICIAL PROCESS AT RISK: SCALES OF JUSTICE UNEQUAL UNDER PRESENT FEDERAL JUDICIAL DISQUALIFICATION STATUTES

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I. INTRODUCTION

Inscribed in the highly visible façade of the Supreme Court building is the caption “Equal Justice Under the Law.” This inscription, which assures that every citizen is dealt equal justice, embodies the guiding principle of our society and judiciary. The responsibility of ensuring that equality is delivered in our courts are the Justices and judges who pledge to perform their duties impartially, free of personal interest or bias.¹ As public officials, judges

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¹ See Jeffrey M. Shaman & Julie R. Fouts, *The Impact of Judicial Relationships on the Appearance of Impartiality*, JUD. CONDUCT REP., Winter 1990, at 1.

exercise judicial discretion over a diversified range of issues both in public and private sectors affecting "every facet of life" and influencing "every corner of society."² Judges are considered by most citizens as symbols of justice, consistently striving to impartially balance the scales of justice providing an even playing field for all.³

An impartial judiciary is essential to immortalize justice and to preserve the public confidence in the integrity of the judicial process.⁴ Judges should not be persuaded by personal bias or prejudice concerning particular litigants or by a personal stake in the outcome of a proceeding. In order to suppress the presence of partiality and safeguard "independence and accountability,"⁵ state and federal forums regulate judicial disqualification through statutes and Canon 3E of the *Code of Judicial Conduct*.⁶ These codes intend to foster public confidence in the integrity of the judicial system and "sustain the rule of law and constitutional and democratic values" of our society.⁷

Nevertheless, it is evident in today's society that citizens have been losing confidence in the ability of the law and the courts to dispense equal justice for all.⁸ Under attack from political and media scrutiny, the judiciary has been the focus of contemptuous criticism.⁹ From scandals surrounding judicial campaign financing¹⁰ to criticism of Supreme Court Justice Breyer upon his nomination to the Court,¹¹ the public is alarmed by pervasive impropriety within the judiciary. This criticism initiated discussion about whether current federal judicial disqualification statutes and the *Code of Judicial Conduct* are adequate scriptures compelling judges to be ethical and avoid the appearance of impropriety.

This Comment examines the injustice within the judicial process as a result of substandard specifications for judicial disqualification. The Comment describes the historical development leading up to the present

² See Jeffrey M. Shaman, *Judicial Ethics*, GEO. J. LEGAL ETHICS, Summer 1988, at 1.

³ See Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 646 (1999).

⁴ See Jeremy S. Brumbelow, *Liteky v. United States: The Extrajudicial Source Doctrine and Its Implications For Judicial Disqualification*, 48 ARK. L. REV. 1059, 1059 (1995).

⁵ THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 278 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).

⁷ See Zemans, *supra* note 3, at 632.

⁸ See Roberta S. Mitchell, *The Founding of Capital's Law Review: A Retrospective*, 25 CAP. U. L. REV. 237, 241 (1996).

⁹ See Zemans, *supra* note 3, at 637.

¹⁰ See Alexander Wohl, *Justice for Rent*, AMERICAN PROSPECT, May 22, 2000, available at 2000 WL 4739281.

¹¹ See Stanley A. Kurzban, *Legality, Ethicality and Propriety of Justice Breyer's Participation in United States v. Ottati & Goss*, 20 J. LEGAL PROF. 139, 139-40 (1996).

statutory standards for recusal and then discusses the federal statutes which are deficient in providing for judicial disqualification, specifically focusing on the disqualification of federal judges with financial or other interests in the outcome of a proceeding. The Comment then concludes by evaluating the inherent problem in the particular federal provisions in light of current case law and recommends a solution to curb the potential for injustice.

II. HISTORICAL DEVELOPMENT

A. *Blackstone's Commentaries on the Laws of England*

In England, during the era of William Blackstone, judicial disqualification was invalidated as a means of protecting the judicial process from judges' biases.¹² Blackstone's *Commentaries on the Laws of England* represented a significant shift from the English tradition of utilizing recusal to substitute a suspect judge with a detached replacement.¹³ Instead, Blackstone adhered to the view that judges and people should tolerate the suspicion of partiality within the courts.¹⁴ According to Blackstone, "the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."¹⁵ Notwithstanding Blackstone's beliefs, under early English common law disqualification was necessary when the judge had a direct economic interest in the outcome.¹⁶

B. *Constitutional Grounds for Disqualification*

The Constitution instituted an independent judiciary with decisional independence to guarantee that all individual cases were decided impartially.¹⁷ As a result, "the problem of judicial disqualification is of constitutional dimensions."¹⁸ The Constitution warrants that every citizen will receive an

¹² See, e.g., *Liteky v. United States*, 510 U.S. 540, 543-44 (1994); see also Brumbelow, *supra* note 4, at 1064.

¹³ See William de Raleigh & Henri de Bracton, *The Laws and Customs of England* (1270), in *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* 278-279 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

¹⁴ See William Blackstone, *Commentaries on the Laws of England* (1765), in *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* 278, 279 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

¹⁵ *Id.*

¹⁶ See Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 751 (1973).

¹⁷ See Zemans, *supra* note 3, at 630-31.

¹⁸ Brumbelow, *supra* note 4, at 1064.

impartial trial before a "neutral and detached judge"¹⁹ under the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁰ The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.²¹ This powerful and independent constitutional interest in a fair adjudicative proceeding helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.²² At the same time, this constitutional interest preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done."²³ Justice ensures that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.²⁴

The Supreme Court has jealously guarded the "requirement of neutrality"²⁵ under the Due Process Clause safeguarding "the purity of the judicial process and its institutions."²⁶ No person can be a judge in his own case and no person is permitted to try cases where he has an interest in the outcome.²⁷ The Court has demanded that "justice must satisfy the appearance of justice."²⁸ Thus, every procedure which would offer a possible temptation to the average person as a judge not to hold the balance between the State and the accused denies the latter due process of law, even though the judge may have no actual bias and may be capable of weighing the scales of justice equally between contending parties.²⁹ Therefore, constitutional law mandates that due process is violated when a judge has "the slightest pecuniary interest."³⁰

¹⁹ See *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) ("Petitioner is entitled to a neutral and detached judge."); see also Brumbelow, *supra* note 4, at 1064.

²⁰ See U.S. CONST. amend. V, § 1 ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); see also Brumbelow, *supra* note 4, at 1064.

²¹ See, e.g., *Marshall v. Jerico*, 446 U.S. 238, 242 (1980); see also Brumbelow, *supra* note 4, at 1065.

²² See *Marshall*, 446 U.S. at 242; see also Brumbelow, *supra* note 4, at 1065.

²³ *Marshall*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951)); see also Brumbelow, *supra* note 4, at 1065.

²⁴ See *Marshall*, 446 U.S. at 242; see also Brumbelow, *supra* note 4, at 1065.

²⁵ See *Marshall*, 446 U.S. at 242; see also Brumbelow, *supra* note 4, at 1065.

²⁶ *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d 437, 439-40 (5th Cir. 1968); see also Brumbelow, *supra* note 4, at 1065.

²⁷ See *In re Murchison*, 349 U.S. 133, 136 (1955).

²⁸ *Marshall*, 446 U.S. at 242 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

²⁹ See *Murchison*, 349 U.S. at 136.

³⁰ *Tumey v. Ohio*, 273 U.S. 510, 524 (1927); see also *Davis v. Xerox*, 811 F.2d 1293, 1294 (9th Cir. 1987).

C. American Bar Association Code of Judicial Conduct

The American Bar Association adopted the *Canons of Judicial Ethics* in 1924 to provide a model of conduct rather than an enforceable code.³¹ The thirty-six canons that consisted of generalized standards of proscribed conduct were drafted by a committee headed by Chief Justice William Howard Taft and have been criticized for emphasis on "moral posturing."³² Failing in concrete strictures, the *Canons of Judicial Ethics* were deficient in solving complex questions.³³ As a result, the American Bar Association created a Special Committee on Standards of Judicial Conduct to compose contemporary authoritative regulations.³⁴

In 1972, the American Bar Association adopted the *Code of Judicial Conduct*³⁵ that, contrary to its predecessor, contains five compulsory and enforceable canons.³⁶ Through minor changes in 1982 and 1984 and a revision in 1990, the Code, generally and specifically, calls upon judges to "observe high standards of conduct."³⁷ The Code demands that judges uphold the integrity and independence of the judiciary, avoid impropriety and the appearance of impropriety in all of their activities, perform the duties of their office impartially and diligently, and minimize the risk of conflict with judicial obligations when engaging in extra-judicial activities.³⁸

The Canons of the *Code of Judicial Conduct* are instrumental in dictating a uniform model code of ethics that federal and state judges must observe. Forty-seven states, the District of Columbia, and the Federal Judiciary have adopted the Model Code either in its entirety or in part.³⁹ Consequently, the Code forms the "foundation for a national body of law concerning judicial conduct and a uniform standard to be followed in each jurisdiction."⁴⁰

Canon 3E of the *Code of Judicial Conduct* addresses judicial disqualification. The section provides:

³¹ See Shaman, *supra* note 2, at 3.

³² Shaman, *supra* note 2, at 3 (quoting Robert McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391).

³³ See Shaman, *supra* note 2, at 3.

³⁴ See *id.*

³⁵ MODEL CODE OF JUDICIAL CONDUCT (1972).

³⁶ See Shaman, *supra* note 2, at 3.

³⁷ Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 987 (1984).

³⁸ See generally MODEL CODE OF JUDICIAL CONDUCT Canons 1-5 (1990).

³⁹ See Shaman, *supra* note 2, at 3.

⁴⁰ *Id.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
- (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
- (d) the judge or the judge's 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 a more than de minimis interest that could be substantially affected by the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.⁴¹

The general test of disqualification contained in Canon 3E confers that the judge must disqualify himself if the "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."⁴² The Code intends to maintain the appearance of impartiality throughout the judiciary by ensuring that no reasonable person will suspect that a biased

⁴¹ MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990) (footnotes omitted).

⁴² Note, *supra* note 16, at 745.

judge will participate in a proceeding.⁴³ The Canon also requires judicial disqualification in specific instances where a judge's impartiality may be questioned.⁴⁴ Furthermore, parties are allowed to waive disqualification under Canon 3F, where the disclosure of any basis for recusal was not a result of personal bias or prejudice concerning either party.⁴⁵

In revising the *Code of Judicial Conduct* in 1990, the American Bar Association added two important provisions regarding judicial disqualification in the commentary to the Code. First, the American Bar Association added that judges disclose "on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge does not personally feel that the information implies that recusal is necessary."⁴⁶ Second, the American Bar Association further enumerated that "ownership in a mutual . . . investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest."⁴⁷ These provisions were attached to elevate public trust and confidence in the judiciary by guarding the appearance of justice while simultaneously preventing excessive disqualification and judge shopping within the judicial process.

D. Federal Standards for Judicial Disqualification

In order to foster public confidence in the integrity of the judicial system and preserve the constitutional and democratic values of our society, Congress has legislated statutes delineating conditions under which a federal judge must disqualify himself.⁴⁸ Federal Statutes originating in 1792 have compelled district judges to recuse themselves when they have an interest in the suit, or have been counsel to a party in the proceeding.⁴⁹ When utilized, the statutes mandate that "no man can lawfully sit as a judge in a cause in which he may have a pecuniary interest, [and as a result,] [a]ny interest, . . . however small, has been held sufficient to render a judge incompetent."⁵⁰ Congress expanded

⁴³ See *id.*

⁴⁴ See MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).

⁴⁵ See MODEL CODE OF JUDICIAL CONDUCT Canon 3F (1990).

⁴⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990); see also Kurzban, *supra* note 11, at 154.

⁴⁷ MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990); see also Kurzban, *supra* note 11, at 154.

⁴⁸ See 28 U.S.C. § 455 (1993); see also Brumbelow, *supra* note 4, at 1065.

⁴⁹ See *Liteky v. United States*, 510 U.S. 540, 544 (1994).

⁵⁰ THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 280 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993) (quoting *Pearce v. Atwood*, 13 Mass. 324, 340 (1816)).

the recusal statutes in 1821 to include all judicial relationships or connections with a party that would in the judge's opinion make it improper to sit.⁵¹

Congress reacted to evolving societal concerns by enacting three separate recusal statutes containing broader and more stringent standards governing the disqualification of federal judges. Seeking to exclude federal judges from hearing an appeal from the decision of any case, over which the judge presided as a trial judge, Congress, in 1891, passed 28 U.S.C. § 47.⁵² The statute guarantees that federal appellate judges will not be predisposed by the opinions or decisions arrived at in the trial court either by colleagues or themselves.⁵³

The second statute Congress adopted regarding recusal occurred in 1911. The provision, codified at 28 U.S.C. § 144, allows litigants to disqualify a district court judge from a proceeding because of personal bias or prejudice.⁵⁴ The provision currently reads as follows:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.⁵⁵

As presently applied, the statute requires that each party file an affidavit in good faith stating with particularity the facts and reasons supporting the party's allegations that bias or prejudice exist.⁵⁶ Conclusory allegations without substantiated facts to support such accusations are not sufficient to

⁵¹ See *Liteky*, 510 U.S. at 544.

⁵² See Brumbelow, *supra* note 4, at 1066-67.

⁵³ See *id.*

⁵⁴ See 28 U.S.C. § 144 (1993); see also Brumbelow, *supra* note 4, at 1067.

⁵⁵ 28 U.S.C. § 144.

⁵⁶ See *id.*; see also *Berger v. United States*, 255 U.S. 22, 33 (1941); Brumbelow, *supra* note 4, at 1068; Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L. J. 829, 831-32 (1984).

disqualify a judge.⁵⁷ Further, the litigant must file the affidavit in a timely manner and with "reasonable diligence."⁵⁸

However, the statute is limited in its application since each party may file only one affidavit in a given case and the statute only applies in federal district courts.⁵⁹ The statute's effectiveness is further diminished because it is ultimately the judge's decision to disqualify himself.⁶⁰ Even if a party proffers a sufficient affidavit demonstrating the existence of bias or prejudice to warrant recusal, the judge has the authority to scrutinize the legal sufficiency of the affidavit and deny the litigant's motion.⁶¹ Therefore, Congress' attempt at securing judicial impartiality was not served with the implementation of 28 U.S.C. § 144.

In 1974, Congress modified a third recusal statute, 28 U.S.C. § 455, in response to the personal involvement provision that positioned judges "on the horns of a dilemma."⁶² The previous recusal statute was introduced in 1970 to revise the 1792 act and provided that:

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.⁶³

Congress drastically overhauled this statute to reach all members of the federal judiciary and articulated with specificity the level of involvement necessary to warrant judicial disqualification.⁶⁴ The newly reworked statute provides as follows:

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

⁵⁷ See Brumbelow, *supra* note 4, at 1068.

⁵⁸ *Id.* at 1068-69.

⁵⁹ See 28 U.S.C. § 144; see also Brumbelow, *supra* note 4, at 1067-68.

⁶⁰ See Brumbelow, *supra* note 4, at 1069.

⁶¹ See *id.*

⁶² *United States v. Nobel*, 696 F.2d 231, 232-33 (3d Cir. 1982); see also Moore, *supra* note 56, at 832; Brumbelow, *supra* note 4, at 1070.

⁶³ 28 U.S.C. § 455 (1970).

⁶⁴ See Moore, *supra* note 56, at 832-33; see also Brumbelow, *supra* note 4, at 1070.

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.⁶⁵

Currently, "the basic provision on disqualification of federal judges,"⁶⁶ 28 U.S.C. § 455, delineates two grounds for disqualification. First, the law prescribes that a judge must disqualify himself "in any proceeding in which

⁶⁵ 28 U.S.C. § 455 (1993).

⁶⁶ Brumbelow, *supra* note 4, at 1070.

his impartiality might reasonably be questioned.”⁶⁷ This element of the statute establishes an objective test requiring recusal “when an objective, disinterested observer fully informed of the facts under which recusal was sought would entertain significant doubt that justice would be done in the particular case.”⁶⁸ However, the parties are allowed to waive disqualification if the record contains the basis for recusal.⁶⁹ Second, the statute asserts grounds for mandatory disqualification when one of five specific circumstances exists.⁷⁰ When circumstances call for mandatory recusal, waiver is not permitted and may not be accepted by a judge.⁷¹ Litigants, who move for recusal under 28 U.S.C. § 455 and support their motions with affidavits, memoranda, or other factual statements, still must rely heavily upon the judge who is the target of the motion.⁷²

In revising 28 U.S.C. § 455, Congress sought to achieve uniformity between the statute and the American Bar Association’s *Code of Judicial Conduct*, and preserve the public confidence in the administration of justice and the integrity of the judicial process.⁷³ Further, Congress attempted to “clarify and broaden the grounds for judicial disqualification” to assure the nation that the judiciary operated impartially.⁷⁴

III. SPECIFIC GROUNDS FOR JUDICIAL DISQUALIFICATION UNDER 28 U.S.C. § 455

A. 28 U.S.C. § 455

Congress intended 28 U.S.C. § 455 to conform generally to the American Bar Association’s *Code of Judicial Conduct* in an effort to increase public confidence in the impartiality of federal judges while simultaneously maintaining the efficient administration of justice. In adopting language verbatim from the *Code of Judicial Conduct*, Congress attempted to revise the statute in light of the legal and ethical considerations contemplated by the Advisory Committee on the Codes of Conduct of the Judicial Conference of the United States. However, specific provisions within the statute, when

⁶⁷ 28 U.S.C. § 455(a).

⁶⁸ Kurzban, *supra* note 11, at 150 (quoting *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 715 (7th Cir. 1989)) (internal quotation marks omitted).

⁶⁹ See 28 U.S.C. § 455(e) (1993).

⁷⁰ See *id.* § 455(b).

⁷¹ See *id.* § 455(e).

⁷² See Brumbelow, *supra* note 4, at 1072-73.

⁷³ See *id.* at 1075-76.

⁷⁴ See *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 859 (1988).

applied to specific facts or circumstances, raise ethically questionable judgments. The Advisory Committee emphasizes that ethical considerations oblige a judge to assess "possible and potential conflicts of interest as well as actual conflicts of interest."⁷⁵ The following provisions of 28 U.S.C. § 455 have significant shortcomings that allow judges to act unethically when presented with situations that question the judge's impartiality.

1. APPEARANCE OF PARTIALITY: 28 U.S.C. § 455(A)

Section 455(a) of Title 28 of the United States Code is a "catch-all recusal" provision requiring disqualification in any proceeding in which the judge's "impartiality might reasonably be questioned."⁷⁶ This provision directs that all grounds for recusal, including but not limited to both "interest and relationship" and "bias or prejudice" grounds, be "evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance."⁷⁷ Thus, the law instructs a court to determine "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality."⁷⁸ Accordingly, if an "objective, disinterested observer fully informed of the facts under which recusal was sought would entertain significant doubt that justice would be done in the particular case," the judge must disqualify himself "to avoid even the appearance of partiality . . . [even though] . . . no actual partiality exists."⁷⁹

Congress adopted this provision from the *Code of Judicial Conduct* "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for judging the judge's impartiality, he should disqualify himself and let another judge preside over the case."⁸⁰ However, there are limitations in its application. First, under § 455(e) any basis for disqualification brought under § 455(a) may be waived by the parties as long as the record reflects the grounds for disqualification.⁸¹ Second, even though judges must disqualify themselves if a reasonable person might question their impartiality under § 455(a), there must be a reasonable

⁷⁵ *In re Cement & Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981).

⁷⁶ 28 U.S.C. § 455(a).

⁷⁷ *Liteky v. United States*, 510 U.S. 540, 548 (1994).

⁷⁸ *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995); see also Brumbelow, *supra* note 4, at 1073-74; Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 Neb. L. Rev. 1046, 1048 (1993).

⁷⁹ *Nichols*, 71 F.3d at 351.

⁸⁰ Kurzban, *supra* note 11, at 150 (quoting Steven Lubet, *Judicial Ethics and Private Lives*, 79 Nw. U. L. Rev. 983, 986 (1984)).

⁸¹ See 28 U.S.C. § 455(e).

basis for such disqualification.⁸² Thus, courts have interpreted § 455(a) to favor judicial retention rather than disqualification even where there is a hint of potential impropriety as a result of a "remote, contingent, or speculative interest."⁸³

In 1988, the United States Supreme Court granted certiorari in *Liljeberg v. Health Services Acquisition Corp.*,⁸⁴ to ascertain whether the district judge should have disqualified himself under 28 U.S.C. § 455(a) as a trustee of a university, which possessed an interest in the proceeding. Federal District Judge Robert Collins presided over the trial in which Health Services Acquisition Corporation brought an action against John Liljeberg, Jr., seeking a declaration of ownership of a corporation known as St. Jude Hospital.⁸⁵ Prior to trial, Judge Collins, as a member of the Board of Trustees of Loyola University,⁸⁶ regularly attended meetings that discussed Liljeberg's negotiations with the University to purchase a parcel of land from Loyola University for use as a hospital site and to re-zone Loyola's adjoining land.⁸⁷ The meetings stressed that Loyola's potential benefits, the proceeds from the real estate sale and a substantial increase in the value of the re-zoned adjoining land, were contingent upon Liljeberg obtaining a certificate of need.⁸⁸ At the same time Liljeberg was negotiating with Loyola, he reached an agreement in principle with Hospital Affiliates International transferring St. Jude Hospital to Health Services Acquisition Corporation.⁸⁹ This conflict gave rise to the declaratory judgement lawsuit that Judge Collins presided over.⁹⁰ Since, Loyola University was an interested non-party, the Supreme Court held that Judge Collins, as a trustee of Loyola University, violated 28 U.S.C. § 455(a) for failing to disqualify himself because an objective observer would have doubted Judge Collins impartiality.⁹¹

In re Placid Oil Co.,⁹² exemplifies a case in which the interest was too remote, speculative, and contingent to create the appearance of partiality and require disqualification under § 455(a). Petitioners filed an action against twenty-three banks seeking damages, declaratory relief, and reformation and rescission of credit agreements based on malfeasance, which include

⁸² See Kurzban, *supra* note 11, at 150.

⁸³ *Id.* at 150-52.

⁸⁴ 486 U.S. 847 (1988).

⁸⁵ See *id.* at 850.

⁸⁶ See *id.* at 853 n.3.

⁸⁷ See *id.* at 853.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.* at 854-55.

⁹¹ See *id.*

⁹² 802 F.2d 783 (5th Cir. 1986).

inequitable conduct, breaches of fiduciary duty, fraud, and antitrust violations.⁹³ As a result of discovering that the district judge had a substantial investment in a non-party bank that potentially would be affected by the outcome of the proceeding, the petitioners moved to recuse the district judge on the grounds that his impartiality might reasonably be questioned.⁹⁴ Upon the judge's rejection of the motion and a filing of a writ of mandamus, the Fifth Circuit Court of Appeals, held that the district judge's interest in the case was too remote, contingent, and speculative to require disqualification. The Fifth Circuit Court of Appeals, in interpreting the resusal statute, concluded that the interest did not create a situation in which the judge's impartiality might reasonably be questioned.⁹⁵

2. FINANCIAL INTEREST: 28 U.S.C. § 455(B)(4)

Section 455(b) of Title 28 of the United States Code enumerates with specificity additional circumstances requiring judicial disqualification.⁹⁶ Specifically, § 455(b)(4) provides for judicial disqualification because of a financial interest held by the judge, the judge's spouse or minor child living at home, or because such persons have another interest that could be substantially affected by the outcome of the proceedings.⁹⁷ The provision provides the following:

(b) [Any justice, judge, or magistrate of the United States] shall also disqualify himself in the following circumstances:

....

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding⁹⁸

In devising this particular clause, Congress intended to address the public concern that a "judge's direct economic or financial interest, even though

⁹³ See *id.* at 786.

⁹⁴ See *id.*

⁹⁵ See *id.* at 786-87.

⁹⁶ See 28 U.S.C. § 455(b) (1993).

⁹⁷ See *id.*; see also *United States v. Nobel*, 696 F.2d 231 (3d Cir. 1982).

⁹⁸ 28 U.S.C. § 455(b)(4).

relatively small, in the outcome of the case may well be inconsistent with due process."⁹⁹

Congress, therefore, established three instances in § 455(b)(4) that would result in a violation of due process if the judge was not disqualified from the proceeding: (1) the judge has a financial interest "in a party to the proceeding," (2) the judge has a financial interest in the "subject matter in controversy," or (3) the judge has "any other interest that could be substantially affected by the outcome of the proceeding."¹⁰⁰ Congress identified in the clause two types of disqualifying interests, a financial interest and any other interest.¹⁰¹ The statute defines a financial interest as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."¹⁰² Ownership in a mutual or common investment fund or an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest for purposes of this statute.¹⁰³ This provision requires disqualification no matter how minuscule the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety.¹⁰⁴ However, a remote, contingent, or speculative interest is not a disqualifying financial interest under 28 U.S.C. § 455(b)(4).¹⁰⁵

The per se disqualification rule for a financial interest was subjected to criticism as a result of its rigid application. Critics argued that this section required judges to be substituted midstream upon discovering a financial interest. This wasted judicial time and energy and imposed a substantial burden on the judicial process.¹⁰⁶ Congress responded to the complaints by amending § 455 with a provision that eliminates the need for disqualification if substantial judicial time has been devoted to the matter and the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that generates the grounds for disqualification.¹⁰⁷

⁹⁹ Abramson, *supra* note 78, at 1070.

¹⁰⁰ See 28 U.S.C. § 455(b)(4); see also Abramson, *supra* note 78, at 1070.

¹⁰¹ See 28 U.S.C. § 455(b)(4).

¹⁰² *Id.*

¹⁰³ See *id.* § 455(d)(4)(i)-(ii).

¹⁰⁴ See *Liljeberg*, 486 U.S. at 860-61; see also 32 AM. JUR. 2D *What Constitutes a Financial Interest* § 145 (1995).

¹⁰⁵ See *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998).

¹⁰⁶ See *In re Cement & Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1081 (D. Ariz. 1981).

¹⁰⁷ See 28 U.S.C. § 455(f).

a. Financial Interest in a Party to this Action

Title 28, Section 455(b)(4), which requires a judge to disqualify himself if he possesses “a financial interest in a party to the proceeding,”¹⁰⁸ mandates recusal no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of bias.¹⁰⁹ In order to apply this as a basis of judicial disqualification, the presiding judge, his spouse, or any minor children living in the judge’s household must have ownership of a “legal or equitable interest,” however small, or have a relationship as director, adviser, or other active participant in the affairs of a party.¹¹⁰

In re Cement and Concrete Antitrust Litigation,¹¹¹ illustrates the “financial interest in a party” section of the statute, holding that a district judge must disqualify himself when he has knowledge that his spouse owned shares of stock in several members of the plaintiff class.¹¹² The district court further mentioned that even though the wife possessed an inconsequential financial interest in a party, the judge must still automatically recuse himself despite the illogical nature of such an act.¹¹³

b. Financial Interest in the Subject Matter in Controversy

When a judge has a financial interest in a non-party, 28 U.S.C. § 455(b)(4) requires the court to ask whether the judge has a “financial interest in the subject matter in controversy.”¹¹⁴ However, Congress has provided limited guidance on how courts should interpret “subject matter in controversy.”¹¹⁵

When evaluating whether a judge has a “financial interest in the subject matter in controversy,” numerous courts have examined how direct an effect the litigation before it will have on the interested non-party.¹¹⁶ These courts hold that “the effect of a favorable ruling must be direct, rather than indirect,

¹⁰⁸ *Id.* § 455(b)(4).

¹⁰⁹ *See Liljeberg*, 486 U.S. at 860-61; *see also* 32 AM. JUR. 2D *What Constitutes a Financial Interest* § 145 (1995).

¹¹⁰ *See* 28 U.S.C. § 455(d)(4).

¹¹¹ 15 F. Supp. 1076 (D. Ariz. 1981).

¹¹² *See id.* at 1077.

¹¹³ *See id.* at 1082.

¹¹⁴ 28 U.S.C. § 455(b)(4).

¹¹⁵ *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 780 (D.N.M. 1989).

¹¹⁶ *See McCann v. Communications Design Corp.*, 775 F. Supp. 1535, 1541 (D. Conn. 1991); *see also Sollenbarger*, 706 F. Supp. at 781; *In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986).

speculative, or remote," to establish grounds for recusal under the test.¹¹⁷ Another court relied on *Webster's Dictionary* to construe "subject matter in controversy" to mean "the matter acted upon", "the matter presented for consideration," or "the topic of dispute in a legal matter."¹¹⁸ Several commentators identify that the nexus between the litigation before the court and the court's financial interest is the principal element in the "subject matter in controversy" inquiry.¹¹⁹

Exemplifying the judiciary's application of the "subject matter in controversy" inquiry, the United States District Court of New Mexico in *Sollenbarger v. Mountain States Telephone and Telegraph Co.*, determined that the court's financial interest in four non-party corporations were directly linked to the litigation triggering disqualification under 28 U.S.C. § 455(b)(4).¹²⁰ In *Sollenbarger*, the litigation concerned a plan of reorganization that divested a telephone system into separate entities allocating to each post-divestiture entity a proportionate share of the system's consolidated debt and equity, and providing that the companies share in the contingent liabilities on the same basis.¹²¹ Telephone customers subsequently filed an action against one of the companies alleging that all phone customers in New Mexico had invalid inside wire maintenance service contracts due to antitrust violations that began prior to divestiture.¹²² As a result of the presiding judge's financial interest in four post divestiture companies, the court held that the plan of organization provided a direct nexus between the court's financial interest and the litigation, requiring judicial disqualification because the court had a financial interest in the subject matter in controversy.¹²³

Contrary to the result in *Sollenbarger*, the Temporary Emergency Court of Appeals in *Department of Energy v. Brimmer*,¹²⁴ and the Fifth Circuit Court of Appeals in *In re Placid Oil Co.*,¹²⁵ held that the judge's interest in non-party corporations did not amount to a financial interest in the subject matter in controversy. In *Brimmer*, the judge owned stock in energy companies that participated in the same entitlement program as the plaintiff.¹²⁶ However, the

¹¹⁷ See *id.*

¹¹⁸ United States v. Nobel, 696 F.2d 231, 234 (3d Cir. 1982); see also *Sollenbarger*, 706 F. Supp. at 781.

¹¹⁹ See *Sollenbarger*, 706 F. Supp. at 781.

¹²⁰ See *id.* at 782.

¹²¹ See *id.* at 778.

¹²² See *id.* at 777.

¹²³ See *id.* at 782.

¹²⁴ 673 F.2d 1287 (Temp. Emer. Ct. App. 1982).

¹²⁵ 802 F.2d 783 (5th Cir. 1986).

¹²⁶ See *Brimmer*, 673 F.2d at 1289-90.

court ruled that since his financial interest would not be directly affected by the outcome of the case, he did not have a financial interest in the subject matter in controversy.¹²⁷ Similar to *Brimmer*, the court in *In re Placid Oil Co.* held that where the judge invested in twenty-three non-party banks in the state the potential effect on the banking industry of the state as a result of his ruling was an indirect and speculative interest not covered by the recusal statute.¹²⁸

c. Any Other Interest

Whereas the first provision of § 455(b)(4) requires judicial disqualification for any financial interest, however small, the second provision requires recusal if a judge has "any other interest that could be substantially affected by the outcome of the proceeding."¹²⁹ Although the concept of substantiality is undefined, courts have suggested that the outcome of this test should "depend on the interaction of two variables: the remoteness of the interest and its extent or degree."¹³⁰ Thus, in regard to "any other interest":

If the interest strongly resembles a direct interest—for example, stock held in a subsidiary (or parent) of the corporate party—any amount should disqualify, just as does any stock held in the party itself. As the interest becomes less direct, such as that in an enterprise carrying on business with the party, only if the extent of the interest is itself substantial can the judge's impartiality reasonably be questioned.¹³¹

In applying this analysis to specific facts, courts have reasoned that interests relinquishing small, indirect, potential benefits, which are categorized as "any other interest" under the statute, are not grounds for disqualification.

A case illustrating the application of the "any other interest" test under the second provision of §455(b)(4) is *Delta Airlines, Inc. v. Sasser*.¹³² In *Sasser*, the defendant appealed a default judgment in an action that alleged that he illegally altered, brokered, purchased and sold frequent flyer tickets.¹³³ The defendant filed a motion to recuse the three appellate judges on the ground

¹²⁷ See *id.* at 1293-95.

¹²⁸ See *In re Placid*, 802 F.2d at 786-87.

¹²⁹ 28 U.S.C. § 455(b)(4) (1993).

¹³⁰ *Alaska Oil Co. v. Alaska*, 45 B.R. 358, 361 (D. Ak. 1985); see also Note, *supra* note 16, at 752-54.

¹³¹ Note, *supra* note 16, at 753.

¹³² 127 F.3d 1296 (11th Cir. 1997).

¹³³ See *id.* at 1297.

that the judges have personal accounts in the Delta Frequent Flyer Program.¹³⁴ The Eleventh Circuit Court of Appeals held that the judges' interests in their personal frequent flyer accounts could not substantially affect the outcome of this case because the issue presented in the case focused on an individual's misconduct regarding frequent flyer awards rather than the viability of the frequent flyer program.¹³⁵

In *Alaska Oil Co. v. Alaska*,¹³⁶ the United States District Court of Alaska held that appellate judge's entitlement to the Alaska permanent fund dividend as an Alaskan resident was not an interest that could be substantially affected by the outcome of the proceedings, requiring disqualification from hearing the appeal.¹³⁷ In *Alaska Oil Co.*, the primary issue on appeal centered on a contractual dispute between Alaska Oil Company and the State of Alaska where Alaska alleged that it was entitled to receive "in kind" royalties under its North Slope mineral leases with Alaska Oil Company.¹³⁸ Alaska Oil Company filed a motion to recuse the appellate judge because any income the state might recover in this action would be deposited in the state's permanent fund, and thus, distributed to all Alaska residents, including the resident federal judges, as a permanent fund dividend.¹³⁹ The court reasoned that since the extent of the interest is insignificant and the decision would not directly increase or decrease the permanent fund revenues, the judge's interest would not be substantially affected by the outcome of the proceeding.¹⁴⁰

IV. THE PRESENCE OF INJUSTICE IN THE JUDICIAL PROCESS

A. *Public Perception*

In response to pressing ethical and legal issues concerning the presence of corruption and impropriety within the judiciary, Congress enacted 28 U.S.C. § 455.¹⁴¹ An event igniting the legislation occurred after Nixon nominated Clement Haynsworth to the United States Supreme Court in 1969. The nation was outraged upon discovering that Clement Haynsworth had presided over two civil cases that involved subsidiaries of companies in which

¹³⁴ See *id.*

¹³⁵ See *id.* at 1298.

¹³⁶ *Alaska Oil Co. v. Alaska*, 45 B.K. 358 (D. Ak. 1985).

¹³⁷ See *id.* at 362.

¹³⁸ See *id.* at 359-60.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 362.

¹⁴¹ See Joe Stephens, *Judicial Ethics Law Contains Few Loopholes*, THE KAN. CITY STAR, Apr. 5, 1998, at A12.

he was a substantial stockholder.¹⁴² As a result, the Senate rejected his nomination to the Supreme Court believing that it was imperative for him to disqualify himself from proceedings in which he had a conflict in interest.¹⁴³

The federal judiciary and several individual judges continue to be "the focus of derisive commentary."¹⁴⁴ More recently, the nomination of Justice Stephen G. Breyer to the United States Supreme Court provoked a great deal of controversy and dissension in the nation because of his involvement in eight environmental cases concerning toxic waste removal.¹⁴⁵ The cause of concern originated from the fact that Justice Breyer did not disqualify himself even though his judgment in those cases may have had an indirect effect on his investment in a syndicated fund of Lloyd's of London, which insured waste-disposers against risks that materialized from such clean-ups and exposed him to liability that could potentially amount to one million dollars.¹⁴⁶ This event caused public confidence in the judiciary to wane and underscored the deficiencies within 28 U.S.C. § 455.

B. *Deficiencies Within 28 U.S.C. § 455*

An exhaustive investigation and analysis of the events that transpired regarding Justice Breyer's failure to disqualify himself in *United States v. Ottati & Goss*,¹⁴⁷ one of the eight environmental cases, concluded that Justice Breyer legally presided over *Ottati & Goss*, under 28 U.S.C. § 455.¹⁴⁸ However, the analysis asserted that Justice Breyer's decision to remain on the case and not recuse himself was ethically questionable and unjust.¹⁴⁹ Accordingly, the results of the investigation are indicative of 28 U.S.C. § 455's, inability to sustain the constitutional and democratic values of our society. The statute neglects to comply with both the constitutional principle that every citizen of the United States will receive an impartial trial before a neutral and detached judge and the Supreme Court mandate that "justice must satisfy the appearance of justice."¹⁵⁰

In order to appreciate the significance of this argument, a full understanding of *Ottati & Goss* is necessary. In *Ottati & Goss*, the

¹⁴² See Note, *supra* note 16, at 736-37.

¹⁴³ See *id.*

¹⁴⁴ Zemans, *supra* note 3, at 637.

¹⁴⁵ See Kurzban, *supra* note 11, at 139-40.

¹⁴⁶ See *id.*

¹⁴⁷ 900 F.2d 429 (1st Cir. 1990).

¹⁴⁸ See Kurzban, *supra* note 11, at 162.

¹⁴⁹ See *id.*

¹⁵⁰ *Marshall*, 446 U.S. at 242 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Environmental Protection Agency (EPA) appealed a district court's refusal to issue, unmodified, an injunction forcing a defendant to pay \$9.3 million to the EPA for costs it had incurred in cleaning up a toxic-waste site.¹⁵¹ The Comprehensive Environmental Response Compensation and Liability Act and the Administrative Procedure Act advised the EPA to order and compel companies disposing of toxic waste to clean up and remove the waste if the actual threatened release of a hazardous substance from a site posed an imminent and substantial endangerment to the public health or welfare of the environment or reimburse the EPA for costs it sustains in its effort to clean up the toxic waste site.¹⁵² The legislation further provided that the EPA may seek an injunction to recover costs and that the courts set aside agency actions, findings, and conclusions only upon a finding of action that is arbitrary, capricious, or an abuse of discretion.¹⁵³ The laws forced companies to acquire insurance policies in order to insure themselves against a mandated clean up.¹⁵⁴

At the time of rendering a decision in *Ottati & Goss*, Justice Breyer was an investor in an insurance fund that incurred liability from cases involving environmental pollution.¹⁵⁵ As a result of the environmental legislation, he was at a substantial risk of losing his investment in the insurance fund as well as exposure for personal liabilities for up to \$1 million in penalties imposed by the EPA.¹⁵⁶ With full knowledge of his potential conflict, then Chief Judge Breyer, writing for the First Circuit Court of Appeals, affirmed the district court's ruling, holding that the courts need not apply the lenient, arbitrary and capricious standard to injunctions the EPA sought against defendants such as *Ottati & Goss*, but were free to make their own determinations of fact and to exercise their own judgment in fashioning relief.¹⁵⁷ According to Democratic Senator Howard Metzenbaum of Ohio, the *Ottati & Goss* decision advanced the interests of polluters and insurers by bringing about less hazardous waste-cleanup and weaker clean-up standards.¹⁵⁸

In scrutinizing the legality of Justice Breyer's decision not to disqualify himself in *Ottati & Goss*, the analysis revealed that under 28 U.S.C. § 455, Justice Breyer neither generated the appearance of partiality nor maintained a financial interest in a party, a financial interest in the subject matter in

¹⁵¹ See *Ottati & Goss*, 900 F.2d at 431-33.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See Kurzban, *supra* note 11, at 143.

¹⁵⁶ See *id.*

¹⁵⁷ See *Ottati & Goss*, 900 F.2d at 445; see also Kurzban, *supra* note 11, at 146.

¹⁵⁸ See Kurzban, *supra* note 11, at 146.

controversy, or any other interest that could be substantially affected by the outcome of the proceeding requiring his recusal.¹⁵⁹ When confronted with the implication that his impartiality might reasonably be questioned, Justice Breyer defended himself by applying a two-prong test to a rule that on its face appears only to require that an objective disinterested person, knowing all the relevant facts would suspect the appearance of partiality.¹⁶⁰ However, Justice Breyer found comfort in the fact that the courts in interpreting § 455(a) favor judicial retention rather than disqualification where there is a hint of potential impropriety as a result of a “remote, contingent, or speculative interest.”¹⁶¹ Since his investment in a syndicated insurance fund was an interest that was not “direct, proximate, or inherent in the instant event,” Justice Breyer concluded that he had no reasonable basis to disqualify himself.¹⁶²

This biased line of thinking in the judicial system perpetuates because of the loose language in § 455(a). Certainly any judge given the option to stay on a case or recuse himself will take the line of least resistance and remain on the case. Thus, courts have interpreted into the statute a reasonable basis test that excludes any “remote, contingent, or speculative interest” from becoming a disqualifying interest.¹⁶³ As a result, the statute, as it currently stands, defies the constitutional principle that “justice must satisfy the appearance of justice.”¹⁶⁴ The legislative intent in creating a “catch all provision” in § 455(a) was to instill public confidence in the judiciary. Appellate courts continue to “rubber stamp” abuses of judicial discretion by not requiring a judge to recuse himself when he has an indirect interest that would cause a reasonable person to question his impartiality.

Justice Breyer’s position on the subject is a prime example of the bench attitude regarding recusal. Critics suggested that Justice Breyer should have disqualified himself since he had a financial interest in the subject matter in controversy pursuant to § 455(b)(4). Justice Breyer defended himself by applying the court favored direct effect test, which requires disqualification only if a favorable ruling will have a direct effect on the judge’s non-party financial interest.¹⁶⁵ Since Justice Breyer’s favorable ruling could only have

¹⁵⁹ See *id.* at 155-60.

¹⁶⁰ *Id.* at 150-53.

¹⁶¹ *Id.*

¹⁶² See *id.*

¹⁶³ See *id.*; see also *In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986).

¹⁶⁴ *Marshall*, 446 U.S. at 242 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

¹⁶⁵ See *McCann v. Communications Design Corp.*, 775 F. Supp. 1535, 1541 (D. Conn. 1991); see also *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 781 (D.N.M. 1989); *In re Placid Oil Co.*, 802 F.2d at 786-87.

an "indirect, speculative, or remote" effect on his financial interest, he did not have a disqualifying financial interest in the subject matter in controversy.¹⁶⁶

In the absence of any congressional action, the courts in defining the "subject matter in controversy" clause have repeatedly instituted a test favoring judicial retention. The lack of instructive guidance allows subjective, random, and arbitrary results when a party attempts to disqualify a judge creating pervasive impropriety within the judiciary. The court's ability to narrowly construe the statute only to interests directly affected by the outcome of the proceeding, authorizes judges who harness a potential bias as a result of an indirect interest to preside over a proceeding. The ability of the courts to negotiate the law to yield judicial retention rather than judicial disqualification taints the bench.

Another glaring defect arose as a result of Justice Breyer's failure to follow 28 U.S.C. § 455(b)(4), and disqualify himself since he maintained an interest that could be substantially affected by the outcome of the proceeding. Justice Breyer claimed that his interest was not sufficiently substantial to sustain a charge that he violated the disqualification statute.¹⁶⁷ He applied the court suggested test comprising of two variables, the remoteness of his interest and its extent or degree, determining that his interest in the syndicated investment fund was immaterial to the outcome of the proceeding.¹⁶⁸ He acknowledged that even though his investment was extremely volatile as a result of the current legislation, it was too isolated to be sufficiently substantial under § 455(b)(4), to compel his disqualification.¹⁶⁹

The third provision of § 455(b)(4) is intended to disqualify a judge with any interest that could be substantially affected. Congress neglected to define "substantial," subjecting it to the courts' interpretation. Consequently, courts are fostering judicial retention rather than recusal under the principle that every judge has a duty to sit and bolster their decision by rationalizing that judicial efficiency is crucial to the judicial process. However, this interpretation compromises the integrity of the judicial system by exchanging impartiality for efficiency.

Based on some of the caselaw that has been recited in this paper, it is clear that the courts are taking liberties for the sake of judicial expediency by retaining judges on cases which demand removal due to bias or an appearance of partiality. This intrusion of injustice on the bench will continue because of the promiscuous language in § 455. Consequently, the "judicial disqualification standards are not uniformly [applied] and . . . self-

¹⁶⁶ See Kurzban, *supra* note 11, at 150-53.

¹⁶⁷ See *id.* at 156.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

disqualification appears to be subjective, random, and arbitrary."¹⁷⁰ The only adequate way to limit the wide latitude of discretion traditionally cloaked around a judge is to change the language in the statute.

C. *Legal but not Ethical, a Solution to the Problem*

Under current judicial disqualification standards, Justice Breyer's actions may not have ascended to the level of illegality, but judicial ethics were breached.¹⁷¹ "If a judge sits on a case even tangentially touching a matter that could cost him all his assets [it] is bound to affect him at least consciously."¹⁷² In *The Nature of the Judicial Process*, Justice Benjamin Cardozo referenced this sensation stating that "we may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."¹⁷³ Thus, Congress must prevent judges from taking advantage of their positions in the judiciary to advance economic, political, social, or other interests and protect against the appearance of partiality.

In constructing specific provisions of § 455, Congress failed to provide sufficiently detailed and concrete standards creating an opportunity for judges to circumvent judicial disqualification and adjudicate a case even if they hold bias for or against a party. Congress must readdress judicial disqualification and modify § 455 to "inspire trust and confidence, and . . . bring honor to the judiciary."¹⁷⁴ Accordingly, the projected § 455 must hold "judges . . . to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust," and require judges to "exercise their judicial functions with integrity, impartiality, and independence."¹⁷⁵

After analyzing the opinions offered by the appellate courts when called upon to affirm or reverse "recusal denials," the courts almost uniformly favor affirmation of retention to avoid judicial inefficiency and reports of judicial misconduct. As a result of the court taking liberties in the interpretation of § 455, these discouraging results are consistently developed. Modifying the statute to include strict, concise, and unambiguous language would abate

¹⁷⁰ Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 645 (1996).

¹⁷¹ See Kurzban, *supra* note 11, at 139.

¹⁷² *Id.* at 159-160.

¹⁷³ John T. Noonan, Jr., *Persons and Masks of the Law* (1976) (quoting Benjamin Cardozo, *The Nature of the Judicial Process*), reprinted in *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* 22, 28 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

¹⁷⁴ Shaman, *supra* note 2, at 2.

¹⁷⁵ *Id.* at 1-2.

further creative interpretation of judicial interest or disinterest in a matter before the court.

The following is offered as a possible solution:

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

- (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality ~~might reasonably be questioned~~ [is in good faith questioned by any party to the proceeding. An affidavit of good faith shall be filed with the court.]
- (b) He shall also disqualify himself in the following circumstances:
 - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a [direct or indirect] 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;

V. CONCLUSION

Justice Lewis Powell, Jr. once stated that:

[E]qual justice is not merely a caption on the façade of the Supreme Court Building, [rather,] it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . [and] it is fundamental that justice should be the same in substance and availability.¹⁷⁶

The existence of this precept and the integrity of the judicial process are in dire risk as a result of the emerging impropriety within the judiciary. "If the public is to maintain the grant of authority to the courts, they must be perceived as legitimate institutions playing their appropriate role in our system of government."¹⁷⁷

As symbols of justice, judges must be competent and ethical and their actions must foster respect for the judicial process in the citizens that grant them their power.¹⁷⁸ Further, judges should refrain from using their inherent

¹⁷⁶ Victoria A. Roberts, *Equal Justice For All: How Do We Achieve It?*, 76 MICH. B.J. 256, 258 (1997).

¹⁷⁷ Zemans, *supra* note 3, at 642.

¹⁷⁸ See Shaman, *supra* note 2, at 1.

powers to undermine confidence. It is the responsibility of Congress to devise judicial disqualification standards that are absolute when expounding upon the grounds for recusal, that avoid the appearance of partiality, and that maintain public confidence in the people who comprise the judiciary.