Disqualifying Federal District Judges Without Cause

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COMMENT

DISQUALIFYING FEDERAL DISTRICT JUDGES WITHOUT CAUSE

Although we deny the petition for recusal, we add a caveat. The record adversely reflects upon [Federal District] Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. . . . We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially. ¹

Attorneys who appear in federal district court are virtually powerless to remove a judge from a particular case when they personally believe, rightly or wrongly, that justice will not be done by that individual judge. The present disqualification statute ² requires a showing of sufficient "cause" to remove a judge. By judicial interpretation, the adequacy of the cause alleged, which is difficult to establish in its own right, is passed upon by the very judge being challenged. The federal appellate courts are very reluctant to reverse a district judge who has refused to disqualified himself.

Yet the sometimes inarticulable doubts held by attorneys about an individual judge are real concerns. The inability of an attorney to remove a federal district judge from a particular case except by use of the current extremely awkward and highly unsuccessful disqualification procedure is a source of frustration which undermines the confidence of both the bar and the public in the federal district courts. Senator Birch Bayh has observed: "No statute creates more distrust than does the section 144 procedure for disqualification for prejudice."³

Senator Bayh introduced legislation in both the 91st and 92d Congresses to amend Section 144 to permit attorneys to remove a federal

district judge from an individual case by filing an affidavit of prejudice, which need not explain why the judge should be removed from the case. So long as the affidavit is timely filed, the challenged judge would have no discretion; he must disqualify himself from the case immediately. Seventeen states currently employ such "without cause" disqualification procedures.¹

This Comment will examine the desirability of adopting a without cause disqualification procedure to allow either party to remove a federal district judge from a particular case. After a discussion of the need for disqualification mechanisms, existing procedures for removal, either from a particular case or from the bench entirely, are discussed. Proposals for change, especially the Bayh bills, are outlined and evaluated in light of the practical problems peculiar to the federal district courts. The Comment concludes that a procedure to disqualify federal district judges without cause, as contained in the Bayh bills, is sound and should be adopted. Such a procedure would provide a middle ground between the existing extremes of the practicing attorney's almost total inability to remove a judge from a case and the spectre of removal from the bench entirely; the system should provide a healthy check on federal district judges without undue strain or humiliation for either the lawyers or judges involved.⁵

I. THE NEED FOR DISQUALIFICATION MECHANISMS

A. The Role of the Federal District Judge

We must remember, too, that we have to make judges out of men, and that by being made judges their prejudices are not diminished and their intelligence is not increased.

—Robert G. Ingersol⁶

Although the description is not often found in legal literature, fed-

¹. See Project, Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311, 347 (1969) (tabulation of disqualification mechanisms in the 50 states) [hereinafter cited as Oregon Project]. A without cause affidavit procedure permits disqualification without a hearing on the truth or legal sufficiency of the facts alleged.


eral district judges can be characterized as the tyrants of America's judiciary. Whether benevolent or despotic, they occupy a position of singular independence and isolation when compared to their fellow judges in either the federal or state judiciaries. They receive a life appointment (subject only to a good behavior proviso)\(^7\) at high pay (presently $40,000 a year).\(^8\) Primarily trial judges, because of their independence and isolation, they can operate their courtrooms as small kingdoms, subject only to the direct personal influence of the chief federal district judge and to indirect institutional influences such as the Federal Rules of Procedure, the Federal Rules of Evidence, and appellate review.

Unlike federal appellate judges, district judges are not often participants in the interchange of ideas characteristic of the courts of appeal or the Supreme Court.\(^9\) Unlike state trial judges, they are not subject to reelection and the direct pressure of the local bar.\(^10\) There is probably less "rotation" of federal trial judges than of state trial judges.

This combination of independence and isolation can produce superior judges and allow them to operate in an atmosphere of comparative judicial freedom. Many lawyers and judges are leading reform movements to assure more independence for state trial judges for precisely this reason.\(^11\) But the combination of independence and isolation can produce less than superior judges as well. In the words of Justice Holmes, "Judges commonly are elderly men and more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."\(^12\) Comparative independence and extended isolation can make a difficult situation unbearable; a courtroom operated like a small kingdom can prove intolerable to lawyers.

Although there is no accepted definition of what is a good or a bad judge, few would deny that there are inadequate judges on the federal bench at the district court level. Certainly judges whose general per-

\(^{7}\) U.S. Const. art. III, § 1.
\(^{10}\) What pressure the local bar exerts appears almost exclusively during the selection process, discussed in the text accompanying notes 13–32 infra.
\(^{11}\) See, e.g., Utter, Selection and Retention—A Judge's Perspective, 48 Wash. L. Rev. 839 (1973).
\(^{12}\) Lawless Judges, supra note 6, at v.
formance is satisfactory may still have difficulty with specific cases.

Efforts to improve the quality of federal district court judges usually focus on the selection process, which has received extensive study in recent years.\textsuperscript{13} The American Bar Association (ABA) Committee on the Federal Judiciary rated a rather substantial percentage (5 percent) of eventual appointees to federal district judgeships as "Not qualified."\textsuperscript{14} Approximately 60 percent of the appointees received either "Exceptionally well qualified" or "Well qualified" recommendations.\textsuperscript{15}

Would elimination of the nominees who are confirmed despite a "Not qualified" recommendation be helpful? Would increasing the percentage of nominees with prior judicial experience improve the overall quality of federal district judges?

No one knows.\textsuperscript{16} It must be remembered that the ABA opposed the nomination of Louis D. Brandeis to the Supreme Court in a statement signed by ex-President Taft and six former presidents of the ABA. "[T]he statement emphasized that Brandeis's 'reputation, character, and professional career' made him 'not a fit person to be a member of the Supreme Court' . . . ."\textsuperscript{17} One of President Kennedy's appointees to the Federal District Court for the Southern District of Mississippi, Judge Cox, has been the subject of stinging rebukes for his dilatory

\begin{footnotes}
\footnotetext[14]{Of the Eisenhower appointees, 5.7\% received "Not qualified." Grossman at 198. Of the Kennedy appointees, 6.3\% received a similar rating. Federal Judges at 178. (Grossman at 198 places the Kennedy figure at 7.3\% as "not qualified or opposed"). Of the Johnson appointees, 2.8\% were rated "Not qualified." Federal Judges at 178.}
\footnotetext[15]{Of the Eisenhowe appointees, 61.7\% received one of these two ratings. Grossman at 198. Of the Kennedy appointees, 62.2\% received one of the two ratings. Federal Judges at 178. (Grossman at 198 places the Kennedy figure at 61.8\%). For Johnson appointees, the figure is 55.5\%. Federal Judges at 178.}
\footnotetext[16]{After a lengthy study, Harold Chase observed:
Suffice it to say here that in my studied opinion, there is no grave emergency situation with respect to the selection of federal judges. . . . Interestingly enough, interviews and observation have led me to the conclusion that, where a judge is regarded as unfit for the federal bench, it is not the fault of the selection process, but rather of the constitutional provision granting that federal judges "shall hold their offices during good behavior."
Federal Judges, supra note 13, at 189. Chase also concluded that "any attempt to make mandatory a requirement of judicial experience [for a federal judgeship] would be unwise." Id. at 199.}
\end{footnotes}
tactics and failure to abide by the obvious mandate of the Fifth Circuit Court of Appeals in the civil rights cases which appeared before him.\textsuperscript{18} Yet Judge Cox received an “Exceptionally well qualified” rating from the ABA\textsuperscript{19} less than two years before his judicial performance in civil rights cases was subjected to severe criticism by the Fifth Circuit,\textsuperscript{20} legal periodicals,\textsuperscript{21} and the national press.\textsuperscript{22} The Brandeis and Cox examples illustrate that the ABA’s judgment is far from infallible—or even, perhaps, democratic.\textsuperscript{23}

Increasing the percentage of nominees with prior judicial experience would not necessarily improve the quality of federal district judges. Although 7 out of 10 nominees had no prior judicial experience in 1963,\textsuperscript{24} the lawyer members of the ABA Committee on the Federal Judiciary indicated that they preferred a nominee with a successful trial practice over a nominee with prior judicial experience in a state court.\textsuperscript{25} Moreover, prior judicial experience cannot be equated to a “good record” as a judge. Shifting a bad judge from a state to a federal bench solves nothing and may serve to compound and perpetuate the original mistake. In any event, evaluation of prior judicial experience is very difficult.\textsuperscript{26}

An inquiry into possible methods of improving the qualifications of federal district court nominees is probably a fruitless exercise. Al-
though the ABA Committee on the Federal Judiciary has taken a much more activist role in the nomination and confirmation process for federal district judges, the practice of senatorial courtesy continues. Thus, the Senators of the President's party of the state where the judgeship is located have powerful influence with the Senate Judiciary Committee, including a veto power over the President's nominees.\textsuperscript{27} One commentator has observed:\textsuperscript{28}

[The Senate] has appropriated the President's power of nomination so far as it concerns appointments of interest to senators of the party in power; and the President has virtually surrendered his power directly to local party politics as to appointments in states where senators are of the opposition.

In the two instances where the ABA waged a fight in the Senate Judiciary Committee, the appointment of Sarah T. Hughes to a federal district court in Texas and the appointment of Irving Ben Cooper to the Federal District Court for the Southern District of New York, it lost.\textsuperscript{29} One Senator observed in the Sarah T. Hughes confirmation proceedings:\textsuperscript{30}

\begin{quote}
[It might be well if] [the ABA Committee] would read the law occasionally and confine themselves perhaps to the purpose for which they were created instead of attempting to influence appointments of this kind . . . as they have attempted to do in many cases over the country.
\end{quote}

In summary, few conclusions can be drawn about what background or particular qualifications should be sought in nominees, or who should have more or less influence in the selection process.\textsuperscript{31} The only

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\item[27] Richardson & Vines at 58–63.
\item[28] Id. at 60, quoting E. Haynes, Selection and Tenure of Judges 23 (1944).
\item[29] Grossman, supra note 13, recounts both episodes in detail at 179–194.
\item[30] Id. at 179–80, quoting (then) Senator Long of Missouri.
\item[31] Compare the conclusion of Judicial Performance, supra note 18, about the solution to the problems in the federal district courts of the Fifth Circuit in the early 1960's:

The chief difficulty arises not from the behavior of judges but from the appointment of men who in important areas will not observe the self-discipline upon which an appellate system is premised. The principal cure must be found in the appointment of judges who will disinterestedly comply with decisions of higher courts.

\textit{Id.} at 133. The Comment made no suggestions about how judges who would “disinterestedly comply with decisions of higher courts” could be selected. Earlier the Comment had noted that of the eight appointments of President Kennedy to federal district courts in the Fifth Circuit, “four have indicated a considerable reluctance to
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safe conclusion which can be reached is that no matter what qualifications are sought, no matter which group or groups select and screen the nominees, inadequate federal district judges will inevitably appear on the bench. As stated by (then) Deputy Attorney General Nicholas deB. Katzenbach in response to ABA criticism of President Kennedy’s appointment of federal district judges who were rated “Not qualified” (7.3 percent):

I would be very surprised if there were not judges appointed who will prove to have been unworthy and unqualified. . . . I think that at least some of the Judges found by this Committee to be unqualified will . . . prove to have been good appointments. I think some of the Judges found to be qualified will, over a period of years, prove to have been bad appointments.

A “bad appointment” is not necessarily to be defined as a judge who performs inadequately in every case. More likely, a judge is considered bad if his or her performance falls below acceptable standards in a significant number of cases. A judge who is competent to handle simple tort actions may not be capable of controlling a complex anti-trust dispute; a judge whose partiality in criminal cases is questionable may be adjudged impartial in all civil actions. As other commentators have noted, it is doubtful that any selection process, no matter how thorough, can consistently provide judges with no weaknesses.

Finally, all trial judges occasionally are faced with ticklish situations involving the appearance of prejudice or a potential conflict of interest. As stated by the Eighth Circuit Court of Appeals:

We recognize that advocates construe statements of a trial judge in a somewhat partisan light and thus magnify the impact of any comment of the court, whether it be favorable or critical. A trial judge, unless he carefully weighs his pretrial comments, may very well leave the impression that he has improperly prejudged a case, a situation

follow the letter and spirit of the prevailing law in the civil rights area.” Id. at 106 & n.84. As noted earlier, one of those four, Judge Cox, had received an “exceptionally well qualified” rating from the ABA. Id. at 107.


which seems to have occurred here. It is important that the litigant not only actually receive justice, but that he believe he has received justice. A judge, like Caesar's wife, should be above suspicion.

To avoid giving the impression that a case has been improperly prejudged is a difficult task for a trial judge; avoiding such an impression in all cases may be an impossible task even for the best of judges. The impossibility of the task points up the need for disqualification mechanisms in individual cases.

B. Conflicts of Interest

1. Financial

Historically, pecuniary interest in the outcome of litigation has been a ground for disqualification of either trial or appellate judges. Indeed, financial conflict of interest was, for a time, the only ground for disqualification. Nonetheless, the definition of what constitutes a pecuniary or financial interest in a proceeding is a fuzzy one.

In 1927, the Supreme Court in Tumey v. Ohio held that a judge could not hear a case in which he received a portion of the fine imposed upon the defendant. In re Murchison, decided in 1955, held that due process requires that "no 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 1972, Tumey and Murchison were followed in Ward v. Village of Monroeville. All three cases involved instances where the judge had a direct financial interest in the outcome of the proceeding. Receipt of a portion of the fine collected is certainly a proximate connection, but is there such a connection when the judge owns an infinitesimally small percentage of a corporation? Just what financial ligature makes a judge no longer above suspicion?

The furor following the nomination of Circuit Judge Clement J. Haynsworth, Jr., to the United States Supreme Court over alleged

34. Frank, supra note 5, at 43, citing the maxim "no man shall be a judge in his own case," which originated in Dr. Bonham's Case. 77 Eng. Rep. 638 (K.B. 1608).
35. 273 U.S. 510 (1927).
37. Id. at 136.
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financial conflicts of interest has helped to clarify what connection is necessary and illustrates the expansion of what constitutes a pecuniary or financial interest in a proceeding. Sitting as an appellate judge in several cases involving as a party litigant a corporation in which he held a small number of shares, Judge Haynsworth did not disclose to counsel the extent and nature of his holdings nor did he disqualify himself. Many observers believe that it was Judge Haynsworth’s refusal to disqualify himself which led the Senate to reject his nomination.

The Haynsworth experience changed the accepted disqualification standard from a “substantial interest” to “any interest” in order to avoid even the appearance of impropriety. During his confirmation hearings, Justice Blackmun testified that the times had changed, and that “after the Haynsworth episode, he had disqualified himself in precisely the kind of small interest case in which he previously would have sat.” Whether the change of standard from one of “substantial interest” to one of “any interest” is a change of form rather than sub-

39. In the NLRB v. Darlington Manufacturing Co. cases, 325 F.2d 682 (4th Cir. 1963) & 397 F.2d 760 (4th Cir. 1968), Judge Haynsworth was a “substantial stockholder” in a vending company which had machines in plants of several affiliates of defendant’s parent corporation. Judge Haynsworth neither disclosed his holdings nor disqualified himself. When questions arose in 1963 regarding the propriety of his conduct, the Judge was cleared of all charges after an investigation by the circuit judges and the Department of Justice. (Judge Haynsworth requested the investigation.) In Brunswick Corp. v. Long, 392 F.2d 337 (4th Cir.), cert. denied, 391 U.S. 966 (1968), Judge Haynsworth bought $16,000 worth of Brunswick stock after an appellate panel of which he was a member had decided in favor of the Brunswick Corporation. Although he did not realize that the formal opinion had not been released when he purchased the stock, Judge Haynsworth failed to disqualify himself when the opinion was presented for his signature. In Farrow v. Grace Lines, Inc., 381 F.2d 380 (4th Cir. 1967), Donohue v. Maryland Casualty Co., 363 F.2d 442 (4th Cir. 1966), and Maryland Casualty Co. v. Baldwin, 357 F.2d 338 (4th Cir. 1966), Judge Haynsworth held an extremely small amount of the outstanding stock in one of the party litigants. Again he neither disclosed his interest nor disqualified himself.

40. The coalition which defeated Judge Haynsworth’s nomination was composed both of Senators who opposed the nominee’s political and social viewpoint, especially with regard to racial questions, and of those who were troubled by the conflict of interest questions. John P. Frank believes that the swing votes came from the latter group. Frank, supra note 5, at 43.

41. Compare ABA CANONS OF JUDICIAL ETHICS No. 4, with ABA CODE OF JUDICIAL CONDUCT, Canon 2 (Final Draft 1972) [hereinafter cited as CODE OF JUDICIAL CONDUCT].

42. Frank, supra note 5, at 61-62, citing Hearings on the Nomination of Harry A. Blackmun to be Associate Justice of the Supreme Court Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 49-50 (1970).
stance is debatable, but it appears that the "appearance of impropriety standard" is now accepted.  

2. Personal

By the end of the nineteenth century, personal conflicts of interest had been added as a ground for disqualifying judges. Bias or prejudice may be inferred when a party litigant or counsel is a blood relative, former law partner, client or friend (past or present) of the judge, or when the government agency in which the judge or justice was formerly employed is a party litigant.

A personal conflict of interest is as difficult to identify as an "indirect" financial conflict of interest. Accordingly, it has been suggested frequently of late that the "appearance of impropriety" standard should apply to this area as well. Yet even this proposed solution offers no easy answer to the potential conflicts presented. Applied in a financial context, the "appearance of impropriety" standard works well—the judge or justice either has a financial interest, direct or indirect, or he or she does not. One simple way for judges to avoid most financial conflict of interest problems is not to own corporate stock. But few judges can do without friends or relatives and most have

43. According to Professor David Mellinkoff, that is how it should be. Regarding the Haynsworth cases, Professor Mellinkoff observed:

As a member of the bar for 30 years I accept Judge Haynsworth's explanation. At the same time I cannot but observe that to the unsuccessful litigant in Justice Haynsworth's Court the explanation would ring hollow. At best losing a lawsuit is a disheartening, at worst a crushing experience to anyone convinced rightly or wrongly of the justice of his cause. The disappointment is endurable only under a system of justice in which the loser knows that the process by which he lost was a fair one.

. . . It is not difficult to imagine the bitterness in the heart of the injured seaman when he learns that one of the judges to whom he appealed in vain to right the supposed wrong of the Grace Lines was even a small owner of the company that owns Grace Lines. By the standard of the marketplace Justice Haynsworth's stock-holding was trifling. It looms large in the mind of the unhappy litigant searching to discover just what it was that tipped the scale of justice against him.

To avoid such avoidable strains on the legal system, it has long been a maxim of the law that courts shall not only do justice but that they shall seem to do justice... . . .


44. Frank, supra note 5, at 44.

45. See generally Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973) [hereinafter cited as Disqualification of Judges], discussing Canon 3C of the Code of Judicial Conduct, supra note 41.
former law partners, clients or agency contacts. Under either the "appearance of impropriety" standard or the new *Code of Judicial Conduct* Canon 3C's standard which requires a judge to disqualify himself whenever "his impartiality might reasonably be questioned," where is the line drawn?

Personal conflicts of interest are significant because they lead to bias or the inference of bias. If a judge is a friend or relative of a party litigant, the inference of favoritism is easily aroused. The judge may in fact have been impartial, but it may be difficult to convince a losing litigant of that impartiality.

A century ago, two Supreme Court Justices failed to disqualify themselves when participating in cases argued by their brothers. Today, such behavior would be unacceptable by anyone's standards. Professor John P. Frank states that the American practice is for a judge to disqualify himself "at various points between the third and sixth degrees" of relationship by blood. However, Judge Learned Hand reviewed on appeal decisions by his cousin, Judge Augustus N. Hand, when the former was a circuit judge and the latter a district judge. Further, it has not been the practice of Supreme Court Justices to disqualify themselves in cases argued by former law partners. Whether a Justice disqualifies himself when presented with a case coming out of an agency (usually the Department of Justice) in which he was formerly employed depends upon the nature of the case and the disposition of the Justice. Justice Rehnquist felt compelled to explain in a special memorandum his refusal to disqualify himself in *Laird v. Tatum*, a case in which he had expressed his views while

46. See note 41 *supra*.
47. See the quotation from Professor Mellinkoff in note 43 *supra*.
48. Frank, *supra* note 5, at 47.
49. *Id.* at 46 & n.19. S. 1064, 93d Cong., 1st Sess. § 1 (b)(5) (1973) draws the line at the third degree. S. 1064 is discussed in Part II, Section C, *infra*.
an Assistant Attorney General. Finally, although "[e]ach Justice will inevitably have friends at the bar, and some of them are very close," this circumstance alone is not a ground for disqualification in the Supreme Court. Even former Justices have argued cases before the Court.

C. Favoritism or Antagonism—Prejudice

Closely related to the topic of personal conflicts of interest is the concept of prejudice stemming from prior exposure to the counsel at bar, the party litigant or the issue being litigated, or simply from the judge’s cultural background. These areas are not often the subject of attention, yet if we are concerned with preserving or creating "a system of justice in which the loser knows that the process by which he lost was a fair one," the appearance of favoritism or antagonism must be considered.

In this context, prior exposure to counsel should be defined solely in terms of prior exposure at trial or during some stage of the litigation. It would be belaboring the obvious to detail the many instances in which a lawyer may feel that a judge is displaying favoritism towards the other counsel or antagonism towards himself. In federal district courts, lawyers are powerless to remedy the situation. Dean Wigmore’s observation in 1912 is undoubtedly still true:

The public does not fully understand the position of the judge in respect to his immunity from exposure by the bar. His professional iniquities or incompetencies, if any, are so committed as to be di-

54. 408 U.S. 1 (1972).
55. Frank, supra note 5, at 49.
56. Id. & n.30. Professor Frank related in a footnote:

I have had pleasant personal relations with most of the Justices, in varying degrees of closeness, over the past thirty years. As one of them has cheerfully said, "I can decide a case against you as well as against anyone else." and quite so. However, I have scrupulously sought to avoid any social contact with a Justice except in the presence of opposing counsel around the time of an argument, and have felt something of a twinge of embarrassment in accidentally finding myself at dinner with one of the Justices on the evening before a case was to be presented.

Id. at n.30.
57. Id. at 49. Recently, former Justice Goldberg argued Flood v. Kuhn, 407 U.S. 258 (1972), before the Supreme Court (unsuccesfully).
58. See note 43 supra.
59. See, e.g., text accompanying note 33 supra.
60. Colliers, Feb. 10, 1912, at 12.
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rectly known only to a few persons in any given instance; and these few persons are the attorneys in charge of the case. To bear open testimony against him now is to risk professional ruin at his hands in the near future. Moreover, this ruin can be perpetrated by him without fear of the detection of his malice, because a judge’s decision can be openly placed on plausible grounds, while secretly based on the resolve to disfavor the attorney in the case. Hence, lawyers dread, most of all things, to give personal offense to a judge.

Prejudice resulting from prior exposure to the issue being litigated is seldom mentioned. The prejudice does not necessarily stem from the fact that the same or a similar issue has been litigated before a judge previously; rather, the judge’s track record begins to indicate a particular predisposition. This predisposition can become obvious at the trial or appellate level. For example, in 60 consecutive government anti-trust cases, Chief Justice Warren voted in favor of the government 59 times.3

Statistical studies aside, most lawyers stereotype judges, whether on the state or federal bench, as either “liberal” or “conservative.” Judges are only human, as is often observed, and such predispositions cannot help but become apparent with the passage of time. The real question in this area is when a predisposition rises to the level of prejudice.

In Woods v. Evans,62 a federal district judge for the Western District of Washington, Judge Goodwin, denied relief in a prisoner class action suit seeking judicial prescription of rules for inmate disciplinary proceedings at the Washington State Penitentiary.63 Judge Goodwin stated:64

The complaint and supporting affidavits in this claimed class action should be referred to a class that is almost forgotten by the complainants and the general public. This Judge is now a member of the Class. Its name is the National Association of the Victims of Crimes.

The reason that this Judge feels said group should answer the complaints set forth in the affidavits in support of the claims is obvious.

61. Frank, supra note 5, at 48 n.27, citing Stern, Commentary, 38 ANTITRUST J. 602, 608-09 (1969). During the same period Justices Stewart and Harlan each voted against the government as frequently as for it. Id.
64. No. 2806, slip opinion at 3.
The victims have a more personal relationship with the members of the prison inmate class.

Fortunately for the prison inmate class, their victims have very little, if any, voice in the management of the penitentiary and the treatment of its residents. The management of the institution is in the hands of the politician, and social worker, and, in the case of the Washington State Penitentiary, the many times convicted felon.

Federal District Judge William H. Cox has been quoted as having repeatedly described 200 [voting] applicants as 'a bunch of niggers' and called them 'chimpanzees' who 'ought to be in the movies rather than being registered to vote.' Certainly such overt expressions of cultural or political biases can give rise to the suspicion that a judge has prejudged a case, especially when his track record or his personal views are well known in the mind of both litigant and counsel; indeed they can give rise to an affidavit of prejudice under 28 U.S.C. § 144. Yet it is because "lawyers dread, most of all things, to give personal offense to a judge" that prejudice stemming from prior exposure to counsel or the litigant, or to the issue being litigated, or from the judge's acknowledged cultural background, is seldom mentioned, especially in federal district courts.

D. Inconsistency in Judicial Performance

Inevitably, lawyers also form an opinion of who is or is not a good judge not only in general but also for a particular type of case. As will be seen, some federal district judges have human frailties so profound as to render them, in the opinion of lawyers who practice before them, unfit for retention on the bench. Yet even these judges are probably competent to handle many of the routine, uncomplicated matters which clutter a judge's docket. Conversely, even the best of judges often are considered to have a "blind spot," or an area of litigation in which the judge's rationality and impartiality is perceived as being somewhat lower than normal. Some lawyers may feel that individual lawyers, namely themselves, constitute a judge's blind spot. From any


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perspective, and it is primarily the trial lawyer's perspective which is adopted here, all judges have individual inconsistencies which make them vulnerable to a charge of being less impartial in one particular case than in another. Such judges should not be removed from the bench, or we would have no federal district judges. But certainly the extent of a particular judge's inconsistency in retaining the appearance of impartiality ought to be considered in evaluating the propriety of adopting a without cause affidavit procedure for disqualifying judges from individual cases.

A unique survey conducted in November 1971, by the Chicago Council of Lawyers on the judges then sitting in the Federal District Court for the Northern District of Illinois (Chicago) found that only 8 of the (then) 13 sitting judges "were favored for continued service by the responding lawyers." Only 4 of the 13 judges were thought worthy of advancement. A judge was favored for continued service or advancement (a separate question) if he received a favorable vote of 60 percent of those responding to the survey.

The evaluation of one judge who was not favored for retention on the bench, Senior Judge Julius Hoffman, who received national attention (and notoriety) while presiding over the Chicago Seven conspiracy trial, reflects a perceived lack of consistency in judicial performance:

67. Chicago Council of Lawyers, Results of a Survey of Lawyers Concerning the Performance of Judicial Officers in the Federal District Court, at 1 (1972) [hereinafter cited as Chicago Survey]. All three of the senior judges sitting in the Federal District Court for the Northern District of Illinois at the time of the survey were included in the five judges not favored for continued service. Id. at 1-2.
68. See United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).
69. Chicago Survey at 8. The appellate court summarized Judge Hoffman's conduct as follows:

The district judge's deprecatory and often antagonistic attitude towards the defense is evident in the record from the very beginning. It appears in remarks and actions both in the presence and absence of the jury. . . .

. . . . It does appear, however, that in comparable situations, the judge was more likely to exercise his discretion against the defense than against the government.

Most significant, however, were remarks in the presence of the jury, deprecatory of defense counsel and their case. These comments were often touched with sarcasm, implying rather than saying outright that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit. Sometimes the comment was not associated with any ruling in ordinary course; sometimes gratuitously added to an otherwise proper ruling; nearly always unnecessary. Taken individually any one was not very significant and might be disregarded as harmless attempt at humor. But cumulatively, they telegraphed to the jury the judge’s contempt for the defense.

472 F. 2d at 386-87 (footnotes omitted).
Judge Hoffian received less than 60% favorable responses on 10 of the 28 questions. These related to his impartiality in both civil and criminal cases, legal ability in criminal cases, and four aspects of judicial temperament: patience, courtesy, dignity, and consideration in scheduling hearings. It is of particular note that on the questions concerning patience and courtesy, all other judges received between 57% and 98% favorable responses, while Judge Hoffian received 12% and 13% favorable responses, respectively.

Another federal district judge in Chicago, Judge William J. Lynch, fared even worse when evaluated by the lawyers who practiced in his court: 70

Judge Lynch received less than 60% favorable responses on 21 of the 28 questions. He received unfavorable responses on all seven questions relating to judicial integrity, all eight relating to legal ability, and all five relating to diligence. He received at least 60% favorable responses on all of the six questions concerning judicial temperament.

That the members of the Illinois bar practicing before the federal district court in Chicago feel that 38.5 percent (5 of 13) of the federal district judges should not continue on the bench and 69 percent (9 of 13) of the judges should not be considered for judicial advancement is startling. Such statistics suggest that the number of judges considered unfit for retention on the bench nationwide may be higher than anyone has dared to predict. But members of the Illinois bar and members of the federal bar throughout the country are forced to continue to practice before these judges, for at present there is no effective method, except in extreme circumstances, for a lawyer to avoid litigating a case before a judge who he personally feels is unfit or prejudiced.

II. EXISTING METHODS OF DISQUALIFYING FEDERAL DISTRICT JUDGES

As has been demonstrated, there are a variety of circumstances in which it may be appropriate to disqualify federal district judges from presiding over particular cases. In extreme circumstances, it may be necessary to remove a federal district judge from the bench perma-

70. Chicago Survey at 8.
This section will focus primarily on the present disqualification mechanisms; only brief mention will be made of removal mechanisms.

A. Statutory Disqualification Mechanisms

Two federal statutes govern disqualification of federal district judges: 28 U.S.C. § 144 provides for disqualification based upon the filing of a "with cause" affidavit of prejudice by a party litigant or counsel; 28 U.S.C. § 455 defines the circumstances in which a judge should affirmatively disqualify himself or herself.

1. Section 144

The present disqualification statute reads:71

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Enacted in 1911 and redrafted slightly in 1948,72 Section 144 was first interpreted in Berger v. United States,73 which held that the challenged judge could not determine the truth of the facts contained in the affidavit of prejudice, but he or she could decide whether the alleged facts gave "fair support" to the charge of bias or prejudice. Stated another way, Section 144 "made possible the disqualification of a federal judge upon the showing of facts which indicated the possible

72. See Disqualification for Bias, supra note 65, at 1436. See also Note, Disqualification of a Federal District Judge for Bias—The Standard Under Section 144, 57 MINN. L. REV. 749 (1973) [hereinafter cited as Section 144 Standard].
73. 255 U.S. 22, 33–34 (1921), discussed in Disqualification for Bias, supra note 65, at 1437, & Section 144 Standard, supra note 72, at 755.
presence of bias, thereby focusing not only upon impartiality itself but also upon the appearance of impartiality.”74 As interpreted by Berger and subsequent cases, however, under Section 144 “the affiant must affirmatively show bias in fact.”75

Prior to a brief examination of the difficulty of establishing bias in fact, it is appropriate to observe how the mechanics of Section 144 work to intimidate and embarrass lawyers appearing in federal district court. To disqualify a federal district judge under Section 144, attorneys must timely file in good faith an affidavit alleging facts sufficient to establish that the particular judge is biased in fact. This affidavit is then passed upon by the very judge who is being challenged. If the challenged judge finds the affidavit lacking, he denies the motion for recusal or disqualification.76 The losing litigant then has a choice of proceeding to trial before the challenged judge or appealing the denial of the motion for disqualification to the Court of Appeals. If the motion loses on appeal, the trial will proceed before the challenged judge. Recalling Dean Wigmore’s observation that “lawyers dread most of all things, to give personal offense to a judge,” it is not difficult to imagine the embarrassment and strain upon a lawyer who is forced to go to trial before the very judge who has previously passed upon a motion, made in good faith, which alleged that he or she was too biased to judge the case fairly. Thus, the existing Section 144 procedure places the lawyer, the federal district judge and perhaps the party litigant in a very awkward situation. In the words of Senator Birch Bayh: “Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias.”77

How successful are attorneys who file Section 144 affidavits? No complete data is available to adequately answer this question. However, even the most cursory review of the case law under Section 144 indicates that the present Section 144 bias-in-fact standard is very difficult to satisfy. A recent casenote on the Section 144 standard observed:78

74. Section 144 Standard, supra note 72, at 749.
75. Id. at 750.
76. Frank, supra note 5, at 45, declared that the concept of recusation is obsolete. See also id. at 45 n.7.
78. Section 144 Standard, supra note 72, at 755–56.
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[Berger] did evince the Court's disposition in favor of a liberal standard for disqualification.

In the years that followed, however, lower federal courts effectively abandoned the import of Berger by adopting narrow constructions of Section 21 [the immediate predecessor of Section 144]. The statute's purposes were frequently circumscribed by restrictive interpretations of the "personal bias or prejudice" which the affiant must show to gain recusal and by the imposition of a high burden of proof of such bias. Both constraints greatly reduced the availability of disqualification as a remedy for litigants suspecting partiality.

The Note concisely summarizes the Section 144 standard applied by the various federal courts:79

Under the terms of the statute, the affiant must affirmatively demonstrate a manifestation of a feeling of the trial judge "either against him or in favor of any adverse party." However, a litigant's affirmative showing of identifiable bias alone is insufficient to gain recusal. Instead, many federal courts require each litigant seeking recusal to show that the judge dislikes him as a person. Similarly, other courts have held that neither bias against the affiant's cause nor identifiable prejudgment on the merits is sufficient to obtain disqualification. . . .

Other federal courts have looked to the source of a judge's alleged bias in an attempt to determine whether it is personal to the litigants. Most of these courts agree that if a bias developed during the course of previous litigation, no ground for disqualification exists. In United States v. Grinnell, the Supreme Court further confined the scope of recusable bias. In order to be disqualifying, the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

This description of the standard which has developed under Section 144 indicates how difficult it is to disqualify a federal district judge by affidavit. The standard is not impossible to meet, however. In United Family Life Insurance Co. v. Barrow,80 a federal district judge who "commenced work on an attempt to keep [a] ranch business in operation and to readjust pursuant to Chapter XI of the Bankruptcy Act" and who was also designated to hear a series of lawsuits relating to

79. Id. at 756–58 (footnotes omitted).
80. 452 F.2d 997 (10th Cir. 1971).
distribution of the proceeds of $15 million of life insurance, part of the proceeds of which were to go towards operation of the ranch, was held to be "in an inconsistent position" and was disqualified under Section 144 by the Tenth Circuit Court of Appeals.81

Beyond financial conflicts of interest, advertent or inadvertent, the Section 144 standard is almost impossible to meet. In Pfizer Inc. v. Lord,82 an antitrust action against drug manufacturers, the defendants alleged that Federal District Judge Miles W. Lord demonstrated bias in several ways.83 In a lengthy opinion, the Eighth Circuit Court of Appeals applied the Grinnell test—"the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case"84—to the facts in the record and denied relief. However, the Eighth Circuit court added:85

We are convinced of petitioners' sincerity and good faith in filing their affidavits even though we have ruled adversely to their contentions. Clearly some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality. . . .

81. Id. at 999.
82. 456 F.2d 532 (8th C.ir.), cert. denied, 406 U.S. 976 (1972).
83. Defendants alleged eight grounds for the judge's bias:
(1) taking aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants in an effort to assist the other plaintiffs;
(2) suggesting that the United States Government, if it were to settle its civil action, would be permitting the defendants to "buy a monopoly";
(3) declaring that: "We may have another proceeding, or, at least some moves" against defendants to vindicate the integrity of the United States Patent Office and courts for fraud on those tribunals";
(4) urging the Department of Justice to investigate the Patent Office, which he characterized as "the sickest institution that our Government has ever invented" and "the weakest link in the competitive system in America";
(5) refusing, without a hearing, to consider a settlement of the treble damage class actions at a dollar amount previously approved in these cases by another district court and the Court of Appeals for the Second Circuit, which caused one damage plaintiff to withdraw its agreement to settle for that dollar amount:
(6) soliciting law suits against defendants by urging a private attorney to find some hospital patients to form a new class of plaintiffs;
(7) interrogating a deposition witness in an aggressive and angry manner, in an attempt to intimidate the witness and to influence his testimony along the lines desired by plaintiffs, suggesting openly that the witness was evasive and lying, and threatening to levy a fine; and
(8) accusing counsel for one of the petitioners of instructing his client to "manufacture" and "doctor" evidence.
Id. at 535-36.
85. Id. at 544.
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... This record reflects adversely upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. ... These cases will continue under Judge Lord's aegis. We expect him to provide an impartial forum in compliance with his judicial obligation. ...

Any further review of the case law under 28 U.S.C. § 144 (1970) seems unnecessary. It is sufficient to note that the Section 144 standard is clearly established, it is very difficult to meet and it places all concerned in an extremely embarrassing situation. As Senator Bayh has stated: "No statute creates more distrust than does the section 144 procedure for disqualification for prejudice." Yet no discernable judicial trend towards changing the standard is apparent.

2. Section 455

Section 455 explicitly directs a judge to disqualify him or herself from an individual case in certain broadly defined circumstances:

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.

As discussed at length earlier, many political observers believe that it was Judge Clement J. Haynsworth, Jr.'s failure to disqualify himself from a number of cases which led the Senate to reject his nomination to the Supreme Court. The Haynsworth episode changed the Section 455 disqualification standard from "substantial interest" in a proceeding to "any interest" in a proceeding, in order to avoid even the appearance of impropriety.

Aside from the Haynsworth nomination, however, Section 455 is seldom used and seldom litigated. Litigants not intimately familiar with a judge's financial portfolio lack the information necessary to challenge a judge's refusal to disqualify himself; judicial abuse of

88. See text accompanying notes 39-43 supra.
Section 455 seldom can be discovered. Moreover the Section 455 burden of proof is a heavy one. Holdings that a federal district judge need not disqualify himself when hearing cases filed while he was the area United States Attorney are common, even though they seem to stretch the language of Section 455. In *Utah-Idaho Sugar Co. v. Ritter*, when a federal district judge challenged an order of the Judicial Council of the Tenth Circuit, most members of the Tenth Circuit Court refused to disqualify themselves under Section 455 even though they were members of the Judicial Council at the time the challenged order was entered.

The publicity surrounding the Haynsworth nomination focused attention on the section and led to proposals for change. Action by the Senate in 1973 makes revision of Section 455 seem likely; the proposed change will be discussed below.

### B. ABA Code of Judicial Conduct: Canon 3C

Canon 3C of the new *Code of Judicial Conduct* begins: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ." and goes on to list specific situations when a judge should disqualify himself. Justice Rehnquist in his memorandum explaining his refusal to withdraw in *Laird v. Tatum* equated the ABA Code's Canon 3C and the standard under Section 455, but his analysis has been strongly criticized. The differences between the two standards have been capsulized as follows:

89. *See Gravenmier v. United States*, 469 F.2d 66 (9th Cir. 1972) (Federal district judge who was listed as "of counsel" while United States attorney during a prior, separate proceeding against defendant not required to disqualify himself under Section 455); *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972) (Same judge, same holding, except no separate proceeding involved); *United States v. Wilson*, 426 F.2d 268 (6th Cir. 1970) (Federal district judge need not disqualify himself in a criminal proceeding filed when he was United States attorney for the locality in charge of the investigation where he knew nothing of case and where he had informed defendant of this fact and had volunteered to withdraw and defendant had waived withdrawal).

90. 461 F.2d 1100 (10th Cir. 1972).


93. *See*, e.g., *Disqualification of Judges*, supra note 45, at 744-45.
First, the Code states as a general rule that a judge must disqualify himself whenever "his impartiality might reasonably be questioned." Thus, in contrast to the situation under section 455, an underlying standard is articulated to guide the judge when the circumstances do not fall clearly within one of the Code's specific grounds for disqualification. Second, the Code sets forth an extensive but nonexclusive list of per se rules for disqualification which go far beyond the tests of section 455 in both scope and precision.

The Code of Judicial Conduct has been the subject of praise because its goal is the appearance of impartiality throughout the judiciary. "[D]isqualification should follow if the 'reasonable man,' were he to know 'all the circumstances,' would harbor doubts about the judge's impartiality."\(^{94}\) Yet whatever its differences from Section 455, and no matter how laudible its goals, unless judges rigorously adhere to the Canon 3C standard, party litigants must still rely on Section 455 to attempt to force judges to disqualify themselves. Canon 3C provides law review writers with good ammunition for scholarly attacks on Supreme Court Justices and may provide a useful standard for review of the conduct of federal judicial nominees, but it will do little to help individual practitioners who harbor a feeling that a federal district judge will not provide a fair and impartial forum in a particular case.

C. Senate Bill 1064: Revision of Section 455 to Include the Canon 3C Standard

On October 4, 1973, the Senate passed Senate Bill 1064 which incorporates Canon 3C of the Code of Judicial Conduct into 28 U.S.C. § 455; that bill became effective as Public Law 93–512 on December 5, 1974.

Under S. 1064, the Code's general rule that a judge must disqualify himself or herself whenever "his [or her] impartiality might reasonably be questioned" is drafted literally into subsection (a) of Section 455. Subsection (b) lists specific circumstances in which a judge must disqualify. These circumstances are almost identical to those outlined in Canon 3C.

\(^{94}\) Id. at 745, citing E. Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973).

This increased specificity concerning when a judge must disqualify is commendable. Subsection (d)(4) of the revamped Section 455 defines "financial interest" as "ownership of a legal interest or equitable interest, however small...," thereby codifying what is now believed to be the standard which Court of Appeals judges have applied since the Haynsworth nomination. Subsection (e) prohibits waiver of disqualification in any of the circumstances outlined in subsection (b), but not in the more general subsection (a) area if there has been full disclosure.

Certainly S. 1064 is a step in the right direction. But it is a modest step. Attorneys still function under the handicap of having little or no information about a judge's personal or financial background or holdings. The Act requires judges to disqualify themselves in specific, narrow circumstances. Congressional adoption of the "any proceeding in which his impartiality might reasonably be questioned" is interpreted in the accompanying Report as meaning: "Disqualification for lack of impartiality must have a reasonable basis." It will be for the courts to decide what a "reasonable basis" is and, judging from the judiciary's record on both Sections 144 and 455, a narrow interpretation can be expected. Finally, challenges to a judge brought under a revised Section 455 must still be reviewed by fellow judges, thereby ignoring "the possibility of embarrassment and tension created when one man must rule on the impartiality of his colleague—and often, his friend."

D. Removal Procedures

1. Impeachment

Little need be said about removal procedures, which result in the complete removal of a federal judge from the bench. Virtually everyone who has ever written on the subject of impeachment has concluded that it is a cumbersome, ineffective, and therefore seldom used method of removing judges. Thomas Jefferson believed that im-

96. See text accompanying notes 39–43 supra.
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peachment was not an efficient threat to a usurping and lawless judge. The inefficiency of impeachment led Raoul Berger to conclude that impeachment is not the only constitutionally permissible method of removing federal district judges.

2. Removal by judicial conference

Late in 1965, the Judicial Council of the Tenth Circuit Court of Appeals found that Federal District Judge Stephen S. Chandler was "presently unable, or unwilling, to discharge efficiently the duties of his office" and ordered him to "take no action whatsoever in any case or proceeding now or hereafter pending." This action, which is referred to collectively as the Chandler incident, led to a legal battle between Judge Chandler and the Judicial Council of the Tenth Circuit, in which the United States Supreme Court refused to intervene (twice), over whether the Judicial Council could constitutionally take such action or whether impeachment was the only method by which a federal judge could be removed. Within two months, Judge Chandler and the Judicial Council settled their differences; the Council allowed Judge Chandler to retain about 160 cases which had already been assigned to him; in turn, he was not to be assigned any new cases and he agreed not to contest the Council's modified order. However, Judge Chandler later unsuccessfully sought a writ of mandamus or alternatively a writ of prohibition to the Judicial Council in the Supreme Court. The Court denied the relief requested on procedural rather than substantive grounds. Hence, the constitutionality of the Judicial Council's action is still open to question.

Senate Bill 1506 (the Judicial Reform Act) is an attempt by Congress to establish a nonimpeachment removal mechanism for re-

100. Letter from Thomas Jefferson to Spencer Roane, Sept. 6, 1819, in LAWLESS JUDGES, supra note 6, at 246 n.12.
103. Chandler Incident at 450.
calcitrant or incompetent federal judges. Under S. 1506, the Judicial Conference of the United States would preside over removal of the judges if the "good Behaviour" standard of the Constitution has not been met. Additionally, the bill provides for involuntary retirement of judges whose physical or mental disabilities prevent them from carrying out their judicial duties. Here again, however, it can be anticipated that a removal procedure as proposed in S. 1506 would be used only in extreme cases, and not when particular litigants are concerned about the impartiality of a particular federal district judge in a given case.

E. Summary

The Section 144 standard for disqualification of judges in individual cases is very difficult to satisfy. The nature of the affidavit procedure—the challenged judge reviews the adequacy of the challenge—places the lawyer or litigant in a very awkward position, especially when the affidavit is found inadequate. The self-disqualification standard of Section 455 as judicially interpreted is equally difficult to satisfy, although the Haynsworth nomination may have changed the actual practice of sitting judges. Canon 3C of the Code of Judicial Conduct establishes a more specific list of instances which require self-disqualification; Public Law 93–512 incorporates this standard into Section 455. By its nature, however, even if included in Section 455, the Canon 3C standard probably will do little to assuage the fears of an attorney who is skeptical for inarticulable reasons about a judge's impartiality in a particular case. Finally, the standards for permanent removal of federal district judges are even more difficult to meet.

To preserve or create a system which approaches the avowed goal of maintaining an appearance of fairness as well as meting out fairness itself, new disqualification procedures seem necessary. It is suggested that adoption of new disqualification procedures will obviate the need for adoption of new removal procedures. Removal of a judge

109. Id. § 380.
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is a drastic step. Most judges are capable of handling some of the routine cases found on the typical federal district court docket. So long as attorneys can avoid going to trial before judges who either are unfit or are perceived to be unfit to preside over a particular case, there seems to be no pressing need to totally remove the judge in question from the federal bench.

III. DISQUALIFICATION WITHOUT CAUSE:
A PROPOSAL FOR REVISION OF SECTION 144

A. The Bayh Bill

On August 7, 1970, and again on May 17, 1971, Senator Birch Bayh introduced Senate Bill 4201 and Senate Bill 1886 which were popularly titled the Judicial Disqualification Acts. The two bills were identical: each proposed revision of 28 U.S.C. §§ 144 and 455. No Congressional action was taken on either bill. Emphasis here will be placed upon Senator Bayh's proposal for revision of Section 144.

Section 144 of each Judicial Disqualification Act proposed to amend 28 U.S.C. § 144 as follows:

Whenever a party to any proceeding in a district court, either with his own verification or over his attorney's signature, makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall be timely if filed (a) twenty or more days before the time first set for trial or (b) within ten days after the filing party is first given notice of the identity of the trial judge or (c) when good cause is shown for failure to file the affidavit within such times. A party may file only one such affidavit in any case, and only one affidavit may be filed on a side. A party waives his right to file an affidavit by participating in a hearing or submission of any motion or other matter requiring the judge to exercise discretion as to any aspect of the case or by beginning trial proceedings before the judge.

113. Proposed revision of Section 455 is discussed in Part II, Section C, supra.
This amendment would have effectively adopted a "without cause" affidavit procedure similar to that in existence in approximately 17 states, including Washington, Oregon, and California.

Upon introduction of the Judicial Disqualification Acts, Senator Bayh explained how the proposed amendments to Section 144 would remedy its present deficiencies:

The Judicial Disqualification Act . . . would create a right in a litigant to one peremptory challenge of a trial judge assigned to hear his case, adopting a disqualification provision now employed in California and a number of other States. Under such a provision a judge is disqualified upon the filing of an affidavit alleging bias or prejudice and signed by the party or by his lawyer. The disqualified judge is left with no option except to determine whether the application has been timely made. The affidavit must be filed before any discretionary matter has been presented to the judge. Each side is restricted to one challenge, in order to avoid abuse in cases where one of the parties simply wants to create delays or to avoid trial altogether.

The Bayh bill drew immediate praise from Professor John P. Frank, who predicted that resistance to the Bayh proposal "will be personal and emotional; the judge does not like to be judged." This observation may account for the failure of Congress to take any action on Section 144 of the Bayh bill; it has not even been introduced in the 93rd Congress.

B. Would It Work? The Oregon Experience

There exists a concern that an automatic disqualification mechanism would be abused by attorneys appearing in federal district court, making more work for the limited judicial personnel and creating administrative chaos. The Report accompanying S. 1064 con-
cluded that there are enough judicial personnel to cope with more stringent self-disqualification standards, but doubts surrounding attorney abuse of an automatic disqualification mechanism can be dispersed only by empirical data. The logical place to seek such data is in a state which has adopted a without cause disqualification procedure.

Fortunately, an extraordinarily thorough study of an automatic disqualification state, Oregon, has been performed. The empirical study (referred to as the Oregon Project), conducted by the staff of the Oregon Law Review, covers cases filed between May 1, 1955, and January 1, 1968, and affidavits filed between May 2, 1955 and July 1, 1968. The study covered 259,200 cases filed in this 13-year period in the circuit courts (trial courts of original and general jurisdiction) of Oregon. The field data was analyzed at the University of Oregon Computer Center.

In all aspects save one, the Oregon affidavit procedure is identical to the scheme proposed in the Bayh bill and the one in effect in 16 other states. Oregon's procedure differs from the Bayh proposal in that each side is allowed two affidavits without cause. This difference, however, makes the Oregon procedure even more subject to abuse than a system which allows for only one affidavit. Both schemes require only that the affidavit be timely and filed in good faith.

119. In discussing the practical impact of a revision of Section 455's disqualification procedure, the Report accompanying S. 1064 acknowledged the growth in the size of the federal judiciary:

There are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or a district judge who becomes disqualified.


120. Oregon Project, supra note 4.

121. Id. at 378.

122. Id. at 379.

123. Id. at 374.

124. A built-in safeguard against abuse of without cause affidavit procedures is the possibility that a litigant, after exercising the "free" affidavit, may be forced to go to trial before a judge who has previously been the recipient of a similar affidavit. By doubling the number of "free" affidavits, Oregon's procedure halves the possibility. Hence an attorney who practices in a rural county with only one or two circuit court judges can affidavit one or both with impunity, which could lead to abuse of the affidavit procedure.

125. Oregon Project, supra note 4, at 360. "Timely" generally means the affidavit must be filed before the judge in question has made any decision involving the exercise of discretion. Id. at 366-71. Most litigation focuses on the timing of the filing of the affidavit. Id. at 375. "Good faith" means what it says and is rarely litigated.
The authors of the *Oregon Project* undertook an evaluation of the field data explicitly to determine whether the Oregon statutes had been the subject of abuse. They concluded:

[T]he liberal Oregon affidavit of prejudice statutes are being used with restraint, and . . . are responsible for a minimum of disruption to court administration. Most persons who invoke the statute with any degree of frequency have apparent bona fide reasons for doing so.

A more detailed description of the *Oregon Project's* findings follows. Out of 259,200 cases analyzed, the authors found that approximately one disqualification affidavit was entered for each 186 cases filed, of which 92.2 percent were successful. Judges were disqualified for statutory prejudice in one out of 202 cases, not an alarming frequency.

Surprisingly, a very few law firms accounted for a disproportionately large number of affidavits. Six firms were responsible for 49.6 percent of the affidavits filed, and one of those six firms (Firm A) accounted for 31.1 percent of the total affidavits filed. Firm A directed 426 or 98.8% of all its challenges at one particular judge. This appeared to be a personal dispute between Firm A and the judge, for the same judge was the subject of only 23 challenges by attorneys other than members of Firm A.

Firm A made 98.3 percent of its challenges on its own behalf and only 1.7 percent on behalf of its clients. The authors noted that when a "hostile relationship" developed between a law firm and a judge, the firm usually thought it necessary to continue to affidavit the judge *ad infinitum* on its own behalf, and not on its clients behalf. Overall, attorneys filed 62.1 percent of the challenges and clients signed the remaining 37.9 percent of the affidavits of prejudice. Excluding members of Firm A from the data, 13 attorneys made 50.3 percent of all challenges to Oregon circuit judges. Thus, less than

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126. *Id.* at 399.
127. *Id.* at 379.
128. *Id.*
129. *Id.* at 380.
130. *Id.* at 380.
131. *Id.* at 380.
132. *Id.* at 381–82.
133. *Id.* at 385, Table 3.
134. *Id.* at 383.
one-half of 1 percent of all the attorneys active during the 13-year period of the study made one-half of the challenges.\textsuperscript{135}

Eighty-nine different circuit judges held office during the 13-year period studied. Seventy-three of these judges were challenged at least once; 37 were challenged at least five or more times; and 11 judges were challenged 30 or more times.\textsuperscript{136} Of the 16 judges receiving no challenges, only two held office more than 9 years; all of the remaining 14 judges served 5 years or less.\textsuperscript{137} Visiting or pro tem judges were challenged by affidavit 2.4 times as often as regular sitting judges.\textsuperscript{138} Beyond this "visiting judge" category, judges with 11 to 15 years on the bench were most frequently subjected to affidavit.\textsuperscript{139}

The authors found no trend to affidavit judges more or less often in urban or in rural counties.\textsuperscript{140} Little evidence was found to support the conclusion that affidavits were used to "judge shop" in two-judge counties: indeed, the rate of challenges was only two-thirds that of the normal rate for all counties.\textsuperscript{141} Finally, the authors studied which party to a lawsuit was more prone to affidavit a judge. The data revealed that plaintiffs (or their attorneys) filed 39 percent of the challenges; defendants filed 61 percent.\textsuperscript{142} The high rate of challenges in criminal cases probably accounts for this difference.\textsuperscript{143}

The \textit{Oregon Project's} conclusions, based upon an extraordinarily thorough empirical study, seem to fully support Professor John P. Frank; the automatic disqualification system does work "without strain or humiliation where it exists."\textsuperscript{144}

\textbf{C. Suggested Improvements to the Bayh Bill}

Two improvements on the automatic disqualification system proposed in the Bayh bill will be briefly considered. The first involves the

\begin{flushleft}
\textsuperscript{135} \textit{Id.} at n.442.  \\
\textsuperscript{136} \textit{Id.} at 385.  \\
\textsuperscript{137} \textit{Id.} at 385–86.  \\
\textsuperscript{138} \textit{Id.} at 388.  \\
\textsuperscript{139} \textit{Id.} at 389, Table 5.  \\
\textsuperscript{140} "It is fair to say that the challenges were well distributed throughout the 36 counties, if relative caseload adjustments are made." \textit{Id.} at 391.  \\
\textsuperscript{141} \textit{Id.} at 392.  \\
\textsuperscript{142} \textit{Id.} at 385, Table 3.  \\
\textsuperscript{143} \textit{See id.}  \\
\textsuperscript{144} Frank, \textit{supra} note 5, at 67.
\end{flushleft}
number of affidavits allowed each side; the second concerns the form
of the affidavit.

The Oregon statutes which were the subject of the Oregon Project
study allow each litigant two automatic affidavits of prejudice, while
the Bayh proposal allows each side only a single peremptory challenge
of a judge. Professor Frank explained the more restrictive nature of
the Bayh proposal as follows: "the goal is substantial justice within the
limits of available judicial personnel and one challenge per side is as
many strikes as the structure can carry." However, it is not clear
that there is an insufficient number of federal district judges to merit
two or more disqualifications per side. Oregon, a small state with
"limited judicial personnel," has encountered no difficulty with its dis-
qualification system. In large metropolitan areas, one affidavit may be
insufficient to eliminate the potential judges a lawyer or litigant ac-
tually believes are biased. When polled, the federal bar in Chicago
indicated a desire to retain only 8 of its (then) 13 federal district
district judges. The possibility of being forced to go to trial before an unde-
sirable judge because the lawyer has exercised his sole "free" affidavit
in the instant case can loom large in a trial attorney's mind. Such a
prospect may deter use of the affidavit in instances which would other-
wise warrant its use.

Granting more than one affidavit without cause should reduce this
possibility and encourage honest use of the affidavit procedure. If the
Oregon experience holds true nationwide, no abuse would result. Fi-
ally, if limited judicial personnel is the only valid objection to use of
a multi-affidavit procedure, a sliding scale system could be adopted
whereby the number of affidavits allowed depends upon the number
of federal district judges in a particular district. Hence, a district with
fewer than 4 judges could allow only one challenge per side; a district
with at least 4 but fewer than 8 judges could allow two challenges per
side; a district with at least 8 but fewer than 12 judges could allow
three per side; and a district with 12 or more judges could allow four
or more challenges per side.

The form of the affidavit is rarely considered in detail. Usually stat-
utes require attorneys or their clients to state in good faith that they
believe a judge to be biased or prejudiced against them. It has been

145. Id. at 66.
said that this type of affidavit makes liars of attorneys.\textsuperscript{146} The affidavit could state simply: "I would prefer that a judge other than Judge ________ hear this case."\textsuperscript{147} This suggestion would seem to avoid unduly antagonizing judges and might place attorneys in a less compromising position.

IV. CONCLUSION

This Comment has explored at length the need for improved disqualification and removal mechanisms in the federal district courts. From the trial attorney's perspective, the need for an adequate disqualification procedure—one which avoids having the very judge being challenged pass on the merits of the challenge, or similarly, one which avoids having a colleague of the challenged judge pass upon the merits\textsuperscript{148}—is clear. Based upon the Oregon experience, warnings of possible abuse of a peremptory challenge system and of exhaustion of limited judicial personnel appear unfounded.

From the perspective of a federal district judge, adoption of a without cause disqualification procedure may be beneficial. It may be true that "the judge does not like to be judged," but some feedback from the local bar may be welcome. A judge who receives an abnormally high number of affidavits of prejudice, though not subject to formal pressure, would usually be led to reevaluate his demeanor or performance. Some judges may conclude, quite correctly, that they should go on senior status or retire altogether. A without cause disqualification mechanism may prove to be an efficient, humane way of indicating to elderly judges that the time for retirement has arrived.

What would the legal profession or the public think of a without cause disqualification procedure at the federal district court level? Liberals would cheer the adoption of a procedure which could dis-

\textsuperscript{146} Interview with C. Z. Smith, Associate Dean of the University of Washington School of Law, in Seattle, early March 1974. Dean Smith was a trial judge in Seattle for 8 years, 1 year as a municipal court judge (traffic and misdemeanor cases only) and 7 years as a superior court judge (general and original jurisdiction).

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} One possible change in section 144 would require some other judge to rule on the question of a trial judge's alleged bias. However, this still puts undue pressure on counsel, and it ignores the possibility of embarrassment and tension created when one man must rule on the impartiality of his colleague—and often, his friend.

\textsuperscript{116} \textsc{Cong. Rec.} 27798 (1970); \textsuperscript{117} \textsc{Cong. Rec.} 15268 (1971).
qualify a judge with a rather blatant predisposition against liberal actions, such as prisoner class actions. Conservatives would cheer a procedure which allowed for the disqualification of a liberal judge from deep South civil rights cases. And each might oppose adoption of a without cause challenge system for the very same reason—from their perspective it would permit disqualification of a judge whose orientation or bent they share. Yet these considerations should not play an important part in a discussion over the merits of an automatic disqualification system. Truly good judges—judges who dispense justice as merited in each individual case—will seldom be disqualified. As demonstrated by the Oregon Project, most federal district judges have nothing to fear from the adoption of a without cause disqualification procedure in the federal district courts.

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