Bias and Interest: Should They Lead To Dissimilar Results in Judicial Qualification Practice?

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A fair trial is basic to the American legal system.[1] Integral to a fair trial is the participation of impartial judges.[2] Judicial impartiality does more, however, than facilitate fairness; it also promotes a public confidence in the judiciary[3] which is necessary if the legal system is to function properly.[4] Often, impartiality means more than impartiality in fact; the judiciary must also appear to be fair.[5]

Appearance is not an easy or finite gauge with which to judge judges.[6] The legislative history[7] of the judicial disqualification statute, 28 U.S.C. § 455,[8] and the interpretative cases require that appearances be viewed from

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1. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); *In re* Murchison, 349 U.S. 133, 136 (1955); U.S. CONST. amends. V and XIV § 1; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 746 (1973).

2. *See* Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

3. H.R. REP. No. 1453, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351, 6355 [hereinafter cited as 1974 U.S. CODE CONG. & AD. NEWS].

4. Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting). Justice Frankfurter postulated that since the Supreme Court had neither power of purse nor sword its power must derive from "sustained public confidence." *Id.* at 267.

5. Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

6. Andrews v. Agricultural Labor Rel. Bd., 28 Cal. 3d 781, 793, 171 Cal. Rptr. 590, 596, 623 P.2d 151, 157 (1981). Despite its "deep concern for the objective and impartial discharge of all judicial duties" the court refused to apply a standard "as vague, unmanageable and laden with potential mischief as . . . 'appearance of bias.'" *Id.* The California Supreme Court has also questioned whether bias can be factually proven. Solberg v. Superior Court, 19 Cal. 3d 186, 193 n.10, 137 Cal. Rptr. 460, 467 n.10, 561 P.2d 1148, 1155 n.10 (1977). The United States Supreme Court does not harbor the same doubts. *See* Peters v. Kiff, 407 U.S. 493, 502 (1972), *overruled on other grounds*, Taylor v. Louisiana, 419 U.S. 552 (1975).

7. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6355. *See also* 13A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3549, at 612 (1984).

8. Pub. L. 93-512, § 1, 88 Stat. 1609, Dec. 5, 1974. 28 U.S.C. § 455 is one of three statutes governing the disqualification of federal judges. The other two statutes are 28 U.S.C. § 47 and 28 U.S.C. § 144.

Section 47 "states the narrow but important principle" that judges shall not hear appeals of matters over which they previously presided. 13A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3541, at 551 (1984). Section 47 has not been litigated in more than forty years. 28 U.S.C.A. § 47 (West 1968 & Supp. 1984).

Section 144's focus is solely on personal judicial bias and prejudice, and unlike section 455, the bias must be actual. Crider v. Keohane, 484 F. Supp. 13, 15 (W.D. Okla. 1979). Also unlike section

the vantage of the reasonable person.[9] This vantage is not, however, a fixed point in law. It is a fluid standard, influenced as much by convenience, proclivities, and prejudice as by reason and logic.[10] The law is, above all, a culmination of experience.[11] The experience of the late 1960s led to the statute's enactment;[12] subsequent experience suggests that changes in that statute are mandated.

Two recent cases, *In re Cement Antitrust Litigation (MDL No. 296)*[13] and *Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*,[14] illustrate the problems inherent in the statute governing the disqualification[15] of federal judges.[16] Under section 455, a judge can be disqualified from an individual case due to bias[17] or interest.[18] In *Cement*, the trial judge was disqualified because his spouse had a contingent interest of less than thirty dollars in the case's outcome.[19] The *Cement* case touches an estimated ten million shareholders in over 210 thousand parties and involves billions of dollars.[20] In stark contrast, the *Chitimacha* trial judge was not disqualified despite a lifetime of association with the parties and subject matter of the case.[21]

The distinguishing element between the two cases, other than their outcomes, is the statutory subsections under which disqualification was consid-

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455, section 144 has specific procedural requirements. United States v. Conforte, 457 F. Supp. 641, 654 n.7 (W.D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980). Additionally, section 144 is only applicable to district judges, *In re* Foster Iron Works, Inc., 3 Bankr. 715, 718 (Bankr. S.D. Tex. 1980). The broad scope and procedural ease of section 455 have made it the statute of choice in disqualification practice. United States v. Sibla, 624 F.2d 864, 867-68 (9th Cir. 1980); Crider v. Keohane, 484 F. Supp. at 15. *See also* Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 152-54 (1976) (section 144 as so much "statutory detritus").

9. United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981), *cert. denied sub nom.* Hubbard v. United States, 456 U.S. 926 (1982); *In re* Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980); Davis v. Board of School Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The reasonable person standard presumes that the person has knowledge of all the relevant facts. Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980).

10. *See* O. HOLMES, THE COMMON LAW 1 (M. Howe ed. 1963).

11. *See id.*

12. *See infra* notes 100-112 and accompanying text.

13. 688 F.2d 1297 (9th Cir. 1982), *aff'd sub nom. as if by an equally divided court*, Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983), *and* Arizona v. United States Dist. Court, *ex rel.* Kaiser Cement Gypsum Corp., 459 U.S. 1191 (1983).

14. 690 F.2d 1157 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1984).

15. Technically, disqualification, the exclusion by force of law, can be distinguished from recusation, a discretionary withdrawal from a case. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 44-45 (1971). Common usage, however, has blurred the distinction. *See* BLACK'S LAW DICTIONARY 1148 (rev. 5th ed. 1979). The term disqualification, as used in this Note, embodies both variants.

16. This Note adopts the approach of the statute and employs the word "judge" to mean justices, appellate judges, and magistrates, as well as federal trial judges. *See generally* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, wherein the House Report, Canon 3 of the CODE OF JUDICIAL CONDUCT, and section 455 each uses "judge" as an all-encompassing term.

17. As used in this Note, bias means any attitude, including prejudice, that the judge adopts toward a party or issue.

18. As used in this Note, interest encompasses any type of pecuniary, personal, or family relationship which a court might have with a party or subject matter in litigation.

19. *In re* Cement and Concrete Antitrust Litig. (MDL No. 296), 515 F. Supp. 1076, 1085-86 (D. Ariz. 1981), *aff'd*, 688 F.2d 1297 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983).

20. 515 F. Supp. at 1082.

21. *Chitimacha*, 690 F.2d at 1166-67.

ered. In *Cement*, because the judge's association was the financial interest of a member of the judge's immediate family, section 455(b) mandated disqualification.[22] The judge was disqualified despite a belief by the review court that no factually based question of judicial impartiality existed.[23] That the judge's "interest" was de minimis under any circumstances, and wholly insignificant given the magnitude of the case, was immaterial.[24] Once a financial link with the case is discovered, disqualification is mandatory regardless of the size of the interest or when discovery occurs.[25]

The hardship imposed by this draconian rule[26] is illustrated by subsequent developments in *Cement*.[27] This case was, in terms of parties and claims, one of the largest cases ever to come before the federal bench. After Judge Muecke's disqualification, the major plaintiffs' class was decertified.[28] Key ingredients in a court's decision to proceed with a case as a class action are that court's perceptions of the manageability and necessity of the class.[29] A judge's attitude toward class actions is not a disqualifying factor,[30] but it does influence how litigants try the case. Thus, where a judge is receptive to allowing a class action, litigants will spend a great deal of time and money maintaining the action as such. This was precisely the situation in *Cement*. The litigants and the court expended substantial resources to maintain the class action,[31] but by changing judges and bringing in a new viewpoint on the maintainability of the class action, the expenditures of time, energy, and money were for naught.[32]

The application of section 455(b) caused the *Cement* litigants to suffer drastic and costly changes on de minimis grounds.[33] The illogic in this result is that section 455 does not mandate disqualification when different but more compelling grounds are present. In *Chitimacha*, for example, because the judge had no financial links to the case, disqualification was not mandatory. Compelling grounds existed, however, to question the *Chitimacha* judge's impartiality.

In *Chitimacha*, the only ground for disqualification which the challengers could successfully bring before the court was the appearance of partiality.[34] Appearances are not disqualifying per se under section 455(a).[35] The trial court has the discretion to determine whether appearances are disquali-

22. *Cement*, 688 F.2d at 1300.

23. *See id.* at 1315.

24. *See Cement and Concrete*, 515 F. Supp. at 1085-86, for a discussion of the relationship between Mrs. Muecke's interest and the magnitude of the case. 28 U.S.C. § 455(b)(4) requires disqualification wherever the judge or his spouse has a "financial interest in the subject matter in controversy or in a party to the proceeding." Subsection (d)(4) defines financial interest to include "ownership of a legal or equitable interest, however small."

25. *See Cement & Concrete*, 515 F. Supp. at 1078.

26. Harper, *The Breakdown in Federal Appeals*, 70 A.B.A.J. Feb. 1984, at 56, 57.

27. *See infra* notes 41 and 188-94 and accompanying text.

28. *See infra* note 41.

29. FED. R. CIV. P. 23(b)(3)(C)-(D).

30. Professor Thode, Reporter for the CODE OF JUDICIAL CONDUCT, indicates that there is value in having judges with fixed beliefs on legal questions. E. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 61 (1973).

31. *See infra* notes 43 and 188-94 and accompanying text.

32. *See infra* note 194 and accompanying text.

33. *See infra* note 46 and accompanying text.

34. The facts of *Chitimacha* are set forth 690 F.2d at 1160-62.

fying,[36] and subsequent review courts may only determine whether that discretion has been abused.[37]

The *Chitimacha* trial judge's alleged ties to the case were: a former client was involved in the case; his former law firm, from which he still received compensation for his partnership interest, represented in other matters a defendant in the case; relatives of his former law partners were defendants; and the judge had previously been involved, as a lawyer, with the land that was the focus of this case. Additionally, at one point in the case the plaintiffs claimed land that the judge owned. In every instance linking the *Chitimacha* trial judge to the case before him, no disqualifying appearance was found. Instead, each link was deemed sufficiently attenuated as to no longer suggest any impartiality.[38]

If the nexus between the trial judges and the parties and subject matter in *Cement* and *Chitimacha* are compared, the appearances in *Cement* suggest no judicial partiality. In *Chitimacha*, on the other hand, the appearances are highly suggestive of possible partiality. Why then, should the outcome of *Cement* and *Chitimacha*'s disqualification proceedings be so dissimilar?

This Note answers that question by first reviewing, in greater detail, these two cases. Additionally, the statute under which disqualification was sought is analyzed. This analysis involves not only an exploration of the historical and political genesis of the statute, but also its application in the decade since its adoption in current form. Special attention is given to the impact of the statute on complex civil litigation. Finally, this Note suggests that per se grounds be held to the same standard as appearances.

ANOMALOUS RESULTS: *CEMENT* AND *CHITIMACHA*

In re Cement Antitrust Litigation (MDL No. 296)[39] may constitute, by virtue of its size[40] and eventual outcome,[41] the most significant instance of judicial disqualification to date. In 1977, the Judicial Panel on Multi-district Litigation transferred all pending actions in this nationwide case to Arizona, citing Chief Judge C.A. Muecke's familiarity with the litigation and his expertise in complex litigation.[42] Judge Muecke presided over an active discovery and pretrial process and in 1979 certified a nationwide class of

35. Subsection (e) of 28 U.S.C. § 455 allows waiver of disqualification where the grounds are appearances.

36. Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983).

37. *In re* Federal Sky-Walk Cases, 680 F.2d 1175, 1183 (8th Cir. 1980), *cert. denied*, 459 U.S. 988 (1982).

38. *Chitmacha*, 690 F.2d at 1166-67.

39. 688 F.2d 1297 (9th Cir. 1982), *aff'g*, 515 F. Supp. 1076 (D. Ariz. 1981). The facts of the *Cement* pretrial process are set forth 515 F. Supp. at 1076 and 688 F.2d at 1299-1300.

40. *Cement* initially involved 21 separate antitrust actions, 688 F.2d at 1299, ultimately resulting in a nation-wide plaintiff's class of cement consumers, "a substantial portion of which are corporate entities," 515 F. Supp. at 1077, whose shareholders would number in excess of ten million. *Id.* at 1082.

41. Since its transfer to a new judge, the *Cement* classes have been decertified and all but one plaintiff has withdrawn. Cement and Concrete Antitrust Litig. (No. MDL 296), CIV 76-455 PHX MLR. *See infra* notes 190-94 and accompanying text.

42. *Cement*, 688 F.2d at 1299; *In re* Cement and Concrete Antitrust Litig. 437 F. Supp.750 (Jud. Pan. Mult. Lit. 1977).

cement consumers.[43] Subsequently, plaintiffs lodged with the court a class list of 210,235 putative members. Judge Muecke continued playing a vital role in the management of the action until 1981.

In January, 1981, it was brought to Judge Muecke's attention that a comparison of his 1980 financial disclosure statement with the master list of putative class members revealed that the judge's spouse owned stock in seven of the 210,235 class members. Defendants in the antitrust action moved for Judge Muecke's disqualification under 28 U.S.C. § 455(b)(4). The judge's first reaction to the proposition, that the de minimis nature of his spouse's holding required automatic disqualification, was one of surprise.[44] Upon reviewing the statute, however, the judge stated:

> I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.[45]

A contingent spousal financial interest totalling no more than $29.70 and perhaps as little as $4.24 mandated disqualification.[46]

Plaintiffs appealed Judge Muecke's disqualification decision.[47] The Ninth Circuit reluctantly concurred in the lower court decision.[48] Upon subsequent appeal to the United States Supreme Court, the Court affirmed as mandated by statute the lower courts, lacking the required six-justice quorum.[49] The Court's affirmance left unresolved the legal issue presented in *Cement*:[50] whether such a de minimis, attenuated, and tardily discovered interest should be disqualifying in a case of such major and complex propor-

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43. Over a five-year period Judge Muecke spent thousands of hours mastering and guiding this case. *Cement and Concrete*, 515 F. Supp. at 1077.

44. *Id.* at 1078.

45. *Id.*

46. The variance in the dollar amount is based on a range of presumptions employed in calculating the potential recovery. The larger amount, $29.70, is based on the following presumptions:

1) Each of the entities in which Mrs. Muecke owns stock files a timely claim, eventually approved for full participation against the recovery.
2) The amount of recovery equals the total approved claims.
3) Each entity achieves a full recovery on its claim.
4) None of the entities in which Mrs. Muecke has an interset pays any taxes on any recovery obtained.
5) Each of these entities distribute, as dividends, their full recovery to shareholders.
6) Those entities whose subsidiaries are the actual claimants against the recovery pass their recovery on to their "parent" who in turn passes that amount, in full, to its shareholders.

If this last presumption is not fulfilled, Mrs. Muecke's recovery, based on the presumptions above, will only be $4.24. Even those presumptions are tenuous and thus Mrs. Muecke's recovery could have been even less than $4.24. *Cement and Concrete*, 515 F. Supp. at 1084-86.

47. *In re* Cement Antitrust Litig. (MDL No. 296), 688 F.2d 1297 (9th Cir. 1982).

48. *Id.* at 1315. The Ninth Circuit discusses the negative ramifications of an unwaivable per se rule of disqualification. *Id.* at 1311-15.

49. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983), and Arizona v. United States Dist. Court *ex rel* Kaiser Cement Gypsum Corp., 459 U.S. 1191 (1983).

50. 28 U.S.C. § 2109 (1982) requires a quorum of six justices to decide a question. The withdrawal of four justices, *see infra* note 51 and accompanying text, precluded the Court from granting certiorari in *Cement*. Section 2109 provides that under such circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." Such affirmance leaves the legal questions in the case unrsolved. Neil v. Biggers, 409 U.S. 188, 192 (1972).

tions as *Cement*. Ironically, four Supreme Court members disqualified themselves for the same type of interest as that held by Mrs. Muecke.[51]

Had it been possible to characterize Mrs. Muecke's interest as beneficial, rather than as financial, the outcome of the disqualification proceedings would have been markedly different. In *In re New Mexico Natural Gas Antitrust Litigation*[52] and *In re Virginia Electric & Power Co. (VEPCO)*[53] each trial judge, as a utility consumer, had a contingent interest in the case before him. In each instance the judge's interest was comparable to or greater in value than Mrs. Muecke's interest.[54] Neither judge was allowed to remove himself from the case.[55] Because these interests were not, under the statute, direct financial interests in the parties before the court, the interests were treated differently than Mrs. Muecke's interest.[56] In fact, Mrs. Muecke's interest and probability of recovery were as attenuated as that of the judges' in *New Mexico Natural Gas* and *VEPCO*.[57] While Mrs. Muecke did have a direct interest in *Cement*, the interest was merely that of members of the common populace due to the sheer magnitude of corporate parties involved and, as in *New Mexico Natural Gas* and *VEPCO*, should have been treated accordingly.[58]

Cement illustrates how little is necessary to remove a judge from a case; other cases paint an altogether different picture. In *Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*,[59] the plaintiffs asserted several factually based links between the trial judge, Judge W. Eugene Davis, and the defendants and subject matter before him. The grounds for disqualification in this Indian land claims action were as follows: the judge owned property within the tribe's aboriginal territory; one of the defendants was a former client of the judge; the judge's former law firm still represented one of the defendants, though not in the matter in question; the judge still received payments from his former law firm as part of his partnership buy-out upon ascension to the bench; relatives of the judge's former law partners were defendants in the action; and the judge had previously acted as an attorney and notary public regarding various parcels of land subject to the case before him. Judge Davis did not rule on the disqualification motion, but temporar-

51. Petitioners Brief for a Writ of Certiorari at 8 n.7, Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983).

52. 620 F.2d 794 (10th Cir. 1980).

53. 539 F.2d 357 (4th Cir. 1976).

54. In *New Mexico Natural Gas* the trial judge's potential interest was an annual reduction in utility bills of $12.00 to $31.00. 620 F.2d at 796. In *VEPCO* the interest was a one-time utility refund estimated to be between $70 and $100. 539 F.2d at 360.

55. *New Mexico Natural Gas*, 620 F.2d at 797; *VEPCO*, 539 F.2d at 369.

56. 28 U.S.C. § 455(b)(4) creates two categories of disqualifying interests: "financial" and "any other interest that could be substantially affected by the outcome of the proceeding." Financial interests are disqualifying per se, regardless of size. *See* 28 U.S.C. § 455(d)(4). Mrs. Muecke's interest was financial and therefore mandated Judge Muecke's disqualification. Where the interest is characterized as only being beneficial, as in *New Mexico Natural Gas* and *VEPCO*, the outcome of the proceedings must be seen as visiting some substantial impact on the interest before it is disqualifying. *New Mexico Natural Gas*, 620 F.2d at 796; *VEPCO*, 539 F.2d at 367-68; *Cement and Concrete*, 515 F. Supp. at 1078.

57. *New Mexico Natural Gas*, 620 F.2d at 796-97; *VEPCO*, 539 F.2d at 367-68.

58. "[P]ractical problems abound" if judges are disqualified everytime they have an interest as "a member of the common populace." *New Mexico Natural Gas*, 620 F.2d at 797.

59. 690 F.2d 1157 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1984).

ily transferred the case to the district's chief judge. The chief judge dismissed the motion.

On appeal, the Fifth Circuit found, first, that the judge's relationships with his former client and the relatives of former partners were too remote to merit disqualification. Second, the court found that the payments from the judge's former firm were not out of current firm profits and, therefore, were not affected by the proceedings.[60] Finally, the circuit court found that the judge's alleged previous involvement with the subject land was not stated with sufficient particularity to warrant disqualification. The court stated that if a reasonable person would harbor doubts about a judge's impartiality, the judge should be disqualified.[61] The court found no basis in any of the allegations standing alone, or in combination, to doubt Judge Davis's impartiality.[62]

Interestingly, courts have mandated disqualification where only one circumstance similar to the *Chitimacha* links existed.[63] The multiple connections between Judge Davis and the case before him would seem to mandate disqualification on the basis of appearances. While not factually on point, the Supreme Court's dictum in *Mayberry v. Pennsylvania*[64] suggests that while one instance might not constitute a disqualifying circumstance, a succession of events, acts, or links might put the judge's continued participation into reasonable doubt.[65]

Thus, on one hand the judge in *Cement* was disqualified because his spouse had a contingent interest of less than thirty dollars in an action involving millions of dollars and millions of people. On the other hand, the *Chitimacha* judge was allowed to continue participating in a case where he had a lifetime of involvement with the parties and the subject matter.

Chitimacha and *Cement* illustrate the chief pitfall of section 455. By denying latitude to judges and parties regarding the per se grounds of disqualification, judges can be removed from cases where their impartiality is never reasonably in doubt.[66] Proponents of revised section 455 argue that there can be no leeway on the per se grounds because judges cannot sit with certainty, and the public cannot maintain confidence in the judiciary, if the prohibition against certain links with matters before the judges are not abso-

60. *Id.* at 1166-67.

61. *See id.* at 1165.

62. *Id.* at 1167.

63. *See, e.g.*, Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980) (business relationship with attorney in the case), *cert. denied*, 449 U.S. 820 (1980); SCA Services, Inc. v. Morgan, 557 F.2d 1010 (7th Cir. 1977) (judge's brother was a partner in firm before judge; actual participation in the case was not necessary for an adverse public opinion to exist); Church of Scientology of California v. Cooper, 495 F. Supp. 455 (C.D. Cal. 1980) (disqualification appropriate even where allegations are erroneous if there is a reasonable question as to the judge's impartiality); Hampton v. Hanrahan, 499 F. Supp. 640 (E.D. Ill. 1980) (former law firm member-chairperson of group filing amicus brief in case); California v. Kleppe, 431 F. Supp. 1344 (C.D. Cal. 1977) (investments in a former client).

64. 400 U.S. 455 (1971).

65. *Id.* at 465.

66. Scholars have long held that if the goal of the judicial process is to find the truth, judges must have latitude in trying the cases before them. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AMER. L. REV. 729, 738 (1906).

lute.[67] The basis for this view is that some people will perceive a judicial bias in even the smallest interest.[68] Under the appearances standard, however, it is from the view of a reasonable person knowing all the facts that judges are to be judged.[69] Would a reasonable person knowing all the facts have disqualified Judge Muecke? A historical and political overview provides an understanding of how judicial disqualification practice reached this point.

JUDICIAL DISQUALIFICATION: THE HISTORICAL FOUNDATION

Judicial disqualification practice has its roots in the foundations of the English-American legal system and encompasses some primary beliefs regarding what is necessary for a properly functioning judicial system. Public confidence in the judiciary is an unrefutable requirement of civilized society.[70] Public confidence springs from a belief in justice,[71] and belief in justice springs from the public's perception that justice is being done.[72]

While "justice" is an amorphous concept, certain precepts embody the concept.[73] Chief among these precepts is that no judge shall sit in a case where that judge is a party or will benefit from the outcome of the case.[74] Early English construction of this precept led to the disqualification of a physicians review board which retained the fines it was empowered to levy;[75] the "la[ying] by the heels" of the Mayor of Hereford because he presided over the ejectment of one of his own tenants;[76] the quashing of a court order because one of the judges named in the "stile of [the] Court" also occupied the office which was the subject of the matter before the court;[77] and, of particular contemporary interest, the overturning of a court action where the decision benefited the community where two of the sitting judges resided.[78]

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67. *See* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6355.

68. *See id.* at 6356.

69. Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980).

70. "To distrust the judiciary marks the beginning of the end of society." O. KIRCHHEIMER, POLITICAL JUSTICE 175 (1961) (quoting Honore Balzac); 3 BLACKSTONE, COMMENTARIES * 361 (judge's "authority greatly depends upon [the] presumption and idea" that society must trust its judges) (as quoted in Frank, *supra* note 15, at 43).

71. Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW & CONTEMP. PROBS. 69, 79 (1970).

72. "[J]ustice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 14 (1954).

73. Miller, *supra* note 71, at 79.

74. "No man shall be a judge in his own case." I COKE, INSTITUTES * 141a, *as quoted in* Frank, *supra* note 15, at 43.

75. Dr. Bonham's Case, 8 Co. 114a, 77 Eng. Rep. 638 (K.B. 1608). "Censors" (modern-day medical certification board) could not be judges, because they passed sentence; ministers, because they issued summons; or parties, because they received the fines levied. 77 Eng. Rep. at 652. Nor could one be both a judge and an attorney for any of the parties. *Id.*

76. Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (K.B. 1698). The court, per Holt, C.J., noted the judge in such a situation must be removed even if he was "the sole Judge of the Court." *Id.* This absolutist position was soon modified. *See infra* note 78.

77. Case of Foxham Tithing, 2 Salk. 607, 91 Eng. Rep. 514 (K.B. 1706).

78. Between the Parishes of Great Charte and Kennington, 2 Strange 1173, 93 Eng. Rep. 1107 (K.B. 1726). The court action under review was the removal of a pauper from the judges' own community. The upper court characterized the residency of the lower court as an "interest" and noted that a "fundamental . . . rule of justice" is that a party interested in the matter could not be a judge on the matter. In contrast to the case involving the Mayor of Hereford, *supra* note 76, the court here opined that an exception could be made if no other justices were available. *Id.*

Today, the doctrine covering situations where no other judge is available is known as the "Rule

Throughout this period of English law, the test of judicial impartiality was based on financial interest and not personal bias.[79] It was presumed that judges were not biased.[80] Disqualification for pecuniary interest was tempered in England by the recognition that necessity might compel a judge to sit when no other judge was available.[81]

From this English base, American laws regarding judicial disqualification emerged.[82] Treating financial interest as distinct from bias precipitated the development of different standards.[83] These differences are reflected today in the anomalous outcomes of *Cement* and *Chitimacha*.

Early twentieth-century American law did not restrict the bases of judicial disqualification to interest in the parties or subject matter.[84] Contrary to Blackstone's advisory that the "law will not suppose the possibility of bias or favor in a judge,"[85] statutes[86] and cases[87] added bias and prejudice[88] to the

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of Necessity" and is uncontroverted by section 455. United States v. Will, 449 U.S. 200, 213, 217 (1980). *Will* involved a lawsuit against the United States by members of the federal trial bench. The issue was a pay raise for federal judges. Because all judges were affected and would therefore have a conflict, no judge would be disqualified.

79. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).

80. Frank, *supra* note 15, at 43, *quoting* 3 BLACKSTONE, COMMENTARIES *361: "For the law will not suppose the 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."

81. Dimes v. Proprietors of the Grand Junction Canal, 3 H.L. 759, 788, 10 Eng. Rep. 301, 313 (H.L. 1852); *see also* Great Charte, 2 Strange 1173, 93 Eng. Rep. 1107.

82. *See* Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1480-81 (1981).

83. *Id.*

84. Tumey v. Ohio, 273 U.S. 510, 523 (1927). *Tumey v. Ohio* represents the elevation to constitutional status of the centuries-old precept that judges must be impartial as to matters before them. In *Tumey* the Mayor of North College Hill, Ohio, was compensated in part from the fines he imposed. A portion of the fines also went for municipal improvements. These facts are strikingly similar to those found in Dr. Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608), *see supra* note 75 and accompanying text, and Between the Parishes of Great Charte and Kennington, 2 Strange 1173, 93 Eng. Rep. 1107 (K.B. 1726), *see supra* note 78 and accompanying text. In *Great Charte* the review court found the lower court's participation in the case to be violative of a "fundamental . . . rule of justice." 93 Eng. Rep. at 1107. Two hundred years later, in *Tumey v. Ohio*, the United States Supreme Court found the Mayor's practices to be violative of due process. 273 U.S. at 531-32.

While the emphasis in *Tumey* was on the constitutional grounds for disqualification, the *Tumey* Court recognized that not all questions regarding the disqualification of judges were constitutional in nature. 273 U.S. at 523 ("[M]atters of Kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion."). However, in criminal cases, the Court firmly held that, because a defendant's liberty or property are subject to the judgment of the court, the question of disqualification engendered by a judge's direct pecuniary interest is constitutional in nature. The Court cited Dr. Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638, for the proposition that "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." 273 U.S. at 524. The Court also concluded that if the fines imposed were small enough, they would fall within the scope of the maxim *de minimis non curat lex*. 273 U.S. at 531. Thus there is a point where the interests of the judges are so small that even the constitutional safeguards are not offended. *See* Note, *supra* note 1, at 746 (due process does not require disqualification grounded on appearances).

85. *See supra* note 80.

86. Section 21 of the Judicial Code provided for disqualification by a party affidavit if "the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit." 36 Stat. 1090 (1911). Until the adoption of section 21 in 1911, there was no statute making evident bias a ground for judicial disqualification. Frank, *supra* note 79, at 629. The companion Judicial Code provision, section 20, 36 Stat. 1090 (1911), has a substantially longer history, dating from the Act of May 8, 1792, ch. 36 § 11, 1 Stat. 278-79. Section 20 was a standard, interest-type statute, providing for disqualification if the

list of disqualifying factors.[89] A judge could be disqualified from a particular case because of favoritism or antagonism toward any party to the case.

Berger v. United States[90] is an early application of the bias test. In addition to holding that allegations of bias must be based on facts,[91] the United States Supreme Court also noted in *Berger* that a tribunal must do more than be impartial in matters before it; it must also give assurance that it is impartial.[92] In *Offut v. United States*,[93] Justice Frankfurter carried the concept of

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judge had previously represented one of the parties, or there was a prospect that the judge would become a material witness in the case, or the judge had a relationship or connection with a party. The foregoing sections were subsequently reenacted as 28 U.S.C. § 25 and § 24 respectively in 1940, and as 28 U.S.C. § 144 and § 455 in 1948. Further amendments have retained the same United States Code numbers.

87. Berger v. United States, 255 U.S. 22 (1921). *Berger* is especially important for giving "full breadth to the legislative intent behind the statute." Frank, *supra* note 79, at 629. The statute referred to in *Berger* was section 21 of title 28. *See supra* notes 86.

88. Bias and prejudice are terms not easily given to precise legal definition. In *Berger* the majority characterized the requisite attributes for disqualification as an "objectionable inclination or disposition." 255 U.S. at 35. Justice McReynolds, in dissent, offered a clearer description stating "[b]ias and prejudice are synonymous words and denote 'an opinion or leaning adverse to anything without just grounds or before sufficient knowledge,'—a state of mind." 255 U.S. at 42 (McReynolds, J., dissenting). An even older case, *Ex parte* N.K. Fairbank Co., 194 F. 978, 989-90 (M.D. Ala. 1912), provides a more precise definition, noting both a censurable and an uncensurable level of bias and prejudice. The uncensurable level arises out of our ordinary contacts with the world and has no "evil" effect. *Id.* at 989. However, a censurable level arises when bias and prejudice is

> so strong that [it] result[s] in personal bias or prejudice as to individual suitors, dominating the judge to such an extent that [it] beget[s] a mental or moral condition which makes the judge willing to do wrong although he sees the right, regarding the justiciable matters brought before him, or else, though the judge's intentions be good, render him incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties to the suit.

Id. at 989-90.

In more recent cases, courts have characterized bias and prejudice as something more than "intemper[ance]," Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981), an "antagonism or animosity toward a party," United States v. Professional Air Traffic Controllers Org., 527 F. Supp. 1344, 1357 (N.D. Ill. 1981), and have stated that "[a] defendant is entitled to the cold neutrality of an impartial judge . . . 'that' no judge shall preside [where] . . . he is not wholly free, disinterested, impartial and independent." United States v. Orbiz, 366 F. Supp. 628, 629 (D.P.R. 1973).

89. See *supra* note 86 for other disqualifying factors.

90. 255 U.S. 22 (1921).

91. *Id.* at 33-34. Forty-five years after *Berger*, the Supreme Court refined the doctrine to hold that bias or prejudice must be shown by facts external to the proceeding. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). The distinction between internal and external sources of bias is a significant one. If the trial judge comes into a case with an open mind, then any subsequent determination or "bias" is part of the normal course of proceedings. In *Grinnell* the trial court admitted that it had reached the conclusion, based on the discovery and pretrial materials urged upon the court by defendants, that if the facts were as alleged by the plaintiff, "stringent relief" would be mandated. 384 U.S. at 583. While such a position by the trial bench may indicate an adverse disposition toward a party, since it is a bias developed in the course of proceedings, it is not preclusive of the trial judge's continued sitting. *Id.* at 583.

Berger, 255 U.S. 22, involved defendants of Germanic extraction and the trial judge expressed admittedly prejudicial views in another case against a defendant of similar extraction. The underlying presumption in *Berger* was that the judge's prejudice was not based upon anything he had learned from the proceedings but rather was one of personal bias brought to the case.

The Court is very concerned about a bias of this nature because it is a personal bias that would be very hard to divine as it manifests itself in judicial findings, 255 U.S. at 36, and as Justice Frankfurter said in Offutt v. United States, 348 U.S. 11, 14, what constitutes the ingredients of justice are "subtle matters."

92. 255 U.S. at 35-36.

93. 348 U.S. 11 (1954). The trial judge became personally embroiled with defense counsel in a criminal case. In conduct which the United States Supreme Court characterized as displaying per-

assurances a step further. He directed that "[j]ustice must satisfy the appearance of justice."[94]

Despite the seeming absolutism of Justice Frankfurter's charge, lower courts continued to recognize the contrary consideration of a duty to sit.[95] In *Commonwealth Coatings Corporation v. Continental Casualty Company*,[96] the Supreme Court reiterated its earlier admonitions regarding the importance of appearances.[97] With *Commonwealth Coatings* the lines were, if unintentionally, drawn.[98] Judges were forced to choose between their perceived duty to sit and their duty to avoid even the appearance of partiality.[99] These lines became markedly clear upon the nomination of Judge Clement Haynsworth Jr. to the Supreme Court.

JUDICIAL DISQUALIFICATION PRACTICE: THE POLITICAL FOUNDATION

The importance of appearances became clear in the 1969 nomination of Judge Haynsworth to the United States Supreme Court.[100] Judge Haynsworth's opponents used the judge's failure to disqualify himself in a number of earlier cases as the basis for denying him the appointment.[101] The judge's failure to disqualify himself in these cases was not unusual for the times,[102] but his views on key social issues were enough to create an unyielding view of his disqualification practices.[103] The Haynsworth nomination, while a

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sonal animosity and a lack of proper judicial restraint, the trial court imposed severe contempt sanctions against counsel. *Id.* at 12, 17.

94. *Id.* at 14. The following year, 1955, the Supreme Court merged *Offutt* and *Tumey* in another case involving post-trial imposition of contempt sanctions. *In re* Murchison, 349 U.S. 133 (1955).

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end 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.

349 U.S. at 136.

95. Edwards v. United States, 334 F.2d 360 (5th Cir. 1964). "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation." *Id.* at 362 n.2.

96. 393 U.S. 145 (1968).

97. *See Burger*, 255 U.S. at 36; *Offutt*, 348 U.S. at 14.

98. Frank, *supra* note 15, at 59-60.

99. Justice Blackmun, during his Senate confirmation proceedings, admitted that after *Commonwealth Coatings* he disqualified himself from a case, despite contrary Eighth Circuit practice, where he had only a small amount of stock in one of the parties. Frank, *supra* note 15, at 57 and 59.

100. *See* Note, *supra* note 1, at 736; Frank, *supra* note 15, at 43.

101. Frank, *supra* note 15, at 43 and 60. Mr. Frank discusses extensively the uncertainty the judicial profession was experiencing during the period when Judge Haynsworth made several decisions regarding his personal finances. It cannot be overemphasized that this was a period of considerable change in judicial disqualification practice. *Id.* at 51-62. While the cases for which the judge found himself under attack involved a wide range of interests, all of the cases in question were resolved prior to the *Commonwealth Coatings* decision. Mr. Frank's thoughts as to Judge Haynsworth's actions were that: "no significant objection to his confirmation should be made on the basis of disqualification." Frank, *supra* note 15, at 43.

102. Justice Blackmun, the eventual successful nominee for the United States Supreme Court seat, had also participated in a number of cases where he had held a financial interest in a party. *See* Frank, *supra* note 15, at 62 n.81.

103. *Senate Floor Fight Ahead*, 5 TRIAL, Aug.-Sept. 1969, at 5. This article reported that Judge Haynsworth would face a confirmation fight because of purported racial and politcial views. No mention was made of any ethical controversies.

landmark in judicial disqualification practice,[104] was part of a larger sequence of events[105] providing the impetus for a new standard: substantial pecuniary interest would no longer be necessary for disqualification;[106] any pecuniary interest would be sufficient.[107]

It was in the context of a decade of turmoil and rising expectations,[108] with nominations running aground and a new body of decisional law emerging, that potential revisers of section 455 addressed the issues of bias and interest.[109] The imprecision with which bias and interest were defined was a

104. *See* Note, *supra* note 1, at 736.

105. Judicial reform was part of the larger reform movement of the 1960s. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 804 (1972), to instill public confidence in governmental institutions by making those institutions "open . . . and responsive." Bayh, *Congress Must Act Now*, 6 TRIAL, April-May 1970, at 48. Senator Bayh was the prime mover behind the bill that eventually became the current version of 28 U.S.C. § 455. Large segments of society had become disenchanted with the workings of government and a natural target for this dissatisfaction was the judiciary. McKay, *The Judicial and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 11 (1971). Such attacks on the judiciary were only a part of the broader community discontent. J.P. MACKENZIE, THE APPEARANCE OF JUSTICE 225-28 (1974). *See* Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 426-27; *see also* D. STEIN, JUDGING THE JUDGES (1974).

Members of the Supreme Court were not especially helpful in upholding the image of the Court in this reformist era. Justice Douglas was involved with Albert Parvin and the Parvin Foundation. This raised intense feelings and a movement toward Douglas's possible impeachment. Gerald Ford, in an April 15, 1970, speech to the House of Representatives regarding Justice Douglas and impeachment stated that an impeachable offense "is whatever a majority of the House of Representatives considers it to be at a given moment in history . . . ." J.P. MACKENZIE, *supra* at 26-37.

Additionally, Justice Rehnquist's 1972 memorandum explaining his reasons for not disqualifying himself from hearing Laird v. Tatum, 409 U.S. 824 (1972) (Rehnquist, J., mem.), despite allegations of prior involvement and bias, added fuel to the fire. *See* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6356. Laird v. Tatum, 408 U.S. 1 (1972), was a case concerning army surveillance of civilian political activity. The United States Supreme Court, with Justice Rehnquist as a member of the 5-4 majority, found that the army's activity was not chilling of first amendment rights. Justice Rehnquist had testified in the case on behalf of the Justice Department. In addition to arguing that he was not in technical violation of existing statutes or canons, Justice Rehnquist argued that all judges have doctrinal and constitutional propensities, some of which may have been articulated before ascension to the bench. 409 U.S. at 835-36. Ultimately, the Justice felt the controlling doctrine was that of a duty to sit. *Id.* at 837-39. Thus, the duty to sit doctrine had a very powerful proponent.

106. The prior version of Section 455 required that disqualification occur "in any case which [the judge] has a substantial interest . . . ." 28 U.S.C. § 455, June 25, 1948, ch. 646, 62 Stat. 908.

Prior to 1948, the word "substantial" was absent from the statute. No answer is available as to why it was added in 1948. Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377, 383.

107. 28 U.S.C. § 455(d)(4).

108. *See* J.P. MACKENZIE, *supra* note 105, at xii-xiii; Bayh, *supra* note 105, at 48.

109. Justice Lewis F. Powell Jr., while president of the ABA in 1964, proposed that lawyers and judges formulate new codes of conduct. Traynor, *Foreward, The Code is Clear*, 1972 UTAH L. REV. 333. Actual appointment of the special committee to draft a new code did not occur until 1969 when the ABA president, Bernard G. Segal, appointed the Special Committee on Standards of Judicial Conduct of which Roger J. Traynor, former Chief Justice of California, was chairman and Professor E. Wayne Thode, University of Utah College of Law, was reporter. By the time the Committee had completed its work, a marked change had already occurred in disqualification practice. The ethical climate of the period dictated that few judges would continue to sit in cases where they had any financial interest. Ainsworth, *Impact of the Code of Judicial Conduct on Federal Judges*, 1972 UTAH L. REV. 369, 373. Despite the fact that the process began well in advance of the Haynsworth nomination, the Canons still reflect the influence of that event. Frank, *supra* note 106, at 379. Adopted unanimously by the American Bar Association House of Delegates in August, 1972, the Code was subsequently adopted in April, 1973, by the Judicial Conference of the United States as being applicable to all federal judges.

On the legislative side, in 1970 Senators Bayh and Tydings introduced a bill containing the disqualification standards applied during the Haynsworth proceedings. Frank, *supra* note 15, at 62. This was not Senator Tydings's first foray into the judicial disqualification controversy. The Senator

major issue. This imprecision, coupled with the presumption that bias was the greatest source of a sense of injustice, strengthened the impetus to create a more stringent statute.[110] Additionally, though judges in the post-Haynsworth nomination period might remove themselves from any matter in which they had any pecuniary interest,[111] it was forcefully argued that there was a continuing need for a more precise definition of interest.[112]

The prior version of section 455 was significantly less explicit in its disqualification mandate.[113] The key to disqualification was possession by the judge of a substantial interest in the case.[114]

While the revision's supporters favored a stronger statute with more precise elements, they never believed that revision was necessary to make federal judges more honest. Those supporters, as well as most legal scholars and commentators, believed in the basic honesty and fairness of the federal judiciary. Their goal was to impress upon the public that the judiciary was honest and fair.[115] The intended effect was an increase in the public's confidence in the judiciary.[116]

Dissatisfaction with the administration of justice is not a new phenomenon.[117] The 1974 revision of section 455 was heavily grounded in a perceived crisis of public confidence. This may have been an overreaction to

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had initiated, as early as 1966, investigations regarding whether the federal judiciary had the tools necessary to police itself. Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROBS. 178 (1970). These investigative efforts led to the 1968 introduction of legislation and over the next year hearings were held periodically. *Id.* at 196. In 1970 Senator Tydings joined with Senator Bayh in introducing what became known as the Bayh Bill. That bill failed to pass. In 1973 two bills, introduced by Senators Hollings and Bayh, were merged into S. 1064 and successfully cleared all congressional hurdles by December, 1974. 28 U.S.C. § 455, Pub. L. 93-512, § 1, 88 Stat. 1609 (1974). *See also* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6353.

110. Frank, *supra* note 106, at 380.

111. Frank, *supra* note 15, at 62, *quoting Hearings on the Nomination of Harry A. Blackmun to be Associate Justice of the Supreme Court Before the Senate Committee on the Judiciary*, 91st Cong., 2d Session 41 (1970) (statement of Harry A. Blackmun, nominee, United States Supreme Court). Justice Blackmun admitted that his own disqualification practice had changed since *Commonwealth Coating* and the Haynsworth defeat. *Hearings* at 49-50. *See also* Ainsworth, *supra* note 109.

112. Judge Haynsworth's defeat demonstrated the necessity of rewriting the federal law of judicial disqualification. Frank, *supra* note 15, at 43; Frank, *supra* note 106, at 379.

113. The statute stated:

> 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, 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.

28 U.S.C. § 455, June 25, 1948, ch. 646, 62 Stat. 908. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79.

114. The source of the substantiality requirement is unknown. *See* Frank, *supra* note 106, at 383.

115. Bayh, *supra* note 105, at 48.

116. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, 6354. This is a statutory incorporation of United States v. Berger, 255 U.S. 22 (1921).

117. Roscoe Pound, writing in 1906, commented upon the real and serious dissatisfaction with the courts and the general lack of respect for law which existed in the United States at that time. Pound, *supra* note 66, at 730. This is not dissimilar from the view expressed by Professor McKay, *supra* note 105, at 11. "Disrespect for the courts is taking new and more virulent form in increasingly contemptuous conduct in court and even physical disruption. Even more alarming is the widely shared mistrust of the judicial system as a whole." *Id.* at 11.

All legal systems have been attacked as being unfair and permeated with bias. Pound, *supra* note 66, at 731. *See also* G. GILMORE, THE AGES OF AMERICAN LAW 1 (1974) ("In most societies at most periods the legal profession has been heartily disliked by all non-lawyers: a recurrent dream

several factors, including the Haynsworth nomination and Watergate. The nexus between judicial disqualification practice and the public's confidence in the judiciary may not be in the appearance of justice being done, but rather in whether the public likes or dislikes disqualification outcomes.[118] In law, as in other areas of society, correct solutions are predicated on asking correct questions.[119] When the reformers cited a lack of public confidence in the judiciary, the key question was not how to allay that dissatisfaction, but rather, why was public confidence lacking. If the answer was that courts handed down unpopular decisions, then disqualification practices did not need radical change.

In eras of reform, changing the law is often seen as the curative for all ills. Often, legal reform has a magical ring to it.[120] Despite the wished for magic, it is incorrect to presume that rigid codification of human behavior leads to miraculous cures.[121]

REVISIONS IN SECTION 455

Appearance of Impartiality Standards

In 1974 the United States Congress made two significant revisions in 28 U.S.C. § 455. First, Congress made appearance of impartiality the statutory standard by which the federal judiciary is judged.[122] The statutory inclusion

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. . . that the class of lawyers can be done away with."). In American history there have been several periods of extreme anti-judicial attitudes and strictures. G. GILMORE, *supra* at 21-22.

The present era is not free from anti-lawyer and anti-legal system attitudes. Currently in Arizona, there is a drive for a civilian lawyer regulatory agency and the introduction of a bill in the State legislature banning lawyers from service in the legislature. Arizona Business Gazette, Feb. 13, 1984, at B1, col. 1. A recent article in the ABA Journal called the current situation in United States trial courts a "crisis in judicial competence." Sklar, *Judicial Incompetence: A Plea for Reform*, 69 A.B.A. J. 1598, 1600 (1983). *See also* Will, *Such, Such Were the Joys*, NEWSWEEK, Jan. 2, 1984, at 72 ("Lawyers, the curse of modern times.").

118. The public will accept disqualification procedures only when the outcome is to its liking. Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. Section 455*, 1978 U. ILL. L.F., 863, 871. Cases only arise when a party is dissatisfied with the court's disqualification action. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3547, at 384 (1975).

Advocates of statutory reform did not include in their analysis that attitudes toward those who decide the law are often dependent upon social and political attitudes. G. GILMORE, *supra* note 117, at 13. When society is as diversified and oft-times divided as American society, when values are under attack and undergoing change and there is a noticeable difference in the rate of progress between public opinion and the law, the law and those most intimately involved in its administration are the first to be attacked. *See* Weistart, *Judicial Ethics: Forward*, 35 LAW & CONTEMP. PROBS. 1, 2 (1970). Often law and the prevailing perception of what constitutes justice are not the same. Grossman, *supra* note 105, at 804-05. The prevailing perception of what constitutes justice may be nothing more than "the principle of the gored ox in operation." Miller, *supra* note 71, at 76. Thus public confidence in the judiciary may not be as much a function of the judiciary's publically perceived ethical conduct as it is a function of the decisions handed down by the courts. This is especially true when judicial decisions impact upon or are negatively perceived by those who influence public opinion. Weistart, *supra*, at 2.

119. Estate of Rogers v. Comm'r, 320 U.S. 410, 413 (1943).

120. Chief Justice Traynor noted that law reform is perceived as a miracle fabric. Traynor, *The Judges and Law Reform*, 5 TRIAL, April-May 1969, at 37.

121. G. GILMORE, *supra* note 117, at 95-96, 100-01, 104-05 and 108-10.

122. 28 U.S.C. § 455 (as amended) Pub. L. 93-512, § 1, 88 Stat. 1609 (1974). Subsection (a) of the statute provides: "[a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The 1978 amendment merely deleted from the statute references to referees in bankruptcy. *Id.*

of appearances was part of a congressional plan to promote public confidence in the judiciary and to bring certainty and objectivity to federal disqualification practice.[123]

The appearance standard is primarily embodied in subsection (a) of section 455.[124] Subsection (a) is also the statute's catch-all provision.[125] It is intended to provide judges with an objective standard for self-disqualification determinations.[126] If a reasonable factual basis exists upon which a judge's impartiality might be questioned, disqualification is mandated.[127] Despite the emphasis on facts, some authorities argue that the disqualifying factor need not be a determinable bias or interest. "Any appearance of partiality" will suffice to disqualify a judge.[128] Other authorities take a contrary view, requiring that bias or interest create an irrebuttable presumption of unfairness.[129]

That "any appearance" is not the standard utilized is evidenced by *Chitimacha*.[130] The trial judge appeared to have various property, financial, and personal associations with the parties and subject matter of the case at bar. Though the Fifth Circuit noted that the goal of section 455 "is to foster impartiality by requiring even its appearance,"[131] the court looked at the remoteness of the interest to determine whether the judge should have been disqualified.[132]

Regardless of whether the test is "any appearance" or some "factually based appearance," the general rule is that the source of the alleged bias must be external to the case in order to require disqualification.[133] The bias complained of must arise from events prior to or collateral to the proceed-

123. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6352, 6355.

124. *See supra* note 122.

125. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6354; United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978).

126. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6354-55; United States v. Conforte, 457 F. Supp. 641, 655 (D.C. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980); State of Idaho v. Freeman, 507 F. Supp. 706, 720 (D. Idaho 1981); United States v. Corr, 434 F. Supp. 408, 412 (S.D.N.Y. 1977).

127. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, 6355. Above all, the challenge to impartiality must be reasonable. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 407 F. Supp. 324, 329 (E.D. Va. 1976), *vacated on other grounds*, 539 F.2d 357 (4th Cir. 1976). Reasonableness is determined by whether a reasonable person would infer, under all the circumstances, that the judge's impartiality is subject to question. Bradley v. Milliken, 426 F. Supp. 929, 933-34 (D. Mich. 1977). The circumstances must have a factual foundation. United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980); United States v. Corr, 434 F. Supp. 410, 412 (S.D.N.Y. 1977). Once facts exist which would cause a reasonable person to question a judge's impartiality, disqualification is mandatory. Roberts v. Bailar, 625 F.2d 125, 129 n.14 (6th Cir. 1980).

128. Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 257 (1978).

129. Not only must bias be pervasive, Hamm v. Board of Regents, 708 F.2d 647, 651 (8th Cir. 1983), but it must be so pervasive that an ordinary, reasonable person would be unable to set it aside and fairly judge a person or class. Whitehurst v. Wright, 592 F.2d 834, 838 (5th Cir. 1979); United States v. Professional Air Traffic Controllers Org., 527 F. Supp. 1344, 1359 (N.D. Ill. 1981).

130. 690 F.2d 1157 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1984).

131. *Id.* at 1165.

132. *Id.* at 1166-67.

133. *See* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6355. This proposition is consistent with United States v. Grinnell Corp., 384 U.S. 563 (1966). *See also* Frank, *supra* note 106, at 380.

ings in which the question of partiality arose.[134] If the bias arises from the proceedings before the court, it is not as a general rule disqualifying.[135] As cases progress, judges are allowed to reach conclusions as to the parties and issues before them, based on the evidence presented.[136] Even if those conclusions are expressed during the course of the proceedings, such expressions are not automatically disqualifying.[137]

The rule on external sources is not universal however. A number of courts have found that when the bias alleged is sufficiently pervasive, even partiality arising out of the proceeding at bar is disqualifying.[138] This is a major modification of the traditional appearance standard.[139] Where attitudes and demeanor of bias arise from the proceedings before the court, "any appearance of partiality" will not suffice.[140] Instead, the partiality must be pervasive.[141] Thus the extent of the judge's bias will be controlling.

Whatever the purported source of the alleged partiality, a party or counsel cannot gain from creating an appearance of conflict.[142] Nor can a tactic designed to generate conflicts between judge and counsel or party be a basis for disqualification.[143] That a judge may behave intemperately in the course of proceedings is not itself disqualifying.[144] The bench has a great deal of latitude to express its views during proceedings,[145] especially when those views are directed toward general legal or social issues related to the case before the judge.[146]

The burden of showing that the alleged bias is of disqualifying magni-

134. *See* Cleveland v. Krupansky, 619 F.2d 576, 577 (6th Cir. 1980), *cert. denied*, 449 U.S. 834 (1980); *In re* Parr, 13 Bankr. 1010, 1018 (E.D.N.Y. 1981).

135. *See* Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 1017, 1019 (S.D. Tex. 1981).

136. United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983). Such bias is considered to have been derived from the evidence. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

137. *See* United States v. Nelson, 718 F.2d at 321.

138. Hamm v. Board of Regents, 708 F.2d 647, 651 (11th Cir. 1983). In *Hamm* the court reviewed the trial court's comments on the lack of evidence, rulings adverse to one of the parties, and friction with counsel and found no pervasive bias.

139. Grinnell v. United States, 384 U.S. 563 (1966). Much of the debate as to the source of bias may arise from the *in pari materia* relationships of sections 144 and 455. United States v. Story, 716 F.2d 1088, 1090-91 (6th Cir. 1983).

140. *See* United States v. Hines, 696 F.2d 722, 729 (10th Cir. 1982); Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *In re* Horton, 621 F.2d 968, 970 (9th Cir. 1980); Idaho v. Freeman, 507 F. Supp. 706, 728 (D. Idaho 1981).

141. Phillips v. Joint Legislative Comm. on Performance and Expenditure Review, 637 F.2d 1014, 1020-21 (5th Cir. 1981), *cert. denied sub nom.* Mississippi v. Phillips, 456 U.S. 960 (1982). (judge's racial prejudice was not overtly indicative of hostility to the plaintiff's claim, and therefore it was within the judge's discretion whether disqualification was mandated).

142. McCuin v. Texas Power & Light Co., 538 F. Supp. 311 (E.D. Tex. 1982), *aff'd*, 714 F.2d 1255 (11th Cir. 1983). The defendant employed the judge's brother-in-law as local counsel. To disqualify the judge in such circumstances would allow a party to use the statute for a purpose for which it was not intended. 538 F. Supp. at 314. Under these circumstances, the appropriate action is the disqualification of counsel. *Id.*

143. Davis v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1975); Hayes v. National Football League, 463 F. Supp. 1174 (C.D. Cal. 1979).

144. Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981). *But see* Nicodemus v. Chrysler Corp., 596 F.2d 152, 155 (6th Cir. 1979).

145. In *United States v. Gregory*, the trial judge, in handing over his requested financial disclosure statement, told counsel for the defendant, "I hope you choke on it." 508 F. Supp. 1218, 1219 (D. Ala. 1980), *appeal dismissed*, 656 F.2d 1132 (5th Cir. 1981).

146. *See* Johnson v. Citizens Bank & Trust Co., 659 F.2d 865, 869 (8th Cir. 1981).

tude is on the party challenging the judge's impartiality.[147] Whether that burden has been met is within the discretion of the challenged judge.[148] The judge's discretion is greatest when the doubt as to continued participation is raised solely by appearances.[149] In exercising this discretion, the judge must be mindful that the purpose of the statute is to promote public confidence.[150] Therefore, the judge must willingly step aside whenever there is a reasonable factual basis which might diminish public confidence.[151]

Supporting the presumption of a willingness to step aside is the fact that subsection (a) has removed the presumption of a duty to sit.[152] Previously, judges believed that they had equal duties of sitting and not sitting.[153] If appearances were the sole grounds for disqualification, the duty to sit precluded stepping aside.[154] It is now accepted that pursuant to section 455(a) a judge is no longer compelled to hear a case once it becomes unreasonable to do so because of an appearance of partiality.[155]

The substitution of an objective "reasonable person" standard for the previously applied standard of "in the judge's opinion" to determine whether bias in fact or in appearance exists is a significant aspect of the 1974 revision of section 455.[156] With the emphasis on appearances, it is appropriate that the analysis be objective.

Per Se Disqualification Standard

The second significant change wrought by the 1974 revision was the addition of per se grounds for disqualification.[157] This change brought the statute into general conformance with the existing judicial ethical grounds for disqualification.[158] A key difference between the statutory and ethical

147. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964); Frank, *supra* note 15, at 51. Even after adoption of the Code of Judicial Conduct there was a presumption that the duty to sit was stronger than the duty to avoid an appearance of impartiality. *Laird v. Tatum*, 409 U.S. at 837.

148. *See Cement*, 688 F.2d at 1313.

149. *See* David v. Attorney General, 699 F.2d 411, 416-17 (7th Cir.), *cert. denied*, 104 S. Ct. 113 (1983); United States v. International Business Machines Corp., 475 F. Supp. 1372, 1389 (S.D.N.Y. 1979); *see, e.g.*, SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) (judge's brother-in-law's law firm representing a party in the case might create a belief in the public's mind that the judge could not longer be impartial); Spires v. Hearst Corp., 420 F. Supp. 304 (C.D. Cal. 1976) (newspaper, while party to case before judge, running favorable article about judge can create an appearance of partiality); Turner v. American Bar Ass'n, 407 F. Supp. 451 (N.D. Tex. 1975) (contemporaneous civil action against the judge by criminal defendant before the judge could lead to possible prejudice).

150. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6355.

151. *Id.*

152. *Id.* Fair discretion has been substituted for a duty to sit. Frank, *supra* note 106, at 379.

153. Edwards, 334 F.2d at 362 n.2.

154. *See id.*

155. Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979).

156. 28 U.S.C. § 455(a); 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6354-55; Davis v. Board of Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). For an example of the "in the judge's opinion" standard, see Kinnear-Weed Corp. v. Humble Oil and Refining Co., 441 F.2d 631, 635 (5th Cir. 1971).

157. These are found in section 455(b). *See infra* note 169 for pertinent portions of the text.

158. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6351. "The bill would make both the statutory and the ethical standard virtually identical." *Id.* at 6353. This view is not shared by the judiciary. At its 1974 session, the Judicial Conference of the United States voted to express its disapproval of the then-proposed amendments to section 455. Report of the Joint Committee on the Code of Judicial Conduct, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6359. The reasons for this action by the nation's federal judiciary were threefold: (1) to permit a reason-

grounds persists. The statute allows the parties to waive disqualification only when the grounds for disqualification fall into the appearances category.[159] The Code of Judicial Conduct, however, provides for waiver only when the grounds are per se.[160] These contrary views illustrate a major difference in perception between the Congress and the judiciary as to what grounds are more closely linked to public confidence in the legal system.[161]

Subsection (b) of the statute delineates specific circumstances which mandate disqualification. The congressional intent was to assist judges in avoiding public criticism.[162] Adherence to the specific standards set forth would presumably eliminate uncertainty and ambiguity regarding the partiality of judges.[163]

Subsection (b) addresses bias and interest. Like subsection (a), subsection (b)(1) focuses on bias.[164] It generally employs the same tests and encounters the same problems as subsection (a).[165] There is, however, a distinction between the two subsections. Subsection (b)(1), setting forth a per se ground for disqualification, requires more than just an appearance of bias.[166] Therefore, a single, negative opinion about a litigant will not be automatically disqualifying.[167] Only when a reasonable person can find that the opinion exhibits a bias-in-fact that will bar a fair trial will a single opinion about a party be disqualifying.[168] This can be characterized as a non-de minimis bias test.

The other key aspect of subsection (b) is the attention given to pecuniary interest in subsections (b)(4) and (5). These subsections mandate disqualification when the judge has a direct or familial financial interest in the

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able period of time to elapse after the adoption of the parallel section of the Judicial Code, it being, theoretically, easier to amend a canon than a statute if the provisions therein prove less than satisfactory; (2) that the provisions are contradictory, the ABA and the Judicial Conference contending that judges should be permanently disqualified "in all circumstances" where impartiality might reasonably be questioned, while the Congress would allow waiver in such circumstances; and (3) that judicial discretion must be retained in order to protect the needs and rights of litigants. *Id.* at 6360-61. The Congress responded, emphatically, "that the American people are entitled to ethical behavior on the part of all three branches of the Government, not merely the Executive or legislative branches." *Id.* at 6361. There was no direct response to the specific points raised by the judiciary.

159. 28 U.S.C. § 455(e) provides:

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

160. *See* ABA CODE OF JUDICIAL CONDUCT Canon 3D.

161. The sentiments exchanged between the Congress and the Judicial Conference, *see supra* note 158, are part of a long standing debate over who should codify the ethical standards under which judges operate. *See generally* Clark, *Judicial Self Regulation—Its Potential*, 35 LAW & CONTEMP. PROBS. 37 (1970); Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970); Shipley, *supra* note 109.

162. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 3, at 6355.

163. Prior statutes failed to provide the necessary ethical guidance to the judiciary. Weistart, *supra* note 118, at 1.

164. 28 U.S.C. § 455(b)(1) provides that a judge must disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

165. United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978).

166. *See* United States v. Conforte, 457 F. Supp. 641, 657 (D. Nev.), *aff'd*, 624 F.2d 869 (9th Cir. 1978), *cert. denied*, 449 U.S. 1012 (1980).

167. 457 F. Supp. at 657-58 n.12.

168. *Id.* at 659.

proceedings.[169] The general rule is that any financial interest, regardless of size, in a party or subject matter in litigation before the judge, is disqualifying.[170] While there are some exceptions to this mandate,[171] judges have a statutory responsibility to avoid financial dealings which could bring the court's impartiality into question. This responsibility includes judicial cognizance of the financial involvements of the judge's spouse and minors residing within the judge's household.[172] Where the interest involved is not a financial interest, the case's impact on the interest must be substantial.[173]

A de minimis financial interest is not excepted from mandatory disqualification.[174] This is a departure from previous disqualification practice[175] and from legal doctrine in general. Courts have long held that the law will not bother itself with trifles.[176] Yet under subsection 455(b), a trifling, de minimis financial interest can disrupt costly and complex litigation.

PER SE DISQUALIFICATION AND THE COST TO COMPLEX LITIGATION

Complex litigation has assumed a unique status in federal practice.[177] Immense effort has gone into developing judicial procedures and expertise in order to bring these often massive cases with their extensive and intricate issues to a fair and relatively expeditious conclusion.[178] Much of this development has occurred without the support of the formalized rules found in

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169. 28 U.S.C. § 455(b)(4) mandates judicial disqualification when:

> 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 . . . .

Subsection (b)(5) adds "party involvement" to disqualifying interests.

170. 28 U.S.C. § 455(d)(4) provides that " 'financial' interest means ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party."

171. 28 U.S.C. § 455(d)(4)(i)-(iv).

172. 28 U.S.C. § 455(c).

173. 28 U.S.C. § 455(b)(4) mandates disqualification in "any other interest that could be substantially affected by the outcome of the proceeding."

174. *See supra* note 170.

175. *See* the prior version of section 455, *supra* note 113. De minimis financial interests in the subject matter or parties were not disqualifying in prior practice. Frank, *supra* note 15, at 53 n.39; Frank, *supra* note 79, at 613 n.31.

176. H. BROOM, LEGAL MAXIMS 88 (10th ed. 1939). This maxim has been applied in antitrust law, where a major doctrine is that certain activities are per se violations of the Sherman Antitrust Act. The application of the concept of *de minimis non curat lex* has resulted in the preclusion of antitrust enforcement in situations where the activities of the defendants are per se violative of the antitrust laws. However, because of the de minimis impact on commerce by the defendants's conduct, the rule is not applied. *See* United States v. Topco Assocs., 405 U.S. 596, 606 (1972). The Supreme Court has also recognized the applicability of the maxim to judicial disqualification for pecuniary interest. Tumey v. Ohio, 273 U.S. 510, 531 (1927).

177. *See generally* MANUAL FOR COMPLEX LITIGATION (1982). Cases fall into the category of complex litigation when they "present extensive and intricate issues and, in consequence, raise more than the usual number of problems." *Id.* at xxvi. Complex litigation is addressed by the Judicial Panel on Multidistrict Litigation. *Id.* at xxiv. Between its inception in 1968 and June, 1981, the Judicial Panel transferred 10,410 civil actions for centralized proceedings. Reports of the Proceedings of the Judicial Conference of the United States, Sept. 24-25, 1981, *reprinted in* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 58 (1981).

178. *See generally* MANUAL, *supra* note 177.

other areas of federal practice.[179] Despite the great strain placed on judges, lawyers, and parties[180] by complex cases, the flexibility provided by suggested guidelines instead of fixed rules has been a primary ingredient in the successful management of these cases.[181]

Another key ingredient is the control of the case by one permanently assigned judge.[182] The multiplicity of intricate issues requires vigorous, consistent, and informed judicial involvement[183] to master the case and to bring it to a fair conclusion.[184] In short, a judge must keep his or her finger constantly on the pulse of a complex case.

In exercising this control, the court must be mindful that it is the litigants, through their development of the issues and facts in the case, who must ultimately resolve the dispute between them. These cases should not be resolved by procedural rules.[185] Emphasis on rules and technicalities and not the dispute itself offends the public sense of justice in a manner similar to appearances of judicial partiality.[186] When the emphasis on rules results in two-year delays in resolving important disputes, the tenet that "justice delayed is justice denied" is as applicable as the tenet asserting that "judges must appear to be just."[187]

Under the prior version of section 455,[188] the impact of *Cement*'s outcome on Mrs. Muecke's interest would have been too insubstantial to merit disqualification. Claims submitted to date in *Cement* exceeded five billion dollars,[189] though some claims may prove meritless when reviewed. The five-billion-dollar figure highlights the difference between Mrs. Muecke's less than thirty dollar interest and the potential interests of others in *Cement*'s outcome.[190] The disparity is further noted by the settlements with various defendants prior to Judge Muecke's disqualification in 1981—settlements which have created a fund in excess of forty-eight million dollars.[191]

Since the judge's disqualification, no further settlements have been achieved,[192] nor are they likely to occur. In January, 1984, Judge Muecke's successor as trial judge for *Cement*, Judge Manuel L. Real, Central District of California, decertified the class which Judge Muecke had certified five

179. MANUAL, *supra* note 177, at xxiv, *quoting* the remarks of Chief Justice Earl Warren to the American Law Institute, May 16, 1967.

180. MANUAL, *supra* note 177, at 12.

181. *Id.* at xxv.

182. *Id.* at 12.

183. *Id.* at 18.

184. *Id.* at 19.

185. *Id. See* Pound, *supra* note 66, at 738-39.

186. *See* Pound, *supra* note 66, at 738.

187. The speedy administration of judicial dockets is still much favored. *See* Harding v. Federal Reserve Bank, 707 F.2d 46, 52 (2d Cir. 1983) (MacMahon, J., concurring).

188. *See supra* note 106. Judge Muecke, 515 F. Supp. at 1080, and the Ninth Circuit, 688 F.2d at 1313-15, took Congress to task for not creating an exception to the per se rule for complex litigation, especially class actions. Some members of Congress had recognized the possibility of problems if such an exception were not included in § 455. 688 F.2d at 1312.

189. Conversation with Kirk McKinney, Counsel for Plaintiffs, *Cement*, 688 F.2d 1297, Jan. 31, 1985.

190. *Id.*

191. *Id.*

192. *Id.*

years earlier.[193] Due to the economic reality of multidistrict class action litigation, that the named plaintiffs cannot afford to prosecute the action without some reasonable probability that a fund will be created to reimburse those plaintiffs for their costs, all but one plaintiff has withdrawn from the action.[194]

This abrupt turnaround in *Cement* has significant portents for complex class actions. Normally, no one plaintiff has a claim large enough to warrant pursuing the action against the defendants. Plaintiffs depend upon the potential for a sufficiently large recovery for the entire class to compensate them for the costs of achieving that recovery.[195] If the class is not allowed to proceed as a class, and instead plaintiffs must singularly face defendants, most plaintiffs will either withdraw or be vanquished.[196] Therefore, if complex class actions are to be a major factor in the vindication of individual rights and interests, care must be taken to prevent derailment well into the life of the case.

Both Judge Muecke and the Ninth Circuit commented extensively on the uniqueness of complex litigation and the importance of congressional recognition of that uniqueness as it regards judicial disqualification practice.[197] The central theme of their discussion was that the interests involved in complex litigation are large, as is the expertise to properly master the case. Judge Muecke spent countless hours on *Cement*.[198] Plaintiffs' counsel logged 149,000 hours developing their case.[199] The 210,235 parties in this action are estimated to have ten million shareholders. These large interests should not be controlled by a de minimis happenstance and the application of rigid rules. Where the judge's impartiality is never in issue and the interest involved is de minimis, it is difficult to justify the cost in judicial and lawyer time and client and public monies precipitated by forced disqualification.

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193. Cement and Concrete Antitrust Litig. (MDL No. 296), Civ. 76-455 MLR PHX, January 6, 1984.

194. Arizona is the sole remaining plaintiff. Its complaint against the defendants has been dismissed and is currently pending appeal before the Ninth Circuit on the issue of dismissal. Conversation with Dee A. Mowry, Counsel for Plaintiffs, *Cement*, 688 F.2d 1297, Jan. 31, 1985.

195. *See* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

196. *See id.* at 338.

197. *See supra* note 188.

198. *Cement and Concrete*, 515 F. Supp. at 1077. *See In re* IBM Corp., 618 F.2d 923, 934 (2d Cir. 1980), for another case where disqualification "would result in . . . waste." Here, however, the Second Circuit declined to compel disqualification. *See also In re* Virginia Elec. & Power Co. (VEPCO), 539 F.2d 357, 363 (1976) (the "efficient administration of justice would be severely hampered" if the judge was disqualified for the interest he held).

More recently, another District of Arizona judge, Judge Richard Bilby, disqualified himself from a complex case involving the Washington Public Power Supply System when it was discovered that his parents owned bonds in the above entity. Judge Bilby had been assigned to the case in the summer of 1983 and had advised lawyers at that time that his parents owned WPPSS bonds. None of the parties objected at that time to the Judge's continued participation in the case. Only recently was the matter raised again by one of the parties, and the judge withdrew after spending considerable time and energy on the matter. Judge Bilby's parents's interest was two bonds with a face value of $100,000. The case itself involved several billion dollars in claims. The Arizona Daily Star, January 23, 1985, at B6, col. 3.

199. Conversation, *supra* note 189. The legal fees involved could near 15 million dollars. *Id.* Because the case was brought to a conclusion without resolving the claims against the majority of defendants, the 15 million dollars in legal fees constitute one-third of the settlement fund. *Id.*

CONCLUSION

By the early 1970s a perceived need existed to instill public confidence in the federal judiciary. The perception may have been greater than the need. Whatever the extent of need, 28 U.S.C. § 455 was substantially revised in 1974, giving statutory status to appearances as a disqualification ground and, for the first time, establishing per se disqualification grounds.

Chitimacha and *Cement* illustrate a major problem with the current statute. When a judge appears to be or has the potential for being impartial, that appearance can be negated simply by a judicial proclamation that there is no reasonable basis for disqualification. Where the grounds are merely technical and, as in *Cement*, de minimis, disqualification is unavoidable. *Chitimacha* ignores that in some cases, due to the issues involved, any appearance of impropriety, regardless of remoteness, is sufficient to cast doubt upon the judiciary.[200] *Cement* recognizes that the public's confidence in the legal process decreases when there are significant delays in litigation,[201] but section 455 makes the problem unavoidable.

Current judicial disqualification practice fails to consider that there is only one reason to disqualify a judge: a lack of public confidence in the judge's ability to fairly preside over the matter. This lack of confidence can spring from both factual and sensory sources. No one source is more dispositive than another. That a judge has a financial interest in the subject matter, or is generally ill-disposed toward a party, or displays intemperate judicial behavior are indications that fairness might not be obtained in that courtroom on that matter. To treat any one indicator differently than any other by applying stricter or lesser standards ignores the ultimate goal: justice.

Justice is defeated when overwhelming appearances are ignored and trivial elements control. While it may be impossible to achieve a perfect solution to the former problem, there is no reason not to rectify the latter. Per se grounds of disqualification must be held to the same standard as their sensory counterpart. Interest should only be disqualifying when a reasonable person knowing all the facts would feel that justice cannot be obtained because of that interest.

200. *See, e.g.*, Church of Scientology v. Cooper, 495 F. Supp. 455, 461-62 (C.D. Cal. 1980).
201. *See* Pound, *supra* note 66, at 738.