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Appellate Review of Judicial Disqualification Decisions in the Federal Courts†

By Karen Nelson Moore*

Litigants in the federal district courts are more frequently asking judges to disqualify themselves from hearing cases on the grounds of alleged bias, prejudice, or personal interest in the suit. Often the district judge denies the motion for judicial disqualification, and the disappointed party immediately seeks appellate review. Because the disqualification decision, whether a grant or a denial, is not a final decision on the merits of the case, it normally cannot be appealed immediately unless it comes within one of the limited exceptions to the final order doctrine or some other theory warranting immediate review of an interlocutory order.

Whether an appellate court should immediately review an interlocutory decision concerning judicial disqualification depends on the balance between two types of fundamental policies. On the one hand, the policies of economy and efficiency of appellate review and of respect for the trial court mandate that the appellate court delay review of any issue, including judicial disqualification, until the lower court reaches a final judgment. On the other hand, the question of judicial disqualification goes to the heart of the judicial process and may so fundamentally affect the judgment that immediate review is necessary to protect the adversely affected party and the judicial process itself.

The United States Supreme Court has not directly addressed the question of immediate review of judicial disqualification decisions.1†

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1. The Court, however, has held that the collateral order doctrine is not usually available to obtain review of counsel disqualification orders, see Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), and this decision arguably has decreased the likelihood of successful use of the doctrine in the judicial disqualification context. See infra text accompanying notes 158-96 for a discussion of the collateral order doctrine as applied to judicial disqualifications.
The federal courts of appeals are divided regarding the reviewability of judicial disqualification orders under the collateral order doctrine, writs of mandamus or prohibition, or other theories. Indeed, many courts and commentators simply assume that immediate review is possible under some doctrine and proceed directly to the merits of the issue.

This Article addresses whether and under what circumstances an appellate court should immediately review an interlocutory decision concerning judicial disqualification. It suggests that the reviewability of a judicial disqualification decision must be analyzed in terms of the underlying basis for the judicial disqualification motion. The Article establishes two models of judicial disqualification decisions, based on the statutory grounds for judicial disqualification. The Article then analyzes the suitability of mandamus, the collateral order doctrine, and certification under 28 U.S.C. § 1292(b) as devices to gain immediate appellate review of cases in each model. The Article concludes that under each model some form of immediate appellate review is warranted, although the type of review depends upon the characteristics of the model involved.

The Statutory Grounds for Disqualification of Federal District Judges: A Paradigmatic Approach

Under current federal statutes two broad types of situations warrant judicial disqualification: first, personal bias or prejudice, whether in fact or appearance; second, personal involvement by the judge in the matter in controversy. Neither the statutes nor their legislative histories indicate whether immediate appellate court review of district court disqualification decisions is appropriate.

Since 1792, federal statutes have required a district judge to withdraw from hearing a case if it appears that the judge is "concerned in interest," or had been of counsel for either party. The modern statu-
tory framework first emerged in 1911, when, in the course of codification, Congress separately provided for disqualification on the basis of a judge's relationship with the matter in controversy and disqualification on the basis of the judge's personal bias or prejudice.\footnote{The language was modified in 1821 to require disqualification also when the judge was "so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit." Act of March 3, 1821, ch. 51, 3 Stat. 643. Under both Acts, the circuit court was to take jurisdiction of the case. Id.} The provision addressing a judge's relationship with the matter in controversy was drawn largely from the old statutory language,\footnote{Id § 20.} whereas the bias provisions were essentially new.\footnote{Id. § 21.}

The bias provision, 28 U.S.C. § 144, requires a district judge to remove himself whenever a party "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."\footnote{28 U.S.C. § 144 (1982).} The party may file only one affidavit in a judicial disqualification case and must include in the affidavit a statement of facts and reasons for believing there is bias. Moreover, the statute requires counsel to certify that the affidavit is made in good faith.\footnote{Id.}

The relatively general language of section 144 led to a substantial amount of litigation concerning the scope of inquiry into the facts stated in the affidavit and other aspects of its sufficiency, the nature of bias or prejudice sufficient to warrant disqualification, and the appropriate timing of review of the trial judge's determination.\footnote{See generally Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966).} The Supreme Court has only twice focused on these issues. In Berger v. United States,\footnote{255 U.S. 22 (1921).} the Court held that the district judge must determine only the sufficiency of the affidavit, not the truth of the allegations contained therein.\footnote{Id at 36.} In Ex parte American Steel Barrel Co.,\footnote{230 U.S. 35 (1913).} the Court held that the facts stated in the affidavit must demonstrate bias or prejudice, not simply adverse rulings in the course of the proceedings.\footnote{Id. at 43-44. See also Berger, 255 U.S. 22, 34 (1921) (interpreting the American Steel Barrel case to require that allegations of bias must be based on facts occurring before May 1984]}
The Court has not definitively resolved the issue of the appropriate
time for review of the trial judge's determination.

In 1974 Congress substantially amended the personal involvement
provision, 28 U.S.C. § 455, in an attempt to clarify the kind of involve-
ment with the matter in controversy that warrants judicial disqualification.17 Revised section 455(a) requires a federal judge to disqualify
himself in two situations.18 First, a judge must disqualify himself "in
any proceeding in which his impartiality might reasonably be ques-
tioned."19 According to the legislative history, this provision estab-
lishes an objective standard that operates regardless of actual bias,20
although there must be some reasonable basis for alleging bias.21 Sec-
ond, a judge must disqualify himself when one of five specified circum-
stances exists:22 (1) the judge "has a personal bias or prejudice
concerning a party, or personal knowledge of disputed evidentiary facts
concerning the proceeding";23 (2) the judge was involved with the mat-
ter while in private practice either directly or through an associate or
partner;24 (3) the judge was involved with the matter while in govern-
ment service;25 (4) the judge has a financial interest of any size in the
subject matter in controversy or in a party whether personally or as a

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28 U.S.C. § 455 (1982)).
18. These amended provisions largely track the terms of Canon 3C of the Code of
Judicial Conduct of the American Bar Association, adopted by that Association in 1972 and
approved for application to federal judges by the Judicial Conference of the United States.
NEWS 6351, 6352-53 [hereinafter cited as HOUSE REPORT].
20. See HOUSE REPORT, supra note 18, at 5, 8, reprinted in 1974 U.S. CODE CONG. &
AD. NEWS at 6354-55, 6358.
22. 28 U.S.C. § 455(b) (1982). The judge may not obtain a waiver of disqualification
from the parties unless the basis for disqualification is solely encompassed in § 455(a), which
deals with cases where impartiality "might reasonably be questioned." Id. § 455(e).
23. Id. § 455(b)(1).
24. Id. § 455(b)(2).
25. Id. § 455(b)(3).
fiduciary, or through a spouse or minor child, or any other interest that could be substantially affected by the litigation; and (5) the judge or a close relative is involved as a party, officer, witness, lawyer, or holder of any other position of interest in the matter. This second portion of the statute reiterates that the existence of personal bias or prejudice is a mandatory ground for disqualification, but also delineates particular relationships that require disqualification because of an inherent likelihood to give the appearance of bias.

The revision of section 455 complicated the relationship between the two key statutory provisions. Before the revision, cases involving allegations of bias and prejudice were governed by section 144, whereas allegations of a disqualifying relationship between the judge and the matter in controversy were governed by section 455, which has less complicated procedural provisions. The 1974 amendment, however, broadened section 455 to cover bias as well. Section 455 now prohibits a judge from hearing a case not only when he "has a personal bias or prejudice concerning a party," but also when "his impartiality might reasonably be questioned." While the proscription of actual (subjective) bias and prejudice tracks the language of section 144, the proscription of objective bias creates a new and more easily established ground for obtaining disqualification, the appearance of bias. The legislative history of section 455 provides no guidance regarding the differences and overlap between the two statutes.

26. Id. § 455(b)(4). The 1974 amendment extended the scope of this section of the statute. Under the old language of § 455 a judge was proscribed from hearing a matter in which he had a "substantial" financial interest. 28 U.S.C. § 455 (1970), amended by 28 U.S.C. § 455 (1982). Under the amended statute, he is proscribed from sitting when he has financial interest of any degree. The legislative history indicates a clear congressional intent to avoid uncertainty and ambiguity in determining what is substantial and to avoid potential due process problems that might arise no matter how small a direct economic or financial interest the judge might have. See HOUSE REPORT, supra note 18, at 7, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6356.


28. Id. § 455(b)(3).

29. Id. § 455(b)(1) (generally reiterating bias and prejudice grounds stated in § 144).

30. Id. § 455(b)(1).

31. Id. § 455(a).

32. Section 144 requires that a judge shall not hear a case when he has a "personal bias or prejudice" either in favor of or against a party to the proceeding. 28 U.S.C. § 144 (1982).

33. For example, the House Report on § 455 does not address the problem of the relationship between § 455 and § 144, except by including a letter from the Department of Justice which suggests, inter alia, incorporation of the timeliness requirements of § 144 into § 455. See HOUSE REPORT, supra note 18, at 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6358. In the Senate hearings, Senator Bayh made brief reference to the advisability of amending § 144 to permit one preemptory challenge of a judge, but Congress did not act
Litigants have begun to use the bias provisions of sections 455(a) and (b)(1) in conjunction with\textsuperscript{34} or in place of\textsuperscript{35} section 144. This reliance on section 455 is not surprising because that section presents litigants with fewer obstacles to invoking its application. First, the requirements of section 144 for a sufficient and timely affidavit or a certificate of good cause do not appear to govern either section 455(a) or section 455(b)(1). Parties proceeding under section 144 have found these requirements difficult to satisfy.\textsuperscript{36} Second, and perhaps more important, the appearance-of-bias test under section 455(a) is easier to satisfy than the bias-in-fact test of sections 144\textsuperscript{37} and 455(b)(1). Faced with the difficulty of establishing a judge's state of mind, courts have not always required direct proof of a judge's bias even under section 144.\textsuperscript{38} Under that section, however, courts have required proof of more than a mere reasonable question about impartiality which is sufficient under section 455(a).\textsuperscript{39} Although sections 144 and 455(b)(1) both require a showing of personal bias with respect to a party, section 455(a)

\textsuperscript{34} See, e.g., In re Corrugated Container Antitrust Litig., 614 F.2d 958 (5th Cir.), cert. denied, 449 U.S. 888 (1980); In re IBM Corp., 618 F.2d 923 (2d Cir. 1980); Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978); United States v. Ritter, 540 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 1058 (1976).

\textsuperscript{35} See, e.g., United States v. Bonilla, 626 F.2d 177 (1st Cir. 1980); Cleveland v. Krupansky, 619 F.2d 576 (6th Cir.), cert. denied, 449 U.S. 834 (1980); Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977).

\textsuperscript{36} See, e.g., Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980) (§ 144 requirements were not satisfied because the plaintiff had failed to sign the affidavit as § 144 expressly requires); Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970) (affidavit by plaintiff's attorney did not constitute an affidavit by a party to the action as required by § 144); In re United Shoe Mach. Corp., 276 F.2d 77 (1st Cir. 1960); Williams v. Kent, 216 F.2d 342 (6th Cir. 1954); Foster v. Medina, 170 F.2d 632 (2d Cir. 1948), cert. denied, 335 U.S. 909 (1949); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934).

Moreover, § 455(b)(1), unlike § 144, does not require a party to make and file an affidavit of prejudice, but rather seems to make disqualification an issue which the judge is mandated to notice and determine even if the parties are silent. See 28 U.S.C. § 455(c) (1982) ("A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.").

\textsuperscript{37} Although it has never been clearly established that § 144 required bias-in-fact, the statutory language certainly points in that direction.

\textsuperscript{38} See, e.g., Connelly v. United States Dist. Court, 191 F.2d 692, 695-96 (9th Cir. 1951). See generally Note, supra note 12, at 1445-47.

more broadly prohibits participation of a judge whose impartiality might be questioned.

Models For Classifying Judicial Disqualification Decisions

Model I

The situations giving rise to disqualification under these two statutes, which are the basis for virtually all judicial disqualification motions, can be classified according to two models or paradigms that aid the determination of when disqualification is mandated. Under Model I, disqualification is required if the judge has engaged in certain relationships with the matter in controversy that are proscribed under sections 455(b)(2)-(b)(5). Thus, disqualification should ensue if the judge or a close relative has been counsel, witness, party, or officer of a party in the matter in controversy; if the judge, his spouse, or his minor child has any financial interest in the matter in controversy or in a party; or if the judge or a close relative has any other interest that could be substantially affected by the outcome of the proceeding.

Each of these relationships presents the possibility of bias and is generally capable of objective documentation. For example, relatively little subjective judgment or discretion is necessary to determine whether a judge owns stock in a corporation that is a party, holds a position as an officer or director of a corporate party, or has personal knowledge of evidentiary facts tending to make it likely that he would be a witness.

Two recent cases illustrate the Model I situation. In In re Rodgers the trial judge's former partner had represented during the period of their partnership a client whose interests were involved in the case. The judge’s former partner and his client were likely to be called as witnesses, although they were not counsel or parties in the case. The

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40. Cases are rarely brought on nonstatutory grounds. A noteworthy exception is Ward v. Village of Monroeville, 409 U.S. 57 (1972) (sustaining a constitutional due process challenge to a judge hearing a case in which, due to a concurrent executive position, he had a financial interest in assessing large fines). See also Tumey v. Ohio, 273 U.S. 510 (1927) (finding a due process violation in allowing a trial judge to receive, in addition to his regular salary, money from fines levied by him).

41. 28 U.S.C. §§ 455(b)(2), (b)(3), (b)(5) (1982). Model I encompasses the portion of § 455(b)(1) that proscribes involvement by a judge having "personal knowledge of disputed evidentiary facts concerning the proceeding."


43. Id. §§ 455(b)(4), (b)(5).

44. Model I cases, however, may raise substantial issues of statutory construction in determining whether specific factual circumstances constitute a proscribed relationship. See infra notes 205-07 & accompanying text.

45. 537 F.2d 1196 (4th Cir. 1976).
court of appeals held that section 455(b)(2), which concerns disqualification based on former private practice, mandated disqualification under these circumstances. In another case exemplifying Model I, SCA Services, Inc. v. Morgan, the brother of the district judge was a senior partner in the law firm representing one of the parties. The judge's brother was not a participant in the litigation, but had financial and other interests in the success of his firm. Although the motion to disqualify was based on the brother's role as counsel as well as his interests in the matter, the court of appeals ordered the disqualification simply due to the brother's interests in the matter. In both these cases, the alleged ground for disqualification could be established readily by independent objective evidence.

Model II

Model II encompasses the bias and prejudice provisions requiring disqualification. It consists of two subcategories: Type A, bias-in-fact, includes situations in which the judge "has a personal bias or prejudice concerning a party;" Type B, appearance-of-bias, includes situations in which a judge's "impartiality might reasonably be questioned." The statutory language applicable to Type A cases narrowly proscribes personal bias only with respect to parties, while the language governing Type B cases broadly proscribes the appearance of partiality. Connelly v. United States District Court exemplifies Type A, bias-in-fact. In Connelly the defendant was charged with organizing the Communist Party to overthrow the United States government. Out of court the judge told the defendant's attorney that he was "sorry" to see the attorney "getting mixed up with these Commies." The judge, a former United States Attorney who had prosecuted some of the defendant's alleged co-conspirators, had made similar comments on other occasions. The Ninth Circuit held that these statements were sufficient

46. Id. at 1197.
47. 557 F.2d 110 (7th Cir. 1977).
48. Id. at 116-17. Disqualification also was ordered on the basis of § 455(a), the appearance of partiality. Id. at 117.
49. 28 U.S.C. § 455(b)(1). This language is essentially identical to § 144's requirement that a judge step down if a party files a sufficient affidavit that the judge "has a personal bias or prejudice either against him or in favor of any adverse party." See supra note 10 & accompanying text.
52. 191 F.2d 692 (9th Cir. 1951).
53. Id. at 694.
to warrant disqualification under the bias-in-fact provisions.\textsuperscript{54}

Type B, apparent bias, was unsuccessfully claimed in \textit{In re United States}.\textsuperscript{55} The prosecution charged the trial judge with the appearance of partiality because the judge and the defendant, a state senator, had a prior association. The trial judge had had a close professional and personal relationship with the former state governor, who had been the subject of a legislative investigation several years earlier. The trial judge and the defendant in the pending criminal extortion case had assisted the governor during that investigation. The court of appeals denied the prosecution's petition for writ of mandamus, on the ground that the prior association between the judge and the defendant did not demonstrate the appearance of partiality to a reasonable observer.\textsuperscript{56} Apparent bias was successfully claimed, however, in \textit{United States v. Ritter}.\textsuperscript{57} The court concluded in \textit{Ritter} that the judge's partiality might reasonably be questioned because of comments he made favorable to one counsel and disparaging of the opposing counsel.\textsuperscript{58}

\textit{Connelly, In re United States}, and \textit{Ritter} illustrate that, unlike the easily determinable factual relationships involved in Model I cases, Model II disqualification turns on assessment of the judge's actual or apparent perceptions, feelings, and state of mind. Mood and state of mind, viewed either subjectively or objectively, are often difficult to ascertain and to evaluate. Considerable judgment and inference may be necessary to determine whether bias exists. Even the objective appearance-of-bias standard presents the difficulty of deciding what facts reasonable people would view as constituting bias.\textsuperscript{59}

Thus, the issues presented by the two models differ primarily in their susceptibility to objective documentation and in the extent to which discretion may be exercised in ruling on disqualification. These factors should be critical in determining whether immediate appellate review is available.

\textbf{Reviewability of Disqualification Orders: The Theoretical Grounds}

Disqualification motions are properly made and determined early

\begin{flushleft}
\textsuperscript{54} \textit{Id.} at 696.
\textsuperscript{55} 666 F.2d 690 (1st Cir. 1981).
\textsuperscript{56} \textit{Id.} at 697.
\textsuperscript{57} 540 F.2d 459 (10th Cir.), \textit{cert. denied}, 429 U.S. 1058 (1976).
\textsuperscript{58} 540 F.2d 459, 464 (10th Cir. 1976).
\end{flushleft}
in the case, almost always before trial.60 Under current interpretations the decision of a challenged judge to grant the disqualification motion generally is not reviewable because a party is not entitled to have a particular judge decide a particular case.61 This Article focuses on those cases in which the district judge denies the motion to disqualify himself, and considers whether review of such rulings should be immediate or should await the final disposition of the case by the challenged judge.

Under the final order doctrine62 and 28 U.S.C. § 1291,63 a denial of disqualification is not immediately appealable; review must await the final judgment in the entire case.64 Although the Supreme Court has not yet resolved the issue, many courts of appeals have avoided the

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60. Section 144 includes a requirement of timeliness. Although § 455 does not mention any timeliness standard, it is sensible to raise the disqualification issue early in the case to obtain a new judge as soon as possible and to avoid possible claims of laches and unwarranted delay. Because the disqualification is mandatory under § 455(b), disqualification issues occasionally arise after protracted litigation, causing particular difficulty. See, e.g., In re Cement Antitrust Litig., 673 F.2d 1020 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983). In a few cases disqualification under § 455 has been denied due to delay in raising the issue. See, e.g., Delesdernier v. Porterie, 666 F.2d 116, 122-23 (5th Cir.), cert. denied, 459 U.S. 839 (1982) (§ 455(a) challenge first raised on appeal after second trial was untimely); In re IBM Corp., 618 F.2d 923, 933 (2d Cir. 1980) (§ 455 motion, made a decade after case was filed and while decision was pending, was untimely). But see SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (no requirement of timeliness for filing of § 455(b) motion).


Grants of disqualification have been held immediately reviewable, however, under 28 U.S.C. § 1292(b). See, e.g., In re New Mexico Natural Gas Antitrust Litig., 620 F.2d 794 (10th Cir. 1980); In re Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976); Kelley v. Metropolitan County Bd. of Educ., 479 F.2d 810 (6th Cir. 1973). Some recent cases have suggested mandamus as an appropriate mechanism for review of a grant of disqualification. See In re Cement Antitrust Litig., 673 F.2d 1020 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983); In re Virginia Elec. & Power Co., 539 F.2d 357, 363 (4th Cir. 1976) (upholding jurisdiction under both § 1292(b) and supervisory mandamus power). In all but the Kelley case, the scope of the language of the disqualification statute rather than the application of the statute to the asserted facts was involved. See infra text accompanying notes 205-11.

62. See infra text accompanying notes 158-60.

63. 28 U.S.C. § 1291 (1982) (providing that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts") (emphasis added).

64. See, e.g., United States v. Washington, 573 F.2d 1121, 1122 (9th Cir. 1978); Scarrella v. Midwest Fed. Sav. & Loan, 536 F.2d 1207 (8th Cir.), cert. denied, 429 U.S. 885 (1976); Dubnoff v. Goldstein, 385 F.2d 717 (2d Cir. 1967); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.), cert. denied, 377 U.S. 952 (1964); Collier v. Picard, 237 F.2d 234, 235 (6th Cir. 1956); In re Chicago Rapid Transit, 200 F.2d 341, 343 (7th Cir. 1952). These cases are consistent with the Supreme Court's view that a final decision "ends the
final order doctrine by allowing review through writ of mandamus. On occasion the collateral order exception to the final order doctrine and the statutory interlocutory appeal provision of 28 U.S.C. § 1292(b) have been invoked to allow immediate review. The propriety of these mechanisms is evaluated below in light of the characteristics of Model I and Model II disqualification orders.

Review by Mandamus

The writ of mandamus has been the most successful of these mechanisms for obtaining immediate review of judicial disqualification decisions. A majority of circuit courts has held that mandamus is available in appropriate cases to review a trial judge's decision not to disqualify himself. Even in these circuits, however, the courts usually deny the writ on the ground that the factual circumstances do not warrant exercise of the discretion to issue the writ. A minority of the circuits holds that mandamus is not available to obtain review of judicial disqualification orders.

65. See infra notes 77-78 & accompanying text.

66. See, e.g., Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978); In re Rodgers, 537 F.2d 1196 (4th Cir. 1976); Pfizer, Inc. v. Lord, 456 F.2d 532, 536 (8th Cir.), cert. denied, 406 U.S. 976 (1972); Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966); In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961); Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951); Henry v. Speer, 201 F. 869 (5th Cir. 1913). Cf. Hurd v. Letts, 152 F.2d 121 (D.C. Cir. 1945).

67. See, e.g., In re United States, 666 F.2d 690 (1st Cir. 1981); In re IBM Corp., 618 F.2d 923 (2d Cir. 1980); In re Corrugated Container Antitrust Litig., 614 F.2d 958 (5th Cir.), cert. denied, 449 U.S. 888 (1980); Scarrella v. Midwest Fed. Sav. & Loan, 536 F.2d 1207, 1210 (8th Cir.), cert. denied, 429 U.S. 885 (1976); Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970); In re Union Leader Corp. 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961); Foster v. Medina, 170 F.2d 632 (2d Cir. 1948), cert. denied, 335 U.S. 909 (1949); Dilling v. United States, 142 F.2d 473 (D.C. Cir. 1944).

68. The Third, Sixth, and Seventh Circuits take a chary view of mandamus. The Seventh Circuit holds that mandamus is inappropriate, at least when the bias ground for disqualification is invoked. See, e.g., Action Realty Co. v. Will, 427 F.2d 843, 845 (7th Cir. 1970); Korer v. Hoffman, 212 F.2d 211, 212 (7th Cir. 1954). See infra note 114.

The Third Circuit's opinions are confusing, but appear to deny the availability of the writ. In Green v. Murphy, 259 F.2d 591 (3rd Cir. 1958), the court held that the remedy of appeal of final judgment was adequate and denied the writ. The court also stated that the circumstances did not warrant the exercise of the court's power to issue mandamus. Id. at 594. Judge Hastie, concurring, understood the majority opinion to allow mandamus if the judge arbitrarily disregards his plain duty to disqualify himself. Id. at 595. In a later case, the Third Circuit interpreted Green to bar mandamus in § 144 cases, but distinguished Green and held that the special circumstances of the case before it warranted immediate review of the district judge's decision not to step down. Rapp v. Van Dusen, 350 F.2d 806, 810, 814 (3d Cir. 1965). The court observed that it would not be able to review the interlocutory
The Supreme Court has not ruled directly on the availability of mandamus for review of judicial disqualification decisions and has given contradictory signals regarding such use of mandamus. In *Ex parte American Steel Barrel Co.*, the Court exercised its discretion to deny a writ of mandamus after a trial judge had granted a party's motion for disqualification due to bias and the senior circuit judge had appointed a new judge. The Court stated that it would grant mandamus only "when it is clear and indisputable that there is no other legal remedy," and noted that review was possible "in due course of law," apparently on appeal from the final judgment. The Court noted that the senior circuit judge had exercised legitimate discretion in appointing the new judge. In dicta the Court stated that if the trial judge had refused to disqualify himself, "his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal."

Eight years later, in *Berger v. United States*, the Court considered the opposite circumstance. In *Berger* the trial judge had refused to dis-
qualify himself when faced with an affidavit alleging bias. After trial the final decision was appealed to the court of appeals, which certified questions to the Supreme Court. The Court, in the course of evaluating whether disqualification was warranted under the statutory provisions, stated,

[to commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The remedy by appeal is inadequate.* It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.]

Although the Court indicated that appeal after final judgment is inadequate, the *Berger* Court was primarily concerned with devising a mechanism for achieving actual and apparent judicial impartiality by removing from the challenged judge the power to decide whether facts alleged in the affidavit are true. Thus *Berger*, like *American Steel Barrel*, simply offers dicta concerning the availability of mandamus to review denials of disqualification motions.

**Application of the Requirements for Mandamus to the Disqualification Models**

The appropriateness of the writ of mandamus in the judicial disqualification context can best be evaluated by applying the requirements for mandamus to the two models for judicial disqualification. The fundamental difference between the two models, the degree of discretion that is required in determining the disqualification issue, is critical to resolving whether the writ of mandamus is an appropriate review mechanism.

**The Requirements for Mandamus**

Review by writ of mandamus has traditionally been available only in extraordinary situations. Initially mandamus was available

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75. *Id.* at 36 (emphasis added).
76. *Id.*
77. The writ of mandamus is authorized currently by 28 U.S.C. § 1651(a) (1982), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This provision also authorizes the writ of prohibition, which has been sought as an alternative to mandamus in some judicial disqualification cases. *See, e.g.*, *Hurd v. Letts*, 152 F.2d 121 (D.C. Cir. 1945).
78. Almost every opinion of the Supreme Court in mandamus cases includes some language to the effect that mandamus and prohibition, "[a]s extraordinary remedies, . . . are reserved for really extraordinary cases." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). *See, e.g.*,
only when an appeal of a final judgment would not provide effective relief; however, this requirement has been substantially weakened in recent years. Nonetheless, mandamus is not generally available as a means of interlocutory review or if an appeal from the final judgment can be taken. Despite the statutory requirement that the writ of mandamus may issue only in aid of the appellate court’s jurisdiction, this requirement can be satisfied even before a party has perfected his appeal if issuance of the writ is necessary to preserve the appellate court’s ability to afford complete relief to the prevailing party.

A second traditional requirement for mandamus is that the writ will issue only to confine a judge to his jurisdictional powers or to compel him to exercise his judicial authority. Mandamus has not been available when a judge has simply erred, but has not abused his judicial power. For example, mandamus has been available to order a judge to dismiss a case in which he had asserted jurisdiction contrary to

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81. LaBuy, 352 U.S. 249, 255 (1957). Indeed, cases after LaBuy reemphasize the traditional view that mandamus must be carefully limited to ensure that it does not become a substitute for appeal. See, e.g., Will v. United States, 389 U.S. 90, 96-97, 97 n.5 (1967) (mandamus was denied with respect to a trial judge's order that the government comply with a bill of particulars despite the possibility that there was no other mechanism for review of the order). See also Helstoski v. Meanor, 442 U.S. 500, 505-07 (1979) (mandamus denied where direct appeal of ruling on speech or debate clause available); Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) (mandamus denied where adequate alternatives existed for review of discovery order).


83. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). See Note, supra note 80, at 595 n.1, 603 n. 42.


statute,\textsuperscript{86} to require a judge to hear a case,\textsuperscript{87} and to direct a judge to perform a ministerial duty.\textsuperscript{88} In contrast, mandamus was not available to direct a judge to reinstate pleas in abatement to an indictment when the judge acted within his jurisdictional powers in striking the pleas, regardless of whether the order was erroneous.\textsuperscript{89}

The Supreme Court has indicated that mandamus is appropriate only to correct clear abuses of discretion.\textsuperscript{90} \textit{LaBuy v. Howes Leather Co.},\textsuperscript{91} however, illustrates the difficulty of deciding whether a case involves a clear abuse of discretion or simply the improper exercise of discretion not reviewable by mandamus. In \textit{LaBuy} the Court held that the trial judge’s reference of a complex antitrust case to a master under Rule 53(b) was reviewable by mandamus.\textsuperscript{92} The Court characterized the trial judge’s reference order as an abdication of his judicial functions that nullified the applicable Federal Rules of Civil Procedure.\textsuperscript{93} The four dissenting Justices, however, noted that Rule 53(b) "vested Judge LaBuy with the discretionary power to make a reference if he found, as he did, that 'some exceptional condition' required the reference."\textsuperscript{94} The dissenters argued that, at most, Judge LaBuy’s ruling amounted to mere error, reviewable only on appeal.\textsuperscript{95} Elsewhere the Court has tried to clarify the rule that mere error should not be transformed into abuse of discretion in order to invoke mandamus.\textsuperscript{96}

87. \textit{Thermtron Prods., Inc. v. Hermansdorfer}, 423 U.S. 336, 352-53 (1976); McClellan v. Carland, 217 U.S. 268, 280 (1910). In \textit{Thermtron} mandamus was issued to require a trial judge to entertain an action that he had remanded to state court on a ground not authorized in the removal statute, 28 U.S.C. § 1447. Mandamus was necessary "to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law." 423 U.S. at 353. In these cases the grant of the writ of mandamus enabled the appellate court to protect its appellate jurisdiction. See \textit{Will v. Calvert Fire Ins. Co.}, 437 U.S. 655, 662 (1978).
88. \textit{Ex parte} United States, 287 U.S. 241 (1932) (petition for a writ of mandamus granted requiring a judge to set aside an order denying an application for a bench warrant).
89. Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 27 (1943).
92. \textit{Id.} at 256.
93. \textit{Id.} at 256-57. Apparently the trial judge had frequently referred cases to masters because of congestion of the court.
94. \textit{Id.} at 261 (Brennan, J., dissenting, joined by Frankfurter, Burton & Harlan, JJ.).
95. \textit{Id.} The dissenters applied the traditional requirements for mandamus—that the lower court had exceeded or refused to exercise its jurisdiction or that the writ was necessary to preserve effective appellate review of the issue—and found that the requirements had not been satisfied. \textit{Id.} at 260-62.
96. \textit{See, e.g.}, \textit{Will v. United States}, 389 U.S. 90, 98, n.6 (1967) ("Courts . . . must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and
While *LaBuy* appears to broaden the scope of the clear abuse of discretion standard, the opinion evidences the Court's great concern for preserving the appellate court's supervisory control of the trial court to ensure proper judicial administration. The latter concern may constitute a new rationale for mandamus separate from traditional doctrine. The Court invoked both rationales for mandamus in *Schlagenhauf v. Holder,* holding that a judge's order of a physical examination of a defendant was reviewable through mandamus. The Court noted the allegations that the order was beyond the power of the trial judge, and the Court addressed issues of a supervisory nature involving construction of a Federal Rule of Civil Procedure.

The difficulty of distinguishing between an abuse of discretion and the exercise of discretion is demonstrated by the divergent opinions in the more recent case of *Will v. Calvert Fire Insurance Co.* The plurality viewed the judge's decision to defer federal proceedings pending concurrent state litigation as an exercise of discretion not amenable to review through mandamus, although it acknowledged that a court of appeals may issue the writ to correct "unauthorized action of the district court obstructing the appeal" if a judge "obstinately refuses to adjudicate a matter properly before [him]." Four dissenting Justices, however, concluded that mandamus should issue because the judge clearly abused his discretion in failing to exercise jurisdiction.

Courts are reluctant to issue writs of mandamus for several reasons. First, frequent reliance on mandamus would substantially interfere with the final judgment rule as well as with strong congressional and judicial policies against piecemeal litigation. The Court has

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98. *See generally Note, supra note 80. That Note suggests supervisory mandamus is proper where "the order attacked represents one instance of a significant erroneous practice the appellate court finds is likely to recur." *Id.* at 610 (footnote omitted).
100. *Id.* at 110-12 (1964). *Schlagenhauf* and *LaBuy* have also been interpreted as authorizing "advisory mandamus," i.e., the use of mandamus "to settle 'novel and important' questions of law." *Note, supra* note 80, at 611-13.
102. *Id.* at 665-66. Justice Blackmun, while concurring only in the judgment, probably agreed with this rationale because his separate opinion dealt only with a different issue in the case.
103. *Id.* at 666-67.
104. *Id.* at 676-77.
stated that mandamus is not available simply because adherence to the final judgment rule would cause inconvenience, cost, or other hardship to the litigants.\textsuperscript{106} The congressional requirement of appellate review only upon final judgment would be thwarted if mandamus became an avenue for piecemeal appeals, and final judgment in the case could be delayed.\textsuperscript{107} Thus, even if the issue is whether the trial judge properly exercised his discretion in awarding a new trial, mandamus is ordinarily unavailable because review can be obtained by direct appeal after a final judgment has been entered upon completion of the new trial.\textsuperscript{108}

Courts have also been concerned that the mandamus petition turns the judge into a litigant.\textsuperscript{109} The judge must either hire counsel or allow counsel of a party to represent him, thus raising questions of potential bias in subsequent rulings in the case.\textsuperscript{110} Perhaps even more important, involving the judge as a litigant reduces respect for the judiciary and the judicial system.

Finally, the Court has stressed that when the basic tests for mandamus are satisfied, the decision to grant the writ is ultimately within the discretion of the appellate court.\textsuperscript{111} The Court has frequently indicated that, although the appellate court might have the power to grant the writ in a certain category of cases, it may nonetheless deny the writ as inappropriate based on the specific facts in such a case.\textsuperscript{112} Moreover, the Court requires the petitioner to show that his "right to issuance of the writ is 'clear and indisputable,'"\textsuperscript{113} a heavy burden of proof.


\textsuperscript{107} Roche, 319 U.S. 21, 30 (1943); Cribbedick, 309 U.S. 323, 325 (1940).


\textsuperscript{110} Kerr, 426 U.S. 394, 402 (1976); Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir. 1965). The \textit{Rapp} court established a prospective rule in mandamus cases making the judge a party in name only and leaving litigation of the transfer of venue to the real parties in interest. \textit{Rapp}, 350 F.2d at 812-13. This rule may not be fully effective when mandamus is sought for judicial disqualification, because neither party may want to support the judge. If one party does support the judge, this association may create additional grounds for allegations of bias. For example, in \textit{In re Union Leader Corp.}, 292 F.2d 381 (1st Cir.), \textit{cert. denied}, 368 U.S. 927 (1961), the intervenor was permitted to answer the petition in place of the trial judge. \textit{Id.} at 384. The petitioner argued unsuccessfully that the intervenor chose to support the trial judge because it believed that the judge was prejudiced in its favor. \textit{Id.} at 384 n.4.

\textsuperscript{111} See, e.g., Kerr, 426 U.S. 394, 403 (1976); Schlagenhauf, 379 U.S. 104, 111 n.8 (1964); Parr v. United States, 351 U.S. 513, 520 (1956).

\textsuperscript{112} See, e.g., Roche, 319 U.S. 21, 25-26 (1943).

The Supreme Court's decisions on the availability of mandamus thus suggest several questions that must be addressed before the writ will issue. First, how does the availability of mandamus interact with the final judgment rule in a given case? Does mandamus offer a necessary relief valve for the pressures of the final judgment rule, or would the issuance of the writ unduly permit piecemeal appeals and the associated problems Congress sought to avoid? Second, has the lower court simply exercised its discretion, in which case mandamus is not available to correct error; or has the lower court abused its discretion or failed to exercise its authority, thus making mandamus appropriate? These issues will now be discussed in the context of mandamus review of a trial judge's decision not to disqualify himself.

Propriety of Mandamus Review of Judicial Disqualification Orders

The models developed above provide a useful framework for evaluating the propriety of using the writ of mandamus to review judicial disqualification decisions. In the following discussion it will be argued that the availability of mandamus should depend on whether judicial disqualification is premised on objective tests of proscribed relationships, as in the Model I cases, or on subjective criteria of bias, as in the Model II cases. Thus, evaluation of the propriety of review by mandamus requires that the traditional mandamus criteria be analyzed according to the type of disqualification decision involved.

The Current Availability of Mandamus

The courts have typically treated judicial disqualification orders as homogenous, and have failed to distinguish the cases involving objective criteria from those involving subjective criteria. Although most circuits have held that mandamus is available in appropriate cases to review judicial disqualification decisions, courts frequently have denied the writ on discretionary grounds based on the factual circumstances of the case.

114. A rare exception is the Seventh Circuit, which has held that mandamus is not available to review judicial disqualification under the bias provision of 28 U.S.C. § 144, see, e.g., Action Realty Co. v. Will, 427 F.2d 843 (7th Cir. 1970); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954), but has granted mandamus in a case involving proscribed relationships under § 455, SCA Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). The court believed that "the specificity and legislative intent of section 455 are sufficiently different from section 144 as to warrant a departure from our previous position." Id. at 117. The court found that the failure of the trial judge to disqualify himself when his brother's law firm represented a party was a violation of §§ 455(a) and (b)(5)(iii), and an abuse of discretion warranting issuance of the writ of mandamus. Id. at 117-18.

115. See supra notes 66-68 & accompanying text.
The courts of appeals have mentioned a variety of grounds for the availability of mandamus in the judicial disqualification context. Some courts have invoked the traditional criteria making mandamus available to aid appellate jurisdiction,¹¹⁶ or to aid the supervisory power of the appellate courts.¹¹⁷ Others have stressed the special need for mandamus in the disqualification context to preserve a right to a fair and impartial hearing,¹¹⁸ and one court noted that a claim of judicial bias strikes at the heart of the judicial process.¹¹⁹

Courts have noted that the postponement of appellate review of disqualification orders has a particularly negative effect on the administration of justice.¹²⁰ Moreover, the effect of bias charges upon the judge may pervade the trial and make appeal after final judgment ineffective.¹²¹ In virtually all appellate opinions these factors have been mentioned without special regard for the type of the disqualification at issue.

**Model I Cases**

In Model I cases the trial judge must disqualify himself if he stands in a statutorily forbidden relationship to a party; he cannot exercise discretion.¹²² If a judge fails to disqualify himself in such circumstances, he has violated the express command of the statute and exceeded his jurisdiction. This abuse of discretion is precisely the kind of situation in which the courts traditionally have granted mandamus.¹²³

Although Model I cases clearly satisfy the abuse of discretion test

¹¹⁶ See, e.g., Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934) (writ denied). Cf. Connelly v. United States Dist. Court, 191 F.2d 692, 693 (9th Cir. 1951) (writ of prohibition issued to prevent the trial judge from taking any further action in the case).


¹¹⁸ See, e.g., Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962), cert. denied, 372 U.S. 915 (1963); In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961).

¹¹⁹ In re IBM Corp., 618 F.2d 923 (2d Cir. 1980).

¹²⁰ See Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966); In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961).

¹²¹ See, e.g., Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951); In re Lisman, 89 F.2d 898 (2d Cir. 1937).

¹²² See supra text accompanying notes 18-33.

¹²³ See supra text accompanying notes 84-104.
for mandamus, the interaction of mandamus with the principles of the final judgment rule must be examined. The final judgment rule embodies the concern of Congress and the courts that immediate appeal of every issue at trial would delay ultimate resolution of litigation, diminish the power and prestige of the trial bench, overburden the appellate bench, and ultimately diminish respect for the judicial system. Because mandamus is an extraordinary remedy to be used only when appellate review is inadequate, the issue is whether the detriment from delayed review of a judicial disqualification decision in a Model I case outweighs the concerns embodied in the final judgment rule and warrants immediate review by mandamus.

Immediate review is warranted in Model I cases. Congress enacted a firm rule of disqualification on the belief that the proscribed relationships were likely to result in bias, or at least the appearance of partiality. Delayed review of an order denying disqualification of a judge with a proscribed relationship would leave that judge in a position to issue numerous orders fundamentally shaping the case. Any bias resulting from the proscribed relationship could influence the judge, whether consciously or unconsciously, in making the rulings. If the appellate court ultimately disqualifies the judge after final judgment and orders a new trial, every ruling involving any exercise of discretion by the disqualified judge would have to be reconsidered. This problem is aggravated when the rulings are difficult, if not impossible, to undo. For example, rulings permitting discovery

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125. See supra notes 78-80 & accompanying text.
127. The courts have rarely addressed the question of what action the second trial judge should take upon remand after reversal of final judgment due to the initial judge’s refusal to disqualify himself. Some opinions simply remand the case for a new trial. See, e.g., United States v. Amerine, 411 F.2d 1130, 1133 (6th Cir. 1969) (remand for new trial as the judge should have disqualified himself under § 455(b) because he was U.S. attorney when complaint filed, although court of appeals believed that the first trial was actually “fair”). Cf. In re Rodgers, 537 F.2d 1196 (4th Cir. 1976) (pretrial rulings issued by judge who was removed by mandamus need not be reviewed and should remain law of the case, since no bias was alleged). One case suggests that the new judge could review the totality of the record and decide whether to endorse the prior rulings. Ransom v. S & S Food Center, Inc., 700 F.2d 670, 673 (11th Cir. 1983) (new judge adopted first judge’s rulings after first judge disqualified himself because his father’s partner had represented a party). Another case holds that the entire proceedings and disposition below are a “nullity.” Mixon v. United States, 620 F.2d 486 (5th Cir. 1980) (magistrate had been defendant’s prosecutor in earlier related proceeding). In none of these cases did the reviewing court analyze in any detail the extent to which the basis for disqualification may have affected prior orders of the judge.
disclosure, or involving temporary injunctive relief may effectively never be reversible.

Even assuming that a second trial would be untainted by the bias of the disqualified judge in the initial trial, other costs ensue from proceeding with the initial trial before review of the disqualification motion. One especially serious cost is the erosion of public confidence in the effective administration of justice that may result if a judge involved in a proscribed relationship conducts the case. The court system will appear ineffectual to the public and to the adversely affected litigant if it is unable to halt proceedings involving Model I bias. A public perception of the appearance of bias may not be altered by a new trial after final judgment.

Moreover, review of the disqualification decision in Model I cases by mandamus can be accomplished easily and efficiently. A finding of Model I bias involves an objective determination that a proscribed relationship exists, or that a specific relationship is prohibited by statute. Such determinations can be reviewed expeditiously. Thus, immediate review of Model I cases by mandamus promotes efficiency, while delaying review until final judgment entails additional costs.

Furthermore, mandamus review would not substantially conflict with the policies underlying the final judgment rule. Model I cases are unlikely to occur so frequently as to overburden the appellate bench, given the limited number and scope of proscribed relationships and the inherent reluctance of counsel to challenge the judge. When disqualification is raised by a party, the issues must first be addressed by the trial judge; an immediate appellate court review will not weaken the already challenged prestige of the trial court, and in fact is likely to increase respect for the judicial system.

In summary, Model I cases satisfy the major requirements for issuance of the extraordinary writ. These cases typically concern whether a judge has exceeded his jurisdictional powers and are often not effectively reviewable upon appeal. Furthermore, immediate review by writ of mandamus can be accomplished efficiently. Thus, mandamus should be available to afford immediate review in Model I cases. Although the decision to grant a writ of mandamus rests within the discretion of the appellate court, Model I cases are especially amenable

128. See supra notes 41-44 & accompanying text.
129. All petitions for mandamus are given priority on the appellate docket. Fed. R. App. P. 21(b).
130. See supra notes 124-25 & accompanying text.
to the exercise of that discretion.\textsuperscript{132}

\textit{Model II Cases}

Model II cases, involving bias-in-fact or the appearance of bias, differ fundamentally from Model I cases in the amount of discretion involved in determining the necessity of disqualification.\textsuperscript{133} In Model II cases a judge must determine whether he is biased concerning a party, or whether reasonable persons would question his impartiality.\textsuperscript{134} The exercise of discretion is inherent in this determination. Although the judge is required to disqualify himself when bias or the appearance of partiality exists,\textsuperscript{135} the finding of bias or its appearance is necessarily based on a subjective evaluation of the facts.\textsuperscript{136}

\textit{In re Union Leader Corp.}\textsuperscript{137} provides a good example of the subjectivity and exercise of discretion involved in Model II cases. In \textit{Union Leader}, one party moved to disqualify the judge on grounds of alleged bias resulting from editorials published in the party’s newspaper that had criticized the judge.\textsuperscript{138} The trial judge refused to disqualify himself under section 144, stating that he did not feel any prejudice.\textsuperscript{139} The court of appeals, reviewing the disqualification issue on petition for writ of mandamus, concluded that the judge’s responses did not demonstrate personal bias or prejudice and denied the writ.\textsuperscript{140} Both the trial and appellate courts were required to make inherently subjec-

\footnotesize{\textsuperscript{132} In some instances appellate courts have granted petitions for writs of mandamus in circumstances encompassed by Model I. \textit{See, e.g., In re Rodgers, 537 F.2d 1196 (4th Cir. 1976)} (mandamus granted because district judge’s former law partner, during partnership with the judge, represented interests involved in the pending litigation, requiring disqualification under 28 U.S.C. \textsection 455(b)(2)). \textit{See also Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966)} (mandamus granted because judge was represented in another pending case by party’s counsel); \textit{In re Honolulu Consol. Oil Co., 243 F. 348 (9th Cir. 1917)} (possible effect of litigation on stock owned by the district judge constituted a proscribed interest warranting issuance of writ of mandamus).}

\footnotesize{\textsuperscript{133} \textit{See supra notes 40-59 & accompanying text.}}

\footnotesize{\textsuperscript{134} Technically, under \textsection 144 the judge must accept the facts stated in the affidavit of disqualification and simply determine whether the affidavit is sufficient to warrant disqualification on the grounds of bias. \textit{See Berger v. United States, 255 U.S. 22, 33-36 (1921); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982), cert. denied, 104 S. Ct. 69 (1983)}. This requirement removes a factual determination from the judge’s consideration, yet leaves him with the obligation to decide whether such facts sufficiently indicate bias-in-fact. Section 455 does not contain the affidavit procedure of \textsection 144, but requires much of the same analysis. \textit{See supra notes 30-39 & accompanying text.}}

\footnotesize{\textsuperscript{135} 28 U.S.C. \textsections 144, 455(a) (1982).}

\footnotesize{\textsuperscript{136} \textit{See supra notes 49-59 & accompanying text.}}

\footnotesize{\textsuperscript{137} 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961).}

\footnotesize{\textsuperscript{138} \textit{Id.} at 385-86.}

\footnotesize{\textsuperscript{139} \textit{Id.} at 383, 386.}

\footnotesize{\textsuperscript{140} \textit{Id.} at 389-91.}
tive evaluations regarding the effect of the editorials on the judge's state of mind.

The *Union Leader* facts illustrate that the disqualification determination in Model II cases necessitates an exercise of discretion by the trial judge that does not satisfy the second essential requirement for mandamus, to confine a judge to his power or to require him to exercise his authority. Thus, the typical Model II case should not be reviewed on writ of mandamus under traditional theory. Whether the theory of mandamus should be adjusted to permit mandamus review for Model II cases will now be examined.

A fundamental concern of our judicial system is to provide impartial justice both in appearance and in fact. Permitting a judge who is or appears to be biased to try a case, and allowing review only after final judgment, is an enormous encroachment on this fundamental value. Judge Hastie expressed these concerns in his concurring opinion in *Green v. Murphy*:

The very special, challenging and often sensational charge of partiality in the administration of justice which is initiated by a formal affidavit of prejudice against a judge should receive final adjudication at first opportunity, if only in the interest of public confidence in the courts. Moreover, a trial is not likely to proceed in a very satisfactory way if an unsettled claim of judicial bias is an ever present source of tension and irritation. Only a final ruling on the matter by a disinterested higher court before trial can dispel this unwholesome aura.

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141. Some Model II cases might be reviewable by mandamus even under the traditional theory. For example, if a judge had stated publicly that he detested a party and would rule against the party on every matter regardless of the merits, his failure to disqualify himself would be a clear abuse of discretion, not mere error.

142. This conclusion applies to both subcategories of Model II described *supra* notes 49-51 & accompanying text. In the *Union Leader* case, an example of type A, the judge was charged with actual bias, and the decision required substantial judicial discretion. Type B, the appearance of bias category, is judged according to a more objective standard. To the extent that they incorporate a reasonableness test, however, even type B cases require an exercise of discretion not required in Model I situations.

143. Nonetheless, several courts of appeals have granted writs of mandamus and required disqualification of judges in Model II cases, ostensibly under traditional standards for mandamus. *See, e.g.*, United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976) (mandamus granted to require disqualification pursuant to § 455(a) due to an apparent relationship between the attorney and the judge); Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951) (mandamus granted to require disqualification pursuant to § 144 on basis of judge's comments about Communists).


145. 259 F.2d 591 (3d Cir. 1958).
justice, even though the [appellate] court reserves the right to pass upon the matter after trial. Such considerations far outweigh the objections to piecemeal appeals which ordinarily militate against deciding on mandamus an issue which can be reviewed after trial.\textsuperscript{146}

As in Model I,\textsuperscript{147} review on appeal from final judgment is ineffective in Model II cases, thus satisfying the first requirement for mandamus. Indeed, because allegations of bias-in-fact or the appearance of bias attack the integrity of the judicial process,\textsuperscript{148} review after final judgment is particularly ineffective for Model II.\textsuperscript{149} Under these circumstances, the second requirement of confining a judge to his jurisdiction arguably should no longer be essential to obtain mandamus review in Model II cases.

Thus, one approach is to link the propriety of mandamus to the inadequacy of delayed appellate review when the integrity of the judi-

\textsuperscript{146} Id. at 595.

\textsuperscript{147} See supra note 127 & accompanying text for a discussion of the ineffectiveness of remedy by appeal in Model I cases.

\textsuperscript{148} See, e.g., Berger v. United States, 255 U.S. 22, 36 (1921) ("The remedy by appeal is inadequate. It comes after trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing court is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."); In re United States, 666 F.2d 690, 694 (1st Cir. 1981) (quoting In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir. 1961)) ("the claim of bias cannot be labelled as frivolous and deferred until final appeal. '[P]ublic confidence in the courts [requires] that such a question be disposed of at the earliest possible opportunity.'"). But see Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958) (stating that review of judicial bias charge upon appeal of criminal conviction is an adequate remedy).

\textsuperscript{149} In Model II cases, in which bias or the appearance of bias is involved, it may be especially difficult to remedy, on appeal of final judgment, the damage caused by the biased rulings at the pretrial and trial stages. See In re IBM Corp., 618 F.2d 923, 934 (2d Cir. 1980) (implying that if first judge is disqualified for bias, new judge will have to review record and "purge those parts revealing extrajudicial bias"). Nonetheless, at least one Model II case was reversed on the ground of judicial bias and remanded for a new trial. United States v. Holland, 655 F.2d 44 (6th Cir. 1980). Cf. Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980) (on review of final judgment the court of appeals held that the district judge should have disqualified himself under § 455(a), and it remanded for further proceedings); Fredonia Broadcasting Corp. v. RCA, 569 F.2d 251 (5th Cir.), cert. denied, 439 U.S. 859 (1978) (on review of final judgment in the second trial, the court reversed and remanded for a third trial because the initial judge should have been disqualified under § 455(a)).

Because § 144 required that the challenged trial judge proceed no further, some older cases when granting mandamus required that the new judge hear all further proceedings. See Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962), cert. denied, 372 U.S. 915 (1963); Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951). In these cases the courts failed to appreciate that the bias of the judge may have influenced his earlier rulings and thus harmed the affected party. Reexamination of contested rulings would not be inconsistent with the language of § 144. Moreover, § 455 does not contain similar language, but rather requires a judge to disqualify himself. The language of § 455 clearly affords an opportunity for reconsideration of any issue resolved by the disqualified judge.
cial process is implicated. Such an approach, which obviates the problem posed by the discretionary aspect of a Model II disqualification decision, has been implied by at least one court. In In re IBM Corp, the Second Circuit held that it had the power to review by mandamus a trial judge’s refusal to disqualify himself on the grounds of personal bias. The court stated:

The question here is not whether the trial judge had abused his discretion because of a personal, extrajudicial bias which precludes dispassionate judgment . . . . A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits.151

Under this proposed reformulation of mandamus criteria, mandamus would be appropriate in Model II cases to review judicial denials of disqualification on grounds of bias or appearance of bias, in order to ensure impartiality in the judicial system and to remedy the ineffectiveness of review from final judgment. This reasoning applies even if the trial judge’s decision did not amount to an abuse of power, but was simply an erroneous exercise of discretion. Because the trial judge in ruling on a disqualification motion decides whether he himself is or appears to be biased, swift review is essential to ensure impartiality. By narrowly confining the applicability of this reformulation to those trial court decisions affecting the fundamental concern of providing impartial justice, the reformulation would not substantially weaken the traditional standards for mandamus outlined above.152 The importance of impartiality to the success of the judicial system and the crucial supervisory aspects involved in review of judicial disqualification orders 153

150. 618 F.2d 923 (2d Cir. 1980).
151. Id. at 926-27. Although the court held that it had the power to issue the writ of mandamus, it found that the party seeking disqualification had not shown a clear and indisputable right to relief in the absence of proof that the judge was actually prejudiced against the party, or that the judge’s impartiality might reasonably be questioned. Id. at 926-29. Cf. Legal Aid Soc'y v. Herlands, 399 F.2d 343, 346 (2d Cir. 1968), cert. denied, 394 U.S. 922 (1969) (“Refusal of recusation goes to the constitution of the tribunal which is to conduct the trial, an issue which . . . comes exceedingly close to jurisdiction and thus is within the traditional concept of mandamus.”).
152. See supra notes 77-113 & accompanying text.
153. See In re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. United States Dist. Court, 459 U.S. 1191 (1983) (invoking supervisory mandamus authority when the resolution of the disqualification issue would aid the efficient and orderly administration of trial courts). The establishment, enunciation, and enforcement of criteria for judicial disqualification that conform to statutory standards can form a basis for supervisory and advisory mandamus review that is consistent with Supreme Court doctrine established in LaBuy and Schlagenhaft, discussed supra notes 97-100 & ac-
justify confining the application of this reformulation of mandamus criteria to the review of judicial disqualification cases.

Alternatives to Mandamus

The difficulties in obtaining mandamus review of Model II cases and the courts' general reluctance to invoke mandamus warrant examination of other methods for obtaining immediate review of judicial disqualification decisions. An alternative to review by mandamus is a statutory or judicial exception to the final judgment rule allowing interlocutory appeal. Interlocutory appeal affords immediate review of a significant issue affecting the public's and the litigants' perceptions of the impartiality of the judicial system without requiring alteration of traditional mandamus criteria.

The avenue of interlocutory appeal is even more attractive because of doubt regarding the appropriate standard of review in mandamus proceedings. Courts traditionally have been reluctant to issue the writ of mandamus even when they believed they had the power to do so, and have imposed on the litigant the burden of demonstrating a clear and indisputable right to the writ. This clear and indisputable right standard for mandamus appears to be stricter than the abuse of discretion standard courts have applied in reviewing disqualification denials on appeal. If the mandamus standard of review is stricter, then a party who fails to obtain a writ of mandamus arguably can still raise the disqualification issue on appeal from final judgment where a less companying text. In some Model II cases the denial of disqualification may involve a significant error, presenting either novel questions of law or questions likely to recur. For example, supervisory mandamus is appropriate if a judge repeatedly makes comments demonstrating bias against a party, yet fails to grant the disqualification motion. See United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), cert. denied, 362 U.S. 950 (1960). Advisory mandamus is appropriate if, for example, the judge denies disqualification because he disagrees that his involvement in a church whose members have strong views on the subject matter of litigation constitutes actual or apparent bias, thus presenting a novel question of law for the appeals court. Cf. Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981), 478 F. Supp. 33 (D. Idaho 1979) (review of disqualification denial never actually sought because of other developments).

154. See, e.g., In re United States, 666 F.2d 690, 695-96 (1st Cir. 1981); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 962 (5th Cir.), cert. denied, 449 U.S. 888 (1980).

155. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir. 1982), cert. denied, 459 U.S. 988 (1983); Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1021 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); United States v. Gigax, 605 F.2d 507, 514 (10th Cir. 1979); Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979); S.J. Groves & Sons Co. v. International Bhd. of Teamsters, Local 627, 581 F.2d 1241, 1248 (7th Cir. 1978); Mayberry v. Maroney, 558 F.2d 1159, 1162 (3d Cir. 1977). The First Circuit applies the same abuse of discretion test in mandamus cases. United States v. Bonita, 626 F.2d 177, 179 n.2 (1st Cir. 1980).
strict burden of proof prevails, thus creating the potential for duplicative review. Interlocutory appeal may be a more desirable mechanism than mandamus because review on interlocutory appeal involves application of traditional tests for review on appeal, thus avoiding the possibility of a second consideration of the disqualification issue under a different standard of proof. The availability of interlocutory appeal under the collateral order doctrine and section 1292(b) certification will be considered in the following two sections.

Review Under the Collateral Order Doctrine

Under 28 U.S.C. § 1291, an appeal can be taken only from a "final decision." A decision is final if it "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judg-


157. Indeed, even the normal standard for appellate review, abuse of discretion, is arguably too strict when the issue concerns judicial impartiality. If the trial judge has ruled on the question of his own partiality, perhaps the reviewing court should decide the issue de novo rather than defer to the trial judge. This approach is particularly appropriate if the issue is legal rather than factual, so that the demeanor and credibility of witnesses are irrelevant. See supra note 127. Cf. In re Cement Antitrust Litig., 688 F.2d 1297, 1307 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. United States Dist. Court, 459 U.S. 1191 (1983) (in a supervisory mandamus case the appeals court may issue a writ if it concludes that district court erred, even if it cannot characterize the trial court's action as "clearly erroneous"). Moreover, strict standards for review are anomalous given the easily satisfied substantive requirements for disqualification in amended 28 U.S.C. § 455 (1982). See supra notes 18-39 & accompanying text.

The only comment on appellate review in the House Report is opaque. The Report stated that the provision of § 455(a) regarding the appearance of bias standard "is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances [sic] in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." HOUSE REPORT, supra note 18, at 5, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6355. This apparent endorsement of the abuse of discretion standard refers simply to the bias provisions, not to the proscribed relationship sections.

The requirement of finality reflects the concern that piece-meal appeals will delay resolution of the litigation and severely weaken judicial administration. The collateral order doctrine constitutes a narrow exception under which a litigant may obtain immediate appeal from an interlocutory order. This section will address the propriety of the collateral order doctrine as a means to review judicial disqualification cases. The first part will review the requirements for invocation of the collateral order doctrine and discuss whether they are satisfied in Model I and Model II situations. The second part will examine the traditional policy considerations militating against interlocutory appeal that have led the courts to limit strictly the application of the doctrine.

Requirements

The collateral order doctrine was developed over thirty years ago in Cohen v. Beneficial Industrial Loan Corp. The Supreme Court determined that an interlocutory order is immediately appealable if it falls “in that small class which finally determine[s] claims of right separable from; and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” In Cohen the district court had held that a state law requiring plaintiffs in shareholder derivative suits to post security did not apply to actions brought in federal court. In holding that the district court’s order was immediately appealable, the Court found that the order was “a final disposition of a claimed right which [was] not an ingredient of the cause of action” and that the defendant’s right to

160. See, e.g., Cobbledick v. United States, 309 U.S. 323, 325 (1940), in which Justice Frankfurter's opinion for a unanimous Court noted:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

162. 337 U.S. 541 (1949).
163. Id. at 546.
164. Id. at 544-47.
165. Id. at 546-47.
security might be irretrievably lost if he were forced to await review of the issue on appeal from the final judgment.\textsuperscript{166} In addition, the Court stressed that the defendant's appeal presented a "serious and unsettled question"\textsuperscript{167} and cautioned that it might reach a different conclusion on the issue of appealability if the defendant's right to security were clear and if the order "involved only an exercise of discretion as to the amount of security."\textsuperscript{168}

The first two Cohen requirements, that the district court order finally determine an issue collateral to the merits of the action, do not pose significant difficulty in judicial disqualification cases. A trial judge's decision not to disqualify himself is as final as the order denying imposition of security obligations in Cohen. In both situations, despite a technical possibility of reopening the issue at the trial court level, the litigation proceeds with respect to other issues on the assumption that the judge's decision is final.\textsuperscript{169} Moreover, whether based on allegations of proscribed relationships or bias, the determination of the disqualification issue is separable from the merits of the case. Disqualification revolves around the judge's relationships to the parties and his state of mind, and is to be resolved without consideration of his judicial rulings.\textsuperscript{170}

The inadequacy of remedy by appeal and the unsettled question requirements, however, may be obstacles to obtaining interlocutory review under the collateral order doctrine. In the recent case of Firestone Tire & Rubber Co. v. Risjord,\textsuperscript{171} the Court focused on the inadequacy of

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\textsuperscript{166} \textit{Id.} at 546. The Supreme Court more recently formulated the Cohen three-part test in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (quoted in Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982)).

In Coopers & Lybrand the Court unanimously held that the collateral order doctrine could not be used to obtain immediate review of a trial judge's decision concerning certification of a class action because the three key elements of the doctrine were absent. First, the district judge could revise his order during the course of the case, so the decision was not truly final. Second, the determination of certification was not separable from the factual and legal issues of the case. Third, effective review on appeal after final judgment was available. 437 U.S. at 469.

\textsuperscript{167} Cohen, 337 U.S. 541, 547 (1949).

\textsuperscript{168} Id.

\textsuperscript{169} As the Court stated in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981), a case involving disqualification of counsel, the denial of disqualification is conclusive, "because the only issue is whether challenged counsel will be permitted to continue." Furthermore, with respect to disqualification under § 144, the statute explicitly permits only one affidavit of prejudice, \textit{i.e.}, one challenge. See supra notes 10-11 & accompanying text.

\textsuperscript{170} See supra note 16 & accompanying text.

\textsuperscript{171} 449 U.S. 368 (1981).
appeal requirement, holding that orders denying counsel disqualification did not come within the collateral order doctrine. The majority stated that the order refusing to disqualify counsel was a conclusive determination of the issue, and assumed that the issue was separable from the merits. The Court concluded, however, that the party seeking disqualification had not shown that immediate appeal was necessary, and held that the court of appeals' power to vacate the judgment and to order a new trial upon review of the final judgment was an adequate remedy. Indeed, the Court believed that it would be difficult to review properly the district judge's decision on counsel disqualification until the end of the litigation, when the impact of the decision on the underlying litigation could be evaluated.

The Firestone Court concluded that any potential harm from delaying the appeal until final judgment was not significantly different from that involved in other interlocutory orders that are not immediately reviewable. The Court quoted a Second Circuit opinion, which stated that the harm from delay in the appeal of the counsel disqualification decision was no different from delay in the appeal of “orders requiring discovery over a work-product objection or orders denying motions for recusal of the trial judge.” Although the Court did not continue the quotation, the Second Circuit had stated that immediate appeal from these orders was not available. The analogy drawn by the Firestone Court and by the Second Circuit is simply dictum; neither court identified or analyzed the special harm inherent in delay of review of judicial disqualification denials.

Although the Firestone Court decided that the collateral order doctrine is unavailable to appeal counsel disqualification denials, the court did not directly decide whether judicial disqualification decisions could be immediately appealable under the collateral order doctrine.

172. Id. at 375-76. See supra note 169.
173. Id. at 378. See also id. at 378-79 n.13. The concurring Justices disagreed only with the majority's statement that a denial of disqualification is a conclusive determination. Id. at 380 (Rehnquist, J., concurring).
174. Id. at 377.
175. Id. at 378 (quoting Armstrong v. McAlpin, 625 F.2d 433, 438 (2d Cir. 1980), judgment vacated and appeal dismissed, 449 U.S. 1106 (1981)).
177. The Court did suggest, however, that immediate review through a certified question under 28 U.S.C. § 1292(b) (1982) or through mandamus might be appropriate in some cases. 449 U.S. 368 at 378-79 n.13. Mandamus has been used to obtain review of counsel disqualification denials after Firestone. See, e.g., Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (an important legal issue was presented, and the defendant could suffer substantial harm if the appeal was delayed until final judgment).
Critical to the resolution of this issue is the portion of the *Firestone* opinion concerning the availability of effective review after a final judgment. Use of the collateral order doctrine in judicial disqualification decision cases will be permitted only if it can be demonstrated that, unlike counsel disqualification cases, effective review after a final judgment is unavailable.

First, consider a simple Model I case in which the trial judge owns stock in a party but has refused to disqualify himself. Such a decision meets the requirements of the collateral order doctrine of a final decision on an issue separate from the merits of the case. But is it effectively unreviewable on appeal of the final judgment?

Effective review on appeal from a final judgment in judicial disqualification cases will usually be extremely difficult and will be inadequate to preserve the fact and appearance of impartiality. As noted above in connection with mandamus, delay of review poses two crucial problems. First, if the judge erred in refusing to disqualify himself, then judicial bias may infect the entire proceeding, not just the trial. The difficulty of proving how bias affected particular rulings may compel beginning the whole proceeding anew. Moreover, the impact of certain biased rulings may never be negated. Second, it may be impossible to undo the damage to the judicial system caused by the impression of partiality given to the litigants and public.

Delayed review of judicial disqualification decisions causes problems that are substantially more severe than those involved in denials of counsel disqualifications. Counsel disqualification cases such as *Firestone* involve allegations of counsel conflict of interest that may affect the counsel's conduct of the case or perhaps the adversary process. The impact on the litigants can be assessed and resolved after final judgment of the case. Charges of judicial bias, on the other hand, raise doubts about the judge's impartiality, which is the core of the judicial system. Congress has required disqualification in Model I cases on the ground that bias or the appearance of bias is inherent in certain types of relationships, and so a broad prophylactic rule is necessary. Immediate review of denials of judicial disqualification is necessary to preserve the impartial judicial system that the statute was intended to ensure. Moreover, since section 455(b) establishes strict,

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178. See supra notes 169-70.
179. See supra note 127 & accompanying text.
180. See supra notes 144-49 & accompanying text.
182. See supra note 126 & accompanying text.
objective guidelines for disqualification, evidencing Congress' view that judges cannot perform or appear to perform impartially when they are involved in the proscribed relationships, it would be anomalous to require the party seeking disqualification to demonstrate that review at the end of the merits of the case would be inadequate protection.

The judicial disqualification statute does not address the availability of interlocutory review. Congress' silence, however, could be interpreted not as rejection of immediate appealability but as permission for the judiciary to identify and acknowledge the need for immediate appeal through the collateral order doctrine or through other means such as mandamus.

In Model II cases, which involve the subjective determination of whether a judge is biased or has the appearance of bias, Congress has given the judiciary more discretion to make these determinations. Because the decision on disqualification in Model II is ultimately based on judicial discretion, it is all the more important that appellate review of this exercise of discretion be prompt so that the impartiality of the judicial system can be preserved as completely and as quickly as possible. The nature of this discretion to be exercised in Model II disqualification cases, involving core principles of judicial impartiality, is thus distinguishable from the implication in Cohen that the collateral order doctrine might not apply to the exercise of discretion in setting an amount of a security deposit.

An additional stumbling block for litigants in Model II cases is the requirement under the collateral order doctrine that the issue involved be a "serious and unsettled question." This requirement suggests that immediate review under this theory should be limited to preceden-

183. Several cases state that a denial of disqualification can be reviewed on final judgment or on appeal of some other interlocutory order that is appealable. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), cert. denied, 459 U.S. 988 (1983); United States v. Bonilla, 626 F.2d 177 (1st Cir. 1980); Collier v. Picard, 237 F.2d 234 (6th Cir. 1956); Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944). Linking review of a disqualification denial to the presence of some other immediately appealable order, however, is an inadequate safeguard of judicial impartiality. Indeed, if the disqualification denial is not directly connected to the appealable order, it is doubtful that the statements in the above cases are correct. See United States v. Washington, 573 F.2d 1121, 1123 (9th Cir. 1978); General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 198 (4th Cir.), cert. denied, 377 U.S. 952 (1964).

184. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1948); See also supra text accompanying notes 166-68.

tial type cases and should not be used for case-by-case analysis. Model II decisions by their nature require case-by-case analysis because they entail the exercise of judgment based on particular facts. In contrast, Model I cases are more likely to depend on statutory interpretation. Whether a particular type of relationship is covered by a statutory prohibition is an issue likely to satisfy the serious, unsettled question requirement; once resolved, the issue is unlikely to arise again.

The Cohen Court was understandably concerned that the appeals courts avoid routine review of every interlocutory order regarding security, and thus the requirement of a serious unsettled question in that context makes good sense. In the judicial disqualification context, however, immediate review of questionable disqualification decisions is essential, regardless of their precedential weight, to preserve the appearance and reality of impartiality. Thus, although Model II cases may pose special problems under the traditional Cohen unsettled question criterion, they nonetheless merit immediate Cohen-type review.

In sum, except for the potential problems posed by the unsettled question element, both Model I and Model II cases ordinarily will satisfy the Cohen requirements. The appropriateness of immediate review under the collateral order doctrine in such situations is further evidenced by an examination of the policy considerations underlying the courts’ general reluctance to invoke the doctrine.

Policy Considerations

In Firestone, the Court articulated three traditional concerns in support of strictly limiting interlocutory appeals. The Court emphasized that limits on interlocutory appeals ensure appropriate deference to the trial judge in his role as initial decisionmaker and protect his independence. Second, these limits avoid the harassment and expense of successive appeals. Further, these limits promote efficient judicial administration.

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186. See also Cohen, 337 U.S. 541, 547 (1948) (collateral order doctrine will not be available to review every security order case).
187. Id.
188. Firestone, 449 U.S. 368, 374 (1981). The Court did not decide whether orders granting counsel disqualification might be immediately appealable under § 1291. Id. at 372 n.8. Several Circuits have held such grant orders to be appealable under the collateral order doctrine. See, e.g., Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); Firestone Tire & Rubber Co. v. Risjord, 612 F.2d 377 (8th Cir. 1980), vacated, 449 U.S. 368 (1981); Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979). Cf. Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), cert. denied, 454 U.S. 895 (1981) (distinguishing Firestone on the grounds that in grants of counsel disqualification there is no need to wait to evaluate final impact, and irreparable harm would result if the
Although these concerns may support the *Firestone* Court's decision to limit use of the collateral order doctrine in counsel disqualification cases, they are not appropriate in the judicial disqualification context. First, ensuring appropriate deference to trial judges should not be a particularly important goal when the judge's own impartiality is challenged on the ground of congressionally proscribed relationships or bias. Indeed, in this circumstance little deference should be shown to the trial judge's determination.\(^{189}\) Second, judicial disqualification motions are much less likely to be filed than counsel disqualification motions because of the serious ramifications of unsuccessful motions; the filing of a judicial disqualification motion undoubtedly will antagonize a judge, consciously or subconsciously. One result is to deter parties from making questionable disqualification motions.\(^{190}\) Counsel disqualification motions do not have this drawback, and indeed are becoming increasingly common.\(^{191}\) Thus, practical concerns about a potential flood of appeals, which may have motivated the *Firestone* Court, should not be present in judicial disqualification cases. In addition, the substantial risks undertaken when a party makes a judicial disqualification motion indicate that such motions will be used only when clearly necessary to protect the right of the movant to an impartial trial, thus justifying any harassment or expense that results from immediate appeal of such a motion. Finally, the goal of efficient judicial administration must be balanced against the more fundamental goal of impartial judicial administration. Only in the extreme cases should impartiality be sacrificed for efficiency.\(^{192}\)

Because judicial disqualification orders will generally satisfy the *Cohen* requirements and immediate review will not frustrate the policies against interlocutory appeal, the collateral order doctrine should be available for review of Model I and Model II cases. Although the few circuit courts to consider the issue have rejected use of the doctrine in this context,\(^{193}\) the opinions have assumed that review on final judgment is adequate. This is not the case. Nor is the availability of man-
damus in certain extraordinary cases a sufficient reason to deny review under the collateral order doctrine. The standard of review in mandamus proceedings is apparently stricter than that for appeal under the collateral order doctrine and may, as discussed above, create the potential for duplicative review of judicial disqualification motions. In addition, the stricter mandamus standard may place an undue burden on the party seeking the writ in light of the fundamental concerns raised by a trial judge’s refusal to disqualify himself. Indeed, if a case satisfies the mandamus doctrine’s requirement of the ineffectiveness of appeal from final judgment, it will satisfy the collateral order doctrine’s requirement as well.

Review Through Section 1292(b) Certification

The only other mechanism that has been used to obtain interlocutory review of disqualification decisions is the certified controlling question of law provision of 28 U.S.C. § 1292(b). This statute permits a district judge in a civil action to certify that an “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The court of appeals then has discretion to permit the appeal if application is timely filed. Thus, the process involves two steps in which both

United States v. Washington, 573 F.2d 1121 (9th Cir. 1978); Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966).

In In re Cement Antitrust Litig., 673 F.2d 1020 (9th Cir. 1982), aff’d for absence of quorum sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983), the Ninth Circuit denied review under the collateral order doctrine of a grant of judicial disqualification based on stock ownership, on the basis that the effect of an erroneous decision to disqualify would not deprive the litigant of a protected right that could be destroyed absent immediate appeal. The dissenting judge, however, believed review would be consistent with the policies and doctrine of the collateral order doctrine in light of the substantial delay in familiarizing a new trial judge with the case. Id. at 1030. See also Hampton v. City of Chicago, 643 F.2d 478, 480 (7th Cir. 1981) (continued participation of a particular judge is not a claim of right, thus appeal under collateral order doctrine and review after entry of final judgment or upon petition for writ of mandamus are precluded).

194. See supra notes 156-57 & accompanying text.
195. See supra notes 154-57 & accompanying text.
trial and appellate courts must be convinced of the need for prompt appellate review.\textsuperscript{198}

The determination of what constitutes a "controlling question of law" that will "materially advance the ultimate termination of the litigation" is crucial to the availability of section 1292(b) review of judicial disqualification orders. Recent pronouncements of the Supreme Court suggest that the appellant must demonstrate "that exceptional circumstances justify a departure" from the final judgment rule.\textsuperscript{199} Although the legislative history offers little in the way of interpretation of this language, the term "controlling question of law" appears to require that there be a significant legal question that will have major impact on the case, either by shortening the time for litigation or by substantially altering the nature of the litigation.\textsuperscript{200} One court has suggested that

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\textsuperscript{198} The importance of the dual determination of the need for immediate review has been stressed by the courts, see, e.g., Coopers \& Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978), the Congress, see, e.g., H.R. REP. No. 1667, 85th Cong., 2d Sess., 4-6 (1958), and the commentators, see, e.g., Note, supra note 197, at 610. As the House Report states, The problem . . . is to provide a procedural screen through which only the desired cases may pass, and to avoid the wastage of a multitude of fruitless applications to invoke the amendment contrary to its purpose. . . . Requirement that the Trial Court certify the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases.


\textsuperscript{199} Coopers \& Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

\textsuperscript{200} See Note, supra note 197, at 618. Four examples mentioned in the hearings on § 1292(b) exemplify these characteristics. See id. at 611-12.

Some courts have suggested that a controlling question of law usually cannot be collateral to the basic issues of the case and that in order to be a controlling question it must be shown "that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983). Neither of these factors, however, necessarily follows from the statutory language. Indeed, controlling questions may in some circumstances involve peripheral issues. See, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971) (appeal allowed under § 1292(b) with respect to discovery order over claim of executive privilege because discovery was crucial to withstanding summary judgment motion). Moreover, Congress did not necessarily demonstrate its intent to require an outcome determinative effect when it chose the language "materially advance the ultimate termination of the litigation." The Senate Committee Report suggests that the key purpose of the provision was to "aid in the disposition of cases before the district courts . . . by saving useless expenditure of court time." S. REP. No. 2434, 85th Cong., 2d Sess. 4, reprinted in 1958 U.S. CODE CONG. \& AD. NEWS 5255, 5257.

In the Cement Antitrust case the Ninth Circuit concluded that these purported requirements were not satisfied by a grant of a disqualification motion when the district judge's wife owned stock in a few corporate members of a massive class action. A denial of disqualification, however, may satisfy even the Ninth Circuit's unduly restrictive view. Indeed, a
"'controlling' means serious to the conduct of the litigation, either practically or legally."201 Another court noted that a procedural determination that might "importantly affect the conduct of the action" would be considered controlling as well.202

An order denying judicial disqualification does have a fundamental impact on the further conduct of the case. If the denial was incorrect and requires reversal, an entirely new proceeding will be necessary, involving substantial delay and expense for the parties. Moreover, effective review on appeal of a final judgment may be impossible to obtain.203 Section 1292(b) also requires, however, that the appeal involve a legal question, not merely a factual interpretation.204

Once again differentiation between Model I and Model II disqualification cases becomes important. In the proscribed relationship cases of Model I, substantial questions of interpretation of the disqualification statute are likely to arise and will satisfy the requirements of section 1292(b). For example, consider a judge who is confronted with the question whether section 455(b)(4) requires his disqualification in a case involving the electric utility serving the judge's residence. As a customer, the judge could receive a small amount of money upon judgment against the utility.205 If the judge fails to disqualify himself, either because he interprets the statute to require disqualification only when there is a substantial financial interest, or because he interprets the phrase "financial or other interest" to exclude the customer relationship or contingent interests, he is deciding a legal question that con-

subsequent Ninth Circuit opinion in the Cement case suggests that several other judges of that court would have allowed an interlocutory appeal. In re Cement Anitrust Litig., 688 F.2d 1297, 1302 (9th Cir. 1982), aff'd for absence of quorum sub nom. Arizona v. United States Dist. Court, 459 U.S. 1191 (1983) (court stated it was impressed and persuaded by the dissent in an earlier Cement proceeding in which the majority denied interlocutory appeal, but refused to reconsider an issue so recently resolved by another panel in the Circuit). Interestingly, the Supreme Court was compelled under 28 U.S.C. §§ 1, 2109 to affirm because four Justices had disqualified themselves and the remaining Justices thought that the case could not be heard at the next Term of the Court. 459 U.S. at 1191.


203. See supra notes 127, 147-49 & accompanying text.

204. See Note, supra note 197, at 618 n.57. Section 1292(b) is available only in civil cases. Thus, in criminal cases disqualification orders can be reviewed only under the collateral order doctrine or mandamus.

205. Similar facts were presented in In re Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976) (holding that review under § 1292(b) and by mandamus were both appropriate). The court considered the applicability of § 455(b)(4) even though amended § 455 did not apply retroactively.
controls the judicial decisionmaking in the case.\textsuperscript{206} If he is wrong in his interpretation, immediate review would materially advance the litigation's ultimate termination by eliminating the requirement for a second trial. Moreover, this example would also satisfy the requirement in section 1292(b) that there be substantial doubt concerning the proper resolution of the legal issue if there were no controlling precedent establishing the scope of the statute.\textsuperscript{207}

In Model II cases, however, the question is usually whether the trial judge correctly determined that he was neither actually nor apparently biased. Usually this involves a factual determination; rarely is the judge interpreting a purely legal issue on which there is substantial doubt.\textsuperscript{208} Thus, for example, if a judge denied disqualification because he believes his remarks or actions do not demonstrate bias, review under section 1292(b) is generally inappropriate.\textsuperscript{209}

On occasion, a Model II case may involve a controlling legal question: for example, the issue may be whether bias against a party's counsel satisfies the section 144 requirement of personal bias against a party.\textsuperscript{210} Immediate review under section 1292(b) might be appropriate under these circumstances if the other statutory requirements for review are met, \textit{i.e.}, if there are substantial grounds for doubt regarding the issue and if immediate review might expedite the ultimate resolution of the case. Nonetheless, in the usual Model II case the trial judge will simply apply the statute to the facts and make a discretionary determination regarding the existence of bias. Such rulings are generally

\textsuperscript{206} In \textit{Virginia Electric}, the judge had disqualified himself and then certified an appeal under § 1292(b). The Fourth Circuit found that review under § 1292(b) was appropriate because the trial would be delayed while a new judge became familiar with the complex litigation. \textit{Id.} at 364. The court also believed that review of the disqualification by a second judge after final judgment would be impossible, presumably because improper recusal would not be a ground for reversal after trial on the merits. \textit{Id.} at 384. \textit{See also In re New Mexico Natural Gas Antitrust Litig., 620 F.2d 794 (10th Cir. 1980)} (allowing § 1292(b) review in case involving similar facts).

\textsuperscript{207} In \textit{Virginia Electric} the Fourth Circuit held that the judge's contingent interest of $70 to $100 in a damages award with recovery spread over 40 years was \textit{de minimis} and did not require disqualification under the statute. 539 F.2d at 368.

\textsuperscript{208} It is, of course, often very difficult to draw the line between questions of law and questions requiring the application of law to the facts. \textit{See generally H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law} 375-83 (1958).

\textsuperscript{209} In \textit{re Virginia Elec. & Power Co., 539 F.2d 357, 363 (4th Cir. 1976)} (dicta).

\textsuperscript{210} \textit{See, e.g., Davis v. Board of School Comm'r's, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976)} (review allowed under § 1292(b) of order denying disqualification under § 144). \textit{See also Haas v. Pittsburgh Nat'l Bank, 627 F.2d 677 (3d Cir. 1980)} (allowing review under § 1292(b) where the question concerned disqualification due to apparent bias based on counsel's improper conduct).
not appropriate for section 1292(b) review.211

Although many Model I cases and a few Model II cases will satisfy the threshold requirements of section 1292(b), the appeals court has the ultimate and complete discretion to accept or deny an appeal that has been certified by the trial court.212 Thus, there is a built-in safety valve to regulate any interference with the proceedings at either the trial or appellate level that might result from immediate appeal. Although this may help to appease those whose primary concern is the efficiency of the court system, it causes a great concern among those who believe immediate review of judicial disqualification orders is generally necessary to ensure that the judicial system operates and appears to operate in an impartial fashion. Moreover, the requirement in section 1292(b) of initial certification by the very trial judge whose impartiality is questioned makes it unlikely that this route of interlocutory appeal will frequently succeed, especially in Model II bias cases.

Conclusion

Immediate appellate review of trial court decisions denying judicial disqualification is generally warranted in view of the fundamental importance to our judicial system of preserving both the fact and the appearance of an impartial judiciary. Review after final judgment of the case will often be inadequate, and the costs of immediate appellate review are relatively slight. This Article has utilized a paradigmatic approach to evaluate the possibilities of immediate review under current mechanisms of interlocutory review, focusing on the characteristics of objective (Model I) and subjective (Model II) bases for disqualification and how these characteristics affect the availability of interlocutory review.

Congress has left to the judiciary the task of determining whether immediate review of judicial disqualification decisions should be available. Congress should amend the disqualification statutes to provide explicitly for immediate review. Pending such congressional action, however, an analysis of the characteristics of the disqualification motion involved must guide the judiciary on the issue. It is hoped that this

211. Indeed, it has been suggested that judicial disqualification orders generally are unlikely to satisfy the controlling question of law requirement. See 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3553 at 659 (1984). This notion ignores the differences outlined in this Article between the Model I and II cases. Model I cases are likely to present either controlling questions of law or no questions at all, because discretionary exercises have been largely eliminated by Congress. Model II cases, however, will usually conform to the above generalization.

212. 28 U.S.C. § 1292(b); see also supra note 198.
approach will lead the appellate courts to permit the use of the various interlocutory review devices with more frequency, thereby promoting the ideal of an unquestionably impartial judicial system.