CITE AS

Wright, Miller & Cooper, Federal
Practice and Procedure:
Jurisdiction 2d § —

FEDERAL PRACTICE

AND

PROCEDURE

By

CHARLES ALAN WRIGHT
William B. Bates Chair for the Administration of Justice
The University of Texas

ARTHUR R. MILLER
Professor of Law, Harvard University

EDWARD H. COOPER
Professor of Law, University of Michigan

JURISDICTION
AND
RELATED MATTERS

Federal Judicial System

Sections 3531.11 to 3560

Volume 13A

[Date First Edition Volume published: 1975]
[Date Second Edition Volume published: 1984]

ST. PAUL, MINN.
WEST PUBLISHING CO.
1984

It should be noted, however, that there is a maxim of law to the effect that if all judges are disqualified in a particular case because the case involves the judiciary, none is disqualified.[5]

Three federal statutes are intended to protect these interests by stating circumstances under which a judge is disqualified to sit.[6] The oldest of these is the statute that is now § 455 of Title 28. It was first enacted in 1792,[7] and, as amended in 1821, 1911, and 1948, provided for disqualification because of specified relationships to a case or because of a substantial interest in the case.[8] The statute, as will be discussed, was completely rewrit-

5. None disqualified

Evans v. Gore, 1920, 40 S.Ct. 550, 253 U.S. 245, 64 L.Ed. 827.

Duplantier v. U.S., C.A.5th, 1979, 606 F.2d 654, 662–663.

U.S. v. Conforte, D.C.Nev.1978, 457 F.Supp. 641, 658–659.

The federal disqualification statutes do not alter the time-honored Rule of Necessity. U.S. v. Will, 1980, 101 S.Ct. 471, 449 U.S. 200, 66 L.Ed. 2d 392.

Since, if judges of the Court of Claims declined, because of their interest in the case, to hear case brought by various federal judges seeking to recover additional compensation allegedly due to them under the Constitution, there would be no judges qualified to hear the case, the judges of the Court of Claims would apply the rule of necessity and proceed to hear the case. Atkins v. U.S., Ct.Cl.1977, 556 F.2d 1028, 1035–1040, certiorari denied 98 S.Ct. 718, 434 U.S. 1009, 54 L.Ed.2d 751.

Although legal profession was attacked on theory that litigants had constitutional right to be represented by lay counsel and that federal and state requirements limiting practice of law in courts to licensed attorneys were unconstitutional, so that impartiality of judges as members of legal profession might reasonably be questioned, and members of panel of Court of Appeals were named as parties to lawsuit, inasmuch as it appeared that plaintiffs had deliberately adopted course of procedure that might disqualify every federal judge in country, members of panel were not disqualified to consider appeal. Pilla v. American Bar Assn., C.A.8th, 1976, 542 F.2d 56.

If disqualification of judge operates so as to bar justice to the parties and no other tribunal is available, the disqualified judge or judges may by necessity proceed to judgment. Turner v. American Bar Assn., D.C.Tex.1975, 407 F.Supp. 451, 483.

6. Protect these interests

"* * * [I]t was to protect this guarantee that the recusal statutes were enacted * * *, and it would be anomalous to hold that a claim under the statutes insufficient on its merits could nevertheless satisfy the constitutional standard." In re International Business Machines Corp., C.A.2d, 1980, 618 F.2d 923, 932 n. 11, **citing Wright, Miller & Cooper.**

7. First enacted

Act of May 8, 1792, c. 36, § 11, 1 Stat. 278–279.

8. Relationship or interest

For the historical evolution of the statute, see Comment, Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455, 1973, 71 Mich.L.Rev. 538, 539–540.

The text of 28 U.S.C.A. § 455, as it read from 1948 to 1974, was as follows: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party of his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

ten in 1974 and the amended version of it is now the basic provision on disqualification of federal judges.

A second statute, § 47 of Title 28, is a simplified form of a law first passed in 1891.[9] It states the narrow but important principle that no judge shall hear or determine an appeal from the decision of a case or issue tried by him.[10]

Finally, the 1911 Judicial Code introduced for the first time a statutory method for seeking disqualification of a judge on the ground of bias or prejudice.[11] That statute, now § 144 of Title 28, was for years the most important of the federal disqualification statutes, although it was construed very narrowly and actual disqualifications under it were rare.[12] It remains on the books and its procedural device of filing an affidavit of prejudice will continue to be important,[13] even though the substantive ground for disqualification that it contained is now also subsumed under the amended version of § 455.

Certain highly publicized events in recent years led to heightened interest in judicial ethics and to the circumstances in which it is proper for a judge to sit.[14] In part as a response to this, the American Bar Association in 1972 adopted a Code of Judicial Conduct, drafted by a distinguished committee, which supersedes the former Canons of Judicial Ethics.[15] Canon 3C of the

9. 1891 law

Act of March 3, 1891, c. 517, § 6, 26 Stat. 827.

10. Judge's own decision

See § 3545.

11. Bias or prejudice

Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090.

12. Narrowly construed

See §§ 3542, 3551.

"* * * [I]n practice, the procedural requirements of this statute, which are quite specific, have been strictly construed. * * * As a result, actual disqualifications under section 144 have been rare." U.S. v. Hines, C.A.10th, 1982, 696 F.2d 722, 728, **citing Wright, Miller & Cooper.**

13. Affidavit of prejudice

See § 3551.

14. Heightened interest

See MacKenzie, The Appearance of Justice, 1974.

15. Code of Judicial Conduct

A.B.A., Code of Judicial Conduct, 1972.

See also the very helpful work, Thode, Reporter's Notes to Code of Judicial Conduct, 1973.

Thode, The Code of Judicial Conduct—The First Five Years in the Courts, 1977 Utah L.Rev. 395.

Symposium on the Code of Judicial Conduct, 1972 Utah L.Rev. 333.