OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 40 WINTER 2015 NUMBER 3

NOTES

LET THE SUN SHINE IN: A JUDICIALLY IMPLIED TIMELINESS REQUIREMENT CREATES A MURKY STANDARD FOR FEDERAL JUDGES AND LITIGANTS AND PERPETUATES AN APPEARANCE OF BIAS IN THE FEDERAL JUDICIARY

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I. INTRODUCTION

Proponents of a fair and just legal system (arguably, most United States citizens) would posit that individuals who interact with a court in the federal court system are entitled to a "neutral and detached" justice, judge, or magistrate.[1] This is a lofty and idealized standard that many of our country's leaders, Supreme Court Justices, and everyday citizens advance as the status quo and the expectation for the federal judiciary.[2]

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1. Ward v. Vill. of Monroeville, 409 U.S. 57, 62 (1972). In *Ward*, the Supreme Court construed an Ohio statute "for the disqualification of interested, biased, or prejudiced judges [as] a sufficient safeguard to protect petitioner's rights." *Id.* at 61.

2. *See generally* Robert Barnes, *Justices Consider When a Judge Should Bow Out*,

The federal judiciary's reputation is unique due to the unprecedented emphasis placed on the importance of a fair and equitable judicial system, an essential function of a democracy.[3] Federal judges are subject to congressionally enacted statutory constraints[4] and a code of conduct that provides guidance and prescribes a high standard regarding judicial conduct.[5] Congress, the legislative body responsible for enacting a large portion of the guidelines for federal judges, has enacted various statutory constraints upon the federal judiciary.[6] Some of these statutes promulgate vague standards, and the judiciary's interpretation of various federal recusal statutes, particularly 28 U.S.C. § 455,[7] produces uneven results in precedential case law—an outcome that undermines the federal judiciary's reputation.[8] Even if unintended, these uneven results can produce an appearance of bias and undermine the necessary function of the federal judiciary by creating a lack of transparency and trust in the institution.[9]

This Note asserts that § 455 is obsolete and—in many circumstances—quite vague and inapplicable in the face of contemporary recusal challenges and the current public concerns toward the federal judiciary. Part II posits that § 455's legislative history and purpose demonstrate that Congress should continue to refine the statutory guidelines and high standards that Americans expect from the federal judiciary. Part III explores the role of the Constitution, the judiciary's reputation, and how these topics impact the necessity for a clear recusal statute. Part IV includes a discussion of the procedural and substantive aspects of a timeliness requirement. Furthermore, Part IV contends that an issue arises when courts attempt to interpret § 455; there are two conflicting veins of applicable case law and judicial reasoning regarding

WASH. POST (Mar. 4, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/03/AR2009030301761.html [perma.cc/6YF2-LQAD] (discussing how the standard for determining the appearance of judicial bias is difficult to elucidate).

3. *See* Roberta Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment with Democracy*, N.Y. TIMES (Sept. 15, 2015), http://www.nytimes.com/2015/09/15/opinion/across-the-globe-a-growing-disillusionment-with-democracy.html?_r=0 [perma.cc/U94U-VU8T].

4. *See, e.g.*, 28 U.S.C. § 455 (2012).

5. *See generally* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2011).

6. *See, e.g.*, 28 U.S.C. §§ 144, 455.

7. *See id.* § 455.

8. *See infra* Part IV.

9. For an analysis of the ways that the appearance of bias in a federal courtroom can undermine the federal judiciary, see Barnes, *supra* note 2.

what amounts to an appearance of impropriety and whether there is an implied timeliness requirement in the statute. Part V proposes that Congress should amend § 455's text to expressly state a timeliness requirement that will alleviate the appearance of bias and fulfill the statute's purpose. This Note concludes by condensing the overall argument and prescribing a legislative solution.

II. USING LEGISLATIVE HISTORY AND PURPOSE TO DECIPHER 28 U.S.C. § 455

A. Congress's Judicial Ethics and Statutory Goals

Congress's purpose for enacting § 455 and the history surrounding the legislation provide compelling support for the need to amend the federal judiciary's recusal statute. Since this Note proposes changes to the current version of § 455's text, it is essential to recognize and be familiar with the components of the relevant text. Subsection (a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[10] Subsections (b) and (c) of the statute state as follows:

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his

10. 28 U.S.C. § 455(a).

> spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
>
> (c) 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.[11]

The text of the statute, as enumerated above, sets forth two variations of judicial bias: (1) the general appearance of bias;[12] and (2) the detailed, specified instances of bias.[13] The existing statute can be read using a three-pronged approach. The first prong of the statute, § 455(a), is a general provision.[14] The second, more specific prong, § 455(b)–(c), pertains to certain instances and situations in which judicial recusal is required.[15] The final prong encompasses administrative matters, including a waiver provision.[16] The waiver provision, § 455(e), states that conflicts under § 455(a) can be waived if the judge fully discloses the conflict and both parties—fully aware of the conflict—agree to move forward.[17] On the other hand, conflicts that arise under § 455(b) are not

11. *Id.* § 455(b)–(c).
12. *See id.* § 455(a).
13. *Id.* § 455(b)–(c).
14. *See id.* § 455(a).
15. *Id.* § 455(b)–(c).
16. *See id.* § 455(d).
17. *See id.* § 455(e); *see also* Delesdernier v. Porterie, 666 F.2d 116, 119–20 (5th Cir. 1982).

usually considered waivable.[18]

At this point, it is important to highlight both the statute's history and Congress's purported purpose for enacting § 455. These two things (the legislative history and the congressional purpose) offer insight to analyze the necessity for clearly worded legislation that addresses judicial recusal—specifically, the lack of a timeliness requirement.[19] Most importantly, the statute's history and purpose provide pertinent guidance regarding judicial bias, which exists in two forms: (1) actual bias; and (2) the appearance of bias.[20] For purposes of this Note, the most relevant statute regarding judicial disqualification is § 455. However, at key points, this Note will also draw on the history, purpose, and procedural implications of § 144.[21] Section 144 is pertinent because courts sometimes interpret § 144 in conjunction with § 455.[22] Even though some courts have chosen to read and interpret these two statutes jointly,[23] other courts have chosen to read and interpret them as completely separate and as prescribing opposite results.[24] Consequently, these distinct and conflicting interpretations give rise to confusion and an uneven application of § 455.[25]

18. *Delesdernier*, 666 F.2d at 120.

19. *See id.* at 120–21 (discussing the legislative history and congressional purpose of § 455 and noting that the court was "unconvinced that the question is conclusively determined by the legislative history of the 1974 amendments, and [the court] must base [its] decision on other considerations as well"); *see also* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 169 n.7 (4th Cir.) ("Section 455's legislative history is murky at best."), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

20. *Delesdernier*, 666 F.2d at 120–21.

21. *See* 28 U.S.C. § 144; *see also Delesdernier*, 666 F.2d at 121.

22. *See, e.g.*, Phillips v. Joint Legislative Comm. on Performance & Expenditure Review, 637 F.2d 1014, 1019 (5th Cir. 1981) ("Substantively, the two statutes are quite similar, if not identical."); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) ("[Sections] 144 and 455 [are given] the same meaning legally . . . whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned."); Lindsey *ex rel.* Lindsey v. City of Beaufort, 911 F. Supp. 962, 967 (D.S.C. 1995) ("Substantially, the two statutes, §§ 144 and 455 are similar.").

23. *See* cases cited *supra* note 22.

24. *See, e.g.*, SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam) (concluding "that the specificity and legislative intent of [§] 455 are sufficiently different from [§] 144").

25. *See Phillips*, 637 F.2d at 1019–20 n.6 ("To the extent that there is a difference, [§] 455 imposes the stricter standard: a movant under [§] 144 must allege facts to convince a reasonable person that *bias exists* while under the broader language of [§] 455, he must show only that a reasonable person 'would *harbor doubts* about the judge's impartiality.' On the other hand, [§] 455, unlike [§] 144, does not require the judge to accept all allegations by a moving party as true. Indeed, the section requires no

It is also necessary to recognize the text that is *not* present in the current version of the statute.[26] The text of § 455 does not explicitly state a timeliness requirement for motions regarding a judge's recusal during the litigation process,[27] but many courts read a judicially implied timeliness requirement into the language of the statute.[28] The timeliness requirement relates to a lawyer's timely filing or disclosure of information about a potential conflict that concerns the judge.[29] The language of § 455 also lacks clarity regarding whether it is the judge's responsibility to seek information regarding a conflict or whether it is the litigant's responsibility as a participant in the litigation.[30] The statute's language seems to indicate that Congress may have placed the burden on

motion at all; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. Section 144, by contrast, requires allegation by affidavit within a stringent time limit and allows a party only one such affidavit in any case." (citations omitted) (quoting Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (emphasis added))).

26. *See* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 168 (4th Cir.) ("[W]e conclude that § 455(b), like § 455(a), includes a timely-filing requirement . . . ."), *cert. denied*, 135 S. Ct. 437 (2014) (mem.); United States v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990) (stating that § 455 contains an "implied" timeliness requirement); *see also* United States v. York, 888 F.2d 1050, 1055 (5th Cir. 1989) (discussing the purposes of the timeliness requirement in § 455); Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 332–34 (2d Cir. 1987) (discussing timeliness and the other procedural requirements of judicial recusal); United States v. Int'l Bus. Machs. Corp. (*In re* Int'l Bus. Machs. Corp.), 618 F.2d 923, 934 (2d Cir. 1980) (denying petitioner's request for recusal because it was untimely); Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567, 574–75 (4th Cir. 1975) (finding that the plaintiff waived the issue of disqualification because it was not raised promptly).

27. *See Morgan*, 557 F.2d at 117 (noting that the provisions of the statute do not "contain any time limits within which disqualification must be sought").

28. *See Kolon Indus., Inc.*, 748 F.3d at 180–81 (Shedd, J., dissenting) ("After all, '[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.'" (alteration in original) (quoting Jama v. Immigration & Customs Enf't, 543 U.S. 335, 341 (2005))); *see also In re* United States, 441 F.3d 44, 65 (1st Cir. 2006) ("This court has not stated a standard of review for a holding by a district court that a recusal motion is untimely, but has viewed the issue as a preliminary one and engaged in our own review of whether there was a calculated withholding of a recusal motion such that we would deem it waived.").

29. *See Owens*, 902 F.2d at 1155 ("Timeliness is an essential element of a recusal motion."). *But see In re United States*, 441 F.3d at 65 (rejecting "the preliminary argument that the recusal motion came too late" and noting that "it may take some time to build [a factual] foundation").

30. *See Kolon Indus., Inc.*, 748 F.3d at 179 (Shedd, J., dissenting) (arguing that a judicially imposed timeliness requirement should not "shift[] the burden of bringing forward recusal grounds . . . from the judge to the litigants").

the judge,[31] but in many circumstances, courts allow and encourage litigants to bring the issue to the court's attention.[32]

Congress's stated purpose for enacting the new and more detailed statute was to "strive for the clearest and simplest formulation if the judicial branch is to operate at the highest ethical level."[33] At this point, the way for Congress to ensure that the judiciary is operating at such a level is to amend § 455 to ensure the consistent, clear application of the statute.

B. Historical Analysis

In 1969, the American Bar Association ("ABA") came together—in response to certain outside pressures[34]—to devise new measures regarding judicial ethics and conduct.[35] As a result, the ABA created a revised *Model Code of Judicial Conduct*.[36] After that revision, the ABA

31. Liteky v. United States, 510 U.S. 540, 548 (1994) (noting that Congress "placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit").

32. United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980) ("The statute imposes a self-enforcing duty on the judge, but its provisions may be asserted also by a party to the action." (citing Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975))).

33. *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 1 (1974) [hereinafter *House Hearing*] (statement of Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary).

34. H.R. REP. NO. 93-1453, at 2–3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352–53.

35. *Id.*

> Since approval by the ABA, the new Code of Judicial Conduct has been adopted by Colorado, Massachusetts, New Hampshire, Virginia, West Virginia and the District of Columbia. More importantly, the Judicial Conference of the United States in April 1973 adopted the new Code of Judicial Conduct as being applicable to all federal judges.

Id. at 3, 1974 U.S.C.C.A.N. at 6352.

36. *Id.* at 2–3, 1974 U.S.C.C.A.N. at 6352.

> In 1969 the [ABA] appointed a distinguished committee to consider changes in the Canons of Judicial Ethics. The chairman of the committee was former Chief Justice Roger J. Traynor of the California Supreme Court. Mr. Justice Potter Stewart, Judge Irving R. Kaufman and Judge Edward T. Gignoux represented the three tiers of the federal judiciary on the committee. In the course of its work the ABA committee prepared various preliminary and tentative drafts which were distributed to 14,000 lawyers, judges and lay

implemented a campaign to persuade Congress to amend the existing statutory text pertaining to judicial recusal.[37] Congress agreed with both the necessity to promulgate the ABA's goals regarding judicial ethics and conduct and the ABA's proposed reasons for changing the existing statutory text.[38] The ABA stated that the text needed to be amended for the following reason:

> [E]xistence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. [The judge] was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.[39]

Congress's purpose in undertaking this task was to reexamine the then-existing governing statute and to tighten and strengthen the law governing judicial bias and conflict.[40]

In 1974, Congress chose to amend and enact § 455.[41] Congress, in its efforts to modify the statutory text, relied on the language set forth by the *Model Code of Judicial Conduct*; consequently, the statute's language mirrored the recommended language minus some minor technical changes.[42] The new statutory language extinguished the need for judges to engage in arbitrary, subjective recusal exercises and instead "g[ave] judges a reasonable latitude to disqualify where an appearance of unfairness may reasonably exist if they s[a]t."[43] Congress, a deliberative

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> leaders throughout the country. At each step of the drafting process the committee received and considered the comments made by many of these leaders. The committee's work culminated in a final draft of a proposed Code of Judicial Conduct which was unanimously approved by the House of Delegates of the ABA in August 1972.

Id.

37. *See id.*, 1974 U.S.C.C.A.N. at 6352–53.

38. *See id.*

39. *Id.* at 2, 1974 U.S.C.C.A.N. at 6352.

40. Delesdernier v. Porterie, 666 F.2d 116, 119 (5th Cir. 1982) ("In 1974, Congress amended § 455 with a view to stiffening the conflict of interest provisions for the federal judiciary.").

41. *Id*.

42. H.R. REP. NO. 93-1453, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 6353.

43. *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on*

and reactive body, recognized the need to amend the statute to make it a relevant and useful tool for judicial recusal.

Since 1974, the language of § 455 has prescribed an objective standard that counsels a judge to determine "what a reasonable person knowing all the relevant facts would think about the impartiality of the judge."[44] The statute's text was meant to encourage and reflect public confidence in the judiciary's impartiality; for instance, "if there [was] a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."[45] Of note, prior to 1974, the language of § 455 required judges to use a subjective test to determine their impartiality.[46] The subjective test required obligatory disqualification "only when a judge, in examining his own conscience, found bias unavoidable."[47] This was a broad test, producing wide and varying results.[48] Furthermore, the subjective test also incorporated the archaic "duty to sit" doctrine.[49] In revising § 455, Congress noted its intent to eliminate the duty to sit by specifically citing that doctrine and by discussing the troublesome burden that the doctrine placed on a judge.[50] However, even after the more objective standard of recusal took effect, the statute still did not address any specific procedural or timeliness requirements.[51]

Improvements in Judicial Mach. of the S. Comm. on the Judiciary, 93d Cong. 114 (1973) [hereinafter *Senate Hearing*] (statement of John P. Frank).

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

45. H.R. REP. NO. 93-1453, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6355.

46. *See* 28 U.S.C. § 455 (1970) ("Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.").

47. *Roberts*, 625 F.2d at 128.

48. *See* Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 758 n.52 (2010) ("[W]hile a judge was to recuse whenever he had a substantial interest, '[t]he word "substantial" was undefined and subject to [a] myriad [of] interpretations, especially when viewed from the subjective position of the judge.'" (second alteration in original) (quoting Idaho v. Freeman, 507 F. Supp. 706, 717 (D. Idaho 1981))).

49. *See* Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (en banc).

50. *See Senate Hearing*, *supra* note 43, at 110 (statement of Prof. E. Wayne Thode) (affirming that the duty to sit was eliminated by the new language of § 455).

51. Delesdernier v. Porterie, 666 F.2d 116, 120 (5th Cir. 1982).

III. CONSTITUTIONAL IMPLICATIONS AND THE APPEARANCE OF JUDICIAL BIAS: JUDICIAL IMPARTIALITY AND THE FEDERAL JUDICIARY'S LEGITIMACY

The Supreme Court has found that the Constitution guarantees "[j]udicial impartiality [a]s one of the core elements of due process."[52] In *Tumey v. Ohio*, the Court stated that "[a]ll questions of judicial qualification may not involve constitutional validity."[53] However, the Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant . . . of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."[54] The foundational premise of that holding is that a judicial decision made without any appearance of bias "is essential to upholding the legitimacy of the judiciary."[55] The *Model Code of Judicial Conduct* enumerates certain guidelines regarding the appearance of bias and actual bias,[56] and it places great importance on exterminating the appearance of bias.[57] The *Model Code of Judicial Conduct* states that "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety."[58] It further states that "[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."[59] While the *Model Code of Judicial Conduct* as a guide for the judiciary, it is also necessary to explore the additional outside forces that impact the judiciary.

The history of the federal judiciary (including the Supreme Court) is rife with examples of the legitimacy of the courts being questioned because it can be argued that—in their simplest form and essence—courts are not examples of purely legitimate democratic institutions.[60] As

52. Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610 (2002).
53. Tumey v. Ohio, 273 U.S. 510, 523 (1927).
54. *Id.*
55. Ifill, *supra* note 52.
56. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2011).
57. *Id.* at r. 1.2.
58. *Id.* at r. 1.2 cmt. 1.
59. *Id.* at r. 1.2 cmt. 3.
60. Lindsay G. Roberts, *Neutral Principles and Judicial Legitimacy*, 54 OKLA. L. REV. 53, 55 (2001).

> The Court's institutional vulnerability—most importantly, its vulnerability on

a result, a judge's or a court's appearance of bias can have a grave effect on the legitimacy of the federal judiciary.[61] For the federal judiciary to function effectively, its neutrality and lack of bias are essential:

> [T]he judiciary—especially the appointed judiciary—derives its authority and legitimacy from the willingness of the people and sister branches of government to accept and submit to its decisions. Because public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function.[62]

The idea that some judges accept and embrace the concept of judicial activism is becoming more prevalent in society.[63] In contrast, the following excerpt characterizes the somewhat idealized and romanticized view of the federal judiciary that judicial activists spurn:

> Until recently, the American legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially. The mythic emblems surrounding the goddess Justice illustrate this vision of the proper judicial attitude: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions.[64]

> the legitimacy of its central role in Constitutional interpretation—traced to the fact that, unlike their congressional and executive counterparts, the members of the Court were not elected and their tenure was effectively for life. The Court, in short, was undemocratic, and the popular branches capitalized on this suspect credential to draw the Court up short whenever it appeared to claim too much power.

Id.

61. *Id.* at 56.

62. Ifill, *supra* note 52, at 611 (footnote omitted).

63. *Id.* "Despite this now standard argument, the public perception of judges and the judiciary as nonpolitical, neutral decision-makers, has been deeply eroded during the past fifty years." *Id.*

64. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 376 (1982).

Arguably, the judiciary is not viewed through that lens any longer, and

> federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active . . . stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial, judges are playing a critical role in shaping litigation and influencing results.[65]

As a result of this involvement and active stance, Congress should take steps to ensure that the federal judiciary does not appear biased. In other words, Congress should amend § 455 to state an explicit timeliness requirement.

IV. A JUDICIALLY IMPLIED TIMELINESS REQUIREMENT FOR 28 U.S.C. § 455 CREATES AND PERPETUATES DISTINCT AND UNEVEN OUTCOMES

For those supporting a judicially implied timeliness requirement, the crux of the argument relies on the notion that § 455 should be read in conjunction with the procedural requirements stated in § 144.[66] Proponents base their argument on the explicit language in § 144, "which requires a 'timely and sufficient affidavit.'"[67] Additionally, some courts impute the explicit timeliness requirement of § 144 to § 455 because the language is similar; therefore, these courts propose that a timeliness requirement should be read into the statute.[68] Those courts reason that the language of § 455(b) mirrors that of § 144, requiring recusal where a judge "has a personal bias or prejudice concerning a party."[69] Due to the similarity of the statutes, courts have also held that there is "no reason why there should not be a timeliness requirement [in § 455] even

65. *Id.* at 376–77 (footnote omitted).
66. Delesdernier v. Porterie, 666 F.2d 116, 119–21 (5th Cir. 1982).
67. United States v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990) (quoting 28 U.S.C. § 144 (1988)).
68. *Id.* at 1155–56.
69. United States v. Int'l Bus. Machs. Corp. (*In re* Int'l Bus. Machs. Corp.), 618 F.2d 923, 928 (2d Cir. 1980) (quoting 28 U.S.C. § 455(b)(i) (1976)).

without . . . explicit statutory [language]."[70]

Consequently, supporters of a judicially implied timeliness requirement also maintain the widely held principle that the timeliness requirement is inherent in § 455(a) and "may not be disregarded" in any context.[71] These courts interpret the timeliness requirement to require litigants to "raise the disqualification of the . . . [judge] at the earliest moment after knowledge of the facts."[72] This idea reinforces a public policy that requires litigants to refrain from abusing or wasting judicial resources.[73] When arguing for the inherency of the timeliness requirement, proponents explain that the absence of an express timeliness requirement in § 455(a)—taken literally—would encourage litigants to delay seeking recusal in hopes that the judge or the jury will provide them with a favorable outcome.[74] Of note, before Congress amended the statute in 1974, federal judges generally read a timeliness requirement into the statute even though the requirement was not explicit.[75]

Other courts, however, choose to interpret § 455(a) as a "'catchall' recusal provision" that covers a broad range of potential situations in which judicial recusal is necessary and that calls for application of the timeliness requirement only in certain situations.[76] In that case, if a judge fully discloses the conflict to the litigants, the conflict is potentially waivable under § 455(e).[77] Courts argue that by waiving the conflict, litigants also waive the timeliness requirement.[78] Accordingly, in such a situation, the judicially implied timeliness requirement is applied only part of the time.[79]

Interestingly, throughout most of these cases, there are many instances where the court relies on a conclusory statement: "Timeliness is an essential element of a recusal motion."[80] This holding is in direct

70. *Id.* at 932.
71. *Delesdernier*, 666 F.2d at 121.
72. *Owens*, 902 F.2d at 1156 (alterations in original) (quoting Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567, 574 (4th Cir. 1975)).
73. *See id.*
74. *Delesdernier*, 666 F.2d at 121.
75. *Id.*
76. Liteky v. United States, 510 U.S. 540, 548 (1994).
77. *Delesdernier*, 666 F.2d at 120.
78. *Id.* at 121–23.
79. *Id.*
80. United States v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990); *see also* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 168–69 (4th Cir.), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

opposition of the courts that do *not* impute a judicially implied timeliness requirement.[81] As is evident, the various interpretations of the recusal statute create vague and opposing precedent that makes it difficult for the judiciary to produce consistent results.

Congress's stated purpose concerning the specific text of § 455(a) indicates that the subsection was meant to be a "general, or catch-all, provision."[82] In *United States v. Baker*, the court commented that "[§] 455(a) is general in nature and does not rest on the personal bias and prejudice structure of either 28 U.S.C. § 144 or 28 U.S.C. § 455(b)(1)."[83] As a result, the general or catch-all provision fails to provide the guidance necessary to serve the congressional purposes of tightening and strengthening the judicial recusal standard.[84] Accordingly, the statute should be amended to provide clearer text and a straightforward meaning for application within today's judiciary.[85]

A. The Implications of Imputing a Timeliness Requirement in 28 U.S.C. § 455(a)

Some courts argue that an implied timeliness requirement applies beyond § 455(a).[86] For instance, many courts—as a matter of ease and due to a lack of statutory guidance—simply impute the same judicially implied timeliness requirement to § 455(b).[87] Those courts reason that judicial recusal is a highly fact-intensive situation that could arguably fall

81. *Delesdernier*, 666 F.2d at 120–21.

82. Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978) (quoting H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354).

83. United States v. Baker, 441 F. Supp. 612, 617 (M.D. Tenn. 1977).

84. *See* H.R. REP. NO. 93-1453, at 2–3, *reprinted in* 1974 U.S.C.C.A.N. at 6352–53.

85. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 5–6 (2d ed. 2006) ("Might the judge justify an interpretation that departs from the ordinary and literal meaning of the text by asking what the legislature 'intended' its words to mean in these circumstances? It is difficult to draft clear commands, in part because drafters lack the omniscience to foresee all circumstances that might arise. We also might feel that it is more respectful for the agent (the judge) to adhere to what the principal (the legislature) probably would have wanted, rather than to a wooden and literal interpretation of words that turn out to be poorly chosen in a given context. Indeed, we might think that 'interpretation' is best understood not as literal application of dictionary definitions, but instead as attempting to unlock the message the speaker intended to send. Thus, perhaps statutory text cannot be interpreted properly without this inquiry.").

86. *See* United States v. York, 888 F.2d 1050, 1053–54 (5th Cir. 1989).

87. *Id.*

under the language found in both subsections of § 455.[88] Other courts distinguish between the two subsections when discussing the timeliness requirement.[89] There are arguments on both sides of this issue regarding the notions of congressional intent and purpose, increasing the confusion of § 455(a)'s implementation among courts.[90]

Moreover, arguments exist regarding the actual application of the timeliness requirement. For example, if a timeliness requirement is applicable to the statute, it would be practically applicable to only § 455(a); thus, if a judicial conflict arises under § 455(b), then there would not be an implied timeliness requirement.[91] Furthermore, some courts have distinguished between § 455(a) and § 455(b) by stating that "timeliness is not a factor" under § 455(a).[92]

Courts have also commented on the leniency of the procedural aspect of § 455(a), noting that "a party may move for recusal under § 455(a) even without submitting a sworn affidavit, thereby avoiding the risk of perjury."[93] Since a litigant or individual does not have to submit a signed affidavit asserting specific facts, the procedural nature of § 455(a) helps a litigant avoid the potential implications of perjury; as a result, the statute does, in fact, create a very lenient standard.[94] This leads to the potential abuse of § 455(a), as the language of the statute is vague and litigants are not under the requirements of an affidavit.[95] Courts also disagree about how to interpret and apply the language of § 455(a).[96]

The procedural limitations of § 144 are also problematic when compared to § 455. It is important to note that "[b]y its terms, § 144 applies only in federal district courts, and each party may file only one affidavit in a given case."[97] This statute, § 144, contains an explicit timeliness requirement, but note that § 455(b)(1) states that a judge must

88. *See* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 168–70 (4th Cir.), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

89. *See, e.g.*, Delesdernier v. Porterie, 666 F.2d 116, 122 n.3 (5th Cir. 1982).

90. *See* ESKRIDGE ET AL., *supra* note 85, at 4–8.

91. *See Delesdernier*, 666 F.2d at 122 n.3.

92. United States v. Kehlbeck, 766 F. Supp. 707, 712 (S.D. Ind. 1990).

93. *Id.*

94. *See id.*

95. *See id.*

96. *See generally* Ellen M. Martin, Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 148–54 (1977) (discussing various interpretations of § 455(a)).

97. Jeremy S. Brumbelow, Case Note, Liteky v. United States*: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 ARK. L. REV. 1059, 1067–68 (1995) (footnote omitted).

"disqualify himself" from a proceeding "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[98] When comparing these statutes, the procedural guidelines are somewhat conflicting: "[S]ection 455 states that a judge shall recuse himself, but like its predecessor, does not specify whether a party may invoke the section, and if so, what procedural restrictions are applicable."[99] Many courts also impute the procedural framework of § 144 to § 455, and

> [a]lthough there is no cross-reference in the statute to [§] 144, the courts may use the latter statute to supply the procedural framework lacking in amended [§] 455. Such an interpretation is likely to be prompted by the realization that a litigant who wishes to disqualify the assigned judge for bias could circumvent the [§] 144 restrictions on such matters as timing and the number of permissible challenges simply by employing [§] 455 in its stead.[100]

Section 144 states clear procedural requirements; however, imputing those requirements to § 455 may muddy the waters, creating a purely speculative inquiry to ascertain whether the burden should lie at the litigant's doorstep or at the feet of a judge who has a potential conflict.[101] In many proceedings, litigants are bringing conflicts to the court's attention while the language of § 455(a) apparently places that burden on the judge.[102] Additionally, bias and prejudice have varying definitions, and courts comment in some cases on how difficult it is to find a solid definition to apply to the statute.[103] In many instances, the line between § 144 and § 455 can become so clouded that lawyers often bring motions to recuse under both statutes in an effort to achieve the best outcome for their clients.[104]

98. 28 U.S.C. § 455(b)(1) (2012).
99. Martin, *supra* note 96, at 153.
100. *Id.* (footnote omitted). Of particular interest to a litigant, "both the substantive and procedural standards for disqualification under [§] 455 have become more attractive to the challenging party. It appears there is no longer any reason to use [§] 144 at all, and that the section is only statutory detritus." *Id.* at 154.
101. Delesdernier v. Porterie, 666 F.2d 116, 119–21 (5th Cir. 1982).
102. Martin, *supra* note 96, at 153.
103. *See* Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975).
104. *See, e.g.*, United States v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990).

B. The Argument Against a Judicially Implied Timeliness Requirement

Some courts refuse to find a timeliness requirement because its application would reach beyond the text of § 455,[105] which lacks an express timeliness requirement.[106] For instance, in *SCA Services, Inc. v. Morgan*, the Seventh Circuit held that the statute "impose[s] no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought."[107] As previously mentioned, some might argue that courts should interpret the lack of a timeliness requirement in § 455 in conjunction with the timeliness requirement in § 144,[108] but the court in *Morgan* expressly rejected that argument.[109]

Circuit courts have also noted and discussed that Congress's decision to omit an express timeliness requirement from the language of § 455 is evidence that the statute expressly rejects such a requirement.[110] For example, the Seventh Circuit based its decision in *Morgan* on the fact that the United States Department of Justice ("DOJ") asked Congress to include a timeliness requirement in § 455, but Congress declined that request.[111] In rejecting a timeliness requirement, the court interpreted that congressional action to mean that there is not a timeliness requirement—reasonable or otherwise—in the statute.[112]

Likewise, in *Roberts v. Bailar*, the Sixth Circuit rejected a judicially implied timeliness requirement in § 455, stating that "[n]either the text nor the legislative history of § 455(a) contain any suggestion that the

105. *See* Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 262 (1978). "Courts have split on the question of a timeliness requirement in amended [§] 455, with the majority requiring a timely filing." *Id.*

106. *Delesdernier*, 666 F.2d at 121.

107. SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam).

108. *See supra* Section IV.A.

109. *Morgan*, 557 F.2d at 117.

110. *See, e.g.*, Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 168 (4th Cir.) (upholding denial of an untimely motion to recuse), *cert. denied*, 135 S. Ct. 437 (2014) (mem.); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) ("There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a).").

111. *See* 28 U.S.C. § 455 (2012).

112. *See In re* African-Am. Slave Descendants Litig., 307 F. Supp. 2d 977, 983 (N.D. Ill. 2004) ("The *Morgan* court reached its holding by reasoning that since Congress did not incorporate the [DOJ]'s recommendation that a time limit be included in the text of the statute, to impose such a time limit would frustrate the purpose of the statute."); *see also Morgan*, 557 F.2d at 117.

procedures of § 144 are applicable to disqualification under § 455(a)."[113] The Sixth Circuit further highlighted the fact that "Congress disregarded suggestions that requirements such as timeliness apply to disqualification under § 455."[114] Additionally, the lack of a timeliness requirement in the statute creates an uneven application regarding crucial pretrial motions, which may allow partial judges to preside over court proceedings where the judges are later found to have a conflict.[115] It is evident from this discussion that some courts have based their interpretation on a basic canon of statutory interpretation—the plain meaning rule—to find that Congress's lack of an explicit timeliness requirement in § 455 indicates an intention to exclude a timeliness requirement, meaning that the requirement should not be implicitly read into the statute's text.[116]

Furthermore, some have even argued that reading a timeliness requirement into the text of the statute "subverts the statute's intent."[117] In particular, they argue that the timeliness requirement subverts the statute's intent because Congress enacted the statute "to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality."[118] Their argument rests on the idea that a judge should not be subject to a stated time frame for recusal because if § 455 explicitly stated a timeliness requirement, a judge with a conflict could still preside over a proceeding in a situation where a litigant filed an untimely motion.[119] That position places the burden of avoiding actual impartiality or the appearance of impartiality solely on judges, and it holds that judges should recuse themselves regardless of whether the litigants have filed a motion to recuse in a timely manner.[120] Overall, the argument promotes the ideas that the statute is self-enforcing and that "[t]he timely filing requirement . . . pivots responsibility from the judges to the litigants when that duty and responsibility should lie with [the

113. *Roberts*, 625 F.2d at 128 n.8.

114. *Id.*

115. *See Kolon Indus., Inc.*, 748 F.3d at 184 (Shedd, J., dissenting) (arguing that the interests of justice are not served when, due to nothing more than an untimely motion that § 455 does not expressly state is necessary, a judge remains on the bench when he has a conflict).

116. *Id.* at 180–81 ("After all, '[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.'" (alteration in original) (quoting Jama v. Immigration & Customs Enf't, 543 U.S. 335, 341 (2005))).

117. *Id.* at 181.

118. *Id.* (quoting Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir. 1982)).

119. *See id.* at 181–82; *see also Delesdernier*, 666 F.2d at 121.

120. *See Kolon Indus., Inc.*, 748 F.3d at 181–82 (Shedd, J., dissenting).

judge]."[121] Although there is merit to that argument, it oversimplifies the statute's language and purpose, and it applies reasoning that is completely at odds with those courts that implement a judicially implied timeliness requirement. Consequently, it may be more efficient and effective to implement an explicit timeliness requirement in the language of the statute, which would ultimately increase public confidence in the judiciary.

C. The Absence of a Timeliness Requirement Subverts the Congressional Goal of Increasing Public Confidence in the Judiciary

It is important for Congress to react to current and ongoing situations regarding the judiciary, especially situations that place the judiciary in a potentially negative light and cause individuals to question the propriety of the judiciary.[122] The uneven results produced by the application of § 455 are troubling, and they create inconsistent precedent.[123]

1. Congress's "Repudiation" of the DOJ's Request Should Not Be an Impetus for Rejecting an Explicit Timeliness Requirement

Historically, courts have relied on the "judicial gloss" regarding timeliness that Congress supposedly understood to be in place when it enacted the newer version of § 455.[124] That judicial gloss imputed the previously implied timeliness requirement from the earlier version of § 455 to the newer statute, and it was understood "that a timeliness requirement was implicit."[125] However, as previously noted, the earliest version of § 455 did not include an explicit timeliness requirement in the text of the statute.[126] In addition to using judicial gloss, courts tend to cite a report from the DOJ that Congress received during § 455's revision

121. *Id.* at 182.

122. *See* SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam).

123. *Compare Kolon Indus., Inc.*, 748 F.3d at 170 (holding that a "timely-filing requirement applies to recusal motions under § 455(a) and (b) alike"), *with Morgan*, 557 F.2d at 117 (holding that there are no "time limits within which disqualification must be sought").

124. *See* United States v. York, 888 F.2d 1050, 1053 (5th Cir. 1989) ("[O]thers have asserted that Congress did not feel a need to include a timeliness requirement, as it was understood that the 'judicial gloss' on the former [§] 455 would be preserved and that a timeliness requirement was implicit.").

125. *Id.*

126. Delesdernier v. Porterie, 666 F.2d 116, 119 (5th Cir. 1982).

hearings.[127]

During debates regarding the statute's revision, Congress requested an opinion from the DOJ concerning the proposed legislation.[128] The DOJ subsequently submitted a report that detailed and described the usefulness of the proposed amendment.[129] The report also indicated that a requirement for timeliness would be useful and necessary "to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before."[130] The lack of a timeliness requirement and the potential impact the statute would have on the judiciary concerned the DOJ,[131] but Congress ultimately chose not to include the DOJ's recommendation in the legislation's final version.[132]

The reliance on certain legislative history documents sets the scene for drawing on the legislative history and congressional intent. However, it is not, and should not be, the only source for enacting and amending specific legislation.[133] Congress's reasons for rejecting the memo (including its reliance on the fact that courts would continue to impute an implicit timeliness requirement[134])—whether implicit or incidental—create a divide between courts regarding the application of the statute in federal practice, and Congress should remedy this divide.[135]

127. *See, e.g.*, *id.* at 120; *see also* H.R. REP. NO. 93-1453, at 7–9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6357–58.

128. *See* H.R. REP. NO. 93-1453, at 8, *reprinted in* 1974 U.S.C.C.A.N. at 6357.

129. *See id.*, 1974 U.S.C.C.A.N. at 6358.

130. *Id.* at 9, 1974 U.S.C.C.A.N. at 6358.

131. *See id.* ("However, consideration should be given to adding a provision such as is embodied in 28 U.S.C. [§] 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before.").

132. *Delesdernier*, 666 F.2d at 121.

133. *See* ESKRIDGE ET AL., *supra* note 85, at 222. ("The trouble starts when you try to determine what is meant by legislative intent: Is it the *specific intent* of the legislators, how they actually decided a particular issue of statutory scope or application? An *imaginative reconstruction* of what the legislators would have decided had they thought about the issue? Or the legislature's *general intent*, its *purpose* in enacting the law? The most legitimate basis for statutory interpretation under an intentionalist theory would be actual specific intent, but that is typically hard to discover, and it is completely unknowable when interpreters face new problems unanticipated by drafters.").

134. *See id.*

135. *See* SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam) ("Congress did not incorporate this recommendation in the statute. . . . [I]t is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute . . . .").

2. Public Confidence and Perception Regarding Impartiality in the Judiciary Should Influence the Language of 28 U.S.C. § 455(a)

The tenets of judicial impartiality and the appearance of impartiality are foundational parts of the American judicial system.[136] Public perceptions and opinions of impartiality can be as important as (if not more important than) actual impartiality.[137] Taking this into consideration, Congress recognized that the statute governing judicial bias and prejudice could be broadly construed, so it took measures to fix those inconsistences.[138] Congress drafted the text of § 455 to ensure that the impartiality of the judiciary remained unblemished.[139] Additionally, Congress specifically focused on public confidence in the judiciary as a purported purpose of the statute:

> [T]he purpose of the statute is to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality. That policy is not served by permitting an arguably biased judge to remain in a case simply because an incompetent or insufficiently diligent counsel failed to raise a timely objection.[140]

In theory, and perhaps in practice, this policy is straightforward and admirable, but an individual without a timeliness requirement may be tempted to remain quiet regarding issues of conflict that should be brought to the attention of the judiciary.[141] One court made the following observation:

> Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem. Congress did not enact § 455(a) to allow counsel to make a game of the federal

136. *See id.* at 113.
137. *See id.*
138. *See* H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352 ("These statutory and ethical provisions proved to be not only indefinite and ambiguous, but also, in certain situations, conflicting. The uncertainty of who was a 'near relative' or of when the judge was 'so related' caused problems in application of both the statutory and the ethical standards.").
139. *See* Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir. 1982).
140. *Id.*
141. *Id.*

> judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.[142]

The court's statement is laudable, but not all courts are bound by it; as a result, Congress should make the timeliness requirement explicit in § 455 to ensure that courts evenly apply the law. The judicial recusal inquiry is very fact intensive, and the statute does not provide any concrete procedural guidance.[143] As a result, the issue becomes murky and arbitrary.[144] For instance, the Fifth Circuit noted that it has "repeatedly observed that it 'has not "yet clearly defined the scope of [its] review of § 455 issues raised for the first time on appeal."' Although [it has] inferred a timeliness requirement from § 455, [it has] declined to adopt a *per se* rule on untimeliness."[145] The statute, as written, seems to place the burden on judges to recuse themselves whenever a conflict arises.[146] The distinction between a judge's knowledge and a litigant's knowledge—in addition to the time frame for when certain information comes to light during a proceeding—plays a key role in determining whether the interests of justice are properly served.[147] The following instance highlights that determination:

> The district judge knew, from the outset of litigation, that his prior law firm was representing a client that it represented when he was partner. As discovery began, the judge had before him multiple requests from [the litigant] to look into [previous] litigation and pleadings and filings, indicating that the [previous] litigation was central to [the litigant's] defense on the merits of the trade secrets claims. This is not a case in which a party discovered, for instance, financial information that the judge was unaware of and sat on that information until after trial. In this case the judge was, at all times, aware of the facts relevant to

142. *Id.*

143. United States v. Anderson, 160 F.3d 231, 233 (5th Cir. 1998) ("[E]ach [§] 455(a) case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances rather than by comparison to similar situations considered in prior jurisprudence.").

144. *See* United States v. Sanford, 157 F.3d 987, 988 (5th Cir. 1998).

145. *Id.* (citation omitted) (quoting Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 216 (5th Cir. 1998)).

146. *See id.*; *see also* 28 U.S.C. § 455(a) (2012).

147. Martin, *supra* note 96, at 147.

> recusal under § 455(b)(2) and it was up to the judge to self-enforce those statutory provisions.[148]

The court in the above instance squarely placed the burden of recusal on the judge; when the judge did not recuse himself, the court took that information under advisement but held that the judge had no enforceable duty regarding recusal.[149] A strongly worded dissent noted the impact that such a decision has on the appearance of impartiality (or lack thereof) in a proceeding:

> [T]he majority's determination that [the litigant's] recusal requests were untimely means that a district judge who, by the majority's own determination, is no longer permitted to conduct further proceedings involving the trade secrets claims, presided over a trial that ended in a *one billion* dollar verdict and a twenty-year worldwide production shutdown injunction. Such a result does not . . . inspire public confidence in the judiciary. The majority's rule leaves judges with no enforceable duty to remove themselves from cases absent action by a party. This result cannot be squared with the statute's purpose or language.[150]

The public perception of the judiciary is critical. In this instance, the bias of the judge (i.e., the bias of the judiciary) damaged the public perception of the impartiality that was expected in the proceedings—regardless of the trial's outcome.[151]

Congress can potentially remedy this issue and other related issues by clarifying the language in § 455. As history has shown, the timeliness requirement was judicially imposed, and courts have failed to develop consistent case law regarding that requirement.[152] Congress should, therefore, step in to amend § 455, which will make the the statute less susceptible to arbitrary interpretations; the impartiality of judges is important and necessary to the integrity of the judicial system. There should not be a variety of tests or standards that litigants and judges have

148. Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 184 (4th Cir.) (Shedd, J., dissenting), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

149. *See id.* at 178 (majority opinion); *see also id.* at 184 (Shedd, J., dissenting).

150. *Id.* at 184 (Shedd, J., dissenting).

151. *See id.*

152. *See generally* Martin, *supra* note 96, at 148–59.

to apply to determine the appropriateness of recusal; instead, the language of the statute should be clear and straightforward enough to make the necessity of recusal evident.[153]

3. A Litigant's Timeliness Issue Is Not Resolved by 28 U.S.C. § 144

The text of § 144 would not resolve any timeliness or appearance-of-bias issues posited under § 144. The language of § 144 states as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[154]

The text and structure of § 144 and the text of § 455 are markedly different and should be used for two separate purposes.[155] Additionally, nothing in the congressional hearings regarding § 455 suggests that the statutes should be read in conjunction with each other. In the senatorial hearing, Senator Ernest F. Hollings commented as follows: "With respect to the federal judiciary, there are two provisions dealing with disqualification, 28 U.S.C. [§] 144 which provides for disqualification for judicial bias or prejudice, and 28 U.S.C. [§] 455 which is the only [f]ederal provision on disqualification for interest and relationship."[156] The statutes were intended to oversee two different subject matters; in particular, § 144 was to be "the original bias disqualification statute, requir[ing] the judge to be disqualified if one of the parties submits a

153. *See generally* Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 332–34 (2d Cir. 1987) (detailing the litany of recusal standards and the tests a court can apply).

154. 28 U.S.C. § 144 (2012).

155. *See* Martin, *supra* note 96, at 152.

156. *Senate Hearing*, *supra* note 43, at 23–24 (statement of Sen. Ernest F. Hollings).

sufficient affidavit stating the reasons that the judge is biased or prejudiced."[157]

D. The Lack of an Explicit Timeliness Requirement Creates Conflict in Court Proceedings: Do Litigants Knowingly Conceal Ethical Issues for Strategic Purposes?

One of the main concerns regarding the lack of an explicit timeliness requirement in § 455 is that it encourages the knowing concealment of an ethical issue (i.e., a conflict) for strategic purposes.[158] An attorney might, under the right circumstances and incentives, withhold information regarding a potential ethical issue concerning a judge.[159] In that instance, if the litigant wins at the trial level, then it is unlikely that the attorney will bring the information to the court's attention; however, should the litigant lose at the trial level, the attorney will then raise the issue in hopes of receiving a new trial.[160] This is contrary to the congressional purposes for implementing the statute, and it subverts and mocks the judicial process.[161] A policy against this scenario is important because it "is vital . . . to prevent waste and delay" of judicial resources:[162]

> The policy argument in favor of instituting a timeliness requirement is . . . to prevent litigants from wasting valuable court resources by proceeding through a long trial, knowing all the time that there are grounds for recusal but waiting until the end of trial to make the [§] 455 motion should they lose.[163]

157. Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 793 n.35 (1993).

158. *See* Martin, *supra* note 96, at 161 ("[M]odern criticism has focused on the possibilities for abusing the peremptory system by asserting perjurious or frivolous claims for purposes of judge shopping or delay." (footnotes omitted)).

159. *See* Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir. 1982) ("If disqualification may be raised at any time, a lawyer is then encouraged to delay making a § 455(a) motion as long as possible if he believes that there is any chance that he will win at trial. If he loses, he can always claim the judge was disqualified and get a new trial.").

160. *See id.*

161. *See id.*

162. Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 168 (4th Cir.) (alteration in original) (quoting United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990)), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

163. United States v. York, 888 F.2d 1050, 1053–54 (5th Cir. 1989).

The circumstances in *Union Carbide Corp. v. United States Cutting Service, Inc.* demonstrate this situation.[164] There, the defendants "may have waited too long to move to recuse [the judge]" for a conflict of interest regarding the financial interests of the judge's husband.[165] Counsel "was reluctant to move to recuse the judge and did so only at his client's insistence. . . . This is not a good reason for delay, at least where the ground for disqualification is merely an appearance of partiality."[166] When an attorney seeks to game the system in such a manner, the judicial process is not placed in the most positive light, and it fails to maintain the high standards for which the judiciary is known:

> The public is not likely to be convinced that a judge is any less biased merely because the facts that cast doubt upon his impartiality were not complained about until well into the proceeding. On the other hand, it might legitimately be asked whether the spectacle of an attorney dragging his opponent through a long and costly proceeding, only to conclude by moving for disqualification of the judge, is not equally detrimental to public impressions of the judicial system.[167]

There is no problem with demanding a high standard of conduct from both judges and attorneys; however, in this instance, Congress could address the issue and perpetuate the existence of an impartial judiciary by amending the language of the statute.

Since some commentators advocate for a different timeliness requirement for § 455(a) and § 455(b), it is necessary to address whether such requirements promote the policy reasons for enacting the statute.[168] If there is a difference between § 455(a) and (b), "it . . . must hinge either on the distinction of waivability or on some greater interest in protecting against actual bias as opposed to mere appearance of impropriety."[169] The reason for this distinction is because the conflicts specified in § 455(b) are not waivable; therefore, they should not be subject to a timeliness requirement.

164. *See* Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 716 (7th Cir. 1986).
165. *Id.*
166. *Id.*
167. Litteneker, *supra* note 105, at 263 n.155.
168. *See York*, 888 F.2d at 1054–56.
169. *Id.* at 1054.

> [A] distinction should be drawn between § 455(a) and § 455(b) with respect to timeliness. Grounds for disqualification under § 455(a) permit a waiver after full disclosure of all relevant facts, while grounds under § 455(b) do not. This might suggest that arguments for timeliness under § 455(b) have less force, or at least that a requirement of timeliness under § 455(b) should be less stringent than one under § 455(a).[170]

This argument is meritorious, but Congress could still impose a timeliness requirement under § 455(b); this would not affect the waivability of the subsections since waivability and timeliness are separate and distinct issues.[171] Additionally, a timeliness requirement under § 455(a) would serve the same purposes if enacted under § 455(b).[172]

Due to the lack of an explicit timeliness requirement in the text of the statute, courts have been forced to apply various factor tests to determine whether a motion has been timely filed and which party shoulders the burden.[173] Courts employ various tests and arbitrary notions regarding who bears the burden under § 455.[174] In *Apple v. Jewish Hospital & Medical Center*, the court employed a four-factor test because "in considering the question of timeliness, the actual time elapsed between the events giving rise to the charge of bias or prejudice and the making of

170. Delesdernier v. Porterie, 666 F.2d 116, 122 n.3 (5th Cir. 1982) (citation omitted) (citing Litteneker, *supra* note 105, at 265).

171. *See York*, 888 F.2d at 1054–55 ("In assessing whether the arguments for a timeliness requirement have sufficient force, we observe that waiver and timeliness are distinct issues. The proscription against waiver in [§] 455(e) prohibits the parties from agreeing to relinquish their right to have the judge recuse himself if that recusal should be based upon [§] 455(b) grounds; in other words, [§] 455(e) prohibits the judge and the parties from agreeing among themselves to abrogate [§] 455(b).").

172. *See id.* at 1055 ("Thus, policy reasons supporting a timeliness requirement appear to be stronger than those supporting a waiver option. Hence, we conclude that it is more consistent with the legislative purposes underlying the entirety of [§] 455 for us to construe both subsections (a) and (b) as requiring timeliness.").

173. *See, e.g.*, Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333–34 (2d Cir. 1987); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631, 634 (5th Cir. 1971) (requiring the litigant to "produc[e] clear and convincing evidence that a public officer such as [the judge], failed to discharge the duty mandated by § 455").

174. Roberts v. Bailar, 625 F.2d 125, 129–30 (6th Cir. 1980) (noting that Congress used the 1974 amendment to "shift[] the focus of § 455" and holding that "[c]learly, under § 455(a), the District Judge had a duty to recuse himself"). In *Roberts*, the court based its decision solely on its concern with "the appearance of impartiality." *Id.* at 130.

the motion is not necessarily dispositive."[175] The court outlined the four factors as follows:

> (1) the movant has participated in a substantial manner in trial or pre-trial proceedings; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant can demonstrate good cause for delay.[176]

The court also stated that there may be additional factors that the court could consider regarding who should have the burden of bringing the conflict to the court's attention.[177] This factor test is directly adverse to Congress's intention and its purported purpose for enacting the judicial recusal statute.[178] Indeed, Congress intended the statute to be self-enforcing enough to direct the statute's burdens to the judiciary and not to the litigants.[179]

V. AN EXPLICIT TIMELINESS REQUIREMENT IN THE LANGUAGE OF THE STATUTE WILL PRODUCE CONSISTENT APPLICATION AND UNIFORM RESULTS

A. There Should Be an Explicit Timeliness Requirement in 28 U.S.C. § 455(a)

Again, the existing statutory text of § 445(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[180] The most efficient way to address the concerns that the ambiguity of the statute creates is to amend the statute, creating an explicit timeliness requirement. This would erase the need for any judicially created factor tests or implied timeliness requirements. The statute *should* read as follows:

175. *Apple*, 829 F.2d at 333–34.
176. *Id.* at 334 (citations omitted).
177. *See id.*
178. *See* Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir. 1982); *see also Roberts*, 625 F.2d at 129.
179. *Delesdernier*, 666 F.2d at 121.
180. 28 U.S.C. § 455(a) (2012).

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned *and the burden to inquire into potential conflicts, where his impartiality might reasonably be questioned, shall lie on the justice, judge, or magistrate judge of the United States. Any justice, judge, or magistrate judge of the United States shall recuse himself in a reasonable and timely manner*.

The language supporting an explicit timeliness requirement will help to conserve judicial resources and to prevent waste by ensuring that judges shoulder the burden of recusal.[181] Additionally, this language helps serve the purported congressional purposes for enacting § 455, ensuring the self-executing nature of the statute and making judges responsible for identifying a potential conflict.[182]

The burden that currently rests on litigants is putative in nature; Congress intended this statute to place the burden on the judge.[183] In application, this statute—with the new, explicit revisions—would place a burden on the judge to identify any surrounding conflicts. The judge would then be responsible for raising a potential conflict at the outset of the litigation. As previously mentioned, that burden would preserve judicial resources. It could also prevent situations similar to the one in *Kolon Industries, Inc. v. E.I. DuPont de Nemours & Co.*[184] In *Kolon Industries*, the appellate court upheld the district court's ruling despite acknowledging that the district judge presided over a trial (for which it took months to prepare) while aware of a conflict.[185]

Courts should repudiate the standard that encourages reading § 455(a) in conjunction with the procedural requirements of § 144 because there is no apparent congressional intention for these statutes to

181. *See* United States v. Int'l Bus. Machs. Corp. (*In re* Int'l Bus. Machs. Corp.), 618 F.2d 923, 933 (2d Cir. 1980).

182. Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980); *see also* United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980).

183. *See* Lindsey *ex rel.* Lindsey v. City of Beaufort, 911 F. Supp. 962, 967 n.4 (D.S.C. 1995).

184. *See generally* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160 (4th Cir.), *cert. denied*, 135 S. Ct. 437 (2014) (mem.).

185. *See id.* at 168–70 (upholding the district court's decision to deny the recusal motion—even though the trial judge was a former partner in a firm that had previously represented the prevailing party—because the petitioner waived the recusal issue by failing to raise it in a timely fashion).

be read in that manner.[186] Due to a lack of congressional guidance regarding this issue, courts have had to impute their own judicially imposed timeliness requirement, which produces varying results.[187] That is not an efficient option for the judiciary; thus, the statute should clearly reflect the congressional purpose through its text in order to eliminate the appearance of impartiality in the judiciary.

As the court stated in *United States v. Sibla*, "[§] 455, on the other hand, sets forth no procedural requirements. That section is directed to the judge, rather than the parties, and is self-enforcing on the part of the judge."[188] In *Sibla*, the court discussed the complementary nature of § 144 and § 455 and how they should be read in conjunction with each other.[189] Meanwhile, in other cases, judges have commented on the necessity of reading the statutes separately.[190] In *Summers v. Singletary*, the court stated that "policy considerations supporting a timeliness requirement are the same in each section: to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge."[191] Consequently, Congress must recognize the importance of maintaining clear statutory text that is responsive to today's needs, which include the necessity for the judiciary to actually remain impartial and to preserve the appearance of impartiality.

The suggested addition to the current language of the statute—"a reasonable and timely manner"—should be interpreted like it was in *Lindsey ex rel. Lindsey v. City of Beaufort*, meaning "made at counsel's first opportunity after discovery of the disqualifying facts."[192] The inclusion of the language regarding a reasonable and timely manner will further highlight the necessity for the judge to hold the burden.[193] In that instance, the judge would have the primary burden to discover conflicts;

186. *Id.*
187. *See* Delesdernier v. Porterie, 666 F.2d 116, 120–21 (5th Cir. 1982).
188. United States v. Sibla, 624 F.2d 864, 867–68 (9th Cir. 1980).
189. *See id.* at 868 ("In light of the difference in procedures for [§§] 144 and 455, it is apparent that the two sections are not redundant but are complementary, even when the only ground for recusal alleged is bias or prejudice. . . . Thus, [§] 455 modifies [§] 144 in requiring the judge to go beyond the [§] 144 affidavit and consider the merits of the motion pursuant to [§] 455 (a) & (b)(1).").
190. *See* Summers v. Singletary, 119 F.3d 917, 921 (11th Cir. 1997).
191. *Id.*
192. *See* Lindsey *ex rel.* Lindsey v. City of Beaufort, 911 F. Supp. 962, 966 (D.S.C. 1995).
193. *See id.* at 967.

however, in the event that the litigants discover a conflict, they should bring that conflict to the judge's attention immediately. Inserting the new language is also a step toward reducing the arbitrary interpretations of § 455, which continue to produce uneven results.

B. Maintaining Judicial Standards Is Necessary for Achieving Actual Impartiality and for Preserving the Appearance of Impartiality

Throughout the congressional hearings related to § 455, there was some discussion regarding the actual impartiality and the appearance of "impropriety" in the judiciary.[194] It is important to maintain the proper standard of respect, dignity, and trustworthiness for the judiciary and to ensure that our statutes preserve its relevancy and impact.[195] The standard that § 445(a) requires is "whether a reasonable person would infer that a trial judge's impartiality might reasonably be questioned."[196] This Note's proposed addition to the statutory language should not be construed as changing this standard;[197] the language simply adds additional guidance to the judge's burden in determining whether a

194. *See Senate Hearing*, *supra* note 43, at 110–11 (statement of Prof. E. Wayne Thode).

> Mr. WESTPHAL. All right. I think your general written statement you have submitted to the subcommittee covers this point, but I think it is important that it be clarified. Under what circumstances, or to what extent is impropriety or an appearance of impropriety a possible ground for disqualification?
> Professor THODE. Well, it seems to me it is only when the impropriety or the appearance of impropriety is the kind that would lead a reasonable person to question the judge's impartiality in the particular case. Not all kinds of improprieties are included in that, just those that have an impact on this particular case so that a judge might reasonabl[y] be thought not to be impartial.
> Mr. WESTPHAL. So in effect what the ABA committee has done, they have adopted a standard of avoidance of impropriety or appearance of impropriety as a general standard to guide the conduct of a judge in any of his activities on or off the bench?
> Professor THODE. That is correct. And he could be censored or otherwise brought to task for violation of that, even though it would be a violation that would not require his disqualification in a particular case.

Id.

195. *See supra* Section IV.C.

196. United States v. Baker, 441 F. Supp. 612, 617 (M.D. Tenn. 1977).

197. *See* United States v. Kehlbeck, 766 F. Supp. 707, 712 (S.D. Ind. 1990) ("[A] judge is required to recuse himself *sua sponte* under § 455(a) if he knows of facts that would undermine the appearance of impartiality.").

conflict exists.[198] The statute will still maintain "a self-enforcing duty on [federal] judge[s], but . . . a party to the action" should be able to bring a conflict to the attention of the court in the interest of maintaining actual impartiality and the appearance of impartiality within the judicial system.[199] Ultimately, judges should take a more active role in identifying and determining conflicts.

It is important to note that—for the purposes of maintaining actual impartiality and the appearance of impartiality—the timeliness requirement should not be construed as applicable to § 455(b). "Subsection (b), on the other hand, was addressed to specific instances 'which are in addition to the general standards set up in section (a).'"[200] The court also noted that "[w]e recognize, as indeed is apparent from subsection (b), that many cases exist where the mere appearance of partiality suffices for nonwaivable disqualification. It is a general rule that the appearance of partiality is as dangerous as the fact of it."[201] The House of Representatives noted that these specific instances were very serious and that these conflicts could never be waivable.[202] Based on statutory interpretation, there should not be a timeliness requirement regarding these specific instances, and the plain meaning of the text should stand:

> [P]lain meaning might be the best guide for applying a statute, because plain meaning is the most obvious and perhaps the most objective focal point for all of us to know what the rule of law requires of us and our neighbors; it is probably what our elected representatives intended or would have intended the law to mean; and it is likely to provide an acceptable resolution of the controversy.[203]

Section 455(b) states a clear and concise rule regarding judicial recusal, but § 445(a) uses an arbitrary and general phraseology that subjects the judiciary to a potential appearance of partiality. To achieve and maintain the appearance of impartiality, Congress should amend the

198. *See* Delesdernier v. Porterie, 666 F.2d 116, 119–20 (5th Cir. 1982).
199. United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980).
200. *Id.* at 881 (quoting H.R. REP. NO. 93-1453, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355).
201. *Id.*
202. *See generally* H.R. REP. NO. 93-1453, *reprinted in* 1974 U.S.C.C.A.N 6351.
203. ESKRIDGE ET AL., *supra* note 85, at 231.

text of § 455(a) to include precise and explicit text that would allow all federal judges—using the plain meaning rule of statutory interpretation—to interpret and evenly apply the statute.

The ABA's revised *Model Code of Judicial Conduct* and the subsequent legislation that Congress passed should be subject to continued deliberation and review. Congress should be responsive to the needs of the judiciary; the time has come to amend the legislation to continue meeting those needs. Roger J. Traynor, the former chief justice of the California Supreme Court, stated as follows:

> [T]he Committee realized that it would be futile to set Draconian standards that could not be obeyed in many areas in the country, [but] it deemed it essential to set a minimum standard applicable to all areas until such time as it is feasible to prescribe a higher standard for all areas.[204]

His concerns centered on the ideas that the changes should be implemented gradually and that those changes would eventually include an explicit timeliness requirement in § 455.[205]

It appears that a prominent theme throughout the testimonies of the various judges and law professors at the congressional hearings regarding § 455 was the idea that the standards enumerated in the canons of judicial ethics and the proposed statutory text would not be the final result. Perhaps this reflects the importance of continuing to strive toward a higher standard that will ensure the clarity and consistent application of § 455. Accordingly, Congress should continue to deliberate and review the ABA's revised *Model Code of Judicial Conduct* and the subsequent pieces of related legislation in order to appropriately respond to the needs of the judiciary.

VI. CONCLUSION

The clarity of a statute's text is important to promote an efficient judiciary and to save judicial resources.[206] A judicially implied timeliness requirement creates an unclear standard that will not suffice under the

204. *House Hearing*, *supra* note 33, at 6 (statement of Hon. Roger J. Traynor, Chairman, ABA Spec. Comm. on Standards of Judicial Conduct).

205. *See id.*

206. *See* Martin, *supra* note 96.

current text of § 455. An *implied* timeliness requirement creates confusion and produces uneven and arbitrary results. Congress should amend the statute to state an *explicit* timeliness requirement under § 455(a). That could resolve the ambiguity and irregular application of the statute, which has historically included various tests and arbitrary interpretations. Congress can further its efforts to continue holding the judiciary to a high ethical standard by enacting this explicit requirement.