The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?

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NOTE

THE RULE OF NECESSITY: IS JUDICIAL NON-DISQUALIFICATION REALLY NECESSARY?*

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* This Note was one of the winners of the 1995 New York State Bar Association's Law Student Legal Ethics Award.
I. INTRODUCTION

An essential element of our system of justice is an independent, impartial adjudicator. Only when this element is present can we believe that decisions will be made on a fair and impartial basis and that justice has been done. The requirement of a neutral decisionmaker "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Without this requirement, all of the other components of due process in our system, such as the right to an attorney, a hearing, a transcript, and to cross-examine witnesses, become useless and meaningless. Indeed, due process of law requires not only freedom from partiality, but also the appearance of impartiality. Hence, many statutes and judicial codes seek to prevent one who has a conflict of interest, is biased, or who appears to be biased, from adjudicating a case.

In jurisprudence, however, a well-accepted exception exists to this standard. This exception is known as the Rule of Necessity and can be traced back to the 15th century. It provides that "[i]f no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, [then] the original judge assigned to the case need not be disqualified despite his or her partiality." This exception is invoked by

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2. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951); Abramson, supra note 1, at 1046.
7. Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 5.03 (1995). The Rule of Necessity as used in this Note should not be confused with another rule of necessity that exists in legal ethics. The ethical "rule of necessity" causes a presumption that a conflict of interest exists when an attorney must confront an opposing client with whom the attorney has had a substantial previous relationship. See Vangsness v. Superior Court, 206 Cal. Rptr. 45 (Ct. App. 1984). Another rule of necessity exists in evidentiary matters where a prosecutor must demonstrate the unavailability of a declarant before a court will allow hearsay to be admitted. See Ohio v. Roberts, 448 U.S. 56, 65 (1980).
courts today in cases concerning judicial salaries,9 taxpayers and ratepayers of utilities,10 and class action suits where all judges in a given court are affected by the outcome.11 The Rule of Necessity is applied not only by the courts, but also by federal administrative agencies that have exclusive jurisdiction over certain matters.12 It is also used by local boards that can terminate employees from their jobs13 or impeach local officials,14 and by the chief executive of a state to justify his legitimacy in deciding whether a convicted felon lives or dies.15

However, the Rule of Necessity should not be invoked as often as it is today. In most cases, alternatives should be explored before a decisionmaker invokes the Rule to justify acting where a conflict of interest occurs or where impartiality is questioned.16

Part II of this Note traces the movement over the last 300 years that has sought to prevent judges from hearing cases in which they may have an interest. Part III examines the history of the Rule of Necessity and its current applications in judicial, administrative, and executive decisionmaking contexts. This Part also concludes that the Rule should not be applied as often as it is. Part IV contains several proposals to reduce the number of instances in which the Rule is applied.

10. In re New Mexico Natural Gas Antitrust Litig., 620 F.2d 794, 795 (10th Cir. 1980); In re Virginia Elec. & Power Co., 539 F.2d 357, 360 (4th Cir. 1976); Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo.), cert. denied, 493 U.S. 983 (1989).
11. In re City of Houston, 745 F.2d 925, 930 n.9 (5th Cir. 1984) (noting that a judge could have applied the Rule of Necessity to justify ruling in a class action civil rights suit); In re Johns-Manville Corp., 43 B.R. 765, 770 (Bankr. S.D.N.Y. 1984) (allowing the judge to rule in an asbestos class action suit in which all judges in the Southern District of New York were exposed to the asbestos via the courthouse).
12. See FTC v. Cement Inst., 333 U.S. 683 (1948); Annotation, Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified to Act in Particular Case, 39 A.L.R. 1476, 1479-80 (1925) [hereinafter Annotation].
16. See infra text accompanying notes 101-11.
II. THE ROOTS OF IMPARTIAL ADJUDICATION

A. English Common Law

The use of an independent adjudicator in resolving disputes has long been a foundation in the Anglo-American system of law.¹⁷ In the common law, the doctrine *Nemo Judex in re sua*¹⁸ was so central that "Lord Coke insisted upon a court's right to invalidate acts of Parliament that ignored it."¹⁹

An example of its importance was demonstrated in *Dr. Bonham's Case*²⁰ where a graduate of Cambridge University was imprisoned by the Board of Censors of the Royal College of Physicians ("Board") for refusing to yield to competency tests.²¹ If the Board had found Bonham incompetent, it would have been authorized by statute to impose a fine on him, one-half of which would go to the college itself.²² In a false imprisonment action brought against the Board, Lord Coke held that the statute in question could not grant the Board the authority to levy fines. The Board was an interested party because it would reap a financial benefit by finding the doctor guilty.²³

The common-law, however, confined disqualification of judges to cases of direct pecuniary interest.²⁴ Disqualification due to bias of a judge was not permitted.²⁵

B. American Origins

The concept that an independent and impartial adjudicator of disputes is essential to a system of justice was instilled in the United


¹⁸. "[N]o man is to be a judge in his own cause." Redish & Marshall, *supra* note 4, at 479; see *In re Murchison*, 349 U.S. 133, 136 (1955); Dimes v. Grand Junction Canal, 10 Eng. Rep. 301, 305 (H.L. 1852). It is also expressed as *Nemo unquam judicet in se*. Black's Law Dictionary 1039 (6th ed. 1990). This sentiment was also shared by the Founders of the American Republic. See *infra* note 28.

¹⁹. Redish & Marshall, *supra* note 4, at 479-80; see also Frank, *supra* note 17, at 610.


²³. *Id.* at 651-52; Redish & Marshall, *supra* note 4, at 480.

²⁴. See Frank, *supra* note 17, at 609.

²⁵. *Id.* at 612.
States at the beginning of the Republic.26 By providing for life tenure on good behavior, Article III of the Constitution provides for federal judges to be insulated from political pressures and political removal that result from partisan concerns.27 The Founders believed that only an independent judiciary could truly provide a system of justice that would protect the rights of all.28

C. Due Process Justifications

An impartial adjudicator also is essential to preserving due process rights under the Fifth and Fourteenth Amendments to the Constitution.29 The right to notice, counsel, the opportunity to be heard, and the confrontation of witnesses do not assure fairness if no impartial decisionmaker exists.30

One of the first cases by the United States Supreme Court that stressed the importance of judicial impartiality is Tumey v. Ohio.31 In Tumey, the defendant had been convicted and fined for unlawful

27. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.
28. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . ." THE FEDERALIST No. 10, at 18 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

... .

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id. No. 78, at 228, 230-31 (Alexander Hamilton).

30. Redish & Marshall, supra note 4, at 476.
possession of an intoxicating liquor by the mayor of a small village in Ohio. Under the Ohio statute, one-half of any fine collected went to the state, and the other half went to the village. The village had an ordinance which provided that the mayor would receive his own personal costs from the village's share, which in this case amounted to twelve dollars. The Court held that a system where a judge is paid only when he convicts is unconstitutional because a defendant is deprived of his due process of law when his liberty or property is subjected to a judge who has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Only when the costs are so small that they may be considered remote and de minimis can they possibly be allowed.

What is most interesting about this case is the Court's finding that a violation of due process occurs only when a judge has a financial interest in a case. As far as the Constitution is concerned, other types of bias may be permissible. While later cases have upheld the concept that a pecuniary interest by a judge in a case clearly violates due process, these cases have been vague as to whether other biases also violate the right.

D. Statutory Basis

Three federal statutes govern the circumstances under which a federal judge can be prevented from hearing and deciding a case due to

32. Id. at 517.
33. Id. at 519, 523.
34. Id. at 523.
35. Id. at 531.
36. Redish & Marshall, supra note 4, at 500. This holding reflects the common law view of when a judge should be disqualified. See Frank, supra note 17, at 609-12.
37. "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." Tumey, 273 U.S. at 523.
39. See Aetna Life Ins., 475 U.S. at 821 (holding that "only in the most extreme of cases would disqualification on [that] basis be constitutionally required," without saying what those cases would be); In re Murchison, 349 U.S. 133, 136 (1955) (holding that "[f]airness of course requires an absence of actual bias in the trial of cases" and "justice must satisfy the appearance of justice" in ruling that a single person cannot act both as a judge and a grand jury in a case). But see Redish & Marshall, supra note 4, at 500-02 (noting that the Court is reluctant to find due process violations for personal bias and has never found it for predisposition to facts or law in a case).
a conflict of interest. \(^40\) The first statute, 28 U.S.C. § 47, \(^41\) simply codifies the principle that a case may be reviewed on appeal only by someone other than the original decisionmaker. \(^42\)

Significant differences exist between the remaining two statutes, 28 U.S.C. §§ 144 and 455, although facially they appear to be more procedural than substantive. \(^43\) Section 144 \(^44\) contains more narrow restrictions because it applies only to federal district court judges and requires a party to timely file an affidavit stating facts sufficient to establish bias. \(^45\) Courts have required a "clear and convincing" standard to invoke the statute based on the allegations, which are viewed in light of whether they "would convince a reasonable man that bias exists." \(^46\) These standards balance the requirement of the statute that the facts stated in the affidavit must be taken as true, even if the judge knows them to be false. \(^47\) Although section 144 appears to allow the parties one challenge for cause of a judge in each case, \(^48\) the statute in practice is more protective of a judge's ability to sit since the time limit for making the challenge and the affidavits alleging bias are strictly construed. \(^49\)


\(^41\) "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1994).

\(^42\) See Stempel, supra note 40, at 628.


\(^44\) Section 144 provides:

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.


\(^46\) Id. (quoting United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973)).

\(^47\) Id. at 706-07.

\(^48\) See supra note 44 for text of the act.

\(^49\) Bloom, supra note 1, at 667; Stempel, supra note 40, at 629; see also Berger v. United States, 255 U.S. 22 (1921) (holding that a judge is not automatically disqualified by the allegations of bias in the affidavit even though they are presumed to be true). According to Berger, the judge must first determine if the allegations are legally sufficient to prove bias, and if so, he is disqualified. Id. at 36. A legally sufficient affidavit "must give fair support to the charge of a bent of mind that
Section 455\textsuperscript{50} applies to all judges and justices, and is not restricted to cases of personal bias or prejudice.\textsuperscript{51} It provides for recusal even if automatic disqualification had a potential for abuse and could lead to judge shopping. \textit{Id}. at 35-34. The court was concerned that any proceeding in which his impartiality might reasonably be questioned.

Section 455 provides, in relevant part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(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 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.

\textit{Id}. at 35-34.


\textsuperscript{51} Bloom, supra note 1, at 670-71.
absent a showing of bias or prejudice "so long as the movant can
demonstrate that a reasonable person could entertain serious doubts as to
the judge’s impartiality."52

Section 455 was enacted in 1974 to replace the previous statute,53
which had been criticized for being vague and contradictory.54 The most
significant change was transforming the standard for disqualification from
a subjective to an objective one by removing the phrase "in his opinion"
and substituting "which his impartiality might reasonably be ques-
tioned."55 The new statute also eliminated the "duty to sit" doctrine.56
That doctrine required that a judge decide borderline questions of recusal
in favor of presiding over a case.57

Although the grounds for disqualification under section 144 are set
forth in section 455,58 section 455 does not require an affidavit to be
filed. Nor does section 455 impose a time requirement or require a
certificate of counsel or record to certify that the motion has been made
in good faith.59 Unlike section 144, section 455 is also "self-enforcing"
for it places the burden on the judge to recuse himself *sua sponte* if any
of the specified circumstances are present.60

Section 455 is divided into two parts.61 Section 455(a) provides
that any judge "shall disqualify himself in any proceeding in which his
impartiality might reasonably be questioned."62 This "appearance of
bias" standard mandates disqualification when a reasonable person could

52. Stempel, *supra* note 40, at 629-30; see Abramson, *supra* note 1, at 1051-52.
53. The previous statute provided:

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.

54. *Id.* at 5, reprinted in 1974 U.S.C.C.A.N. at 6355 (stating that the purpose of the revisions
were to "promote public confidence in the impartiality of the judicial process by saying, in effect,
if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify
himself and let another judge preside over the case"); Bloom, *supra* note 1, at 672.
*supra* note 1, at 673; Adam J. Safer, Note, The Illegitimacy of the Extrajudicial Source Requirement
56. *Id.* at 5, reprinted in 1974 U.S.C.C.A.N. at 6355; Bloom,
*supra* note 1, at 673; Safer, *supra* note 55, at 796.
60. 28 U.S.C. § 455(a); Bloom, *supra* note 1, at 671; Hoekema, *supra* note 45, at 698.
61. Abramson, *supra* note 1, at 1048; Bloom, *supra* note 1, at 672.
merely question a judge’s impartiality, regardless of whether bias actually exists. Section 455(b) enumerates specific situations where a judge must disqualify him or herself from the matter. In particular, section 455(b)(1) incorporates the standard of section 144 by requiring recusal when the judge has an actual bias towards a party in the case, or has personal knowledge of disputed evidentiary facts concerning the proceedings. Other portions of section 455(b) prevent a judge from hearing cases where: the judge previously served as a lawyer in the matter; a lawyer with whom the judge previously practiced law served as a lawyer, judge, or material witness concerning the matter during their association; the judge was formerly in government employment and served as counsel, adviser, or a material witness concerning the matter, or expressed an opinion concerning the merits of the particular case in question, the judge, his or her spouse, “a person within the third degree of relationship to either of them” or the spouse of such a person, is a party, lawyer, likely to be a material witness or “[i]is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding”; or the judge, his or her spouse, or minor children residing at home have a financial interest in the subject matter in controversy, no matter how small the interest. The statute also imposes an affirmative duty upon a judge to be informed about his or her own financial interests and to make a reasonable effort to be informed about the interests of his or her spouse or minor children.

63. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859 (1988) (holding that a district court judge was disqualified from ruling in a case in which the plaintiff was purchasing land from Loyola University, where the judge was a trustee); Bloom, supra note 1, at 674; Hoekema, supra note 45, at 708; Safer, supra note 55, at 797.
64. 28 U.S.C. § 455(b).
65. Id. § 455(b)(1); Stempel, supra note 40, at 630.
67. Id. § 455(b)(3).
68. Id. § 455(b)(5); see also Stempel, supra note 40, at 630 (noting that the provision includes any relative “short of a cousin”).
69. 28 U.S.C. § 455(b)(5).
70. Id.; Unlike other conflicts, a financial conflict cannot be waived by the parties. 28 U.S.C. § 455(b)(4); In re Cement Antitrust Litig., 688 F.2d 1297, 1313 (9th Cir. 1982) (disqualifying a judge from hearing a case in which his wife held stock in plaintiff companies and did not opt out of class action suit), aff'd, 459 U.S. 1191 (1983); H.R. Rep. No. 1453, supra note 53, at 5, reprinted in 1974 U.S.C.C.A.N. at 6357; Hoekema, supra note 45, at 710.
71. 28 U.S.C. § 455(e).
E. Ethical Codes

The first ethical code for judges, promulgated by the American Bar Association ("ABA") in 1924, contained several provisions regarding judicial disqualification due to possible self-interest. These Canons protected against the appearance of partiality and emphasized the need to avoid activities that might interfere with judicial duties. The 1924 Canons, however, were highly criticized and the ABA replaced them in 1972 with the Model Code of Judicial Conduct, which became a model for judicial codes in all but three states. A section on disqualifi-

72. SHAMAN ET AL., supra note 7, § 1.02; Steven Lubet, Regulation of Judges' Business and Financial Activities, 37 EMORY L.J. 1, 3 (1988); CANONS OF JUDICIAL ETHICS (1924). One of the motivations for formulating these Canons was to respond to United States District Court Judge Kenesaw Mountain Landis' working simultaneously as a federal judge and also as the first commissioner of baseball. He received $42,500 from baseball and $7,500 for being a federal judge. See JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180-81 (1974). Ironically, Landis was also the judge whose behavior was criticized in Berger v. United States, 255 U.S. 22 (1921). See supra note 49.

73. The ethical canons provided:

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

CANONS OF JUDICIAL ETHICS Canon 13 (1924) (Kinship or Influence).

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

Id. Canon 26 (Personal Investments and Relations).

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Id. Canon 29 (Self-Interest).

74. Lubet, supra note 72, at 3.

75. These canons were viewed as emphasizing "moral posturing" and proved to be "more hortatory than helpful in providing firm guidance for the solution of difficult questions." SHAMAN ET AL., supra note 7, § 1.02.

76. Montana, Rhode Island, and Wisconsin have not adopted the Model Code of Judicial Conduct. Kittie D. Warshawsky, The Judicial Canons: A First Step in Addressing Gender Bias in
cation was formulated that outlined instances where a judge should not hear a case due to an appearance of impartiality, or the existence of actual bias.\textsuperscript{77} The amended 28 U.S.C. § 455 was based on the ABA’s 1972 Model Code.\textsuperscript{78} Although the Model Code was revised in 1990,\textsuperscript{79}

\textit{the Courtroom}, 7 GEO. J. LEGAL ETHICS 1047, 1052 n.25 (1994).

\textsuperscript{77} The pertinent sections provide:

C. DISQUALIFICATION

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) 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;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) 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.

(2) 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.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

D. REMITTAL OF DISQUALIFICATION

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge’s participation, all agree in writing that the judge’s relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers, shall be incorporated in the record of the proceeding.


\textsuperscript{78} H.R. REP. No. 1453, supra note 53, at 1-2, reprinted in 1974 U.S.C.C.A.N. at 6351-52. The ABA code and § 455 depart sharply in that § 455 does not include a waiver of disqualification provision if the judge has only a small financial interest in the case at hand. Congress did this
most states still retain a Code based on the 1972 version. 80

III. RULE OF NECESSITY

A. History

The origin of the Rule of Necessity is uncertain. The first case to invoke the Rule can be traced to England in 1430, where it was held that the Chancellor of Oxford could act as the judge in a case in which he was also a party since no provision existed for the appointment of another judge to hear the case. 81 The Rule was first codified in a 1743 Act of Parliament which provided that justices of the peace were not disqualified from deciding cases simply because they had a dual status as taxpayers. 82 Another early example of the Rule was *Dimes v. Grand*

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80 Intentionally because it believed that “confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.” *Id.* at 7, *reprinted in* 1974 U.S.C.C.A.N. at 6357.

81. The 1990 Code is essentially the same as the 1972 version, with some minor modifications. Due to some reorganizational changes, the disqualification section has been moved from Canon 3C to 3E. Section 3E(1)(a) added bias or prejudice against a party’s lawyer to the list of disqualifying circumstances. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 26-29 (1992). Section 3E(1)(c) expanded the disqualification to include the economic interests of a spouse, parent, or child who does not reside with the judge. *Id.* at 28. Section 3E(1)(d) was revised to state that a *de minimis* interest should not disqualify a judge. *Id.* at 28-29. This revised code illustrates that the ABA is still at odds with Congress over 28 U.S.C. § 455. The Model Code provides that a *de minimis* financial interest should not disqualify a judge from hearing a case and still contains a provision for a waiver of disqualification, whereas § 455 does not. 28 U.S.C. § 455; MODEL CODE OF JUDICIAL CONDUCT, Canon 3(E)(1)(c), (F) (1990).


83. See United States v. Will, 449 U.S. 200, 213 (1980); FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 270 (1929); SHAMAN ET AL., *supra* note 7, § 5.03.

84. See Frank, *supra* note 17, at 611. The statute provided:

Whereas Doubts have arisen whether, according to the Laws and Statutes now in Force, his Majesty’s Justices of the Peace may lawfully act in any Case relating to the Parishes or Places to the Rates and Taxes of which such Justices respectively are rated or chargeable . . . be it enacted . . . That it shall and may be lawful to and for all and every Justice or Justices of the Peace . . . to make, do and execute all . . . Things appertaining to their Office . . . notwithstanding that any such Justice or Justices . . . is or are rated to or chargeable with the Taxes, Levies, or Rates within any such . . . Place affected . . . .

Junction Canal, in which Lord Chancellor Cottenham was disqualified from participating in a case because he held shares in a company that was a party to the litigation. The Vice-Chancellor decided the case and the Lord Chancellor enrolled the decree for the case to be appealed to the House of Lords. The House of Lords concluded that the Lord Chancellor was disqualified from deciding the merits of the case, but was by necessity required to "enrol the decree" to make judgment final and the case appealable.

In the United States, the Rule of Necessity gained acceptance in the 19th Century. Both federal and state courts have accepted the Rule of Necessity. The United States Supreme Court applied the Rule in Evans v. Gore, which dealt with the taxability of salaries of federal judges. Although all of the members of the Court were substantially affected by the decision, they felt compelled to decide the case.

84. See Resnik, supra note 83, at 1891 n.41.
85. Id.
86. Id. Hence this case does not appear to be a classic example of the Rule of Necessity. The Lord Chancellor did not actually take part in deciding the merits of the case, but rather took part in a technical formality to satisfy procedural requirements. See also Thellusson v. Rendlesham, 11 Eng. Rep. 172, 211 (H.L. 1859) (noting that although the Lord Chancellor (Lord Chelmsford) had served as counsel to one of the parties concerning the case at an earlier date, he could have decided the case if he were the only judge with the authority to hear it).
87. The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be.

Philadelphia v. Fox, 64 Pa. 169, 185 (1870) (referring to a case, City of Philadelphia v. American Philosophical Soc'y, 42 Pa. (6 Wright) 9 (1862), in which judges that were members of the American Philosophical Society decided whether taxes should be levied against a building utilized by the Society because they were the only ones who could hear the case); see Commonwealth v. Ryan, 5 Mass. 89 (1809); In re Leefe, 2 Barb. Ch. 39 (N.Y. Ch. 1846) (holding that although a state statute prevented the chancellor from sitting in a case in which a relative was a party, the state constitution required that only the chancellor could hear an appeal from all inferior equity tribunals, and that therefore the chancellor must decide the case).
88. See Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936).
89. 253 U.S. 245 (1920).
90. Id.
91. The Court stated:

Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other
The Supreme Court directly addressed the validity of the Rule of Necessity in *United States v. Will.*\(^92\) *Will* concerned several acts of Congress that repealed previously authorized cost-of-living increases for high-level federal employees, including federal judges.\(^93\) In response, thirteen United States District Court judges filed a class action suit against the United States in the Northern District of Illinois on behalf of all Article III judges,\(^94\) arguing that the statute violated the Compensation Clause of the Constitution.\(^95\) The district court granted summary judgment in favor of the plaintiffs, and the case was appealed directly to the Supreme Court.\(^96\) Since all the members of the Court had a direct interest in the case, disqualification statutes would ordinarily have required that the Members of the Court should recuse themselves.\(^97\) The Court held, however, that section 455 did not operate to disqualify the members of the Court because then the case could not possibly have been heard since all federal judges were parties to the case.\(^98\) The Court then held that repealing the pay increase for two of the four years violated the Compensation Clause of the Constitution.\(^99\) The case was remanded to the district court for calculation of the dollar amounts that the Justices should be compensated.\(^100\)

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appellate tribunal to which under the law he could go.  
*Id.* at 247-48. Incidentally, the Court held in *Evans* that it was unconstitutional to tax the salaries of federal judges because such a tax violated the Compensation Clause. *Id.* at 264.

93. *Id.* at 206-08.
94. *Id.* at 209.
95. The Compensation Clause provides that federal judges shall receive compensation “which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.
98. *Will*, 449 U.S. at 214-16. In its decision the Court stated that in enacting § 455, Congress did not intend to alter the Rule of Necessity. *Id.* at 217. However, the Court inferred that Congress never intended to alter the Rule on the basis that it was never mentioned in the legislative history. *Id.* at 216; see also H.R. REP. NO. 1453, *supra* note 53, reprinted in 1974 U.S.C.C.A.N. at 6351 (containing the legislative history of the statute).
100. *Id.* at 231.
B. Modern Applications

1. Judicial

Cases concerning judicial salaries are probably the best example of when the Rule of Necessity is applied today. The Rule is also used in cases affecting statewide pensions and requirements for judicial retirement in the states, as well as cases where all citizens of a state, including the judges, are affected by their status as taxpayers, or as ratepayers to a single utility. Under the Rule, judges have been allowed to sit in cases where they are affected by the status of receiving a paycheck from the United States government, and in class actions where they may be affected by the outcome. The Rule has even been applied in instances where an attorney who represented a judge in a class action suit appears before that judge in another matter.

More recently, it appears that the Rule is applied most often when a litigant sues all of the members in a court system with frivolous suits in an attempt to prevent other cases from being heard, or when a


102. See Board of Trustees v. Hill, 472 N.E.2d 204 (Ind. 1985); Oakley v. Gainer, 331 S.E.2d 846 (W. Va. 1985).


104. 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); Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo. 1989); see also Exxon Corp. v. Heinze, 792 F. Supp. 72 (D. Alaska 1992) (stating that a judge could not recuse himself from a case concerning the Alaska Permanent Fund because all state residents, including all other judges, receive payments from the fund).


106. In re City of Houston, 745 F.2d 925 (5th Cir. 1984) (noting that the judge could have used the Rule of Necessity to justify ruling in a class action civil rights suit); In re Johns-Manville Corp., 43 B.R. 765 (Bankr. S.D.N.Y. 1984) (allowing a judge to rule in an asbestos class action suit for all judges in the Southern District of New York who were exposed to the asbestos via the courthouse).


108. See Guinn v. Finisilver, 48 F.3d 1232 (10th Cir. 1995) (table decision, full text available in 1995 WL 94651) (invoking the Rule of Necessity when party sued all judges who heard his cases); In re Complaint of Doe, 2 F.3d 308 (8th Cir. 1993) (allowing Judicial Council to decide judicial conduct complaint where many members of the Council were named as respondents); Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976) (refusing to allow plaintiffs to prevent their own prosecution by suing all members of the legal profession); In re Nowak, 143 B.R. 154 (Bankr. N.D. Y. 1991).
litigant threatens all of the members of a court system with physical harm.109 The Rule is also discussed in cases where the defendant in a criminal action is also a sitting judge,110 as well as in disbarment and attorney disciplinary hearings where the presiding judges may have promulgated rules concerning lawyer conduct.111

The Rule has not been applied in a number of situations where one might expect it to be used. For example, the Rule is not applied when a chief judge files a suit as the administrator of a state’s court system.112

Ill. 1992) (holding that judge was not forced to recuse himself when debtor sued him and many other judges alleging that they had committed treason); United States v. Van Dyke, 568 F. Supp. 820 (D. Or. 1983) (disallowing defendants’ attempts to disqualify all federal judges when they sued every one after they attempted to protest taxes by filing frivolous documents with numerous county clerks); Say & Say v. Castellano, 27 Cal. Rptr. 2d 270 (Ct. App. 1994) (preventing the plaintiff from frustrating the ability of the court to adjudicate by filing a case against a judge and hoping for recusal); Say & Say, Inc. v. Ebershoff, 25 Cal. Rptr. 2d 703 (Ct. App. 1993) (finding that the plaintiff was a “vexatious litigant” by filing suit against any judge assigned to their case, and that therefore dismissal should not be allowed); In re Appointment of Special Judge, 500 N.E.2d 751 (Ind. 1986) (finding that since no reasonable basis existed for defendant’s claim against the judge, the Rule of Necessity would allow such judge to adjudicate the case); Muka v. New York State Bar Ass’n, 466 N.Y.S.2d 891 (Sup. Ct. 1983) (allowing the Rule of Necessity to preclude recusal of a judge who had been sued by plaintiff, both individually and as a member of the New York State Bar Association); State v. Werner, 651 A.2d 1234 (R.I. 1994) (invoking the Rule of Necessity when defendant had filed suit against all of the justices of the Rhode Island Supreme Court); Filan v. Martin, 684 F.2d 769 (Wash. Ct. App. 1984) (utilizing the Rule of Necessity to allow a judge to dismiss a suit in which the plaintiff claimed that immunity for judges and prosecutors was against the principles of the Declaration of Independence).


110. See United States v. Claiborne, 781 F.2d 1327 (9th Cir. 1986); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984). In Petition to Inspect, a special committee of federal judges was authorized under 28 U.S.C. 884 (1984) to investigate charges of bribery against Federal District Court Judge Alcee Hastings. Judge Hastings argued that since the case aroused issues of concern to all Article III judges, the Judges should have disqualified themselves under 28 U.S.C. § 455. The Eleventh Circuit ruled that although the judges were interested, the Rule of Necessity allowed them to investigate the case. Id. at 1266. But see United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987) (holding that the Rule of Necessity did not allow disqualified judges to sit in rehearing en banc concerning conviction of a federal judge since other judges were available to hear the case), cert. denied, 484 U.S. 1026 (1988).

111. See Anonymous v. Grievance Commn., 527 N.Y.S.2d 248, 250 (App. Div. 1988); see also United States v. Wright, 873 F.2d 437, 446 (1st Cir. 1989) (noting that the Rule of Necessity may be utilized to allow a judge who was a member of the Sentencing Guidelines Commission to hear a case dealing with the interpretation of those guidelines).

112. See, e.g., State ex rel. Hash v. McGraw, 376 S.E.2d 634, 637 (W. Va. 1988). In McGraw, the chief justice of the West Virginia Court of Appeals, who is also the “administrative head of all courts,” caused charges to be brought against several attorneys for placing a new judge on the bench.
when a pecuniary interest is so low as to not create a conflict of interest,113 or when "judicial machinery" exists to resolve a potential conflict of interest.114

2. Administrative

The Rule of Necessity is also applied in cases where members of an administrative agency with quasi-judicial powers may adjudicate a matter before them.115 Due to the increase in the number of administrative agencies and the number of cases emanating from them,116 the Rule of Necessity is more apt to be invoked in the context of administrative agencies than in the context of the judiciary.117 In the judicial setting, alternate judges can hear a suit if a conflict exists with a particular judge.118 In the agency setting, however, legislatures have often given agencies and boards exclusive jurisdiction in their areas.119 Therefore, a dispute cannot be transferred to another tribunal.120

The United States Supreme Court implicitly allowed the Rule of

without authority. The chief justice was allowed to hear the case when it reached the Supreme Court of Appeals because he had no personal or pecuniary interest in the matter that could reasonably affect the impartiality of the court. Thus, under the court's analysis, the Rule of Necessity did not have to be invoked. Id. at 636-37.

113. See, e.g., Hubby v. Carpenter, 350 S.E.2d 706, 706-09 (W. Va. 1986) (holding that because only a small amount of the city's revenues are gained through fines levied in the mayor's court, no violation of due process exists, and hence the Rule of Necessity need not be invoked).


115. Annotation, supra note 12, at 1479-80.


117. The due process right to have a fair trial in a fair tribunal applies to agencies in adjudicatory proceedings just as it does to the judiciary in judicial proceedings. See Amos Treat & Co. v. SEC, 306 F.2d 260, 263-64 (D.C. Cir. 1962).


120. See, e.g., Fischer v. Rosenthal & Co., 481 F. Supp. 53, 54 (N.D. Tex. 1979) (holding that Congress granted exclusive regulatory jurisdiction over commodity futures and option contracts to the Commodity Futures Trading Commission). The Administrative Procedure Act provides for hearings to be conducted in an "impartial manner" and provides for the disqualification of a presiding or participating employee in an adjudicatory setting, but does not provide for the employee to be replaced after such an occurrence. See 5 U.S.C. § 556(b) (1994).
Necessity in the context of administrative agencies in *Federal Trade Commission v. Cement Institute.* In this case, the Federal Trade Commission ("FTC") had issued a cease and desist order to seventy-four cement manufacturers for restraining and hindering competition in the sale and distribution of cement through a mutual understanding or an agreement to employ a multiple basing point system of pricing. As a result of this agreement, the FTC alleged, cement buyers had been unable to purchase cement for delivery from any one of the cement manufacturers at a lower price or on more favorable terms.

One of the defendants complained that the FTC was prejudiced and biased against the Portland cement industry. The FTC, prior to the hearing, had filed reports indicating that some of its members believed that the operation of the multiple basing point system was equivalent to a price fixing restraint of trade in violation of the Sherman Antitrust Act. Thus, the membership of the FTC had formed an opinion due to its prior official investigations.

The Court held that if the entire FTC had entertained such views as the result of its prior ex parte investigations, it would not necessarily mean that the minds of all its members were irrevocably closed on the subject. The Court also held that sustaining the defendants' position would defeat the congressional intent of the Trade Commission Act. If the agency had been disqualified in the proceedings against the respondents, neither the FTC nor any other governmental agency could have acted upon the complaint. Congress has provided no substitute commissioner, nor authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Hence, the Court in this case was actually endorsing a "Rule of Necessity" for administrative agencies.

This practice also occurs frequently on the local level of government. For example, the Rule has been invoked in cases involving local

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122. *Id.* at 688.
123. *Id.*
124. *Id.* at 700.
125. *Id.*
126. *Id.*
127. *Id.* at 701.
128. *Id.*
129. *Id.*
130. *Id.*
school boards, discharge of police officers, employment dismissals, and impeachment of executive officials by town boards and city councils. The Rule is also invoked by other types of boards and agencies, such as highway commissions and water authorities, which make adjudicatory decisions. Jurisdictions are split, however, as to when it is appropriate to apply the Rule. Some hold that if a board is deadlocked in a decision, or if the law requires a certain number of members to certify a vote on an issue (such as if six members of an eight member board are required for an impeachment), then an otherwise disqualified member may be allowed to act to break the deadlock, while other jurisdictions hold that the Rule of Necessity would not be


136. See Eastern Air Lines, Inc. v. FAA, 772 F.2d 1508, 1512 (11th Cir. 1985) (holding that the Rule of Necessity could allow the FAA to rule on allowing one airline to buy another's flight slots); Acme Brick Co. v. Missouri P.R.R., 821 S.W.2d 7, 10-11 (Ark. 1991) (holding that the Rule of Necessity required the Highway Commission to make a decision even though counsel for a party in the case simultaneously represented the Commission in another case); Gissel v. Kenmare Township, 512 N.W.2d 470, 475 n.3 (N.D. 1994) (stating that the Board of Commissioners could rule to close a road in an eminent domain proceeding, even though members of the Board had a financial interest in the controversy); Larson v. Wells County Water Resource Bd., 385 N.W.2d 480, 485 (N.D. 1986) (allowing the Water Board to approve a drain project even though the Board Chairman owned land in the area to be drained).

137. See Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52, 60 (Mo. Ct. App. 1990); Barker v. Secretary of State's Office, 752 S.W.2d 437, 441 (Mo. Ct. App. 1988). But see Central Mo. Plumbing Co. v. Plumbers Local Union 35, 908 S.W.2d 366, 371 (Mo. Ct. App. 1995) (refusing to allow the Rule of Necessity to break deadlock where the Labor and Industrial Relations Commissioner participated in deliberations from the outset instead of waiting to see if a deadlock would develop).
allowed to break a deadlock.\textsuperscript{138} Some jurisdictions require what might be described as an extreme necessity before allowing an interested board to adjudicate a matter.\textsuperscript{139}

3. Executive
A corollary of the application of the Rule of Necessity to administrative agencies is its application to situations where an official of the executive branch of government is the sole adjudicator of an issue. The best example of this is the clemency hearing, where a governor of a state is by law the only one who may decide if a convicted felon receives clemency or not.\textsuperscript{140} A conflict of interest exists when a governor previously prosecuted a defendant as the attorney general of the state and then must decide whether that person will receive the death penalty. However, since the governor is the only one who may decide whether clemency is received, the Rule of Necessity would allow him to act.\textsuperscript{141} The Rule has also been invoked to allow a mayor to veto a bill in which she had a financial interest.\textsuperscript{142}


\textsuperscript{139} See King v. Rothschild, 56 F.3d 80 (Fed. Cir. 1995) (table case, full text available in 1995 WL 303977, at *2) (refusing to allow the Merit Systems Protection Board to invoke the Rule of Necessity when the failure of the Board to act would not have a "substantial impact on the administration of the civil service"). Alabama has consistently held that the Rule of Necessity may only be utilized in situations of "paramount importance." If a board is unable to adjudicate a matter because its members are disqualified, the stalemate should continue since other solutions are possible, such as the legislature remediying the problem, or the members of the board resigning. See City of Huntsville v. Biles, 489 So. 2d 509, 515 (Ala. 1986); State ex rel. Miller v. Aldridge, 103 So. 835, 838 (Ala. 1925).


\textsuperscript{141} Pickens, 851 F. Supp. at 366. In allowing Arkansas Governor Jim Guy Tucker to act on a clemency petition in which he had personally participated as attorney general, the Pickens court relied on a case where the previous governor, Bill Clinton, had made a clemency decision. In that death penalty case, Clinton had previously appeared as attorney general. Id. at 365.

\textsuperscript{142} See Affordable Hous. Alliance v. Feinstein, 224 Cal. Rptr. 557, 561 (Ct. App. 1986) (allowing the Mayor of San Francisco to veto a rent-control ordinance in which she had a financial interest).
C. The Rule’s Weaknesses

Although the Rule of Necessity has been well-accepted by many courts, it is not without fault. The Rule, as best demonstrated by the Supreme Court’s decision in Will, contradicts not only 28 U.S.C. § 455 and the ABA’s Model Code of Judicial Conduct, but also a long history of jurisprudence that has sought to eliminate even the appearance of impropriety or bias in judicial proceedings. It is inappropriate for a judge to decide a case after they know that their impartiality is questioned.

The Will decision is disturbing for the Court never addressed the issue of just how “necessary” it was to hear a case that involved whether their salaries would receive an increase. The Court never explored, or even suggested that Congress could explore, other options that could be used in the future.

The Rule also creates problems when it is invoked by administrative agencies and executive branch officials. The Rule allows officials who have a direct pecuniary interest in the outcome of a matter to vote on it anyway. It also allows, in some cases, the public official responsible


144. See supra text accompanying notes 92-100.

145. See supra notes 77, 79. The commentary to the ABA’s Model Code recognized but did not criticize the Rule of Necessity:

By decisional law, the rule of necessity may override the rule of disqualification.

For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) commentary (1990).

146. See supra text accompanying notes 17-23.

147. See Resnik, supra note 83, at 1894.


149. See Resnik, supra note 83, at 1892-94. For examples of other options, see infra text accompanying notes 159-60.

150. See supra notes 101-07 and accompanying text.
for sentencing a person to death to decide whether that penalty is
ultimately carried out.\textsuperscript{151} Other alternatives should at least be explored.

IV. PROPOSED ALTERNATIVES TO THE RULE

\textit{A. Federal Cases}

It is rare for the Rule to be invoked on the federal level because a
case can usually be assigned to another judge in a district and can even
be assigned to judges in other circuits if the need arises.\textsuperscript{152} However,
no alternative exists to the Rule of Necessity when a case similar to \textit{Will}
presents itself. Yet, this does not mean that no other possible solution
may be explored.

The dilemma confronting the federal judges in \textit{Will} could have been
circumvented by relying exclusively on the state judiciaries whose judges
would not have been predisposed to either side in the case, and would
have been fully competent and obligated to adjudicate issues of federal
constitutional law.\textsuperscript{153} This approach, however, would deprive the
system of one uniform, dispositive judicial resolution of a constitutional
issue since judges in the fifty states could come to different deci-
sions.\textsuperscript{154} Hence, since consistency in interpretation is so important, such
a result would be undesirable.\textsuperscript{155}

\textsuperscript{151} See supra notes 140-41 and accompanying text.

\textsuperscript{152} The relevant statute provides:

(a) The Chief Justice of the United States may . . . designate and assign
temporarily any circuit judge to act as circuit judge in another circuit upon request by the
chief judge or circuit justice of such circuit.

(b) The chief judge of a circuit or the circuit justice may, in the public interest,
designate and assign temporarily any circuit judge within the circuit, including a judge
designated and assigned to temporary duty therein, to hold a district court in any district
within the circuit.


(b) The chief judge of a circuit may, in the public interest, designate and assign
temporarily any district judge of the circuit to hold a district court in any district within
the circuit.

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(d) The Chief Justice of the United States may designate and assign temporarily
a district judge of one circuit for service in another circuit, either in a district court or
court of appeals, upon presentation of a certificate of necessity by the chief judge or
circuit justice of the circuit wherein the need arises.

\textit{Id.} § 292 (b), (d).

\textsuperscript{153} Redish & Marshall, supra note 4, at 492.

\textsuperscript{154} Id. at 493.

\textsuperscript{155} Id.
Another alternative would be to create a panel of retired federal judges to decide such a case where judicial salaries may be at question.\(^{156}\) Because retired judges are called from time to time to adjudicate matters,\(^ {157}\) no conflict of interest or constitutional problems exist in matters such as this. However, this solution would not work in cases that affect pension and retirement payments since this would affect both retired and sitting judges.\(^ {158}\)

One possible solution is to have a panel of state supreme court judges hear and adjudicate a federal case on the very rare occasions when such a conflict occurs. This panel could be appointed by the President and approved by the Senate.\(^ {159}\) This solution would, however, breach the separation between federal and state authority in certain matters and hence would be unconstitutional as a violation of Article III of the Constitution.\(^ {160}\) Although a constitutional amendment would be required to allow such a proposal, the only alternative would be to have an adjudicator hear and decide a dispute with the appearance of impropriety. A possible amendment to cure the constitutional problems could read:

**PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO ELIMINATE THE RULE OF NECESSITY IN THE JUDICIAL CONTEXT.**

**SECTION 1.** Upon the presentation of a certificate of necessity from the Chief Justice of the United States, the President shall appoint a requisite number of justices necessary to adjudicate a case within the judicial power of the United States. Such appointment shall be selected from sitting justices of the highest courts of the several States, and be by and with the Advice and Consent of the Senate.

**SECTION 2.** Upon presentation of a certificate of necessity from the chief judicial official of a State to the Chief Justice of the United States, the Judicial power of the United States shall extend to cases

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\(^{156}\) This alternative would only apply to retired federal judges and not to those who have moved from regular active service to senior status. Retired judges receive an annuity equal to their salary at the time they retire, while those in senior status receive the same salary that they did while they were in office. See 28 U.S.C. § 371 (1994). Hence, retired judges could serve as long as Congress does not change their annuity payments. However, the United States Code would need to be amended for this change to take place because it currently only allows those in senior status to continue to perform judicial functions. See id. § 294(b).


\(^{158}\) See Board of Trustees v. Hill, 472 N.E.2d 204, 206 (Ind. 1985); Oakley v. Gainer, 331 S.E.2d 846, 851 (W. Va. 1985).

\(^{159}\) See United States v. Moody, 762 F. Supp. 1485, 1488 (N.D. Ga. 1991) (mentioning that the defendant’s attorney suggested that the Senate Judiciary Committee appoint an “independent judicial officer” to preside over the trial in order for there to be an impartial panel to hear the case).

\(^{160}\) See U.S. CONST. art. III.
between citizens of the same State.

B. State Cases

State courts have experimented in the past with creating special judicial panels to adjudicate a dispute when all judges in the state judicial system were forced to disqualify themselves. However, conflicts again arise when the case involves the salaries or pensions of all state judges.

One solution is for the case to be transferred to the federal system and to allow federal district court and appellate level judges to hear such disputes. The federal judges would be unaffected by the outcome of the case and are entirely competent to hear this type of case because they already make determinations based on state law in diversity cases. Article III of the Constitution, however, prevents federal judges from hearing cases which deal with state salaries or pensions where no federal statute is applicable. Since these suits are often between citizens of the same state, diversity jurisdiction does not exist. The Constitution would have to be amended to expand federal jurisdiction to hear such cases. The amendment proposed above addresses this problem.

C. Administrative Adjudications

Some jurisdictions confront the problem of the Rule of Necessity being used in an administrative agency or board by having the state courts review the decision of the agency or board with heightened scrutiny. However, the U.S. Supreme Court has held that such a "procedural safeguard" does not guarantee that one will receive a fair adjudication in the original tribunal.

161. See Johnson v. Darr, 272 S.W. 1098 (Tex. 1925) (noting that since all members of the court system were disqualified due to their membership in a fraternal organization, a panel of three women was created by the Governor to act as Special Associate Justices); Peterson v. Knutson, 233 N.W.2d 716 (Minn. 1975) (utilizing state district court judges to decide a controversy over an election of state supreme court justices).


163. U.S. CONST. art. III.

164. Barker v. Secretary of State's Office, 752 S.W.2d 437 (Mo. Ct. App. 1988); see 4 DAVIS, supra note 131, at § 19.9.

165. Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972) (holding that a review by a County Court of Common Pleas does not guarantee that the petitioner will get a fair hearing in a
Several jurisdictions already use a solution for the instance when one or more members of a board or agency may have to disqualify or recuse themselves due to a conflict of interest. This solution is simply to appoint another person to sit in the place of the disqualified member, or to pick an arbitrator to settle the dispute. This remedy should be introduced into those jurisdictions which do not have any other alternatives.

This procedure currently does not exist on the federal level. There, the dilemma could be remedied by a presidential appointment with approval by the Senate, or even by adjudication of the conflict through a Senate committee or subcommittee for swifter resolution. The following could be a model:

**AN ACT, TO ELIMINATE THE RULE OF NECESSITY IN THE FEDERAL ADMINISTRATIVE CONTEXT.**

In the event an employee is disqualified under 5 U.S.C. § 556, and no mechanism exists for the case to be heard other than through such an empowered agency, the President, with the Advice and Consent of the Senate shall appoint replacement employees to adjudicate the matter.

**D. Executive**

A solution does exist for resolving the dilemma when a single executive official has the authority to decide or adjudicate a matter. States could amend their constitutions to allow the lieutenant governor, or a line of executive branch officials to make the decision in such instances. Many states already contain clauses in their statutes and constitutions that allow the lieutenant governor to act as governor when

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the governor is incapacitated or absent from the jurisdiction.\textsuperscript{170} The constitutions only need to be amended to also include conflict of interest. The same arrangement could be made for mayors and other municipal officials.

V. CONCLUSION

In our judicial system, we heavily depend on the prudence and wisdom of judges to reach fair and just resolutions to complicated disputes. It is hoped that judges can rise above their own personal biases and interests in most situations to reach a fair result.\textsuperscript{171} However, it is unfair for a judge to be put in such a situation. It must be uncomfortable for a judge to be placed in a position of determining whether his or her salary should be increased according to the law, knowing that if he or she were to rule in favor of an increase, the judge would be soundly criticized, although the correct decision was made.

Today’s judicial disqualification statutes and ethical codes mandate that a judge should not hear a case in which the “impartiality” may be questioned.\textsuperscript{172} The Rule of Necessity completely contradicts this concept by forcing judges to rule in situations where their impartiality is questioned. Unfortunately, it is not possible to completely eradicate the Rule of Necessity. Certain situations may occur where the Rule will have to be utilized because it would truly be impossible to find an adjudicator with no interest in the outcome.\textsuperscript{173} However, the Rule’s application should be severely restricted, and therefore, be less “necessary” than it is today.

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