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## Subjecting Land Commissioners to the Same Strict Disqualification Standards as Judges Under 28 U.S.C. § 455. *United States v. Werner*, 916 F.2d 175 (4th Cir. 1990)

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SUBJECTING LAND COMMISSIONERS TO THE SAME STRICT  
DISQUALIFICATION STANDARDS AS JUDGES UNDER 28  
U.S.C. § 455

*United States v. Werner*, 916 F.2d 175 (4th Cir. 1990)

In *United States v. Werner*,<sup>1</sup> the Fourth Circuit concluded that the disqualification standards for judges set forth in the federal disqualification statute apply to land commissioners.<sup>2</sup>

In 1980 the United States acquired through condemnation land Robert Stanton Werner owned.<sup>3</sup> In 1982, the United States District Court for the Northern District of West Virginia appointed a commission to determine the amount of just compensation payable to Werner for the property.<sup>4</sup> In 1983, Werner moved to disqualify one member of the commission, Bradley Nash, alleging that he was biased against Werner and, as mayor of a nearby community, had a conflict of interest in the matter.<sup>5</sup> Nash, who previously secured funds from the National Park

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1. 916 F.2d 175 (4th Cir. 1990).

2. *Id.* at 178. The federal disqualification statute is 28 U.S.C. § 455(a) (1988). This Case Comment is limited to whether land commissioners should be held to the same disqualification standards as judges. Whether a particular land commissioner's activities might persuade a disinterested observer reasonably to question his impartiality is thus beyond the scope of this Comment. For a general discussion on impartiality and the judicial system, see Susan B. Hoekma, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 USC § 455(a)*, 60 TEMP. L.Q. 697 (1987).

3. 916 F.2d at 176. The United States acquired the property pursuant to 40 U.S.C. § 258a (1988) for use as part of the National Park Service's Appalachian National Scenic Trail. *Id.*

4. *Id.* The court treated the land commissioners as special masters to determine the fair value of the subject property. *Id.* The district court made the appointment pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure: "Before appointing the . . . commission . . . the court shall advise the parties of the identity and qualifications of each prospective commissioner . . . and may permit the parties to examine such designee. . . . Each party shall have the right to object for valid cause to the appointment of any person as a commissioner." FED. R. CIV. P. 71A(h).

If the district court appoints a commission, Rule 71A grants the commission the powers of a master provided in Federal Rule of Civil Procedure 53(c). FED. R. CIV. P. 71A, 53(c). The commission's "action and report should be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice prescribed in paragraph (2) of subdivision (e) of Rule 53." FED. R. CIV. P. 71A(h). Under Rule 53, a "master," such as an auditor, examiner, or assessor, is under the control of the district court, which may adopt, modify, or reject its report. FED. R. CIV. P. 53(e)(2). Rule 53 provides "in an action to be tried without a jury, the court *shall* accept the master's findings of fact unless clearly erroneous." FED. R. CIV. P. 53(e)(2) (emphasis added).

5. 916 F.2d at 176. In addition to securing funds from the National Park Service, Nash donated land on prior occasions to the National Park Service. *Id.* In addition to his personal donations, Nash also was a charter member of the Harper's Ferry National Historic Park, which donated occasionally to the National Park Service. *Id.* Werner alleged that Nash's previous and ongoing

Service for various town projects, was attempting to obtain funding for additional projects at the time the district court appointed him to the land commission.<sup>6</sup> Based on Nash's response to the motion, in which he attested to his ability to render a fair decision despite his ties with the National Park Service, the district court denied Werner's motion to disqualify.<sup>7</sup>

Werner appealed the district court's award of compensation for the acreage to the Fourth Circuit, alleging that the district court erred in denying his motion to disqualify and replace Nash as a land commissioner.<sup>8</sup> The Fourth Circuit reversed and remanded for a new determination of compensation,<sup>9</sup> holding that the federal disqualification statute, 28 U.S.C. § 455(a) (1988), for justices, federal judges, and magistrates applies to land commissioners as well.<sup>10</sup>

A fair trial in a fair tribunal is necessary to comport with due process.<sup>11</sup> Historically,<sup>12</sup> Congress has sought to maintain public confidence in the integrity and impartiality of the judicial system<sup>13</sup> by requiring fair

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relations with the National Park Service raised reasonable questions regarding his ability to remain impartial as a land commissioner. *Id.*

6. *Id.* In the 1970s, as mayor, Nash obtained two financial grants from the National Park Service for the Harper's Ferry Police force and for the construction of a new sewer system. *Id.* At the time the court appointed the land commission, Nash was negotiating with the National Park Service for additional funding for a town water project. *Id.*

7. *Id.* The district court concluded no conflict of interest existed, based solely on Nash's statements in response to the motion to disqualify. *Id.* Werner argued on appeal, however, that Nash's statements amounted to implied accusations that Werner's counsel was a land speculator. *Id.* at 177. Werner alleged that this evidence provided further proof of Nash's bias. *Id.*

8. *Id.* at 176. On appeal, Werner argued that the land commissioner should have been disqualified because: (1) his duty as mayor created a conflict of interest, (2) he was personally biased against Werner, and (3) his statements in the response to the motion to disqualify evidenced possible animosity toward Werner's counsel. *Id.* at 176-77.

9. *Id.* at 179. The court held that Nash's attempts to procure financing from the National Park Service, as well as his affidavits in response to Werner's motion to disqualify, constituted questions regarding his objectivity sufficient for a disinterested person reasonably to question his impartiality. *Id.*

10. *Id.* at 178.

11. See U.S. CONST. amend. V; U.S. CONST. amend. XIV. See also *In re Murchison*, 349 U.S. 133, 136 (1955); *Taylor v. Hayes*, 418 U.S. 488, 496-501 (1974) (fairness requires not only an absence of actual bias, but the prevention of a likelihood of an appearance of bias).

12. The first federal disqualification statute disqualified judges who had been of counsel for either party. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 274, 278-79. Today, a judge must disqualify herself if an appearance of a conflict of interest exists. See 28 U.S.C. § 455(a) (1988).

13. See Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 746-47 (1973) (concern for appearances necessary because judicial authority ultimately rests on public acceptance of judicial decisionmaking). Public confidence in the judiciary will diminish if judicial officers are allowed to make biased decisions and deprive individuals of fair and impartial

trials in fact and in appearance.<sup>14</sup> Acknowledging the congressional commitment to impartiality in the judicial system, the American Bar Association ("ABA") adopted, in 1924, its own standards to govern judicial conduct and disqualification.<sup>15</sup> In 1948, with its enactment of section 455, Congress established subjective disqualification standards for justices and judges.<sup>16</sup> In 1974, Congress amended section 455, significantly raising the disqualification standards for justices, judges, magistrates and referees in bankruptcy.<sup>17</sup> With the 1974 amendment, Congress rejected the prior subjective standards<sup>18</sup> and adopted an objective standard modeled on the *Model Code of Judicial Conduct*.<sup>19</sup>

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trials. See Ann M. Janus, Recent Decision, *Judicial Disqualification for Appearance of Bias—Jenkins v. Sterlacci*, 62 TEMP. L. REV. 1075, 1076 (1989). See also Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538, 563 (1973) (to maintain public confidence, courts should attempt to avoid any suggestion of impropriety).

14. See *infra* note 19 for the text of 28 U.S.C. § 455(a) (1988).

15. Janus, *supra* note 13, at 1076-77 n.19-21 (citing ABA CANON OF JUDICIAL ETHICS No. 4 (1924) (ethical code adopted to promote impartiality in judicial system)). See also Randall J. Littecker, Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978) (Congress enacted statute to safeguard impartiality in judiciary); Comment, *supra* note 13, at 540-41 (ABA Canon adopted in 1924 established the general standards for conduct in judiciary).

16. Prior to amendment in 1974, the 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.

Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (amended 1974).

17. After Congress amended the statute in 1974, 28 U.S.C. § 455(a) provided, in part: "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Pub. L. No. 93-512, 88 stat. 1604 (amended 1978).

The 1974 amendment substituted "'Disqualification of justice, judge, magistrate, or referee in bankruptcy' for 'Interest of justice or judge' in the section catchline, reorganized the structure of the provisions and expanded the applicability to include magistrates and referees in bankruptcy." 28 U.S.C.A. § 455, historic and statutory notes (West Supp. 1990).

18. H.R. REP. NO. 1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.N. 6351, 6352. The prior statute made the "judge himself the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification." *Id.* at 6352. The existence of both statutory and ethical standards, together with the uncertain language of the statute, forced a judge to decide either the legal or the ethical issue. *Id.* at 6352.

19. The federal disqualification standard was amended in 1974 to conform with the *Code of Judicial Conduct* and to promote public confidence in the judicial process. See Janus, *supra*, note 13, at 1077 n.22. See also H.R. REP. NO. 1453, *supra* note 18, at 6351. Congress intended the amendment "to make the statutory and ethical duties [of a judge] identical and eliminate the dual standards that governed judicial conduct." Janus, *supra* note 13, at 1077 n.22. The dual standards often conflicted, forcing a judge to decide whether to follow an ethical or statutory standard. *Id.*

However, the amended statute contained decidedly different language. Compare 28 U.S.C. § 455 (1988) with MODEL CODE OF JUDICIAL CONDUCT. The statute changed the word "should" to

Because the provisions of the disqualification statute do not include the term "special master" specifically, courts have interpreted the scope of the statute inconsistently.<sup>20</sup> The circuits are split on whether the statute applies to special masters appointed as land commissioners.<sup>21</sup>

In *United States v. Certain Parcels of Land*,<sup>22</sup> the Fourth Circuit considered when a district court must disqualify a land commissioner, appointed by the district court to determine the compensation payable to a landowner in an eminent domain proceeding, for bias or conflict of interest.<sup>23</sup> The court applied the same standards as if it had been considering the disqualification of a federal judge.<sup>24</sup> The court did not specifically

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"shall," indicating that a judge must disqualify himself. Janus, *supra* note 13, at 1077 n.22. See 28 U.S.C. § 455(a) (1988). Most importantly, the statute changed the word "judge" to "justice, judge, or magistrate." Janus, *supra* note 13, at 1077 n.22.

Subsequent to the most recent amendment in 1978, the statute now states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1988).

20. See *supra* note 19. Special masters are usually private lawyers, retired judges, or legal academics. Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2134 (1989). Masters are appointed to aid the judge in handling a particular case. *Id.* No standard exists for the appointment of masters, although Rule 53(b) of the Federal Rules of Civil Procedure mandates that courts appoint masters as the exception and not as the rule. *Id.* at 2134 n.15. See FED. R. CIV. P. 53(b). In nonjury cases, Rule 53 provides for the appointment of special masters on a showing of exceptional conditions, such as accounting pursuant to an assessment of damages. FED. R. CIV. P. 53(b). See Silberman, *supra*, at 2134. See generally CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2604 (1971). In jury cases, a court may appoint a master if the issues are complicated. FED. R. CIV. P. 53(b).

Historically, masters assisted judges primarily on matters of accounting and evidence. Silberman, *supra*, at 2134 n.18. In early federal practice, masters participated in all aspects of the case. *Id.* Historical evidence indicates that although a more restricted role was originally intended for the masters, under Rule 53, they now assist in trial, pretrial, and post-trial litigation. *Id.* at 2135.

Indeed, masters for accounting and damages are quite common today. *Id.* at 2133. See, e.g., *Devex Corp. v. General Motors Corp.*, 857 F.2d 197 (3d Cir. 1988) (accounting and assessment of damages in a patent case); *Hartwick College v. United States*, 801 F.2d 608 (2d Cir. 1986) (master to calculate attorney's fees in tax case, as well as to decide individual monetary claims).

Under Rule 53, the master must file a report, subject to a "clearly erroneous" factual review by the district judge. Silberman, *supra*, at 2135 (quoting FED. R. CIV. P. 53).

21. Compare *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976) and *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988) with *Jenkins v. Sterlacci*, 860 F.2d 1168 (D.C. Cir.), *petition for reh'g denied per curiam*, 856 F.2d 274 (D.C. Cir. 1988).

22. 384 F.2d 677 (4th Cir. 1967).

23. *Id.* at 681. The court decided the case based on a subjective standard. *Id.* Since the decision in *Certain Parcels*, Congress amended the disqualification statute, adopting an objective standard. See 28 U.S.C. § 455 (1988).

24. 384 F.2d at 681. The court relied on the general rule regarding disqualification set forth in *United States v. Lewis*, 308 F.2d 453, 457 (9th Cir. 1962) ("[D]isqualification is a matter for the

rely on 28 U.S.C. § 455, but utilized a subjective standard that left removal to the discretion of the district court, unless actual bias had been demonstrated.<sup>25</sup> The court held that the district court's failure to remove a commissioner was an abuse of its discretion, even though the commissioner was an attorney who had represented a nearby landowner in a prior condemnation proceeding.<sup>26</sup>

However, circuit decisions since the amendment have differed on whether the *Certain Parcels* standard still controlled under the new, objective and heightened federal statute.<sup>27</sup> In *Morgan v. Kerrigan*,<sup>28</sup> the First Circuit held that special masters need not comply with the strict disqualification standards applicable to judges because masters are subject to the control of the district court.<sup>29</sup> In *Morgan*, the court affirmed the district court's denial of a motion to disqualify masters appointed to formulate a school desegregation plan, despite the masters' previous association with the school.<sup>30</sup> The court did not apply the disqualification standards for judges, concluding that more relaxed standards applied to masters and experts because the court controlled the masters.<sup>31</sup> The court emphasized the crucial need to hire individuals with expertise in specific subject matters as a reason to lower the standard.<sup>32</sup>

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exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement.”).

25. 384 F.2d at 681 (“where matters are committed to the sound discretion of the district judge, the exercise of his discretion will not be disturbed unless [abused]”).

26. *Id.* at 677. Because a subjective standard applied, the court of appeals upheld the district judge's ruling that no actual bias existed. *Id.* at 681.

27. *United States v. Werner*, 916 F.2d 175, 177 (4th Cir. 1990) (since *Certain Parcels*, Congress has heightened the disqualification standards).

28. 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

29. *Id.* at 426.

30. *Id.* The defendants objected to the masters' association with the Harvard University Graduate School of Education. They argued that the masters should be disqualified because they were indirectly related to the Harvard Center for Law and Education, three of whose attorneys represented the plaintiffs in this case. *Id.* The challengers also objected to two other masters who supported the NAACP, which, although not a party to the action, supported the plaintiffs' suit and advanced funds to cover disbursements. *Id.* The court found the masters' relationships attenuated and denied the motion to disqualify. *Id.*

31. *Id.* at 426-47. The court found that even if it applied the stricter standards, the masters acted impartially in proposing their desegregation plan, and the district court did not err in denying the defendants' motion. *Id.*

32. *Id.* at 426. Because the case involved complex administration of a desegregation plan, concerns for the efficient use of judicial resources may have influenced the court's decision to apply a lower standard and reject the motion to disqualify. See Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 664 (1985) (“excessive disqualification would seriously damage the efficient administration of justice”). See also

Similarly, in *Rios v. Enterprise Association Steamfitters Local 638*,<sup>33</sup> the Court of Appeals for the Second Circuit held that the strict disqualification standards of section 455(a) do not apply to special masters.<sup>34</sup> In *Rios*, the court affirmed the district court's refusal to disqualify the Administrator's Designee,<sup>35</sup> who was responsible for determining back-pay in an EEOC employment discrimination action against a union.<sup>36</sup> The court held that, because Congress did not include special masters in its 1974 general revision of section 455,<sup>37</sup> Congress did not intend to apply the strict standard to court-appointed masters.<sup>38</sup> According to the court, less stringent disqualification standards should apply because the district court adequately controls masters and evaluates their conclusions.<sup>39</sup>

Both *Rios* and *Morgan* refused to apply the judicial disqualification standards to special masters.<sup>40</sup> In contrast, the Court of Appeals for the District of Columbia Circuit recently rejected these approaches. In *Jenkins v. Sterlacci*,<sup>41</sup> the court held that the federal disqualification standards for judges apply to special masters because masters perform duties functionally equivalent to those of judges.<sup>42</sup> The conflict in *Jenkins* arose

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Hoekma, *supra* note 2, at 704. Disqualification creates some administration costs. *Id.* When it occurs in a complex case, the burden may be substantial. *Id.* In addition, litigants can manipulate disqualification to their advantage or to the disadvantage of their opponents by forum shopping or causing excessive delays in time and money. *Id.*

33. 860 F.2d 1168 (2d Cir. 1988).

34. *Id.* at 1172-74.

35. *Id.* at 1175. To implement certain backpay orders efficiently, the district court referred the matters to a master, the Administrator Designee. *Id.* at 1170. None of the parties objected to the appointment of the Administrator Designee. *Id.*

36. *Id.* at 1178. The Administrator Designee previously represented a union, in an unrelated action, in which he served as an adversary to the Equal Employment Opportunity Commission. *Id.* at 1175.

37. *Id.* at 1174. In addition, in 1978, when Congress enacted the Bankruptcy Reform Act of 1978, Congress amended 28 U.S.C. § 455, deleting the term "referee in bankruptcy." See Pub. L. No. 95-598, reprinted in 1978 U.S.C.C.A.N. 5787, 5936. Following the reasoning of the *Rios* court, Congress at this time should have inserted the term "special masters" if it indeed intended the strict disqualification standards to apply to them.

38. 860 F.2d at 1174.

39. *Id.* at 1175. The court also found that district courts possess considerable, but acceptable, discretion in refusing to disqualify masters. *Id.* at 1175 n.37. See also FED. R. CIV. P. 53(c) & (e) (district court may reject, modify, or adopt the master's findings).

40. See *supra* notes 28-39 and accompanying text.

41. 849 F.2d 627 (D.C. Cir.), *petition for reh'g denied*, 856 F.2d 274 (D.C. Cir. 1988) (per curiam).

42. *Id.* at 630. Upon dissolution of a law firm, the district court assigned a master to distribute the firm's profits. *Id.* at 629. Sterlacci contended that the master's involvement in an unrelated appeal affected his ability to distribute these profits impartially. *Id.* at 634 n.7.

because the master, a law professor and practicing attorney, acted contemporaneously in an unrelated action as the opposing attorney to a law firm that represented a litigant in a hearing before the master.<sup>43</sup> Relying on the language in the *ABA Code of Judicial Conduct*, the District of Columbia Court of Appeals assumed the federal disqualification standards applied to any officer, including a master, who performed judicial functions.<sup>44</sup> The court found the more relaxed standards inappropriate for special masters because, under Rule 53(e)(2) of the Federal Rules of Civil Procedure, district courts review special masters' findings of facts under a "clearly erroneous" standard.<sup>45</sup> Because of that deferential review of findings of fact, and because courts frequently appoint special masters to administer complex issues, the court considered the position of a special master to be "functionally indistinguishable" from that of a trial judge.<sup>46</sup> In addition, according to the *Jenkins* court, higher standards apply to masters because they may serve as advocates in matters unrelated to their service as masters.<sup>47</sup> The court reasoned that the possibility of dual roles may cast doubt on the objectivity of the special masters.<sup>48</sup>

In *United States v. Werner*,<sup>49</sup> the Fourth Circuit held that section 455(a)'s strict disqualification standards apply both to judges and to land commissioners whom the district court appoints to determine just compensation for land taken in an eminent domain action.<sup>50</sup> Noting that

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43. *Id.* at 630. See Silberman, *supra* note 20, at 2160.

44. 849 F.2d at 631 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 3(c)(1)). However, unlike 28 U.S.C. § 455 (1988), which is silent on masters and which the court should have used to determine the standard for any justice, judge or magistrate, the *Model Code of Judicial Conduct* explicitly provides that a special master or anyone who performs judicial functions is a judge for purposes of the Code. Silberman, *supra* note 20, at 2161.

45. 849 F.2d at 631. The court concluded that the district court lacks complete control because of the standard of review for the findings of fact. *Id.* at 631.

46. *Id.* The court recognized that even if a special master's findings went against the district and appellate court's view of the weight of evidence, the findings would be upheld. *Id.*

47. *Id.* at 632. See Silberman, *supra* note 20, at 2134 (modern-day special masters, either prominent and experienced practitioners or prestigious academics, are selected from a narrow circle). The court recognized that an attorney need not completely cease activities as an advocate on becoming a special master. 849 F.2d at 632. The court thought it necessary, however, that a special master avoid any undertaking that would "tend to appear to compromise his impartiality as a decisionmaker." *Id.*

48. *Id.* at 632. The master appointed by the district court must not serve in an opposing capacity at any time during his service as a master in the pending action. Silberman, *supra* note 20, at 2134.

49. 916 F.2d 175 (4th Cir. 1990).

50. *Id.* at 178.



circuits are split on the issue, the court held that lower standards do not apply because a "court commissioner" is considered a judge by a canon of the *Model Code of Judicial Conduct*.<sup>51</sup> The court viewed the standard the Code sets as "substantially identical" to section 455(a)'s.<sup>52</sup> Thus for the purposes of section 455, the court considered a land commissioner a judge.<sup>53</sup> In support of its holding, the court looked to the legislative history of the disqualification statute, which suggested that Congress amended section 455 to ensure "the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the *Code of Judicial Conduct*."<sup>54</sup>

Furthermore, the court applied a heightened standard because Congress amended section 455 to "promote public confidence in impartiality of the judicial process."<sup>55</sup> The court also determined that Congress amended Rule 71A of the Federal Rules of Civil Procedure to "insure that unbiased and competent commissioners are appointed"<sup>56</sup> to assist district courts. The court noted that public confidence in the fairness of judicial proceedings is vital at all levels, including just-compensation tribunals.<sup>57</sup> According to the court, applying the heightened disqualification standard to land commissioners furthers Congress' goals.

After determining that section 455 governs the disqualification of land commissioners, the court followed the *Jenkins* analysis, concluding that the same disqualification standards apply to judges, special masters, and land commissioners.<sup>58</sup> Because the district court reviews the land commissioner's findings of fact under a "clearly erroneous" standard, the court found that land commissioners perform tasks essentially identical

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51. *Id.* MODEL ABA CODE OF JUDICIAL CONDUCT, Compliance with the Code of Judicial Conduct (1972). "[A]nyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a bankruptcy judge, special master, court commissioner, or magistrate, is a judge for the purpose of this Code." MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1) at I-58. *See also* Belfiore v. New York Times Co., 826 F.2d 177, 185 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988) (*Model Code of Judicial Conduct* applies to special masters).

52. 916 F.2d at 178.

53. The court agreed with the rationale of the District of Columbia Circuit in *Jenkins v. Sterlacci*, 849 F.2d 627 (D.C. Cir. 1988), in relying on the *Model Code of Judicial Conduct*. 916 F.2d at 178.

54. 916 F.2d at 178. *See* H.R. REP. NO. 1453, *supra* note 18, at 6352.

55. 916 F.2d at 178 (quoting H.R. REP. NO. 1453, *supra* note 18, at 6355).

56. *Id.* at 178 (quoting FED. R. CIV. P. 71A advisory committee's note).

57. *Id.*

58. *Id.* (citing *Jenkins v. Sterlacci*, 849 F.2d 627, 637 (D.C. Cir. 1988)).

to the functions performed by a judge.<sup>59</sup> Thus the court concluded that land commissioners must be held to the heightened standards set forth in section 455.<sup>60</sup>

The Fourth Circuit's application of the disqualification standards of section 455 to land commissioners in *Werner* is misplaced. First, the court downplayed the significance of the recent amendments to section 455.<sup>61</sup> Congress has had numerous opportunities to clarify the statute specifically to include special masters in the section's coverage.<sup>62</sup> In addition, Congress amended section 455 in 1974 generally to comport with the *Model Code of Judicial Conduct*, but declined specifically to adopt its language.<sup>63</sup> Assuming that Congress composed the statute after much deliberation and consideration, the exclusion of terms like "special masters" is an unlikely oversight. Furthermore, if Congress intended to subject masters and other court appointees to the strict standards applicable to judges, Congress could have amended the section when it enacted the Judicial Improvement Act in 1988.<sup>64</sup> The court thus misinterpreted the intentions of Congress when it subjected land commissioners to the standards that govern disqualification for judges.<sup>65</sup>

The Fourth Circuit's decision in *Werner* also failed to consider fully the role and importance of land commissioners. Appointed by the district court,<sup>66</sup> land commissioners possess the powers of special masters under Rule 53(c) of the Federal Rules of Civil Procedure.<sup>67</sup> Under Rule 71A(h) of the Federal Rules of Civil Procedure, before appointing members to the land commission, the court must advise the parties to the action of the identity and qualifications of each prospective commissioner.<sup>68</sup> In addition, a court may permit the parties to examine each

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59. *Id.* at 178. See FED. R. CIV. P. 71A, 53(e)(2).

60. 916 F.2d at 178.

61. See Pub. L. No. 93-512, reprinted in 1974 U.S.C.C.A.N. 6351; Pub. L. No. 95-598, reprinted in 1978 U.S.C.C.A.N. 5787; Pub. L. No. 100-702, reprinted in 1988 U.S.C.C.A.N. 5982.

62. See *supra* notes 4 and 17.

63. See *supra* note 19 for text of MODEL CODE OF JUDICIAL CONDUCT.

64. Pub. L. No. 100-702, reprinted in 1988 U.S.C.C.A.N. 5982, 6029.

65. See *supra* notes 16-19. Judges are unambiguously governed by the strict, objective standard set forth in 28 U.S.C. § 455(a) (1988).

66. See FED. R. CIV. P. 71A(h) (the district court, in its discretion, may order that, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interests of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.").

67. See *id.*

68. See *id.* ("before appointing the members of the commission . . . the court shall advise the parties of the identity and qualifications of each prospective commissioner. . .").

designee, and each party has the right to object for valid cause to the appointment of any person as commissioner.<sup>69</sup> In *Werner*, no one challenged Nash's appointment until after the trial and judgment.<sup>70</sup> Land commissioners should not be held to a strict standard when the parties waive their rights by failing to object to the court's appointment before the trial begins.

In addition, as masters, land commissioners are under the district court's plenary control.<sup>71</sup> Because judges must comply with the Federal Rules of Civil Procedure,<sup>72</sup> the court possesses full control over masters charged with determining extremely complicated valuations as well as those who calculate fairly simple valuations. Under Rule 53(a), the district court's considerable control over masters eliminates the need to impose strict disqualification standards.<sup>73</sup> Furthermore, a strict standard is unnecessary because Rule 53(a) adequately establishes safeguards to protect the judicial system from the biases and conflicts of interests of special masters.<sup>74</sup>

Finally, the Fourth Circuit undervalued the importance of the need to hire individuals with expertise in particular, often specialized areas.<sup>75</sup> The need to hire qualified individuals as land commissioners can override the need to impose higher ethical standards.<sup>76</sup> Individuals qualified to serve as masters, such as land commissioners, may be small in number, and there may be few indeed who do not serve as advocates in similar, if unrelated, matters.<sup>77</sup> A district court should not impede judicial econ-

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69. *See id.*

70. 916 F.2d at 176.

71. *See* FED. R. CIV. P. 53(e)(2). Each master must complete a report that the court may adopt, modify, or reject in whole or part after the hearing. The court also may request further evidence from the master or recommit it with instructions. *See* FED. R. CIV. P. 53(e)(5). The parties are given ample time to object to the choice of the commissioners; thus, the strict standard regarding disqualification imposed upon judges is not necessary for masters. *See* FED. R. CIV. P. 71A(h).

72. FED. R. CIV. P. 1 ("these rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity. . . .").

73. *See* FED. R. CIV. P. 53(a).

74. *Id.*

75. *See* *Morgan v. Kerrigan*, 530 F.2d 401, 426 (4th Cir. 1976), *cert. denied*, 426 U.S. 935 (1976). Masters' functions are often very focused: to supervise various pretrial phases of litigation; to facilitate settlement under a broad charter; to act as a negotiator and conciliator between the parties; or to assist in shaping, monitoring, or enforcing compliance with post-judgment relief. Silberman, *supra* note 20, at 2135-36. Use of masters has been extremely valuable in processing the expanding and complicated litigation in contemporary society. *See id.* at 2174.

76. 530 F.2d at 426.

77. *Cf. Rios v. Enterprise Ass'n Steamfitters Local 688*, 860 F.2d 1168 (2d Cir. 1988) (the

omy by granting a motion to disqualify based on previous or ongoing relations when no actual bias has been shown.<sup>78</sup> An attorney may wear several hats, serving as an advocate for one group, and later serving as a master.<sup>79</sup> Often, the kind of experienced practitioners who may best assist the district court have represented both sides in past actions.<sup>80</sup> The wheels of justice may cease to turn efficiently if a district court must disqualify any master who fails to maintain the strict standards of impartiality imposed on judges.<sup>81</sup>

The *Werner* decision is thus an unfortunate addition to the confusion surrounding the applicable disqualification standards for land commissioners. Congress should clarify section 455 and draft guidelines for the correct interpretation of the standards governing land commissioners. Until Congress addresses the issue, however, courts should refrain from subjecting both masters and commissioners and the efficiency of justice to the heightened disqualification standards applicable to judges.

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administrator was highly qualified for the position of master, yet it was unavoidable that an attorney of such experience will have represented both workers and unions in EEOC enforcement actions).

78. *See supra* note 32.

79. Silberman, *supra* note 20, at 2160 (quoting *Jenkins v. Sterlacci*, 849 F.2d 627, 632 (D.C. Cir. 1988) (depending upon the professional function he is performing from one day to the next, a master may wear different hats)).

80. *See supra* note 77.

81. Of course, no court should refuse to grant a motion to disqualify if it anticipates that a special master has tainted the proceedings.

