11-16-2004

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87 Iowa L. Rev. 1213 (2002)

SUPPLEMENT TO THE *Iowa Law Review*

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I. INTRODUCTION

Each year, the United States Supreme Court receives seventy to eighty last-minute requests for stays of execution in which condemned individuals seek to avoid the death penalty.[1] Unlike the more predictable rhythms of its October Terms, requests for a stay of execution can come at any time of the year, any time of the day. The requests persist even though most are routinely denied.[2] On its face, Napoleon Beazley's request, which reached the Court in August 2001, seemed almost routine, if a matter of life and death can ever be called routine.

Beazley's personal circumstances, however, were unusual. He was an African-American man, convicted by an all-white jury of capital murder for the shooting death of a white businessman during an apparent carjacking. Beazley was only seventeen years old at the time of the crime, a star football player, president of his high school class, and the son of the first black city council member in Grapeland, Texas.[3]

Notwithstanding Beazley's background and achievements, it was the identity of his alleged victim—or more specifically, the identity of the victim's son—that made this case the occasion for an unusually public discussion of what is typically a quiet, almost invisible, legal issue: when federal judges should be subject to disqualification or required to recuse themselves from deciding cases.[4]

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1. Anne Gearan, *Death Penalty Fractures Court*, CHARLESTON GAZETTE, Aug. 15, 2001, at P1A, LEXIS, *News Group File* (noting that the Supreme Court is the last resort for most emergency requests for stays of execution).

2. *Id.*

3. Jim Yardley, *Execution Approaches in a Most Rare Murder Case*, N.Y. TIMES, Aug. 10, 2001, at A10 (describing Beazley's background and circumstances); *see also* Gearan, *supra* note 1 (same). Beazley was sentenced to death, based largely on the testimony of his two co-defendants, Cedric and Donald Coleman. The Colemans were adults at the time of the offense and subsequently recanted some of their testimony. The Coleman brothers were sentenced to life imprisonment. Coleman v. Texas, 956 S.W.2d 98, 100 (Tex. 1997); *see also* David Stout, *Texas Execution is Halted by State Court of Appeals*, N.Y. TIMES, Aug. 16, 2001, at A14 (discussing the Coleman brothers' conviction and sentencing). The victim's wife, who was present during the incident and survived by "playing dead," was unable to identify any of the perpetrators. *Coleman*, 956 S.W.2d at 101.

4. Although the terms "recusal" and "disqualification" frequently are treated synonymously, "recusal" and "disqualification" traditionally have had different meanings. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 5 (1996):

> [I]n many jurisdictions the term "disqualification" has been defined in such a way as to include both removal by a judge on his own motion and removal at the request of a party. In fact, in modern practice the terms "disqualification" and "recusal" are frequently viewed as synonymous and are often used interchangeably.

Id.; John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970) [hereinafter Frank, *Support of the Bayh Bill*] ("There is a technical distinction between disqualification or exclusion by force of law, and recusation, or withdrawal at the

The murder victim was John Luttig, whose son, J. Michael Luttig, was a judge on the United States Court of Appeals for the Fourth Circuit. According to *The New York Times*, Judge Luttig relocated his office from Virginia to Texas during the murder trial, consulted with prosecutors "regularly" during the trial, and testified at sentencing.[5]

As Beazley's execution date neared, his case attracted worldwide attention due to his status as a juvenile at the time of the offense, his lack of any prior criminal record, and the failure of his trial counsel to raise the age issue or to question Beazley's two co-defendants, who testified against him in exchange for avoiding the death penalty.[6] When Beazley's attorney sought a stay of execution in the United States Supreme Court, the level of publicity rose even higher, with articles appearing almost daily in *The New York Times*.[7]

The victim's son, Judge Luttig, had a number of connections to the Supreme Court.[8] He had clerked for Justice Antonin Scalia and helped prepare Justices Clarence Thomas and David Souter for their Senate confirmation hearings.[9] Upon recognizing the identity of the victim, Justice Scalia quickly recused himself from the case.[10] Beazley's attorney subsequently sent a letter to the clerk of the Supreme Court asking that Justice Thomas withdraw as well, explaining that Justice Thomas's participation raised an "appearance-of-bias issue" because Justice Thomas believed Judge Luttig was responsible for his ascension to the Supreme Court.[11]

Ultimately, the nine members of the Supreme Court split into three factions: three Justices recused themselves; three Justices voted to stay the scheduled execution; and three Justices voted to deny the stay.[12] The

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judge's discretion, but the latter term is now largely obsolete."). Traditionally, "recusal" has referred to a judge's discretionary, voluntary decision to step down. *See* FLAMM, *supra*, § 1.1, at 4 (noting this traditional view); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 n.3 (1984) (indicating that although the term "recusal" often is used as a synonym for disqualification, "it technically refers to a voluntary decision of the judge to step down"). "Disqualification," in contrast, refers to a motion for the statutorily or constitutionally mandated removal of a judge. FLAMM, *supra*, § 1.1, at 4–5.

5. Yardley, *supra* note 3, at A10.

6. Gearan, *supra* note 1 (discussing the *Beazley* case); Stout, *supra* note 3, at A14 (same); *see also* Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES, Aug. 14, 2001, at A1, A12 (noting that "Mr. Beazley's case has drawn international attention, especially from groups opposed to executing offenders who commit their crimes before the age of 18, including the European Union").

7. Bonner, *supra* note 6, at A1, A12 (discussing the *Beazley* case); Stout, *supra* note 3, at A14 (same); Jim Yardley & Raymond Bonner, *Justice Thomas's Recusal Sought in a Texas Death Case*, N.Y. TIMES, Aug. 13, 2001, at A13 (same); Yardley, *supra* note 3, at A10 (same).

8. Gearan, *supra* note 1.

9. *Id.*

10. Yardley & Bonner, *supra* note 7, at A13.

11. *Id.*

12. Justices Antonin Scalia, Clarence Thomas, and David Souter recused themselves from

resulting tie vote was insufficient to issue a stay of execution.

Although an individual's life does not literally hang in the balance in every case, the outcome of every lawsuit, whether civil or criminal, is of enormous importance to the participating litigants. In determining the outcome of a lawsuit, fairness and impartiality are concepts central, and essential, to maintaining public support for, and confidence in, our courts and our system of justice.[13]

However, bias may intrude into a judge's ability to be impartial.[14] Some potential biases, such as those raised in Napoleon Beazley's case, are recognized readily, both by outsiders and by the judges involved.[15] Other variations of bias, however, are more difficult, or even impossible, for judges

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the case; Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer voted to stay the execution; and Justices William Rehnquist, Anthony Kennedy, and Sandra Day O'Connor voted against the stay. Stout, *supra* note 3, at A14; *see also* Beazley v. Johnson, 533 U.S. 969 (mem.) (2001). Two days later, the Texas Court of Criminal Appeals issued a stay of execution. Stout, *supra* note 3, at A14 (noting that the Texas court, which "seldom grants stays of execution," issued the postponement "just a few hours before [the petitioner] was to be put to death").

13. As one prominent commentator has observed:

> Judicial decisions rendered under circumstances suggesting bias or favortism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based. Since an appearance of bias may be just as damaging to public confidence in the administration of justice as the actual presence of bias, acts or conduct giving the appearance of bias should generally be avoided in the same way as acts or conduct that inexorably bespeak partiality.

FLAMM, *supra* note 4, § 5.4.1, at 150; *see also* Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18 (noting that the concerns regarding impartiality in the Supreme Court's *Bush v. Gore* decision "have . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law").

14. In a general sense, "bias" indicates preferences for and against certain people. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 176 (1992). In the context of judicial decisionmaking, bias can arise in a number of circumstances. For example, financial bias may exist if the judge has a financial interest in a party or the outcome of the litigation. 28 U.S.C. § 455(b)(4) (1994). Relationship bias may exist if the judge is related to, or is friends with, someone involved in the lawsuit. *Id.* § 455(b)(5). Personal bias may exist if the judge personally likes or dislikes someone involved in the lawsuit. *Id.* § 455(b)(1); *see also infra* note 130 (discussing case law concerning personal bias). Biases may also exist due to stereotypes and ideologies. Alexander, *supra*, at 177. All of these types of bias have the potential to impair the judiciary's impartiality. In addition, biases may be conscious or unconscious. *See infra* notes 175–78 and accompanying text (discussing unconscious bias). Although a judge's conscious awareness of bias does not eliminate all concern, unconscious bias is even more problematic because the judge's lack of awareness prevents any action to eliminate preferences. *See infra* note 183 and accompanying text (noting that social science research has confirmed that people who honestly believe they are not prejudiced may nevertheless have unconscious biases). Indeed, social science researchers have concluded that prejudiced responses are largely unconscious. *See infra* note 179 (providing examples of social science research into unconscious nature of bias).

15. One such example is the possibility of bias when a judge has a financial interest in a party or proceeding. 28 U.S.C. § 455(b)(4) (1994).

to recognize within themselves.[16] Commentators have suggested that the power of this latter type of bias was evident in the Supreme Court's decision

16. The participation of various Supreme Court Justices in particular cases has raised critics' eyebrows on a number of occasions. In 1993, seven of the United States Supreme Court Justices issued a "Statement of Recusal Policy," which provided in part:

> We do not think it would serve the public interest . . . to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. . . .
>
> Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case.

Justice Rehnquist has participated in several cases involving potential recusal issues. *See*, Tony Mauro, *Rehnquist to Participate in Microsoft Case*, THE LEGAL INTELLIGENCER, Sept. 27, 2000, at 4, *available at* LEXIS, News Library, AMLAWM File (reporting that United States Supreme Court Chief Justice William Rehnquist had decided to continue to participate in the Microsoft antitrust case even though, at that time, his son James was a Microsoft lawyer in a private antitrust case in Boston, and despite his acknowledgement that "a decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust liability in other courts"); *id.* (reporting that Justice Rehnquist stated "there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected" by the case before the Supreme Court). Justice Rehnquist was also subjected to criticism for his participation in *Laird v. Tatum*, 408 U.S. 1 (1971), in which the Court ruled, by a 5–4 margin, that the plaintiffs' attempt to enjoin domestic military surveillance did not raise a justiciable issue. Critics asserted that Justice Rehnquist's participation was inappropriate due to his activities in his previous position as an Assistant Attorney General, which were closely related to the subject matter of *Laird*. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 736–37 (1973) [hereinafter Note, *Disqualification*] (criticizing Justice Rehnquist's participation in *Laird* case); Note, *Justice Rehnquist's Decision to Participate in* Laird v. Tatum, 73 COLUM. L. REV. 106, 117–24 (1973) (same). *See generally* Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657 (1996) (discussing the difficulties raised by recusal at the Supreme Court level); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987) (same).

In perhaps the most publicized case involving recusal issues, no Justice recused himself or herself from hearing *Bush v. Gore*, despite the widely-perceived bias of the Court's Republican appointees. *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (providing Court's resolution to contested presidential election results in Florida); *see also* Dave Zweifel, *Court's Decision Still Rankles Law Profs*, CAP. TIMES, Jan. 24, 2001, at 6A *available at* LEXIS, News Library, CAPTMS File (reprinting text of public letter signed by 585 law professors, accusing the Supreme Court of "acting as political proponents for candidate Bush" in *Bush v. Gore*). *See generally* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (questioning the results of *Bush v. Gore*); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001):

> A great many Americans suspect that a certain five justices of the United States Supreme Court, or some of them, acted reprehensibly in *Bush v. Gore*. The suspicion is that these justices, who cast judicial votes in that case to terminate the process of the year 2000 presidential election, were prompted to their actions by a prior personal preference for a Bush victory. The feeling is that they would not have done the same had the positions of the political parties and their nominees been reversed in an otherwise identical case—had it been Gore not Bush whom a Democratic Secretary Harris sought to declare victorious, Bush, not Gore, seeking recounts from Republican-appointed judges on the state supreme bench, and so forth. The suspicion is not baseless.

in *Bowers v. Hardwick*,[17] which upheld the constitutionality of the Georgia sodomy law by a five-to-four vote.[18] After he retired from the Court, Justice Lewis F. Powell, Jr., who cast the deciding vote in *Hardwick*, stated, "I think I probably made a mistake in that one."[19] At the time of Powell's concurrence in *Hardwick*, he believed that he did not know any gay men, not realizing that one of his own law clerks was gay.[20] Such underlying, unconscious bias against gay men appears to have motivated the *Hardwick* decision.[21] Unfortunately, biases—on a wide range of issues—are not unusual.[22]

The aim of recusal and disqualification is to ensure both actual judicial impartiality, which is a necessary prerequisite of due process, and the appearance of impartiality, which is necessary to ensure confidence in the courts.[23] The procedural protections provided by evidentiary and other rules

17. 478 U.S. 186 (1986).

18. *See* Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of* Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1, 10 (1994) (stating that the "inescapable conclusion is that the result in *Hardwick* is about homophobia"); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1770 (1993) (describing *Hardwick* as an "exercise of homophobic power"); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) (reading *Hardwick* strongly suggests "that the explanation [of Justice White's opinion] lies in the emotional response of five [J]ustices to the subject matter underlying the case as they perceived it, or rather, as they reconstituted it: the subject of homosexuality"); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806 (1993) (suggesting *Hardwick* reflects "homophobic ideology"); *see also* RICHARD A. POSNER, SEX AND REASON 1 (1992) (acknowledging his "belated discovery that judges know next to nothing about the subject [of sexuality] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary").

19. Ethan Bronner, *Ex-Justice Powell Has 2d Thoughts on Sodomy Case*, BOSTON GLOBE, Oct. 26, 1990, at 3, *available at* LEXIS, News Library, BGLOBE File.

20. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521 (1994).

21. *See generally* Cass R. Sunstein, *Two Phone Calls*, 16 CONST. COMMENT. 595 (1999) (imagining the ramifications if Justice Powell's gay law clerk had told the Justice of his sexual orientation while *Hardwick* was under consideration). The sodomy statute at issue in *Hardwick* covered both oral and anal sexual activity committed by any two adults, whether heterosexual or homosexual, whether married or unmarried. The lower courts had treated the lawsuit as a facial challenge to the statute and addressed the statute in its entirety, making no distinctions between the categories of individuals subject to the statute's prohibition. The Supreme Court recast the case as one involving "the fundamental rights of homosexuals." Stoddard, *supra* note 18, at 651–52. *See generally supra* note 18 (summarizing commentary that has concluded *Hardwick* was motivated by bias against gay men).

22. *See infra* note 176 (discussing recent commentary regarding judicial bias).

23. "A fair trial in a fair tribunal is a basic requirement of due process . . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re* Murchison, 349 U.S. 133, 136 (1955); *accord* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986) (indicating that an impartial tribunal is required for due process); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (same); Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) (same); Ward v. Vill. of Monroeville, 409 U.S. 57, 61–62 (1972) (same); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (same); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476

are of little value if a judge has an interest in the outcome, or if a judicial participant favors or disfavors one of the litigants.[24] Moreover, the necessity of judicial impartiality encompasses both actual and perceived biases.[25] As the Supreme Court has noted, "even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias."[26]

The laudable and constitutionally mandated goal of eliminating bias raises different issues at each of the three federal court levels—the federal district courts, the federal courts of appeals, and the United States Supreme Court.[27] While recusal and disqualification issues at both the district court

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(1986) (same). The constitutional guarantee of due process requires judicial impartiality at both the district court and court of appeals levels. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *see also* H.R. REP. NO. 1453, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6356 (expressing concern that a "judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process").

24. For example, evidence excluded for lack of personal knowledge or as hearsay ultimately may yield little protection if the judge harbors bias against a party. *See* FED. R. EVID. 602, 802.

25. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988)

> "The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible."

(quoting Hall v. Small Bus. Admin., 695 F.2d 175, 179 (5th Cir. 1983)); *see also* Liteky v. United States, 510 U.S. 540, 563–65 (1994) (Kennedy, J., concurring) (explaining that one of the very objects of law is the impartiality of its judges in fact and appearance).

26. Peters v. Kiff, 407 U.S. 493, 502 (1972).

27. *See supra* note 23 and accompanying text (discussing necessity of judicial impartiality for due process and for public confidence in the judicial system). At the federal district court level, a single judge presides over a case, and typically, the attorneys have numerous contacts with the judge over a period of time. The recusal or disqualification of a particular district court judge results in the substitution of a different judge. *See infra* note 198 and accompanying text (contrasting differences between disqualification at federal district court and federal appellate court levels); *see also infra* note 28 (compiling commentary regarding disqualification at district court level). At the federal court of appeals level, a three-judge panel is randomly selected from the judges who sit in that circuit, and typically the attorneys interact with the panel only once: during oral argument. *See infra* note 35 (noting that appellate court cases are heard by panels of three judges); *infra* notes 190–94 (discussing procedures and practices of federal appellate courts); *infra* note 200 (providing numbers of appellate judges in each circuit). *See generally infra* note 190 and authorities cited therein. The recusal or disqualification of one or more federal appellate court judges typically results in the substitution of a different three-judge panel from the same circuit. *See infra* note 198 and accompanying text (regarding substitution of judge); *infra* note 201 (regarding sitting by designation). At the Supreme Court level, the Justices vote as to whether to grant a petition for certiorari, and if four of the Justices agree to take the case, the matter is briefed and argued to the full nine-member Court. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.17, at 221 (6th ed. 1986). Any recusal or disqualification reduces the number of Justices available to hear the case; there is no provision for substituting a

and Supreme Court levels have attracted the attention of legal scholars,[28] the federal courts of appeals have largely been overlooked. This omission is interesting because the goal of eliminating bias in the federal courts of appeals is undercut by three prominent problems affecting recusal and disqualification.[29]

The first of these problems lies in the recusal and disqualification procedures available in the federal appellate courts. At the federal appellate court level, both the guidelines and the remedy are ill-defined at best.[30] The

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different judicial decisionmaker. *See generally* John P. Frank, *Conflict of Interest and U.S. Supreme Court Justices*, 18 AM. J. COMP. L. 744 (1970) [hereinafter Frank, *Conflict of Interest*] (discussing problems of judicial disqualification at the Supreme Court level); Lubet, *supra* note 16 (same); Stempel, *supra* note 16 (same).

28. The legal commentary addressing judicial recusal and disqualification has focused primarily on the federal district courts. *See, e.g.*, Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046 (1993) [hereinafter Abramson, *Specifying Grounds*] (addressing judicial disqualification in the federal district courts); Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445 (1981) (same); Bernard Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. PITT. L. REV. 415 (1950) (same); Ellen M. Martin, Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1976) (same); Denelle J. Waynick, Comment, *Judicial Disqualification: The Quest for Impartiality and Integrity*, 33 HOW. L.J. 449 (1991) (same). Other commentators have addressed issues of recusal and disqualification as they affect the United States Supreme Court. *See, e.g.*, Frank, *Conflict of Interest*, *supra* note 27 (discussing problems of judicial disqualification at Supreme Court level); Lubet, *supra* note 16 (same); Stempel, *supra* note 16 (same). Only a student note has addressed these issues in the context of the federal courts of appeals. *See* Jason Hutt, Note, *A Wrong Without a Remedy: Proposing a Recusal Procedure for Circuit Court Judges*, 22 VT. L. REV. 627 (1998) (discussing a Second Circuit case raising a potential recusal issue). An examination of the various state court practices and procedures is beyond the scope of this Article. For the most complete treatments, see FLAMM, *supra* note 4; Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994) [hereinafter Abramson, *Recusal Motions*] (summarizing state court practices with respect to recusal and disqualification).

29. I do not mean to suggest that federal circuit court judges intentionally attempt to sit on cases in which they are biased or prejudiced in some manner. In addition to the unconscious psychological processes involved in some improper influences, *see infra* notes 179–84 and accompanying text (discussing recent research regarding unconscious bias), several factors extraneous to the value systems of individual judges contribute to the difficulties in the current recusal system, including some case law precedent that takes a narrow view of disqualification for bias or prejudice, some of which was decided before the abolition of the "duty to sit" doctrine. *See infra* note 68 and accompanying text (explaining the "duty to sit" doctrine); *see also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244–45 (1987) ("[A] judge who withdraws usually writes no opinion. Published opinions, consequently, form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

30. *See* Burg, *supra* note 28, at 1463 n.101 ("[T]he method for challenging appellate judges who refuse to step aside is a mystery. Section 144 does not apply because it is limited on its face to trial judges. Only section 455 applies to appellate judges, and it contains no procedure for invocation."); *see also* Stempel, *supra* note 16, at 638 (noting that "[t]he mechanics of the [disqualification] motion are less defined in circuit court than district court practice"). In fact, some prominent treatises addressing appellate practice and procedure contain no discussion whatsoever pertaining to federal appellate judge disqualification. *See, e.g.*,

federal judicial disqualification statute, by its terms, applies only to district court judges,[31] not appellate court judges.[32] This leaves recusal as the only remedy in the federal appellate courts—a remedy that is vested solely in the appellate judges themselves.[33] In addition, for all practical purposes, no review exists of appellate judges' recusal decisions.[34]

The second problem is that certain practices and procedures unique to the federal appellate courts limit the effectiveness of recusal and disqualification. For example, the parties to an appeal learn the composition of their three-judge panel[35] after the matter has been calendared for oral

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RICHARDSON R. LYNN, APPELLATE LITIGATION (2d ed. 1993) (containing no discussion of appellate disqualification); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989) (same). In fairness, however, the absence of discussion may be attributable to the lack of anything to report. *See* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE UNITED STATES COURT OF APPEALS § 5.2, at 27–28 (2d ed. 1990) (noting two issues with respect to appellate judge disqualification: "First, the lawyer will probably have insufficient information to feel comfortable in asserting without reservation that the judge should have been disqualified. Second, no procedures exist for raising such a question.").

31. *See* 28 U.S.C. § 144 (1994) (referring to "any proceeding in a *district* court") (emphasis added); Millslagle v. Olson, 128 F.2d 1015, 1016 (8th Cir. 1942) (holding § 144 inapplicable to federal circuit courts of appeals); *see also infra* note 67 and accompanying text (citing cases holding that § 144 applies only to district court judges).

32. In referring to "federal appellate judges," this Article addresses only judges serving on the federal circuit courts of appeals. Although many of the concerns addressed in this Article would apply to Justices of the United States Supreme Court, the nine-member Court poses special recusal and disqualification concerns in terms of the limited number of Justices, the lack of any provision for sitting by designation, and the reality that the Supreme Court is the court of last resort without any option for further review. For a discussion of Supreme Court recusal and disqualification, see FLAMM, *supra* note 4, § 28.3, at 850–55; Frank, *Conflict of Interest*, *supra* note 27; Lubet, *supra* note 16; Stempel, *supra* note 16. Accordingly, issues concerning the recusal of Justices of the United States Supreme Court are beyond the scope of this Article.

33. *See* 28 U.S.C. §§ 144, 455 (1994); Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1191 nn.368–71 (2001) (discussing the renewal remedy). A third, related statute provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1994). Section 47 is aimed at judges elevated from a district to appellate judgeship. *See* Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978) (noting that, "[t]o say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety, and appropriateness of what he did in the trial of the case"); FLAMM, *supra* note 4, § 12.5, at 367:

> [U]nder the statutory law of the federal government . . . judges are not permitted to sit in a cause at more than one level in its vertical progression through the judicial hierarchy.

The rationale for this rule is that one could reasonably question the impartiality of a judge who sits as a member of an appellate court in review of her own decision as a trial judge.

The distinct, yet related, possibility that an appellate judge could bias a proceeding, despite her non-participation in that proceeding, is beyond the scope of this Article.

34. *See infra* notes 120, 196 and accompanying text (explaining the limited purpose of review by the Supreme Court).

35. Federal circuit courts of appeals must decide cases in panels of three, "at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or

argument—which typically occurs less than thirty days before the oral argument.[36] Moreover, most practicing lawyers have little contact with appellate judges, and appellate judges generally maintain a lower profile than trial judges.[37]

The third problem is the complete failure of available mechanisms to recognize unconscious bias. Recent psychological studies suggest that unconscious bias is far more prevalent than originally believed.[38] Accordingly, any judicial recusal and disqualification scheme should contain some mechanism for addressing such bias.

Part II of this Article reviews the existing statutory provisions pertaining to the recusal and disqualification of federal judges.[39] Part III examines the relevant ethical provisions in the American Bar Association's *Model Code of Judicial Conduct* and the *Code of Conduct for United States Judges.*[40] Part IV analyzes the practices, standards, and procedures that render recusal and disqualification more difficult in the federal appellate courts, and proposes increased protections.[41] Part V analyzes the particular difficulties inherent in issues involving potential bias.[42] Finally, Part VI proposes a modified peremptory challenge procedure, incorporating both substantive and procedural changes that address existing deficits in recusal and disqualification provisions for federal appellate judges by permitting each side to exercise one peremptory challenge at the time of filing its opening brief in the appellate court.[43] Although complete impartiality may be an unattainable goal, greater deference to parties' concerns regarding bias and prejudice would better serve the recusal and disqualification standards and would better reflect our current understanding of the psychology of judicial decisionmaking.

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disqualified," in which case a judge from another appellate or district court may hear the case by designation. 28 U.S.C. § 46(b) (1994).

36. *See infra* note 190–92 and accompanying text (explaining practices in the federal courts of appeals regarding informing parties of the panel's identity and the circulation of bench memoranda).

37. *See infra* notes 193 and accompanying text (discussing the lower profile of appellate judges and the faster pace of appellate briefing and argument schedules).

38. *See infra* notes 176–79 and accompanying text (summarizing recent studies on unconscious bias).

39. *See infra* notes 44–74 and accompanying text (discussing the historical development of the recusal and disqualification statutes).

40. *See infra* notes 75–92 and accompanying text (discussing the relevant ethical rules and codes).

41. *See infra* notes 93–130 and accompanying text (discussing the specific practices and procedures in the federal appellate courts rendering recusal and disqualification issues more difficult).

42. *See infra* notes 131–89 and accompanying text (discussing various forms of bias and difficulties in detecting bias).

43. *See infra* notes 190–210 and accompanying text (discussing peremptory challenges and setting forth modified peremptory challenge proposal).

II. FEDERAL LAW CONCERNING JUDICIAL DISQUALIFICATION

At common law, only a direct financial interest invoked recusal or disqualification.[44] "The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else."[45] Blackstone rejected the possibility that a judge should be disqualified for any reason other than a direct financial interest.[46] Indeed, the early English courts held that judges were not disqualified even when they were related to the parties.[47]

Congress subsequently expanded the narrow categories for judicial disqualification in 1792.[48] Under the 1792 legislation, recusal was required when the judge had a financial interest in the litigation or represented either party as counsel.[49] Congress amended the statute in 1821 to require recusal when a judge's connection or relationship to a party rendered it improper, in the judge's own opinion, to sit on the case.[50] In 1891, Congress added a new statute prohibiting judges from hearing appeals of cases they

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44. One example of such interest would be a judge in an ejectment case who was a lessor of the plaintiff. *See, e.g.*, Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (K.B. 1698); Earl of Derby's Case, 12 Co. 114, 77 Eng. Rep. 1390 (K.B. 1614) (same). Another example would be a judge who would receive the fine that he had the power to impose in the case he was deciding. *See, e.g.*, Dr. Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608).

45. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) [hereinafter Frank, *Disqualification of Judges*].

46.

> By the laws of England, also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose the possibility of bias or favor in a judge.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 361 (William D. Lewis ed., 1922); *see also* Frank, *Support of the Bayh Bill*, *supra* note 4, at 43–44 n.3 ("[B]lackstone consciously rejected the earlier views of Bracton, who had said that a judge should disqualify if he were related to a party, if he were hostile to a party, or if he had been counsel in the case." (citing 4 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 281 (Woodbine ed. 1942)).

47. *See, e.g.*, Brookes v. Rivers, 1 Hardres 503, 145 Eng. Rep. 569 (Ex. 1668) (explaining that a judge need not disqualify himself in case involving his brother-in-law "for favour shall not be presumed in a judge"); *see also* FLAMM, *supra* note 4, § 1.2.2, at 7 ("The early English courts' nonrecognition of bias as a ground for disqualification extended even to cases involving familial relationships between judges and parties."). Interestingly, although the English courts held that judges were not disqualified for such relationships, they would disqualify jurors on that basis. *See* Vernon v. Manners, 2 Plowden 425, 75 Eng. Rep. 639 (K.B. 1572) (disqualifying juror for relationship).

48. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278; *see* FLAMM, *supra* note 4, § 23.1, at 672 (noting the federal judicial disqualification statute was amended "on multiple occasions; in each instance Congress enlarged the enumerated grounds for seeking disqualification.").

49. § 11, 1 Stat. at 278.

50. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.

themselves had tried.[51] In 1911, Congress expanded the statutory reach further, requiring that judges recuse themselves when they had an "interest" in the pending case, had been of counsel or a material witness for either party, or when, in their opinion, they were so related to or associated with any party or attorney as to render it improper for them to participate in the case.[52]

In a companion statute to the 1911 recusal legislation, Congress authorized a party to raise the issue of judicial disqualification when the party believed that the assigned judge had a personal bias or prejudice against him or her.[53] The purpose of this statute was to create a peremptory challenge procedure, whereby recusal was mandatory when a party filed a timely affidavit alleging the judge was biased.[54] Before this 1911 legislation, a federal litigant who believed that the assigned judge demonstrated bias against him or her had no recourse for obtaining relief.[55]

The congressional debates in 1910 and 1911 concerning the peremptory challenge approach showed "a surprising unanimity in favor of this new remedy."[56] When asked whether the proposed statute allowed the district judge to exercise discretion in determining whether the affidavit was sufficient to disqualify, the statute's sponsor, Representative Cullop of Indiana, replied, "no[,] it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case."[57] However, despite the clear intentions of both the bill's sponsor and the statute's language, a series of judicial decisions quickly eradicated the peremptory challenge intent behind the statute.[58]

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51. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826 (codified as amended at 28 U.S.C. § 47 (1994)).

52. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090.

53. *Id.* § 21.

54. 46 CONG. REC. 2626–27 (1911). The 1911 statute provided that upon the filing of an affidavit alleging bias, "such judge shall proceed no further therein, but another judge shall be designated." 36 Stat. at 1090; *see also* FLAMM, *supra* note 4, § 23.3, at 674 (noting that this section "was clearly intended by Congress to be peremptory in nature"). Congress modeled the federal statute on an Indiana statute, which provided for automatic disqualification upon the filing of the affidavit. *See* Ind. Code Ann. §§ 2-1401, 9-1301 (Michie 1933); Fidelity & Cas. Co. v. Carroll, 117 N.E. 858, 859 (Ind. 1917) ("Under this statute, when a proper affidavit has been made and filed, the court has no discretion, but must grant the change [of judge]."); Lester B. Orfield, *Recusation of Federal Judges*, 17 BUFF. L. REV. 799, 804 (1968) (noting that the filing of an affidavit results in automatic disqualification); Schwartz, *supra* note 28, at 424 (same).

55. *See* 46 CONG. REC. 2627 (1911) (remarks of Rep. Cullop); *see also* Frank, *Disqualification of Judges*, *supra* note 45, at 629 (reprinting the remarks of Rep. Cullop).

56. Orfield, *supra* note 54, at 803 (quoting Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 10 (1923)).

57. 46 CONG. REC. 2627 (1911); *see also* United States v. Flegenheimer, 14 F. Supp. 584, 589 (D.N.J. 1935) (holding that once the affidavit is filed, the judge may not proceed any further).

58. *See, e.g.*, Berger v. United States, 255 U.S. 22, 35–36 (1921) (holding that the allegations in an affidavit were to be accepted as true, but that judge was required to pass on the

In 1948, these sections were recodified as §§ 144 and 455.[59] While Congress recodified § 144 without significant change, it made two changes to § 455, which preserved the distinction between the two statutory provisions. The first change eliminated the requirement that a party initiate disqualification, which had the effect of "converting [Section] 455 from a 'challenge-for-cause' provision to a 'self-enforcing' disqualification provision."[60] The second change added the adjective "substantial" before the word "interest" in setting forth the grounds for invoking § 455, thus reducing the likelihood of recusal.[61] The impact of these amendments was to grant judges vast discretion to use their own subjective opinions to decide whether recusal was necessary.[62]

Congress next considered amendments to the federal recusal and disqualification statutes in 1974. These amendments resulted from financial conflict of interest concerns raised during the confirmation hearings concerning Judge Clement Haynsworth, Jr.'s nomination to the United States Supreme Court in 1969,[63] as well as other scandals and controversies.[64]

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affidavit's sufficiency); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962) (finding the affidavit insufficient if it alleged "mere conclusions"); Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958) (refusing to accord properly filed affidavit of bias with presumption of validity); Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913) (holding that prejudgment on the merits was insufficient to meet statutory requirement of "personal" bias or prejudice); Cole v. Loew's Inc., 76 F. Supp. 872, 876 (S.D. Cal. 1948), *rev'd on other grounds*, 185 F.2d 641 (9th Cir. 1950) (requiring "a personal attitude of enmity directed against the suitor"); Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924) (interpreting the statute as requiring affiant to demonstrate that the judge disliked him personally); *Ex parte* N.K. Fairbank Co., 194 F. 978, 990–1001 (M.D. Ala. 1912) (vesting discretion in trial judge). *See generally* FLAMM, *supra* note 4, § 23.4.1, at 674–75 (noting that the Supreme Court "interpreted the statute in such a manner as to effectively eviscerate its peremptory intent.... [Thus] judicial disqualification under [this section] never became the peremptory process Congress had originally envisioned.").

59. Act of May 24, 1949, Pub. L. No. 81–72, ch. 139, § 65, 63 Stat. 99 (codified at 28 U.S.C. § 144 (1994)); Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, § 455, 62 Stat. 908 (codified at 28 U.S.C. § 455).

60. FLAMM, *supra* note 4, § 23.5.1, at 676.

61. *Id.* at 676–77.

62. Under the 1948 version of § 455, "a judge was generally required to disqualify himself from presiding over a matter only if he believed in his own subjective opinion that it would be improper for him to sit." *Id.* § 23.5.2, at 678. Thus, the federal judicial disqualification framework in 1948 "consisted of two wholly independent statutes, one of which, § 455, was intended to be self-enforcing but rarely was, and the other, § 144, which was intended to be peremptory but never was." *Id.*, § 23.6.1, at 678.

63. The concerns involved whether Judge Haynsworth should have recused himself from five different cases, where he had a small financial interest, which had come before him during his tenure on the United States Court of Appeals for the Fourth Circuit. *See generally* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991) (discussing Judge Haynsworth and the confirmation hearings). In one case, Judge Haynsworth owned $16,000 in a party's stock; in another, the judge was a shareholder in a party's supplier; in the remaining three cases, the judge owned stock in a party's parent company. Frank, *Support of the Bayh Bill*, *supra* note 4, at 51–60 (1970).

64. There were other scandals and controversies impacting the proposed amendments. *See*

Ultimately, § 144 was left unchanged and continues to govern judicial disqualification today.[65] Section 144 contains both a substantive and a procedural component, providing:

> 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.[66]

By its terms, § 144's restriction to "any proceeding in a district court" limits judicial disqualification motions on the basis of bias or prejudice to the disqualification of district court judges.[67]

Leubsdorf, *supra* note 29, at 245 n.45 (noting "the series of scandals and controversies that led to the amendment of [§] 455" in 1974); *see also* FLAMM, *supra* note 4, § 23.6.1, at 678–79 (stating that the "notoriety arising from [the Haynsworth] situation, as well as from a number of highly publicized cases involving other judges' refusals to disqualify themselves despite apparent or actual conflicts of interest, began to kindle public sentiment for altering the standards for disqualifying federal judges"); JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974) (describing as examples of scandal and controversy, among others, indictment of Seventh Circuit Court of Appeals Judge Otto Kerner and failure of the Senate to approve Justice Abe Fortas as Chief Justice).

65. 28 U.S.C. § 144 (1994). The 1974 proposed amendment to § 144 would have permitted each side of the case to exercise one peremptory challenge to a federal district court judge. S. 1886, 92d Cong. § 144 (1971). However, this amendment to § 144 proved controversial, and the bill's sponsor, Senator Birch Bayh, withdrew it. *Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 6-7, 12–13 (1973) [hereinafter *Hearings on S. 1064*]; *id.* at 66, 76 (statement of Sen. Bayh).

66. 28 U.S.C. § 144 (1994).

67. *Id. See In re* Bernard, 31 F.3d 842, 843 n.3 (9th Cir. 1994) (noting § 144 "applies only to district judges, not appellate judges"); Hepperle v. Johnston, 590 F.2d 609, 613 (5th Cir. 1979) (noting that § 144 "by its terms applies only to district judges"); Pilla v. Am. Bar Ass'n, 542 F.2d 56, 58 (8th Cir. 1976):

> Section 144 is limited in application to proceedings in a district court. It provides that upon the filing of a proper affidavit of prejudice, the judge against whom the affidavit is filed shall proceed no further in the case, and that another judge shall be assigned to hear it. It has been held squarely that the section does not apply to a federal appellate judge.

Id. Millslagle v. Olson, 128 F.2d 1015, 1016 (8th Cir. 1942) ("The statute (Title 28 U.S.C. § 25

Although Congress left § 144 unchanged, it did amend § 455, which pertains to recusal generally. The 1974 amendment replaced the "substantial interest" recusal standard with a specific list of the circumstances mandating disqualification; it also replaced the subjective standard, which left recusal to the judge's discretion, with the more objective standard set forth in the American Bar Association's *ABA Model Code of Judicial Conduct*.[68] Today, subsection (a) of § 455 provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Subsection (b) then lists specific circumstances in which judges are required to recuse themselves.[69]

[now § 144]), of which appellant seems to be trying to avail himself, does not apply to courts of appeals."); Kinney v. Plymouth Rock Squab Co., 213 F. 449, 449 (1st Cir. 1914) (noting that a predecessor statute to § 144 "is so framed that evidently it does not apply to an appellate tribunal"); *see also* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 23 n.103 (1994) (noting that § 144 does not apply to courts of appeals); Note, *Disqualification*, *supra* note 16, at 738 (same).

68. AMERICAN BAR ASSOCIATION, ABA MODEL CODE OF JUDICIAL CONDUCT (2000 ed. 1999) [hereinafter MODEL CODE OF JUDICIAL CONDUCT]. The previous version of § 455 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.

H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352. In addition to eliminating the subjective standard reflected by the phrase "in his opinion," the 1974 amendments also eliminated the "duty to sit" doctrine, which required judges to decide borderline questions of recusal in favor of presiding over the case. *Id.* at 6355; *see* Laird v. Tatum, 409 U.S. 824, 837 (1972) (stating that a federal judge "has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*") (emphasis in original); *see also* FLAMM, *supra* note 4, § 23.6.2, at 681 (noting that the 1974 amendments to § 455 changed the section "to read substantially the same way as former Canon 3C (now 3E) of the Code of Judicial Conduct").

69. Section 455(b) provides:

> 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

In contrast to § 144, which applies only to federal district court judges, § 455 applies to both federal appellate and district court judges.[70] However, because § 455 anticipates that judges will recuse themselves when faced with situations falling within the statutory proscriptions, it has limited the alternatives available to remedy potential problems. In particular, § 455 contains no procedural component, leaving unclear how litigants may pursue a remedy when judges, particularly appellate judges, decline to recuse themselves voluntarily.[71]

The legal commentary addressing judicial disqualification has focused primarily upon district court judges.[72] This limited focus is logical for several reasons. As noted, the federal judicial disqualification statute applies only to the district courts.[73] In addition, perhaps due to the more open scrutiny of

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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.

Id. See H.R. REP. NO. 93-1453, at 5; S. REP. NO. 93-419, at 5 (1973). Recusal under § 455(a) "is mandatory whenever any fact reasonably suggests that the judge appears to lack impartiality, whereas under § 455(b) recusal is mandatory when certain specifically enumerated circumstances create a presumption that the judge lacks impartiality." FLAMM, *supra* note 4, § 24.1, at 686. Subsection (b)(4) imposes a "rigid per se rule." *Id.* § 24.6.2, at 698. Waiver of any ground for disqualification enumerated in subsection (b) is prohibited. 28 U.S.C. § 455(e) (1994). Thus, the parties cannot agree to waive a judge's disqualification due to financial interest. FLAMM, *supra* note 4, § 24.9.1, at 712–13:

> [P]roposals to amend § 455 to permit express waiver of the statutory grounds for disqualification were criticized on the ground that parties with valid objections to a judge might be intimidated into agreeing to a waiver. Congress voiced concern about the possibility of federal judges wielding a 'velvet blackjack.' . . . Congress ultimately concluded that confidence in the impartiality of federal judges would be enhanced by *not* permitting waiver and, in fact, that to allow express waiver would defeat the purpose of the judicial disqualification statutes.

70. H.R. REP. NO. 93-1453, at 5; S. REP. NO. 93-419, at 5 (referring to "[a]ny justice, judge, or magistrate of the United States").

71. *See infra* note 124 and accompanying text (discussing lack of procedural component in § 455).

72. *See generally* Abramson, *Specifying Grounds*, *supra* note 28 (discussing judicial disqualification of federal district court judges); Leubsdorf, *supra* note 29 (same); Moore, *supra* note 4 (same); Nugent, *supra* note 67 (same); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMP. L.Q. 697 (1987) (same).

73. 28 U.S.C. § 144 (1994); *see also supra* note 67 and accompanying text (discussing cases

district court decisions and the ready availability of appeal, most of the published decisions addressing judicial disqualification tend to involve the district judge's disqualification decision.[74] However, the sparse case law and commentary do not reflect the potential gravity of appellate disqualification.

III. THE APPLICABLE PROVISIONS OF THE ETHICAL CODES OF CONDUCT

At every court level, the ultimate purpose behind judicial disqualification provisions is fairness—both actual fairness and perceived fairness.[75] The importance of perceived fairness is reflected in the American Bar Association's *Model Code of Judicial Conduct* and the *Code of Conduct for United States Judges,* which both repeatedly refer to the "appearance" of impropriety.[76] In addition, Canon 3 of both codes sets forth a general standard of disqualification from any proceeding "in which the judge's impartiality might reasonably be questioned."[77] Accordingly, the codes provide a basis for resolving situations involving potential bias.

Interestingly, however, these ethical codes represent a missed opportunity to regulate judicial conduct—not due to any omission within the codes, but due to the judiciary's failure to employ the ethical codes. The courts often neglect these ethical codes and instead focus exclusively on the statutory provisions set forth in §§ 144 and 455.

As a model code, the *ABA Model Code of Judicial Conduct ("Model Code")* carries no force until adopted. Although forty-nine of the fifty states have adopted the *ABA Model Code of Judicial Conduct* in some form,[78] the states differ with respect to the status and power accorded to these ethical rules.[79]

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holding that § 144 applies only to district court judges).

74. *See generally* SCA Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) (discussing district judge's disqualification decision); Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977) (same); *In re* Rodgers, 537 F.2d 1196 (4th Cir. 1976) (same); *In re* Cont'l Vending Mach. Corp., 543 F.2d 986 (2d Cir. 1976) (same); United States v. Bray, 546 F.2d 851 (10th Cir. 1976) (same); Bradley v. Milliken, 426 F. Supp. 929 (E.D. Mich. 1977) (same); McCrystal v. Barnwell County, 422 F. Supp. 219 (S.D.N.Y. 1976) (same); Mavis v. Comm. Carriers, Inc., 408 F. Supp. 55 (C.D. Cal. 1975) (same); Hirschkop v. Virginia State Bar Ass'n, 406 F. Supp. 721 (E.D. Va. 1975) (same).

75. *See supra* notes 23–24 and accompanying text (discussing purposes behind recusal and disqualification).

76. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canons 2, 3, 4; CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 2, 3, *reprinted in* 175 F.R.D. 364, 365–73 (1998) [hereinafter CODE OF CONDUCT FOR UNITED STATES JUDGES].

77. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3E(1); CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3C(1).

78. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (stating 49 states have adopted some form of the ABA Model Code of Judicial Conduct).

79. Some states give the Code of Judicial Conduct the status of law. *See, e.g.*, Collins v. Joshi, 611 So. 2d 898, 901 (Miss. 1992) (treating the Code of Judicial Conduct as law). Other states consider the Code a set of "standards of self-assessment of whether recusal is necessary." Abramson, *Recusal Motions, supra* note 28, at 543 n.3; *see also* Forsmark v. State, 349 N.W.2d 763,

Similarly, the Judicial Conference of the United States, which adopted the *Code of Conduct for United States Judges*, holds no specific statutory grant of authority to enact binding ethical rules.[80] Despite the lack of inherent force behind the ethical codes, the provisions of Canons 3E and 3F of the *Model Code* closely parallel those of § 455,[81] as do the provisions in the *Code of Conduct for United States Judges*.[82] Indeed, Congress intended that § 455 should conform to the *ABA Model Code of Judicial Conduct*.[83]

Canon 3E of the *Model Code* and Canon 3C of the *Code of Conduct for United States Judges* address recusal and disqualification. Canon 3E of the *ABA Model Code of Judicial Conduct* provides that:

> [a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [when] the judge has a personal bias or prejudice [regarding] a party or a party's lawyer, [has] personal knowledge of disputed evidentiary facts, [or] has served as a lawyer [or] been a material witness [in the matter].[84]

Additional disqualifying circumstances include situations in which the judge or a member of the judge's family

> has an economic interest in the subject matter . . . or in a party to the proceeding, [or where] the judge, the judge's spouse, or a person within the third degree of relationship to either of them . . . is a party to the proceeding; [is] an officer, director or trustee of a party; is acting as a lawyer in the proceeding; [has] a more than de minimis interest that could be substantially affected by the proceeding, [or] is . . . likely to be a material witness . . . .[85]

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767 (Iowa 1984) (describing the Code of Judicial Conduct as a "guiding precept upon which every judge, by an objective in-depth search of his or her own conscience, must decide whether a fair trial dictates he or she should make way for another judge to preside").

80. *See In re* Cargill, 66 F.3d 1256, 1267 (1st Cir. 1995) (Campbell, J., dissenting) (noting that although "the Judicial Conference of the United States, which adopted the [ethical code, does not] hold a specific statutory grant of authority to enact binding ethical rules," the adoption should nevertheless be accorded "great persuasive weight").

81. *Compare* 28 U.S.C. § 455 (1994) *with* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canons 3E, 3F (reflecting parallel provisions).

82. *Compare* 28 U.S.C. § 455 (1994) *with* CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3 (reflecting parallel provisions).

83. *See* 28 U.S.C. § 455 (1994); H.R. REP. NO. 1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6358; 119 CONG. REC. 33029 (1973) (remarks of Sen. Burdick) (articulating intention that § 455 should conform to the *ABA Model Code of Judicial Conduct*).

84. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3E.

85. Canon 3E provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a

The language of Canon 3C of the *Code of Conduct for United States Judges* is nearly identical to Canon 3E of the *ABA Model Code of Judicial Conduct*, except that it omits the reference to personal bias or prejudice concerning a party's lawyer.[86] In addition, subdivision (c), while still referring to "any other interest that could be affected substantially by the outcome of the proceeding," omits the reference to "de minimis."[87]

Canon 3F of the *Model Code*, and Canon 3C(4) and 3D of the *Code of Conduct for United States Judges*, authorize waiver of disqualification under some circumstances.[88] Canon 3F of the *Model Code* states:

> A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified,

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party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's 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 a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3E; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3C.

86. CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3C.

87. *Id.*

88. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3F; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3D.

> and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.[89]

Again, Canon 3D of the *Code of Conduct for United States Judges* is nearly identical, but exempts "the circumstances specifically set out in subsections (a) through (e)" from the reach of such waiver,[90] thus more closely paralleling the statutory language of § 455.

The tendency to focus exclusively on § 455, rather than examining the guidance available under these ethical codes and related bar association opinions, has contributed to minimizing the impact of the appearance of impropriety standard. By declining the guidance of these ethical codes, the courts can create their own interpretations of the statutory proscriptions.[91] Often, these interpretations downplay the potential for the appearance of impropriety and instead attempt to objectify the reasons for permitting the challenged judge to participate in the proceedings.[92] Taken together with the practices, standards, and procedures unique to the federal appellate courts, there is a very real danger of hampering the impartiality necessary to our system of justice.

IV. HAMPERING IMPARTIALITY: PRACTICES, STANDARDS, AND PROCEDURES

A first step in addressing judicial bias is recognizing the considerations relevant to judicial disqualification and how the existing statutory framework does not adequately address these concerns.

At least three competing considerations are relevant when examining judicial disqualification. First, we expect judges to bring their practical, real-life experiences to the bench and to participate in bar-related and

89. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3F; *see also supra* note 69 and accompanying text (discussing waiver).

90. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3D, *reprinted in* 175 F.R.D. 364 (1998).

91. *See infra* note 92 and accompanying text (discussing examples of cases ignoring ethical rules).

92. *See, e.g.*, Carter v. West Publ'g Co., No. 99-11959-EE, 1999 WL 994997, at *1-2, 4 (11th Cir. Nov. 1, 1999) (describing a judge who declined to recuse himself from a case where he had previously traveled to resort-style locations at the defendant's expense, allegedly was personal friends with the defendant's top executives, and appeared before a subcommittee to advocate a product by defendant; relying on § 455; and citing to the Code of Conduct for United States Judges as permitting judges to participate in "extra-judicial activities" but without citing to the appearance of bias standard in Canon 3); Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at *29–31 (4th Cir. June 17, 1998) (dealing with a judge who declined to recuse himself from a case involving carjacking and subsequent murder, where judge's father had been killed during a carjacking four years earlier; and citing only to § 455); Ball Mem'l Hosp. v. Mut. Hosp. Ins., 788 F.2d 1223, 1224 (7th Cir. 1986) (dealing with a judge who declined to recuse himself from a case where the judge had served as a consultant for an entity related to the defendant approximately one year earlier, without citing to § 455 or any ethical codes).

community activities as active citizens and role models.[93] Yet, at the same time, we expect judges to decide cases with near-absolute impartiality.[94]

Second, we wish to achieve this near-absolute impartiality through an ideal, perfect balance, whereby we eliminate any semblance of partiality and thereby enhance public confidence in the judiciary,[95] but without increasing judge-shopping and dilatory tactics by counsel.[96] And third, we seek an objective standard that somehow takes into account the individual subjective views of the unspecified outside observer. These competing considerations suggest an impossible task invoking considerations of both substance and procedure, which raise particularly troublesome concerns at the appellate level.

The procedures for using § 455 undermine its goal of actual and perceived impartiality at both the district and appellate court levels. The language of § 455 indicates that the statute is self-enforcing.[97] However, a

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93. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT x–xi (2d ed. 1992) [hereinafter ABRAMSON, DISQUALIFICATION UNDER CANON 3]:

> Judges, after all, must live in the real world, and cannot be expected to sever all of their ties with it upon taking the bench. Nor would it be entirely beneficial to the judicial process for judges to live in ivory towers. Involvement in the outside world enriches the judicial temperament, and enhances a judge's ability to make difficult decisions. As Justice Holmes put it, "the life of the law has not been logic: it has been experience."

See also id. at 24:

> Each judge brings to the bench a background with neighbors, friends and acquaintances, and business and social relations. The results of these associations and the impressions they create in the judge's mind form a personality and philosophical disposition toward the world. . . . In short, a judge is expected to act according to his values. Indeed, proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias.

94. *See* Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 606 (1996) ("[J]udges do not live in ivory towers and are not immune to the foibles of the human condition. Nonetheless, we demand that they adhere to the highest degree of impartiality that is mortally possible."); *see also* FLAMM, *supra* note 4, § 1.7, at 14–15 (noting that "it is generally agreed, at least in principle, that [the parties] are entitled to nothing less than a calm and dispassionate decisionmaker who operates in an atmosphere of absolute neutrality").

95. *See* H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351 (listing public confidence as one of the purposes of the legislation); S. REP. NO. 93-419, at 5 (1974) (indicating that the purpose of § 455 is "to promote public confidence in the impartiality of the judicial process"); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 848 (1988) (requiring recusal, primarily to satisfy the appearance of justice).

96. *See Hearings on S.* 1064, *supra* note 65, at 54 (noting that a survey of California judges reflected judge-shopping as the most frequent abuse of California's state judicial disqualification statute); *see also* Frank, *Support of the Bayh Bill*, *supra* note 4, at 67 (noting disqualification should not "be a gimmick for waste or maneuver"); Schwartz, *supra* note 28, at 426 (noting the possibility of "[m]aneuvering to have one's case brought on before a supposedly favorable judge").

97. *See generally* 28 U.S.C. § 455 (1994); *see supra* note 60 and accompanying text

party also may invoke § 455 through motion in the trial court, assignment of error on appeal, interlocutory appeal, or by extraordinary writ.[98] When a litigant seeks to prevent a particular district court judge from participating in a proceeding, it is the challenged judge who evaluates and rules on the litigant's motion for disqualification.[99] This practice and procedure of having the challenged judge determine the existence of a perceived bias undercuts the statute's effectiveness.[100]

The litigant may seek review of a district judge's recusal decision in the federal court of appeals.[101] Even then, however, appellate review of a district

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(explaining that 1948 amendments converted § 455 to a self-enforcing disqualification provision); Aronson v. Brown, 14 F.3d 1578, 1581 (Fed. Cir. 1994) ("[S]ection 455 is 'self-enforcing' in that it is self-executing; that is, a judge may recuse *sua sponte*."); *see also* Taylor v. O'Grady, 888 F.2d 1189, 1200 (7th Cir. 1989) ("Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself *sua sponte* under the stated circumstances."); United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) ("[S]ection 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint."); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975) (finding that no motion is required to precipitate a judge's recusal under § 455).

98. *Davis*, 517 F.2d at 1051.

99. *See, e.g.*, United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993) (noting that it is the challenged judge who rules on a disqualification motion); United States v. Cooley, 1 F.3d 985, 994 (10th Cir. 1993) (same); United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (same); United States v. Nelson, 922 F.2d 311, 319 (6th Cir. 1990) (same); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (same); *see also* Leubsdorf, *supra* note 29, at 242 (noting the "bizarre rule" requiring "the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias"); Stempel, *supra* note 16, at 633 (noting that "the recusal motion is ruled upon by the district judge whose ability to decide fairly is the very subject of the motion").

100. As practitioners are well-aware, filing a motion for judicial disqualification is a risky proposition for at least two reasons. First, the filing of the disqualification motion itself may alienate the challenged judge. *See* FLAMM, *supra* note 4, § 1.10.5, at 25 (noting that "it must be acknowledged that the filing of a judicial disqualification motion may antagonize the challenged judge either consciously or subconsciously, with the result that the moving litigants and their counsel are likely to suffer"). Flamm states:

> [A]ttorneys have sometimes been reticent to file [disqualification] motions. When they have decided to bring the ethical issue to the fore, they often have framed the request in terms of a 'suggestion' or 'invitation' to the judge to consider whether to disqualify himself, rather than as a motion that affirmatively seeks such relief.

Id. at 27.

Second, "[j]udges who have been challenged by frivolous disqualification motions are not without means to retaliate." *Id.* § 1.10.3, at 23–24 (noting that courts have responded to disqualification motions by imposing monetary sanctions, revoking the privilege to practice *pro hac vice*, and initiating charges ranging from contempt to disbarment).

101. *See* Stempel, *supra* note 16, at 634:

> The denial of a disqualification motion is never a final order subjecting the case to immediate appeal since the case remains to be decided on the merits. Ordinarily, then, the unsuccessful recusal movant must wait until the conclusion of trial court

judge's recusal decision is unnecessarily hampered. The litigant often cannot obtain immediate appellate review.[102] Moreover, in reviewing district court recusal and disqualification decisions, federal appellate courts employ the highly deferential abuse of discretion standard of review,[103] rather than *de novo* review.[104] In light of the existing anomaly requiring district judges to rule on motions involving their own partiality,[105] and the undeniable importance of judicial impartiality to due process,[106] the abuse of discretion standard accords too much deference to the trial judge's determination.[107]

Despite these issues, at least appellate review exists when the subject of the disqualification motion is a federal district court judge. The situation changes dramatically when it is a federal appellate judge whom the litigant seeks to preclude from participating in a proceeding.

At the appellate level, when an appellate judge evaluates § 455 and recuses himself or herself, the statute has served its intended purpose.[108] But what happens when the appellate judge contemplates recusal, but then declines to do so, or never considers the possibility of recusal at all? What

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proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits.

Id. Such appeals may be interlocutory, by writ of mandamus, or on direct appeal of a final order. *See* Moore, *supra* note 4, at 830 (discussing circumstances in which interlocutory appeal is appropriate); *see also* Stempel, *supra* note 16, at 636 (noting that "[t]raditionally, the most likely avenue for interlocutory review of recusal orders has been the writ of mandamus").

102. *See supra* note 101 and accompanying text (explaining that the denial of a disqualification motion does not constitute a final order and therefore is not subject to an immediate appeal).

103. *See, e.g., In re* Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) (stating that "[t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion"); Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982) (finding that on an appeal of recusal motion under 28 U.S.C. §§ 144 or 455, "we ask only whether [the district judge] has abused [his] discretion"); *accord* Aguinda v. Texaco, Inc., 241 F.3d 194, 200 (2d Cir. 2001); Leslie v. Grupo ICA, 198 F.3d 1152, 1157 (9th Cir. 1999); United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999); Garcia v. Women's Hosp., 143 F.3d 227, 229 (5th Cir. 1998).

104. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.14, at 2-102 (2d ed. 1992) (stating that *de novo* review is one permitting "an *independent conclusion* on the *record*") (emphasis in original).

105. *See supra* note 99 and accompanying text (citing cases upholding this practice).

106. *See supra* notes 23–24 and accompanying text (discussing the necessity of judicial impartiality to due process).

107. *See* 1 CHILDRESS & DAVIS, *supra* note 104, § 4.02, at 4–17 (stating that the abuse of discretion standard requires "substantial deference"); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 5 (1991) (noting the only standard entitled to more deference than the abuse of discretion standard is that of no review at all). In light of these considerations, it would appear that a *de novo* standard of review, which accords no deference to the trial judge's recusal decision, would be more appropriate.

108. The initial decision whether to participate in a case rests with the individual judge. *In re* Bernard, 31 F.3d 842, 843 (9th Cir. 1994).

recourse is available? The case law suggests that the remedies are exceptionally limited.[109]

The one remedy available to a litigant who believes that a particular appellate judge should not participate in a proceeding is to raise the issue by motion.[110] Thus, if an appellate judge considered but rejected the possibility of recusal, or if the judge never considered recusal at all, the litigant may move to disqualify the judge.[111]

However, as is true in the district court, a disqualification motion filed in the appellate court is heard by the challenged judge alone, not the full three-judge panel: "[T]he motion is addressed to, and must be decided by, the very judge whose impartiality is being questioned. . . . Neither section 455, nor the Federal Rules of Appellate Procedure, nor our local rules contain a mechanism for referring disqualification motions to someone else."[112] Even if the motion to disqualify the appellate judge is filed after a determination on the merits, such as when the litigant does not learn of the basis for possible prejudice until after the conclusion of the proceedings, the motion is still reviewed only by the judge whose participation is challenged.[113]

The irony of requiring the challenged judge alone to review the disqualification motion has been noted in several contexts.[114] During the 1974 amendment hearings, Senator Birch Bayh commented, "[s]urely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias."[115] Moreover, requiring the challenged judge to review a motion to disqualify runs contrary to the axiom that "[n]o man shall be a judge in his own case."[116]

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109. *See infra* notes 110–21 and accompanying text (describing available remedies).

110. *See In re* Manoa Fin. Co., 781 F.2d 1370, 1373 (9th Cir. 1986) (per curiam) ("Though section 455 is stated in terms of a self-enforcing obligation upon the judge, it may be invoked by a party.").

111. *Id.*

112. *In re* Bernard, 31 F.3d 842, 843 (9th Cir. 1994); *see also* United States v. Balistrieri, 779 F.2d 1191, 1202–03 (7th Cir. 1985) ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge.").

113. *See* Schurz Communications, Inc. v. Fed. Communications Comm'n, 982 F.2d 1057, 1059 (7th Cir. 1993) ("At the movants' request, the petition for reconsideration was (before I acted on it) referred to the other judges on the panel, although the rules and operating provisions of the court make no provision for such a referral. The other judges have declined to consider the petition.").

114. *See infra* note 117 and accompanying text (discussing the difficulties of requiring judges to evaluate disqualification motions filed against them).

115. *Hearings on S. 1064*, *supra* note 65, at 82 (statement of Sen. Birch Bayh); *see also supra* note 99 and accompanying text (noting that it is the challenged judge who rules on a disqualification motion).

116. Dr. Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608); *see also* Frank, *Support of the Bayh Bill*, *supra* note 4, at 45 (citing 1 COKE, INSTITUTES 141a for the axiom "[n]o man shall be judge in his own case").

Despite this incongruity, the practice continues, perhaps due to the absence of any provision for referral and the resistance of other appellate judges to the idea of evaluating allegations of bias or prejudice against their colleagues.[117]

If the motion to disqualify an appellate judge is unsuccessful, there is essentially no further recourse.[118] Unlike challenges to a district court judge's participation in a case, which the litigant may appeal to the court of appeals,[119] there is no right to further review of an appellate judge's recusal decision.[120] Further review of a recusal decision is discretionary and rarely granted.[121]

Another problematic aspect of the appellate recusal procedure is the troubling lack of uniformity among the circuit courts with respect to standards and procedures.[122] As previously noted, § 144 applies only to district judges, and § 455 contains no procedural component for implementation.[123] Due to § 455's lack of express procedural guidance,[124]

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117. Martin, *supra* note 28, at 159; *see also supra* note 113 (quoting a case in which the other two judges on the panel refused to consider a petition for reconsideration involving a motion to disqualify the third member of the panel); Stempel, *supra* note 16, at 639 (noting the "closer personal ties among members of the circuit bench"); Note, *Disqualification*, *supra* note 16, at 1439 (noting that even at the district court level, "a district judge passing on the disqualification of one of his colleagues would be in a sensitive position, and he might feel under pressure not to disqualify"); Note, *Disqualification of a Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749, 767 (1973) (noting that "[m]any courts are understandably reluctant to disqualify a fellow judge since a finding of actual prejudice . . . impugns both that judge's qualifications and those of the system he represents").

118. *See* Stempel, *supra* note 16, at 639 (noting that "the circuit court seems less institutionally equipped or oriented for reviewing its own recusal issues").

119. *See supra* note 101 and accompanying text (noting that a litigant may seek review of a district judge's recusal decision in the federal court of appeals).

120. *See* Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals."); *see also* Stempel, *supra* note 16, at 639–40 ("One can argue that the chances of obtaining Supreme Court review of even the worst district and appellate recusal decisions are so rare as to amount to no review at all.").

121. Further review would include a petition for rehearing, a petition for rehearing en banc, or a petition for writ of certiorari before the United States Supreme Court. FLAMM, *supra* note 4, § 28.2.6, at 850.

122. *See infra* notes 125–26 and accompanying text (discussing lack of uniform standards and procedures among the federal circuit courts).

123. *See supra* notes 67–71 and accompanying text (discussing § 144's inapplicability to federal appellate judges and the omission of any procedural component in § 455).

124.

> [Section 455] does not specify whether a party may invoke the section, and if so, what procedural restrictions are applicable. The first question, whether a party may raise section 455, seems to have resolved itself. Even decisions which have interpreted the new statute narrowly have presumed that the party retains this right. The second question, regarding the limitations, if any, on party use of section 455, is as yet unanswered and is likely to be more controversial.

the federal circuit courts have adopted their own approaches, resulting in non-uniformity with respect to the required process, procedure,[125] and standards.[126]

A second concern is the difficulty of implementing recusal and disqualification procedures under the specific circumstances established in § 455. In particular, although the circuits purport to use an objective standard,[127] the application of that objective standard varies widely, resulting in inconsistencies.[128]

Martin, *supra* note 28, at 153. Martin also details why the procedural limitations in § 144 should not be imported into § 455:

> The procedural requirements of section 144 were originally included in that statute as a safeguard against abuse of a peremptory system of recusal. As applied to the discretionary system which section 144 became through judicial construction, they caused an unsatisfactory limitation on the use of the recusal remedy. The purpose of amending section 455 was to rectify this situation by broadening the grounds for disqualification. Thus, it seems a fair inference that application of the new [section 455] was not intended to be restricted by the procedures of section 144.

125. Due to the lack of procedural requirements in § 455, some courts have found that a party wishing to seek judicial disqualification under § 455 must follow the procedural requirements set forth in § 144. *See, e.g.*, United States v. Furst, 886 F.2d 558, 582 (3d Cir. 1989) (using § 144's criteria); Venuto v. Witco Corp., 809 F. Supp. 3, 4 (D.N.J. 1992) (same); Danielson v. Winnfield Funeral Home, 634 F. Supp. 1110, 1113 (E.D. La. 1986), *aff'd in part sub nom.* Dulaney v. Winnfield Funeral Home, 820 F.2d 1222 (5th Cir. 1987) (same). Other courts, however, have rejected the application of § 144's procedural requirements to § 455. *See, e.g.*, Wilson v. City of Chicago, 710 F. Supp. 1168, 1170 (N.D. Ill. 1989) (rejecting application of § 144's procedural requirements); Idaho v. Freeman, 507 F. Supp. 706, 724 (D. Idaho 1981) (same); *In re* Searches Conducted on Mar. 5, 1980, 497 F. Supp. 1283, 1286 (E.D. Wis. 1980) (same).

Another procedural issue is whether a time limit exists for bringing a § 455 motion. *Compare In re* Bernard, 31 F.3d 842, 846 (9th Cir. 1994) (explaining that a motion was timely although made after oral argument), *and* Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1418 (Fed. Cir. 1989) (finding no timeliness requirement for circumstances under which judges are recused), *and* United States v. Kehlbeck, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (observing that timeliness was not a factor in a judge's recusal under § 455(a)), *with* Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982) (holding that a motion to disqualify judge must be filed in a timely manner), *and* Planned Parenthood v. Casey, 812 F. Supp. 541, 546 (E.D. Pa. 1993) (finding a timely motion to recuse is in the nature of the good faith requirement). *See also* FLAMM, *supra* note 4, § 26.7.1, at 752 (noting that "not all courts have agreed as to whether the timeliness requirement survived" the 1974 amendments). Yet another issue involves whether a § 455 disqualification motion requires accompanying affidavits. *See, e.g., In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987). If so, the question is whether such affidavits are given conclusive weight. *Compare* United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (finding that § 455 affidavits may be contradicted), *with* City of Cleveland v. Krupansky, 619 F.2d 576, 578 (6th Cir. 1980) (holding that affidavits are uncontrovertible).

126. *See* FLAMM, *supra* note 4, § 26.8, at 757–59 (noting that the Fifth and Ninth Circuits have expressed the view that § 144's bias-in-fact standard applies to § 455 motions, whereas the other circuits have found to the contrary).

127. *Compare* United States v. Lopez, 944 F.2d 33, 37 (1st Cir. 1991) ("'[W]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt

Thus, the concerns raised by § 455 itself, as well as the peculiarities of appellate practice and procedure, pose difficulties with respect to judicial recusal and disqualification at the federal appellate level.[129] However, the most obvious, and most difficult, problems arise in the areas of personal bias and prejudice.[130]

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concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the [moving party], but rather in the mind of the reasonable man.'" (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1996))) *with* Deluca v. Long Island, 862 F.2d 427, 428–29 (2d Cir. 1988) (focusing on whether an objective, disinterested observer, fully informed of the facts underlying the grounds on which recusal is sought, would entertain significant doubt that justice would be done absent recusal). *See also* United States v. Wade, 931 F.2d 300, 304 (5th Cir. 1991) (relying on whether a reasonable person, knowing relevant facts, would expect that "a justice, judge, or magistrate knew of circumstances creating an appearance of partiality" (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850 (1988))).

128. *See* FLAMM, *supra* note 4, § 1.6, at 14 (noting that "the modern American case precedents that deal with judicial disqualification issues are replete with inconsistencies"). Professor Leubsdorf aptly summarized these inconsistencies as follows:

> [Lawyers and lawmakers] have erected a set of cloudy distinctions that disqualify an occasional judge while allowing many others to sit. A federal judge, for instance, must withdraw for "personal bias" against a party, but not for an equally powerful bias against that party's case or counsel. A judge may hear a case although she previously expressed strong views on its crucial legal issues, but she must withdraw if she commented on the application of uncontroversial law to the facts of that case. A judge who owns a single share of stock in a large corporation may not hear a suit for a few hundred dollars against it, but a judge may retry a suit even though her first decision was vacated for numerous errors favoring one party. A judge may construe a statute she helped write, but not instruct a jury considering a traffic accident she saw. Courts declare that impartiality is so important that a reasonable—albeit incorrect—appearance of bias compels recusal; but courts will close their eyes to what a judge has done in court, and sometimes even what she has said there, in appraising disqualification claims.

Leubsdorf, *supra* note 29, at 238 (citations omitted).

129. *See supra* notes 97–128 and accompanying text (discussing difficulties resulting from § 455 and appellate practices and procedures).

130. "[P]ersonal bias or prejudice" has the same meaning under both § 144 and § 455. United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986); United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985); United States v. Mirkin, 649 F.2d 78, 81 (1st Cir. 1981); United States v. Gigax, 605 F.2d 507, 512 (10th Cir. 1979). Under both sections, the grounds for recusal must stem from an extrajudicial source; *see, e.g.*, Liteky v. United States, 510 U.S. 549, 555 (1994) (holding that no personal bias was shown by prior adverse rulings alone); United States v. Hartsel, 199 F.3d 812, 820–21 (6th Cir. 1999) (holding that no personal bias was shown when a judge presided over co-defendant's plea and sentencing prior to defendant's bench trial); United States v. Arena, 180 F.3d 380, 398 (2d Cir. 1999) (finding that no personal bias was shown when a judge made prior rulings adverse to defendant); *see also* Abramson, *Specifying Grounds*, *supra* note 28, at 1052 (noting that "[t]he extrajudicial source rule is relevant to all categories of cases relating to allegations of personal bias or prejudice"); Abramson notes:

> "Requiring litigants to establish an extrajudicial source for the bias they allege makes a great deal of sense. After all, nearly every decision a judge makes is partisan in the sense that it is more favorable to one side than the other. Indeed, the judicial system is predicated upon the requirement that judges and juries draw conclusions about facts and behavior presented to them in the context of the

V. THE FAILURE TO ACKNOWLEDGE THE PERVASIVE PROBLEM OF BIAS

The law tends to be highly resistant to non-objective concepts or factors, and instead seeks logic, rationality, and predictability,[131] shunning that which is subjective or non-quantifiable.[132] This is one reason that law and economics has been a popular field, because it proposes cost-benefit analysis as a tool for efficient judicial decision-making.[133] In this vein, one such proponent of the economic approach is Justice Antonin Scalia, who has attempted to equate the concept of "fairness" solely with economic factors such as reliance, apparently concerned that otherwise "the potential vagaries of 'fairness' raise the spectre of judicial activism."[134]

> judicial process. Moreover, litigation frequently unveils unsavory facts about individuals and cases. Were disqualification to result merely because uncomplimentary facts were learned in the course of litigation or because conclusions were ultimately reached based on those facts the law of recusal would surely cause the judicial system to grind to a halt."

Id. (quoting Spangler v. Sears, Roebuck and Co., 759 F. Supp. 1327, 1332 (S.D. Ind. 1991)).

131. *See generally* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 966 (2001) (arguing that legal policy assessment should be premised on welfare economics rather than on notions of fairness).

132. *See* ABRAMSON, DISQUALIFICATION UNDER CANON 3, *supra* note 93, at 23 (noting that "[o]f the Canon 3 triad of disqualifying factors (bias, relationship or interest), bias or prejudice is the most difficult to apply 'because it defies any exact basis of measurement.'"); *see also id.* ("Bias is necessarily more elusive, because it focuses on the judge's personal thoughts.").

133. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471 (1998) ("Economic analysis of law usually proceeds under the assumptions of neoclassical economics. But empirical evidence gives much reason to doubt these assumptions; people exhibit bounded rationality, bounded self-interest, and bounded willpower."); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1053 (2000) ("As law and economics turns forty years old, its continued vitality is threatened by its unrealistic core behavioral assumption: that people subject to the law act rationally."); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 739 (2000) ("[R]ecently, legal scholars have become interested in new theories of human decision making that researchers in psychology and empiricial economics are developing. These new theories promise to predict people's reactions to law more accurately than either law and economics or traditional legal scholarship."); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1175 (1997) ("The future of economic analysis of law lies in new and better understandings of decision and choice."). *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). A number of recent commentators, however, have challenged economic analysis of the law as relying, erroneously, on an assumption of rationality. RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001) (examining intersection of law with other disciplines, most notably economics, but also including psychology, history, and statistics).

134. Debra Lyn Bassett, *In the Wake of* Schooner Peggy: *Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 511 (2001); *see, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 623 (1990) (criticizing the concurrence's proposed standard of "contemporary notions of due process" as measuring "state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just," rendering the proposed standard "subjectiv[e], and hence inadequa[te]").

This transformation of fairness into an economic concept is also seen in the recusal and disqualification statutes. Section 455 provides that a judge shall recuse himself when "[h]e 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 of the controversy or in a party to the proceeding . . . ."[135] Section 455 subsequently defines "financial interest" as "ownership of a legal or equitable interest, *however small* . . . ."[136] This expansive definition of financial interest resulted from the uproar raised during Judge Haynsworth's nomination to the United States Supreme Court due to his alleged financial interest in some of the cases in which he participated.[137] However, despite expanding the circumstances under which a duty of recusal existed for a financial interest, Congress rejected the equivalent expansion of the duty of recusal for bias or prejudice.[138]

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135. 28 U.S.C. § 455(b)(4) (1994).

136. *Id.* § 455(d)(4) (emphasis added); *see* Abramson, *Specifying Grounds*, *supra* note 28, at 1070 (noting that "a financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest"). This definition further provides that ownership in a mutual fund is not a financial interest unless the judge participates in management of the fund. Moreover, an office in an educational, religious, charitable, or civic organization is not a financial interest in securities held by the organization; the proprietary interest of a policyholder in a mutual insurance company or of a depositor in a mutual savings association is not a financial interest in the organization unless the outcome of the proceeding could substantially affect the value of the interest; and ownership of government securities constitutes a financial interest in the issuer only if the outcome of the proceeding could have a substantial effect on the value of the securities. *Id.* at 1071 n.92. For a discussion of issues related to disqualification for financial interests, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 698–705 (1985).

137. Frank, *Support of the Bayh Bill*, *supra* note 4, at 62; *see also supra* notes 63–64 and accompanying text (discussing the 1974 amendments to federal disqualification statutes and the impact of the Haynsworth proceedings); Martin, *supra* note 28, at 146–47 ("Based on the Haynsworth experience, a financial interest was defined to include any ownership interest, however small.").

138. *See* Frank, *Support of the Bayh Bill*, *supra* note 4, at 65:

> The existing federal statute permits a party to disqualify a judge for bias and prejudice. What is required is actual bias and prejudice. The affidavit of disqualification is tested by the trial judge to determine whether a complaint states a cause of action. The statute is strictly construed, and some district judges take extreme umbrage when an affidavit is filed.
>
> Many states permit disqualification essentially at the option of a party and leave the disqualified judge nothing to determine except whether the application is timely made. The Bayh bill adopts this liberal disqualification practice by eliminating from existing law any requirement that the party state the facts or the reason for believing that bias or prejudice exist. The affidavit is thus reduced to a form of words; the disqualification becomes the same as a peremptory challenge to a juror . . . . (footnotes omitted).

Id. Senator Bayh subsequently abandoned this proposed amendment. *See supra* note 65 and accompanying text (discussing withdrawal of proposed amendment to § 144).

Requiring recusal for a financial interest "however small,"[139] while simultaneously denying a more comprehensive approach for bias or prejudice, places an undue emphasis on a judge's potential financial interest in a pending case.[140] Indeed, studies have shown that judges are most likely to recuse themselves from cases involving an actual or suggested financial self-interest in the pending matter, and are far less likely to recuse themselves in matters concerning possible judicial bias or prejudice.[141] Although financial self-interest certainly warrants the disengagement of the affected judge from the case, financial self-interest is not the only—nor the most serious—form of bias or prejudice.

Why is there a distinction between financial interest and other forms of bias? The attractiveness of financial self-interest as a determining standard is the objective nature of its determination.[142] Bias and prejudice, both subjective determinations, are more difficult to ascertain.[143] Contributing to this conundrum is the fact that judges, like all human beings, are susceptible to the phenomenon of believing they can be fair and unbiased.[144]

Certainly clarity is an admirable goal in setting recusal standards, and achieving clarity is easier when financial interests are involved, due to the objective definitional standard available.[145] However, a dichotomy currently

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139. 28 U.S.C. § 455(d)(4) (1994).

140. *See infra* notes 141–43 and accompanying text (discussing tendency of judges to disqualify themselves more readily for financial conflicts of interest than for possible judicial bias or prejudice).

141. *See* JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1 (1995) (finding almost one-half of the judges indicated a strong disposition toward disqualification on questions involving financial conflicts of interest, whereas on questions establishing possible judicial bias or prejudice, a majority of the responding judges indicated ambivalence regarding the decision to disqualify and one-third indicated a strong disposition *against* disqualification); Jona Goldschmidt & Jeffrey M. Shaman, *Judicial Disqualification: What Do Judges Think?*, 80 JUDICATURE 68, 70 (1996) (citing an American Judicature Society study finding that situations involving financial conflicts of interest "are the easiest for judges to resolve through disqualification").

142. *See supra* notes 131–32 and accompanying text (discussing the law's resistance to factors that are subjective or non-quantifiable).

143. *See, e.g.*, Abramson, *Specifying Grounds*, *supra* note 28, at 1051 (noting that "[i]n part, the difficulty in applying the personal bias standard results from its subjectivity"); *supra* note 132 (discussing the elusive nature of bias); *see also supra* notes 8–12 and accompanying text (discussing the divergent views of the Supreme Court Justices regarding judicial recusal in the *Beazley* case).

144. *See infra* notes 151–52 and accompanying text (discussing judges' belief that they can be impartial and fair).

145. Similarly, disqualification on the basis of relationship is also subject to an objective definition. 28 U.S.C. § 455(b)(5) (1994) (requiring recusal under specific circumstances involving the judge, "his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person"). The "third degree of relationship," being a precise measure of specific meaning, creates an objective definition. Abramson, *Specifying Grounds*, *supra* note 28, at 1065 n.72:

exists between financial and most non-financial interests: any doubts about potential bias resulting from a financial interest are resolved in favor of recusal, whereas any doubts about potential bias resulting from most non-financial interests often tend to be resolved in favor of participating in the case.[146]

Early commentators justified judicial participation in a case, even under questionable circumstances, based on the lifetime tenure of federal judges[147] and their oath of impartiality.[148] Subsequent commentators realized the fallacy of such presumptions, noting, "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."[149] More recent commentators also have challenged the notion that judges, however well-meaning, are able to shake their biases and prejudices at will.[150] The reality remains, however, that

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> Because the civil law system traditionally recognizes only blood relationships, the third degree of relationship standard disqualifies on the basis of a judge's or the judge's spouse's parent, grandparent, uncle, aunt, brother, sister, niece, nephew, son, or daughter.
>
> The American Bar Association's Code of Judicial Conduct was amended in 1990 to explicitly define the third degree of relationship. It includes [these] relatives, plus great-grandparents and great-grandchildren.

Id. See also ABRAMSON, DISQUALIFICATION UNDER CANON 3, *supra* note 93, at 23 ("A familial relationship or financial interest can be identified immediately and articulated in a recusal motion. Bias is necessarily more elusive, because it focuses on the judge's personal thoughts.").

146. Although the 1974 amendments eliminated the "duty to sit" doctrine, *supra* note 68, the cases suggest that some judges effectively have retained this doctrine in resolving recusal and disqualification matters involving suggestions of bias or prejudice. *See, e.g.*, Carter v. West Publ'g Co., No. 99-11959-EE, 1999 WL 994997, at *6–7 (11th Cir. Nov. 1, 1999) (noting that § 455 "does away with the old 'duty to sit' doctrine," but then stating, "[o]n the other hand, 'there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.'" (quoting Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987)).

147. *See* 28 U.S.C. §§ 44(b), 134(a) (1994) (providing lifetime tenure for federal judges).

148. *See id.* § 453, providing that:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

Id. See also BLACKSTONE, *supra* note 46, at 361 (stating "the law will not suppose the possibility of bias or favor in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea").

149. Schwartz, *supra* note 28, at 427–28 (quoting *In re* Linahan, 138 F.2d 650, 652 (2d Cir. 1943)).

150. *See* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 363 (2000) (discussing judicial bias in the

many judges approach recusal decisions with a presumption of participation and with a touch of defensiveness,[151] believing "I am not biased; I can be fair."[152] Obviously, Congress deemed the "I can be fair" approach a failure with respect to financial interests.[153] There is no reason to believe that judges are any more successful with respect to non-financial biases.[154]

Moreover, a judge's perception that he or she "can be fair" misses the point.[155] Section 455 requires recusal both when the judge's impartiality

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context of sexual orientation); Nugent, *supra* note 67, at 3 (noting that "all judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decision-making process"); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) [hereinafter Rachlinski, *Heuristics and Biases*] (noting that judges are susceptible to various biases).

151. *See* ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 58 (1981) (noting that "[j]udges, like other persons, are likely to resent charges of bias"); FLAMM, *supra* note 4, § 1.10.5, at 25 (noting that "[j]ust as judges generally do not like to admit having committed legal error, they are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality"); Leubsdorf, *supra* note 29, at 244 (noting that a judge's defensiveness in writing her opinion denying a disqualification motion "may prop up the judge's sense of her own rectitude; reading it often increases one's dismay that the judge insists on sitting"). A notable exception to the defensive approach is illustrated by the opinion in In re *Bernard*, 31 F.3d 842 (9th Cir. 1994). In *Bernard*, Judge Alex Kozinski stated that "judges have a professional responsibility not to take such challenges personally." *Id.* at 846 n.8; *see also id.* at 847 (noting that "[c]ounsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court").

152. Nugent, *supra* note 67, at 5 (noting that "judges are typically appalled if their impartiality is drawn into question[,] . . . believ[ing] themselves to be consistently objective, impartial and fair"). *Cf.* Dacher Keltner & Robert J. Robinson, *Extremism, Power, and the Imagined Basis of Social Conflict*, 5 CURRENT DIRECTIONS IN PSYCHOL. SCI. 101, 102–03 (1996) (noting that "opposing partisans indicated that they were more objective, fairer to the evidence, and freer from bias" with respect both to their opponents and to other partisans on their own side).

153. *See supra* note 62 (discussing 1948 version of § 455, which gave judges vast discretion in deciding whether to recuse themselves from participating in a case); *see also supra* notes 64–65 and accompanying text (discussing amendment to § 455 requiring disqualification for a financial interest in a party or the subject matter of a proceeding).

154. *See* ABRAMSON, DISQUALIFICATION UNDER CANON 3, *supra* note 93, at xi:

> [I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary.

Id. See also Leubsdorf, *supra* note 29, at 245 (noting that "the most biased judges [are] the least willing to withdraw").

155. *See infra* notes 160–62 and accompanying text (discussing difficulty of recognizing bias and necessity of judicial impartiality to achieve public confidence in the judicial system).

"might reasonably be questioned"[156] and when the judge "has a personal bias or prejudice concerning a party."[157] Similarly, ethical rules require a judge to withdraw when the judge's participation presents an "appearance of impropriety."[158] Although hardly paragons of clarity, both the "might reasonably be questioned" and the "appearance of impropriety" standards are nevertheless useful because they reflect two crucial points that judges sometimes overlook in their attempts to claim impartiality. The first point is that disqualification is mandated when appearances suggest bias; bias-in-fact is unnecessary.[159] Second, the perspective from which the judge is to consider any potential bias or prejudice is that of an outsider, not from the judge's own personal perspective.[160] The primary objective of § 455 is to promote public confidence in the impartiality of the judiciary.[161]

Promoting public confidence in the judiciary necessarily requires viewing judicial practices from the perspective of the general public. In particular, bias or prejudice must be viewed from the perspective of the public, rather than that of the judiciary, for two reasons. First, bias and prejudice are notoriously difficult to recognize within ourselves.[162] Thus, doubts as to how the public might view a judge's participation in the case must be resolved in favor of recusal. Second, public confidence in the judiciary does not result from the judiciary's perception of impartiality; it

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156. 28 U.S.C. § 455(a) (1994); *see also* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 3E(1) (using same standard); CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canon 3C (using same standard).

157. 28 U.S.C. § 455(b)(1) (1994).

158. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 68, Canon 2; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 76, Canons 2, 3.

159. FLAMM, *supra* note 4, § 5.2, at 144 (noting that, "[i]f the objective standard is met, a judge must grant a motion to disqualify, even if the judge is in fact impartial").

160. *Id.* § 5.6.4, at 162–63:

> [T]he charge of partiality must be based on facts that would create a reasonable doubt concerning the judge's impartiality not in the mind of the judge himself, or in the mind of the litigant or his counsel, or even in that of a member of a jury, but in the mind of a reasonable, uninvolved observer.

Id. But see Charles Malarkey, Comment, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J. 695, 710 (1990) ("Notwithstanding its emphasis on objective examination, application of the appearance of bias standard requires essentially subjective determinations.").

161. "This general standard [of § 455(a)] is designed to promote public confidence in the impartiality of the judicial process . . . ." H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; S. REP. NO. 93-419, at 5 (1974); *see* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861 (1988) (requiring recusal, primarily to satisfy the appearance of justice).

162. *See* Rachlinski, *Heuristics and Biases*, *supra* note 150, at 65 (noting that "biases are easier to spot in others than in oneself"); Justin Kruger & Thomas Gilovich, *"Naive Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 743–44 (1999) (noting tendency to see bias in others more readily than in ourselves).

results from the public's perception of impartiality.[163] Thus, a judge's belief that he or she is not biased is simply of little consequence to a recusal determination.[164] As one insightful judge observed:

> Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under section 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.[165]

The dangers of judicial bias have been downplayed by repeated stories in the popular press denouncing jury verdicts, thus resulting in disparities between public perceptions of juror bias and perceptions of judicial bias. The widespread publicity of large jury awards has created an erroneous public impression that juries are unfairly biased against defendants.[166] The media publicize jury punitive damage awards,[167] and in all fairness, also publicizes judicial comments or behavior that appear improper.[168] However,

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163. *See supra* note 25 and accompanying text (discussing the importance of avoiding even the appearance of partiality to a reasonable person, even if no actual partiality exists); *infra* note 164 (same).

164. *See* FLAMM, *supra* note 4, § 5.6.2, at 157:

> The 'appearance of bias' standard . . . does not contemplate that the converse will necessarily be true—that when a judge is convinced of his ability to preside impartially he may properly deny a disqualification motion. On the contrary, the judge's actual state of mind or lack of partiality is generally considered beside the point because a judge who is convinced of his own impartiality, as well as the purity of his motives, may nonetheless act in a manner that would lead a reasonable person to believe he is biased.

165. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990).

166. *See infra* note 169 and accompanying text (discussing negative public perceptions of civil juries).

167.

> If the anecdotes accurately reflected jury verdicts, one would expect to find the vast majority of jury verdicts favoring plaintiffs. But this is not the reality. The most recent study compiled by the Rand Institute for Civil Justice concluded that across all cases, plaintiffs won only "slightly more than 55 percent of all verdicts."

Bassett, *supra* note 33, at 1178 n.313 (citing ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 at xv (1996)). Contrary to popular perceptions, the Rand study found that punitive damages were awarded very rarely, and in fact, were awarded in only 2.6% of all product liability verdicts. ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 33, 36 (1996).

168. *See, e.g.*, John Schwartz, *U.S. v. Microsoft: The Judge; A Judge Overturned by an Appearance of Bias*, N.Y. TIMES, June 29, 2001, at A4 (discussing an appellate court ruling that Judge Thomas

the overall context and construct of media reports, and the reactions to them, differ depending on whether the report concerns a judge or jury.[169] A report concerning a large jury award fuels the erroneous[170] but widely-held perception that jurors are unreliable,[171] whereas a report concerning a renegade judge is often treated as a single aberration rather than as a reflection of the judiciary at large.[172]

Perhaps the awareness that judges are more knowledgeable about the law than most jurors serves to insulate judges from the erroneous overgeneralizations heaped upon the jury system. However, judges' greater legal knowledge does not inure them from bias and prejudice.[173] Judicial

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Penfield Jackson violated judicial ethics rules by discussing Microsoft antitrust case pending in his court); *see also* Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, CT. REV., Summer 2000, at 4, 4 (concluding that Richard Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, impermissibly commented on both pending and impending proceedings involving President William Jefferson Clinton).

169. Professor Neil Vidmar has compiled negative descriptions of jury behavior and jury verdicts in personal injury cases as follows:

> Jury irrationality, the jury lottery, spiraling damage awards, unbridled juror sympathies, the dangerous national sport of punitive damages, the "deep pockets" effect, commonplace verdicts in which fifty or even eighty percent of the award is for pain and suffering, racial and gender biases in verdicts, runaway juries, pro-plaintiff tendencies, capriciousness and unreliability, the defective jury system, exorbitant and unjustified awards, stifled product innovation, raised insurance rates, doctors leaving pediatrics and other areas of practice, nuisance cases, thousands of cases settled for unrealistic amounts because of the threat of even larger jury awards, and an American economy suffering from the litigation costs that must be passed on to consumers.

Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1205 (1994); *see also* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) (noting "no idea today has suffered more abuse—from benign neglect to malignant hostility to cynical manipulation and strategic perversion—than the idea of the jury").

170. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 163 (1986) ("[T]he hard facts indicate that on the whole the jury behaves responsibly and rationally."); *id.* at 245 ("Critics have charged that the jury falls short on three main grounds: it is incompetent, it is prejudiced, and it wages war with the law. However, when hard facts rather than anecdote and opinion are considered, the charges do not appear warranted."); *see also* Bassett, *supra* note 33, at 1178 n.313 (summarizing studies of jury verdicts); William Glaberson, *"A Study's Verdict: Jury Awards Are Not Out of Control,"* N.Y. TIMES, Aug. 6, 2001, at A9 (revealing from a comprehensive study of nearly 9,000 trials across the country that judges award punitive damages about as often as juries and generally in about the same proportions).

171. *See* Bassett, *supra* note 33, at 1179 n.315 (discussing the portrayal of juries as irrational and incompetent in media reporting); *see also* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 875–76 (1998) ("Studies clearly show that media reports are selective in the reporting of trial outcomes. Media coverage is heavily skewed toward reporting plaintiff wins and large damage awards. Unfortunately, this bias in reporting fuels legislative debate and public perceptions of the jury system.").

172. *See supra* note 168 and accompanying text (discussing news reports of specific judges).

173. *See infra* note 176 and accompanying text (discussing judicial bias).

bias is just as real—and every bit as threatening to fairness, justice, and due process—as juror bias.[174]

Although judicial bias—including bias of which the judge is unaware—has long been subject to occasional commentary,[175] recent commentary is bringing its existence to the fore.[176] As yet unacknowledged, in either practice or the legal literature, is the potential impact of recent psychological research into unconscious bias upon judicial recusal and

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174. *See supra* note 14 (discussing judicial bias); *infra* note 176 (same).

175. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring) (noting that "judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process"); Jeremy Bentham, *The Elements of the Art of Packing*, pt. I, ch. 6, §§ 2–3 (1821), *in* 5 THE WORKS OF JEREMY BENTHAM 61, 89–93 (J. Bowring ed., 1838–43) (discussing judicial motives, including love of money, power, ease, and vengeance); JEROME FRANK, COURTS ON TRIAL 151 (1950) (noting the existence of "peculiarly individual factors" operating to influence judges and that "[t]hese uniquely, highly individual, operative influences are far more subtle, far more difficult to get at. Many of them, without possible doubt, are unknown to anyone except the judge. Indeed, often the judge himself is unaware of them."); LORD MACMILLAN, LAW AND OTHER THINGS 217–18 (1937):

> [A] judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognised by their possessor. . . . [A judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.

Id.; Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CAL. L. REV. 89, 93 (1918) (noting that "all of us, including our judges, have many predispositions with varying degrees of potency, which unconsciously attach themselves to the conscious consideration of every problem").

176. *See generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (exploring psychological processes in the work of lawyers and judges); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784–821 (2001) (presenting a study of magistrate judges showing that judges rely on the same cognitive decision-making processes as laypersons and other experts, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias, leaving judges vulnerable to cognitive illusions that can produce poor judgments); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1722 (2000) (noting Los Angeles County superior court judges' "near total exclusion of Mexican-Americans" from grand jury service in the late 1960s, and noting each judge testified that "he harbored no intention to discriminate"); Nugent, *supra* note 67, at 3 ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process."); *id.* at 49 ("[M]any judges are slow to accept the possibility of bias in their own decision-making, viewing the existence of partiality as improbable."); Rachlinski, *Heuristics and Biases*, *supra* note 150, at 99–101:

> Courts identify cognitive illusions that might affect juries and adapt to them, but fail to identify cognitive illusions that affect judges and fall prey to them. . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment. Several studies show that judges commit the hindsight bias in legal contexts.

disqualification.[177] In particular, the current federal disqualification statute, which leaves the responsibility of recusal to appellate judges, contains no mechanism for addressing the existence of unconscious bias.[178]

Recent studies indicate that prejudiced responses are largely unconscious.[179] Until the 1980s, most psychologists assumed that attitudes, including prejudice and stereotypes, operated consciously.[180] Accordingly, many researchers used self-reporting to measure attitudes and stereotypes.[181] More recently, however, psychologists have emphasized that attitudes have "explicit" and "implicit" indices:

> Explicit measures of attitudes operate in a conscious mode and are exemplified by traditional self-report measures. Implicit attitudes, in contrast, operate in an unconscious fashion and represent introspectively unidentified (or inaccurately identified) traces of

177. A few legal commentators have discussed unconscious bias in the context of employment discrimination under Title VII of the Civil Rights Acts of 1964 and 1991. *See generally* Ann C. McGinley, *¡Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000) (discussing unconscious bias in context of Title VII); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999) (same). The existence of unconscious bias is important in the employment context because, under the current standard, courts will find the necessary intent only if the employer acted with a conscious discriminatory intent or motive.

178. *See supra* notes 97–113 and accompanying text (discussing § 455 and appellate practices).

179. *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious gender stereotyping in fame judgments, and finding that explicit expressions of sexism or stereotypes were uncorrelated with the observed unconscious gender bias); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding that "stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways"); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, Black category labels facilitated stereotype activation under automatic and controlled processing conditions.").

180. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

181. *Id.*

> past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.[182]

These studies of unconscious bias confirm the observation that people who claim, and honestly believe, they are not prejudiced may nonetheless harbor unconscious stereotypes and beliefs.[183] Thus, although judges should be constantly vigilant for potential biases and prejudices, they will not always recognize their own biases and stereotypes.[184] In light of this reality, a peremptory challenge procedure best addresses the combination of unique concerns inherent in the recusal and disqualification of federal appellate judges by creating a procedure that takes into account judges' inability to detect some unconscious biases.

The notion of a "peremptory challenge" is best known in the context of striking potential jurors from serving on a jury panel.[185] In lawsuits filed in either state or federal court, parties may exercise peremptory challenges to remove a certain number of potential jurors without articulating a reason for the challenge.[186] The same peremptory challenge concept has been applied to judges in a number of state courts,[187] and was Congress's original intention behind the predecessor to § 144.[188] Indeed, a peremptory

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182. Dovidio et al., *supra* note 179, at 511.

183. Greenwald & Banaji, *supra* note 180, at 15; *see also* Devine, *supra* note 179, at 5–7 (discussing unconscious bias).

184. *See supra* notes 173–77 and accompanying text (discussing judicial bias).

185. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (noting that peremptory challenges can be used to strike potential jurors "without a reason stated, without inquiry, and without being subject to the court's control"); *see also* Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 949 (1994) ("A peremptory strike is a challenge to a venireperson without assignment of any reason.").

186. *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 140 (1977) (noting that parties may challenge an unlimited number of prospective jurors for cause, which requires the judge's assent, but are granted only a limited number of peremptory challenges to strike potential jurors, which may be exercised without stating a reason); *see also* FED. R. CRIM. P. 24(b) (providing for a number of peremptory challenges in federal criminal cases, depending on potential punishment for the charged offense).

187. Although the majority of jurisdictions permit the removal of a judge only for cause, "a substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a peremptory basis." FLAMM, *supra* note 4, § 27.1, at 768; *see* ALASKA STAT. § 22.20.022 (Michie 2000) (permitting judicial disqualification by peremptory challenge); ARIZ. R. CIV. PROC. 42(f)(1) (2000) (same); CAL. CIV. PROC. CODE § 170.6 (West 2002) (same); IDAHO R. CIV. PROC. 40(d)(1) (2001) (same); ILL. CIV. PROC. CODE § 2-1001 (2001) (same); MINN. R. CIV. PROC. 63.03 (2000) (same); MO. R. CIV. PROC. 51.05 (2000) (same); NEV. SUP. CT. R. 48.1(3) (2002) (same); N. MEX. STAT. ANN. § 38-3-9 (Michie 2000) (same); WASH. REV. CODE § 4.12.050 (2000) (same); WIS. STAT. ANN. § 801.58 (West 2001) (same); WYO. CODE CIV. PROC. 40.1(b)(1) (2000) (same); *see also* TEX. GOV'T STAT. ANN. § 74.053 (2000) (pertaining to visiting judges).

188. *See supra* notes 53–58 and accompanying text (discussing the peremptory challenge intent behind § 144's predecessor).

challenge procedure is particularly appropriate because the purpose of peremptory challenge procedures generally, as well as § 455 specifically, is to ensure impartiality.[189] In Part VI, this Article sets forth a modified peremptory challenge proposal as an alternative to the existing procedures regarding judicial recusal and disqualification.

VI. A PEREMPTORY CHALLENGE PROPOSAL

Because the current statutory scheme has several flaws that cause particular harm in the appellate context, and because others are more likely to identify unconscious bias than even the best-intentioned judges, this Article proposes the adoption of a modified peremptory challenge approach to appellate judicial disqualification. A peremptory model would be ideal for at least four reasons.

First, the shorter timelines in federal appellate courts—both with respect to accelerated briefing schedules generally, and with respect to the announcement of panel composition only a short time before oral argument specifically—provide less time for investigating judges' potential biases and less time for completing the necessary procedures.[190] The parties to an appeal do not know which judges will hear their case at the time that they submit their written briefs. Instead, litigants learn the composition of the panel that will hear their case only shortly before oral argument, which in some cases is after the panel already has reached a tentative decision on the merits.[191] Moreover, in some circuits, the identity of the judges on the panel

189. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 n.8 (1994) (noting that the purpose of peremptory challenges "is to permit litigants to assist the government in the selection of an impartial trier of fact"); Georgia v. McCollum, 505 U.S. 42, 57 (1992) (noting that peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial"); Swain v. Alabama, 380 U.S. 202, 219 (1965) (noting that the peremptory challenge "satisfies the rule that 'to perform its high function in the best way,' 'justice must satisfy the appearance of justice.'" (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))); *see also supra* notes 95, 161 (noting that the purpose of § 455 is to promote confidence in the judiciary through the assurance of impartiality).

190. *See* PAUL G. ULRICH ET AL., FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 6.36, at 446 (2d ed. 1999) ("Approximately ten days before oral argument, the Ninth Circuit Clerk will, upon request, inform the parties of the identity of the judges on the panel designated to hear the appeal."); *see also* CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 128 (2d ed. 1999) (noting that the Sixth Circuit discloses the names of the judges on the panel two weeks before oral argument, while the Third Circuit sends out the names of the panel members ten days before oral argument); *see also supra notes* 27–28 and accompanying text (discussing procedures and practices of federal appellate courts); FLAMM, *supra* note 4, § 28.2.3, at 848 ("[A]ppellants are typically not notified of the composition of the panel that will hear their appeal until shortly before oral argument."); Stempel, *supra* note 16, at 638 (observing that "litigants are notified of the three-judge panel that will hear their case only a relatively short time before oral argument").

191. Although most federal circuit court judges circulate bench memoranda summarizing the facts and applicable law to the other judges sitting in the case, it is the practice of some circuit judges to circulate a tentative draft opinion rather than a bench memorandum. Jim R.

is not revealed until the morning of oral argument.[192]

Second, the lessened visibility of federal circuit court judges generally, and the decreased contacts with appellate judges as contrasted with district judges, render ascertaining potential bias and prejudice more difficult.[193] Unlike district court proceedings, where a practitioner has repeated contacts with the judge over a period of time from which to glean information suggesting potential biases or prejudices, interactions with appellate judges occur at a single oral argument of thirty to sixty minutes in duration.[194] These realities of appellate practice and procedure place additional burdens on the recusal and disqualification of appellate judges.[195]

Third, the effective lack of review of an appellate judge's recusal decision,[196] particularly when contrasted with the automatic right of review

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Carrigan, *Some Nuts and Bolts of Appellate Advocacy*, *in* APPELLATE PRACTICE MANUAL 105 (Priscilla Anne Schwab ed., 1992).

192. *See* LYNN, *supra* note 30, at 276 (stating that it is common for the circuit courts of appeals to decline to identify a panel until the morning of the argument); *see also* Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1060 (7th Cir. 1993) (noting that "the practice of this court is not to announce the panel composition until the day of argument"); *Cf. In re* Bernard, 31 F.3d 842, 846 (9th Cir. 1994):

> [W]e do not require counsel to learn the names of the judges, and counsel for the Bernards . . . has declared under penalty of perjury that he did not know the identity of the judges who would hear this case until the day of oral argument. Surprising as this is, given counsel's many years of experience in the courts of this circuit, I have no basis for doubting his representation.

193. *See* FLAMM, *supra* note 4, § 28.2.3, at 848 (noting "the generally lower profile of appellate justices" and observing that with "the relatively fast pace of appellate briefing schedules, a ground for seeking the disqualification of an appellate court justice may not surface until after the appellate justice or panel has ruled on the merits of the appeal"); Stempel, *supra* note 16, at 639:

> Often a recusal issue does not arise until after the panel has ruled on the merits. This is probably the result of the short notice of panel composition, the relatively fast pace of an appellate briefing and argument schedule, and the perhaps lower profile of circuit judges and their personal and financial ties.

194. *See* BERRY, *supra* note 190, at 127 ("[T]he circuits vary widely as to when to allow argument and for how long. Thirty minutes per side is slightly above average among the circuits, with some allowing as little as 10 to 15 minutes for each advocate.").

195. *See supra* notes 190–94 and accompanying text (discussing federal appellate court practices and procedures which limit the effectiveness of judicial recusal and disqualification); *see also supra* notes 97–113 (same).

196. Certainly United States Supreme Court review is highly unlikely. The purpose of the United States Supreme Court is not to correct erroneous judgments by the lower federal courts. *See, e.g.*, Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals."); STERN, *supra* note 27, § 4.17, at 221 (6th ed. 1986) (same); *see also* Stempel, *supra* note 16, at 639–40 ("One can argue that the chances of obtaining Supreme Court review of even the worst district and appellate recusal decisions are so rare as to amount to no review at all."). Although, indeed rare, the Supreme Court has addressed recusal decisions of at least one state supreme court and two state municipal courts. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S.

of district judges' recusal decisions, renders the current remedies inadequate.[197]

Fourth, the inconsistent application of recusal and disqualification criteria, due to differences in the standards of individual judges, indicates that because some judges fail to recognize biases or prejudices that are evident to the litigants, a modified procedure is justified. Although inconsistent criteria are evident in both the district and appellate courts, the problem is exacerbated in the federal appellate courts due to the lack of review.

Accordingly, a modified peremptory challenge procedure would enhance perceptions of justice while limiting potential abuses. Such a procedure is further supported by other realities of federal appellate court practice and procedure. For example, while district court proceedings are heard by a single judge, appellate court proceedings are conducted by panels of three judges.[198] Accordingly, unlike the disqualification of a district court judge, which results in a complete change of the judicial arbiter, the peremptory challenge of an appellate judge requires the substitution of one of three adjudicators.

One argument raised against district judge peremptory challenges during earlier congressional debates was the concern that some jurisdictions had only one federal district court judge.[199] Although this concern is lessened today due to the growth in population, this concern does not exist at the federal appellate level—there is no circuit that has only three judges.[200] Moreover, statutory provisions already authorize judges to sit on the circuit courts by designation.[201]

813, 828 (1986) (vacating sentence where Alabama Supreme Court justice failed to recuse himself in a case in which he held a financial interest in the outcome); Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972) (reversing and remanding where a municipal judge failed to recuse himself); Tumey v. Ohio, 273 U.S. 510, 535 (1927) (same). It appears that the last Supreme Court decision involving the recusal of a federal circuit judge was eighty-nine years ago and involved the predecessor to 28 U.S.C. § 47 (1994), which is aimed at judges elevated from a district to appellate judgeship. *See* William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co., 228 U.S. 645, 650 (1913) (explaining that parties may not consent to permit judge who disposed of case in the first instance to review his own action in the circuit court of appeals); *see also supra* note 33 (discussing § 47).

197. *See supra* notes 101–07 and accompanying text (discussing ability to obtain review of a district judge's recusal decision).

198. 28 U.S.C. § 46(b) (1994) (providing that federal circuit courts of appeals must decide cases in panels of three); *see supra* note 35 and accompanying text (discussing § 46(b)).

199. CHASET, *supra* note 151, at 41–42; Frank, *Support of the Bayh Bill*, *supra* note 4, at 44 (noting that "a few states" had only one federal judge and "[o]nly one court of appeals is limited to three judges. In the larger circuits, the chambers line the halls. The result both can and should be that the standard of disqualification goes up; it is so easy to put someone else on the case.").

200. The smallest of the federal courts of appeals is the First Circuit, which encompasses Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico, and has six authorized judgeships. *See* THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL

The disqualification of federal judges by peremptory challenge is not a novel proposal; federal legislation allowing parties to peremptorily challenge federal judges has been introduced on several occasions.[202] Indeed, § 144 is phrased as, and was intended as, a peremptory challenge provision—albeit one that the federal judiciary quickly undermined.[203]

The previous peremptory challenge proposals, and the commentary surrounding them,[204] permit the anticipation of opposing arguments. Opponents of peremptory challenge proposals historically have raised three primary concerns: (1) judge-shopping, (2) delay, and (3) administrative concerns.[205]

The most frequent objection to previous proposals involving peremptory challenges to federal judges has involved the fear of gamesmanship or judge-shopping.[206] With proper safeguards, however, the impact of such tactics can be lessened.[207] The underlying issue is one of power: whether to vest complete power in the judiciary, despite the known existence of unconscious bias and despite some judges' reluctance to recuse themselves, or whether to vest a small fragment of power in the litigants, which likely will provide some increase in litigants' confidence in the judiciary but may also result in some peremptory challenges that would not pass statutory muster.

This Article proposes granting one peremptory challenge per side in federal appellate court proceedings.[208] Moreover, this proposal would

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COURTS (1999), *at* http://www.uscourts.gov/UFC99.pdf (last visited Mar. 12, 2002) (on file with Iowa Law Review). Of the remaining circuits, the Seventh and Eighth Circuits have eleven authorized judgeships; the Tenth, Eleventh, Federal, and District of Columbia Circuits have twelve authorized judgeships; the Second Circuit has thirteen authorized judgeships; the Third Circuit has fourteen authorized judgeships; the Fourth Circuit has fifteen authorized judgeships; the Sixth Circuit has sixteen authorized judgeships; the Fifth Circuit has seventeen authorized judgeships; and the Ninth Circuit has twenty-eight authorized judgeships. *Id.*

201. 28 U.S.C. §§ 291–296 (1994).

202. *See, e.g.*, H.R. 3125, 98th Cong. (1983) (setting forth a proposal to permit disqualification of federal judges by peremptory challenge); H.R. 1649, 97th Cong. (1981) (same); H.R. 7473, 96th Cong. (1980) (same); H.R. 7165, 96th Cong. (1980) (same); S. 1886, 92d Cong. (1971) (same).

203. *See supra* notes 54–58 and accompanying text (discussing eradication of peremptory process through court decisions).

204. *See, e.g.*, CHASET, *supra* note 151, at 13–19 (discussing prior peremptory challenge proposals); Frank, *Support of the Bayh Bill*, *supra* note 4, at 65–68 (same); *see generally* Peter A. Galbraith, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1974) (same).

205. *See generally* CHASET, *supra* note 151 (discussing opposition to peremptory challenge proposals).

206. CHASET, *supra* note 151, at 39; *see also* FLAMM, *supra* note 4, § 3.5.2, at 65 ("Of the many varieties of 'abuse' to which peremptory disqualification provisions are susceptible, 'judge-shopping' has widely been recognized to be the most common.").

207. *See infra* notes 208–09 and accompanying text (discussing modifications to peremptory challenge proposal aimed at lessening judge-shopping or gamesmanship).

208. The use of the word "side," rather than "litigant," is intentional. As was explained in

require that litigants wishing to exercise a peremptory challenge do so at the time of filing their brief in the Court of Appeals—meaning that litigants must assert their challenge at the outset of the appeal, long before the appellate court announces the panel's composition. This would require litigants to investigate possible sources of bias and prejudice thoroughly at the outset of the appeal. Requiring litigants to exercise any peremptory challenge at the outset of the appeal, before knowing the panel's composition, would lessen opportunities for gamesmanship, such as those prompted by attempting to "bump" a "liberal" judge in the hopes of obtaining a more "conservative" judge as the replacement. This approach also would prevent the use of disqualification motions to delay pending proceedings.

Due to the previously-identified problem with respect to the decreased availability of information about appellate judges,[209] litigants would retain the ability to bring a subsequent disqualification motion pursuant to § 455. However, such a disqualification motion would require a substantiating affidavit, detailing the reasons why the litigant believes recusal is necessary.

If the challenged appellate judge declined to recuse himself or herself after reviewing the disqualification motion, the challenged judge would issue no ruling to the litigants. Instead, the motion would proceed automatically to a review by the other two members of the panel, without notice to, or action by, the litigants. Only if the other two panel members agreed with their colleague's decision against recusal would a ruling be issued to the litigants, signed by all panel members, indicating their agreement with the decision. Any further review would be available only through the traditional discretionary procedures of rehearing or certiorari.

The benefits of this proposal lie in the availability of automatic review by the full panel in the event of the motion's initial denial, as well as the opportunity for additional reflection by the challenged judge using a procedure that minimizes potential embarrassment. If the challenged judge initially denies the motion, the litigants are not notified of this decision. Instead, the matter would proceed to review by the full panel. If another member of the panel subsequently persuades the challenged judge of the necessity for recusal, or if the challenged judge has second thoughts, the challenged judge retains the opportunity to recuse himself or herself

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defense of a prior peremptory challenge proposal:

> The restriction of one such request to a side does not overlook the fact that there may be conflicting or independent interests on a "side." Rather, the proposal rejects this consideration because the goal is substantial justice within the limits of available judicial personnel and one challenge per side is as many strikes as the structure can carry.

Frank, *Support of the Bayh Bill*, *supra* note 4, at 66.

209. *See supra* notes 193–94 and accompanying text (discussing lower profiles of appellate judges).

without embarrassment—the litigants will not know that the decision to recuse was made only after an initial denial.

Virtually any modification to the existing recusal and disqualification procedures would cause some administrative disruption. However, this proposal minimizes administrative burdens by requiring litigants to exercise peremptory challenges at the outset of the appeal, rather than after panel assignments. This permits the courts to take peremptory challenges into account in making the initial panel assignments, and it also reduces the possibility that a judge (or the judge's law clerk) may have invested substantial time in reviewing a case, only to learn of a peremptory challenge shortly before oral argument.

The current federal recusal and disqualification provisions simply do not accord adequate due process protections. At early Roman civil law, the Code of Justinian demanded impartiality, stating, "[a]lthough a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion let it be permitted to him, who thinks the judge under suspicion, to recuse him before [an] issue joined, so that the cause go to another."[210] Especially in light of the unique procedures at the circuit court level, which serve to limit the effectiveness of existing recusal and disqualification provisions, this proposal is necessary for both the fact, and the appearance, of judicial impartiality.

VII. CONCLUSION

The federal judicial recusal and disqualification provisions raise concerns when applied to district court judges, and those concerns multiply when the provisions are applied to federal circuit court judges. The differences in federal appellate court practices and procedures, practitioners' decreased contacts with appellate judges, and the lack of review available for disqualification motions aimed at appellate judges, mandate significant revisions to existing disqualification procedures. This Article has proposed a modified peremptory challenge procedure for federal circuit court judges, which also would permit a subsequent disqualification motion. Such disqualification motions would require an accompanying affidavit demonstrating the basis for disqualification. If the challenged judge declined the motion, it would be appealed automatically to the full three-judge panel. Any further review would be available only through the traditional discretionary mechanisms of rehearing or certiorari.

210. Putnam, *supra* note 56, at 3 n.10 (translating CODE JUST. 3.1.16. (Justinian 529)).