

HISTORY OF AND PROBLEMS WITH THE FEDERAL JUDICIAL DISQUALIFICATION FRAMEWORK

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I. INTRODUCTION

On June 8, 2009, the United States Supreme Court handed down its decision in *Caperton v. A.T. Massey Coal Co.*¹ In the underlying action, the Supreme Court of Appeals of West Virginia had, by a 3–2 margin, reversed a trial court judgment entering a substantial jury verdict in favor of petitioner.² The deciding vote was cast by the recently-elected Justice Brent Benjamin.³ In his petition for a writ of certiorari, Caperton alleged that Justice Benjamin was, or appeared to be, biased in favor of the respondent because he had received substantial campaign contributions from its CEO.⁴ Siding with petitioner, the United States Supreme Court reversed the West Virginia judgment and remanded the case back to that state’s supreme court.⁵

On December 10, 2009, the Subcommittee on Courts and Competition Policy—a Subcommittee of the House of Representatives Committee on the Judiciary—held a hearing on the state of judicial

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1. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).
 2. *Id.* at 2256.
 3. *Id.* at 2258.
 4. Petition for Writ of Certiorari at 2–3, *Caperton*, 129 S. Ct. 2252 (No. 08-22).
 5. *Caperton*, 129 S. Ct. at 2267.

recusals⁶ after *Caperton*.⁷ To at least some of us who were honored to be invited to testify at the hearing, the fact that the United States Supreme Court had recently handed down its *Caperton* decision provided a curious rationale for holding a hearing to examine the state of *federal* judicial recusal law. After all, *Caperton* involved a due process claim, not a challenge to a federal district judge, and the Court did not directly deal with—and in fact, barely mentioned—federal recusal law.⁸ Moreover, because federal judges, unlike West Virginia Supreme Court justices, are selected rather than elected, the crux of the challenge in that case—that a sitting Justice had received extraordinary campaign contributions from a party—appears to hold little relevance for Congress.

The fact that *Caperton* spurred Congress to action is remarkable for another reason. During the twentieth century, the United States Supreme Court had two occasions to apply federal recusal law in cases in which challenges had been made to federal district court judges based on federal recusal statutes; in both instances, the Supreme Court issued decisions which appeared to fly in the face of the congressional intent in its drafting of the existing federal disqualification framework. Either *Berger v. United States*⁹ or *Liteky v. United States*¹⁰ could have been seen as calls to Congress to revisit the state of federal judicial disqualification law, but neither prompted Congress to act.

Regardless of Congress's impetus for deciding to inquire into the state of federal judicial disqualification law, its decision to hold a hearing on this subject was a welcome development because the current state of the law on this subject is far from ideal. To understand why this is so, it is necessary to understand what the federal law on judicial disqualification is

6. A question often arises as to whether a judge should be discharged from presiding over a particular case. Two different terms are commonly used to describe this situation: *disqualification* and *recusal*. Technically, there is a distinction between the two. Whereas *recusal* normally refers to a judge's decision to stand down voluntarily, *disqualification* has typically been reserved for situations involving the statutorily or constitutionally mandated removal of a judge upon the request of a moving party or its counsel. In most jurisdictions, however, the terms *judicial disqualification* and *recusal* are viewed as synonymous and employed interchangeably, and will be in this Article.

7. See *Examining the State of Judicial Recusals After Caperton* v. A.T. Massey: *Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 110th Cong. (2009).

8. See *Caperton*, 129 S. Ct. at 2256–67.

9. *Berger v. United States*, 255 U.S. 22 (1921).

10. *Liteky v. United States*, 510 U.S. 540 (1994).

and how it came to be that way.

II. THE HISTORY OF FEDERAL JUDICIAL DISQUALIFICATION LAW

Congress enacted the first federal judicial disqualification statute in 1792, but the notion that judges should stand fair and detached between the parties who appear before them did not originate with Congress.¹¹ In fact, edicts designed to ensure judicial impartiality have been recorded since ancient times.¹² Pursuant to the Roman Code of Justinian, a party who believed that a judge was under suspicion was permitted to “recuse” that judge, so long as he did so prior to the time the issue was joined.¹³

The common law standard was initially advanced by Bracton, who like early Roman scholars, believed that a litigant should be allowed to disqualify a judge on the basis of even a suspicion of bias.¹⁴ But England’s Parliament, influenced by Blackstone, ultimately decreed that judges were not subject to disqualification for suspicion alone, but only for pecuniary interest in a cause.¹⁵ Thus, in contrast to the civil law system of “recusation,” the common law notion of what constituted grounds for seeking a judge’s disqualification was exceedingly simple: A judge would be disqualified for possessing a direct financial interest in the cause before him, and for absolutely nothing else.¹⁶

11. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278; *cf.* *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct. Cl. 1977) (discussing how the rule of necessity requires judges to try cases in situations in which they would otherwise be disqualified).

12. See, e.g., 1 EMANUEL B. QUINT & NEIL S. HECHT, *JEWISH JURISPRUDENCE* 6 (1980) (“Every judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One . . . in the work of creation.” (citing BABYLONIAN TALMUD, TRACTATE SHABBATH 10a (n.d.))).

13. Code Just. 3.1.14 (Justinian I 530) (S.P. Scott trans.). This expansive power on the part of early litigants to effect a judge’s recusal formed the basis for the broad disqualification statutes that generally prevail in civil law countries today.

14. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *361.

15. See *id.*; see also *Liteky v. United States*, 510 U.S. 540, 543 (1994) (“Required judicial recusal for bias did not exist in England at the time of Blackstone.”).

16. See *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994); see also *Bd. of Justices v. Fennimore*, 1 N.J.L. 190, 191 (1793) (finding that it was proper for a judge to hear a case of a litigant who lived in the same county when the county’s interests were implicated in the case); Edward G. Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1480–81 (1981) (noting that American judicial disqualification jurisprudence emerged from this English base).

In crafting its first judicial disqualification statute, Congress, drawing on well-developed English precepts, decreed that a judge was subject to disqualification only when he had an interest in a proceeding over which he was to preside, had acted in the proceeding, or had been counsel for a party.¹⁷ Congress subsequently amended that statute on several occasions.¹⁸ For example, in the early part of the nineteenth century the original federal judicial disqualification statute was amended to include relationship to a party as an additional ground for judicial disqualification.¹⁹ But the first significant overhaul of the federal disqualification scheme did not take place until 1911,²⁰ when the original federal statute became section 20 of the Federal Judicial Code.²¹

Like its predecessor, section 20 was a “challenge-for-cause” statute; that is, a federal judge was required to disqualify himself if, and only if, the moving party could demonstrate that the judge had run afoul of one of the statute’s enumerated proscriptions.²² Proving that a federal judge had run afoul of section 20 proved to be very difficult. For one thing, the challenged judge himself was generally permitted to decide whether the moving party had stated legally sufficient grounds for his disqualification,²³ and, perhaps not surprisingly, this issue was frequently resolved against the moving party. Congress sought to rectify this and other perceived statutory shortcomings not by amending section 20, but by enacting an entirely separate statute, which became section 21 of the Federal Judicial Code.²⁴ The new statute provided, in pertinent part, that:

[w]henever a party to any action or proceeding . . . file[s] an affidavit [stating] that the judge before whom the action or proceeding is to be tried or heard has

17. *Liteky*, 510 U.S. at 543–44; *see also* Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 387 (1990) (noting historical inadequacies of recusal jurisprudence).

18. *See* Lewis, *supra* note 17, at 387 n.52; *see also* *Idaho v. Freeman*, 507 F. Supp. 706, 716–20 (D. Idaho 1981) (noting numerous changes made in judicial recusal law).

19. *Liteky*, 510 U.S. at 544 (citing Act of Mar. 3, 1821, ch. 51, 3 Stat. 643).

20. *Id.* (“Not until 1911, however, was a provision enacted requiring district-judge recusal for bias *in general*.”).

21. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 144 (2000)) (providing a procedure for compelling a judge to enter the existence of his conflict of interest on the record and prescribing disqualification where the judge was a material witness).

22. *Freeman*, 507 F. Supp. at 713–14.

23. *Id.*

24. *Id.*

a personal bias . . . either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter.²⁵

Section 21 differed markedly from section 20 in that Congress clearly intended not only that it would allow parties to challenge federal judges for bias, but also that it would allow the parties do so without showing that actual bias existed.²⁶ However, Congress realized that such a peremptory challenge provision would be susceptible to abuse, and it imposed upon the new statute a number of procedural limitations.²⁷ Among other things, allegations of bias offered in support of a section 21 motion were required to be made in the form of a sworn affidavit which had to be timely filed,²⁸ and, as a check against possible false swearing, the moving party's counsel was required to certify that the moving party's affidavit had been filed in good faith.²⁹

Section 21 first came before the Supreme Court in *Berger v. United States*—a case in which petitioners claimed that the district judge in their case was biased against them because they were of Germanic descent.³⁰ The bias manifested by the district judge in *Berger* was hardly subtle. He said, among other things, that “one must have a very judicial mind” not to be prejudiced against German-Americans because “[t]heir hearts are reeking with disloyalty.”³¹ In the face of comments such as this, the Court had little trouble finding that even though actual judicial bias had not been proven, the challenged judge should have recused.³² But *Berger* is notable less for its case-specific outcome than for what the Court said about how section 21 motions were to be decided by district court judges. The Court held that while a federal judge who was called upon to decide a section 21 motion must accept the moving party's factual allegations as being true, the judge could decide whether those allegations, if true, were legally sufficient to compel her disqualification.³³

Since *Berger* was handed down, a handful of federal judges have

25. *Id.* (quoting Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090).

26. See Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 667 (1985).

27. See *Freeman*, 507 F. Supp. at 715.

28. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

29. § 21, 36 Stat. at 1090.

30. *Berger v. United States*, 255 U.S. 22, 28–29 (1921).

31. *Id.* at 28.

32. *Id.* at 36.

33. *Id.*

adverted to the original peremptory intent behind the statute, but most judges who have been challenged pursuant to section 21 have read *Berger* as providing them with a large measure of discretion in deciding whether to grant motions which Congress had clearly intended to be peremptory.³⁴ Of course, Congress could have taken steps to disabuse the federal judiciary of this notion, but it did not. And when Congress next tinkered with section 21 in 1948, recodifying the statute as 28 U.S.C. § 144 with virtually no changes, the drafters made no attempt to reassert the statute's peremptory intent.³⁵

At the same time that section 21 was recodified as § 144, the original federal disqualification statute, section 20, was amended and recodified as 28 U.S.C. § 455.³⁶ A few changes were made to the statute at that time; for example, the requirement that disqualification be initiated by a party was eliminated, thereby converting § 455 from a "challenge-for-cause" provision to at least a partially self-enforcing one.³⁷ But under the amended version of § 455—as under the *Berger* Court's interpretation of § 144—disqualification remained a matter involving substantial judicial discretion.³⁸ A federal judge was expected to recuse himself from presiding over a matter under § 455 only if he believed, in his own subjective opinion, that it would be improper for him to sit.³⁹ In fact, once a federal judge satisfied himself that he was not afflicted with any of the specifically-enumerated grounds for disqualification, a presumption against judicial disqualification was typically indulged, to the effect that the judge not only *could* continue to sit in the case if he desired, but was deemed to have a *duty* to do so.⁴⁰

The subject of judicial disqualification did not come to the fore again until the late 1960s when opponents of Judge Clement Haynsworth seized

34. See, e.g., *Schmidt v. United States*, 115 F.2d 394, 398 (6th Cir. 1940) (applying *Berger* and finding district judge erred in trying the case when confronted with affidavits of bias and prejudice made in good faith).

35. Act of June 25, 1948, ch. 646, § 144, 62 Stat. 869, 898.

36. *Id.* § 455, 62 Stat. at 908.

37. *Id.*

38. See *United States v. Haldeman*, 559 F.2d 31, 137 n.342 (D.C. Cir. 1976).

39. *Id.* at 139 n.359 (stating the former § 455 gave the judge discretion to decide if the allegations warranted disqualification); cf. *Winslow v. Lehr*, 641 F. Supp. 1237, 1239–40 (D. Colo. 1986) (explaining the modified objective standard a judge would use in ruling on a motion to disqualify); *Hauptman v. Wilentz*, 555 F. Supp. 28, 30 (D.N.J. 1982) (noting the change to an objective standard).

40. *Fredonia Broad. Corp. v. RCA Corp.*, 569 F.2d 251, 257 n.9 (5th Cir. 1978).

on his failure to recuse himself from presiding over a number of cases in which he had a financial interest in one of the parties as a basis for challenging his nomination to the United States Supreme Court.⁴¹ At the time, Judge Haynsworth's reluctance to recuse was not considered unusual; in fact, Justice Blackmun—who was eventually confirmed for the same seat—also participated in cases in which he had a financial interest.⁴² But notoriety arising from this situation—as well as from a number of highly publicized cases involving other judges' refusals to recuse themselves despite apparent conflicts of interest⁴³—began to kindle public sentiment for altering the standards for disqualifying federal judges.⁴⁴

In response, Justice Lewis F. Powell Jr.—who was at the time President of the American Bar Association (ABA)—proposed that a new Judicial Code of Conduct be formulated, and a special ABA committee was later appointed to do so.⁴⁵ The ABA Code of Judicial Conduct (1972)—which, among other things, called for judicial disqualification whenever a judge's impartiality could “reasonably be questioned”—was subsequently adopted, in whole or in part, in most American states and the District of Columbia.⁴⁶ In addition, the Judicial Conference of the United States adopted the ABA Code in 1973, with only slight modification, as the governing standard of conduct for all federal judges⁴⁷ except Justices of the United States Supreme Court.⁴⁸

Initially, some perceived no conflict between the Code of Conduct

41. See Michael Nevels, *Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?*, 27 ARIZ. L. REV. 171, 181–82 (1985). Judge Haynsworth was alleged to have joined in the court's opinion even though he owned \$16,000 worth of stock in the prevailing corporation. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 56 (1970).

42. Frank, *supra* note 41, at 62 n.81.

43. See, e.g., *Laird v. Tatum*, 409 U.S. 824 (1972).

44. *Idaho v. Freeman*, 507 F. Supp. 706, 717 n.12 (D. Idaho 1981).

45. See *Margoles v. Johns*, 660 F.2d 291, 299 n.1 (7th Cir. 1981) (noting that the adoption of Canon 3C of the Code of Judicial Conduct occurred in 1973). See generally Nevels, *supra* note 41, at 182 n.109 (detailing the process involved in formulating and adopting the new judicial code).

46. See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 467–68 n.102 (1988).

47. See *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 113 (7th Cir. 1977); see also *United States v. Haldeman*, 559 F.2d 31, 130 n.284 (D.C. Cir. 1976); *Atkins v. United States*, 556 F.2d 1028, 1035 (Ct. Cl. 1977); WARREN E. BURGER, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (1973).

48. See E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 UTAH L. REV. 395, 395 (1977).

and § 455;⁴⁹ however, the ethical imperatives enumerated in the Code were much more stringent than those that had been prescribed in the statutory standard that pre-existed it. Immediately after the Code's adoption, federal judges who were called upon to decide questions of judicial disqualification were obliged to choose between inconsistent legal and ethical imperatives.⁵⁰ In 1973, the House Committee on the Judiciary concluded that this situation placed federal judges on the "horns of a dilemma"⁵¹—besides the problem of the conflicting duties prescribed by § 455 and the Code, federal judges who were called upon to decide judicial disqualification motions were obliged to apply an ambiguous standard.⁵² Congress thereupon set about the task of implementing a plan designed to correct these problems.⁵³ In 1974, Congress acted to reconcile the federal statutory scheme with the Judicial Code,⁵⁴ as well as to broaden the grounds for disqualification by rewriting 28 U.S.C. § 455.⁵⁵ This process culminated in the enactment of the 1974 amendments to § 455,⁵⁶ which altered the existing statute to the point of virtual repeal.⁵⁷

Amended § 455 was expressly intended to substitute a "reasonable

49. See, e.g., *Laird v. Tatum*, 409 U.S. 824, 825 (1972); cf. *Bradley v. Milliken*, 426 F. Supp. 929, 932 (E.D. Mich. 1977).

50. See Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 868 ("[F]ederal judges were governed by disparate ethical and statutory standards.").

51. See *id.* (citing H.R. REP. NO. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6351-54).

52. *Idaho v. Freeman*, 507 F. Supp. 706, 717 (D. Idaho 1981) (noting that, while a judge was to recuse whenever he had a substantial interest, "[t]he word 'substantial' was undefined and subject to myriad interpretations, especially when viewed from the subjective position of the judge").

53. In 1973, two separate bills introduced by Senators Hollings and Bayh were merged into Senate Bill 1064, which successfully cleared all congressional hurdles in November 1974. See H.R. REP. NO. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6351-54; see also *Freeman*, 507 F. Supp. at 718 & nn.14-21.

54. E.g., *Margoles v. Johns*, 660 F.2d 291, 299 (7th Cir. 1982); *Atkins v. United States*, 556 F.2d 1028, 1039 (Ct. Cl. 1977) (noting that "the purpose of the 1974 revision was to conform statutory law with the ABA Code"); *Bradley v. Milliken*, 426 F. Supp. 929, 933 (E.D. Mich. 1977) (noting that Congress had "sought to resolve what it perceived as a judicial dilemma whereby a judge [was] 'forc[ed] . . . to decide either the legal issue or the ethical issue at his peril'" (citing H.R. REP. NO. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6351-54)).

55. *Durhan v. Neopolitan*, 875 F.2d 91, 96-97 (7th Cir. 1989).

56. See Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (codified as amended at 28 U.S.C. § 455 (2000)).

57. See *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987).

person” standard for the “duty to sit” criterion that had previously been used in determining whether a judge should recuse in a particular factual situation.⁵⁸ However, the primary purpose of the amendment was to create a more comprehensive judicial disqualification law⁵⁹ that would promote public confidence in the judiciary⁶⁰ “by eliminating even the appearance of partiality.”⁶¹ Thus, whereas pre-amendment § 455 had consisted of little more than the 1821 prohibition against a judge presiding over any case in which he held an interest or had a relationship with a party,⁶² the 1974 version of the statute provided a federal judge was expected to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”⁶³ Disqualification was also expected in a number of specifically enumerated circumstances, including when the judge was biased against a party or in favor of its adversary.⁶⁴

58. *In re Acker*, 696 F. Supp. 591, 595 (N.D. Ala. 1988).

59. *See Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 525 (D.C. Cir. 1982) (“The amended version of § 455 presents a more exacting standard against which a judge’s interest in a controversy . . . is measured . . .”).

60. *See Hardy v. United States*, 878 F.2d 94, 96 (2d Cir. 1989) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)); *cf. United States v. Balistreri*, 779 F.2d 1191, 1204 (7th Cir. 1985) (“Section 455(a) . . . is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.” (citing H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354–55)); *Cheeves v. S. Clays, Inc.*, 726 F. Supp. 1579, 1581 (M.D. Ga. 1990) (“The aim of section 455(a) is to avoid even the appearance of partiality.”); *Arocena v. United States*, 721 F. Supp. 528, 530 (S.D.N.Y. 1989) (“The purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety.” (citing *Hardy*, 878 F.2d at 96.)).

61. *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987); *cf. Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982); *In re Wyo. Tight Sands Antitrust Cases*, 726 F. Supp. 288, 291 (D. Kan. 1989).

62. *See Liteky v. United States*, 510 U.S. 540, 546 (1994).

63. 28 U.S.C. § 455(a) (2000); *see Andrade v. Chojnacki*, 338 F.3d 448, 454–55 (5th Cir. 2003) (“Caselaw has articulated several interpretative guidelines for this statute. One . . . is that the standard for bias is not ‘subjective,’ as it once was, but, rather, ‘objective.’ . . . Courts moved to this less deferential standard in response to Congress’s 1974 revisions to the 1948 statute.”); *United States v. Pollard*, 747 F. Supp. 797, 799 (D.D.C. 1990) (citing 28 U.S.C. § 455(a)); *United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 125 (E.D.N.Y. 1988) (same).

64. *E.g., Union Independiente de Empleados de Servicios Legales v. P.R. Legal Servs., Inc.*, 550 F. Supp. 1109, 1111 (D.P.R. 1982) (stating that the judge’s personal bias is one of the two grounds for disqualification).

III. PROBLEMS WITH THE CURRENT FEDERAL JUDICIAL DISQUALIFICATION SCHEME

It has been said that the net effect of the 1974 amendments to § 455 was to “liberalize greatly the scope of [judicial] disqualification in the federal courts,”⁶⁵ and in some ways, that may be true. But the amended statute was not without its own problems. For one thing, as one federal district court judge tersely noted, “[i]t is not so easy as the Congress and the Court of Appeals seem to think it is to determine what ‘a reasonable person knowing all the relevant facts’ would think about anything, much less about the impartiality of a judge.”⁶⁶ Another problem is that, while the 1974 amendments to § 455 supposedly displaced the “duty to sit” concept with a rule requiring judges to resolve any doubts about whether disqualification was warranted in favor of disqualification, a spate of recent federal court decisions have affirmed preamendment case law holding that a federal judge is as obligated to sit when the facts do not give fair support to a charge of prejudgment, as the judge is to recuse when the facts warrant such action.⁶⁷

Yet another problem is that federal judges who are called upon to decide disqualification motions are under no obligation to explain their rationale, either for recusing themselves or for declining to do so. This is problematic because, while federal judges do recuse themselves in many situations, a judge who does so rarely writes an opinion explaining why. In contrast, judges who decline to disqualify themselves often write lengthy opinions explaining their reasoning.⁶⁸

65. United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir. 1987). *But see* Bryce v. Episcopal Church, 289 F.3d 648, 659–60 (10th Cir. 2002) (“[T]he recusal statute should not be construed so broadly as to become presumptive . . .”); United States v. Bayless, 201 F.3d 116, 127 (2d Cir. 2000) (“Although the reach of § 455 is broad, it has significant limits.”).

66. Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D. Ohio 1981).

67. *See, e.g.*, United States v. Allen, 587 F.3d 246, 251 (5th Cir. 2009) (affirming trial judge’s statement that “[m]y obligation is to preside unless there’s a legal reason why I should not”); United States v. Holland, 519 F.3d 909, 912 (9th Cir. 2008) (“We are as bound to recuse ourselves when the law and facts require as we are to hear cases when there is no reasonable factual basis for recusal.” (citations omitted)); Sensley v. Albritton, 385 F.3d 591, 598–99 (5th Cir. 2004) (“[A] federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.” (quoting Laird v. Tatum, 409 U.S. 824, 837 (1972))).

68. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009) (noting Justice Benjamin’s concurring opinion in which he addressed his decision not to recuse).

As a result, the existing judicial disqualification jurisprudence does not provide much guidance to parties and their counsel as to whether disqualification is warranted in a particular case. Rather, as Professor John Leubsdorf has succinctly pointed out, the case law tends to reflect “an accumulating mound of reasons and precedents” for denying disqualification.⁶⁹

There are also perils to seeking a federal judge’s disqualification that Congress may not have foreseen. Over the years there have been thousands of reported cases in which federal judges have declined to grant disqualification motions; when that happens, the moving party’s fate is left in the hands of a judge whom that party not only believes may not be impartial, but who may have become biased, subconsciously or otherwise, by the fact of having his impartiality questioned in court. Situations where judicial bias is suspect can also pose a serious dilemma for counsel. During the first half of the nineteenth century, one judge noted that in some districts, “lawyers who wanted to try to disqualify a federal judge were ‘advised to write out their motion to disqualify on the back of their license to practice law.’”⁷⁰ This story may be apocryphal, and certainly does not happen today, but what does occur is probably not what Congress had in mind. Although a litigant is unlikely to appear before a particular judge again, and therefore may feel that she has little to lose in seeking that judge’s removal, an attorney who frequently handles litigation in federal court is likely to be less than eager to make or endorse a recusal motion for one client if she perceives that doing so may prejudice her ability to effectively litigate before that judge in future cases. This reluctance may result in attorneys who are willing to file almost any other kind of motion declining to move to disqualify federal judges, or filing motions to disqualify in such toned-down and deferential ways as to be unlikely to receive serious consideration by the court.

Then there is the matter of the United States Supreme Court chipping away at the congressional intent. *Berger* may provide the best example of this, but an argument can be made that in *Liteky v. United States* the Court limited the ability of federal litigants to challenge judges for bias under § 455 in much the same way that *Berger* undercut the ability of parties to challenge federal judges under what is now § 144. In his concurrence in

69. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244–45 (1987).

70. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.7 (2d ed. 2007) (quoting *Sch. Dist. of Kan. City v. Missouri*, 438 F. Supp. 830, 835 n.2 (W.D. Mo. 1977)).

Liteky, Justice Kennedy wrote that the majority's decision in that case announced "a mistaken, unfortunate precedent" which "weaken[ed] the principal disqualification statute in the federal system, 28 U.S.C. § 455."⁷¹

Federal courts have also experienced a panoply of problems in attempting to ascertain the proper procedure for deciding judicial disqualification motions. In making a motion to disqualify a federal judge, some parties invoke only § 144, others invoke only § 455, others invoke both statutes, and still others invoke neither—leaving it to the challenged judge to decide what disqualification statute applies to the situation at hand and how to apply it. Since the sponsors of the 1974 amendments to § 455 did not explain how they expected the two judicial disqualification statutes to interact, precisely how a revised § 455 was supposed to relate to § 144—if such a relationship was contemplated at all—has never been clear. As a result, the question of whether the procedural requirements set forth in § 144 also apply to motions made under § 455 has never been firmly resolved, and a significant investiture of judicial time and energy has been invested in hand-wringing over such matters as whether or not §§ 144 and 455 are to be construed "in pari materia."⁷² Such an investment might be worth the cost if a significant benefit could be derived from having two separate federal judicial disqualification statutes on the books, but § 144, as presently constituted, appears to serve no useful purpose. In fact, the United States Supreme Court has pointed out that the statute "seems to be properly invocable only when § 455(a) can be invoked anyway."⁷³

All these matters invite scrutiny by Congress, but one of the most serious—if largely unacknowledged—problems with the federal judicial disqualification framework as it exists today is this: Since Congress originally enacted § 144 with the intention of creating a mechanism whereby a federal litigant could disqualify a judge, on a one-time basis, without making any showing of cause, but that peremptory intent of the statute was long ago judicially interpreted out of existence, what is the point of continuing to have two different federal judicial disqualification statutes on the books? The answer would appear to be obvious. It is time for § 144, as presently constituted, to go. The only question is whether the statute should be amended and improved in a way that is calculated to ensure that it will be enforced in the manner Congress originally intended,

71. *Liteky v. United States*, 510 U.S. 540, 557 (1994) (Kennedy, J., concurring).

72. *See, e.g., United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) ("It is well settled that sections 144 and 455 'must be construed in pari materia' . . .").

73. *Liteky*, 510 U.S. at 548.

or simply repealed altogether.

Since Congress enacted its original peremptory statute in 1911, several states—mostly in the western and midwestern parts of the country—have adopted similar statutes.⁷⁴ In those states, the right to challenge a judge on a peremptory basis is widely considered to be a useful and valuable one, as well as one that assuages the concerns of a great number of litigants and attorneys. Moreover, it does not appear that courts or commentators in such jurisdictions have found the occasional interposition of the peremptory challenge right to be a frequent source of abuse or major a impediment to the proper administration of justice. Congress should, therefore, give serious consideration to amending existing § 144 to add a clear directive that the federal peremptory disqualification statute is to be construed liberally in favor of disqualification, and not as a nit to be picked until the peremptory purpose of the statute is eviscerated by judicial interpretation.

If Congress chooses not to go this route, however, logic dictates that § 144 should be repealed. While doing this would do nothing to advance the ball of judicial impartiality, repealing § 144 would eliminate the confusion that attends the existence of two separate federal disqualification statutes which are difficult, if not impossible, to reconcile. Eliminating § 144 would also have the salutary effect of ensuring that litigants no longer rely—to their detriment—on the existence of a statute that seems to present a simple way to remove a seemingly biased judge, when a motion under the statute may, in fact, have no realistic chance of success.

74. See, e.g., CAL. CIV. PROC. CODE § 170.6(2), (5) (West 2010) (authorizing a party to file a peremptory challenge to disqualify a judge).