Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*

Before the House Judiciary Committee's Subcommittee on Courts and Competition

Testimony of Charles G. Geyh
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My name is Charles G. Geyh (pronounced "Jay"). I am the Associate Dean of Research and the John F. Kimberling Chair in Law at the Indiana University Maurer School of Law at Bloomington. I am the author of a forthcoming monograph on judicial disqualification in the federal courts, to be published by the Federal Judicial Center, and am currently serving as director of the American Bar Association's Judicial Disqualification Project. In addition, I am the author *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), and am coauthor (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 4th ed. 2007). In addition, I recently served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and prior to entering academia in 1991, was counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Administration of Justice, under Chairman Robert W. Kastenmeier.

The title of this hearing implies that its catalyst was the United States Supreme Court's recent decision in *Caperton v. A.T.* Massey. Narrowly read, *Caperton* is irrelevant to the federal courts and the United States Congress. *Caperton* featured a justice of the West Virginia Supreme Court who declined to disqualify himself under his state's disqualification rule, which gave rise to the question before the Court: whether a state supreme court justice who refused to disqualify himself under the circumstances of that case, violated the due process clause of the Fourteenth Amendment. In the federal courts disqualification begins and ends with an analysis of the applicable disqualification statutes (28 U.S.C §§144 and 455). A judge's erroneous failure to disqualify himself under the relevant statute may lead to judicial review on appeal or in a mandamus proceeding, but that review will be confined to an interpretation of the applicable statute. The due process implications of non-recusal (under the Fifth Amendment) will not arise, because the case will be decided on the basis of the more stringent statutory disqualification standards—the Constitutional question need never be decided.

More broadly construed, however, *Caperton* is relevant to the federal courts and this Subcommittee. *Caperton* serves as a wake-up call to state and federal courts to take judicial disqualification more seriously. It creates an opportunity that this subcommittee is taking, to reexamine the law of disqualification, assess how the disqualification statutes are working, and ascertain whether reform is needed. In my testimony today, I will assess the general state of federal judicial disqualification. To that end, I will first review the history of judicial disqualification in the United States. Second, I will discuss what I refer to as the "judicial disqualification paradox," which history reveals to have operated as an obstacle to the implementation of disqualification rules. Third, I will identify

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several problems with the federal disqualification regime that the disqualification paradox has created, and propose reforms to address those problems. Fourth and finally, I will offer some preliminary thoughts on the issue of whether Judge Mark Fuller should have disqualified himself from United States v. Siegelman and Scrushy, which Subcommittee counsel has asked me to address.

Although I conclude that there are aspects of the current disqualification regime that could benefit from reform, I want to put my critique in perspective. The problem inherent in judicial disqualification is that judges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge, in the context of specific cases, that despite their best efforts to preserve their impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges. My objective here is to propose reforms that will make that difficult task easier.

I. The History of Judicial Disqualification in the United States

The history of disqualification in the United States reveals a more or less steady march in the direction of imposing ever-more exacting disqualification standards Under English common law, the only accepted basis for judicial disqualification was financial interest—disqualification for bias was not recognized. In 1792, Congress enacted legislation that was the precursor to 28 U.S.C. §455. This legislation codified the common law by calling for disqualification of a district judge who was "concerned in interest," but added that a judge could also be disqualified if he "has been of counsel for either party."[1] The statute was expanded in 1821 to require disqualification when relatives of the judge appeared as parties.[2]

In 1891, Congress enacted legislation, later codified at 28 U.S.C. §47, forbidding a judge from hearing the appeal of a case that the judge tried.[3] In 1911, the precursor to §455 was further amended to require disqualification when the judge was a material witness in the case.[4] That same year, Congress enacted new legislation (later codified as 28 U.S.C. §144) entitling a party to secure the disqualification of a judge by submitting an affidavit that the judge has "a personal bias or prejudice" against the affiant or for the opposing party. A decade later, in *Berger v. United States*, the Supreme Court interpreted this statute to prohibit a judge from ruling on the truth of matters asserted in the party's affidavit, and to require automatic disqualification if the affidavit was facially sufficient.[5]

In 1927, the Supreme Court added a constitutional dimension to the law of disqualification. In *Tumey v. State of Ohio*, the Court invalidated, on due process grounds, an Ohio statute that authorized a judge to preside over cases in which the judge would receive court costs assessed against convicted (but not acquitted) defendants.[6]

By the mid-twentieth century, common law aversion to judicial bias as grounds for disqualification continued to exert considerable influence. Section 455 remained silent as to bias. Section 144, while ostensibly enabling a party to disqualify a district judge simply by submitting an affidavit alleging personal bias, had been given an extremely exacting construction by the circuit courts, as Professor John Frank explained at the time:

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[1] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178-79 (1792).
[2] Act of March 3, 1821, ch. 51, 3 Stat. 643 (1821).
[3] Act of March 3, 1891, ch. 23, § 21, 36 Stat. 1090 (1891).
[4] Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090 (1911).
[5] Berger v. United States, 255 U.S. 22 (1921).
[6] Tumey v. State of Ohio, 273 U.S. 510 (1927).

> Frequent escape from the statute has been effected through narrow construction of the phrase "bias and prejudice." Affidavits are found not "legally sufficient" on the ground that the specific acts mentioned do not in fact indicate "bias and prejudice," a reasoning which emasculates the *Berger* decision by transferring the point of conflict.[7]

Frank warned that "[u]nless and until the Supreme Court gives new force and effect to the *Berger* decision, the disqualification practice of the federal district courts will remain sharply limited."[8]

In 1948, §455 was further amended to disqualify judges who were related to a party's lawyer (not just the party, as had been the case since 1821). As amended, the statute then 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 a party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[9]

In 1964, the United States Court of Appeals for the Fifth Circuit articulated a so-called "duty to sit."[10] "It is a judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason for recusation."[11] By 1972, Justice William Rehnquist reported in *Laird v. Tatum* that the duty to sit had been accepted by all circuit courts.[12]

In 1972, the American Bar Association published the Model Code of Judicial Conduct to replace the Canons of Judicial Ethics it had promulgated fifty years earlier. The Model Code sought to encapsulate the ethics of disqualification into a unified rule.[13] Under the new rule, a judge was subject to disqualification "in a proceeding in which his impartiality might reasonably be questioned, including but not limited to" cases in which the judge had an actual bias concerning a party, had served as a lawyer in the matter (or was still with his former firm when the matter was being handled by another firm lawyer), had an interest in the case, or was related to the parties or their lawyers. In 1974, Congress adopted, with some variations, the 1972 Model Code's disqualification rule in an amendment to §455, which, by virtue of its requirement that judges disqualify themselves whenever their impartiality might reasonably be questioned, was generally seen as qualifying, if not ending, the "duty to sit."[14]

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[7] John Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 629 (1947).
[8] *Id.* at 630.
[9] Comment, *Disqualification for Interest of Lower Federal Court Judges*, 71 Mich. L. Rev., 538, 540 (1973).
[10] United States v. Edwards, 334 F.2d 360 (5th Cir. 1964).
[11] *Id.* at 362.
[12] Laird v. Tatum, 409 U.S. 824, 837 (1972).
[13] Model Code of Judicial Conduct, Canon 3C (1972) (current version at Model Code of Judicial Conduct, R. 2.11 (2007)).
[14] James Alfini, Jeffrey Shaman, Steven Lubet, & Charles Gardner Geyh, Judicial Conduct and Ethics §4. (2007).

II. The Judicial Disqualification Paradox

The history of judicial disqualification has a marked trajectory in which Congress has imposed ever more rigorous disqualification standards on judges. Implicit in this history of escalating regulation is a pattern of behavior in which judges recurrently preside over cases that members of Congress (and those they represent) think they should not. Underlying this pattern is an inherent tension between traditional conceptions of the judicial role and disqualification for bias that has bothered judges and scholars for centuries.

At the core of the judicial role is the notion of impartiality. As early as the 17th century, Sir Matthew Hale's personal code of judicial conduct included several principles focused on impartiality, e.g. "That in the administration of justice I carefully lay aside my own passions."[15] Over three hundred years later, the Model Code of Judicial Conduct continues to strike a very similar tone, with rules directing that a judge "shall perform all duties of judicial office fairly and impartially,"[16] and "shall act at all times in a manner that promotes the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"[17] The principle that a "good" judge is an impartial judge is thus thoroughly engrained in Anglo-American law and legal culture. Indeed, lawyers and judges who ascend to the federal bench take an oath to "faithfully and impartially discharge and perform all the duties" of judicial office.[18]

The judge who disqualifies herself for bias in a given case effectively concedes inability to be the impartial arbiter she has sworn to be. This is a concession the common law did not tolerate, as Blackstone explained when he wrote that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[19] Professor John Frank, writing in the mid-twentieth century, put the point bluntly: "Disqualification for bias represents a complete departure from common law principles."[20] Disqualification for bias thus implies a judge's failure to live up to the centuries old expectation that he be able to "set aside [his] own passions,"[21] which judges are understandably hesitant to admit even to themselves, let alone others.

Disqualification for *apparent* bias (the standard embodied in §455(a), which calls upon judges to disqualify themselves when their impartiality "might reasonably be questioned") poses similar problems. When a judge acknowledges that she has said or done things that could lead the public to question her impartiality, such a concession is in tension with the ethical directive that "a judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."[22] The point is not that judges who disqualify themselves for apparent bias fear discipline for failing to avoid an appearance

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[15] Quoted in J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 208 (1873).

[16] 2007 MODEL CODE, Rule 2.2.

[17] *Id.*, Rule 1.2.

[18] 28 U.S.C. § 453 (2000).

[19] WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

[20] Frank, *supra* note 7 at 618-19.

[21] Matthew Hale, *quoted in* CAMPBELL, *supra* note 15.

[22] 2007 Model Code, Rule 1.2.

of impropriety. Rather, the point is that ethics codes define a good judge as someone who avoids the appearance of partiality, which by negative implication means that a judge who has created an appearance of partiality (and must disqualify herself on that basis) has behaved less than optimally. And so many judges have an understandable reluctance to disqualify themselves for appearing biased, given the adverse implications of such a concession.

In contrast to the culture of impartiality that pervades the judiciary, the public has been steeping in a culture of legal realism since the middle of the twentieth century. The legal realism movement of the early twentieth century cultivated an appreciation for the complexity of judicial decision-making that has, in the years since, been widely internalized, not only by scholars and pundits but by the public as well. Judges are not automatons who apply the law mechanically, in a political vacuum. They are people too, whose thinking is influenced by education, background, experience, ideology and personal values, and who are subject to the same prejudices that afflict the rest of us. As with the rest of us, it is only natural that a judge's personal prejudices will sometimes get the best of her, or at least appear to do so. When that happens in a case she has been called upon to decide, the judge should step aside, to protect judicial impartiality and promote public confidence in the courts. Animated by these realist sentiments, rule-makers of the past century have imposed ever more rigorous disqualification standards in an effort to encourage disqualification for bias and apparent bias. Judges, however, given the history and tradition of the roles they are sworn to play—often remain reluctant to embrace the spirit of these rules. That has given rise to what I have characterized as the judicial disqualification paradox, which as one scholar explains creates a "vicious circle" of litigants moving for disqualification; of seemingly biased judges resisting; of Congress responding with more stringent disqualification rules, which are then subjected to judicial interpretation that contort the rules again.[23]

III. Current Problems with the Federal Judicial Disqualification Regime

A. Problem: Under §455, Judges decide motions requesting their own disqualification.

In the federal system, the norm is that disqualification motions are decided by the judge whose disqualification is sought.[24] While it may be a bit awkward to initiate the disqualification process by calling upon the party who seeks a judge's disqualification to raise the matter with that judge, it is a defensible approach. The target judge will be the most familiar with the facts giving rise to the motion, and can step aside without delay when circumstances warrant.

When, however, the judge is disinclined to step aside, asking that judge to resolve a contested disqualification motion becomes much more problematic. In effect, such an approach calls upon the judge to "grade his own paper"—to ask the judge who is accused of being too biased to decide the case, to decide whether he is too biased to decide the

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[23] John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. Rev. 237, 245 (1987).

[24] Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); *In re* United States, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord* United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

case. Unsurprisingly, two recent commentators observe that "the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of of U.S. disqualification law, and for good reason."[25] Another commentator adds:

> The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.[26]

And yet another echoes that "[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case."[27]

In a recent survey, over 80% of the public polled thought that disqualification motions should be decided by a different judge.[28] The assumption underlying the majority's view—that a judge is ill-positioned to assess the extent of her own bias (real or perceived)—is corroborated by empirical research. Recent empirical studies in cognitive psychology have demonstrated that judges, like lay people, are susceptible to cognitive biases in their decision-making.[29] Considerable research has been conducted in the field of "heuristics"--rules of thumb or mental shortcuts people use to aid their decision-making that may enable efficient judgments in some settings but which are a form of bias may also lead to systematic, erroneous judgments in other settings.[30] This research suggests that when an individual employs "heuristics" in his decision-making, he is unaware of those underlying biases.[31]

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[25] James Sample, David Pozen, *Making Judicial Recusal More Rigorous,* 46 Judges' J. 17, 21 (2007).

[26] Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 Val. U. L. Rev. 543, 561 (1994).

[27] Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 571 (2005).

[28] Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between. Judges, Election Backers (Feb. 22, 2009), *available at* http://www.justiceatstake.org/node/125.

[29] Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in Heuristics and Biases: The Psychology of Intuitive Judgment 49, 49-50 (Thomas Gilovich et al., eds., 2002); Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).

[30] Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in Heuristics and Biases: The Psychology of Intuitive Judgment 49, 49-50 (Thomas Gilovich et al., eds., 2002).

[31] Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 Personality and Soc. Psychol. Bull. 1 (2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781 (2004); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 Personality and Soc. Psychol. Bull. 369 (2002); Richard E. Nisbett et al., *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychol. Rev. 231 (1977).

More generally, people typically rely on introspection to assess their own biases;[32] however, "because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty."[33] The individual thus takes his unfruitful search as proof that bias is not present and fails to correct for those biases.[34]

The peril of asking a person to assess the extent of her own bias is further exacerbated for judges by the judicial disqualification paradox, because the judge is being asked to assess whether she harbors a real or perceived bias that she has sworn to avoid. In short, the tradition of calling upon judges to be the final arbiters of challenges to their own impartiality should be abandoned.

Reform proposal: .Amend §455 to require that contested disqualification motions be heard by a different judge.

A simple solution to the problem of calling upon a judge to evaluate her own qualification to sit is to assign the matter to a different judge. Such a procedure could be limited to courts of original jurisdiction (district judges, magistrates, bankruptcy judges), or extended to appellate courts. Illinois employs such a procedure with language that could be borrowed, with appropriate modifications to accommodate the vocabulary of §455:

> Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition."[35]

The Illinois statute adds that the judge whose disqualification is sought "need not testify but may submit an affidavit if the judge wishes" to assist the judge evaluating the disqualification petition.[36]

B. Problem: 28 U.S.C. §144 has become a virtual dead-letter

Section 144 of Title 28 states in its entirety:

> 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.
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> 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

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[32] Emily Pronin et al., Valuing *Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. of Experimental Soc. Psychol. 565, 565-67 (2007).

[33] Ehrlinger, *supra* note 31, at 10.

[34] Pronin, *supra* note 32, at 565-67.

[35] 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

[36] *Id.*

any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[37]

A literal reading of §144 suggests that a party can force disqualification automatically, simply by filing an affidavit alleging that the judge is biased against the affiant or in favor of the affiant's opponent. Such an interpretation would render §144 akin to peremptory disqualification procedures adopted by judicial systems in a number of western states—and the legislative history of §144 lends some support for this interpretation of the section.[38]

The federal courts have indeed held that under §144 a judge must step aside upon the filing of a facially sufficient affidavit, but they have been exacting in their interpretations, not only of what a facially sufficient affidavit requires, but of the procedural prerequisites to application of the statute as well. Thus, motions have been dismissed because the motion was untimely, because the movant failed to submit an affidavit, because the movant submitted more than one affidavit, because the attorney rather than a party submitted the affidavit, because the movant's affidavit was unaccompanied by a certificate of counsel, because the affidavit failed to make allegations with particularity, and because the certificate of counsel certified only to the affiant's good faith, not counsel's.[39]

This is not accidental. As the First Circuit explained, "courts have responded to the draconian procedure—automatic transfer based solely on one side's affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice to a party."[40] In a similar vein, the the Seventh Circuit has stated:

> [T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient. . . . Because the statute 'is heavily weighed in favor of recusal,' its requirements are to be strictly construed to prevent abuse.[41]

As a consequence, §144 has been rendered a much more cumbersome tool to obtain disqualification than §455, even though §455 calls upon judges to evaluate the merits of a movant's allegations and not simply the facial sufficiency of those allegations. Judges who are loath to tolerate strategic manipulation of disqualification rules and (given the disqualification paradox) are disinclined to second guess their own impartiality have

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[37] 28 U.S.C. § 144 (1949). Originally enacted as § 21 of the Judicial Code of 1911, the statute was recodified as § 144 in 1948 without significant change.

[38] 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

[39] *See, e.g.*, United States v. Barnes, 909 F.2d 1059, 1072 (7th Cir. 1990) (counsel did not present certificate of good faith, "another requirement of section 144 with which Barnes failed to comply"); *In re* Cooper & Lynn, 821 F.2d 833, 838 (1st Cir. 1987) ("[N]o *party* filed an affidavit. . . . Rather the affidavit was filed by an attorney."); United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 1986) ("Elder's affidavit violates the one-affidavit rule . . . and need not be considered."); United States v. Balistrieri, 779 F.2d 1191, 1200 (7th Cir. 1985) ("Because of the statutory limitation that a party may file only one affidavit in a case, we need consider only the affidavit filed with Balistrieri's first motion."); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (motion rejected because counsel, not plaintiff, signed and filed affidavit); United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973) (same); Morrison v. United States, 432 F.2d 1227, 1229 (5th Cir. 1970) (motion rejected because there was no certificate of good faith by counsel); United States v. Hoffa, 382 F.2d 856, 860 (6th Cir. 1967) (same).

[40] *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997).

[41] United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (citation omitted).

imposed what many commentators have long regarded as an unduly stingy construction of §144.[42] An additional reason that §144 has fallen into relative disuse is that it requires the more difficult showing of actual bias, whereas §455(a) requires a mere appearance of bias. Section 455 thus subsumes §144—As the Supreme Court has observed of §144, it "seems to be properly invocable only when §455(a) can be invoked anyway."[43] Moreover, many of the circumstances that might qualify as actual bias under §144 are specifically enumerated in §455(b), which explicitly addresses various conflicts of interest, in addition to actual bias.[44] In short, while parties still file motions under §144, they usually do so in tandem with §455, with the latter section typically monopolizing the court's attention.

Reform Proposal: Eliminate §144 or replace it with a procedure for judicial substitution.

Section 144 has been rendered a problematic and cumbersome tool for disqualification, leaving §455 as the one workable mechanism for disqualification in the federal system. One simple solution is to decommission §144 after nearly a century of service.

A second possibility, however, is to return to the roots of §144 and explore alternative means to achieve its objective. That objective was to provide a party with a relatively simple means to request a different judge without putting the original judge in a position to second guess the merits of the party's request. The pitfall of §144 was its requirement that the moving party submit a "timely and sufficient affidavit" charging the judge with personal bias. By hinging disqualification on a facially sufficient allegation of bias, the underlying truth of which could not be challenged, the statute simultaneously encouraged litigants to exaggerate their assertions of bias to meet the threshold of facial sufficiency, and angered judges targeted with exaggerated claims, who responded by making the threshold requirements more exacting.

The problems of §144 could be avoided if the statute were amended to offer parties a limited opportunity to request a simple substitution of judges, much in the nature of the preemptory challenge in jury selection. Nineteen states currently employ a procedure of this kind. Typically it is limited to trial judges, it may be invoked by each party one time only, and it must be invoked early in the proceedings. I have included, as an appendix to this statement, examples of substitution of judge provisions from the codes of Alaska and Montana.

The primary objection to substitution of judge procedures is that a party may use them strategically to avoid judges who, while impartial, are likely to be unsympathetic to the party's claims on the merits. The short answer to this concern is that a party is entitled only to one substitution per case, which limits the harm—a harm more than offset by the benefit of avoiding the aggravation and expenditure of resources associated with litigating traditional disqualification claims. A secondary objection relates to the administrative burdens associated with implementing judicial substitution procedures—a legitimate concern, to be sure, but one that has not proved insurmountable in the nearly

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[42] John Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 629 (1947).
[43] Liteky v. United States, 510 U.S. 540, 548 (1994).
[44] *See id.* ("section 455 is the more modern and complete recusal statute").

twenty jurisdictions that employ them (including rural jurisdictions like Alaska and Montana).

C. Problem: §455 Requires Disqualification for Trivial Financial Interest "Conflicts"

Under 28 USC §455(b)(4), a federal judge must disqualify himself if he has "a financial interest in the subject matter in controversy or in a party to the proceeding." "Financial interest" is defined in 455(d)(4) as "ownership of a legal or equitable interest, however small." Under the federal statute, then, federal judges must disqualify themselves when they own utterly trivial amounts of stock in a corporate party—as little as a single share. The net effect is to force disqualification even when there is no realistic possibility that the judge's impartiality might reasonably be questioned.

Professor Geoffrey Miller has written critically of this provision and the problems that flow from its over-inclusiveness:

> Recusal and disqualification . . . can operate rigidly and thus exclude judges whose interest in a case cannot plausibly result in prejudice against a party. To the extent recusal and disqualification are overinclusive they can impose unnecessary costs and delay on the administration of justice and can be used by parties for strategic purposes rather than to protect a bona fide interest in avoiding biased results.[45]

A different manifestation of the disqualification paradox is at work here: In response to worries that judges will be reluctant to disqualify themselves if given the discretion to do otherwise, Congress has eliminated all discretion and forced disqualification categorically. Every other specific ground for disqualification under §455(b) is effectively limited to circumstances in which the disqualifying event might reasonably call the judge's impartiality into question. Making a special case of financial interests has proved to be more trouble than it is worth.

Reform Proposal: Amend §455(b)(4) to limit disqualification for financial interest to cases in which a judge's impartiality might reasonably be questioned

A simple and straightforward solution here would be to borrow language from the American Bar Association's Model Code of Judicial Conduct. Model Code Rule 2.11(A)(3) requires disqualification if the judge has an "economic interest in the subject matter in controversy or in a party to the proceeding", but defines economic interest as "ownership of more than a *de minimis* legal or equitable interest." "De minimis," in turn, is defined as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." Under the Model Code, then, judges are subject to disqualification for financial interest only when that interest is significant enough to call a judge's impartiality into question.

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[45] Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 460-61 (2004).

IV. Observations on United States v. Siegelman and Scrushy

Subcommittee counsel has asked me to comment on whether Judge Mark Fuller should have disqualified himself in *United States v. Siegelman and Scrushy*, 561 F.3d 1215 (11th Cir. 2009). The entirety of the Eleventh Circuit's analysis of the disqualification issue in that case is as follows:

> Scrushy contends that he is entitled to a new trial because Chief Judge Fuller should have disclosed his "extraordinary extrajudicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)." This claim is predicated upon Chief Judge Fuller's ownership interest in two aviation companies that engage in business with agencies of the United States government. This claim was raised over nine months after trial and incorporated information learned from the internet and from Chief Judge Fuller's Financial Disclosure Reports.
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> A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986). The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d Cir.1978). The purpose of the rule is to "conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir.1997).
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> Scrushy's recusal motion was untimely, based upon information readily available to him prior to trial, and has all the earmarks of an eleventh-hour ploy based upon his dissatisfaction with the jury's verdict and the judge's post-trial rulings. It has no merit.

The court's analysis strikes me as sound, as far as it goes. Under §455, however, a judge must disqualify himself if his impartiality might reasonably be questioned, regardless of whether a party has filed a motion seeking the judge's disqualification. Thus, even if the Eleventh Circuit was correct in rejecting the defendants' disqualification motion as untimely, the question remains whether Judge Fuller should have disqualified himself in the first place, on his own initiative.

Subcommittee counsel has furnished me with several articles published by Scott Horton in Harper's Magazine, including one featuring an interview with Professor David Luban.[46] Professor Luban reviewed the defendant's recusal motion and the government's response, and on the basis of that review concluded that Judge Fuller should have disqualified himself. Professor Luban is an accomplished legal ethicist, and I hold him in high regard. That said, I have not had access to the underlying documents that formed the basis for Professor Luban's assessment and so am not in a position to reach an independent judgment.

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[46] Scott Horton, *An Interview With Legal Ethicist David Luban Regarding Judge Mark Fuller*, HARPER'S MAGAZINE, August, 2007.

As best I can tell, Professor Luban is most troubled by two features of the case. First is the presence of preexisting, antagonistic, partisan entanglements between the judge and defendants, which could lead a reasonable person to doubt the judge's impartiality. Second is that the judge owned businesses with government contracts, and that because this case was of acute interest to political leaders in Washington, a reasonable person might doubt the capacity of the judge to bracket out the impact of his decision on his business's prospects for future contracts. Professor Luban's observations strike me as cogent, but I nonetheless find myself puzzled as to why defendants did not raise the disqualification issue earlier. The first feature of concern to Luban is one with which defendants would be familiar from the outset of the case, while the second, as the Eleventh Circuit notes, was a matter of public record.

It is possible that Judge Fuller did not disqualify himself on his own initiative because he did not think that disqualification was warranted. Given the ethos of judging, judges are predisposed to think that they can lay aside their passions and be fair. Even so, Judge Fuller might have avoided the subsequent cloud of suspicion (created by the Harper's articles) by erring on the side of disclosure. Comment 5 to Rule 2.11 in the ABA's Model Code of Judicial Conduct offers judges the following advice: "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." In a case with an obviously high political profile such as this, disclosing more, rather than less would seem to have obvious advantages. As noted above, it is unclear whether such disclosures would have revealed any information to the parties of which they were previously unaware or which they could not otherwise have obtained with a simple internet search. Disclosure would, however, have served the salutary purpose of reassuring the public that the judge had no hidden bias or agenda.

Appendix: Judicial Substitution Procedures

Alaska:

AS 22.20.022. Peremptory Disqualification of a Judge.

(a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit must contain a statement that it is made in good faith and not for the purpose of delay.
(b) A judge or court may not punish a person for contempt for making, filing, or presenting the affidavit provided for in this section, or a motion founded on the affidavit.
(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time.
(d) A party or a party's attorney may not file more than one affidavit under this section in an action and no more than two affidavits in an action.

Montana:

MONT CODE ANN § 3-1-804: Montana Code - Section 3-1-804: SUBSTITUTION OF DISTRICT JUDGES

SUBSTITUTION OF DISTRICT JUDGES

This section is limited in its application to district courts and judges presiding therein; it does not include district court judges or other judges sitting as a water court judge, nor a Workers' Compensation Court judge.
1. A motion for substitution of a district judge may be made by any party to a proceeding only in the manner set forth herein. In a civil or criminal case, each adverse party, including the state, is entitled to one substitution of a district judge.
(a) A motion for substitution of a district judge shall be made by filing a written motion with the clerk, as follows:
"The undersigned hereby moves for substitution of District Judge _____ in this case."
A copy of the motion shall be served upon all parties to the proceeding and the clerk shall immediately notify the judge and the first judge in jurisdiction, if there has already been a substitution. After a timely motion has been filed, the substituted judge shall have no

power to act on the merits of the cause or to decide legal issues therein, and shall call in another judge. However, a resident district judge who has previously been substituted from the case may agree to set the calendar, draw a jury, conduct all routine matters including arraignments, preliminary pretrial conferences in civil cases, and other matters which do not go to the merits of the case, if the judge in jurisdiction authorizes the same.
(b) The first district judge who has been substituted or disqualified for cause shall have the duty of calling in all subsequent district judges. In a multi-judge court all other judges in that court shall be called, in accordance with that court's internal operating rules, before a judge from another district court is called in. It shall be the duty of the clerk of court to stamp the name of the judge to whom the case is assigned on the face of the initial pleading, complaint, order to show cause, or information, and all copies thereof.
(c) When a judge is assigned to a cause for 30 consecutive days after service of a summons, or 10 consecutive days after service of an order to show cause, information or other initiating document, and no motion for substitution of judge has been filed within said time period, the plaintiff or the party filing the order, information or other initiating document, and the party upon whom service has been made shall no longer have a right of substitution. Any party named in a summons who is subsequently served shall have 30 consecutive days after such service in which to move for a substitution of judge. Any person subsequently served in connection with an order to show cause, information or other initiating document, shall have 10 consecutive days after such service in which to move for a substitution of judge. If the presiding judge removes himself or herself, or a new judge assumes jurisdiction of the cause by virtue of the internal operating rules of a multi-judge court, the right to move for substitution of a judge is reinstated, unless having been previously used in the cause by the moving party, and the time periods shall run anew. After the time period shall have run as to the original parties to the proceeding, no party who is joined or intervenes thereafter shall have any right of substitution, except that one third party defendant who is not an original party in any pending case may have a right of one substitution within 30 consecutive days after the service upon the third party defendant of a third party complaint.
(d) The motion for substitution shall not be effective for any purpose unless a filing fee is paid to the clerk of the district court in the amount set by law. No filing fee is required by law in criminal cases.
(e) Any motion for substitution which is not timely filed is void for all purposes. The judge for whom substitution is sought shall have jurisdiction to determine timeliness, and if the motion for substitution is untimely, shall make an order declaring the motion void.
(f) When a new judge has accepted jurisdiction, the clerk of court shall mail a copy of the assumption of jurisdiction to the original judge and to each attorney or party of record. The certificate of service shall be attached to the assumption of jurisdiction form in the court file.
(g) When a new trial is ordered by the district court, each adverse party shall thereupon be entitled to one motion for substitution of judge in the manner provided herein. When on appeal the judgment or order appealed from is reversed or modified and the cause is remanded to the district court for a new trial, or when a summary judgment or judgment of dismissal is reversed and the cause remanded, each adverse party shall thereupon be entitled to one motion for substitution of judge in the manner provided herein. Such motion must be filed, with the required filing fee in civil cases, within twenty (20) days

after a new trial has been ordered by the district court or after the remittitur from the Supreme Court has been filed with the district court. No other right of further substitution shall arise in cases remanded by the supreme court. In criminal cases, no further right of substitution shall arise when the cause is remanded for resentencing.