

Action, Accountability, and the Judiciary United States Federal Judicial Recusal Reform In a New Century

Introduction

For all of its bright-line tests and black and white prescriptions, the United States' legal landscape is dominated by greyness on the whole. Such ambiguity is particularly evident in the realm of judicial ethics. As a statutory matter, dispensations concerning the behavior of our nation's judges could not be broader. In enforcement of these edicts, accountability could not be milder. With the extraordinary lack of disclosure requirements for judges and the lack of any supervisory entities to check for conflict-of-interest violations, malfeasance is neither revealed nor regulated.

To understand the nature of the judicial disqualification dilemma today, we must first understand the roots of the judicial function. In the last century, scholars and students alike recognized and valued the concept of judicial autonomy. However, history tells us that such respect does not cut across time. While the principles of executive government have developed over thousands of years, the concept of judicial sovereignty has only come to light in a small fraction of that span. Before the Glorious Revolution in England, judges, like parliament, were often subject to the whims of the Crown. However, by the early 18th century, the value of judicial autonomy in correctly applying law was more widely recognized, and rightly so. This paper's effort is not to refute the value of judicial self-rule; it is to find a practical balance between absolute autonomy and annihilative accountability. A study of America's recusal history will show that such a

balance can be struck, if we are willing to shed antiquated approaches to judicial accountability embrace new standards of conduct.

In a further effort to understand the issue of American judicial recusal, we must also consider current ethical principles in this field. Unfortunately, to state that there is an ethical “standard” concerning judicial recusal would be erroneous; no single, concrete standard exists from which to determine judicial bias in the United States. This is a major source of the current problem in judicial accountability. Each circuit of the federal system has its own take on what proper disqualification standards are. For some sectors, the *appearance* of impartiality is as important as *de facto* impartiality. For other areas, intrajudicial conflicts are considered irrelevant, even if they could be perceived by the public as flagrantly prejudicial. Obviously, there are great discrepancies between these principles. Thus, a common baseline of ethics is needed. The implementation of proper recusal and disclosure standards, as guided by the ABA Code of Judicial Conduct, will do so.

Human nature tells us that power without restraint will be abused. As a consequence of the aforementioned lack of ethical edicts, judicial impropriety has occasionally tumbled through the barrier of judicial sovereignty and into the public consciousness. Such ethical conflict-of-interest violations have plagued the federal judiciary; no branch of American government relies more on public reputation for legitimacy than the courts. Furthermore, the public cases are indicative of a larger problem, since a judge’s fate usually resides in his or her own hands. In the absence of a regulatory body beyond one’s own person, few human beings would constrain themselves from the acquisition of desires; this is why societies have laws. Unfortunately,

our legal arbiters are not immune from this characteristic. This paper will also focus on examples of judges who have abused their power and discretion; each of these abuses could have been avoided, had proper ethical standards been in place.

Lastly, solutions must be provided to help solve the problems presented above. Universal recusal standards would help greatly. Yet, a larger regulatory body beyond the legislature (but perhaps not beyond the legislature's purview) is necessary to guard such recusal principles. Also, reform must occur in the extent to which judges disclose their own personal information. That is to say, without a greater understanding of what a judge's financial interests *are*, it will be impossible to anticipate what their conflicts-of-interest *will be*. Such reforms are integral to success in recusal reform, and will be the culmination of the analysis that follows.

History of U.S. Federal Judicial Disqualification

An informed understanding of federal judicial disqualification today requires adequate knowledge of judicial recusal's history. In the early history of English common law, it was normal practice to replace a suspect judge with a more detached one.^{i[1]} However, by the 18th century, this practice became far less common. Respect for judges was so high, and their station so independent of regulation, that few worried about judicial bias. Moreover, the public had few avenues to turn to if they did have concerns. As Blackstone put it, "[T]he law will not suppose a 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."^{ii[2]}

However, the American Founders did not share Blackstone's absolute confidence that judicial officers would carry out their duties properly. Thus, within the prescribed

checks-and-balances of our Constitution there lies a judiciary that, though largely independent, is not entirely unaccountable. The possibility of impeachment certainly exists; any federal judge certainly should be wary of it as they choose their courses of action. However, an enumeration of what specific actions constitute an impeachable offense for a federal judge is not contained in the Constitution. It was left for both Congress and the courts themselves to flesh out these doctrines. Fortunately, the concept of judicial impartiality was not lost in this mix. The second Congress, in 1792, enacted a statute ordering federal judges to disqualify themselves when they had an interest in a suit they were to hear.^{iii[3]} This law places recusal of a judge in their own hands by omission; since the statute does not spell out where disqualification discretion lies, it was assumed to be with the judge himself. This concept was codified 29 years later in 1821, when the Process Act of 1792 was amended to explicitly note that recusal was the judge's prerogative.^{iv[4]}

The 1821 amendment also has a subtle but important distinction from its 1792 predecessor: it clarifies that bias must come from a "judicial relationship." This assumption, that a judge's bias only comes from intrajudicial sources (i.e. from a previous legal matter) was to be the building-block for a long line of jurisprudence that ignored a judge's personal interest, independent of any legal history with a party. Thus, statutes enacted as late as 1891, such as 28 U.S.C. § 47, refine recusal only to the extent that they clarify how far intrajudicial bias extends.^{v[5]} It was not until the 20th century that the question of extrajudicial (i.e. from interests outside of the judicial process) bias was raised.

In 1911, Congress enacted 28 U.S.C. § 144, the first statute to invoke the possibility of extrajudicial bias as a basis for recusal.^{vi[6]} Stating that a party may move for the disqualification of a federal judge who has a “*personal* bias or prejudice either against [the filing party] or in favor of any adverse party,” 28 U.S.C. § 144 both opened the door for litigants to consider filing recusal motions, rather than leaving the awareness of possible bias at the sole discretion of the judge, and to file such motions based on extrajudicial grounds. [emphasis supplied]

However, 28 U.S.C. § 144’s application did not align with its intent, at least initially. Though parties could now file a disqualification motion, the motion’s validity was still determined by the contested judge. Moreover, early in 28 U.S.C. § 144’s history, the statute was construed so narrowly that the passage of a disqualification motion was rare, thus ultimately maintaining the bench’s discretion.^{vii[7]} This loophole was finally challenged in 1921, with *Berger v. U.S.*^{viii[8]} Here, the United States Supreme Court ruled that once a judge has determined a recusal motion under 28 U.S.C. § 144 “to be legally sufficient,” that is to say, the cause is considered valid by the very judge challenged, then “he is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.”^{ix[9]}

Though *Berger v. U.S.* was slight victory for supporters of judicial impartiality, it only partially fulfilled the promise of 28 U.S.C. § 144. While judges could now be viably removed from a case, initial discretion still lied in the judge’s hands, and the grounds for recusal were static; the invocation of extrajudicial bias as a cause for a disqualification motion did not receive serious attention until half a century after 28 U.S.C. § 144’s creation.

U.S. v. Grinnell Corp.^{x[10]}, argued in 1966, was essentially an anti-trust case, dealing with the technicalities of the Sherman Act. However, almost as an aside, Justice William O. Douglas' decision spends a paragraph answering the defendant's claim that the district judge was biased. Unfortunately, the Court's lack of consideration concerning this issue led to a rather odd conclusion, that "alleged bias and prejudice to be disqualifying must stem from an *extrajudicial* source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."^{xi[11]} [emphasis supplied] If this quotation seems like a radical flip-flop from previous jurisprudence, be assured that it was not intended to be, though what *was* intended is debatable. According to Justice Scalia, Douglas' use of the term "extrajudicial" simply meant "a source outside the judicial proceeding at hand – which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge,"^{xii[12]} proceedings commonly referred to as intrajudicial in legal vernacular. Though Scalia's interpretation is a manipulation of *Grinnell* to suit his own goals - as will later become evident - Scalia is correct to the extent that Douglas' invocation of "extrajudicial" was a misnomer. However, the misuse of the term "extrajudicial" by Justice Douglas was not realized by many in the aftermath of *Grinnell*.^{xiii[13]}

To compensate for *Grinnell*'s perceived marginalization of intrajudicial bias and to clarify the realm of improper extrajudicial inclinations, Congress in 1974 revised the previously inert 28 U.S.C. § 455.^{xiv[14]} This effort was in great part to inform and supplant the abstruse 28 U.S.C. § 144. As a result of the 1974 overhaul, 28 U.S.C. § 455 explicitly outlines the situations in which a federal judge ought to disqualify himself, and does so with a seeming lack of ambiguity. Indeed, "the prior one-paragraph statute was

transformed into a multiple-section, far-reaching statute^{xv[15]} with the lofty charge of promoting "public confidence in the impartiality of the judicial process."^{xvi[16]}

Disqualification jurisprudence from 1974 on has been dominated by the question of how to apply 28 U.S.C. § 455 to the antiquated intra- and extrajudicial recusal doctrines, rather than enforcing their dissolution. This misguided approach is evident in *Davis v. Board of School Commissioners*,^{xvii[17]} where 28 U.S.C. § 455 received its first test. Here, the Fifth Circuit found that the statute should be invoked "on the basis of conduct extrajudicial in nature as distinguished from conduct within a judicial context,"^{xviii[18]} thus confining 28 U.S.C. § 455 to the jurisprudence it was intended to usurp.^{xix[19]} Other circuits have made similar errors, but "[n]ot all circuits have indoctrinated the extrajudicial source into § 455. In particular, the First Circuit has continually held that the source of judicial bias may originate in a judicial setting, and the extrajudicial source doctrine was never adopted by that circuit. The First Circuit approach has been praised by most commentators for its adherence to the original intent of the amended § 455, to keep public confidence in the judiciary high."^{xx[20]} However, the First Circuit's healthy approach, nor the more lacking techniques of its peers, received notice by the Supreme Court for well over a decade.

When the Court did choose to hear an issue arising out of the growing 28 U.S.C. § 455 jurisprudence, in 1988's *Liljeberg v. Health Services Corp.*,^{xxi[21]} the results were reassuring, if not lacking in finality. Here, the Supreme Court narrowly held that "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,^{xxii[22]} and thus disqualification is necessary.

Unfortunately, nowhere in the *Liljeberg* majority opinion are intra- or extrajudicial bias even mentioned, and thus the decision lacks staying power. As University of Wisconsin law scholar Kenneth M. Fall noted in 1989, the “*Liljeberg* decision does not...offer the kind of firm statements on standard of review^{xxiii[23]} necessary to trump previous disqualification standards. Thus, Fall hypothesized that in “the short term, the *Liljeberg* decision is likely to lead to closer scrutiny and more frequent disqualification of federal judges,^{xxiv[24]} while the “long term outlook for *Liljeberg* is more uncertain.”^{xxv[25]} That is to say, Fall perceptively felt that “[a]lthough the specific holdings in *Liljeberg* might not be overturned, a second, strongly worded section 455 case, deciding against disqualification of a judge, could significantly blunt the force of *Liljeberg* as a firm statement supporting strict application of section 455.”^{xxvi[26]} Fall’s perceptive conjecture would soon come to fruition.

Though *Liljeberg* implicitly affirms the intent of 28 U.S.C. § 455 (in the First Circuit mold), by transcending the debate over intrajudicial and extrajudicial bias, Justice Stevens’ opinion failed to provide sweeping changes in 28 U.S.C. § 455’s interpretation. The intrajudicial and extrajudicial debate was far from resolved; by not calling for the extinction of old doctrines, *Liljeberg* simply ignored the heart of the problem in 28 U.S.C. § 455’s jurisprudence. 1994’s *Liteky v. U.S.*^{xxvii[27]} did not.

Modern Standards

Liteky v. U.S.

Liteky v. U.S. represents the Supreme Court's stance on disqualification today. The majority opinion was authored by Justice Scalia and joined by Justices Rehnquist, O'Connor, Thomas, and Ginsburg, while an important concurring opinion was written by Justice Kennedy and joined by Justices Blackmun, Stevens and Souter. In Scalia's majority opinion, the extrajudicial source doctrine was upheld as a lens from which to enforce 28 U.S.C. § 455. Essentially affirming the previous extrajudicial jurisprudence, *Liteky* is a step backward from *Liljeberg*, which overstepped the antiquated *Grinnell* approach. Yet, Justice Scalia's majority opinion does do much to clarify and correct previous misinterpretations of the extrajudicial source doctrine, while at the same time broadening the principle's scope.

Scalia begins by directly attacking the century's extrajudicial jurisprudence based upon the *Grinnell* standard. Scalia notes that an interpretation which fails to recognize Douglas' improper use of the term extrajudicial "mistakes the basis for the 'extrajudicial source' doctrine."^{xxviii[28]} Furthermore, Scalia holds that an interpretation which ignores Congress' efforts in 28 U.S.C. § 455 cannot stand. "It is wrong in theory, though it may not be too far off the mark as a practical matter, to suggest, as many opinions have, that 'extrajudicial source' is the *only* basis for establishing disqualifying bias or prejudice,"^{xxix[29]} Scalia notes.

Scalia then invokes 28 U.S.C. § 455(b)'s "bias or prejudice" standard, and shows its relevance beyond the extrajudicial scope. "A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from *the facts adduced or the events occurring at trial* (my emphasis), it is so extreme as to display clear inability to render fair judgment."^{xxx[30]} Thus, Scalia finds that

the proper use of 28 U.S.C. § 455 includes recusal on intrajudicial grounds, as well as a correct understanding of the extrajudicial source doctrine. Having critiqued the status quo, Scalia next attempts to explicate an enlightened view of judicial disqualification for the post *Grinnell* era.

“[T]he ‘extrajudicial source’ doctrine, as we have described it, applies to 28 U.S.C. § 455. As we have described it, however, there is not much doctrine to the doctrine,”^{xxxii[31]} Scalia states, as he introduces his new interpretation. To revive the principle of extrajudicial recusal, Scalia gives the term a new, expanded reading. “It seems to us,” Scalia writes, “that the origin of the ‘extrajudicial source’ doctrine, and the key to understanding its flexible scope (or the so-called ‘exceptions’ to it), is simply the pejorative connotation of the words ‘bias or prejudice.’ ... The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess, or because it is excessive in degree.”^{xxxiii[32]} Thus, Scalia creates a new definition of extrajudicial bias that, in his opinion, encompasses both a proper interpretation of the term “extrajudicial source” while staying true to Congress’ intent in 28 U.S.C. § 455. Not all members of the Court shared this opinion, however.

As previously stated, *Liteky* was not an unanimous decision, with the four-member concurrence deserving of attention. In his concurring opinion, Justice Kennedy, agrees with Justice Scalia that “*Grinnell* provides little justification for its announcement of the extrajudicial source rule ... the doctrine crept into the jurisprudence more by accident than by design.”^{xxxiii[33]} Scalia and Kennedy differ, however, in how to remedy the *Grinnell* mishap. Informed by *Liljeberg*, Kennedy asserts that “placing too much

emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry ... the relevant consideration under 28 U.S.C. § 455 is the appearance of partiality.^{xxxiv[34]} Kennedy correctly rebukes the correlation Scalia perpetuates between bias and the nature of that bias, stating that “the central inquiry under 28 U.S.C. § 455 is the appearance of partiality, not its place of origin.”^{xxxv[35]} Kennedy aptly recognizes that 28 U.S.C. § 455 was grounded in an effort to free recusal standards from the bonds of *Grinnell*, not simply to inform it. Thus, the concurring opinion in *Liteky* correctly translated *Liljeberg*’s unsaid assumptions for reform, correctly interpreted the intent of 28 U.S.C. § 455, and correctly uprooted *Grinnell*’s logic. All that the concurrence lacks is one vote and *stare decisis*.

ABA Codes

Though Justice Scalia’s *Liteky* decision informs much of the current understanding in recusal law, there are other methods in which the spirit of the *Liteky* concurrence can make headway. The American Bar Association’s Codes of Conduct are the best example. In 1924, the ABA adopted 36 standards of conduct, called the Canons of Judicial Ethics. At the time, these standards were simply examples of proper behavior, not enforceable codes.^{xxxvi[36]} However, as the Canons became more ingrained into legal culture, the ABA decided to codify them into a more palatable format. Created in 1972, the Code of Judicial Conduct contains five canons; the third, in section E (originally section C), concerns judicial disqualification.^{xxxvii[37]} Section 3E contains such strict edicts as “[a] judge shall disqualify himself” when “impartiality might reasonably be questioned” or when there is any “economic” or “de minimis interest.”^{xxxviii[38]}

Such edicts would be of enormous use, if given official recognition by the courts. They could tighten up the intent of 28 U.S.C. § 455, while expanding its scope. Unfortunately, after the ABA instituted the new codes in 1972, “the Judicial Conference of the United States announced that, if a provision of the Code conflicted with a more lenient statutory provision, the latter would supersede the former.”^{xxxix[39]} Since 28 U.S.C. § 455, in its 1972 form, was far more lenient than the Code of Judicial Conduct, the “federal bench was not bound by the Code’s rigorous standard of recusal and continued to apply the statute’s ‘in the judge’s opinion’ test.”^{xl[40]} Though 28 U.S.C. § 455’s 1974 revision moved it closer to the Codes’ exacting standards, in the wake of *Liteky*, the statute does not approach the ABA’s essentially-unofficial Code of Judicial Conduct requirements.

Abuses and Indiscretions

To better understand where judicial disqualification reform must occur, the past consequences of the lacking recusal laws and jurisprudence deserve an examination. Three incidents will be discussed; each exemplifies a different problem in judicial disqualification. Then, analysis will follow concerning Judge Thomas Penfield Jackson’s behavior in a recent case, *U.S. v. Microsoft*,^{xli[41]} and its possible repercussions for the future of judicial disqualification.

The Fay Incident

Having sat through two previous trials regarding charges levied against three supposed drug dealers, Judge Peter Fay, district judge for the Fifth Circuit, was sitting on the third, and ultimately final, case in 1977.^{xlii[42]} Informed by his previous experience with the matter, at one point in the third trial, Fay made the following statement

concerning the defendants: “[T]hese three individuals were members of a conspiracy that I can only describe as a large-scale conspiracy composed of the most vicious individuals that this court has ever seen.”^{xliii[43]}

In light of this statement, Judge Fay’s impartiality towards the defendants was more than in question, as 28 U.S.C. § 455 requires for recusal; this statement would seem to indicate he had already made up his mind. 28 U.S.C. § 455, with its recusal requirement for a “reasonable question” of impartiality,^{xliv[44]} was on the books for almost three years at the time of the Fifth Circuit’s review of Fay’s conduct. The statute had already been utilized in prominent cases, such as *Davis v. Board of School Commissioners*,^{xlv[45]} discussed previously. Yet, there is not a single mention of 28 U.S.C. § 455 in the Fifth Circuit’s review of the Fay situation. Instead, the Fifth Circuit applied the antiquated 28 U.S.C. § 144 to its rationale, before utilizing the improper *Grinnell* technique to conclude “it is clear ... that the facts alleged in the affidavit must show that the judge’s bias is personal, as opposed to judicial, in nature,”^{xlvi[46]} and proceeded to deny the defendants’ recusal motion.

Of course, the invocation of aged statutes is common practice; short of revocation or expiration, law is eternal. Consequently, the Fay incident should not be viewed as an abuse of discretion by the Fifth Circuit. Instead, it is an illustration of the consequences when statutes are placed in competition with each other. The difficult duty of carrying out the intent of congressional law is infinitely complicated when that intent is mired in a swamp of relevant statutes and codes. The Fifth Circuit was in just such a situation, and was forced to blindly pierce the fog of congressional ambiguity and come to a decision. Thus, perhaps one of the most obvious cases of bias, intrajudicial, extrajudicial, or

otherwise, resulted in a quick denial of a disqualification motion. The Fay case illustrates the domino effect of a lacking coherence and uniformity in law – injustice.

The Rehnquist Incident

Fresh out of the Justice Department’s Office of Legal Counsel to the White House, newly appointed Supreme Court Justice Rehnquist heard arguments in *Laird v. Tatum*^{xlvii[47]} in 1972. *Laird* involved a group of anti-Vietnam War activists who claimed that “their rights were being invaded by the Department of the Army’s alleged ‘surveillance of lawful and peaceful civilian political activity.’”^{xlviii[48]} Rehnquist voted with the five justice majority to deny the plaintiffs’ standing. This seemingly routine situation was complicated by the fact that Rehnquist, while with the Justice Department, approved the surveillance program, testified before the Congressional Subcommittee on Constitutional Rights to the validity of such government actions, and publicly supported the program in speeches.^{xlix[49]}

Though Rehnquist attempted to justify his failure to disqualify himself,^{l[50]} it mattered little. In spite of a scholarly outcry of misconduct,^{li[51]} Rehnquist faced few potential repercussions for any wrongdoing. Since a judicial failure to disqualify has never been the cause of a Supreme Court impeachment,^{lii[52]} and such punishment is the only punitive avenue for Congress, Rehnquist was well protected from any harm. Insulated from accountability by any regulatory source beyond Congress, federal judges in general have been allowed similar latitude.^{liii[53]}

The Kelly Incident

In 1992, James McGirr Kelly, a Third Circuit judge for the Eastern District of Pennsylvania, was in his ninth year of litigation in a class action lawsuit involving school

asbestos hazards.^{liv[54]} Fortunately for Kelly, the case was nearing completion. Yet, the suit ended for the judge sooner than he thought. In 1990, Kelly attended a conference on asbestos, a normal act for a judge involved in such litigation. What was abnormal about this situation, however, was that Kelly “had apparently ‘forgotten’ that [the] plaintiffs funded this conference,” and, more egregiously, “forgot” that “he had granted [the] plaintiffs’ *ex parte* request to use \$50,000 from the settlement fund specifically for this conference,”^{lv[55]} or hid the conflict from the parties.^{lvi[56]} After “hard-fought discovery and over the course of more than six months, the full details about the conference”^{lviii[57]} were finally revealed to the defendants.

Despite this obvious conflict-of-interest, Kelly’s deep time-investment in the case caused him to fight the defendants’ motion for disqualification, particularly since the motion was filed just as the case was coming to a close. Kelly’s impartiality could certainly “reasonably be questioned,” as 28 U.S.C. § 455 states. Yet, the judge was unwilling to recognize the validity of the defendants’ recusal charge, or at least was not willing to value it above the expedience of completing the case, even if Kelly’s integrity during the duration of the litigation could reasonably be questioned.^{lviii[58]}

Though the Court of Appeals for the Third Circuit ultimately utilized a writ of mandamus to remove Judge Kelly from the case, the extraordinary inconvenience posed by a retrial of the matter caused the Third Circuit to retain Judge Kelly’s rulings, including those issued post-conference.^{lix[59]} This despite the questionable disposition of Kelly throughout the *entire* trial.^{lx[60]} Perhaps if the defendants’ discovery of conflict had not required a “hard fought” effort over the course of “more than six months,”^{lxi[61]} but

was simply a routine doctrine of judicial disclosure, Judge Kelly’s disqualification could have occurred immediately after his conference transgression, if not earlier.^{lxii[62]}

The Jackson Incident and the Future

U.S. v. Microsoft^{lxiii[63]} will be long remembered as one of the most notable anti-trust cases in a century. Yet, the case also contains an important judicial recusal element. On June 7, 2000, presiding U.S. district court judge Thomas Penfield Jackson released a ruling ordering a de-monopolizing break-up of Microsoft.^{lxiv[64]} Unfortunately, Jackson’s refused to let his “opinion” end there. The next day, June 8, Jackson gave a series of press interviews, in which, among other disparaging comments, Jackson called Bill Gates “Napoleonic,”^{lxv[65]} and said Microsoft was “untrustworthy.”^{lxvi[66]} These remarks, though given after final judgement, preceded the post-trial motion period.

Upon review by the DC Circuit, a seven member panel composed of Chief Judge Edwards and Circuit Judges Williams, Ginsburg, Sentelle, Randolph, Rogers and Tatel authored a per curiam opinion^{lxvii[67]} which, among other holdings, retroactively disqualified Judge Jackson from his final decision in *Microsoft*.^{lxviii[68]} To justify its holding, the DC Circuit’s opinion noted that “28 U.S.C. § 455(a)...requires disqualification only when a judge’s ‘impartiality might reasonably be questioned’ [citation omitted]...we believe the line has been crossed.”^{lxix[69]} As for the remedy, the DC Circuit shrugged off the *Liteky* standard, declaring that the “‘extrajudicial source’ rule has no bearing on the case before us.”^{lxx[70]} The DC Circuit then proceeded to adopt the wide latitude provided by *Liljeberg*. The opinion states that an “application of *Liljeberg* leads us to conclude that the appropriate remedy for the violations of 28 U.S.C. § 455(a) is disqualification of [Judge Jackson] retroactive...to the date he entered the order breaking

up Microsoft.^{lxxi[71]} The DC Circuit then vacated Jackson's final holding in *Microsoft* and remanded the case for review by a different District Judge.

The appellate decision is a remarkable development in disqualification jurisprudence for multiple reasons. First, the DC Circuit correctly invoked 28 U.S.C. § 455(a), and did so without tying themselves to *Liteky*. Finding Scalia's *Liteky* holding too constricting for their needs, the DC Circuit utilized *Liljeberg*'s broader prescriptions, thus transcending the extrajudicial source doctrine while implicitly supplying *Liljeberg* with the staying-power the original opinion lacked.^{lxxii[72]} By doing so, the DC Circuit released 28 U.S.C. § 455(a) from the bonds of extrajudicial vs. intrajudicial jurisprudence, thus fulfilling the promise of Kennedy's concurrence in *Liteky*.

Secondly, the DC Circuit made significant efforts towards recognizing the ABA Code of Conduct's value as a guide to judicial conduct. The per curiam opinion contains an entire section devoted to the specific breaches of the ABA Code by Judge Jackson.^{lxxiii[73]} In this section, the DC Circuit notes that Jackson violated Canon 2, which obligates federal judges to "respect and comply with the law" while conducting "himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," Canon 3A(4), which requires that a "judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding," Canon 3A(6), which states that "a judge should avoid impropriety and the appearance of impropriety in all activities," and Canon 3E, described previously.^{lxxiv[74]}

The DC Circuit's effort to utilize the ABA Code as a guide to inform its understanding of improper judicial conduct is commendable. However, the upshot of the opinion's Code discussion represents the need for further reform. After outlining Jackson's Code violations, the DC Circuit provides the caveat that the "Code of Conduct contains no enforcement mechanism;" they are only "self-enforcing."^{lxxv[75]} In fact, they cannot be enforced if there is a competing federal statute, such as 28 U.S.C. § 455.^{lxxvi[76]} Though the DC Circuit pays lip service^{lxxvii[77]} to an official reprimand of Judge Jackson through 28 U.S.C. § 372(c), which provides for internal disciplinary proceedings for federal judges, that avenue is not pursued in the opinion further. As of this date, a 28 U.S.C. § 372(c) action has not been carried out by the Chief Judge of the DC Circuit, the officer responsible for conducting such an inquiry. Perhaps this is because Jackson broke no enforceable rule, and thus has no cause of action against him. Obviously, such rules should exist, and ought to be quickly and actively enforced.

Solutions And Conclusions

As the Fay incident illustrates, lacking coherency in the statutes and jurisprudence of judicial disqualification can lead to results contrary to any reasonable recusal conception.^{lxxviii[78]} Thus, the first step in reforming judicial recusal is to clearly establish universal federal standards. A statutory adoption of the stricter ABA Codes of Judicial Conduct with 28 U.S.C. § 144 and § 455 would greatly aid this situation. By incorporating the Codes into enforceable law, the United States' federal judicial system would have a strict, tested, and universal standard from which to judge whether recusal is necessary. The Codes run the gamut of recusal possibilities, and can properly "serve as a standard for deciding which procedural method is appropriate for each disqualifying

category of cases -- appearance of partiality, personal bias, prior professional relationships, current familial relationships, and current financial interest in a party or the case.^{lxxix[79]}

Similarly, the Rehnquist incident exemplifies the necessity for independent regulatory bodies. Numerous ideas have been proposed for reform at the federal level. Diane C. Boniface, of Ohio State Law School, has discussed a “peer-panel” system for judicial disqualification. A panel of “disinterested judges” would be created, with the duty simply to “determine whether a recusal motion should be granted or denied”^{lxxx[80]} in any given federal case. The judges would hear the cases as hypotheticals, thus avoiding collegial bias.^{lxxxi[81]} The “hypothetical” system is acceptable in this framework because the reviewing body would be independent of “case in controversy” standards; the body would be regulatory, not strictly judicial in nature.

For the Supreme Court, Jeffrey W. Stempel of Brooklyn Law School proposes a unique system. Stempel suggests that parties “aggrieved by the refusal of a Supreme Court Justice to disqualify himself” ought to, “on timely motion, obtain review by the full Supreme Court. To be sustained, an individual Justice's decision refusing to disqualify himself must be affirmed by a majority of those Justices participating in the review.”^{lxxxii[82]} Another alternative is to make the parties regulatory bodies in-and-of themselves. John P. Frank, partner in Lewis and Roca, advocates peremptory challenges of federal judges.^{lxxxiii[83]} A dissatisfied litigant would receive one per trial, and would have to show great cause to recuse the replacement judge. Any of these reforms would do much to better judicial accountability within the recusal realm.

Much reform is necessary concerning judicial disclosure also, as evidenced by the Kelly incident. The first and perhaps largest step relates to the aforementioned implementation of the ABA's Codes of Judicial Conduct. Canon 6^{lxxxiv[84]} is particularly applicable here. Creating an affirmative duty of extrajudicial disclosure, Canon 6 "is highly relevant today, because many judges obtain reimbursement for travel expenses and accommodations that they incur through attendance and participation at judicial seminars and conferences."^{lxxxv[85]} The Kelly incident could have been completely averted had Canon 6 received the weight of positive law, just as the controversy regarding Judge Jackson's comments could have been averted if Canon 3 was instituted statutorily. Such reform is integral to the proper evolution in the First Circuit and *Liljeberg* mold Kennedy expressed in the *Liteky* concurrence. "If, as Justice Kennedy suggests, the validity of a court's judgments is based upon the public's confidence in an independent and impartial judiciary," Adam J. Siegel, a scholar from Cornell Law School notes, then "efforts by judges to validate their decisions by improving their own scientific literacy through extrajudicial sources may compromise the values that form the basis of our judicial system."^{lxxxvi[86]} Note that Siegel does not mean judges should be ignorant of important issues and information; they must simply be wary of the means by which they receive that information, and who is supplying it. Siegel concludes that "if the federal judiciary is to establish and maintain its independence, judges must follow a code of ethics that will foster justice and the rule of law."^{lxxxvii[87]} The ABA's Codes properly provide for this idea.

Reform of the federal judiciary's recusal system will not be easy. Yet, history tells that, if we value justice, it is necessary. Though the Microsoft incident represents

some progress, it also glaringly reveals a need for further reforms. As long as we are informed by the mistakes of the past, and open to new ideas, the future of judicial disqualification in the federal system can be a model for the world, and an archetype of fairness.

^{i[1]} Raleigh & de Bracton, *The Laws and Customs of England* (1270), sec. 278-289.

^{ii[2]} 3 William Blackstone, *Commentaries on the Laws of England* (1765), sec. 361.

^{iii[3]} See 2 Cong. Ch. 36; 1 Stat. 275. The bill is under the heading “Process Act of May 8, 1792.”

^{iv[4]} See 16 Cong. Ch. 51; 3 Stat. 643. The bill is under the heading “Proceedings In Cases In Which The District Court Judge Is Interested In A Cause Depending In The Court In Which He Is A Judge; March 3, 1821.”

^{v[5]} 28 U.S.C. § 47 (1891) prohibits a federal appellate judges from sitting on a case they were the trial judge.

^{vi[6]} 28 U.S.C. § 144 (1911) reads:

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 [later amended to “session”] 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.

vii^[7] See David C. Hjelmfelt, Statutory Disqualification of Federal Judges, 30 U. Kan. L. Rev. 255, 256 (1982).

viii^[8] 255 U.S. 22 (1921).

ix^[9] *Id.* In agreement with the decision in *Henry v. Speer*, 201 Fed. Rep. 869 (1913).

x^[10] 384 U.S. 563 (1966).

xi^[11] *Id.*

xii^[12] *Infra* note 27 at 545.

xiii^[13] Judge Bork commits this error as late as 1988. In *Liberty Lobby v. Dow Jones*, 838 F.2d. 1287 (1988), at 1301, the opinion reads:

It is well settled that a motion for recusal under 28 U.S.C. § 144 or § 455 must be based upon prejudice from an extra-judicial source ... the attitude for which section 144 mandates recusal is not indicated by prior judicial rulings, or in-court comments prompted by developments in the case or prior legal proceedings, or the exercise of related judicial functions.

See also *Davis v. Board of School Commissioners*, *infra* note 17, for a further example of this error.

xiv^[14] In its 1974 form, 28 U.S.C. § 455 sections (a) and (b) read as follows:

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

(b) He shall also disqualify himself in the following circumstances:

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

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

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

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

(5) He or his spouse, or a person within the third degree of relationship to either

of them, or the spouse of such a person:

- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

^{xv}[15] Adam J. Safer, *The Illegitimacy Of The Extrajudicial Source Requirement For Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 *Cardozo L. Rev.* 787, 794 (1993).

^{xvi}[16] H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974).

^{xvii}[17] 517 F.2d. 1044 (1975).

^{xviii}[18] *Id.* at 1052.

^{xix}[19] *Id.* Among other cases, the Fifth Circuit utilized *U.S. v. Grinnell Corp.*, *supra* note 10, in its reasoning.

^{xx}[20] Shawn P. Flaherty, *Liteky v. United States: The Entrenchment Of An Extrajudicial Source Factor In The Recusal Of Federal Judges Under 28 U.S.C. § 455(a)*, 15 *N. Ill. U. L. Rev.* 411, 418 (1995).

^{xxi}[21] 486 U.S. 847 (1988).

^{xxii}[22] *Id.* at 860, upholding the Fifth Circuit of Appeals' ruling in 796 F.2d. 796, 802 (1986).

^{xxiii}[23] Kenneth M. Fall, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification Of Federal Judges Under Section 455(a)*, 1989 *Wis. L. Rev.* 1033, 1057 (1989).

^{xxiv}[24] *Supra* note 23.

^{xxv}[25] *Supra* note 24, at 1059.

^{xxvi}[26] *Id.*, at 1060.

^{xxvii}[27] 510 U.S. 540 (1994).

^{xxviii}[28] *Supra* note 27 at 549.

^{xxix}[29] *Id.* at 551.

^{xxx}[30] *Id.*

^{xxxi}[31] *Supra* note 27 at 554.

^{xxxii}[32] *Id.* at 550

^{xxxiii}[33] *Id.* at 559

xxxiv^[34] *Id.* at 558

xxxv^[35] *Supra* note 27 at 563

xxxvi^[36] Matthew E. Kaplan, *Judicial Process At Risk: Scales Of Justice Unequal Under Present Federal Judicial Disqualification Statutes*, 8 U. Miami Bus. L.Rev. 273 (2000).

xxxvii^[37] The Code of Judicial Conduct, section 3E, reads as follows:

(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 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.

xxxviii^[38] *Id.*

xxxix^[39] Jeremy S. Brumbelow, *Liteky v. United States: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 Ark. L. Rev. 1059, 1075 (1995).

xl^[40] *Infra* note 54 at 1076.

xli^[41] 97 F. Supp. 2d 59 (2000).

xlii^[42] The circumstances of the case are described in the Fifth Circuit appellate decision in *United States v. Archibald Newbald*, 554 F.2d. 665 (1977).

xliii^[43] *Id.* at 681.

xliv^[44] See 28 U.S.C. § 455(a), *supra* note 14.

xlv^[45] *Supra* note 17.

xlvi^[46] *Supra* note 36, at 682.

xlvii^[47] 408 U.S. 1 (1972).

xlviii^[48] *Id.* at 2.

lix^[49] See Jeffrey W. Stempel; Rehnquist, Recusal, and Reform; 53 *Brooklyn L. Rev.* 589, 592 (1987).

l^[50] See 409 U.S. 901 (1972).

li^[51] *Supra* note 49, at 595.

lii^[52] *Supra* note 50.

liii^[53] See Alexa J. Smith, Federal Impeachment: Defining Process Due, 46 *Hastings L.J.* 639, 650 (1995).

liv^[54] *In Re School Asbestos Litigation*, 977 F.2d. 764 (1992).

lv^[55] Committee on Professional Responsibility of the Association of the Bar of the City of New York, Panel Discussion: Disqualification Of Judges (The Sarokin Matter): Is It A Threat To Judicial Independence?, 58 *Brooklyn L. Rev.* 1063, 1073 (1993).

lvi^[56] “If Judge Kelly noticed the overlap, he made no mention of it to the parties.” *Supra* note 54, at 780.

lvii^[57] *Supra* note 54, at 780.

lviii^[58] Judge Kelly had also considered attending a conference on asbestos in 1986, at the urging of an individual associated with the plaintiffs. Though he declined due to a busy schedule, Kelly was not unaware of the ethical dilemma – he consulted a fellow judge about the propriety of his attendance. See *supra* note 54, at 778. Thus, it would seem reasonable to question whether Judge Kelly was impartial for much of the trial’s life span.

lix^[59] *Supra* note 54, at 785.

lx^[60] *Supra* note 58.

lxi^[61] *Supra* note 54, at 780.

lxii^[62] Disqualification could have conceivably occurred as early as 1986. See *supra* note 58.

lxiii^[63] *Supra* note 41.

lxiv^[64] 87 F. Supp. 2d 30 (2000).

lxv^[65] James Rowley, “Antitrust Judge Continues To Blast Microsoft,” *The Seattle Times*, 15 March 2001, sec. A3.

lxvi^[66] *Supra* note 65.

lxvii^[67] 253 F. 3d 34 (2001).

lxxviii^[68] *Id.* at 119.

lxxix^[69] *Id.* at 114-115.

lxxx^[70] *Id.* at 115.

lxxxi^[71] *Id.* at 116.

lxxxii^[72] See discussion of *Liljeberg*'s lacking forcefulness, *supra* notes 23-26.

lxxxiii^[73] See title VI of the opinion, section B, entitled "Violations of the Code of Conduct for United States Judges," *supra* note 67, at 111-114.

lxxxiv^[74] See discussion of disqualification under the ABA Code, *supra* note 37.

lxxxv^[75] *Supra* note 67, at 114.

lxxxvi^[76] *Supra* note 39.

lxxxvii^[77] A quick reference of 28 U.S.C. § 372(c) is provided, and then no further mention is made. *Supra* note 67, at 114.

lxxxviii^[78] See also *Davis v. Board of School Commissioners*, *supra* note 17, at 1084-1086.

lxxxix^[79] Leslie W. Abramson, A Symposium On Civility And Judicial Ethics In The 1990s: Deciding Recusal Motions: Who Judges The Judges?, 28 Val. U.L. Rev. 543, 559 (1994).

lxxx^[80] Diane C. Boniface, Establishing a More Effective Judicial Disqualification Standard, 50 Ohio St. L.J. 1291, 1304-1305 (1989).

lxxx^[81] *Id.*

lxxxii^[82] *Supra* note 49, at 644.

lxxxiii^[83] John P. Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Probs., 43, 44 (1970).

lxxxiv^[84] Code of Judicial Conduct, Canon 6, entitled "A Judge Should Regularly File Reports Of Compensation Received For Quasi-Judicial And Extra-Judicial Activities," reads as follows:

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions.

A. COMPENSATION

Compensation should not exceed a reasonable amount nor should it exceed what a person

who is not a judge would receive for the same activity.

B. EXPENSE REIMBURSEMENT

Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. PUBLIC REPORTS

A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

^{lxxxv}[85] Adam J. Siegel, *Setting Limits On Judicial Scientific, Technical, And Other Specialized Fact-Finding In The New Millennium*, 86 *Cornell L. Rev.* 167, 189 (2000).

^{lxxxvi}[86] *Id.* at 184.

^{lxxxvii}[87] *Id.*