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Disqualification of a Federal District Judge for Bias--The Standard under Section 144

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Note: Disqualification of a Federal District Judge for Bias—The Standard Under Section 144

I. INTRODUCTION

The Constitutional guarantee of due process embodies the unqualified right of every litigant to have controversies resolved by an impartial court. Where a litigant establishes that a trial judge's bias has prevented a fair and impartial hearing, he is thereby entitled to a new trial before a different judge. Since it would be unfair to require litigants to expend time and resources on a second proceeding necessitated by a judge's indiscretion, and since the judge's bias may not be apparent from the trial record, most jurisdictions have enacted statutory procedures for disqualifying a judge from participation in a case where there is adequate reason to fear that he is interested in the outcome or is otherwise biased.

The federal disqualification-for-bias statute, codified in Section 144 of Title 28 of the United States Code, is typical of statutes expanding the right of a litigant to obtain disqualification over that which existed at common law. By establishing a flexible right to obtain disqualification for bias, Section 144 abandoned the rigid rules and categories of the common law under which recusal followed only from certain facts which were likely to cause bias in fact. This statute made possible the disqualification of a federal judge upon the showing of facts which would indicate the possible presence of bias, thereby focusing not only upon impartiality itself but also upon the appearance of impartiality.

7. See notes 19-21 infra, and accompanying text.
8. See notes 19-21 infra, and accompanying text.
The predecessor of Section 144 contemplated a peremptory or automatic system of recusal under which the litigant's mere filing of an affidavit of bias effected replacement of the judge.¹⁰ Subsequent federal interpretation, however, has substantially denied the statute its intended effect. In demanding that the affiant affirmatively show bias in fact to gain recusal, federal courts have diminished public confidence in the judicial system by refusing to disqualify a judge when he reasonably appears to be biased. This Note will examine the origin of Section 144 and its interpretation by the federal courts to determine whether the current bias in fact standard for recusal should be replaced by an appearance of bias standard. The recent Eighth Circuit case of Pfizer Inc. v. Lord,¹¹ will be reviewed to demonstrate the shortcomings of the current federal approach.

II. THE HISTORY OF SECTION 144

The disqualification of a judge for bias was established in early English common law. Although the fundamental principle that a man may not be a judge in his own cause was recognized at least as early as Coke's time,¹² the early "common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else."¹³ The English courts soon extended disqualification beyond purely pecuniary interest to that derived from any "proprietary interest."¹⁴

The first indication of possible disqualification for actual bias, rather than for pecuniary or other proprietary interests, appeared in 1865.¹⁵ Under this expanded doctrine, disqualification followed upon the litigant's showing that a judge possessed a "substantial interest," whether pecuniary or otherwise, in the outcome of the litigation.¹⁶ The modern English rule has greatly expanded the "substantial interest" formula to allow disqualification whenever there exists a real likelihood that a judge would be predisposed in favor of one of the parties or against another.¹⁷

¹⁰. See note 35 infra, and accompanying text.
¹⁵. The Queen v. Rand, L.R. 1 Q.B. 230 (1866).
As expressed in a 1926 case:

[I]f there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favor of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal.18

Early common law in the United States adopted the grounds for disqualification then existing in England—pecuniary interest,19 relationship to a party,20 and previous representation as counsel in the case.21 However, most early American courts refused to recognize a common law right to disqualification for bias itself.22 Recognizing the inadequacy of the common law, Congress passed the first statute governing disqualification of federal judges in 1792.23 This statute provided that a federal district judge was disqualified when he was interested in the litigation or had been of counsel for either party. These grounds were expanded in the 1911 re-enactment, codified in Section 455 of the Judicial Code.24 That Section permits disqualification, upon the request of any party, on four separate grounds: (1) interest, (2) previous representation of a party, (3) prior participation in the case as a material witness, and (4) pre-existing relationship or connection with a party. However, since none of these constitutes an absolute ground for disqualification,25 a judge challenged under Section 455 was able to determine for himself whether the circumstances would prevent him from sitting.

For 120 years, the predecessor statute of Section 455 was the only significant federal statute on disqualification.26 Dur-

20. Paddock v. Wells, 2 Barb. 331 (N.Y. Ch. 1847).
22. See, e.g., Jones v. State, 61 Ark. 88, 32 S.W. 81 (1895); Clyma v. Kennedy, 64 Conn. 310, 29 A. 539 (1894).
23. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.
25. Frank, supra note 13, at 627. See also Coltrane v. Templeton, 106 F. 370 (4th Cir. 1901).
26. The predecessor statute of Section 455, Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278, applied only to federal district judges. Another
ing that time, lower federal courts greatly limited the statute's usefulness by restrictive interpretations of its four grounds for recusal. 27 According to Judge Frank, a "statute so limited was not enough. The extreme discretion left in the trial judge, the narrow grounds for disqualification, and the complete lack of disqualification for bias were obvious shortcomings." 28

In response to the emasculation of the 1792 statute, and with a recognition that Section 455 was inadequate, Congress considered the need for broadening the grounds for disqualification to include bias and prejudice. The 1911 enactment of Section 144 of the Judicial Code fulfilled this need. 29 That section was re-

27. All four grounds enumerated in Section 455 were narrowly construed. The first, that of "interest," was constrained by direct reliance upon the narrow English common law definition of "interest." Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1857). Similarly, the qualification of "has been of counsel" by the phrase "in this case" greatly reduced the effect of the statute. Carr v. Fife, 156 U.S. 494 (1895); Duncan v. Atlantic Coast Line R.R., 223 F. 446 (S.D. Ga. 1915). Courts confined disqualification of a judge who had been a material witness in the case to situations where the party was able to find an adequate substitute. Borgia v. United States, 78 F.2d 550 (9th Cir.), cert. denied, 296 U.S. 615 (1935). See also 41 U.S.L.W. 3208 (Oct. 17, 1972) (statement by Justice Rehnquist refusing to disqualify himself on this ground in Laird v. Tatum, 408 U.S. 1 (1971)). Finally, disqualification based on the proximity of the relationship between the party and the judge was held to be determined by the law of the state in which the court was sitting. In re Eatonton Elec. Co., 120 F. 1010 (S.D. Ga. 1908).

28. Frank, supra note 13, at 628.


Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last proceeding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.
placed in 1948 by the substantially similar Section 144\textsuperscript{30} which currently stands as the most significant statute for disqualification of federal district judges.\textsuperscript{31} Section 144 provides that:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 144 and its predecessor were clearly addressed to the two major criticisms of Section 455—the discretionary power of the trial judge to review a challenge to his impartiality and the restrictive grounds available for disqualification. During the House debates on the bill that later became Section 21, Representative Cullop of Indiana, the chief sponsor of the bill, responded to the first criticism:

Now, it sometimes happens in the trial of such cases that courts do abuse their discretion, and under the section here [Section 455] it is left solely discretionary with such judge. It must appear that in his opinion a cause does exist, without leaving it to the application of the client, who should make his affidavit and state under oath the cause for such change and present the reason to the court; and in that event, where it is a personal matter to the judge, a charge against him, it ought not to be left to his discretion; and I submit that if he is a conscientious man, he does not want it left to him. It ought to be taken away from him, and taken away from him by the law.\textsuperscript{32}

\textsuperscript{30} 28 U.S.C. § 144 (1970). When the statute was reenacted in 1948 as Section 144, one of the few changes made was to add the qualifier “sufficient” to the word “affidavit,” which had been absent from the original version.

\textsuperscript{31} Section 21 of the 1911 Code was not expressly limited to federal district judges, but it was held that its provisions did not apply to federal appellate courts. Kinney v. Plymouth Rock Squab Co., 213 F. 449 (1st Cir. 1914). Similarly, Section 144 was found inapplicable to federal trial courts other than district courts. In Callwood v. Callwood, 127 F. Supp. 179 (D.V.I. 1954), the Section was held to be unavailable to a party in a territorial court. This result is criticized by one writer, who suggests:

[T]here is no apparent reason why the policies underlying section 144 should not apply with equal force to territorial courts and other federal trial courts such as the Tax Court and the Court of Claims.

Note, supra note 3, at 1436.

\textsuperscript{32} 46 Cong. Rec. 306 (1910) (remarks of Representative Cullop). Representative Cullop continued, identifying the policy underlying the
Addressing the second criticism of Section 455, its restrictive grounds of disqualification, Representative Cullop stated:

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances.\(^3\)

Section 21 passed in 1911 in substantially the same form proposed by Representative Cullop the preceding year.\(^4\) When asked whether the amendment allowed the trial judge any discretion upon the filing of the affidavit, Representative Cullop responded: “No; it provides that the judge shall proceed no further with the case.”\(^5\) In its final form, therefore, the statute adopted a peremptory challenge system under which the party's filing of an affidavit constituted an absolute bar to the continuation of the challenged judge on the case.

III. SECTION 144 IN THE FEDERAL COURTS

Enactment of Section 21 created as many problems as it solved. The procedures and standards it established for disqualification demanded substantial judicial interpretation. Specifically, the statutory requirement of an affidavit stating the “facts and reasons for the belief” that a “personal bias or prejudice” exists left open to the federal courts the question of what grounds were in fact sufficient to require recusal under Section 21.\(^6\) With few exceptions, ensuing interpretations restricted the statute's meaning and failed to effectuate its purposes.

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\(^3\) I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly.

\(^4\) 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

\(^5\) The statement was made during final debate of the bill in the House.

\(^6\) The Congressional debates of 1910 and 1911 revealed “a surprising unanimity in favor of this new remedy.” Putnam, Recusation, 9 Cornell L. Rev. 1, 10 (1923).
In 1921, initial speculation as to whether Section 21 would be broadly or narrowly construed was dispelled by Berger v. United States. In that case, the strong remarks of a federal district judge condemning German-American elements within this country during the First World War were held sufficient to disqualify him from presiding at the trial of German-Americans charged with espionage. A majority of the Supreme Court held that Section 21 empowered the trial judge to determine only the legal sufficiency of the affidavit, not the truth or falsity of the charges against him. However, the Court granted recusal, stating:

[T]he reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of [the trial judge's] mind toward defendants.

Thus, while Berger did not effectuate the system of automatic disqualification intended by the statute, it did evince the Court's disposition in favor of a liberal standard for disqualification.

In the years that followed, however, lower federal courts effectively abandoned the import of Berger by adopting narrow constructions of Section 21. The statute's purposes were frequently circumscribed both by restrictive interpretations of the "personal bias or prejudice" which the affiant must show to gain recusal and by the imposition of a high burden of proof of such

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37. 255 U.S. 22 (1921). The case remains the Supreme Court's most comprehensive interpretation of the statute.
38. The defendants averred in their affidavit that District Judge Landis had stated:
   If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. . . . One must have a very judicial mind, indeed, not be to [sic] prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.
   Id. at 28.
39. The Court stated: "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed." Id. at 36.
40. Id. at 33-34 (emphasis added).
41. See note 35 supra.
42. See notes 32 and 33 supra, and accompanying text.
43. But the clear Berger decision, the clear statute, and its clear legislative history have not been followed in practice, and federal trial practice still does not provide a litigant with the automatic change of venue [sic] to which he is apparently entitled upon filing an affidavit in good faith.
   Frank, supra note 13, at 829.
bias. Both constraints greatly reduced the availability of disqualification as a remedy for litigants suspecting partiality.

Courts were faced initially with the problem of defining "bias or prejudice." If the courts were to accept the dictionary meanings of these words, the scope of recusable conduct would be overly broad. As interpreted by the federal courts, however, the "bias or prejudice" required for disqualification is clearly narrower than the dictionary meanings. Although most courts refuse to define the nature of recusable bias, several have referred generally to an attitude of "enmity" or "personal dislike." Indeed, the question of what types of facts create bias or suggest its presence in a judge is more likely one of psychology than law.

Whatever the nature of recusable bias, Section 144 expressly requires that it be "personal" to the litigants. While federal courts consistently emphasize this requirement, their narrow interpretations have lost sight of the statute's purposes. Under the terms of the statute, the affiant must affirmatively demonstrate a manifestation of a feeling of the trial judge "either against him or in favor of any adverse party." However, a litigant's affirmative showing of identifiable bias alone is insufficient to gain recusal. Instead, many federal courts require each litigant seeking recusal to show that the judge dislikes him as a person. Similarly, other courts have held that neither bias

44. Certainly all men possess numerous biases favoring a certain church, political party, philosophy and lifestyle—for each man "must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation." Ex parte Fairbank Co., 194 F. 978, 989 (M.D. Ala. 1912).


47. Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924).

48. Note, supra note 3, at 1445. However, the opinion of a psychiatrist that the facts of a case show subconscious bias has been held unacceptable as a basis for disqualification of a judge. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958). But see Forer, Psychiatric Evidence in the Recusation of Judges, 73 HARV. L. Rev. 1325, 1331 (1960).

49. Cole v. Loew's Inc., 76 F. Supp. 872, 876 (S.D. Cal. 1948), rev'd on other grounds, 185 F.2d 641 (9th Cir. 1950), cert. denied, 340 U.S. 954 (1951) ("a personal attitude of enmity directed against the suitor making the application"); Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924) ("such personal dislike of a litigant as an individual or a party to the suit, or such personal favoritism or regard for some opposite party"). But cf. Berger v. United States, 255 U.S. 22 (1921).
against the affiant's cause nor identifiable prejudgment on the merits is sufficient to obtain disqualification. 50 Despite the express limitation of the statute to instances of "personal bias," there is serious doubt whether exempting prejudgment on the merits as a ground for recusal implements the intended effect of the statute. 51

Other federal courts have looked to the source of a judge's alleged bias in an attempt to determine whether it is personal to the litigants. Most of these courts agree that if a bias developed during the course of previous litigation, no ground for disqualification exists. 52 In United States v. Grinnell, 53 the Supreme Court further confined the scope of recusable bias. In

50. Frank, supra note 13, at 630 n.102. See also Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913), where the court stated:

[T]he facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and "against deponent's right to recover." [The statute] is not intended to afford relief against this situation.

The rule is defensible where the judge had prejudged applicable law but not where he has prejudged the facts at issue. However, a judge may make a statement which appears to be one of law but is in fact so directly related to the particular situation being litigated that a belief is justified that the judge had prejudged the merits of the case. In one such case, a district judge initiated disbarment proceedings sua sponte against an attorney jailed for contempt while defending members of the Communist Party. The appellate court held an affidavit sufficient for recusal which alleged that the judge had remarked to another judge that:

[I]t was questionable if any American lawyer had a right to appear in any United States court and defend a person who was proved to be a member of the Communist Party which Party had been proved in the Dennis case to advocate and teach the overthrow of the government by force and violence; and ... in making such an appearance, if the lawyer by misconduct or disrespect to the court was found to be in contempt of court, that lawyer should be disbarred from practice in every United States court of the land.

Gladstein v. McLaughlin, 230 F.2d 762, 763 (9th Cir. 1955).

51. If the element of public confidence in the administration of justice is as important as the sponsor of the amendment that became Section 21 of the Judicial Code seemed to think it was, then there is every reason for concluding that a judge who has prejudged is a biased judge.

Schwartz, supra note 45, at 420.

52. See generally Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How. L.J. 228, 249 (1957). Despite such numerous cases, one writer suggests:

[A] strong case for disqualification would seem to occur when the judge has made formal findings in a prior case in which the present affiant was not a party but which involved the precise facts in issue in the present litigation.

Note, supra note 3, at 1451.

order to be disqualifying, the alleged bias "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." 54 This focus upon the source of the judge's bias obscures the fundamental question of whether the bias exists. Grinnell seems to hold that while bias may be present in some cases, the affiant must somehow connect that bias to events occurring outside of the courtroom. 55 This amalgam of interpretations of the "personal" requirement has thus limited the scope of recusable conduct to that which manifests a "personal dislike" of the affiant and stems from an "extrajudicial source," but has exempted prejudgment on the merits. Given the policies underlying Section 144, 56 these approaches frustrate the statute's effectiveness by making it inapplicable to all but the narrowest of circumstances.

Just as the nature of the "personal bias or prejudice" necessary to recuse has been restrictively interpreted by federal courts, the statutory requirement of a "sufficient affidavit" has been similarly confined. Having abandoned the intended peremptory system of disqualification, 57 the courts were necessarily faced with the question of how strong the inference of bias must be to grant a recusal under Section 144. 58 Most federal courts adopted the "real prejudice" rule and thereby demanded an affirmative showing of actual bias before recusal would be granted. 59 These courts reasoned that while no party should be

54. Id. at 583.
55. An objection that the trial judge has acquired prejudicial information outside the courtroom is generally sufficient for disqualification. McFadden v. United States, 63 F.2d 111 (7th Cir. 1933). However, some courts have inquired as to whether such information was acquired by the judge in a judicial or non-judicial capacity. See, e.g., Ferrari v. United States, 169 F.2d 353 (9th Cir. 1948).
56. See note 32 supra.
57. See note 35 supra, and accompanying text.
58. The fact that Congress in 1948 substantially reenacted the language of Section 21 in Section 144 without altering the Berger interpretation relieves federal courts from the burden of justifying such substantial variance from the peremptory system intended by the 1911 Congress. Given such Congressional acquiescence, it is unlikely that the federal courts will depart from their interpretation of the Section. Schwartz, supra note 45, at 425. The argument that an automatic system of disqualification under Section 144 would be unconstitutional has thereby been avoided—an argument which finds support in several state decisions. Austin v. Lambert, 11 Cal. 2d 73, 77 P.2d 849 (1938); Daigh v. Schaffer, 23 Cal. App. 2d 449, 73 P.2d 927 (1937); Diehl v. Crump, 179 P. 4 (Okla. 1919).
59. This was the former English rule. The Queen v. Rand, L.R. 1 Q.B. 230 (1866). Most federal courts have established rules and cate-
compelled to try his cause in the presence of actual bias, there is little likelihood of real harm to that party's interests unless the judge is actually prejudiced. Such courts frequently analogize the allegations in the affidavit to evidence and demand that the allegations, necessarily accepted as true under Berger, must prove that the judge is biased in fact. However, Section 144 made possible the disqualification of a judge on the basis of facts which would indicate the possible presence of bias. Focusing upon the “fair support” language of Berger, a minority of courts have construed the “sufficient affidavit” requirement liberally and disqualified a judge when the affidavit revealed the appearance of bias on his part even though the judge might in fact be impartial.

The difference between these two standards for determining the sufficiency of the affidavit lies largely in the quantum of evidence required by each. The bias in fact standard imposes upon the affiant a burden of proof by a preponderance of the evidence—that it is more likely than not that bias actually exists. Under this standard, the court must determine whether the facts allegations limiting the types of facts which constitute a “sufficient affidavit” to those in which actual bias is proved. For example, allegations that the judge has made rulings adverse to the affiant are generally insufficient to obtain recusal. Palmer v. United States, 249 F.2d 8 (10th Cir. 1957), cert. denied, 356 U.S. 914 (1959) (initial mention of this rule was made in Ex parte American Steel Barrel Co. and Seaman, 230 U.S. 35, 43-44 (1913)). Some courts have extended this rule, holding that any statements made by the judge during earlier stages of the case are similarly insufficient. See, e.g., Chessman v. Teets, 239 F.2d 205, 215 (9th Cir. 1956), rev’d on other grounds, 354 U.S. 156 (1957).


63. See note 40 supra, and accompanying text.

64. See notes 97 and 98 infra, and accompanying text.


When there is ground for believing that such unconscious feeling may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

149 F. Supp. at 242 (emphasis added).

66. See, e.g., Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941).
Leged in the affidavit, necessarily accepted as true, satisfy the minimum requirement of proof of a fact—in this case, the existence of bias. Under the appearance of bias standard some quantum of evidence less than that necessary for proof of a fact would be required. What this amount is cannot be quantified; conceptually, however, disqualification would be allowed where there is evidence from which the court could find that the affiant's suspicion of bias is reasonable. The difference between the two standards is critical. Where the affiant's evidence justifies a finding that his suspicion of bias is reasonable, although insufficient to prove the existence of bias, he will obtain recusal under the appearance standard but not under the bias in fact standard. The latter result contravenes the overriding policy of Berger that judges who appear to be biased should be disqualified.67

The two major questions generated by federal court interpretation of Section 144—the nature of the bias and the burden of proof necessary to obtain recusal—are both raised in the recent Eighth Circuit case of Pfizer Inc. v. Lord.68 Petitioners in that case were defendants in multidistrict, antitrust damage litigation.70 Following incidents of alleged bias during pretrial proceedings, petitioners filed a formal application under Section 144 requesting the district judge to recuse himself for having

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67. See text accompanying note 88 infra.
68. 456 F.2d 532 (8th Cir.), cert. denied, 406 U.S. 976 (1972).
70. The recusal petition arose out of events occurring in the course of coordinated pretrial proceedings in 56 antitrust damage actions brought against petitioners by several classes of plaintiffs. These include wholesalers and retailers, insurance companies, private hospitals, competitors, various state governments, and the United States Government. Some 150 damage actions were coordinated for pretrial in the Southern District of New York. A majority of these cases were settled at that time. West Virginia v. Chas. Pfizer and Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

Following approval of the initial settlements, plaintiffs in these "non-settling" cases petitioned the Judicial Panel on Multidistrict Litigation for a transfer of their cases under 28 U.S.C. § 1407 to the District of Minnesota for the completion of coordinated pretrial proceedings. Although plaintiffs' motion was denied, the Panel did assign the "non-settling" cases to District Judge Lord of Minnesota, who was then specially assigned to the Southern District of New York. In re Antibiotic Drugs, 320 F. Supp. 586 (J.P.M.L. 1970). Shortly thereafter, Judge Lord, sua sponte and over petitioners' objections, transferred forty-nine of the cases to the District of Minnesota pursuant to 28 U.S.C. § 1404 (a) for the completion of pretrial and trial. That action was approved by the Second Circuit Court of Appeals in Pfizer, Inc. v. The Honorable Miles W. Lord, 447 F.2d 122 (2d Cir. 1971).
assumed the role of prosecutor and advocate in plaintiffs' cause. This application was denied for "legal insufficiency" without an opinion. Petitioners then sought a writ of mandamus from the Eighth Circuit Court of Appeals to compel the judge to recuse himself.\textsuperscript{71} Although the court denied petitioners' writ,\textsuperscript{72} it issued a lengthy opinion reprimanding the district court for most of the events of which petitioners had complained.\textsuperscript{73}

The opinion of the Court of Appeals in Pfizer reveals eight incidents allegedly manifesting bias, which the court observed "adversely reflects upon Judge Lord's conduct during pretrial proceedings."\textsuperscript{74} These included:

1. taking aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants in an effort to assist the other plaintiffs;
2. suggesting that the United States Government, if it were to settle its civil action, would be permitting the defendants to "buy a monopoly";
3. declaring that: "We may have another proceeding, or, at least some moves" against defendants to vindicate the integrity of the United States Patent Office and courts for fraud on those tribunals;
4. urging the Department of Justice to investigate the Patent Office, which he characterized as "the sickest institution that our Government has ever invented" and "the weakest link in the competitive system in America";

\textsuperscript{71} The court followed the majority of authorities in holding that mandamus to a court of appeals will lie when a district judge has rejected affidavits requesting his recusal. See, e.g., Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); In re Leader Corp., 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959); Minnesota and Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934). Other courts, however, have held that mandamus will not lie. Albert v. United States Dist. Court, 283 F.2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); Green v. Murphy, 259 F.2d 591 (3d Cir. 1958); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954).

\textsuperscript{72} Respondents, plaintiffs in the pending actions, filed answers objecting to the issuance of the writ and, in a separate motion, sought damages and costs allegedly suffered by reason of the delay attributable to the filing of petitioners' recusal action. The court also denied this motion.

\textsuperscript{73} The court stated: Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.

\textsuperscript{74} Id.
(5) refusing, without a hearing, to consider a settlement of the treble damage class actions at a dollar amount previously approved in these cases by another district court and the Court of Appeals for the Second Circuit, which caused one damage plaintiff to withdraw its agreement to settle for that dollar amount;

(6) soliciting law suits against defendants by urging a private attorney to find some hospital patients to form a new class of plaintiffs;

(7) interrogating a deposition witness in an aggressive and angry manner, in an attempt to intimidate the witness and to influence his testimony along lines desired by plaintiffs, suggesting openly that the witness was evasive and lying, and threatening to levy a fine; and

(8) accusing counsel for one of the petitioners of instructing his client to "manufacture" and "doctor" evidence.

Given the body of restrictive readings of Section 144, the Court of Appeals in Pfizer had no difficulty in denying petitioners' writ. In so holding, the court found that petitioners failed to establish that the alleged bias was "personal" to them and that bias in fact existed, thereby rendering the affidavit "insufficient" under the statute.

Relying first upon the language of Grinnell which demands that the "personal bias or prejudice" necessary to recuse be of an "extrajudicial source," the court in Pfizer merely registered strong disapproval of the judge's remarks regarding the Patent Office since they may have resulted from his exposure to the prior proceedings. Similarly, although the court found the judge's adverse comments regarding petitioners' deposition witness to be "inappropriate, perhaps even unfair to the witness,"

75. Petitioners charged that Judge Lord arbitrarily rejected a proposal from the state of Hawaii, a plaintiff, offering to settle its action under the "Alabama plan," a formula which had received prior judicial approval. That plan is explained in West Virginia v. Chas. Pfizer and Co., 314 F. Supp. 710, 726-30 (S.D.N.Y. 1970).

76. 456 F.2d at 536.


78. The court stated:

We find Judge Lord's remarks [regarding the Patent Office] to be totally injudicious. These words should not have been spoken, and we wholly disapprove of them. Nevertheless, even if we accept petitioners' arguments that these comments disclose a prejudicial attitude concerning the relationship between petitioners and the Patent Office, these observations may have come as a result of Judge Lord's exposure to the prior proceedings and the facts disclosed during the pretrial proceedings. Thus, although Judge Lord's comments were gratuitous and wholly extraneous to the question then before him, we cannot say that they reflect an "extra judicial bias" as is required for recusal under Grinnell . . .

456 F.2d at 542.
these comments failed to "demonstrate any personal prejudice against petitioners."*79 Also, despite the fact that "Judge Lord [had] misconceived his role vis-a-vis the settlement,"*80 the court found such an exercise of discretion to be nonpersonal and thus nonprejudicial, even though "any action of Judge Lord which discourages fair settlements will contravene the public interest."*81

Regarding the burden of proof required by Section 144, the court rejected arguments for the adoption of an appearance of bias standard and instead relied upon the bias in fact standard in denying recusal.*82 The Pfizer court thereby joined the majority of federal courts in interpreting Berger as demanding that petitioners show the existence of actual bias to gain recusal.

IV. THE NEED FOR AN APPEARANCE OF BIAS STANDARD UNDER SECTION 144

The Pfizer court's decision to adhere to the prevailing bias in fact standard is an unfortunate one. The facts of Pfizer illustrate a case in which the evidence would justify a finding that

79. Id. at 539 (emphasis added). The court continued:
We think that a trial judge may comment and inquire during the course of pretrial proceedings so long as he does so in a non-prejudicial manner. . . .

80. Id. at 542. Judge Lord expressed concern that the public interest would not be served by a settlement which would upset the "game plan" he had formulated for the disposition of the "non-settling" cases. While the appellate court disagreed, it rejected any claims of bias therefrom, stating:
We think it is clear that Judge Lord misconceived his role vis-a-vis the settlement. Petitioners assert that a district judge lacks the power to approve or disapprove any proposed settlement between the government and the defendants. . . . We have been shown no authority to the contrary.

81. The court expressly rejected the contention that the judge's opposition to any proposed settlement is personal to petitioners, stating:
The record manifests Judge Lord's obvious perturbation over the contemplated settlement. His words were strong. Yet his ire seems directed not at petitioners but at the government, which, according to Judge Lord, might be selling out the public interest.

82. The court stated that "the facts contained in petitioners' affidavit fall short of showing the bias and prejudice necessary to recuse." 456 F.2d at 544.
petitioners' suspicion of bias is reasonable—that the judge appeared biased against these defendants as members of a class of large business concerns who have arguably disregarded the public interest by engaging in monopolistic activities. Under the appearance standard, therefore, the facts alleged in petitioners' affidavit are sufficient to gain recusal. Pfizer thereby provided an appropriate opportunity to reject the majority approach and adopt the proposed appearance of bias standard.

The establishment of an appearance standard under Section 144 would do much to afford litigants an adequate remedy for suspected bias. By focusing inquiry upon the objective manifestations of a judge's conduct, the appearance standard eliminates the current practice of subjective speculation as to the source and nature of a judge's prejudice and mental state. This proposed standard thereby shifts the emphasis from the state of mind of the judge to the question of whether the affiant's suspicion of bias is a reasonable one. This change is justified for two reasons. First, a direct inquiry into the judge's state of mind is highly impracticable. Second, since the intended peremptory system arguably vests unnecessarily broad power in litigants, and since the bias in fact standard fails to implement the policies underlying the statute, reliance upon the more moderate appearance standard seems a desirable compromise.

Any formulation of a workable standard under Section 144 must take into account the fact that recusal is largely a matter of conflicting factors and policies. Principal among these considerations are: the constitutional right to an impartial trial; the impact of any recusal decision upon public confidence in the judiciary; and the effect of the availability of recusal upon the functioning of the courts. In adopting either the bias in fact or appearance standard, every court should assess the effect of its decision upon each of these three considerations.

The constitutional guarantee of a fair and impartial trial imposes upon all courts the affirmative duty of protecting this

83. It has been suggested that such an approach is supported, and possibly even required, by the language of the statute itself. Note, supra note 62, at 1446-47.
84. Abuses under an automatic disqualification system might prove particularly unacceptable in districts having only one judge, or in those with too few judges to withstand possible "judge shopping." See generally Schwartz, supra note 45, at 426-27; Note, supra note 62, at 1441-45.
85. Indeed, the statute itself suggests a case-by-case approach rather than an evolving set of rigid rules. Note, supra note 62, at 1447.
86. See text accompanying note 1 supra.
fundamental right of every litigant. It is true that a litigant's constitutional right to a fair trial will not be infringed unless actual bias exists. However, tests which appear logically sufficient may fail to secure that right. Instead, courts must provide safeguards to assure that the constitutional right to an impartial trial will not be abridged. Therefore, in the context of recusal, the principle of a fair and impartial trial demands "that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurances that they are impartial." By disqualifying judges who reasonably appear to be biased, the appearance standard provides greater assurance that a litigant's right to a fair trial will remain secure. Under the bias in fact standard, however, that right is jeopardized by imposing a severe burden of proof upon the affiant, thereby failing to detect some instances of bias until appeal after a trial on the merits, if at all.

The second consideration, that of the impact upon public confidence in the judiciary, is closely related to the protection of the constitutional right to an impartial trial. Indeed, if the strength of the judicial system rests upon the confidence of litigants, then surely "[j]ustice must satisfy the appearance of justice." If the purpose of Section 144 had been to provide for recusal solely in cases of actual bias, then perhaps the "real prejudice" or bias in fact standard would be adequate. However, Section 144 has a broader purpose—that of preserving the

87. The argument that constitutional rights demand more than mere logical assurance of protection has been advanced to support similar safeguards. See Kastigar v. United States, 406 U.S. 441 (1972), in which Justice Marshall in a dissenting opinion argues that the government must provide assurances against a witness' self-incrimination when compelling him to testify pursuant to an "immunity statute." Justice Marshall states:

[T]his Court has held that the Constitution does authorize the government to compel a witness to give potentially incriminating testimony, so long as no incriminating use is made of the resulting evidence. Before the government puts its seal of approval on such an interrogation, it must provide an absolutely reliable guarantee that it will not use the testimony in any way at all in the aid of prosecution of the witness. Id. at 471 (emphasis added). See also Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 315 (1950), in which Justice Jackson rejected, as a denial of due process, a system of notice to trust beneficiaries which is not "reasonably certain" to inform all interested parties.


appearance of fairness in judicial proceedings as well as fairness itself.\(^9\) Clearly, the bias in fact standard, in reducing the number of successful recusal motions by imposing a high burden upon litigants seeking recusals, fails to secure the same public confidence in the judiciary that the statute was intended to promote.

Proponents of the bias in fact standard contend that an increased number of successful recusals under the appearance standard would destroy the image of a judge as an impartial, impersonal arbiter.\(^1\) However, the failure of the judicial system to recuse a judge for obvious bias erodes public confidence in that system in a way different in kind from that of a flood of recusals. Where a judge is honestly suspected of bias, although in fact completely impartial, the successful disqualification of that judge dispels suspicions of the litigants and the public that justice has been denied. This result, although necessary, is unobtainable under the prevailing bias in fact standard. The ineffectiveness of Section 144 in fostering public confidence in the judicial system, therefore, is largely attributable to the inadequate bias in fact standard currently applied under the statute.

The final consideration, that of the effect of recusal upon the functioning of the courts, raises questions regarding possible delays caused by recusal petitions, the adequacy of the remedy of appeal, and problems inherent in recusing a fellow judge. As to the first of these problems, the filing of a Section 144 affidavit as a delay tactic is possible under either standard and should ultimately be solved by the cooperation of litigants rather than limiting the availability of the remedy. In addition, one writer suggests that the spectre of possible abuse of Section 144 is not a serious problem.\(^2\) Regarding the remedy of appeal, the court

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90. See generally notes 32 and 33 supra, and accompanying text.
91. See Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How. L.J. 228, 229 (1957), in which the writer identifies “the standard reasons given for denying disqualification,” including:

[F]acilitating the administration of justice, discouraging unwarranted attack on the integrity of the judiciary, preventing litigants from shopping for “sympathetic” judges, and maintaining the important concept of the judge as an impartial, impersonal arbiter, removable only when his relationship to one of the parties introduces an intolerable element of personal involvement.

Perhaps the central question of recusal is whether we can expect judges to maintain an identifiable impartiality. “[I]n an imperfect judicial world an appearance of impartiality, rather than an absolute assurance of impartiality, is perhaps the best that can be expected.” Id. at 252.
92. Procedural requirements have been established to assure that Section 144 is properly used: (1) the affidavit must state the specific
in Pfizer suggests that a judge's alleged bias can be reasserted in an appeal after trial on the merits. However, the infrequency of reversal on this ground, together with the expenditure of additional time and resources by the litigants in a second trial necessitated by a judge's partiality, renders the remedy of appeal unnecessarily costly. Under the appearance standard, an increase in the number of recusals at an earlier stage in the proceedings would reduce the number of appeals filed following denials under the bias in fact standard. Finally, many courts are understandably reluctant to disqualify a fellow judge since a finding of actual prejudice under the bias in fact standard impugns both that judge's qualifications and those of the system he represents. Under the appearance standard, however, disqualification is not accompanied by an affirmative finding of prejudice. The appearance standard thereby removes the stigma from a disqualified judge that the finding of actual bias under the bias in fact standard seems inevitably to engender.

Two additional factors should be considered in adopting an appearance standard under Section 144. First, courts must determine whether an increase in the number of recusals would alter the attitudes or courtroom demeanor of judges. It is, of course, unlikely that such an increase would alter the attitudes of judges. Nevertheless, it may have the salutary effect of restraining conduct that could give the impression of bias. Second, courts must determine whether an increase in the number of recusals would infringe upon a federal district judge's constitutional right to lifetime tenure. If the right to try all cases completely which support the allegations of bias and prejudice; (2) the affidavit must be certified by counsel of record; (3) the affidavit must be filed in accordance with strict time requirements; (4) no litigant may file more than one affidavit. Note, supra note 62, at 1441-45.

93. "If petitioners' fears that they will not be afforded a fair trial should prove justified, they are not left without an appropriate remedy.” Pfizer Inc. v. Lord, 456 F.2d 532, 544 (8th Cir.), cert. denied, 406 U.S. 976 (1972).

94. Note, supra note 62, at 1435.

95. Many courts have interpreted Section 144 narrowly to deny recusal largely because of a general reluctance to disqualify a fellow judge. See, e.g., Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944); Scott v. Beams, 122 F.2d 777 (10th Cir. 1941), cert. denied, 315 U.S. 809 (1942); Cole v. Loew's Inc., 76 F. Supp. 872 (S.D. Cal. 1948), rev'd on other grounds, 185 F.2d 641 (9th Cir. 1950), cert. denied, 340 U.S. 954 (1951).

96. See generally Chandler v. Judicial Council, 398 U.S. 74 (1970), in which the Supreme Court declined to review the Tenth Circuit Judicial Council's removal of cases from a federal district judge. Justices Black and Douglas dissented on the ground that the Council had acted unconstitutionally in stripping the judge of his constitutional right to act. Justice Douglas stated:
ing before a judge is implicit in the right to tenure, the removal of any case from that judge arguably violates his constitutional right to act. Thus, the fundamental question is whether recusal is ever constitutionally permissible, not whether an increase in the number of recusals is constitutional. It seems clear that in resolving a possible conflict between a judge's right to tenure and a litigant's right to a fair trial, the latter should prevail.

These favorable considerations have motivated courts on occasion to utilize the appearance of bias standard. In one such case, a federal appellate court relied upon Berger in reversing a district court's refusal to find bias, stating:

The policy underlying Section [144] is that the courts of the United States "shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial"; i.e., shall appear to be impartial.97

In a second case, another federal appellate court interpreted the statute as requiring disqualification of a judge upon a showing of apparent bias. This court stated:

The purpose of this section is to secure for all litigants a fair and impartial trial before a tribunal completely divested of any personal bias or prejudice, either for or against any party to the proceedings, and it is the duty of all courts to scrupulously adhere to this admonition and to guard against any appearance of personal bias or prejudice which might generate in the minds of litigants a well-grounded belief that the presiding judge is for any reason personally biased or prejudiced against their cause.98

Despite occasional advocacy of the appearance standard,99 the majority of federal courts steadfastly demand a showing of actual bias before granting recusal.

The few courts applying the appearance standard are supported by the English approach to recusal. Under the English

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. . . . Under the Constitution the only leverage that can be asserted against him is impeachment. . . . But there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

Id. at 136-37.


98. Mitchell v. United States, 126 F.2d 550, 552 (10th Cir. 1942) (emphasis added).

99. See Note, Disqualification of Judges Because of Bias and Prejudice, 51 YALE L.J. 169, 175 (1941); Comment, Disqualification of Federal Judges for Personal Bias, 16 U. CHI. L. REV. 349, 353 (1949).
view, a court faced with a disqualification petition considers whether the circumstances surrounding the trial would create in the mind of the litigant a *reasonable apprehension* that he would not receive a fair trial. One court articulated this view by stating:

>The court considers not merely whether there has been any real bias in the mind of the presiding judge against the applicant, but whether incidents may not have happened, which though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the applicant a *justifiable apprehension* that he would not have an impartial trial.¹⁰⁰

Noting that such a test enhances public confidence in the courts,¹⁰¹ the rule that an *appearance of bias* is sufficient to obtain disqualification has found widespread support in England and the British Dominion.¹⁰²

V. CONCLUSION

The inability of litigants to obtain disqualification of a federal district judge for bias under Section 144 is largely the result of restrictive interpretation of the requirements for disqualification imposed by the statute. Narrow readings of the "personal bias or prejudice" requirement and reliance upon the affirmative showing of *bias in fact* under the "sufficient affidavit" requirement have effectively denied the statute its intended utility. This result is neither necessary nor desirable. With the *Berger* decision some fifty years old, there remains today a clear need to reaffirm the test established in that case of whether the "facts and reasons" alleged in the affidavit "give fair support" to a party's *real apprehension of bias* and thereby constitute a "substantial and formidable" showing of that bias.¹⁰³ It is thus

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¹⁰⁰. Amar Singh v. Sadhu Singh (1925) I.L.R. 6 Lah. 396 (High Court of Lahore, India) (emphasis added), cited in Note, supra note 99, at 172 n.27.

¹⁰¹. "[I]t is of fundamental importance that justice should, not only be done, but should manifestly and undoubtedly be seen to be done." King v. Sussex Justices, [1924] 1 K.B. 256, 259 (emphasis added).


necessary to rekindle the thrust and spirit of Berger in its concern for alleviating the appearance as well as the existence of bias. The adoption of the appearance of bias standard for disqualification would prevent the further emasculation of Section 144 and thereby enhance public confidence in the judiciary.