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The Road Less Traveled: The Third Circuit's Preservation of Judicial Impartiality in an Imperfect World

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THE ROAD LESS TRAVELED: THE THIRD CIRCUIT'S PRESERVATION OF JUDICIAL IMPARTIALITY IN AN IMPERFECT WORLD

I. INTRODUCTION

Calls for recusal have made headlines recently, and in diverse situations, including Justice Scalia’s pledge and his duckhunt, Justice Breyer and his sentencing commission, and even Judge Ito in his oversight of the O.J. Simpson murder trial. Judicial recusal provides a little-used method for achieving society’s goal of an unbiased judicial process. In deciding recusal motions, the Third Circuit Court of Appeals has stated that “[t]he


3. See Findlaw.com, Editorial Cartoons and Articles Concerning Justice Scalia’s Role in Cheney Case, at http://news.findlaw.com/hdocs/docs/scotus/chny22304scrbrfex3.pdf (last visited Apr. 7, 2005) (compiling (mostly negative) editorial cartoons and articles reporting on Justice Scalia’s refusal to recuse from case involving Vice President Cheney after, subsequent to Court granting certiorari, both Vice President and Justice Scalia were involved in hunting trip together).


5. See Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges 1 (1996) (explaining calls for Judge Lance Ito to step down from bench in O.J. Simpson murder trial—which he denied—after he admitted bias against testifying Los Angeles police officer who was critical of Judge Ito’s wife).

6. See Kenneth S. Kilimnik, Recusal Standards for Judges in Pennsylvania, 36 VILL. L. REV. 713, 724 (1991) (noting that attorneys raise very few recusal motions because such motions are rarely granted and fear of antagonizing sitting judges); Ronald J. Riccio, Court Rules on Power to Detain Prisoners of the War on Terror and on the Limits of the “Bush Doctrine,” 177 N.J. L.J. 321, July 26, 2004 (explaining that, in response to congressional concern following Justice Scalia’s refusal to recuse himself from Cheney v. United States District Court, Supreme Court has created task force led by Justice Breyer to “address congressional criticism suggesting that judges need to do a better job in policing themselves”); see also Susan B. Hoekema, Comment, Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a), 60 TEMP. L.Q. 697, 697 (1987) (arguing that “an impartial judiciary is an essential element of justice in the United States,” and that “Congress has sought to secure the impartiality of trial judges by requiring judges to disqualify themselves in various situations”).

(1265)
touchstone of recusal is the integrity of the judiciary . . . .”7 Without the current judicial recusal laws, neither American judges nor parties to suits would have the ability to remove cases from decisionmakers who are biased in appearance or in fact.8 With origins in the early British common law, American use of judicial recusal dates back to early colonial times and is an integral part of our adversarial system of justice.9

Three sections of the United States Code provide the primary means for challenging and removing biased decisionmakers.10 These statutes permit parties to bring motions for recusal, as well as for judges to recuse themselves sua sponte.11 Although the statutes are unclear in the forms of bias they prohibit, the courts have developed some specificity through extensive interpretation during the doctrine’s long existence.12 When compared to the trends of other circuits, the Third Circuit’s interpretation of these statutes reflects a forum more favorable to motioning parties, as well as more active in preserving the bench’s neutrality.13

7. United States v. Antar, 53 F.3d 568, 573 n.7 (3d Cir. 1995) (stating that goal of recusal remedy was not unbiased judiciary but perception of one); see also Roger J. Miner, Judicial Ethics in the Twenty-First Century: Tracing the Trends, 32 Hofstra L. Rev. 1107, 1110 (2004) (determining that “in modern-day society, it is perception, rather than reality, that has the greater importance”).

8. See Debra Lyn Bassett, Judicial Disqualification in the Federal Appellate Courts, 87 Iowa L. Rev. 1213, 1221-22 (2002) (noting that recusal, although highly flawed, is only method to obtain removal of federal appeals judge); see also Flamm, supra note 5, at 35-37 (explaining breadth of federal statutes relative to limited protection of Due Process Clause). Although a party may also move for a new judge or justice due to bias or interest under the Due Process Clause, the three federal statutes provide a more strenuous review of judicial activity, effectively eliminating any due process challenge as superfluous. See id. (discrediting usefulness of due process challenges).

9. See Flamm, supra note 5, at 7 (describing development of American recusal doctrine).

10. See 28 U.S.C. § 47 (2001) (prohibiting judges from hearing appeal of case they presided over at trial level); id. § 144 (requiring judges to recuse themselves after satisfactory motion that actual bias exists); id. § 455 (ordering recusal, either sua sponte or by motion, for appearance of partiality or for conflict of interest); Geoffrey P. Miller, Bad Judges, 85 Tex. L. Rev. 431, 460-61 (2004) (explaining that recusal is useful, but problematic, method of preventing and correcting bad judging). Although some judges may argue that complete removal of a case is an overly aggressive solution, it pales in comparison to the mandatory death penalty for ethical violations while on the bench found in both the French Ancien Régime and England in the late middle ages. See Mary L. Volcansek et al., Judicial Misconduct: A Cross-National Comparison 127 (1996) (describing draconian methods of punishing judicial impropriety once found in Europe and their replacement with public humiliation of making inappropriate behavior public).

11. For a discussion on the statutory methods for obtaining recusal, see supra note 10 and accompanying text.

12. See Hoekema, supra note 6, at 712-13 (1987) (describing judicial gloss that has been placed upon vague text of §§ 144 and 455).

13. For a discussion of the primary recusal questions upon which circuit courts have split and the Third Circuit’s tendency to determine these issues in favor of recusal, see infra notes 92-136 and accompanying text.
Three sections of the United States Code address recusal. Section 144 prohibits the sitting of judges against whom a valid affidavit of actual bias toward a party has been submitted. Little-used § 47 estops judges from sitting on the appeals of cases they oversaw at the trial level. Section 455, arguably the most important of the recusal provisions, prevents a judge who is actually partial or who appears to be partial from sitting. In combination, these statutes and their predecessors have provided the last line of defense for the unbiased American judiciary.

This Casebrief explains the Third Circuit’s approach to interpreting and enforcing these three recusal statutes. Part II notes the development of each of the statutes and their interpretation in the Third Circuit. Part III analyzes the primary Third Circuit cases in light of the

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15. See 28 U.S.C. § 144 (providing for recusal for bias or prejudice). Section 144 states:
   Bias or prejudice of judge: 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 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. Id.
16. See 28 U.S.C. § 47 (“No judge shall hear or determine an appeal from the decision of a case or issue tried by him.”); Fed. Jud. Ctr., supra note 14, at 52-53 (noting that Section 47’s prohibitions are “little-used”).
17. See Hoekema, supra note 6, at 698 (describing § 455 as “paramount disqualification statute”); see also 28 U.S.C. § 455 (enacting rules for disqualification). Section 455 states:
   Disqualification of justice, judge, or magistrate:
   (a) Any justice, judge, or magistrate 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: . . . where he has a personal bias, . . . served as a lawyer in the matter in controversy, . . . [he] has a [direct or indirect] financial interest in the subject matter in controversy . . .
   (c) No . . . judge. . . shall accept from the parties a waiver of any ground for disqualification enumerated in subsection (b) . . . .
Id.
18. See Hoekema, supra note 6, at 697 (noting importance of unbiased judiciary and Congress’s long history of pursuing this goal through recusal statutes).
19. For a general discussion of the American recusal doctrine, see supra notes 1-18 and accompanying text. For a discussion of the Third Circuit’s recusal practices in comparison to those of other circuits, see infra notes 20-143 and accompanying text.
20. For a discussion of the origins of the recusal doctrine, see infra notes 24-91 and accompanying text.
statutes’ dual goals of preserving an unbiased judiciary and preserving judicial independence. Additionally, Part III compares the Third Circuit’s views with the interpretations of other circuits. Part IV briefly summarizes the current state of the judicial recusal doctrine—both in the Third Circuit and nationwide—and includes a cautionary note for attorneys who are considering the employment of this extreme remedy.

II. THE DEVELOPMENT OF RECUSAL

A. Origins of the Doctrine

The concept of recusal dates back to early Jewish law and the Roman Empire. The Babylonian Talmud (the “Talmud”), a book of Jewish law from the third century A.D., created strict prohibitions on judges’ interactions with parties. Under the Talmud, judges were required to recuse themselves “when a litigant was his friend, someone he disliked, or a kinsman.” The Talmud also cautioned that “even a judge who had refused a trivial favor from a litigant might find himself leaning in [the litigant’s] favor.” The Roman Empire’s Corpus Juris Civilis, similar to the current § 455, permitted parties to request recusal when they believed a judge was “under suspicion.”

Recusal law has developed with two distinct components, adopted to differing degrees in the various modern legal systems. The first of these components is interest, implicated when a judge may personally gain an

21. For a discussion of Third Circuit case law, see infra notes 82-115.
22. For a discussion of the Third Circuit’s resolution to the inter-circuit conflicts regarding the recusal doctrine, see infra notes 126-36.
23. For a discussion of the Third Circuit’s pro-movant stance, see infra notes 137-43.
24. See Flamm, supra note 5, at 6 (describing earliest recordings of recusal doctrine).
26. See id. (describing Babylonian Talmud’s origins in third century A.D.).
28. See Flamm, supra note 5, at 6 (explaining that this expansive disqualification statute mimics modern statutes in civil law nations). The statute reads: “Although a judge has been appointed by imperial power, yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before the issue is joined, so that the cause go to another.” Id. (quoting Corpus Juris Civilis, Codex of Justinian, lib. 3, tit. 1, no. 16, trans. in Harrington Putnam, Recusation, 9 Cornell L.Q. 1, 3 n.10 (1923)).
29. See id. at 7 (explaining development of recusal doctrine through two distinct and disparately accepted branches).
advantage or profit from the outcome of the case.\textsuperscript{30} The second of these two components is \textit{bias}, defined as a partiality for or against a party by a sitting judge.\textsuperscript{31}

Early British law adopted the Roman tradition of requiring recusal for interest, but—unlike the Romans—the British did not require recusal for bias.\textsuperscript{32} This British theory of absolute judicial impartiality continued to dominate until relatively recently, as bias did not even justify recusal when a judge found himself sitting on a case directly involving his family.\textsuperscript{33} Only during the twentieth century were the grounds for recusal in Britain conclusively expanded to include both interest and bias.\textsuperscript{34} Britain’s continuing focus on judicial independence over judicial accountability has been shared historically by the civil law states of France and Italy.\textsuperscript{35}

B. \textit{The American Development of Recusal}

The more inclusive American recusal doctrine does share an emphasis—although less distinct—on judicial independence over accountability with Britain and the aforementioned civil law states.\textsuperscript{36} Despite the common law system of weak judicial oversight Britain brought to the colonies,\textsuperscript{37} the grounds for recusal-based accountability were quickly

\begin{itemize}
\item \textsuperscript{31} See id. (defining bias and contrasting it with interest).
\item \textsuperscript{32} See FLAMM, supra note 5, at 7 (drawing distinctions between common law recusal and American development of recusal).
\item \textsuperscript{33} See id. at 7 n.8 (noting extent of “common law presumption of absolute impartiality” and its application to \textit{Brookes v. Rivers}, 1 Hardres 503, 145 Eng. Rep. 569 (Ex. 1668), in which judge presided over his brother-in-law’s case). Even when interest did exist, the rule of necessity—first invoked in 1430—permitted judges to preside over cases despite a personal interest if an alternate judge was not available. \textit{See id.} at 9 (reciting extremes of British doctrine). This rule of necessity even permitted judges to preside over cases to which they were a party. \textit{See id.} (recounting rule of necessity’s seemingly unfair results). Interestingly, British judges were not permitted to try cases in their county of birth—presumably for fear of locally-developed bias—until 1739. \textit{See id.} at 8-9 (contrasting deferential rule of necessity with restraining geographic rule).
\item \textsuperscript{34} See id. at 9-10 (explaining that, although civil law countries followed Roman law doctrines of both bias and interest throughout their development, British law only recently expanded grounds for recusal beyond showing of judge’s direct financial interest in case). A presumption of absolute impartiality continued well into modern times in Britain, as Lord Justice Stratton’s 1920 address to the Cambridge Law Society stated that “in England people were inclined to treat the incorruptability of judges as such a matter of course that it was superfluous to even mention it.” \textit{Id.} at 7 n.8.
\item \textsuperscript{35} See VOLCANSEK, supra note 10, at 127 (noting uniform preference for judicial independence over accountability in legal systems of United States, Britain, France and Italy).
\item \textsuperscript{36} See id. at 128 (concluding that judicial systems of United States, Britain, France and Italy favor judicial independence over accountability).
\item \textsuperscript{37} See id. at 87 (noting that, although both state and federal judicial systems borrowed from British, similarities were, and are, more pronounced in federal

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expanded beyond direct financial interest following American independence. Federal legislative acts of the eighteenth and nineteenth centuries required recusal for participating in the issue at hand, interest or a prior role as counsel for a party (1792), improper connections to a party (in the view of the judge) (1821) and prohibited trial judges from hearing cases again upon appeal (1891). These statutory expansions and the increasingly broad judicial interpretations of the vague recusal statutes reflected acceptance of expanded grounds for recusal. Unfortunately, as one author notes, this increased accountability has brought about an equal increase in the uncertainty over the appropriate limits of judicial disqualification.

C. The Modern Recusal Statutes: Sections 47, 144 and 455

1. Development of the Modern American Recusal Statutes

Congress created the first federal judicial disqualification statute in 1792. This statute was amended and expanded on numerous occasions prior to further codification in the Judicial Code of 1911. Congress divided the statute's 1948 version of recusal law into three statutory provisions: Sections 47, 144 and 455. Although amended to correct unforeseen interpretive difficulties, the 1948 versions remain largely in-courts. The individual states have "total autonomy" from the federal system in the United States. Id. at 104 (describing separation of powers between states and federal government). Such autonomy allowed the newly independent states to display their distrust of centralized power by requiring legislative approval of nominees. Id. at 104-05 (explaining why states retained power over judiciary).

38. See FLAMM, supra note 5, at 10-11 (explaining that, as early as 1792, United States required judicial recusal for more than judge's financial interest in case). The first recusal statute, created in 1792, required recusal when a judge had an "interest, had acted in the cause or had been of counsel." Id. at 11 n.4 (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278). Many states began to diverge from the British tradition in colonial times, including a 1672 Connecticut statute requiring recusal for certain familial relationships with parties. Id. at 39 n.6 (citing CONN. GEN. STAT. of 1672).

39. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 (providing original guidelines for recusal).

40. See Act of Mar. 3, 1821, ch. 51, § 1, 3 Stat. 643 (expanding grounds for recusal).


42. See FLAMM, supra note 5, at 11 n.7-9 (listing court cases from second half of twentieth century that expanded recusal doctrine).

43. See id. at 11 (explaining advantages of rigid, yet clearly defined, common law rule over presently developing, broad and ill-defined rule for recusal).


Each of these sections delineate rules for a discrete area of recusal law, and the courts have subjected each section to extensive interpretation.

2. History of § 47: Prohibition Against Appellate Judges Sitting on Cases They Heard at Trial

Section 47 is generally recognized as both the clearest and easiest to apply of the three recusal statutes, as well as the least used. Section 47, consisting of a single sentence, prohibits appellate judges from sitting on cases they oversaw at the trial level. This prohibition dates back to the formation of the federal courts, and was reiterated by Congress at the formation of the circuit courts of appeals. Section 120 of the Judicial Code of 1911 and the 1948 United States Code also retained and refined the requirements for § 47 recusal.

47. For a discussion of the development of § 47, see infra notes 52-53 and accompanying text. For a discussion of the establishment and retention of § 144, see infra notes 64-65 and accompanying text. For a discussion of the creation and continuation of § 455, see infra notes 75-78 and accompanying text.

48. To compare the disparate language of §§ 47, 144 and 455, see supra notes 14-17.

49. See generally Joshua Glick, On the Road: The Supreme Court and the History of Circuit Riding, 24 CARDOZO L. REV. 1753, 1835-36 (2003) (examining § 47's interpretive history and noting courts have uniformly and easily filled in blanks left by this one-sentence statute).

50. See Fed. Jud. Ctr., supra note 14, at 52 (explaining that recusal rarely occurs under § 47 because it appears to overlap with part (a) of more dominant § 455); Sheldon R. Shapiro, Annotation, Construction and Application of § 47 of Judicial Code (28 U.S.C.A. § 47), and Similar Predecessor Statutes, Disqualifying Judge of United States Court of Appeals from Hearing or Determining Appeal from Decision of Case Issued or Tried by Him, 13 A.L.R. Fed. 855, 856-57 (1972) (noting that rule's application is limited to federal courts of appeals). See generally Note, Disqualification of Judges and Justices in the Federal Courts, 86 HARV. L. REV. 736 passim (1973) (commenting extensively on §§ 144 and 455, and referring to § 47 as "little-used" in footnote).

51. See supra note 16 and accompanying text (quoting single sentence of § 47 in its entirety). Due to its structure, § 47 only applies to recently promoted judges or those sitting on appeals courts by designation, and does not apply to judges reviewing their own cases en banc. See Fed. Jud. Ctr., supra note 14, at 1 (describing boundaries of § 47's application).

52. See Shapiro, supra note 50, at 856 (noting origins of § 47). The prohibition against sitting upon the rehearing of a case found in 28 U.S.C. § 47 first appeared in a 1792 statute. See id. (citing Act to Establish the Judicial Courts of the United States, 1 Stat. 73, 75 (1789)). The content was again stated in 1891. See id. (citing Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes, 26 Stat. 826, 827 (1891)).

53. See Shapiro, supra note 50, at 856-57 (continuing description of § 47's origins). The content of § 47 was preserved in Section 120 of the Judicial Code of 1911. See id. (citing Act to Codify, Revise and Amend the Law Relating to the Judiciary, 36 Stat. 1087, 1132 (1911)). The prohibition was restated in a form largely reflecting its present text in 1948. Id. (citing Act to Revise, Codify, and Enact into Law Title 28 of the United States Code Entitled Judicial Code and Judi-
Although the prohibition of § 47 is relatively clear, the circuit courts have split regarding whether a waiver option may be inferred from the statute.\textsuperscript{54} The Supreme Court's most definitive position on the subject was stated in \textit{Rexford v. Brunswick-Balke-Collender Co.},\textsuperscript{55} in which the Court explained:

The terms of the statute . . . are both direct and comprehensive . . . . [T]hat the parties may consent to the judge's participation in its decision[ ] can make no difference, for the sole criterion under the statute is, does the case in the circuit court of appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?\textsuperscript{56}

Despite—or arguably because of—the \textit{Rexford} decision, the circuit courts continue to disagree on the appropriateness of allowing waivers of § 47.\textsuperscript{57}

Several circuits, including the Seventh and the Fourth, have focused on the "direct and comprehensive" portion of the Supreme Court's analysis in \textit{Rexford.}\textsuperscript{58} These circuits have determined that parties may not waive the recusal requirement of § 47 under any circumstances.\textsuperscript{59} The Third Circuit, however, in \textit{United States v. Morrow},\textsuperscript{60} focused on the second portion of \textit{Rexford}, and interpreted § 47 to allow parties to waive recusal in certain circumstances, including when counsel did not raise the motion at trial.\textsuperscript{61}

\textsuperscript{54.} Compare \textit{Rexford v. Brunswick-Balke-Collender Co.}, 228 U.S. 339, 344 (1913) (noting that, in present situation, "consent given [to § 47 waiver] was of no effect whatsoever"), and \textit{Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.}, 228 U.S. 645, 650-51 (1913) (vacating court of appeals' decision due to "grave error" of including trial judge on appellate bench, despite § 47 waiver by parties), with \textit{United States v. Morrow}, 717 F.2d 800, 801 n.1 (3d Cir. 1983) (determining that counsel's silence resulted in waiver of § 47 rights after "having independently considered this matter").

\textsuperscript{55.} 228 U.S. 339 (1913).

\textsuperscript{56.} Id. at 34.

\textsuperscript{57.} For a discussion of the apparent disagreement between the Third Circuit and the Supreme Court's interpretation of § 47 in \textit{Rexford}, see \textit{supra} notes 54-61, \textit{infra} notes 97-113 and accompanying text.


\textsuperscript{59.} See \textit{Russell}, 890 F.2d at 948 (agreeing with Fourth Circuit that judge cannot sit on appellate bench of case he oversaw at trial, even in federal appellate review of state court trial); \textit{Swann}, 431 F.2d at 137 (concluding that trial judge could not sit on appeal of case if appeal raises similar "ultimate question").

\textsuperscript{60.} 717 F.2d 800 (3d Cir. 1983).

\textsuperscript{61.} See id. at 801 n.1 (noting that, due to counsel's failure to file motion, waiver occurred and thus "there is no basis for recusal under 28 U.S.C. § 47 . . . "). \textit{Morrow} interpreted counsel's lack of a recusal motion to serve as a waiver. See id.
3. History of § 144: Evaluating Affidavits of Bias

Section 144 requires judges to recuse themselves upon the filing of a procedurally sufficient affidavit by counsel. To be procedurally sufficient, the affidavit must state that the judge has a personal bias or prejudice concerning one of the parties in the case. This mandatory recusal for bias developed later than the grounds included in § 47 or § 455; it was the Judicial Code of 1911 that first applied this requirement to the federal courts. The intent of the statute was reiterated in the 1948 United States Code and currently exists in largely the same form.

All circuits, with the notable exception of the Ninth, require that the allegations of a § 144 affidavit be accepted as true. Additionally, the allegations may be applied to both the trial at issue and any following trials involving the judge and the party in question. Thus, in both United States (concluding that waiver occurred under § 47). Although facially conflicting with the first clause of the Supreme Court’s decision in Rexford, the Third Circuit’s decision in Morrow may have a justification. See Fed. Jud. Ctr., supra note 14, at 53 (proposing justification for decision in Morrow). In Morrow, the court determined that the appeal would not require a judge to rule on his own possible error, whereas in Rexford, the judge’s own error was at issue on appeal. See id. (considering justification for Third Circuit’s decision).

62. For a discussion of the intent of § 144, see supra note 14 and accompanying text. Most courts require “strict compliance” with the procedural guidelines for a § 144 affidavit. See Fed. Jud. Ctr., supra note 14, at 50 (quoting In re Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997)) (reviewing § 144 doctrine).

63. See 28 U.S.C. § 144 (1949) (providing procedural requirements for motion). The affidavit must be signed by a party to a suit as to its truthfulness and by counsel that it is procedurally valid. See Fed. Jud. Ctr., supra note 14, at 50-51 (outlining requirements court has inferred from § 144). Additionally, parties are generally allowed to file only one affidavit, while later affidavits are not considered even if new facts arise. See id. at 45 (detailing § 144’s elements). Procedurally deficient affidavits may be allowed at the judge’s discretion if good cause or no meaningful prejudice to the other party can be shown. See Flamm, supra note 5, at 507-10 (elaborating on courts’ willingness to permit technically deficient affidavits).

64. See Hoekema, supra note 6, at 697, 702 (explaining origins of § 144 and criticizing judicial gloss placed on recusal doctrine as having “narrowed the broad scope Congress intended for disqualification law”); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1436 (1966) (outlining state-driven early development of doctrine, only later applied to federal courts in Section 21 of Judicial Code of 1911 by ch. 231, 36 Stat. 1090).

65. See Note, supra note 64, at 1436 (describing retention of doctrine in 1948).

66. For a discussion of the § 144 affidavit views of the Ninth and other circuits, see infra notes 104-15 and accompanying text.

v. Rankin\(^{68}\) and Mims v. Shapp,\(^ {69}\) the Third Circuit noted that if the procedural requirements were met, the affidavit’s allegations must be accepted as true.\(^ {70}\) The Ninth Circuit took its unique minority position in Ronwin v. State Bar of Arizona,\(^ {71}\) which allowed judges limited judicial authority to assess the truth of these affidavits.\(^ {72}\)

4. **History of § 455: The Broadest Recusal Statute**

Section 455 is the primary federal recusal statute, and was “expressly designed to promote [public] confidence in the integrity of the judicial process.”\(^ {73}\) This section provides for recusal, either *sua sponte* or by motion, in the event that bias would be objectively perceived, that actual bias exists or that a conflict of interests is present.\(^ {74}\) Like § 47, this section dates back to 1792, and has been updated several times.\(^ {75}\)

Section 455’s 1948 version is similar to the current version, except for one important adjustment.\(^ {76}\) The 1948 version incorporated a subjective standard, which lacked firm guidelines and was interpreted by the judiciary to include a “duty to sit”—a judicial gloss favoring non-recusal over recusal in close questions.\(^ {77}\) Congress revised the statute in 1974 to remove the duty to sit, and created an objective standard focused on preserving public faith in the fairness of the judicial process rather than

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68. 870 F.2d 109 (3d Cir. 1989).
69. 541 F.2d 415 (3d Cir. 1976).
70. See Rankin, 870 F.2d at 110 (requiring that procedurally sufficient affidavits be accepted as true without further analysis); Mims, 541 F.2d at 417 (requiring that judge accept party’s allegations as true—which judge denied—that judge had chased and assaulted defendant in courtroom).
71. 686 F.2d 692 (9th Cir. 1982).
72. See id. at 701 (allowing judges limited discretion in determining validity of procedurally valid allegations if they have personal knowledge).
73. FLAMM, supra note 5, at 36-37. Section 455 contains a lower threshold for removal than does the Due Process Clause because it was designed to more strenuously police the judiciary. See id. (discussing § 455); see also Hoekema, supra note 6, at 698 (describing § 455 as “paramount disqualification statute”).
74. See Fed. Jud. Ctr., supra note 14, at 2 (explaining requirements for § 455). Unlike § 144, § 455 is applied to federal magistrates, judges and justices, and explicitly states that the rule may be waived by a negatively impacted party. See id. (describing sections). Part (b), however, may not be waived as it applies to specific circumstances, regardless of the appearance of impropriety. See id. at 1 (outlining statute).
77. See id. (describing problems with 1948 version of § 455). The judiciary interpreted this subjective standard to create a duty to sit, thereby justifying their reluctance to grant recusal motions. See Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case*, 18 Geo. J. Legal Ethics 229, 234 (2004) (noting both subjective standard and complimentary duty to sit were removed by 1974 amendments).
preserving judicial independence. Although the Third Circuit has not explicitly stated that close questions should be resolved in favor of recusal, many circuits have done so. Additionally, Third Circuit cases, including In re School Asbestos Litigation, suggest agreement.

5. **Standard of Review for Recusal Motions First Brought on Appeal**

Limited review exists for the denial of a recusal motion. Almost all circuits agree that if a motion for recusal is denied in district court, the denial will be reviewed under the abuse of discretion standard. The Seventh Circuit is the lone dissenter to this standard, requiring de novo review of recusal decisions on appeal.

Circuit courts, however, disagree on the applicable standard of review if a recusal motion was not raised in district court. In Selkridge v. United

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78. See Fed. Jud. Ctr., supra note 14, at 2 (explaining revisions made in 1974). This adjustment has been referred to as a "drastic change," and reflects Congress's intent to create a recusal doctrine that is more objective and party-friendly. See 13A Charles Alan Wright et al., Federal Practice and Procedure § 3549 (2d ed. 1984) (commenting on amendment's impact). The lack of a scienter requirement exemplifies the modification's intent to discourage a reading that is "overly-nice" to sitting judges and justices. See id. (explaining broad discretion available to judges). One author has characterized these amendments as "the fear of perception run amok," and argues that Congress has overestimated the public's suspicion of the judiciary, creating "scaredy-cat" judges. See Miner, supra note 7, at 1117 (postulating that unnecessarily low threshold of recusal doctrine is result of congressional misperception).

79. See Fed. Jud. Ctr., supra note 14, at 16 (noting that First, Fifth, Sixth, Tenth and Eleventh Circuits have adopted standards favoring recusal). The Supreme Court has specifically disapproved of multiple circuits' interpretations of the amendments—designed to remove the duty to sit—in a manner retaining the judicial gloss. See Waller v. United States, 504 U.S. 962, 964 (1992) (White, J., dissenting) (frowning on lower courts' creation and retention of duty to sit).

80. 977 F.2d 764 (3d Cir. 1992).

81. See id. at 784 (explaining that legislative history indicates that Congress intended to remove duty to sit, and that recusal should occur despite detrimental impact on plaintiffs and difficulty in transitioning to new judge).


85. Compare Selkridge II, 360 F.3d at 167 (noting plain error standard of review), with Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 795 (2d Cir. 2002) (declaring
Omaha Life Insurance Co. (Selkridge II), the Third Circuit determined that the plain error standard is appropriate for motions first brought on appeal. Conversely, in Taylor v. Vermont Department of Education, the Second Circuit determined that the higher threshold of the fundamental error analysis is applicable. Yet another standard is proposed by the First Circuit in In re United States, requiring that a judge’s decision to deny a recusal motion be “unsupportable by a reasonable reading of the record.”

III. INTERPRETATION: INTER-CIRCUIT CONFLICTS AND THEIR RESOLUTION BY THE THIRD CIRCUIT

Sections 47, 144 and 455 are designed to preserve (or achieve) the goal of an unbiased judicial system in both fact and appearance. Third Circuit precedent has shown that there are multiple ways to achieve this goal within the confines of the recusal statutes. In general, the Third Circuit’s views are more sympathetic to the needs of the parties than the needs of the judges, favoring judicial accountability over judicial indepen-

fundamental error standard applicable in review of recusal motions brought at trial in civil cases).

86. 360 F.3d 155 (3d Cir. 2004).
87. See id. at 167 (noting plain error as Third Circuit’s standard of review for recusal motions first brought on appeal). Plain error is defined as an error that was sufficiently prejudicial as to impact the trial’s outcome. See United States v. Olano, 507 U.S. 725, 734 (1993) (defining standard). Once the appearance of partiality is shown, prejudice is subject to a rebuttable presumption. See United States v. Antar, 53 F.3d 568, 573 n.7 (3d Cir. 1995) (outlining review process).
88. 313 F.3d 768 (2d Cir. 2002).
89. See id. at 795 (explaining that, in civil cases, fundamental error analysis is applied); Antar, 53 F.3d at 575 n.6 (noting appeal of fundamental error analysis, but using plain error due to agreement of both parties that plain error is appropriate standard). Fundamental error analysis requires an error “so serious and flagrant that it goes to the very integrity of the [proceeding].” Taylor, 313 F.3d at 795 (quoting Jarvis v. Ford Motor Co., 283 F.3d 33, 62 (2d Cir. 2002)).
90. 666 F.2d 690 (1st Cir. 1981).
91. See id. at 695 n.* (1st Cir. 1981) (noting that standard is more strict than that for judging Caesar’s Wife—which requires that even suspicion of wrongdoing be absent—and requiring that there be factual proof offered and that judge’s decision reflect rational interpretation of that proof); see also In re Allied Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (subscribing to rational interpretation standard of In re United States).
92. See Bassett, supra note 8, at 1218 (explaining that “[t]he aim of recusal and disqualification is to ensure both actual judicial impartiality, which is a necessary prerequisite of due process, and the appearance of impartiality, which is necessary to ensure confidence in the courts”).
93. For a discussion of circuit interpretations of Rexford, see supra notes 49-53, infra 102-13 and accompanying text. For a discussion of the differences between circuits regarding the amount of judicial discretion permitted in reviewing § 144 affidavits, see supra notes 58-61, infra notes 114-25 and accompanying text. For a discussion of the different standards for reviewing appeals from denials of recusal motions, see supra notes 85-91, infra notes 114-15 and accompanying text.
The Third Circuit's pattern of favoring parties in close questions is in contrast with the trends of both the Supreme Court and several other circuits. These interpretations have been applied to § 47 waiver provisions, the validity of § 144 affidavits and the standard of review for recusal motions first brought on appeal.

A. Inferring (or Not Inferring) a Waiver Provision in § 47

Section 47 is a short statute, and is by far the shortest of the three recusal statutes. Section 47 does not comment upon the applicability of a waiver to its recusal requirement. This differs from § 144, to which a waiver provision is inapplicable, and is unlike § 455, which explicitly states what parts are subject to waiver. Thus, it would appear that Congress addressed the waiver provision only when it deemed such an option to be at issue (or arguably at issue), and through its comparative silence determined that a waiver was not at issue here. The Supreme Court considered this legislative comparison in Rexford, noting the brevity and directness of § 47 and determining that Congress did not intend for the availability of waivers to be inferred.

94. Compare supra note 85 and accompanying text (explaining difference in interpretation of several issues between Third Circuit and other circuits), with Volcansek, supra note 10, at 127 (noting uniformity of independence over accountability in judicial systems of United States, Britain, France and Italy).

95. For a discussion of the Third Circuit's views in comparison with those of other circuits, see supra notes 85-87 and accompanying text.

96. For a contrast of the Third Circuit's recusal doctrine with those of other circuits, see supra note 85 and accompanying text.

97. Compare supra note 16 and accompanying text (reciting full text of § 47), with supra note 15 and accompanying text (repeating § 144 in its entirety), and supra note 17 and accompanying text (presenting primary portions of § 455).


99. See Diana Lowndes, Authority of the Trial Judge, 90 Geo. L.J. 1659, 1661-62 (2002) (noting that recusal motions under § 144, if found to be timely and legally sufficient, are self-activating). Section 144 becomes effective only upon a motion by a party. See id. (outlining requirements of § 144). Thus, a waiver provision is unnecessary for two reasons: first, logic dictates that a waiver will not come from a party that has made a motion questioning the judge's neutrality in the case at hand; second, such a motion—if timely and legally sufficient—is self-activating. See id. (describing workings of § 144).

100. See 28 U.S.C. § 455(e) (2005) (stating that violation of part (a) may be waived by parties if preceded by judge's "full disclosure on the record of the basis for disqualification," and that violation of part (b) cannot be waived under any circumstances).

101. Compare supra note 99 and accompanying text (explaining that it would be illogical to include waiver provision in § 144), with supra note 100 and accompanying text (reciting waiver language in § 455).

102. See Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 343-44 (1913) (explaining that statute's terms are "direct and comprehensive" and do not allow for waiver).
The Third Circuit considered the possibility of a § 47 waiver in *Morrow* and determined that the defendant had waived his recusal option.  

*Morrow* involved the appeal of an arson conviction from the Western District of Pennsylvania.  Although the trial judge also sat by designation on the panel in the court of appeals, the court found there was no violation of § 47. The court justified its finding by noting that the defendant’s counsel was informed that the trial judge would be sitting on the appeal, and “indicated no motion for recusal would be filed and [therefore] recusal was waived.” As such, the Third Circuit has appended a clause to § 47 through interpretation, reading the statute as: “No judge shall hear or determine an appeal from the decision of a case or issue tried by [the judge]” unless a waiver has ensued from the negatively impacted party.

The goal of the recusal statutes is two-fold. First, the statutes are to preserve the judge’s role as a neutral party overseeing cases. Second, the statutes are to preserve the public’s perception of the judge as a neutral party. Congress has specifically acted to remove both the duty to sit and the subjective standard from the ambiguous § 455, both of which appear to be asserted by the court in its interpretation of § 47. In *Morrow*, a three-judge panel (including the judge in question) collectively determined that a judge accused of partiality could function in an unbiased manner.

103. See United States v. Morrow, 717 F.2d 800, 801 n.1 (3d Cir. 1983) (finding that lack of motion to recuse during trial removed defendant’s ability to recuse on appeal under either § 47 or § 455). The court did accurately rule that any opportunity for a § 455(a) recusal claim was waived after counsel declined to do so following a full disclosure on the record, as per the requirements of § 455(a). Compare id. (deciding right to recuse was waived), with 28 U.S.C. § 455(a) 2005 (explicitly allowing waiver of recusal).

104. See *Morrow*, 717 F.2d at 801 n.1 (denying motion claiming error due to judge’s presence on bench of both trial and appeal after inferring waiver because of lack of motion at trial).

105. See id. (delineating court’s reasoning for denying § 47-based appeal).

106. See id. (explaining determination that waiver of recusal had occurred after “[h]aving independently considered this matter”).

107. See 28 U.S.C. § 47; supra notes 97-98 (describing court’s interpretation of § 47 to include non-explicit waiver provision).

108. See Hoekema, supra note 6, at 697 (arguing that “[a]n impartial judiciary is an essential element of the system of justice in the United States,” and that “Congress has sought to secure the impartiality of trial judges by requiring judges to disqualify themselves in various circumstances”); Miner, supra note 7, at 1110 (determining that “in modern-day society, it is perception, rather than reality, that has the greater importance”).

109. See Hoekema, supra note 6, at 697 (explaining Congress’s preservation of judicial impartiality through recusal statutes).

110. See Miner, supra note 7, at 1110 (placing need for judicial impartiality in perception above judicial impartiality in fact).

111. See *Morrow*, 717 F.2d at 801 n.1 (noting that after “[h]aving independently considered this matter,” panel determined there was no need for judge who wrote trial opinion to recuse himself from appeal panel, and also noted that any recusal-based appeal had been waived through counsel’s silence).
Morrow's "judgment call" is precisely the kind of self-interested ruling that Congress acted to remove from the bench by enacting §47 in the interest of preserving an unbiased judicial system in both appearance and fact.\footnote{113}

B. Assessing the Validity of a §144 Affidavit

The Ninth Circuit stands as the lone dissenter to the rule that the truthfulness of a §144 affidavit may not be challenged.\footnote{114} In the majority of circuits, including the Third Circuit, affidavits are reviewed only for particularity under the "convince a reasonable person" test.\footnote{115} The differing standards applied by the circuits highlight the fundamental difference in their approaches to §144.\footnote{116} Thus, judges in the majority of circuits may be forced to legally accept bizarre accusations against them, despite their personal knowledge that the allegations are factually untrue.\footnote{117} The ma-

\footnote{112. See id. (affirming trial judge's denial of recusal motion).}

\footnote{113. See id. (explaining independent review of judge's ability to fulfill his role in unbiased nature by three-judge panel including judge in question); supra note 15 and accompanying text (including §47 in its entirety, lacking any waiver section).}

\footnote{114. See Fed. Jud. Ctr., supra note 14, at 46 (describing Ninth Circuit as having taken "different approach" in allowing judge to deny truthfulness of §144 affidavit).}

\footnote{115. See id. at 46-48 (compiling individual circuits' interpretations of majority standard).}

\footnote{116. Compare Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (using movant-friendly standard of assumed validity of procedurally valid affidavit), with Ronwin v. State Bar of Ariz., 686 F.2d 692, 701 (9th Cir. 1981) (using judge-friendly standard and allowing judges to rule on truthfulness of assertions to which judges have personal knowledge).}

\footnote{117. See United States v. Dansker, 537 F.2d 40, 53 (3d Cir. 1976) (describing circuit's test, requiring facts sufficient to convince reasonable person of judge's personal bias against party when facts are taken as true); Mims, 541 F.2d at 416-17 (requiring that judge accept party's allegations—which judge had denied—that judge had chased party around room and assaulted party). The First Circuit has proposed a solution to the dilemma of forcing judges to accept extreme accusations they know to be untrue. See In re Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997) (describing First Circuit's test). When cases are transferred due to §144 allegations in the First Circuit, the new judge may hold a hearing concerning the truthfulness of the affidavit and return cases in which the affidavits are found to be false. See id. (noting First Circuit recusal procedure). Even among the other circuits, the general trend is to require specific allegations that would convince a reasonable person rather than relying on a party's broad and sweeping accusations. See id. (describing other circuits); United States v. Sykes, 7 F.3d 1381, 1399 (7th Cir. 1993) (describing Seventh Circuit's standard).}

\footnote{118. Published by Villanova University Charles Widger School of Law Digital Repository, 2005}
The majority approach is designed to prevent conflicts that result from judges ruling on the factuality of motions that may be damaging to themselves.\(^{118}\)

In *Rankin*, the defendant moved to transfer the case, requesting recusal because the assigned judge had allegedly chased him around the courtroom and assaulted him.\(^{119}\) Although these accusations were bizarre, it is easy to see the conflict of interest that the judge would face in ruling upon the validity of the motion—especially if the accusations were true.\(^{120}\) The judge would either have to admit embarrassing and unprofessional conduct or rule against the defendant.\(^{121}\) As such, any denial of the motion would be suspect; precisely the self-interested decisions the recusal doctrine is designed to eliminate from court discretion.\(^{122}\)

The Ninth Circuit’s approach, however, allows the judge to rule on the factuality of the allegations because they are, by their very nature, within the judge’s personal knowledge.\(^{123}\) This approach places considerably more faith in a judge’s ability and desire to maintain neutrality—as well as the public’s belief in the judge’s ability to maintain this neutrality—than does the Third Circuit’s approach.\(^{124}\) The Ninth Circuit’s judge-friendly rule is much more reflective of the American trend toward judicial independence, whereas the Third Circuit’s party-friendly rule is loyal

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118. See 48A C.J.S. Judges § 312 (2004) (explaining that “disqualification rule limiting the trial judge to a bare determination of legal sufficiency was designed to prevent the creation of an intolerable adversary atmosphere between the trial judge and the litigant”).

119. See *Rankin*, 870 F.2d at 110 (describing plaintiff’s allegations).

120. See id. at 110 n.1 (noting that accusations were highly questionable and directly contradicted by claimant’s counsel). The claimant and his family, who supported the allegations, were later charged with perjury. See id. at 110-12 (describing perjury issue).

121. See *Berger v. United States*, 255 U.S. 22, 36 (1921) (explaining that “evil” of conflicted and biased review was precisely what statute was designed to prevent, and that appeal is insufficient method to check this bias); United States v. Balistreri, 779 F.2d 1191, 1203 (7th Cir. 1985) (noting that “a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved”). See generally *Hoekema*, supra note 6, at 707 n.74 (1987) (concluding that in history of § 455, judges have been reluctant to recuse themselves when it requires admission of actual bias).

122. See *Berger*, 255 U.S. at 36 (decrying appeal as unable to correct problems inherent in judge’s conflicted and biased review of his own actions).

123. See *Fed. Jud. Ctr.*, supra note 14, at 46 (noting instance where judge was allowed to rule upon truth of allegations because facts were peculiarly within judge’s knowledge).

124. Compare id. (explaining that Ninth Circuit’s actual bias-focused decision “held that recusal was unnecessary in part because the judge knew the allegations were false”), with *Selkridge II*, 360 F.3d 155, 170 (3d Cir. 2004) (focusing on public perception). Notably, one of the court’s primary issues in *Selkridge II* was “the appearance that Judge Moore’s impartiality was compromised.” Id. (concluding that Judge Moore’s grounds for recusal were too narrow). The court’s holding noted the compromise of the appearance of impartiality prior to noting the actual partiality. See id. (considering both actual and perceived partiality in its review).
to the recusal statutes’ theme of removing the appearance and existence of judicial interest or bias.\textsuperscript{125}

C. \textit{The Split Over the Standard of Review for Recusal Motions First Brought on Appeal}

The disagreement between the Third and Second Circuits over the appropriate standard of review for recusal motions first brought on appeal is based on their differing interpretations of Federal Rule of Criminal Procedure 52(b).\textsuperscript{126} Rule 52(b) requires plain error review for motions first brought on appeal.\textsuperscript{127} The Third Circuit applies this plain error standard to all motions brought upon appeal, regardless of whether they are raised in civil or criminal cases.\textsuperscript{128}

In contrast, the Second Circuit focuses on the fact that Rule 52(b) is a criminal rule, and thus applies the plain error standard only to motions first brought on appeal in criminal cases.\textsuperscript{129} In civil cases, these motions are subjected to fundamental error analysis.\textsuperscript{130} The less stringent plain error standard is applied in criminal cases because more substantial personal liberty interests are at stake than the economic and property interests generally at stake in civil cases.\textsuperscript{131} In \textit{Selkridge II}, the Third Circuit noted the appeal of the Second Circuit’s dual standard of review, but ultimately reasserted its uniform standard.\textsuperscript{132} The Third Circuit’s uniform
standard is more favorable to litigants and better preserves the bench’s neutrality, despite the greater ease of forcing recusal.133

The First Circuit’s reasonable interpretation standard is not based on a reading of the Federal Rules of Criminal Procedure, but rather upon striking the proper balance between preserving the public appearance of impartial proceedings and preventing the manipulation of judicial recusal to obtain more favorable judges.134 This standard requires that the reviewing judges be able to conceive of a reasonable explanation for the motion’s denial.135 As a result, the First Circuit, like the Second Circuit, has developed a doctrine more hostile to successful recusal motions than the Third Circuit.136

IV. CONCLUSION: THE PRO-MOVANT THIRD CIRCUIT PROVIDES RELATIVELY GREATER OPPORTUNITY FOR RECUSAL

The American judicial system is premised upon the existence of a neutral bench enforcing the laws while adversarial parties debate the merits of the case before a jury.137 Thus, recusal—a remedy designed to remove a judge who lacks this neutrality—is a difficult subject for the American system of justice.138 The circuit conflicts addressed reflect the

dure 52(b)’s application to criminal cases. See id. (considering different standard applied in Second Circuit).

133. Compare Taylor, 313 F.3d at 795 (defining fundamental error as “more egregious than the ‘plain’ error [standard] that can excuse a procedural default in a criminal trial, and [an error that] is so serious and flagrant that it goes to the very integrity of the [proceeding]” (quoting Jarvis v. Ford Motor Co., 283 F.3d 33, 62 (2d Cir. 2002))) (internal citation and quotation marks omitted), with United States v. Schreiber, 599 F.2d 534, 535 (3d Cir. 1979) (defining plain error as error representing “manifest miscarriage of justice” (quoting United States v. Provenzano, 334 F.2d 678, 690 (3d Cir. 1964))). Other circuits, including the Seventh Circuit and the District of Columbia Circuit, have applied an abuse of discretion standard. See id. at 535 n.1 (referencing conflict with standard of other circuits).

134. See In re Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (justifying First Circuit’s standard of review for denial of recusal motions).

135. See id. (describing requirements of reasonable interpretation standard of review).

136. For a comparison of the standard of review for recusal motion appeals in the Third and Second Circuits, see supra notes 126-33 and accompanying text (noting that fundamental error standard has higher threshold than plain error standard). See also supra notes 134-36 and accompanying text (describing low threshold of reasonable interpretation standard).

137. See BLACK’S LAW DICTIONARY 54 (7th ed. 1999) (defining “adversary system” as “a procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker”).

138. See Hoekema, supra note 6, passim (discussing inherent theoretical conflict in questioning neutrality of decisionmaker in adversarial system).
difficulty of striking a balance between maintaining the neutrality of the
bench and preserving judicial independence. 139

Parties seeking recusal under any of the three applicable statutes must
understand that, although they provide some firm rules, much of judicial
disqualification doctrine remains a gray area that is subject to judicial in-
terpretation and discretion. 140 Entering these gray areas is unquestiona-
bly dangerous, as “[a]n attorney’s decision whether to move for
disqualification of a judge can have serious consequences on the subse-
quent handling of [the attorney’s] case.”141

Parties seeking recusal, however, should be aware that the Third Cir-
cuit has resolved a relatively large number of disputed issues in favor of
permitting recusal. 142 In doing so, the Third Circuit has not only de-
veloped as a more party-friendly venue than other circuits, but also remains
faithful to the twin philosophical pillars of the recusal statutes—preventing
the appearance of partiality and preventing actual bias by the
bench. 143

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139. See Volcansek, supra note 10, at 2 (noting modern democratic conflict
between preserving judicial independence and ensuring judicial neutrality).

140. See id. at xlii (noting that “general principles are extremely hard to come
by” in this area of law because it is driven by myriad sources, including statutes,
constitutional provisions and court rules); Malarkey, supra note 30, at 695 (noting
that “what constitutes a proper ground for judicial disqualification, however,
remains a troublesome question facing both attorneys and judges”).

141. See Malarkey, supra note 30, at 695 (observing that “[i]f you are going to
shoot at the judge it does no good to wound him” (quoting Davis & Levin, Disquali-
plaining that “the filing of a judicial disqualification may antagonize the
challenged judge either consciously or subconsciously, with the result that the
moving litigants and their counsel are likely to suffer”) (citations omitted).

142. For a discussion of the Third Circuit’s interpretation of Rexford and its
refusal to recognize an inference of waiver in § 47, see supra notes 54-61, 103-07
and accompanying text. For a discussion of the Third Circuit’s policy regarding
the amount of judicial discretion permitted in reviewing § 144 affidavits, see supra
notes 67-70, 114-25 and accompanying text. For a discussion of the Third Circuit’s
standard of review for appeals from denials of recusal motions, see supra notes 82-
91, 126-36 and accompanying text.

143. See Fed. Jud. Ctr., supra note 14, at v (stating that parties “move for trial
judges to recuse themselves on grounds of partiality or the appearance of partial-
ity”). For a further discussion of the Third Circuit’s pro-movant interpretation of
§ 47, denying waiver of this section, see supra notes 54-61, 103-07 and accompany-
ing text. For a further discussion of the Third Circuit’s level of judicial discretion
in determining the admissibility of § 144 affidavits, see supra notes 67-70, 114-25
and accompanying text. For a further discussion of the Third Circuit’s standard of
review for denials of recusal motions, see supra notes 82-91, 126-36 and accompany-
ing text.