Journal of Criminal Law and Criminology

Volume 85
Issue 4 *Spring*

Article 10

Spring 1995

A Look at the Extrajudicial Source Doctrine under 28 U.S.C. 455

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0091-4169/95/8504-1114
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 85, No. 4

A LOOK AT THE EXTRAJUDICIAL SOURCE DOCTRINE UNDER 28 U.S.C. § 455

Liteky v. United States, 114 S. Ct. 1147 (1994)

I. INTRODUCTION

In *Liteky v. United States*,[1] the United States Supreme Court held that 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," is subject to the limitation of the extrajudicial source doctrine.[2] The Court determined that the absence of the word "personal" in § 455(a) does not preclude the doctrine's application. In reaching this conclusion, the Court reasoned that the textual basis for the application of the doctrine to § 455(a) is the pejorative connotation of the words "bias or prejudice," which indicates a predisposition that is wrongful or inappropriate.[3] According to the Court, however, the extrajudicial source doctrine is not a per se rule and, thus, is neither a necessary nor a sufficient condition for recusal.[4] Instead, the source of bias is one factor a judge should consider in recusal.[5] Applying this holding to the facts of the case, the Court found that the judge did not have to recuse himself, since the grounds that petitioner asserted were best characterized as the judge's attempts at routine trial administration.[6]

This Note argues that the Court, by subjecting § 455(a) to the limitation of the extrajudicial source doctrine, ignored the plain language and the legislative history of this statute. After examining the history of the 1974 amendments to § 455 and the split in the circuits deciding this issue, this Note examines the inconsistencies in the Court's decision. Although Justice Kennedy's concurrence is better reasoned than the majority opinion, this Note diverges from the concurrence as well. Finally, this Note proposes that the standard for all

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1 114 S. Ct. 1147 (1994).

2 *Id.* at 1157. The extrajudicial source doctrine provides that a judge's bias or prejudice is grounds for recusal if the bias or prejudice arose outside of his judicial functions. *See* United States v. Baltistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985).

3 *Liteky*, 114 S. Ct. at 1154-55.

4 *Id.* at 1157.

5 *Id.*

6 *Id.* at 1157-58.

allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: whether the charge of lack of impartiality is grounded in facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge, or the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of a detached, objective observer.[7]

II. BACKGROUND

A. THE HISTORY OF § 455(a)

Prior to 1974, § 455 required a federal judge to disqualify himself:

> in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceedings therein.[8]

In 1974, responding to certain circuits' articulation of a "duty to sit"[9] in close cases, and criticism of § 455's subjectiveness, Congress amended § 455.[10]

In amending § 455, Congress adopted the American Bar Association's Code of Judicial Conduct (ABA Code), Canon 3C, with only minor changes.[11] As explicitly noted in the legislative history of § 455, Congress' objectives in adopting Canon 3C were to: (1) conform § 455 to the ABA Code; (2) increase public confidence in the impartiality of the judiciary by replacing the subjective standard of the former § 455 with an objective standard; and (3) eradicate the "duty to sit."[12]

In keeping with these objectives, Congress attempted to "broaden and clarify the grounds for judicial disqualification."[13] The current § 455 contains two subsections where recusal may be appropriate. Subsection (a) establishes the general standard for disqualification. It provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[14] The legisla-

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7 United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).

8 28 U.S.C. § 455 (1988).

9 The "duty to sit" obligated judges to resolve close questions on disqualification in favor of non-recusal under § 455. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964).

10 H.R. REP. No. 1453, 93d Cong., 2d Sess. 1, 5 (1974); S. REP. No. 419, 93d Cong., 1st Sess. 1, 5 (1973).

11 *Id.* Prior to its adoption, Canon 3C was superfluous since it was more restrictive than § 455 and provided that if it conflicted with less restrictive statutes, the judge would only have to follow the less restrictive statute.

12 H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5.

13 *Id.*

14 28 U.S.C. § 455(a) (1988).

ture incorporated an objective standard in § 455(a) for measuring the appearance of partiality "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."[15] Furthermore, by making disqualification mandatory whenever a judge's "impartiality might reasonably be questioned," the amendment eradicated the duty-to-sit.[16] In this manner, the changes to § 455 codified each of Congress' stated objectives. Apart from the objective standard of § 455(a), § 455(b) enumerates specific circumstances, which if present, require a judge to recuse himself.[17]

B. COMPARISON OF § 455 WITH § 144

28 U.S.C. § 144 was the first provision enacted requiring district judge recusal for bias in general. Section 144 was initially adopted in 1911 and remains relatively unchanged. It states:

> 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 proceedings . . . .[18]

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15 H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5. Thus, § 455(a) is self-enforcing, in that it places the burden of recusal on the judge.

16 *See id.*

17 28 U.S.C. § 455 (1988). Subsection (b) states that a judge "shall also disqualify himself in the following circumstances:

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

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

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

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

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

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

Id.

18 28 U.S.C. § 144 (1982).

Although the legislative history of § 144 suggests that it may provide for a peremptory and automatic removal of a judge on a party's motion, the courts have consistently construed the statute narrowly, thereby making disqualification unlikely.[19] Unlike § 455, § 144 is not self-enforcing.[20] Instead, the party alleging the bias must file an affidavit with the challenged judge stating "the facts and the reasons for the belief that bias or prejudice exists."[21] Judges examining the affidavit must accept the facts as true, but may evaluate the legal sufficiency of the affidavit.[22] To determine the legal sufficiency, the courts have imposed a "bias-in-fact" standard, as opposed to the "appearance of bias" standard required under § 455.[23] A judge may be disqualified under § 144 only after the court finds that the affidavit is timely[24] and legally sufficient.[25] Section 144's requirements place a heavy burden on the party seeking recusal. To prevail, the party must: 1) allege specific facts showing bias; 2) prove that these facts amount to personal bias; and 3) show that the facts are sufficient to convince a reasonable person that bias actually exists.[26] In contrast, revised § 455 takes a more liberalized approach to judicial disqualification, by requiring merely an appearance of bias and by doing away with the affidavit requirement of § 144.[27]

C. THE EXTRAJUDICIAL SOURCE DOCTRINE

The extrajudicial source doctrine is rooted in § 144.[28] This doctrine mandates that judges may be disqualified from a case only when

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19 Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 666 (1985).

20 *See* United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980). Although § 455 is self-enforcing, parties to the action may also assert its provisions. *Id.*

21 28 U.S.C. § 144 (1982).

22 Berger v. United States, 255 U.S. 22, 36 (1921).

23 28 U.S.C. § 144 (1982). Subsection (a) of § 455 requires an appearance of bias standard: a judge is to recuse himself in cases in which "his impartiality might reasonably be questioned." 28 U.S.C. § 455 (1988).

24 Section 144 requires the party to file the affidavit ten days before the beginning of the term. 28 U.S.C. § 144 (1982).

25 United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987).

26 *Id.* (citing Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976)).

27 *See* Bloom, *supra* note 19, at 674-75. Disqualification of a judge was very difficult under § 144, whereas under the amended § 455, the benefit of the doubt is now placed in favor of recusal. United States v. Alabama, 828 F.2d at 1540.

28 The Supreme Court announced the extrajudicial source doctrine in United States v. Grinnell Corp., 384 U.S. 563, 583 (1966), which cited Berger v. United States, 255 U.S. 22 (1921) as the basis for the doctrine. In *Berger*, the Supreme Court held that a judge could not recuse herself because of adverse rulings made, since such rulings are reviewable on appeal. 255 U.S. at 31.

their bias stems from an extrajudicial source.[29] "Extrajudicial" refers to a bias that does not derive from evidence or the conduct of parties that the judge observes during the course of proceedings.[30] Most courts rely on the presence of the term "personal" in § 144, as well as the section's requirement that the party file the affidavit ten days before the beginning of the term, as clear sources of the extrajudicial source doctrine.[31] The term "personal" is regarded as the antithesis of judicial.[32] "Personal characterizes an attitude of extrajudicial origin, derived non coram judiciae . . . clearly the prejudgment that the statute guards against."[33] Further, courts have reasoned that because the party must file the affidavit ten days prior to the beginning of term, the events leading to recusal could not possibly arise from facts revealed during litigation.[34]

D. THE SPLIT IN THE CIRCUITS

In enumerating the requirements of § 455, Congress did not specify whether the source of a judge's bias affects whether it is reasonable to question a judge's impartiality. As a result, the circuits have been split over whether bias that results from a judge's involvement in earlier judicial proceedings concerning parties to a present action demands recusal under § 455.

The majority of circuits have held that the extrajudicial source doctrine does apply to § 455(a).[35] The D.C. Circuit as well as the Third, Fourth, Eighth, and Eleventh Circuits have expressly refused to entertain a recusal claim where the grounds for bias stemmed from judicial proceedings.[36] Based on the presence of language similar to that in § 144, these courts have applied the extrajudicial source doctrine to § 455(b)(1).[37] Determining that § 455(b) is, in turn, a limitation on § 455(a), the courts have extended the extrajudicial source

29 Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980).

30 *Id.*

31 *E.g.*, Berger v. United States, 255 U.S. 22 (1921); *Ex parte* American Steel Barrel Co., 230 U.S. 35 (1913); United States v. Baltistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985); United States v. Haldeman, 559 F.2d 31, 132 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); Craven v. United States, 22 F.2d 605, 607-08 (1st Cir. 1927).

32 *Baltistrieri*, 779 F.2d at 1202; *Haldeman*, 559 F.2d at 132; *Craven*, 22 F.2d at 607-08.

33 *Craven*, 22 F.2d at 607-08.

34 *Berger*, 255 U.S. at 34-36; *American Steel*, 230 U.S. at 44.

35 *See* United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992); Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1329 (8th Cir. 1985); United States v. Alabama, 828 F.2d 1532, 1545-46 (11th Cir. 1987).

36 *See* Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057, 2061 n.25 (1994).

37 *See id.* at 2066.

doctrine to § 455(a). These circuits provide little justification for this statutory construction beyond pointing to the absence of any discussion by Congress, prior to amending § 455, regarding eradication of the extrajudicial source doctrine.[38]

The Fifth and Sixth Circuits have held that § 455 and § 144 "must be construed in *pari materia*."[39] Therefore, "[d]isqualification under § 455(a) must be predicated as previously under § 144, upon extrajudicial conduct rather than on judicial conduct."[40] Similarly, the Ninth Circuit has concluded that § 455 and § 144 are complementary.[41] Accordingly, the same substantive standard of bias applies to both sections.[42]

In the minority, the First and Second Circuits have concluded that Congress intended to abandon the extrajudicial source doctrine upon adopting the 1974 Amendments.[43] These Circuits rely on the plain meaning of the statute and the legislative history as the basis for this conclusion.[44] The test these circuits have applied, as first articulated in *United States v. Cowden*,[45] is "whether the charge of lack of impartiality is grounded in facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of a reasonable man."[46]

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38 *See id.*

39 Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *Pari materia* is a rule of statutory construction stating that "statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactment. . . ." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

40 *Easley*, 853 F.2d at 1351.

41 *See* United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980). Moreover, the Ninth Circuit suggested that "the net result of the complementary sections is that a party submitting a proper motion and affidavit under § 144 can get two bites of the apple. If after considering all the circumstances, the judge declines to grant recusal pursuant to §§ 455(a) and (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to § 144." *Id.*

42 *Id.* at 867. In United States v. Olander, 584 F.2d 876 (9th Cir. 1978), the Ninth Circuit noted that it was incorrect as a matter of statutory interpretation to interpret § 455(a) as setting forth a different test for disqualification from that of § 455(b)(1). This is especially so because both the drafters of the ABA Code and Congress in adopting § 455(b)(1), were careful to follow the language of § 144. *Olander*, 584 F.2d at 882.

43 *See* United States v. Chantal, 902 F.2d 1018, 1022 (1st Cir. 1990); United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

44 *Id.*

45 545 F.2d 257, 265 (1st Cir. 1976).

46 *Id.*

III. Facts and Procedural History

On November 16, 1990, petitioners Patrick Liteky, Charles Liteky, and Father Roy Bourgeois poured human blood on the walls, carpets, and display cases of the Fort Benning Military Reservation.[47] Petitioners were politically motivated to perform these acts in protest of the United States government's involvement in El Salvador. In particular, petitioners were responding to the murders of six Jesuit priests in El Salvador one year earlier.[48] Charged with willful destruction of United States property in violation of 18 U.S.C. § 1361,[49] petitioners were tried by a jury in the District Court for the Middle District of Georgia.

Prior to trial, petitioners moved to disqualify District Judge Robert Elliott pursuant to 28 U.S.C. § 455(a).[50] Premising their argument on the fact that Judge Elliott had presided over a 1983 bench trial involving Father Roy Bourgeois, in which Father Bourgeois had been convicted of various misdemeanors committed during a protest at the same Fort Benning Military Reservation, petitioners alleged that § 455(a) required the Judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[51] The petitioners' motion claimed that Judge Elliott had displayed "impatience, disregard for the defense, and animosity" toward Bourgeois, his co-defendants, and their beliefs both during and after the 1983 trial.[52] Specifically, petitioners pointed to the following actions by Judge Elliott during the 1983 trial, in support of their motion: (1) stating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; (2) observing after Bourgeois' opening statement[53] that it ought to have been directed toward the anticipated evidentiary showing; (3) limiting the defense counsel's cross-examination; (4) judicial questioning of witnesses; (5) periodically cautioning defense counsel to confine his questions to issues material to the trial; (6) cautioning witnesses to keep answers responsive to actual questions directed at material issues; (7) admonishing Bourgeois during closing arguments that it was not the time to make a political speech; (8) interrupting one of Bourgeois' co-defendants during their closing arguments to warn him to cease introduction of new facts and to re-

47 United States v. Liteky, 114 S. Ct. 1147, 1150 (1994).

48 Brief for the United States at 2, Liteky v. United States, 114 S. Ct. 1147 (1994) (No. 92-6921).

49 Section 1361 prohibits "willfully injur[ing] . . . any property of the United States." 18 U.S.C. § 1361 (1983).

50 *Liteky*, 114 S. Ct. at 1150.

51 28 U.S.C. § 455(a) (1988).

52 *Liteky*, 114 S. Ct. at 1150.

53 The opening statement described the purpose of his political protest.

strict him to a discussion of evidence already presented; and (9) giving Bourgeois an excessive sentence.[54] After considering each of these allegations, Judge Elliott rejected petitioners' motion, reasoning that matters arising from judicial proceedings are not grounds for recusal.[55] In addition, Judge Elliott concluded that all other factual allegations relied on in the motion to recuse, and its supporting documents, were erroneous, in that an objective disinterested party would not entertain a significant doubt about the court's impartiality.[56]

Following the denial of petitioners' motion, the case proceeded to trial. Judge Elliott agreed, at the onset of the trial, to allow defense counsel to state the political motivation behind petitioners' actions in their opening statements.[57] While the Judge also permitted petitioners to testify regarding their motivations, the Judge adamantly maintained that he would not allow long speeches discussing government policy.[58] When defense counsel began discussing events in El Salvador during the opening, however, Judge Elliott sustained the prosecution's objection and told defense counsel to limit his statement to what he intended the evidence to show.[59] At the close of the prosecution's case, petitioners' renewed their motion under § 455(a), adding "the judge's admonishing [of Bourgeois] in front of the jury regarding the opening statement and the Judge's unspecified admonishing [of] others" as grounds for disqualification.[60] After Judge Elliott's second denial of petitioners' § 455(a) motion, the petitioners were convicted for the willful destruction of United States property.[61] Claiming that the District Judge wrongfully denied their recusal motion, the petitioners appealed.[62] The Eleventh Circuit affirmed the lower court's decision, holding that "matters arising out of the course of judicial proceedings are not a proper basis for recusal."[63] The petitioners next filed a petition for certiorari with the United States Supreme Court. The Supreme Court granted certiorari to decide

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54 *Id.*

55 *Id.*

56 Brief for the United States at 10, *Liteky* (No. 92-6921).

57 *Liteky*, 114 S. Ct. at 1151.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* The court sentenced Patrick and Charles Liteky to a prison term of six months and Father Bourgeois to a term of sixteen months. Brief for the United States at 2, *Liteky* (No. 92-6921). All three defendants were fined $636.47 in restitution. *Id.*

62 *Liteky*, 973 F.2d at 910.

63 *Id.* (citing United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988)); *In re* Corrugated Container Antitrust Litig., 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980); Davis v. Board of Sch. Comm'rs., 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)).

whether required recusal under § 455(a) is subject to the limitation of the "extrajudicial source doctrine," and to resolve the inconsistency among the circuits.[64]

II. Summary of the Opinions

A. Majority Opinion

Justice Scalia, writing for the majority,[65] affirmed the decision of the Court of Appeals, holding that § 455(a) is subject to the limitation of the extrajudicial source doctrine.[66] Justice Scalia reached this conclusion after examining the origin of the extrajudicial source doctrine, the doctrine's applicability to § 455(a), and its resulting implications on recusal jurisprudence and the facts of this case.[67]

The Court first reviewed the history of the extrajudicial source doctrine to better understand its scope. The Court determined that Congress promulgated the extrajudicial source doctrine in response to 28 U.S.C. § 144.[68] Requiring judicial disqualification for "personal bias or prejudice," § 144 contains language similar to the language in § 455(b)(1).[69] The petitioners argued that because the word "personal" in § 144 provides the basis for the extrajudicial source doctrine, the absence of the word "personal" in § 455(a) precludes its application to this case.[70] Justice Scalia rejected this textual argument, reasoning that "bias and prejudice [are] not divided into the 'personal' kind, which is offensive, and the official kind, which is perfectly all right."[71] Rather, the term "personal" is simply an adjective that emphasizes the "idiosyncratic nature of bias and prejudice,"—dispositions that are never appropriate.[72] Furthermore, the Court concluded that interpreting the term "personal" in the manner suggested by petitioners would create a complete dichotomy between court-acquired and extrinsically acquired bias, and produce absurd results.[73]

The Court found that the origin of the extrajudicial source doctrine is the pejorative connotation of the words "bias or prejudice" in § 144.[74] The terms "bias" and "prejudice" "connote a favorable or un-

64 *Liteky*, 114 S. Ct. at 1150.

65 Chief Justice Rehnquist and Justices O'Connor, Thomas, and Ginsburg joined in Justice Scalia's opinion.

66 *Id.* at 1158.

67 *Id.*

68 *Id.* at 1152.

69 28 U.S.C. § 144 (1982); 28 U.S.C. § 455 (1988).

70 Brief for Petitioner at 15, *Liteky v. United States*, 114 S. Ct. 1147 (1994) (No. 92-6921).

71 *Liteky*, 114 S. Ct. at 1154.

72 *Id.*

73 *Id.*

74 *Id.* at 1155.

favorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess, or because it is excessive in degree."[75] The Court recognized that not all of a judge's unfavorable dispositions toward an individual are the result of "bias or prejudice."[76] Requiring judges to be impartial does not mean that they must display "child-like innocence, [for] [i]f the judge did not form judgements of the actors in those court-house dramas called trials, he could never render decisions."[77] The "extrajudicial source" doctrine developed as a mechanism to help ensure that judges do not recuse themselves unless their "judicial predispositions . . . go beyond what is normal and acceptable."[78] Because of the similarity in language between § 455(b)(1) and § 144, the Court recognized that the extrajudicial source doctrine clearly applied to § 455(b)(1). The Court then identified an equivalent pejorative connotation of the term "partiality" in § 455(a).[79] As a result, the Court concluded that the same extrajudicial source limitation in § 144 and § 455(b)(1), which derives from this pejorative connotation, limits § 455(a) as well.[80] Based on the pejorative connotation of these terms, Justice Scalia concluded that the sort of "child-like innocence that elimination of the 'extrajudicial source' limitation would require is not reasonable."[81]

As a matter of statutory construction, Justice Scalia also explained that if § 455(a) did not contain a limitation which § 455(b)(1) contained, the statute would contradict itself.[82] Subsection (a), according to Justice Scalia, acts as a "catch all" section which both expands the protections provided by subsection (b), and duplicates some of these protections with regard to bias or prejudice, and interest or relationship.[83] Thus, within these overlapping sections, it would be inconsistent to interpret § 455(a) as implicitly eliminating a limitation

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75 *Id.*

76 *Id.*

77 *Id.* (citing *In re* J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943)).

78 *Id.*

79 The Court stated "[p]artiality does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate." *Liteky*, 114 S. Ct. at 1156.

80 *Id.* The Court also noted that even if the pejorative connotation of "partiality" were not enough to import the "extrajudicial source" doctrine into § 455(a), the "reasonableness" limitation in this section would have the same effect. *Id.* This limitation refers to the fact that § 455(a) only requires recusal when the judge's impartiality "might reasonably be questioned." *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

specifically set forth in § 455(b).[84]

Though Justice Scalia held that mandatory recusal under § 455(a) is subject to the extrajudicial source limitation, he rejected a per se extrajudicial source rule.[85] Rather, Justice Scalia noted that it would be better to speak of the existence of an "extrajudicial source factor" rather than an "extrajudicial source doctrine" in recusal jurisprudence.[86] Justice Scalia elaborated that a judicial opinion derived from an outside source is neither a necessary condition nor a sufficient condition for "bias or prejudice" recusal, reasoning that bias is no less offensive when it stems from a judicial proceeding.[87] Thus, the Court held that there will be some circumstances where a predisposition developed during the course of a trial will suffice for recusal,[88] and other circumstances where a predisposition developed outside of the trial will not suffice.[89]

Justice Scalia then discussed two implications of the presence of the extrajudicial source factor.[90] First, he noted that judicial rulings alone will almost never constitute a valid basis for a bias or partiality motion.[91] By themselves, they cannot show reliance upon an extrajudicial source, and only in the rarest of circumstances can they evidence the degree of favoritism or antagonism required when no extrajudicial source is involved.[92] Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceeding, or of prior proceedings, do not rise to the level of recusal unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.[93] Thus, Justice Scalia noted that, ordinarily, neither judicial remarks made during the course of a trial that are critical, disapproving of, or even hostile to counsel, the parties, or their cases, nor a judge's efforts at courtroom administration support a bias or partiality challenge.[94]

In the final section of the Court's opinion, Justice Scalia applied the facts of the instant case to the foregoing principles. The Court found that the grounds for petitioners' motion, which consisted of judicial rulings, routine trial administration efforts, and ordinary ad-

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84 *Id.*
85 *Id.* at 1157.
86 *Id.*
87 *Id.*
88 Justice Scalia did admit that such circumstances are rare. *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*

monishments to counsel and to witnesses, were insufficient to support a recusal motion.[95] All occurred within the context of judicial proceedings, and neither relied upon knowledge acquired outside such proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.[96]

B. JUSTICE KENNEDY'S CONCURRENCE

Although Justice Kennedy applauded the majority's departure from a per se extrajudicial source rule, he wrote separately to express his disapproval of the "undue emphasis" the Court placed "upon the source of the challenged mindset in determining whether disqualification is mandated by § 455(a)."[97] Justice Kennedy concluded that the proper inquiry under § 455(a) is the appearance of partiality rather than its origin.[98]

Justice Kennedy agreed that, as an empirical matter, there is some utility to the distinction between extrajudicial and intrajudicial sources,[99] but he concluded that the majority took this distinction too far.[100] He reasoned that the Court erred in adopting a standard which places all but dispositive weight upon the source of the alleged disqualification.[101] Justice Kennedy asserted that the majority's standard is not a fair interpretation of the statute and is insufficient to serve and protect the integrity of the courts.[102] Furthermore, he contended that in practice, the standard will be difficult to distinguish from the extrajudicial source rule that the Court claims to reject.[103]

Justice Kennedy further noted that the Court's standard, which asks "whether fair judgment is impossible,"[104] bears little resemblance to the statutory standard which Congress specifically adopted:

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95 *Id.* at 1158.

96 *Id.*

97 *Id.* (Kennedy, J., concurring).

98 *Id.* at 1158-59 (Kennedy, J., concurring).

99 Justice Kennedy recognized that "doubts about a judge's impartiality seldom have merit when the challenged mindset arises as a result of some judicial proceeding." *Id.* at 1160 (Kennedy, J., concurring). Thus, the dichotomy between extrajudicial and intrajudicial sources does provide a "convenient shorthand to explain how courts have confronted the disqualification issue in circumstances that recur with some frequency." *Id.* (Kennedy, J., concurring).

100 *See id.* at 1161 (Kennedy, J., concurring).

101 *Id.* (Kennedy, J., concurring).

102 *Id.* (Kennedy, J., concurring).

103 *Id.* (Kennedy, J., concurring).

104 Justice Kennedy is referring to the portion of the majority's holding that states that opinions arising during the course of judicial proceedings require disqualification under § 455(a) only if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (Kennedy, J., concurring).

whether a judge's "impartiality might reasonably be questioned."[105] This divergence from Congress' standard defeats the intended goal of § 455(a), because it requires examining the judge's state of mind, rather than focusing on the overall appearance of the judge's disposition to a detached observer.[106] Justice Kennedy argued that the majority's standard would have a negative bearing on the integrity of the courts, as well as the interests of the litigants, because of its limited, almost preclusive character.[107] Since "[t]here are bound to be circumstances where a judge's demeanor or attitude would raise reasonable questions concerning impartiality, but would not devolve to the point where one would think fair judgment impossible,"[108] this narrow construction defies the flexible scope that Congress intended § 455(a) to have.[109] Justice Kennedy proposed that the proper standard, which should apply to all allegations of fixed predispositions regardless of their source, follows from the language of the statute: "disqualification is required if an objective observer would entertain a reasonable question about the judge's impartiality."[110]

Finally, Justice Kennedy pointed out that the structure of § 455 clearly indicates that subsections (a) and (b), while addressing many of the same underlying circumstances, operate independently.[111] Moreover, Justice Kennedy noted that *Liljeberg v. Health Services Acquisition Corp.*[112] explicitly rejected any interplay between subsections (a) and (b).[113] Justice Kennedy further noted that one of the distinct concerns of § 455(a) is the appearance of impartiality, whether or not § 455(a) addresses the alleged disqualifying circumstance.[114] Accordingly, § 455(b) does not govern § 455(a) as the majority holds.[115]

Applying his construction of § 455 to the case, Justice Kennedy concluded that the actions of Judge Elliott did not raise any inference of bias or partiality.[116]

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105 *Id.* at 1162 (Kennedy, J., concurring).

106 *Id.* (Kennedy, J., concurring).

107 *Id.* at 1161 (Kennedy, J., concurring). For example, a challenge would fail even if it were shown that an unfair hearing were likely, for it is possible to argue that a fair hearing would be possible nonetheless. *Id.* (Kennedy, J., concurring).

108 *Id.* (Kennedy, J., concurring).

109 *Id.* (Kennedy, J., concurring).

110 *Id.* at 1162 (Kennedy, J., concurring).

111 *Id.* (Kennedy, J., concurring).

112 486 U.S. 847 (1988).

113 *Id.* (Kennedy, J., concurring).

114 *Liteky*, 114 S. Ct. at 1163 (Kennedy, J., concurring).

115 *Id.* (Kennedy, J., concurring).

116 *Id* (Kennedy, J., concurring).

V. ANALYSIS

This Note concludes that the Supreme Court improperly applied an extrajudicial source limitation to § 455(a), because the text of the statute, as well as its legislative history clearly indicate that Congress did not intend the doctrine to apply to § 455(a). Furthermore, this Note asserts that neither recusal jurisprudence nor public policy support the holding that the extrajudicial source doctrine applies to § 455(a). Rather, the proper standard for disqualification under § 455(a) is whether the charge of lack of impartiality is grounded in facts that create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge or in the mind of the movant, but in the mind of a reasonable person.[117]

A. THE TEXT OF § 455(a)

The plain meaning of the statutory language reveals that Congress did not intend for the extrajudicial source doctrine to limit § 455(a). Rather, the language of § 455(a) and § 455(b) suggests that these subsections function autonomously.

In determining whether the extrajudicial source doctrine applies to § 455(a), courts must ascertain the statute's plain meaning by examining the particular language at issue and the language and design of the statute as a whole.[118] If the statute is clear and unambiguous, courts must give effect to Congress' unambiguously expressed intent and cannot pay deference to a contrary interpretation.[119] Section 455 is facially unambiguous. The plain language of § 455(a) does not contain an extrajudicial source limitation. Subsection (a) demands that a judge recuse himself "where his impartiality might reasonably be questioned."[120] There is no stated requirement that recusal is mandated only in instances where a judge's partiality arises extrajudicially, nor is there any indication from the statute as a whole that § 455(b)(1)'s extrajudicial source requirement limits § 455(a).[121] The only logical conclusion from the plain language of the statute is that Congress in-

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117 United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).

118 K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (finding section 526 of the Tariff Act of 1930 to be sufficiently ambiguous and, thus, allowing deference to the Secretary of Treasury's interpretation of the Act).

119 *Id.*

120 28 U.S.C. § 455(a) (1988).

121 On the contrary, the language of § 455(a) suggests that Congress intended it to act as a "catch-all phrase". The language of § 455(a) is broad and sweeping: it requires recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1988). Application of the extrajudicial source doctrine to § 455(a) will narrow the scope of this subsection, thereby hindering the statute's intended function of restoring public confidence in the integrity of the judiciary.

tended § 455(a) to include appearances of partiality which arise both judicially and extrajudicially.

The extrajudicial source doctrine primarily arose in connection with § 144. The presence of the word "personal" in § 144, as well as its requirement that the party file an affidavit ten days in advance of proceedings provided the statutory basis for the application of this doctrine.[122] "Personal" as used in the phrase "personal bias or prejudice" is another way of saying "extrajudicial."[123] Because § 455(b)(1) also uses the term "personal," the extrajudicial source doctrine applies to recusal motions brought under that subsection.[124] Unlike § 144 and § 455(b)(1), § 455(a) does not use the term "personal."[125] Hence, the justification for applying the extrajudicial source doctrine to § 455(a) is absent.[126] Additionally, the courts relied on the presence of the filing limitation as another justification for the extrajudicial source doctrine, reasoning that because the party had to file the affidavit ten days prior to the beginning of the term, the events leading to recusal could not possibly arise from facts adduced during the litigation.[127] Section 455(a) does not have a filing requirement, thus, there is no basis for applying the extrajudicial source doctrine to § 455(a).[128]

Subsection 455(a) and subsection 455(b) are autonomous.[129] Subsection 455(b) begins: "he [the judge] shall *also* disqualify himself in the following circumstances. . . ."[130] Subsection (b) enumerates specific circumstances mandating recusal; these include instances of actual bias as well as specific instances of assumed bias.[131] The inclusion of the term "also" suggests that § 455(a) and § 455(b) have independent force.[132] The language of the statute does not suggest, contrary to the majority's construction, that § 455(b) imposes a limitation on § 455(a).[133] Moreover, § 455(a) requires merely an appear-

122 *See* Liteky v. United States, 114 S. Ct. 1147, 1165 (1994) (Kennedy, J., concurring).

123 United States v. Baltistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985).

124 *Id.*

125 28 U.S.C. § 455(a) (1988).

126 United States v. Chantal, 902 F.2d 1018, 1023-24 (1st Cir. 1990).

127 Berger v. United States, 255 U.S. 22, 34-36 (1921).

128 *Chantal*, 902 F.2d at 1023. It is important to note that circuits which rely on the presence of the term "personal" and the filing limitation as a basis for the extrajudicial source doctrine, still find that, despite the absence of these two specifications in § 455(a), the extrajudicial source doctrine also applies to § 455(a). The circuits provide no rationale for their interpretation.

129 Liteky v. United States, 114 S. Ct. 1147, 1162 (1994) (Kennedy, J., concurring).

130 28 U.S.C. § 455 (1988) (emphasis added).

131 *See id.*

132 *Liteky*, 114 S. Ct. at 1163 (Kennedy, J., concurring).

133 *Id.* (Kennedy, J., concurring).

ance of bias, while § 455(b) requires bias in fact.[134] Subsection 455(e) provides further textual confirmation of the difference between the two subsections.[135] Section 455(e) forbids judges from accepting a waiver of any ground for disqualification under subsection 455(b).[136] However, when a ground for disqualification "arises only under § 455(a), [a] waiver may be accepted. . . ."[137]

B. LEGISLATIVE HISTORY OF § 455

Even if § 455 were ambiguous on its face, the legislative history of the recently amended section suggests that Congress intended to abandon the extrajudicial source doctrine with respect to § 455(a). Congress amended § 455 in response to courts' articulation of the "duty to sit" in close cases and criticism of the prior statute's subjectiveness.[138] The amended recusal provision, 28 U.S.C. § 455(a), now permits disqualification of judges even if alleged prejudice is a result of judicially acquired information, unlike the earlier law which permitted recusal only when the judge had developed preconceived opinions from extrajudicial sources.[139]

In amending § 455, Congress emphasized the importance of restoring public confidence in the integrity of the judiciary by broadening the application of § 455 in favor of recusal.[140] Thus, the underlying goal of § 455(a) is to avoid the appearance of partiality, regardless of whether partiality exists.[141] For that reason, the source of the partiality has no bearing on a § 455(a) inquiry.[142] Bias or prejudice against a party, which arises in the course of a judicial proceeding, is no less inimical to the interests which § 455(a) safeguards than is bias which arises elsewhere.[143] Neither Congress, nor any of the courts which have applied the extra-judicial source doctrine to § 455(a), provide any rational basis for believing that an appearance of bias which arises in a judicial setting is less of a threat to the public's confidence in the judiciary than an appearance of bias which arises extrajudicially.[144] As a result, the remedy which § 455(a) pro-

134 *See* United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990) (§ 455(a) provides an independent basis for mandating disqualification which requires no determination of bias in fact).

135 *Liteky*, 114 S. Ct. at 1163 (Kennedy, J., concurring).

136 28 U.S.C. § 455 (1988).

137 *Id.*

138 H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5.

139 United States v. Chantal, 902 F.2d 1018, 1022 (1st Cir. 1990).

140 H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5.

141 *See* Liteky v. United States, 114 S. Ct. 1147, 1161 (1994) (Kennedy, J., concurring).

142 *Id.* (Kennedy, J., concurring).

143 Petitioner's Brief at 15, *Liteky* (No. 92-6921).

144 *Id.* at 14.

vides should be identical.[145]

Moreover, Congress explained that § 455(a) is a "catch-all" provision: "Subsection (a) of the amended § 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which his impartiality might be questioned."[146] Subsection 455(a) cannot logically function as a "catch-all" if an entire category of bias—that acquired through participation in judicial proceedings—is automatically excluded from consideration on a motion for recusal.[147] To the extent that § 455(a) is a "catch-all" provision, it is clear that Congress intended that subsection to be independent of § 455(b), and also considerably broader.[148] Subsection 455(b) delineates specific instances of *actual bias* as well as specific instances of assumed bias.[149] In contrast, § 455(a) addresses the *appearance* of partiality, guaranteeing that a judge will not sit whenever a reasonable person would question his impartiality.[150] Furthermore, those circuits which have suggested that courts should read § 455 and § 144 in *para materia* ignored Congress' intent, in amending § 455, to liberalize recusal standards by making § 455(a) a "catch-all" provision.[151] The courts failed to recognize that § 144 has remained practically unchanged since its adoption in 1911,[152] while § 455 underwent significant changes in 1974.[153] Given the different time frames in which Congress developed the two statutes, it is illogical to claim that the recently amended § 455 and the eighty-three-year-old § 144 are meant to be read together.

Reading § 455(a) to exclude the extrajudicial source requirement is in accord with Congress' intent to abolish a subjective standard. Subsection (a) looks at the judge's impartiality through the eyes of a detached reasonable observer, regardless of the subjective intent of the judge.[154] The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's "impartiality might reasonably be questioned."[155] This statutory standard, which the Court preserves for allegations of an extrajudicial nature, looks only for an appearance of

145 *Id.* at 15.
146 H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5.
147 Petitioner's Brief at 14, *Liteky* (No. 92-6921).
148 *See* H.R. REP. No. 1453 at 5; S. REP. No. 419 at 5.
149 *Liteky*, 114 S. Ct. at 1163 (Kennedy, J., concurring).
150 *Id.* (Kennedy, J., concurring).
151 *See* H.R. REP. No. 1453 at 5.
152 *See id.*
153 *See id.*
154 *See* 28 U.S.C. § 455 (1988).
155 Liteky v. United States, 114 S. Ct. 1147, 1161 (1994) (Kennedy, J., concurring).

partiality.[156] The Court's standard, whether fair judgment is impossible, unlike the statutory standard, demands direct inquiry into the judge's actual, rather than apparent, state of mind and thus defeats the underlying goal of the amendments, which is to avoid a subjective inquiry.[157]

Finally, Congress' decision to omit the word "personal" in § 455(a) suggests that it did not want the extrajudicial source doctrine to limit § 455(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[158] The ABA code was adopted in 1972 in light of a long line of cases holding that "personal" as used in § 144 meant extrajudicial.[159] There is no indication in the ABA code, the accompanying commentary, or the legislative history of § 455 that Congress disapproved of this earlier judicial interpretation of "personal."[160] Against this background, it is clear that by amending § 455 Congress intended to transfer the extrajudicial bias limitation contained in § 144 to § 455(b)(1), but did not intend for it to apply to § 455(a).[161]

The majority in *Liteky* ignored the legislative history of § 455. The Court should have reserved judgment until examining this illuminating history. Had the Court done so, it would likely have produced a more logical and well-reasoned opinion.

C. SUPREME COURT PRECEDENT

The Court placed undue emphasis on *United States v. Grinnell*,[162] which provides a weak basis for the extrajudicial source doctrine. Justice Kennedy, in his concurrence, argued that the extrajudicial source doctrine has no foundation in the history of recusal jurisprudence.[163] He noted that the term "extrajudicial source," though not the interpretive doctrine bearing its name, has appeared in only one previous United States Supreme Court case, *Grinnell*.[164] In *Grinnell*, the respondents moved to recuse the trial judge pursuant to § 144,[165] alleging

156 *Id.* (Kennedy J., concurring).
157 *Id.* (Kennedy J., concurring). *See infra* note 187.
158 Rodriguez v. United States, 480 U.S. 522, 525 (1987).
159 United States v. Coven, 662 F.2d 162, 167-68 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).
160 *Id.* at 168.
161 *Id.*
162 384 U.S. 563 (1966).
163 Liteky v. United States, 114 S. Ct. 1147, 1159 (1994) (Kennedy, J., concurring).
164 *Id.* (Kennedy, J., concurring).
165 *Grinnell*, 384 U.S. at 580. Section 144 has the same requirement as § 455(b)(1) of

that the trial judge held a personal bias against them.[166] The Court denied the claim, stating that "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[167] In enunciating the extrajudicial source doctrine, the Court did not erect a per se barrier to recusal.[168] The Court in *Grinnell* further stated that certain in-court statements by the judge "reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for"; that during the trial, the judge "repeatedly stated that he had not made up his mind on the merits"; and that another of the judge's challenged statements did not "[manifest] a closed mind on the merits of the case," but rather was "a terse way" of reiterating a prior ruling.[169] Had the Court intended the extrajudicial source doctrine to be dispositive under § 144, those further remarks by the Court would have been unnecessary.[170]

Furthermore, the Court provides little justification for its pronouncement in *Grinnell* of the extrajudicial source doctrine, since it relies upon only a single citation to *Berger v. United States*.[171] This cited passage from *Berger*, however, stands for the significantly narrower proposition that the alleged bias "must be based upon something other than rulings in the case."[172] *Berger*, in turn, relies merely upon one earlier case, *Ex parte American Steel Barrel Co.*,[173] to support this narrow proposition. Thus, the Court's reasoning in *Grinnell* is logically unsound, because it failed to account for the difference between a rule requiring that bias arise from an extrajudicial source, and a rule providing that judicial rulings alone cannot sustain a challenge for bias. Hence, *Grinnell* provides a weak basis for reading the extrajudicial source doctrine into § 144.[174]

The Court should have relied on *Liljeberg*,[175] which indicates that

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personal bias or prejudice.

166 *Id.*

167 *Id.* at 583.

168 *See id.*

169 *Id.*

170 Liteky v. United States, 114 S. Ct. 1147, 1159 (1994) (Kennedy, J., concurring).

171 255 U.S. 22, 31 (1921).

172 *Id.*

173 230 U.S. 35, 44 (1913) (the predecessor of § 144 "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise").

174 *Liteky*, 114 S. Ct. at 1159 (Kennedy, J., concurring).

175 *Liljeberg* arose out of a § 455 motion. *Grinnell*, on the other hand, arose out of a § 144 motion.

courts must read § 455(a) independently of § 455(b).[176] In *Liljeberg*, the respondent sought to disqualify a district judge under § 455(a) because the judge had a financial interest in the outcome of the litigation, of which he [the judge] was not aware.[177] Opposing disqualification, the petitioner asked the Court to interpret § 455(a) in light of § 455(b)(4), which provides for disqualification only if the judge "knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding."[178] The petitioner argued that Congress intended the explicit knowledge requirement in § 455(b)(4) to govern § 455(a), because otherwise the knowledge requirement would be meaningless.[179] In concluding that the scienter requirement of § 455(b)(4) is not a limitation upon § 455(a), the Court noted that petitioner's argument ignored important differences between § 455(a) and § 455(b)(4).[180] Most importantly, § 455(b)(4) required disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually created an appearance of impartiality.[181] To read § 455(a) as providing that the judge must know of the disqualifying facts, requires not simply ignoring the language of the provision, which makes no mention of knowledge, but further requires concluding that the language in § 455(b)(4), which expressly provides that judges must know of their interest, is extraneous.[182] The Court further noted that a careful reading of the respective subsections makes clear that Congress intended to require knowledge under § 455(b)(4), but not under § 455(a).[183] Moreover, advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process—does not depend upon whether or not the judge actually knew of the facts creating an appearance of impropriety, so long as the public might reasonably believe that he knew.[184] The goal of § 455(a) is to avoid even the appearance of partiality. Thus, if it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigants, then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts.[185] In applying

176 *See Liljeberg*, 486 U.S. 847, 859-60 (1988).
177 *Id.*
178 28 U.S.C. § 455(b)(4) (1988).
179 *Liljeberg*, 486 U.S. at 859.
180 *Id.* at 861.
181 *Id.*
182 *Id.* at 859.
183 *Id.*
184 *Id.* at 859-60.
185 *Id.* at 860.

the *Liljeberg* Court's rationale to § 455(b)(1), it is clear that Congress did not intend (b)(1) to place a limitation on § 455(a).

E. FLAWS IN THE COURT'S HOLDING

Because the Court recognized the unfairness of the extrajudicial source doctrine, it carved out an exception to the doctrine in certain circumstances where the judge's actions exhibit "pervasive bias or prejudice."[186] However, the Court admits that it would be rare for a judge's impropriety to rise to the level of pervasive bias or prejudice, thus, leaving the extrajudicial source doctrine completely intact.[187] For a judge to recuse himself under these circumstances the movant must show an "impossibility of fair judgment." Under this threshold, a § 455 challenge would fail even if it were shown that an unfair hearing were likely, because it could be argued that a fair hearing would be possible nonetheless.[188] The integrity of the courts, as well as the interests of the parties and public would be ill-served by this rule.[189] There are bound to be circumstances where a judge's demeanor or attitude would raise reasonable questions concerning impartiality, but would not devolve to the point where one would think fair judgment impossible.[190] Thus, the Court, in effect, is allowing judges a zone of immunity in which to voice their prejudices. This, in turn, raises concerns about the accountability of federal judges appointed for life terms.

F. APPLICATION TO THE FACTS OF THE CASE

The proper, explicitly stated standard for judge recusal is: "whether the charge of lack of impartiality is grounded in facts that would create a reasonable doubt concerning the judge's impartiality, in the mind of a reasonable person."[191] In applying this standard under § 455(a), the First Circuit in *Cowden* held that the mere fact that a judge has already presided over the separate jury trials of codefendants does not constitute reasonable grounds for questioning his impartiality in a subsequent jury trial involving a remaining defendant.[192] The court noted that while judges attempt to shield themselves from needless exposure to matters outside the record, they are necessarily exposed to such matters in the course of ruling on the

186 Liteky v. United States, 114 S. Ct. 1147, 1157 (1994).
187 *Id.* at 1157.
188 *Id.* at 1161 (Kennedy, J., concurring).
189 *Id.* (Kennedy, J., concurring).
190 *Id.* (Kennedy, J., concurring).
191 United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).
192 *Id.* at 266.

admission of evidence.[193] Moreover, the judicial system could not function if judges could deal but once in their lifetime with a given defendant or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case.[194] However, where a judge openly exhibited a partisan zeal for the plaintiff by commenting disparagingly on the defendant's evidence as to plaintiff's contributory negligence in his charge to the jury, during the taking of testimony, and during defendant's closing argument, the First Circuit found, in *Crowe v. Di Manno*,[195] that the judge's activities would lead a reasonable person to believe that the judge was partial to the plaintiff.[196] In finding impropriety on the part of the district judge, the Court of Appeals ordered his recusal.[197]

Applying the same standard to the facts in *Liteky*, Judge Elliott should not have recused himself from the proceedings. The Judge's actions did not give rise to the appearance of impartiality. Rather, his actions were merely an attempt at courtroom administration. Unlike the Judge in *Crowe*, Judge Elliott did nothing to suggest that he was biased. Rather, his actions indicate that he was simply trying to ensure a fair trial, without creating a political forum. Therefore, the Court properly affirmed the judgment of the lower court, but relied on an illogical, unprecedented, unsupported rationale for doing so.

VI. CONCLUSION

In *Liteky v. United States*, the Court applied an extrajudicial source limitation to § 455(a) and found that the judge's actions did not require him to recuse himself from the proceedings. In adopting such a limitation, the Court ignored the legislative history of the 1974 amendments to § 455. The Court's interpretation was inconsistent with the purpose of § 455, which is to restore confidence in the judiciary. The Court should have abandoned the extrajudicial source doctrine as Congress intended, while focusing on the real concern of the statute—the appearance of impartiality. The Court should have applied this standard uniformly for intrajudicial and extrajudicial sources. However, had the Court adopted this standard and applied it to the facts, the Court would have found, similar to its actual finding, that the judge did not need to recuse himself from the proceedings.

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193 *Id.* at 265.
194 *Id.* at 266.
195 225 F.2d 652 (1st Cir. 1955).
196 *Id.* at 658-59.
197 *Id.*