Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)

INTRODUCTION

It has long been recognized that the success of the judiciary depends, fundamentally, on public confidence in the judicial system.[1] That confidence necessarily depends upon public confidence in the impartiality of the judges who implement that system.[2] Indeed, it was the desire to foster public confidence in the impartiality of the judiciary that motivated Congress, in 1974, to enlarge and clarify the standards for judicial disqualification law.[3]

As we approach the twentieth anniversary of the adoption of the amended 28 U.S.C. § 455,[4] most commentators agree that while the standards for judicial disqualification have been textually broadened, they are anything but "clear" and that, consequently, public confidence in the impartiality of the judicial process is threatened.[5]

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[1] *See* THE REPUBLIC OF PLATO, Book III, § 405(a), at 84 (Allan Bloom trans., 1968) ("When licentiousness and illness multiply in a city, aren't many courts and hospitals opened, and aren't the arts of the law court and medicine full of pride when even many free men take them very seriously?") (comment of Socrates to Glaucon).

The above quote ought not to be read as a categorical endorsement of the judicial system, however, as the comment was made only to suggest "how much finer and better it is to arrange [one's life] so as to have no need of a dozing judge." *Id.* § 405(c).

[2] *See* Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 267 (1978) (recognizing "the need for a judicial system that not only is impartial in fact, but also *appears* to render disinterested justice").

[3] 28 U.S.C. § 455 (1988). Section 455 of the United States Code, the general judicial disqualification provision, was amended in 1974. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609. The fundamental purpose behind the section's amendment was to "broaden and clarify the grounds for judicial disqualification" in order "to promote public confidence in the impartiality of the judicial process." H.R. REP. No. 1453, 93d Cong., 2d Sess. 1, 5, *reprinted in* 1975 U.S.C.C.A.N. 6351, 6351, 6355 [hereinafter HOUSE REPORT].

[4] December 5, 1994 will mark the 20th anniversary of the adoption of amended § 455.

[5] *See* Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 663 (1985) (stating that modern judicial disqualification law is deficient because its formalistic and rigid approach to disqualification often fails to accommodate the somewhat conflicting interests of ensuring judicial impartiality on the one hand, and maintaining judicial efficiency on the other). *See generally* Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1481-82 (1981) (arguing that the law of judicial disqualification is unsettled and proposing a test for disqualification which would con-

Part I of this Comment provides a general overview of the modern framework of federal judicial disqualification law and introduces the concept of the extrajudicial source doctrine.[6] Part II addresses § 455's history and the congressional purposes behind the 1974 amendment. Part III demonstrates the approaches various circuits have taken to incorporate the extrajudicial source doctrine into a § 455(a) analysis. Part IV discusses the contrary position of the First Circuit that judicial bias can be disqualifying under § 455(a). Part V addresses what appears to be particular confusion within the Third Circuit regarding the applicability of the extrajudicial source doctrine. Part VI discusses a case that the United States Supreme Court recently decided upholding the extrajudicial source doctrine. Finally, Part VII offers further support of why the extrajudicial source doctrine should be retained.

I. MODERN STATUTORY FRAMEWORK OF FEDERAL JUDICIAL DISQUALIFICATION LAW: 28 U.S.C. §§ 144 AND 455

Sections 144 and 455 of the Judicial Code contain the heart of judicial disqualification law.[7] Section 144 sets out the procedural

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centrate only on the reasonableness of a litigant's belief in the existence of bias); Mark T. Coberly, Comment, *Caesar's Wife Revisited—Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1201-02 (1977) (analyzing proposed automatic disqualification procedures and concluding that the problems inherent in such a system compel retention of the present statutory scheme); 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, 697-98 (1987) (articulating concern that federal judicial interpretation of 28 U.S.C. § 455 has limited the intended broad scope of the section by requiring an elevated standard of proof of bias and by restricting the situations where bias can be found); Litteneker, *supra* note 2 (suggesting that the current judicial disqualification scheme is riddled with substantive and procedural deficiencies and does not provide a total solution to the problems of judicial bias and prejudice); Ellen M. Martin, Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 139-40 (1976) (stating that congressional amendment to § 455 of title 28 of the United States Code intending to broaden and clarify the grounds for disqualification has not achieved its stated purpose and suggesting further congressional action).

[6] Throughout this Comment, I will refer to the judicially created doctrine that only extrajudicial bias warrants disqualification as the "extrajudicial bias limitation." *See* Litteneker, *supra* note 2, at 254 (referring to the limitation that disqualifying bias must be extrajudicial in nature as "the extrajudicial bias limitation").

[7] 28 U.S.C. §§ 144, 455 (1988). A third provision exists which provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1988). Section 47 appears to be designed to prevent a recently promoted judge from hearing appeals from cases that the judge decided below. *See* Burg, *supra* note 5, at 1448 & n.17 (noting that while § 47 applies only to circuit court judges and not to Supreme Court Justices, the practice of Supreme Court Justices presiding over cases that they heard below could be attacked under § 455(a)).

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United

requirements that must be complied with by a party seeking recusal[8] for bias or prejudice.[9] Conversely, § 455[10] is devoid of any procedural requirements and enumerates the criteria for mandatory self-disqualification of all federal judges.[11]

A. *Section 144*

While § 144[12] reads as if it is meant to be a peremptory approach to disqualification, a conclusion supported by the section's legislative history,[13] the United States Supreme Court has long held

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States Constitution likewise require disqualification where the appearance of justice is not satisfied. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see, e.g.*, *In re* Parr, 13 B.R. 1010, 1019 (E.D.N.Y. 1981) ("The Fifth Amendment's Due Process Clause will bar a trial where the appearance of justice is not satisfied.") (citing *In Re* Murchison, 349 U.S. 133, 136 (1955)). The *Parr* court recognized that the constitutional right is independent of §§ 144 and 455 but noted that "any bias violative of Due Process 'would have more readily violated § 144 and § 455.'" *Id.* (quoting United States v. Haldeman, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977)). Accordingly, Supreme Court rulings on judicial disqualification in the federal courts have generally interpreted the Judicial Code and not the Due Process Clauses of the Constitution. Litteneker, *supra* note 2, at 237 n.6 (citing Berger v. United States, 255 U.S. 22 (1921)).

[8] While the terms "disqualification" and "recusal" differ in that disqualification refers to statutorily mandated removal of a judge and recusal to *sua sponte* removal by the judge, this Comment will uniformly use the term "disqualification" for both recusal and disqualification as the distinction is largely irrelevant today because "[u]nder current statutes, disqualification is mandated in virtually all cases where recusal is appropriate." Litteneker, *supra* note 2, at 237 n.5.

[9] 28 U.S.C. § 144 (1988). The section is set out in its entirety *infra* at note 12.

[10] 28 U.S.C. § 455 (1988). Section 455 is set out *infra* at note 29.

[11] *Compare* 28 U.S.C. § 144 (1988) *with* 28 U.S.C. § 455 (1988).

[12] Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
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> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144 (1988).

[13] *See* Coberly, *supra* note 5, at 1216 (citation omitted). This fact was illustrated by an exchange between two congressmen debating the recusal statute. *Id.* at 1216 n.102. In this exchange, Representative Cullop of Indiana was asked by Representative Cox whether judges were allowed discretion in determining the sufficiency of affidavits filed pursuant to § 144:

> Mr. Cullop: . . . no, it provides that the judge shall proceed no

that such a broad reading of the section is unwarranted.[14] In an effort to avoid abuse and judge shopping, the Supreme Court, in *Berger v. United States*,[15] seized on the "legally sufficient" requirement of § 21 of the Judicial Code (the predecessor to § 144).[16] The *Berger* Court determined that a judge was required to evaluate the legal sufficiency,[17] but not the truth, of allegations of bias.[18]

While the *Berger* mandate stipulated that an affidavit is legally sufficient under § 144 when it gives "fair support" to a charge of partiality, the standard has become more rigorous over the years as courts have applied a "clear and convincing" standard[19] and now evaluate whether the facts of an affidavit are sufficient to convince

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> further with the case. The filing of the affidavit deprives him of jurisdiction in the case.
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> Mr. Cox: . . . Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?
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> Mr. Cullop: No; it expressly provides that the judge shall proceed no further.

Id. (quotation omitted).

14 *See* Idaho v. Freeman, 507 F. Supp. 706, 715 (D. Idaho 1981).

15 255 U.S. 22 (1921).

16 *See* Freeman, 507 F. Supp. at 715. The *Berger* Court declared that an affidavit filed pursuant to § 21 "must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment." *Berger*, 255 U.S. at 33-34.

17 *Berger*, 255 U.S. at 36. Today, a three-part test has evolved to determine the legal sufficiency of a § 144 motion which requires a party to demonstrate that: "1. The facts are material and stated with particularity; 2. The facts are such that, if true they would convince a reasonable person that a bias exists; [and] 3. The facts show that the bias is personal, as opposed to judicial, in nature." United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987)(citing Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976) (quotation omitted)); *see also* United States v. Merkt, 794 F.2d 950, 960 n.9 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

18 *Berger*, 255 U.S. at 36. The Court understood that enabling the judge to pass on the truth of the allegations would "give[ ] chance for the evil against which the section is directed." *Id.*

The requirement that a judge may not pass on the truthfulness of the allegations of a § 144 motion is absolute and requires the judge to assume that the facts of the motion are true even where the judge knows that they are false. *See Alabama*, 828 F.2d at 1540; United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986); United States v. Jeffers, 532 F.2d 1101, 1112 (7th Cir. 1976), *aff'd in part and vacated in part*, 432 U.S. 137 (1977); *In Re* Union Leader Corp., 292 F.2d 381, 391 (1st Cir. 1961).

19 For a discussion of the clear and convincing standard now applied to § 144, see Hoekema, *supra* note 5, at 706-07.

The author points out that a higher standard of proof is required under § 144 than § 455(a). *Id.* at 706. It is suggested that the higher standard of proof is necessary to provide a counterbalance to the mandate under § 144 that a judge accept all statements contained in the affidavit as true. *Id.*

a reasonable person of the existence of bias.[20] The standard is also difficult to meet because courts have determined that § 144's procedural requirements must be given a strict construction to protect the judiciary from meritless attacks upon its integrity.[21] In an effort to avoid the abuses of such frivolous attacks, courts have determined that even the slightest infraction of any of § 144's procedural rules will usually result in a refusal to disqualify.[22]

A final condition of § 144 that makes disqualification difficult is the requirement that a judge's alleged judicial bias must be "personal."[23] While a considerable amount of caselaw and commentary has been devoted to the meaning of the term,[24] personal bias is essentially bias derived from an extrajudicial source.[25] The extraju-

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20 Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *see also Balistrieri*, 779 F.2d at 1199 ("An affidavit is sufficient [under § 144] if it avers facts that, if true, would convince a reasonable person that bias exists.") (citation omitted); *Alabama*, 828 F.2d at 1540.

21 United States v. Moore, 405 F. Supp. 771, 772 (S.D. W. Va. 1976) (citation omitted); *see also* United States v. Haldeman, 559 F.2d 31, 134 (D.C. Cir. 1976) (stating that § 144 motions must be strictly construed in order to "guard against groundless claims and the impositions they would inflict on the judicial process"), *cert. denied*, 431 U.S. 933 (1977).

22 *See, e.g.*, United States v. Kelley, 712 F.2d 884, 887-88 (1st Cir. 1983) (determining that a § 144 motion could be found legally insufficient where the motion did not include a certificate of counsel, failed to state new evidence supporting disqualification, and was untimely); *Union Leader*, 292 F.2d at 385 (finding a § 144 motion legally insufficient where the certificate of counsel certified that the affiant, rather than counsel, was acting in good faith).

The *Union Leader* court stressed the "indispensable value" of § 144's procedural requirements, especially the requirement that an affidavit filed pursuant to § 144 contain a certificate of counsel stipulating that the factual allegations contained in the complaint have been made in good faith. *Id.* The court reasoned: "If a certificate is to serve the purpose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct." *Id.*

Finally, the *Union Leader* court noted that the strict procedural requirements of § 144 are not unduly burdensome because if a party fails to produce a sufficient affidavit indicating bias, the party will be protected in the future if prejudice or bias "appear in fact during the course of trial." *Id.* at 389 (citations omitted).

23 28 U.S.C. § 144 (1988).

24 For thorough discussions of the judicial definitions of "personal bias or prejudice," see generally Litteneker, *supra* note 2; Note, *Disqualification of a Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749 (1973); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966) [hereinafter Harvard Note].

25 United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). The Supreme Court has long held that "[t]he 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." *Id.* (citing Berger v. United States, 255 U.S. 22, 31 (1922)); *see also* United States v. Balistrieri, 779 F.2d, 1191, 1199 (7th Cir. 1985) (stating that personal bias must stem from "some

dicial source doctrine has generally been applied to § 144 in the federal circuits[26] with a single exception for bias that is "pervasive."[27] The extrajudicial limitation established by the Supreme

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source other than what the judge has learned through participation in the case") (citation omitted), *cert. denied*, 477 U.S. 908 (1986); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1329 (8th Cir. 1985) ("Facts learned by a judge in his judicial capacity cannot be the basis for disqualification.") (citations omitted); Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) (maintaining that "'[e]xtrajudicial bias' refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings"), *cert. denied*, 450 U.S. 999 (1981); United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976) (holding that "facts learned by a judge in his judicial capacity cannot be the basis for disqualification") (citation omitted), *cert. denied*, 430 U.S. 931 (1977); United States v. Bernstein, 533 F.2d 775, 785 (2d Cir.) ("[W]hat a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification."), *cert. denied*, 429 U.S. 998 (1976).

In *United States v. Haldeman*, the Court of Appeals for the District of Columbia noted that as far back as 1927, personal bias was contrasted with judicial bias and that personal bias "'characterizes an attitude of extrajudicial origin, derived *non coram judice*. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute.'" *Haldeman*, 559 F.2d at 132 (quotation omitted).

26 Litteneker, *supra* note 2, at 252.

27 *See, e.g.*, Hamm v. Members of Bd. of Regents, 708 F.2d 647, 651 (11th Cir. 1983) (stating that courts will make an exception to the extrajudicial bias general rule "when a judge's remarks in a judicial context demonstrate such *pervasive bias* and prejudice that it constitutes bias against the party") (emphasis added) (citation omitted).

This "pervasive bias" exception to the extrajudicial limitation for bias is exemplified by the early case of *Crowe v. Di Manno*, 225 F.2d 652 (1st Cir. 1955). *Crowe* involved a personal injury action instituted by a woman who was dismembered when the car she was driving collided with defendant's tractor trailer. *Id.* at 653-54. At the outset of the opinion, the Court of Appeals for the First Circuit noted that "the District Judge participated very actively in the trial from beginning to end." *Id.* at 655. While the Court of Appeals realized that trial judges are permitted, indeed encouraged, to question witnesses in order to clarify testimony, the court articulated that such participation must be fair, impartial, and accurate. *Id.*

Turning to the district judge's questioning of witnesses in the case below, however, the court of appeals cited numerous instances where the trial judge's comments were neither fair nor impartial but rather "obviously hostile" towards the defendants and lenient towards the plaintiff. *Id.* at 656-58. Based upon the district judge's "disparaging[ ]" and "uncalled for" remarks towards defendants throughout the trial, the court of appeals proffered that the district judge had, "figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff [and] openly exhibited partisan zeal for the plaintiff wholly out of keeping with his office which deprived the defendants of their fundamental right to a fair and impartial trial." *Id.* at 657-59.

Relying on, among others, the *Crowe* decision, the Court of Appeals for the Sixth Circuit disqualified a judge for pervasive bias one year after *Crowe* when the court found that the district judge's "active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was . . . ." Knapp v. Kinsey, 232 F.2d 458, 467 (6th Cir. 1956)

Court has not only stood the test of time for disqualification under § 144 but has also had a profound effect on disqualification under § 455.[28]

B. *Section 455*

Section 455,[29] unlike § 144, has no procedural requirements

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(citations omitted). Echoing the sentiments expressed by the *Crowe* court, the *Knapp* court indicated that judicial bias is rendered personal and disqualifying:

> When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored.

Id. at 466 (citation omitted).

While originating for § 144 motions, the pervasive bias exception is also vigorously applied to § 455, as evidenced by the Fifth Circuit's application of the pervasive bias exception to § 455(a) in *United States v. Holland.* United States v. Holland, 655 F.2d 44 (5th Cir. 1981).

In *Holland,* the defendant, on appeal, sought to have the district judge disqualified based on the judge's comments that the defendant "broke faith" with the court by appealing and, consequently, attempted to increase the defendant's sentence. *Id.* at 45 & n.2. The appellate court ordered the judge disqualified because a reasonable person would question the judge's impartiality where such pervasive prejudice is shown. *Id.* at 47.

Likewise, in *Nicodemus v. Chrysler Corp.,* the Sixth Circuit Court of Appeals, recognizing that some degree of bias will no doubt develop as part of the judicial process, nevertheless disqualified the district judge under § 455(a), stating that "'[i]f . . . a judge's bias appears to have become overpowering, we think it disqualifies him.'" Nicodemus v. Chrysler Corp., 596 F.2d 152, 156 (6th Cir. 1979) (quotation omitted); *see also, Hamm,* 708 F.2d at 651 (stating that an exception to the general rule that bias must be extrajudicial applies where a judge's remarks in a judicial context evidence pervasive bias and prejudice, but noting that "[n]either a trial judge's comments on lack of evidence, rulings adverse to a party, nor friction between the court and counsel constitute pervasive bias"); *In re* International Business Machines Corp., 618 F.2d 923, 928 n.6 (2d Cir. 1980) ("[C]onduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party."); Whitehurst v. Wright, 592 F.2d 834, 838 (5th Cir. 1979) (noting that the general rule is that disqualifying bias must be extrajudicial, but that there is an exception for bias that is pervasive); Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 824-25 (5th Cir. 1969) (holding that repeated accusations of bias unsupported by facts and based upon adverse rulings are insufficient to demonstrate the quality of judicial bias necessary for disqualification).

[28] United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). See *supra* note 25 for the extrajudicial limitation standard adopted by the United States Supreme Court in *Grinnell.*

[29] Section 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:

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

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

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor 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 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.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal and financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;;

(iii) The proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

with which a party alleging bias must comply;[30] instead, § 455 is self-enforcing and mandates disqualification whenever any of its provisions are violated.[31] Section 455(a) contains a general disqualification provision mandating disqualification whenever a judge's "impartiality might reasonably be questioned."[32] Next, subsection (b) enumerates specific examples of situations where recusal is required.[33] While textually § 455(a) places no restric-

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(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, or magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455 (1988).

30 See *supra* note 12 for the text of § 144. While § 144 requires a party to file an affidavit alleging bias on the part of the judge and a certificate of counsel stating that the disqualification motion has been made in good faith, § 455 has no such procedural requirements. See *supra* notes 21-22 and accompanying text for a discussion of the application of § 144's procedural requirements.

31 28 U.S.C. § 455(a) ("Any . . . judge . . . *shall* disqualify himself . . . .") (emphasis added). Section (b) adds further support to the mandate that the primary responsibility for disqualification is placed on the judge. *Id.* § 455(b) ("He *shall* also disqualify himself . . . .") (emphasis added). A party may also petition for disqualification under § 455 by motion or in the appeal process. Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Hoekema, *supra* note 5, at 700; *see also* Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (determining that a party need not follow a particular procedure under § 455(a); federal judges must observe § 455 guidelines *sua sponte*).

A waiver provision exists in § 455(e), providing that the parties may agree to waive disqualification under subsection (a) but not under any of the enumerated circumstances of subsection (b). 28 U.S.C. § 455(e) (1988). A waiver under subsection (a), however, must be "preceded by a full disclosure on the record of the basis for disqualification." *Id.*

32 28 U.S.C. § 455(a) (1988).

33 *Id.* § 455(b). As the focus of this Comment is on the extrajudicial limitation applied to §§ 455(a) and 455(b)(1), the enumerated provisions of §§ 455(b)(2),(3),(4), and (5) and 455(c),(d),(e), and (f) are beyond its scope and will not be discussed. For detailed discussions of when factors such as past legal and professional experience and financial interest will disqualify a judge, see Bloom, *supra* note 5, at 684-700; Burg, *supra* note 5, at 1447-55. *See generally*, Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538 (1973).

tions on the type of bias required for disqualification, most federal circuits have held that the extrajudicial bias limitation adopted by the Supreme Court in *United States v. Grinnell Corporation*[34] for § 144 applies to § 455(a) as well.[35] All commentators who have addressed the issue however, pointing to the legislative history of § 455 and the wording of the section itself, have argued that § 455(a) was never intended to contain any restrictions on the type of bias required for disqualification.[36]

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[34] 384 U.S. 563 (1966). See *supra* note 25 and accompanying text for the Supreme Court's adoption of the extrajudicial limitation in *United States v. Grinnell.*

[35] *See, e.g.*, Johnson v. Trueblood, 629 F.2d 287, 290-92 (3d Cir. 1980) (stating that § 455(a) did not change from § 144 the type of bias required for disqualification and holding that statements made by the trial judge at the pretrial settlement conference were judicial in nature and "add[ed] up more to settlement fever than personal bias warranting recusal under either § 144 or § 455(a)"), *cert. denied*, 450 U.S. 999 (1981); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989) (determining that district judge's denial of plaintiff's motion, pursuant to § 455(a), to postpone trial so plaintiff could assemble evidence was not extrajudicial because the denial was not based on anything the judge learned outside the courtroom); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) (stating that prior recusal of trial judge from a case involving the plaintiff for undisclosed reasons did not warrant judge's disqualification from a second unrelated case involving the same plaintiff), *cert. denied*, 480 U.S. 946 (1987); United States v. Sammons, 918 F.2d 592, 598-99 (6th Cir. 1990) (determining that (1) alleged improper ex parte meeting between the trial judge and prosecutor, (2) erroneous and atypical rulings of the judge in the same year as plaintiff's case, (3) judge's knowledge of prejudicial information, and (4) judge's improper participation in plea negotiations were all a product of the judge's "'participation in the proceedings or prior contact with related cases'" and as such did not warrant recusal under § 455(a)) (quoting Wheeler v. Southland Corp., 875 F.2d 1246, 1251-52 (6th Cir. 1989)); United States v. Sibla, 624 F.2d 864, 867-69 (9th Cir. 1980) (holding that judge's courtroom remarks to the effect that plaintiff's case bordered on frivolousness were insufficient to disqualify under § 455(a) because remarks made at trial are not extrajudicial in nature); McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (holding that plaintiff's disagreement with several evidentiary rulings made by the district court could not be the basis for disqualification under § 455(a) because such rulings were judicial in nature); United States v. Barry, 961 F.2d 260, 264 (D.C. Cir. 1992) (refusing to disqualify judge where judge's remarks at a Harvard Law Forum were foreshadowed by remarks the judge made at sentencing proceeding and as such were judicial in nature and insufficient to warrant § 455(a) disqualification).

[36] Petitioner's Brief at 10, Liteky v. United States, (No. 92-9621) (On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed July 19, 1993) (citations omitted). *See generally* Bloom, *supra* note 5, at 691-92 (arguing that the legislative history to § 455 specifically states that subsection (a) was separated from subsection (b) in order to provide an independent basis for judicial disqualification and that, under § 455(a), a judge should be disqualified whenever the judge's impartiality could reasonably be questioned, regardless of whether the alleged bias is judicial or extrajudicial in nature); Litteneker, *supra* note 2, at 254 (declaring that the extrajudicial limitation for § 455(a) is a "judicial gloss" on the personal bias language in §§ 455(b)(1) and 144, and that application of the limitation to § 455(a) is inconsistent with the language and purpose of the section); Martin, *supra* note 5, at 155 (arguing that application of § 144's strict requirement that bias must be personal and extrajudicial to § 455 defeats Congress's intended purpose to significantly broaden

II. HISTORY OF § 455 AND CONGRESSIONAL PURPOSES BEHIND ITS AMENDMENT

Before embarking on an analysis of the propriety of applying the extrajudicial bias limitation to § 455, it is necessary to consider the section prior to its amendment and the circumstances that influenced its 1974 reform. Prior to 1974, § 455[37] required a federal judge to disqualify himself in specific situations where the judge, "in his opinion," felt that it would be improper to sit.[38] Ostensibly, the section's mandatory (shall) language made it self-enforcing; however, because the judge was the ultimate arbiter of the "substantiality" of his interest and the relationships that would be improper, the self-enforcement provision was superfluous.[39] Moreover, the statute was rapidly losing its bite as many courts be-

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the statutory grounds for judicial disqualification, thus rendering the 1974 amendments to § 455 ineffectual); Hoekema, *supra* note 5, at 709 (articulating that § 455(a) was intended to "fill in gaps" and provide for disqualification when bias could not be established under § 455(b)(1).

The remainder of this Comment will focus on the question of whether the extrajudicial bias limitation established for § 144 has been correctly applied to § 455, and will ultimately conclude that the limitation has rightly been construed to apply to 455(a).

37 The pre-1974 § 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970), *amended by* 28 U.S.C. § 455 (1988).

38 *Id.* This Comment has made every attempt to remain gender neutral when referring to judges generally. Because the pronouns in §§ 144 and 455 are constructed primarily in masculine form with only the latest amendments being gender neutral, however, certain references to judges as "him" or "himself" were necessary to accord with the statutes and to avoid confusion.

39 *See* HOUSE REPORT, *supra* note 3, at 2, 1974 U.S.C.C.A.N. at 6352. ("The uncertainty of who was a 'near relative' or of when the judge was 'so related' caused problems in application . . . . Moreover, the statute made the judge himself the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification.").

The House Report also demonstrated Congress's deep concern that the pre-1974 § 455 conflicted with the Code of Judicial Conduct, which contained separate requirements for disqualification. See *infra* note 43 for the text of the ABA Code of Judicial Conduct. The statement to the House Report noted:

> The existence of dual standards, statutory [§ 455] and ethical [Code of Judicial Conduct], couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. . . . The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.

HOUSE REPORT, *supra* note 3, at 2, 1974 U.S.C.C.A.N. at 6352.

gan to articulate a "duty to sit" in close cases.[40]

In response to growing criticism over § 455's subjectiveness and the "duty to sit" rule,[41] Congress, following the lead of the Judicial Conference of the United States,[42] adopted the American

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40 HOUSE REPORT, *supra* note 3, at 2. 1974 U.S.C.C.A.N. at 6352. The "duty to sit" was a "judicial gloss" on § 455 wherein "a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.'" *Id.* at 5, 1974 U.S.C.C.A.N. at 6355; *see, e.g.*, Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965). The abolishment of the duty to sit was one of the primary objectives enunciated by Congress for § 455's amendment. HOUSE REPORT, *supra* note 3, at 5, 1974 U.S.C.C.A.N. at 6355. Congress held *Edwards* out to be the paradigm of the practice they wished to terminate. *Id.* Therefore, it appears a consideration of the *Edwards* decision, and the judge's reasons for choosing to sit in that case, is warranted.

In a footnote at the outset of his opinion in *Edwards*, Judge Rives explained the determination to sit thusly:

> Judge Hays, the organ of the Court on the original opinion, is a judge of the Second Circuit who was sitting by designation. Judge Cameron, who concurred with Judge Hays, died on April 5, 1964, after a rehearing en banc was ordered but before the case was orally argued and submitted on rehearing. Thereafter I asked the advice of my brothers, stating to them that "since neither Judge Hays nor Judge Cameron can participate in the en banc rehearing . . . it seems to me that to insure complete fairness to both sides, and especially the appearance of fairness to the appellants, I should recuse myself and let this case be considered and decided by the remaining active judges of the Circuit."
>
> Chief Judge Tuttle and Judges Jones, Brown and Gewin advised that I should sit, and Judge Bell advised that he agreed with my tentative view but did not think it inappropriate for me to sit. I did not hear from Judges Hutcheson and Wisdom.
>
> After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, *I have no choice in this case.*
>
> *It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation. . . . While [Judge Hays's and Judge Cameron's] absence makes me prefer not to sit, I have not found that it furnishes me any legal excuse.*
>
> *. . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.*

Edwards, 334 F.2d at 362-63 n.2 (emphasis added); *see* United States v. Diorio, 451 F.2d 21, 24 (2d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) ("[A] trial judge is equally obligated *not* to recuse himself when the facts do not give fair support to a charge of prejudgment, as he is to excuse himself when the facts warrant such action.") (citation omitted).

41 *See* Litteneker, *supra* note 2, at 238-42. For a discussion of the "duty to sit" rule see *supra* note 40 and accompanying text.

42 In April, 1973, the Judicial Conference of the United States promulgated the "Code of Judicial Conduct for United States Judges." *Code of Judicial Conduct for United States Judges*, 69 F.R.D. 273, 273 (1975). The Code was founded upon the American Bar Association's "Code of Judicial Conduct." *Id.* For a brief history of the Judicial Conference, see Warren E. Burger, *The Courts on Trial*, 22 F.R.D. 71 (1958); *A Review of*

Bar Association's Code of Judicial Conduct, Canon 3C.[43] Canon 3C was codified as § 455 with minor changes.[44] As explicitly noted in the legislative history to § 455, Congress's primary objectives in adopting Canon 3C were to: (1) make § 455 conform to the ABA Code;[45] (2) increase public confidence in the impartiality of the judiciary by replacing the subjective standard of the old § 455 with

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the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976, 73 F.R.D. 247 (1976).

43 ABA CODE OF JUDICIAL CONDUCT Canon 3C (1972), *reprinted in* HOUSE REPORT, *supra* note 3, at 4-5, U.S.C.C.A.N. at 6353-54. Canon 3C read in 1972:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter of 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;
>
> (c) 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;
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such 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;
>
> . . .
>
> (2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Id.

44 The most notable change was to make § 455 disqualification mandatory. This was accomplished by stating that a judge "*shall* disqualify himself," 28 U.S.C. § 455 (1988) (emphasis added), rather than "*should* disqualify himself" as Canon 3C required. ABA CODE OF JUDICIAL CONDUCT Canon 3C (1972) (emphasis added).

45 As noted by Judge Traynor during the hearings pertaining to § 455's amendment, "it [was] unseemly to have the Code of Judicial conduct, which ha[d] been adopted by the U.S. Judicial Conference, and the statute[ ] in conflict." *Proposed Amendment to Broaden and Clarify the Grounds for Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1974) [hereinafter *House Hearings*] (statement of Judge Traynor).

an objective one;[46] and (3) remove the "duty to sit" rule established in *Edwards*.[47] Twenty years later, Congress appears to have been achieved its objectives: § 455 and the ABA Code of Judicial Conduct are virtually identical,[48] most courts apply an objective test when deciding if disqualification is warranted,[49] and the concept

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46 The legislative history contained in the House Report noted that the newly amended subsection (a)

> contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion". This general standard is designed 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.

HOUSE REPORT, *supra* note 3, at 5, 1974 U.S.C.C.A.N. at 6354-55.

47 *See id.*; *see also supra* note 40 and accompanying text for a discussion of the *Edwards* case and its articulation of the "duty to sit" rule.

Congress explicitly stated in the legislative history to § 455 that "the language [of amended § 455] . . . has the effect of removing the so-called 'duty to sit'. . . . [E]limination of [the duty] would enhance public confidence in the impartiality of the judicial system." HOUSE REPORT, *supra* note 3, at 5, 1974 U.S.C.C.A.N. 6355.

48 *Compare* 28 U.S.C. § 455 (1988) *with* ABA CODE OF JUDICIAL CONDUCT Canon 3E (1990).

49 Bloom, *supra* note 5, at 673. As the Second Circuit Court of Appeals has stated, "[t]he statute requires the judge to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (citation omitted); *see* United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989). The *Mitchell* court noted that actual bias on the part of the judge is not necessary. *Mitchell*, 886 F.2d at 671. Instead, the court determined the question to be only "'whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.'" *Id.* (quotation omitted).

Likewise, the Eleventh Circuit Court of Appeals has explained: "[U]nder § 455(a) an actual demonstrated prejudice need not exist in order for a judge to recuse himself: 'disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir. 1987) (quotation omitted); *see also* United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992)(articulating that extrajudicial remarks will not warrant disqualification "unless they are of such a character that 'an informed observer would reasonably question the judge's impartiality'") (quotation omitted).

In the above-noted cases, all of the courts noted that the reasonable person objective test that is applied under § 455(a) is only required for bias that is derived from an extrajudicial source. At least one circuit has argued however, that an objective test is required to determine disqualification regardless of whether the alleged bias originated in a judicial or extrajudicial capacity. United States v. Chantal, 902 F.2d 1018, 1024 (1st Cir. 1990). In *Chantal*, the Court of Appeals for the First Circuit rejected the extrajudicial bias limitation and declared that "[t]he question under § 455(a) ' . . . is not whether the judge's statement springs from an extrajudicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial.'" *Id.* (quoting

that judges have a duty to sit in close cases has been abandoned by most circuits.[50]

Despite the apparent fulfillment of the congressional objectives behind § 455's amendment, commentators have assailed the position taken in most circuits that judicial bias, untainted by extrajudicial factors, cannot be disqualifying.[51] A consideration of the different approaches taken by the circuits to justify application of the extrajudicial limitation demonstrates that while their reasons for applying the standard differ, there is almost universal consensus that judicially acquired bias cannot be disqualifying.

III. FEDERAL CIRCUIT APPROACHES TO LIMITING BIAS TO EXTRAJUDICIAL SOURCES

The extrajudicial bias limitation was recently applied to § 455(a) by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Barry*.[52] In *Barry*, the District of Columbia's mayor, Marion S. Barry, appealed a district court order

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Hoekema, *supra* note 5, at 717). *See infra* notes 81-88 for a full discussion of the *Chantal* decision.

Based on the language of § 455(a), the First Circuit's reading of the statute is understandable. A full understanding of the legislative history of § 455, however, renders the circuit's position questionable.

50 *See, e.g.*, United States v. Haldeman, 559 F.2d 31, 139 n.360 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (acknowledging that there was a duty to sit before § 455 was amended, but stating that one of the explicit purposes of the new § 455 was to abolish the duty). The *Haldeman* court was careful to qualify its general proposal that the duty to sit had been abolished with the amendment of § 455 by quoting the following cautionary advice contained in the legislative history to § 455:

> [W]hile the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might reasonably be questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.

Id. (quoting HOUSE REPORT, *supra* note 3, at 5, 1974 U.S.C.C.A.N. at 6355.); *see also* Bradley v. Milliken, 620 F.2d 1143, 1156-57 n.5 (6th Cir. 1980) (noting that courts have agreed that the purpose of amending § 455 was to overrule the duty to sit doctrine).

While there is agreement among the courts that the new § 455 eliminated the duty to sit doctrine, certain commentators have pointed out that some courts have retained a limited version of the duty. *See* Litteneker, *supra* note 2, at 241 n.26 (stating that some courts have managed to retain a limited version of the duty to sit doctrine by according the judge a presumption of impartiality and shifting the burden of proof to the movant to overcome that presumption) (citations omitted); Bloom, *supra* note 5, at 673 n.65 (noting that certain courts have articulated a narrower version of the duty to sit doctrine).

51 See *supra* note 36 and accompanying text for the criticisms of commentators on the courts' importation of the extrajudicial bias limitation, established for § 144, to amended § 455(a).

52 961 F.2d 260 (D.C. Cir. 1992)

that, on remand, resentenced him to prison for six months on a cocaine possession charge.[53] In his appeal, Barry sought, *inter alia*, the disqualification of District Judge Thomas Penfield Jackson, based on remarks Judge Jackson made, four days after sentencing Barry, at a Harvard Law School Criminal Justice Institute forum.[54]

The *Barry* court declared that almost every remark cited by Barry in his § 455(a) motion to disqualify had been foreshadowed by Judge Jackson's comments at the sentencing four days before the Harvard forum.[55] Because Judge Jackson's remarks at sentencing were based upon the judge's observations of the evidence, the court had little trouble concluding that the remarks were derived from a judicial source and, as such, could not be the basis for disqualification under § 455(a).[56]

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53 *Id.* at 261

54 *Id.* at 261-62. The forum was entitled "Presiding Over the Marion Barry Trial." *Id.* at 262. Judge Jackson's remarks, recounted by two students who had been present at the forum, were as follows:

> [Judge Jackson said] he is convinced Barry is guilty of perjury and other crimes and that "he has never seen a stronger government case." . . . "I am not happy with the way the jury addressed this case . . . . Some people on the jury . . . had their own agendas. They would not convict under any circumstances." The judge said he believes four jurors were determined to acquit regardless of the facts. He said they "obviously did not tell the truth" during jury selection when questioned about possible bias.

Id. at 264 (citation omitted).

55 *Id.* Judge Jackson's remarks at Mayor Barry's sentencing proceeding, which preceded the judge's Harvard lecture by four days, were:

> There are . . . other aggravating circumstances to be taken into account. First, although the verdict represents the defendant's first conviction, and is of what some might call a minor crime, the court finds that the offense of which he stands convicted was neither his first nor his last such offense.
>
> Second, I find from the evidence that the defendant employed subterfuge and false testimony—his own and that of others—in an attempt to avoid exposure and prosecution altogether.
>
> The court concludes the defendant's conduct in that regard represented a willful attempt at obstruction of justice.
>
> I am ignoring, for the purposes of sentencing, what I perceive to have been the defendant's efforts, once prosecution had commenced, to induce the jury to disregard the law and the evidence. The jurors will have to answer to themselves and to their fellow citizens for the way in which they discharged their duty.

Id. (citation omitted).

56 *See id.* at 263-65. The *Barry* court prefaced its opinion by declaring that "[the District of Columbia has] long held that to be disqualifying, the appearance of bias or prejudice must stem from an extrajudicial source. A judge's comments on a case are deemed to be 'extrajudicial' only if they have 'some basis other than what the judge learned from his participation in the case.'" *Id.* at 263 (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)) (additional citations omitted).

The *Barry* court did, however, note that Judge Jackson's comments at the forum—suggesting that certain jurors may have lied about their impartiality during the jury selection process—were derived from an extrajudicial source because the remarks could not have been based upon the judge's earlier findings.[57] Nevertheless, the court concluded that a reasonable person would not question Judge Jackson's impartiality based on those remarks alone and, consequently, denied Barry's § 455(a) motion.[58]

The *Barry* opinion demonstrates an approach to § 455(a) disqualification whereby the court will expressly refuse to consider any bias that is judicial in nature, and will apply an objective standard for bias deemed to have been extrajudicially obtained.[59] This approach to disqualification is similar to the approach taken in the Third, Fourth, Eighth, and Eleventh Circuits.[60]

Next, the court demonstrated the District of Columbia Circuit's strict adherence to the rule that, under § 455(a), only extrajudicial bias can be disqualifying when it declared that "remarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based on [the judge's] own observations during the performance of his judicial duties." *Id.*

Finally, the court noted that if remarks are in fact grounded in an extrajudicial source, then the proper standard to evaluate them under § 455 is an objective, reasonable person test. *Id.*

57 *Id.* at 264.

58 *Id.* at 264-65. The court acknowledged that Judge Jackson had, no doubt, developed extremely strong feelings about Mayor Barry's use of cocaine while in public office. *Id.* at 265. The court quoted at length from Judge Jackson's comments during sentencing where the judge openly declared that "proportionate justice" indicated that Barry should receive a sentence similar to the 35- or 12-year sentences recently handed down by the Court of Appeals for the District of Columbia for small-time drug users in other cases. *Id.*

The *Barry* court determined, however, that a reasonable person would not question Judge Jackson's impartiality by placing great emphasis on the fact that, despite his strong feelings, Judge Jackson only sentenced Barry to six months in jail rather than the full eight months that the judge believed was authorized under the sentencing guidelines. *Id.* According to the Court of Appeals:

> [There is] no trace of bias in this sentencing, and we cannot believe that a reasonable observer familiar with this record could believe that Judge Jackson would later punish Barry for the additional sins of four jurors he already believed had betrayed their duty. We conclude, therefore, that § 455(a) did not require Judge Jackson's disqualification.

Id.

59 See *supra* note 49 and accompanying text for a discussion of the objective standard employed by most courts to evaluate alleged extrajudicial bias.

60 *See* United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989) (holding that a judge's refusal to postpone trial was judicial in nature and could not be the basis for disqualification and that other conduct—such as the judge's awareness of a taped telephone conversation between the plaintiff and the judge's wife—although extrajudicial, would not lead a reasonable person to question the judge's impartiality); United States v. Alabama, 828 F.2d 1532, 1545-46 (11th Cir. 1987)(stating that trial judge should have disqualified himself under § 455(a) when the judge had personal

The problem with such an analysis is that it incorporates a limitation on bias established for § 144, because the section contains the word "personal,"[61] into a § 455(a) analysis, even though there is no such "personal" requirement contained therein.[62] No justification is offered by the above-mentioned circuits as to how a § 144 limitation, created long before § 455 was amended, is relevant to an amended § 455(a) analysis.[63]

Both the Fifth and Sixth Circuits have attempted to offer an explanation as to why the extrajudicial limitation of § 144 must be incorporated into § 455.[64] These circuits hold that both sections are to be construed *in pari materia*[65] and that § 455(a) disqualification must be based, as before under § 144, upon extrajudicial conduct only.[66] This explanation has met with considerable criticism

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extrajudicial knowledge of disputed facts which would raise a question about his ability to be impartial); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1329 (8th Cir. 1985) (determining that a judge's rulings on evidentiary matters and certain comments, with the exception of one, made during trial were judicial and insufficient for § 455(a) motion and that the excepted comment, although extrajudicial, would not lead a reasonable person to question the judge's impartiality); Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) (stating that judicial bias does not warrant recusal because such bias can be reviewed on appeal), *cert. denied*, 450 U.S. 999 (1981) .

In *Johnson*, the court spent most of its efforts inquiring whether or not comments made at a pretrial settlement conference can be considered extrajudicial. *Id.* at 290-91. The court found such an inquiry relevant because, in its own words, "only extrajudicial bias requires disqualification." *Id.* Determining that judges can develop opinions prior to trial based upon the evidence and the conduct of the parties, the Third Circuit declared that such pretrial emotions were not extrajudicial in nature and thus insufficient to require an objective analysis under § 455(a). *Id.* at 291-92.

61 See *supra* notes 23-25 and accompanying text for a discussion of how the word "personal" contained in § 144 has been defined by the United States Supreme Court as meaning "extrajudicial."

62 *Compare* 28 U.S.C. § 144 (1988) *with Id.* § 455(a).

63 *See* Bloom, *supra* note 5, at 674-76 (arguing that because § 144 and § 455(b)(1) contain the word "personal" and § 455(a) does not, there were meant to be two separate bias tests under the sections, and that §§ 144 and 455(b)(1) require a "bias-in-fact test" while § 455(a) requires only an "appearance of bias test").

64 *See generally* Easley v. University of Michigan Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988); United States v. Story, 716 F.2d 1088 (6th Cir. 1983); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

65 *In 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).

66 *Story*, 716 F.2d at 1091 (citations omitted). Indeed, the Fifth and Sixth Circuits appear to have incorporated the word "personal" into their test for § 455 disqualification. The Fifth Circuit has declared that "[u]nder both § 144 and § 455, the alleged bias or prejudice must be *personal* and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) (emphasis added) (citation omitted), *cert. denied*, 480 U.S. 946 (1987).

from commentators as well as other circuits.[67]

The Ninth Circuit, while not explicitly stating that §§ 144 and 455 must be read *in pari materia*, has, through its decisions, reached a similar conclusion.[68] The circuit has held that the same substantive standard must be applied to § 144 and § 455(a).[69] In *United States v. Olander*, the Ninth Circuit determined that interpretations of § 144 are controlling for interpretations under § 455(b)(1).[70] The circuit next determined that the same test applied to § 455(b)(1) applies to § 455(a) as well.[71] The circuit reached a

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Likewise, the Sixth Circuit has declared that "bias must be *personal* or extrajudicial in order to justify recusal under § 455(a)." United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990)(emphasis added). The Sixth Circuit has defined personal bias as "bias [that] arises out of the judge's background and associations." *Id.* (quoting Wheeler v. Southland Corp., 875 F.2d 1246, 1251-52 (6th Cir. 1989)).

Both the Fifth and Sixth Circuits' requirement that disqualifying bias under § 455 must be personal appears to be incorrect as § 455(b) plainly includes the term and was meant to cover circumstances where bias "arises out of the judge's background and associations." *See* 28 U.S.C. § 455(b) *supra* (1988). Thus, the Fifth and Sixth Circuits' inclusion of the term personal into a § 455(a) analysis appears to be redundant and a far too narrow reading of the statute.

67 Bloom, *supra* note 5, at 676; David C. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 KAN. L. REV. 255, 262 (1982) ("[R]eading the two sections *in pari materia* violates the usual rules of statutory construction. Section 144 was enacted in 1911 and § 455(a) was amended in 1974, thus there can be no argument that the sections were pieces of companion legislation and should therefore be read together.")

The Fifth and Sixth Circuits' reading together of §§ 144 and 455 has also been criticized by other circuits. *See, e.g.*, Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978)(stating that § 455(a) is intended to have a broader scope than § 455(b)(1)); United States v. Ritter, 540 F.2d 459, 462 (10th Cir.) (acknowledging that § 144 requires a bias in fact standard but noting that § 455(a), as amended, is broader than § 144 and creates an appearance of bias test), *cert. denied*, 429 U.S. 951 (1976). *See generally* United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977).

68 *See, e.g.*, United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980)(applying the same substantive standard to §§ 144 and 455); United States v. Conforte, 624 F.2d 869, 880-81 (9th Cir.) (arguing that the same test applies to § 455 as to § 144), *cert. denied*, 449 U.S. 1012 (1980); United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978) (arguing that the legislative history to § 455 does not indicate that amended § 455 was meant to have a different test than § 144).

69 *Conforte*, 624 F.2d at 880-81.

70 *Olander*, 585 F.2d at 882.

71 *Id.* The circuit determined that "it would be incorrect as a matter of statutory construction to interpret § 455(a) as setting up a different test for disqualification for bias or prejudice from that in § 455(b)(1)." *Id.* This is so, the circuit determined, because subsection (b) is an enumeration of some of the types of bias that will warrant disqualification and, as such, the same test applies for both. *Id.*

This approach has also been criticized by commentators. It has been argued that this approach is contrary to the legislative history of § 455(a) as "[t]he committee report explicitly states that § 455(a) was intended not only to broaden the grounds for disqualification, but to establish grounds for disqualification distinct from those in subsection (b)." Bloom, *supra* note 5, at 675. Bloom's criticism is based on language

curious result in *United States v. Conforte*, however, as the test that the circuit applied to both subsection (a) and (b) is an objective test that does not seem to distinguish between judicial and extrajudicial bias.[72]

The most cogent and persuasive argument justifying the transfer of the extrajudicial limitation from § 144 to § 455(a) was made by the United States Court of Appeals for the District of Columbia

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contained in the legislative history which declared that "[t]hese specific situations in subsection (b) are *in addition* to the general standard set forth in subsection (a)." HOUSE REPORT, *supra* note 3, at 5-6, 1974 U.S.C.C.A.N. at 6355 (emphasis added).

The Ninth Circuit, however, also appears to recognize the intended distinction between § 455(a) and § 455(b)(1). *See Conforte*, 624 F.2d at 880-81. In the *Conforte* opinion, the court specifically stated:

> The standard for measuring the grounds of disqualification is similar [under § 455(a) and (b)(1)], but the sections reach different factual contexts. *Olander* does not undercut the recognition that there may be cases within subsection (a) that are not within subsection (b); and we think this must be so or subsection (e), which allows waiver of disqualification under the former subsection but not the latter, would be without meaning. . . . [S]ubsection (a) is designed to cover contingencies not foreseen by the draftsmen, who set out specific grounds for disqualification under subsection (b). . . . When these specific instances are present, the inquiry must proceed under subsection (b), rather than subsection (a), and waivers may not be accepted.

Id.

The Ninth Circuit's argument that Congress separated subsection (a) from subsection (b) only to distinguish the circumstances when waivers are to be accepted has merit and has been suggested by at least one commentator. *See* Burg, *supra* note 5, at 1481-82 n.228 ("The separation into § 455(a) and § 455(b) may have been done only to distinguish clearly between acceptable and unacceptable situations of waiver.").

There is also evidence in § 455(a)'s legislative history suggesting that the "personal" requirement of § 144 and, consequently, the extrajudicial bias limitation that had developed as a result of the personal requirement, was intended to apply to amended § 455(a). *See House Hearings*, *supra* note 45, at 14-15. In testimony before the House Committee regarding the meaning of the amended § 455(a), John P. Frank described the words "any proceeding in which his impartiality might reasonably be questioned" as "terms of art" that were "meant to cover the kind of thing where, for example, personal relationships are involved." *Id.*; *see infra* note 76 (setting forth a more detailed discussion of Frank's testimony). *Contra* Litteneker, *supra* note 2, at 254 ("Such a strict interpretation . . . seems to accord neither with the language nor the purpose of the amendment. . . . The purpose of the section—to guarantee disqualification whenever a judge's impartiality might reasonably be questioned—suggests that disqualification is necessary regardless of the source of the appearance of bias.").

72 *Conforte*, 624 F.2d at 881. The *Conforte* court explained the Ninth Circuit's test for bias this way:

> [W]e think the test under either subsection (a) or (b) is the same, namely, whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice.

Id.

in *United States v. Haldeman*.[73] In *Haldeman*, the court noted that the extrajudicial bias limitation existed and was applied to the pre-1974 § 455 long before the section was amended.[74] Yet the court noted that nothing in the legislative history to the section intimated that the limitation was meant to be abolished.[75] Indeed, there is not a single mention of the time-honored extrajudicial source requirement in the legislative history to amended § 455.[76]

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[73] United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

[74] *Id.* at 133 n.297.

[75] *Id.* The words that the *Haldeman* court used to retain the extrajudicial bias limitation are worth noting. The court stated:

> For a long time before enactment of new § 455(a) in 1974, the judicial understanding of § 144 and old § 455 was that they were to be confined in operation to extrajudicial conduct or conditions. Nothing we have observed in the legislative history of new § 455(a) suggests that this construction was to be overturned. The Fifth Circuit has concluded that new § 455(a) is to be similarly interpreted. Absent clearer guidance as to the congressional intent, we agree, and by the same token, we might add, Canon 3(C)(1) is to be similarly read. The appearance-of-impropriety standard in terms summons a disqualification, not merely when the judge's impartiality might somehow be questioned, but only when it may *reasonably* be questioned. We think reasonableness of the challenge must take due account of the effect which its acceptance will have on the judicial process. So drastic would be the impact that we are unwilling to ascribe to ethical and legislative formulators of that standard a purpose to direct it toward judicial rulings on questions of law.

Id. (citations omitted). *See* Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (finding "no suggestion in the legislative history that these decisions [adopting the extrajudicial bias limitation] were being overruled or in anywise eroded"), *cert. denied*, 425 U.S. 944 (1976).

This reasoning is extremely persuasive as one can assume (in fact, one must) that Congress was aware of the long line of both pre-and post-*Grinnell* cases that required bias to stem from an extrajudicial source to be disqualifying.

[76] *See generally House Hearings*, *supra* note 45. While there are no specific references to the extrajudicial bias limitation contained in the legislative history of § 455, there are a number of remarks which indicate that, if anything, the limitation was meant to be retained, not abolished. For example, John P. Frank, an expert on judicial ethics and the principal witness to the legislative hearings on S. 1064, the bill which would ultimately become amended § 455, engaged in the following exchange with Representative Robert W. Kastenmeier, the Chairman of the House Subcommittee that considered the bill:

> MR. KASTENMEIER. I am wondering what the practical meaning of this is:
>
> Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> MR. FRANK. May I address myself to that? As you have said, the committee does not deal with this commonly and therefore you may be unaware that these are terms of art. These are not empty words, what they do is adopt the ABA standard as it has existed since 1922, and as it has been interpreted over and over again by the ABA canons and decisions around the country. . . . I want to make loud and clear for purposes of this record, because I assume that this record may have importance for

In view of the conspicuous absence of any reference to the limitation in Congress's clearly enunciated objectives for amending § 455, it would be curious to assume that Congress's silence on the doctrine was, in fact, an implicit rejection of the doctrine.[77]

Again, this is not to say that under a *Haldeman* analysis a judge, so long as he or she makes references to the facts of the case, is free to flaunt an outright bias against a party. Courts have carefully created an exception to the extrajudicial limitation where judicial bias is "pervasive."[78] The "pervasive bias" standard is the appropriate standard under which to evaluate judicial bias because it pays heed to both of Congress's objectives—it silently affirms the extrajudicial limitation[79] while simultaneously increasing public confidence in

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> many, many years in the future, that this does not mean that judges are going to be casually getting off the bench or that somebody can march into a judge and say, "Well, I just don't feel comfortable with you. I wish you would go away. I question your impartiality." That is not to happen at all.
>
> For example, it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it; something of that sort. To that event he has made up his mind. To challenge on that ground is not permitted by this clause at all. It is meant to cover the kind of thing where, for example, personal relationships are involved. A judge may in fact have personal ties of friendship . . . so close with a litigant that he feels that it is just not right for him to be in that case. This permits him to take himself out, in that [sic] circumstances.

Id. at 14-15. The "point of view" that judges gain when "involved" in a matter, which Mr. Frank addresses in his comments, is arguably nothing more than judicial bias, and his contrast of this bias with "personal" bias or prejudice is simply a contrast between judicial and extrajudicial bias; the former being wholly insufficient for § 455(a) disqualification, and the latter requiring disqualification whenever disqualification would be the "reasonable" choice.

77 *See* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.") (citation omitted).

Indeed, where Congress intended to change the "judicially created concept" of the "duty to sit," which was being applied to the old § 455, it had no trouble announcing its intentions in a clear manner. See *supra* note 47 and accompanying text for a discussion of Congress's explicit desire to eliminate the duty to sit doctrine. Arguably, the extrajudicial limitation for bias is as fundamental a doctrine to judicial disqualification law as the duty to sit doctrine; it would be illogical to assume that Congress's explicit elimination of the latter was meant to be an implicit elimination of the former. The author of this Comment maintains that Congress's failure to include the extrajudicial bias limitation in its clearly enumerated objectives for amended § 455 should be understood as a silent affirmation of the doctrine, not an implicit rejection.

78 See *supra* note 27 and accompanying text for a discussion of the pervasive bias exception to the extrajudicial bias limitation.

79 *See supra* note 75 (arguing that the exclusion of the extrajudicial bias limitation from the legislative history of § 455 should be read as an affirmation of the doctrine).

the impartiality of judges.[80]

IV. THE FIRST CIRCUIT REJECTS THE EXTRAJUDICIAL BIAS LIMITATION

In *United States v. Chantal* the First Circuit completely disavowed the extrajudicial limitation applied by its sister circuits.[81] In *Chantal,* appeal was taken from a decision of the United States District Court for the District of Maine, where Chief Judge Gene Carter refused to disqualify himself from a proceeding despite having made strong remarks about the defendant when sentencing him in a prior case.[82]

The United States Court of Appeals for the First Circuit flatly rejected Judge Carter's reasons for refusing to disqualify himself below, noticing that Judge Carter had utilized the wrong standard in the lower court opinion.[83] The *Chantal* court noted that Judge

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80 See *supra* note 3 and accompanying text (noting that the primary objective behind amending § 455 was to enhance public confidence in the judicial process).

The pervasive bias exception increases public confidence in the judiciary because it ensures that a judge will not be disqualified based upon the "points of view" the judge may have developed at trial unless those views are clearly prejudicial.

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

82 *Id* at 1019-20. Judge Carter's remarks about defendant Chantal at a prior sentencing hearing were as follows:

> I can have no confidence whatever that [you] will change [your] ways in the future. The Court views this case in terms of sentencing to be a more serious case than apparently the Government does. This is an individual who has had a privileged pattern of existence, a lot of family support, and an intact family that was very supportive of him, who undertakes to become actively involved, to profit only, as near as I can tell, in the distribution of cocaine, and was involved in it over a period of time, and repeatedly comes back to the distribution of cocaine. I have seen no indication whatever that he has in any way expressed here or anywhere else any remorse or regret for this course of conduct. And I think this is very, very serious, that if people cannot concede or conceive of the ultimate evil of this substance and the practice of distributing it to people even after they've been caught and convicted, I can have no confidence that they are not going to, at the first opportunity they have after they leave this courtroom following sentencing, *go right back to the same type of activity.*
>
> My consideration of all the information I have about this Defendant and my observations of his demeanor on every occasion, including today, when he's been before this Court, indicates to me that *he is an unreconstructed drug trafficker;* and I can have *no confidence* whatever that *he will change his ways in the future.*

Id. at 1019-20.

83 *Id.* at 1021. Judge Carter stated the reasons for refusing to disqualify himself as follows:

> As to Defendant's Motion to Recuse—After a full review of the written submissions of the parties on the within motion it is hereby *DENIED.*

Carter's reliance on the extrajudicial limitation would be on "solid ground" in other circuits but declared that the First Circuit had aligned itself with all commentators who had addressed the issue and determined that judicial bias could be disqualifying.[84]

The court contrasted its interpretation of amended § 455 with the Fifth and Ninth Circuits' interpretation[85] and declared that, unlike circuits which apply the same standard to §§ 455(a) and 455(b)(1), the First Circuit would consider § 455(a) to provide an independent basis for disqualification.[86] Determining that comments made at trial or the circumstances of their origin are not pertinent under § 455(a), the *Chantal* court declared that the standard in any § 455(a) disqualification was a simple reasonable person test.[87] Accordingly, the *Chantal* court remanded to allow Judge

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> The Defendant has failed to support the motion with the affidavit required under 28 U.S.C. § 144. Further, the allegation of fact in support of the motion *clearly implies* that the *basis for the claim of bias or prejudice is information known to the judge because of his performance of judicial duties in Defendant's prior case.* The information is not from *an "extra-judicial source"* and is therefore not an adequate basis to force recusal.

Id. at 1020 n.3 (citations omitted). The circuit court declared that Judge Carter "was judging his appearance of impartiality by the wrong standard." *Id.* at 1021.

84 *Id.* at 1021-22 The court declared that "[t]he First Circuit . . . has repeatedly subscribed to what all commentators characterize as the correct view that, unlike challenges under 28 U.S.C. § 144, the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." *Id.* at 1022.

The court quoted extensively from a 1978 First Circuit opinion where that court stated:

> We recognize that the newly 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 in contradistinction to the prior law that *required* a judge to hear a case unless he had developed preconceptions by means of extrajudicial sources. The rationality for the amendments to the statute . . . was "to foster public confidence in the judicial system" by requiring disqualification based on "a reasonable factual basis for doubting the judge's impartiality".

Id. at 1022 (quoting United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978)).

85 See *supra* notes 64-72 for a discussion of the Fifth and Ninth Circuits' interpretation of § 455(a).

86 *Id.* at 1023. The court noted that "[t]he question under § 455(a) '. . . is not whether the judge's statement springs from an extrajudicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial.'" *Id.* at 1024 (quoting Hoekema, *supra* note 5, at 717).

87 *Id.* at 1024. The court simply asked: "would a reasonable, responsible— perhaps even a non-judge—person have doubts about the judge's impartiality?" *Id.* The court labelled this § 455(a) disqualification test "the *Cowden* question" as it was patterned after a test established in *United States v. Cowden. Id.* In *Cowden*, the court asked:

> [W]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality,

Carter to determine whether or not the judge should disqualify himself under the proper standards enunciated by the *Chantal* court.[88]

V. CONFLICT WITHIN THE CONFLICT: THIRD CIRCUIT CONFUSION

Perhaps even more disturbing than the conflict among the federal circuits regarding the extrajudicial bias issue is an apparent conflict within the Third Circuit itself.[89] The Third Circuit originally established itself as a staunch proponent of the extrajudicial limitation.[90] The circuit's position is extremely questionable, however, in light of its recent decision in *Haines v. Liggett Group Inc.*[91]

The Third Circuit adhered to the extrajudicial limitation in *Johnson v. Trueblood*, where minority shareholders of a corporation filed a shareholders' derivative action against the majority shareholders.[92] After numerous settlement attempts failed and a number of mistrials were declared, a noticeable tension developed both between the parties and between the trial judge and plaintiffs.[93] When trial finally commenced, plaintiffs filed a motion pursuant to § 144 to have the district judge disqualified.[94] The district judge also determined, *sua sponte*, whether he should recuse himself pursuant to § 455(a).[95] The district judge denied both the plaintiff's § 144 motion and his own § 455(a) recusal.[96]

On appeal, the United States Court of Appeals for the Third Circuit addressed the issue of whether the district judge had properly denied the recusal motions.[97] The court began by noting that the Third Circuit's position under both § 144 and 455(a) was that bias, to be disqualifying, must stem from an extrajudicial source.[98]

> 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 the reasonable man.

United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977).

88 *Chantal*, 902 F.2d at 1024.

89 *Compare* Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981) *with* Haines v. Liggett Group Inc., 975 F.2d 81 (3d Cir. 1992).

90 *Johnson*, 629 F.2d at 290-91 (3d Cir. 1980).

91 975 F.2d 81 (3d Cir. 1992), discussed *infra* at notes 102-31.

92 *Johnson*, 629 F.2d at 289, 290-91.

93 *Id.* at 289-90.

94 *Id.* at 290. The plaintiffs based their § 144 motion on "certain scheduling and other rulings by the district court." *Id.* at 291.

95 *Id.* at 290.

96 *Id.*

97 *Id.* at 290-92.

98 *Id.* at 290-91. The court compared § 144 to § 455(a) and concluded:

Accordingly, the court determined that a judge's rulings could not be the basis for recusal under either section.[99]

Having firmly established that any bias, to be disqualifying, must stem from an extrajudicial source, the court turned its attention to certain pro-defendant and anti-plaintiff comments made by the district judge at settlement negotiations to determine if they could be considered extrajudicial.[100] Notwithstanding that the comments were made at a settlement conference, the court of appeals deemed them judicial in nature and insufficient to disqualify under § 455(a) because the district judge's comments were based upon the judge's perception of the case.[101]

> Although Congress has not indicated the precise parameters of the two provisions . . . both statutes require the same type of bias for recusal . . . .
>
> In general, it seems that § 455(a) was intended only to change the standard the district judge is to apply to his or her conduct; it does not alter the type of bias required for recusal. Thus the rule under § 144 continues [for § 455(a)] that only extrajudicial bias requires disqualification.

Id. (citations omitted).

Thus, the Third Circuit appears to have subscribed to the same philosophy employed by the District of Columbia Circuit in *United States v. Haldeman*, which articulated that Congress was well aware of the extrajudicial limitation but never indicated that the limitation was meant to be abolished. See *supra* notes 73-77 for a discussion of the *Haldeman* case and the reasons that court proffered in support of retaining the extrajudicial bias limitation. The "standard" to which the court referred, which Congress intended to change by amending § 455(a), is no doubt a reference to the pre-1974 subjective standard that a judge was required to disqualify himself "in his opinion" whenever the judge found recusal appropriate. *See supra* note 46 and accompanying text (discussing Congress's explicit intent to change the pre-1974 subjective standard for § 455 disqualification to an objective one).

99 *Id.* at 291.

100 *Id.* During settlement negotiations, the district judge made statements to the plaintiffs that the lawsuit had been a "'personal tragedy for the defendants' who were 'honest men of high character.' He also questioned the plaintiffs' motives in bringing the lawsuit and stated that plaintiff Gilbert Johnson was unable to reason logically from A to B." *Id.*

101 *Id.* at 291-92. The Court of Appeals rejected plaintiffs' argument that, because the comments were made before trial had even begun, they were necessarily extrajudicial. *Id.* at 291. The court declared that a "judge often can get a feel for a case prior to trial, which means that his perceptions can be based on the conduct of the parties and the evidence. Thus feelings about a case are not necessarily 'extrajudicial' solely because they are made during settlement negotiations." *Id.*

The court realized that a blanket rule holding all comments made by a judge before trial extrajudicial, without an inquiry as to whether the comments were based upon the judge's evaluation of the case, rather than upon personal animus or prejudice would "unduly hamper [a] judge's ability to effectuate settlement." *Id.* Specifically, the court declared: "The relevant inquiry is whether the trial judge's pretrial comments were linked to his evaluation of the case based on the pleadings and other materials outlining the nature of the case, or whether the comments were based on purely personal feelings towards the parties and the case." *Id.*

The Third Circuit's opinion in *Johnson*, however, is a far cry from its recent decision in *Haines v. Liggett Group Inc.*[102] In *Haines*, respondent Susan Haines, as administratrix of her deceased husband's estate, filed a personal injury action against various leading tobacco companies[103] based on theories of product liability, conspiracy, and tort.[104] Pursuant to a discovery request by Haines, a council created by the tobacco companies[105] to study the health hazards of smoking produced more than 2000 documents but withheld approximately 1500 others, claiming that the withheld documents fell into the privileged categories of attorney-client communications and work product.[106] Haines argued that any privilege to the documents was annulled under the crime-fraud exception.[107] A magistrate judge determined that the crime-fraud exception did not apply to the documents.[108]

Haines appealed the magistrate's conclusion regarding the non-applicability of the crime-fraud exception to the district court.[109] District Judge H. Lee Sarokin, in an opinion issued February 6, 1992, addressed the applicability of the crime-fraud exception to the disputed documents.[110] The judge found "prima facie evidence" of an ongoing fraud by the defendants and that the crime-fraud exception applied to some of the documents.[111] Judge Sarokin accordingly reversed the magistrate's order as to those documents.[112] Based upon Judge Sarokin's opening remarks in his opinion, the defendant tobacco companies then petitioned the Third Circuit for a writ of mandamus to vacate Judge Sarokin's order and to have the case assigned, pursuant to the court's supervi-

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102 975 F.2d 81 (1992).

103 The companies sued by Haines were "Liggett Group, Inc., R.J. Reynolds Tobacco Co., Loew's Theatres, Inc., Philip Morris Incorporated and the Tobacco Institute." *Id.* at 85.

104 *Id.*

105 The council, entitled "Council for Tobacco Research," was the successor to the "Tobacco Industry Research Committee." *Id.* The council, through a grant program under the direction of the Scientific Advisory Board, funded independent research; it did not conduct original research. *Id.*

106 *Id.* Specifically, the council produced "(1) all correspondence, memoranda, research proposals, and research results prepared by the researchers themselves or others working under their direction; and (2) all correspondence to or from researchers, including correspondence with petitioners or their counsel." *Id.*

107 *Id.* at 86.

108 *Id.*

109 *Id.* at 87.

110 *Id.*

111 *Id.* at 88.

112 *Id.*

sory powers, to a different district court judge.[113]

The Third Circuit began its disqualification analysis by noting that "the press reported these remarks prominently."[114] Next, the court acknowledged that the right to trial by an impartial judge is constitutionally mandated under the Due Process Clause.[115] The court further noted that it had supervisory power to mandate that cases be assigned to a different judge when such reassignment was necessary to avoid the appearance of partiality.[116]

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[113] *Id.* at 88, 97. The tobacco industry claimed that the case had to be reassigned because Judge Sarokin was "so prejudiced against them that they [could] not hope to get a fair trial." *Id.* at 97. The companies based their claim of bias on the opening paragraphs of Judge Sarokin's opinion, where he stated:

> In the light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Id.

[114] *Id.* The court cited newspaper articles appearing in the New York Times, Wall Street Journal, Washington Post, Chicago Tribune, Los Angeles Times, and New Jersey Star Ledger as evidence of this fact. The court made no further reference to the articles in the opinion. Presumably, the court referred to the press coverage to indicate that a public having read the articles might reasonably question Judge Sarokin's impartiality. Reliance on newspaper articles to demonstrate that the public might question a judge's impartiality would, however, be far off the mark from the objective test Congress intended for § 455(a). The test for bias is not whether a public knowing bits and pieces of a situation might reasonably question a judge's impartiality, but whether a reasonable public, knowing *all* the facts and circumstances, might question a judge's impartiality. *See supra* note 49 and accompanying text (discussing the proper objective test to be applied to disqualification motions). This would require a reading of all of the relevant court materials, not simply newspaper headlines and articles. *See* Panel Discussion, *Disqualification of Judges (The Sarokin Matter): Is It a Threat To Judicial Independence?*, 58 BROOK. L. REV. 1063, 1088 (1993) ("[W]e do not count column inches to decide whether judges have to be disqualified .... [and] [w]e should not let judicial recusal motions turn on the happenstance of press attention.") (comments of Professor Stephen Gillers).

[115] 975 F.2d at 98 (quoting In re Murchison, 349 U.S. 133, 136 (1955)). See *supra* note 7 for the text of the Due Process Clauses of the United States Constitution.

[116] *Id.* at 98. The court proffered: "[t]o fulfill this [constitutional] requirement—and to avoid both bias and the appearance of bias—this court has supervisory authority to order cases reassigned to another district court judge." *Id.* (citing Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982)). The court quoted the following from *Lewis*:

> Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) . . . the United

The court stated that while there was no doubt that Judge Sarokin was capable of presiding over the case impartially, it also had to be determined whether there was an appearance of impartiality.[117] Because the ultimate issue to be decided by a jury was whether the tobacco companies engaged in organized concealment of the possible hazards of smoking, the court found that the comments of the district judge had destroyed the necessary appearance of impartiality.[118] Consequently, the court found that the appearance of impartiality could only be maintained if, pursuant to the court's supervisory power, the case was reassigned to a different district court judge.[119]

The *Haines* decision is particularly confusing because the opinion contains no statutory analysis and relies solely on the court's inherent supervisory power.[120] The court made no reference to the disqualification provisions contained in the United States Code, nor did the court cite a single case from any circuit construing §§ 144 and 455.[121] The court's decision to rely exclusively on its supervisory power is tenuous because it has been noted that the supervisory power is normally reserved for areas where Congress has not acted.[122]

> States Supreme Court stated: "Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Id. (quoting *Lewis*, 671 F.2d at 789) (citations omitted).

117 *Id.*

118 *Id.* After stressing that the district court's comments went to the very heart of the ultimate issue to be decided by a jury, the court noted: "[m]easured against these precepts, it is impossible for us to vindicate the requirement of 'appearance of impartiality' in view of the statements made in the district court's prologue to its opinion." *Id.*

119 *Id.*

120 *See generally id.*

121 The court relied almost exclusively on *Lewis v. Curtis*, where the court, "[w]ithout pausing to consider whether there is a basis for legal disqualification," also reassigned a case pursuant to the supervisory power. Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.), *cert denied*, 459 U.S. 880 (1982).

122 United States v. Hasting, 461 U.S. 499, 505 (1983); United States v. Scop, 940 F.2d 1004, 1010 (7th Cir. 1991) (stating that supervisory powers are reserved for situations where no statute provides a rule, and "do not allow a court to 'disregard a rule or statute . . . .'") (citation omitted).

The United States Supreme Court has declared that, for the supervisory powers to be invoked, there must be "a judicial 'usurpation of power,'" where the district court has clearly abused its discretion. Kerr v. United States Dist. Court, 426 U.S. 394, 402-03 (1976); *see also* Maryellen Fullerton, *Exploring The Far Reaches Of Mandamus*, 49 BROOK. L. REV. 1131, 1142 (1983) (acknowledging that the Supreme Court has expanded the mandamus power somewhat but noting that, nevertheless, the power is normally reserved for situations where district courts "have established a pattern of erroneous procedures that are likely to recur").

Aside from the separation of powers issue, the *Haines* opinion is troubling because it appears to directly contradict the well- settled Third Circuit position on the extrajudicial limitation.[123] Judge Sarokin was making a determination regarding whether the crime-fraud exception applied to certain documents.[124] The Third Circuit Court of Appeals did not address how the judge was to make his determination without addressing the issue of whether the tobacco companies had engaged in concealment.[125]

A strong argument can seemingly be made that Judge Sarokin's comments in the prologue to his opinion were "linked to [the judge's] evaluation of the case," which is the standard set forth in *Johnson*.[126] Indeed, Judge Sarokin qualified his opening para-

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Clearly, whether Judge Sarokin's comments were extrajudicial or not is debatable and it is thus hard to fathom how Judge Sarokin clearly abused his discretion in light of the precedent established long ago in *Johnson v. Trueblood*, that disqualifying bias must stem from an extrajudicial source. Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981). If the Third Circuit felt that the circuit's continued reliance on the extrajudicial limitation demonstrated a "pattern of erroneous procedure" that warranted the extraordinary writ of mandamus, then it should have articulated its rejection of the limitation clearly and unambiguously. Instead, *Johnson* remains on the books without any negative treatment as a vexatious pitfall for lawyers and jurists. *Id.* Judges are left to guess at whether the *Haines* opinion represents, as it seems to suggest, an implicit rejection of the extrajudicial bias limitation.

See also Brent D. Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 14 B.Y.U. L. REV. 233, 243 (1980). Ward points out that supervisory powers are usually reserved for "highly improper judicial conduct which disrupts the efficient administration of justice." *Id.* It is somewhat ironic that the powers are used to disqualify judges in the Third Circuit in view of the fact that each disqualification arguably hinders judicial efficiency. *See infra* notes 167-69 and accompanying text (discussing the massive administrative burdens that disqualifications place on the court system).

123 *Compare* Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981) *with* Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992).

124 *Haines*, 975 F.2d at 87.

125 *Id.*

126 *See Johnson*, 629 F.2d at 291; Panel Discussion, *supra* note 114, at 1069 (arguing that Judge Sarokin was making a judicial finding based on facts in the record and declaring that "[a] judge's finding on the facts does not reflect an improper bias") (comments of Judge Jack B. Weinstein). The Third Circuit, in *Johnson*, established that "[t]he relevant inquiry [in determining if bias is judicial in nature] is whether the trial judge's . . . comments were linked to his evaluation of the case . . . or whether the comments were based on purely personal feelings towards the parties and the case." *Johnson*, 629 F.2d at 291.

See generally Bennett L. Gershman, *Disqualifying Judges for Bias: The Sarokin Case*, 208 N.Y.L.J., 1, 5 (1992) (declaring that "I have found no other case where a judge has been disqualified for an appearance of bias for remarks contained in a judicial opinion, based on facts in the record, and relating to the merits of the case . . . one comes away from this discussion with the impression either that Judge Sarokin's disqualification is an aberration based on undisclosed factors, or that the standards for

graph by stating "as the following facts disclose," and then proceeded to list facts relevant to his determination.[127] Regardless of the forcefulness of Judge Sarokin's words, the judge's comments were not a personal attack upon the tobacco companies, but a judicial determination supported by facts produced at trial.[128] Moreover, the *Johnson* court explicitly declared that judges over the course of a trial (or, in *Johnson*, before trial had even begun) are entitled to form perceptions based on the evidence and the conduct of the parties.[129] Such bias, the *Johnson* court determined, is judicial in nature and cannot be disqualifying.[130]

Regardless of whether Judge Sarokin's comments created an appearance of partiality or not, the most troubling aspect of the *Haines* decision involves the issue of guidance: Which standard shall Third Circuit district judges apply when faced with a close extrajudicial versus judicial bias situation in the future, the *Haines* model or the *Johnson* extrajudicial standard?[131]

VI. THE END OF THE LINE: THE SUPREME COURT DECIDES WHETHER § 455(A) RECUSAL IS SUBJECT TO THE EXTRAJUDICIAL SOURCE DOCTRINE

The debate that has raged for twenty years over § 455—resulting in a conflict not only among, but within, certain circuits—ended recently when the United States Supreme Court decided *Liteky v. United States*.[132] *Liteky* arose from two convictions for acts of civil disobedience occurring nearly a decade apart.[133] The first involved the 1983 conviction of Father Roy Bourgeois before District Judge J. Robert Elliot in the United States District Court for

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disqualification based on a judge's 'appearance' are nebulous and confused."). *Contra* Panel Discussion, *supra* note 121, at 1078-84 (arguing that Judge Sarokin was injudicious, and that the Judge's removal was necessary to uphold the appearance of impartiality) (comments of Professor Monroe H. Freedman).

127 *Haines*, 975 F.2d at 97.

128 *C.f.*, Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979) ("If a concluding paragraph using colorful language to drive home a point proves an entire opinion biased, then few, if any judicial opinions pass muster under § 455(a).").

129 *See Johnson*, 629 F.2d at 291; *see also In re* Casco Bay Lines, Inc., 17 B.R. 946, 953-54 (1st Cir. 1982) ("We know of no decision which states that a judge is prohibited from forming preliminary legal conclusions based upon facts already in the record which appear to be undisputed.").

130 *Johnson*, 629 F.2d at 291.

131 *Compare* Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992) (refusing to apply the extrajudicial limitation to disqualification) *with Johnson*, 629 F.2d 287 (applying extrajudicial bias limitation to disqualification).

132 114 S. Ct. 1147 (1994).

133 Marcia Coyle, *High Court Hears Case for Judge's Recusal*, NAT'L L.J., November 15, 1993, at 10.

the Middle District of Georgia for several offenses, including assault, which occurred during a protest at Fort Benning Military Reservation.[134] The second involved another conviction of Bourgeois, as well as Charles and John Liteky, in 1991 for willfully injuring government property at the same fort, and was tried before the same district court judge.[135]

Prior to trial, petitioners Bourgeois and Liteky moved, under § 455(a), to have the district judge removed from the case.[136] Petitioners alleged that Bourgeois's earlier conviction before the judge, coupled with the judge's demeaning and confrontational attitude towards Bourgeois at the 1983 trial, mandated recusal in the 1991 trial.[137] The judge denied the pretrial § 455(a) motion, noting that matters arising in a judicial proceeding could not be used to disqualify under § 455(a).[138]

At the end of the 1991 trial, Bourgeois renewed his § 455(a) motion, citing conduct of the district judge in the 1991 trial similar to that which occurred in the previous trial.[139] Again, the motion

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134 Respondent's Brief at 2-3, Liteky v. United States, 114 S. Ct. 1147 (1994) (No. 92-9621); Coyle, *supra* note 133, at 10.

135 *Liteky*, 114 S. Ct. at 1150-51; Respondent's Brief, *supra* note 134, at 2; Bourgeois's second conviction was the result of a similar protest at Fort Benning; this time in response to the training of Salvadoran soldiers at the Army School of the Americas, located at Fort Benning. Coyle, *supra* note 133, at 10. During the protest on November 16, 1990, the first anniversary of the murder of six Jesuit priests and two others in El Salvador, Bourgeois and the Litekys entered the Army School of the Americas and spilled human blood on the exterior and interior of the School. *Id.*

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

137 *Liteky*, 114 S. Ct. at 1150-51. As evidence of Judge Elliot's alleged "'impatience, disregard for the defense and animosity' toward Bourgeois, Bourgeois' codefendants, and their beliefs," petitioners pointed to the following words and actions by the judge in the 1983 trial:

> [S]tating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues of material to trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing Bourgeois that closing argument was not a time for "making a speech" in a "political forum"; and giving Bourgeois what petitioners considered to be an excessive sentence . . . . and the one that counsel for petitioners described at oral argument as the most serious . . . the judge's interruption of the closing argument of one of Bourgeois' codefendants, instructing him to cease the introduction of new facts, and to restrict himself to discussion of evidence already presented.

Id. at 1151.

138 *Id.*

139 *Id.* Bourgeois specifically added as grounds for his renewed disqualification mo-

was denied.[140] After being convicted of the offense charged, petitioners appealed, claiming that Judge Elliot should have been disqualified under § 455(a).[141] The court of appeals affirmed, noting that the alleged instances of bias were judicial in nature and could not be the basis for recusal under § 455(a).[142]

Before the Supreme Court, petitioners argued that § 455(a)'s language, because it does not contain the term "personal," coupled with Congress's intent to "broaden" the grounds for disqualification, led to the conclusion that judicial bias could be disqualifying under § 455(a).[143] Respondent countered that Congress was well aware of the extrajudicial bias limitation when it amended § 455(a) and that its failure to even mention the limitation demonstrated that the rule was meant to be retained.[144]

The Supreme Court, while unanimous in its agreement that Judge Elliot did not violate § 455(a) by refusing to disqualify himself, nevertheless divided sharply on the question of whether the "extrajudicial source" doctrine applies to § 455(a).[145] A five justice majority, per Justice Scalia, held that the "extrajudicial source" doctrine does apply to § 455(a).[146] Justice Scalia began the Court's opinion by tracing the history of the extrajudicial source doctrine from its genesis in § 144.[147]

Justice Scalia first repudiated the popular belief that the *Grinnell* opinion's establishment of the "extrajudicial source" doctrine[148] was based upon the word "personal" contained in § 144.[149]

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tion, the judge's "'admonishing him in front of the jury'" at opening statement and the admonishing of his codefendants during the trial. *Id.*

140 *Id.*

141 *Id.*

142 United States v. Liteky, 973 F.2d 910, 910 (11th Cir. 1992)(per curiam) (citations omitted).

143 *Liteky*, 114 S. Ct. at 1153-54; Petitioner's Brief at 15-16, Liteky v. United States, 114 S. Ct. 1147 (1994)(No. 92-6921).

144 *See*, Respondent's Brief, *supra* note 134, at 26.

145 *See generally*, Liteky v. United States, 114 S. Ct. 1147 (1994). Justice Scalia, delivering the opinion of the Court, was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Thomas, and Justice Ginsburg in declaring that the "extrajudicial source" doctrine applies to § 455(a). *Id.* at 1157. Justice Kennedy, joined by Justices Blackmun, Stevens, and Souter, concurred in the judgment but wrote separately to express the belief that the "source" of bias should play no part in a § 455(a) analysis. *Id.* at 1158 (Kennedy, J., concurring).

146 *Id.* at 1157.

147 *Id.* at 1152.

148 See *supra* note 25 and accompanying text discussing the establishment of the extrajudicial source doctrine in *United States v. Grinnell.*

149 *Id.* at 1154. See *supra* note 12 for the text of § 144. The Justice demonstrated that *Grinnell*'s "extrajudicial source" holding was based upon a previous holding in *Berger v. United States*, 255 U.S. 22 (1921), which, in turn, was based upon an even

The Justice proffered several reasons for concluding that the correct rationale for *Grinnell* and the foundation for the "extrajudicial source" doctrine was not the statutory term "personal."[150]

The first reason, the Justice proffered, was that because "bias" and "prejudice" are pejorative terms describing judicial dispositions that are universally inappropriate or wrongful it is pointless to divide the terms into an offensive "personal" variety and a non-offensive "official" one.[151] The second reason, according to Justice Scalia, was that the creation of a complete dichotomy, when interpreting the word "personal," between judicially and extrajudicially acquired bias would produce absurd results.[152]

In light of these reasons, Justice Scalia determined that the proper origin of the "extrajudicial source" doctrine under § 144 and § 455(b)(1) "is simply the pejorative connotation of the words 'bias or prejudice,'" and not the fact that the sections contain the word "personal."[153] The Justice noted that not all unfavorable dispositions by a judge towards a case would necessarily be biased or prejudiced ones: the only dispositions that are biased or prejudiced are dispositions that are "*wrongful* or *inappropriate*."[154]

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earlier holding in *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913). *Liteky*, 114 S. Ct. at 1154. The *American Steel Barrel Co.* and *Grinnell* holdings, Justice Scalia noted, did not rely upon the term "personal" in § 144, but instead relied upon the requirement that an affidavit for disqualification had to be filed 10 days before the start of the court term. *Id.* That 10-day requirement, Justice Scalia proffered, was the reason that the *Berger* court found that an affidavit "'must be based upon facts antedating the trial, not those occurring during the trial.'" *Id.* (quoting *Berger*, 255 U.S. at 34). Thus, Justice Scalia remarked, "[p]etitioner's suggestion that we relied upon the word 'personal' in our *Grinnell* opinion is simply in error." *Id.*

150 *Id.*

151 *Id.* The Justice opined that the explanation that the "extrajudicial source" doctrine is based upon the word "personal" found in § 144 "is simply not the semantic success it pretends to be." *Id.* This is so, Justice Scalia demonstrated, because the terms bias and prejudice are pejorative ones: they describe dispositions that are *always* inappropriate. *Id.*

152 *Id.* As an example of a possible absurd result, Justice Scalia suggested the image of a judge presiding over an extremely long trial where the judge, having only learned of an obscure religious sect at the trial, develops a strong hatred for the sect and for all its participants. *Id.* Because this hatred arose totally from a judicial source (i.e., it would be "official" rather than "personal") there would exist no basis for the judge's recusal no matter how passionate the judge's hatred for the participants became. *Id.*

153 *Id.* at 1155.

154 *Id.* For example, the Justice noted that even though there is universal hatred for Adolf Hitler, it would be incorrect to say that people are biased or prejudiced against him. *Id.* According to the majority, it would be incorrect because the pejorative connotation of the words bias and prejudice require that a disposition or opinion be "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 . . . ." *Id.*

Having traced the origin of the extrajudicial source doctrine for §§ 144 and 455(b)(1), Justice Scalia turned to the question of whether the doctrine also applies to § 455(a).[155] The Justice demonstrated that just as there exists a pejorative connotation to the words "bias" and "prejudice" found in §§ 144 and 455(b), the word "partiality," at issue in § 455(a), enjoys an equivalent connotation, with equivalent consequences, i.e., the importation of the extrajudicial source doctrine.[156] Justice Scalia explained that as it is necessary for any disposition to be considered biased or prejudiced to be wrongful or inappropriate, all favoritism, to be "partial," must also be wrongful or inappropriate.[157] Partiality, the Justice continued, like bias or prejudice, occurs only when the level of favoritism has gone "beyond what is normal and acceptable."[158]

Moreover, Justice Scalia stressed, finding that the extrajudicial source doctrine applies to §§ 144 and 455(b)(1) but not to § 455(a) would render the statute contradictory.[159] This is so because it would be unreasonable to interpret § 455(a) as eliminat-

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The same can be said for a judge. In certain instances a judge might look unfavorably upon a particular defendant. This unfavorable disposition towards the defendant would not be considered bias or prejudice, however, unless the judge's dislike for the defendant was wrongful or inappropriate, i.e., unless the defendant did not deserve to be looked upon unfavorably.

In view of the fact that it is the pejorative nature of the terms bias and prejudice upon which the extrajudicial source doctrine rests and not upon the word personal, Justice Scalia demonstrated that, in theory at least, disqualifying bias or prejudice may stem from a judicial source. *Id.* This is so because while an extrajudicial source is a common source for wrongful or inappropriate dispositions, it is not the only source for them, and

> [a] favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.

Id.

The Justice cited this fact to explain why many courts have relied upon a "pervasive bias exception" to the doctrine. *Id.* (citation omitted); see *supra* note 27 for a discussion of the pervasive bias exception to the extrajudicial source doctrine.

155 *Liteky*, 114 S. Ct. at 1155.

156 *Id.* at 1155-56.

157 *Id.* at 1156.

158 *Id.* at 1155. Justice Scalia further declared that:

> [E]ven if the pejorative connotation of "partiality" were not enough to import the "extrajudicial source" doctrine into § 455(a), the "reasonableness" limitation (recusal is required only if the judge's impartiality "might *reasonably* be questioned") would have the same effect. To demand the sort of "child-like innocence" that elimination of the "extrajudicial source" limitation would require is not reasonable.

Id. at 1156.

159 *Id.*

ing, implicitly, an explicit limitation contained in § 455(b).[160]

Having determined that the extrajudicial source doctrine applies to § 455(a) as well as §§ 144 and 455(b)(1), Justice Scalia made two final determinations.[161] The first was that judicial rulings, by themselves, will almost never provide a sufficient basis for bias or partiality motions.[162] The second was that judicial opinions derived from current or past courtroom events will not provide a sufficient basis for bias or partiality motions unless a deep-seated antagonism or favoritism could be shown that would make fair judgment impossible.[163]

VII. Factors in Support of Maintaining the Extrajudicial Limitation

There are a number of reasons behind the extrajudicial limitation not mentioned by the Supreme Court which add support to its continued usage: first and foremost is the desire to eliminate "judge-shopping."[164] Congress was acutely aware of this danger when amending § 455 and explicitly provided that the general language of § 455(a) was not meant to enable litigants to choose their judge.[165] It was recently suggested that elimination of the extraju-

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160 *Id.* To illustrate this point, Justice Scalia proffered that it would be wrong to find a § 455(a) violation on the grounds that a party to a proceeding stood within the fourth degree of relationship with the judge, because § 455(b)(5) specifically states that only relations within the third degree are prohibited. *Id.* To hold, under § 455(a) that a relationship of the fourth degree is impermissible when § 455(b)(5) explicitly provides otherwise would, according to the Justice, be an unacceptable elimination of an explicit § 455(b)(5) limitation. Thus, the Justice stated that:

> when one of those aspects addressed in (b) *is* at issue, it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires . . . .
>
> What is at issue in the present case *is* an aspect of "partiality" already addressed in (b), personal bias or prejudice . . . . [N]othing in subsection (a) eliminates the longstanding limitation of (b)(1), that "personal bias or prejudice" does not consist of a disposition that fails to satisfy the "extrajudicial source" doctrine.

Id. at n.2.

161 *Id.* at 1157.

162 *Id.* (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

163 *Id.*

164 *See* Bloom, *supra* note 5, at 664 (explaining that judge shopping occurs when litigants "seek to disqualify one judge so the case will be heard by a judge they believe is more favorable to their side").

165 House Report, *supra* note 3, at 5, 1974 U.S.C.C.A.N. at 6355. Congress advised:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be

dicial limitation for bias would foster such abuses.[166]

A second concern is the massive administrative burden that the federal system would be forced to bear if there was a significant increase in either recusal motions or actual disqualifications.[167] In most instances, the disqualification of a district court judge means that a new judge will be forced, in a short time, to become acquainted with facts acquired over years of litigation; facts that are

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> read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Id.; *see* Idaho v. Freeman, 478 F. Supp. 33, 36 (D. Idaho 1979) (stating that the test for disqualification requires a balancing of the right of every litigant to have an impartial judge against the policy of disallowing judge shopping); Blizard v. Fielding, 454 F. Supp. 318, 321 (D. Mass. 1978) (declaring that the practice of judge shopping has been universally condemned).

166 Panel Discussion, *supra* note 114, at 1119 ("Excessive concern over the appearance of impartiality is simply an invitation to gamesmanship, judge-shopping and satellite litigation, especially by parties who use hardball litigation tactics as a *modus operandi.*") (comments of Professor Daniel J. Capra). As evidence of such "hardball tactics," another panelist pointed to a statement made by J. Michael Jordan, counsel to R.J. Reynolds tobacco company, where Mr. Jordan summarized the tobacco company's litigation tactics thusly:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiff's lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making the other son-of-a-bitch spend all of his.

Id. at 1066 n.9 (quotation omitted) (comments of United States District Judge Jack B. Weinstein).

These comments suggest that the liberalization of § 455(a) standards to include judicially acquired bias will most likely encourage companies who have the most money to make § 455(a) motions based upon dubious "reasonably questionable" lack of impartiality arguments as these companies will better be able to afford the protracted litigation that will no doubt result. Public confidence in the judicial process is not increased where "judge-shopping" is afforded at all, let alone to predominantly wealthy litigants.

A separate but related concern has been expressed that the elimination of the extrajudicial bias limitation could encourage litigants to harass judges in an attempt to make a judge lose his or her composure in a courtroom and use words that could later be deemed disqualifying. Hoekema, *supra* note 5, at 715; *see* Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (determining that disqualification of the trial judge after the defendant had assaulted the judge would encourage unruly behavior in the courtroom and disrupt judicial administration), *cert. denied*, 449 U.S. 1086 (1981).

167 *See* Bloom, *supra* note 5, at 664. Bloom explained that an excessive amount of successful disqualifications could have a serious effect upon judicial efficiency. *Id.* Noting that judges are most often challenged long after litigation has begun, Bloom suggested that the removal of a trial judge late into a trial results in considerable waste of time and is extremely costly. *Id.*

often complex and extremely technical.[168] Moreover, the very essence of a "trial" is compromised when the trial judge, who has heard oral arguments and developed preliminary opinions, is suddenly removed from a case.[169] It is questionable whether public confidence in the judiciary is actually increased where litigants are forced, at trial level, to have their case decided by a judge who did not partake in many of the "trial" functions.

Perhaps the most disturbing result of the abolishment of the extrajudicial limitation would be the possible "chilling effect on judicial writing and decision making."[170] Canon 1(A) of the Code of Judicial Conduct stresses the importance of an independent judiciary.[171] Fear of removal has no place in an independent judiciary and no judge should have to censor opinions based on facts learned at trial for fear that a litigant may object to the forcefulness with which the judge has crafted his or her opinion.[172] As noted by United States District Judge Jack B. Weinstein, the judiciary is best served when judges issue clear, forceful, and unambiguous state-

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168 Panel Discussion, *supra* note 114, at 1068-69 (comments of United States District Judge Jack B. Weinstein).

169 *Id.* Judge Weinstein made the following comments about the importance of a judge being personally exposed to the early stages of litigation:

> Even a case in its early stage may have gone through extensive motion practice, which gives the presiding judge a good opportunity to become familiar with the facts and legal issues. By hearing competing versions of the facts and competing arguments on the controlling law, a trial judge gains an intangible feel for a case that is not available from reading a cold file. Lost are both time and subtle impressions of lawyers and tactics that may provide the basis for more sensitive and productive management of the case.

Id.

170 *Id.* at 1120 (comments of Daniel J. Capra).

171 ABA CODE OF JUDICIAL CONDUCT Canon 1(A) (1990) ("An *independent* and honorable judiciary is indispensable to justice in our society.") (emphasis added).

The commentary to Canon 1, noting that "[d]eference to the judgements and rulings of courts depends upon public confidence in the integrity and independence of judges," provides that "[t]he integrity and independence of judges depends in turn upon their acting without fear or favor." *Id.*

172 As District Judge Sarokin explained when removing himself from a related tobacco case after his removal from *Haines v. Liggett Group, Inc.*:

> The issue presented to me [in *Haines*] required that I determine whether there was evidence of fraud and misrepresentation, and I made that determination and found that there was. It is difficult for me to understand how a finding based upon the evidence can have the appearance of partiality merely because it is expressed in strong terms . . . . I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for determination.

Cipollone v. Liggett Group, Inc., 799 F. Supp. 466, 466 (D.N.J. 1992).

ments regarding the matter at hand.[173]

CONCLUSION

The debate that has raged for over twenty years regarding the application of the extrajudicial source doctrine to § 455(a) of the United States Code has finally come to an end. In an articulate and well-reasoned opinion, the United States Supreme Court wisely determined that the extrajudicial source doctrine applies to § 455(a). The Court's twin assertions—that judicial rulings alone will almost never provide a sufficient basis for partiality motions,[174] and that opinions formed on the basis of past or present courtroom events will also be insufficient unless a deep-seated antagonism or favoritism could be shown that would render fair judgement impossible[175]—provide judges with powerful weapons with which to defend themselves from meritless attacks upon their integrity.

The various unfavorable consequences that would have followed the abolishment of the doctrine—such as judge-shopping, waste of judicial resources, and stagnation of judicial creativity and independence[176]—have been averted. Public confidence in the judicial system will increase and the system itself will benefit now that judges can issue forceful opinions without fear of subsequent removal.

Christopher R. Carton

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173 *See* Panel Discussion, *supra* note 114, at 1070 ("No one should discourage clear statements by judges in either a civil or criminal context. When a judge admonishes a defendant at sentencing or criticizes attorney's for misconduct, the parties and the system are well served. It should be no different when private parties are involved.") (comments of United States District Judge Jack B. Weinstein).

174 Liteky v. United States, 114 S. Ct. 1147, 1157 (1994).

175 *Id.*

176 See *supra* notes 164-73 and accompanying text for a discussion of factors, not considered by the *Liteky* Court, supporting the retention of the extrajudicial source doctrine.