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The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disaqualification Under 28 U.S.C. § 455(a)

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NOTES

THE ILLEGITIMACY OF THE EXTRAJUDICIAL SOURCE REQUIREMENT FOR JUDICIAL DISQUALIFICATION UNDER 28 U.S.C. § 455(a)

INTRODUCTION

According to 28 U.S.C. § 455(a),[1] a judge[2] shall disqualify[3] himself from presiding over "any proceeding in which his impartiality might reasonably be questioned."[4] Judicial disqualification under § 455(a) arises from a number of disparate situations, including a judge's financial conflict of interest[5] and a judge's appearance of bias or prejudice.[6] This Note focuses on judicial disqualification for bias[7] under § 455(a) and the questionable legitimacy of a judicially created doctrine known as the "extrajudicial source requirement." The extrajudicial source requirement allows a judge to deny a disqualification motion based on bias if the judge's alleged bias arises solely from within a judicial proceeding.[8] The First Circuit case of *United States*

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[1] "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1988 & Supp. II 1990).

[2] In this Note the word "judge" will refer to judges, justices, and magistrates.

[3] The term "recusal" commonly refers to the process by which a judge is disqualified. *See* Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 1 (1923). Today the courts use recusal and "disqualification" interchangeably. *In re* School Asbestos Litig., 977 F.2d 764, 769 n.1 (3d Cir. 1992). This Note will use the term "disqualification," although court quotations may use the term "recusal."

[4] 28 U.S.C. § 455(a).

[5] *See, e.g.*, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) (disqualifying judge under § 455(a) for financial conflict of interest); United States v. Lovaglia, 954 F.2d 811 (2d Cir. 1992) (refusing to disqualify judge under § 455(a) because judge lacked financial interest in proceeding).

[6] *See, e.g.*, United States v. Cooley, 1 F.3d 985 (10th Cir. 1993) (disqualifying judge because his comments to the media created appearance of bias); United States v. Holland, 655 F.2d 44 (5th Cir. 1981) (disqualifying judge because his rationale for increasing defendant's sentence constituted pervasive bias).

[7] Generally, when the term "bias" is used in this Note it will denote prejudice or partiality. If it has any more particular meaning, then it will be preceded by an adjective such as extrajudicial or personal, which will be defined as it is presented. Quotations from courts may not adhere to this convention.

[8] *See, e.g.*, Hasbrouck v. Texaco, Inc., 830 F.2d 1513, 1524 (9th Cir. 1987) (For disqualification under § 455(a), the alleged "bias must stem from an extrajudicial source and not be based solely on information gained in the course of the proceedings."), *aff'd on other grounds*, 496 U.S. 543 (1990); *see also* Susan B. Hoekema, Comment, *Questioning the Impartiality of*

v. Chantal[9] provides a good example of the distinction between a judicial and an extrajudicial source of bias.

In *Chantal*, a criminal defendant charged with cocaine trafficking requested that the presiding judge disqualify himself under § 455(a). The defendant based his request on statements made to him by the presiding judge at a prior sentencing hearing after the defendant was convicted for a similar offense. The defendant was sentenced at the first hearing, but before he started serving his prison sentence, he was arrested for drug trafficking and appeared before the same judge.[10] In his comments to the defendant at the prior hearing, the judge indicated that he did not believe that the defendant could change his drug trafficking behavior.[11] The defendant contended that the judge's statements at the prior sentencing hearing required the judge's disqualification because they caused his impartiality to reasonably be questioned as required for disqualification under § 455(a).[12]

The judge refused to disqualify himself, reasoning that comments made at a judicial proceeding could not be used for disqualification purposes and that the defendant failed to show that his impartiality might reasonably be questioned.[13] On appeal, the First Circuit recognized that the judge's comments, which were based solely on information he obtained within a judicial setting, arose from a judicial source but reversed, holding that "the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings."[14]

Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a), 60 TEMP. L.Q. 697, 714 (1987) ("A fundamental principle of the judicially created standards for disqualifying judges for bias . . . is that the evidence of bias must come from an extrajudicial source.").

[9] 902 F.2d 1018 (1st Cir. 1990).

[10] *Id.* at 1020.

[11] At the prior sentencing hearing, before sentencing the defendant to twelve years in prison, the judge said:

> This is an individual who has had a privileged pattern of existence, . . . who . . . repeatedly comes back to the distribution of cocaine.
>
> I have seen no indication whatever that he has in any way expressed . . . 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 observation 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*.

Chantal, 902 F.2d at 1019-20.

[12] *Id.* at 1020.

[13] *Id.* at 1019-20.

[14] *Id.* at 1022.

If the extrajudicial source requirement were applied, the judge would not have been disqualified under the statute. This First Circuit holding is contrary to the rule in every other circuit that has addressed the issue, which requires bias or prejudice for disqualification purposes to arise from a source outside of a judicial proceeding.[15]

The first step in understanding the extrajudicial source requirement is distinguishing between what is considered a judicial source, and thus exempt from disqualification under the extrajudicial source requirement, and what is considered an extrajudicial source. Although there is no single, concrete definition that easily encompasses everything that is considered a judicial source or everything that is considered an extrajudicial source, it may be useful to examine some examples of what courts have considered exempt from disqualification because of their judicial nature. Information that stems from a judicial source for disqualification purposes includes information that a judge acquired during a judicial proceeding[16] as well as a judge's conduct at a judicial proceeding.[17] As the *Chantal* opinion illustrates, conduct at a prior proceeding, including colloquies from the bench, is considered a judicial source for a subsequent proceeding.[18] The same is true for knowledge acquired at a prior judicial proceeding, which is considered a judicial source for subsequent proceedings.[19] A judge's in-court statements are generally not a basis for

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[15] *See, e.g.*, Duckworth v. Department of the Navy, 974 F.2d 1140, 1142 (9th Cir. 1992) (disqualification of judge not required under § 455(a) where all knowledge of the case was acquired through judicial administration rather than from extrajudicial sources); Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988) (Section 455(a) "require[s] recusal only if the bias or prejudice stems from an extrajudicial source and not from conduct or rulings made during the course of the proceeding."); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044 (5th Cir. 1975) (to be disqualifying under § 455, the alleged bias must stem from an extrajudicial source), *cert. denied*, 425 U.S. 944 (1976).

[16] *See, e.g.*, United States v. Pollard, 959 F.2d 1011, 1031 (D.C. Cir. 1992) ("Only personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity is grounds for recusal" under § 455(a).), *cert. denied*, 113 S. Ct. 322 (1992).

[17] *See, e.g.*, United States v. Colon, 961 F.2d 41, 44 (2d Cir. 1992) (extrajudicial matters under § 455(a) do not include "earlier adverse rulings" in the case); *Toth*, 862 F.2d at 1387 (bias from an extrajudicial source means "not from conduct or rulings made during the course of the proceeding").

[18] *Chantal*, 902 F.2d at 1019-22; *see also* United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990) (extrajudicial bias under § 455(a) means "from some source other then participation in the proceedings *or prior contact with related cases*") (emphasis added); *Davis*, 517 F.2d at 1044 (judge's statements to a party's attorney *at a prior judicial proceeding* are not extrajudicial under § 455(a)).

[19] *See, e.g.*, Waller v. United States, No. 91-30041, 1991 U.S. App. LEXIS 30545 (9th Cir. Dec. 19, 1991), *cert. denied*, 112 S. Ct. 2321 (1992) (knowledge acquired from the trial of one codefendant at one proceeding is considered as arising from a judicial source for another codefendant at a subsequent proceeding).

disqualification,[20] except to the extent that they are evidence of bias from an extrajudicial source.[21] In addition, a judge's prior participation in the trial and sentencing of a key prosecution witness in a felony trial is considered a judicial source.[22]

On June 28, 1993, the Supreme Court granted *certiorari* in *United States v. Liteky*[23] to resolve the circuit split between the First Circuit and the other circuits. In *Liteky*, the defendants were convicted of "willfully injur[ing] . . . property of the United States" after they spilled blood on federal property to protest United States involvement in El Salvador.[24] The defendants requested that the judge disqualify himself under § 455(a) because he had presided over the conviction of one of the defendants, which also arose from a protest against United States policies toward El Salvador. The district judge refused to disqualify himself and the Eleventh Circuit affirmed. The Eleventh Circuit's scant opinion did not address the defendants' claim of bias. Instead it merely restated the common principle that "matters arising out of the course of judicial proceedings are not a proper basis for recusal."[25]

This Note does not intend to suggest that the judge in *Liteky* should have disqualified himself, or even that any particular disqualification decision would result in a different outcome if the extrajudicial source requirement were abolished. Rather, it argues that the automatic exclusion of information arising from a judicial source, as a matter of public policy and as a matter of congressional intent, incorrectly and unnecessarily focuses a court's attention on the *source* of a judge's alleged bias instead of where it should be, on the *existence* of a judge's alleged bias. Part I of this Note presents an overview of American disqualification jurisprudence including its constitutional and statutory roots. Part II provides a historical account of the judicially created extrajudicial source requirement for judicial disqualification. The requirement arose from a single sentence in the 1921 Supreme Court opinion, *Berger v. United States*,[26] which applied a

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20 *See, e.g.*, United States v. Sibla, 624 F.2d 864, 869 (1980) (judge's statement to defendant that challenging federal tax laws would be frivolous was not extrajudicial under § 455(a)); *Davis*, 517 F.2d at 1044 (comments made to a party's attorney at a prior proceeding are not extrajudicial as required by § 455(a)).

21 *See, e.g.*, *In re* International Business Mach. Corp., 618 F.2d 923, 928 n.6 (2d Cir. 1980) ("conduct in the course of a trial might be relevant to indicate [an extrajudicial] bias").

22 *See* United States v. Morris, 988 F.2d 1335 (4th Cir. 1993).

23 973 F.2d 910 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 2412 (1993).

24 *Id.*

25 *Id.*

26 255 U.S. 22 (1921). The sentence relied upon by subsequent courts for the extrajudicial source requirement merely stated that, for disqualification purposes, "the bias or prejudice

completely different disqualification statute than § 455(a). Part II also discusses the relevant phrase "personal bias," which appeared in the disqualification statute that gave rise to the extrajudicial source requirement, and the significant absence of this language in § 455(a). Part III explores how the majority of circuits have applied the extrajudicial source requirement, and their rationale for applying it to § 455(a). Part IV analyzes the unique First Circuit approach to § 455(a). Part V presents a thorough policy analysis of why the extrajudicial source requirement should not be applied to § 455(a). It argues that the extrajudicial source requirement detracts from judicial integrity, and consequently as a matter of public policy should not be applied to § 455(a). It also demonstrates that the extrajudicial source requirement frustrates one of Congress's purposes in adopting § 455(a), that is, to establish an objective criteria for disqualification based on impartiality.

I. OVERVIEW OF THE STANDARD FOR DISQUALIFICATION FOR BIAS IN THE UNITED STATES

Since 1911, statutes and judicial decisions have expanded the grounds for disqualification, making disqualification a more common occurrence in American jurisprudence.[27] Part of the confusion in analyzing current disqualification jurisprudence as it relates to bias is the number of methods available for disqualification purposes, and the infrequency of their implementation.[28] A judge can be disqualified for bias under the Due Process Clause, under 28 U.S.C. § 144, and under 28 U.S.C. § 455.[29]

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which can be urged against a judge must be based upon something other than the rulings in the case." *Id.* at 31.

27 For one explanation of this expansion, see John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 247 (1987):

> The obvious explanation for [disqualification expansion] is a shift in society's view of judicial psychology, and of psychology in general: from the eighteenth century's economic man, susceptible only to the tug of financial interest, to today's Freudian person, awash in a sea of conscious and unconscious motives.

Id. Since the eighteenth century, the list of factors disqualifying judges has consistently increased, expanding the scope of judicial disqualification. According to Professor Leubsdorf, every commentator, save Justice Rehnquist, has supported this expansion. *See id.* at 246-47; *see also* Kenneth M. Fall, Note, Liljeberg v. Health Services Acquisition Corp.: *The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 WIS. L. REV. 1033, 1046-49 (disqualification under § 455(a) for the appearance of bias will lead to more frequent disqualification of federal judges).

28 *See* Leubsdorf, *supra* note 27, at 240-45 (Because judges who withdraw from cases do not write opinions, published opinions "form an accumulating mound of reasons and precedents against withdrawal.").

29 For a discussion of the standard for disqualification under the Due Process Clause, see *infra* notes 30-34 and accompanying text. For a discussion of the standard for disqualification

A. *Disqualification for Bias Under the Due Process Clause*

Judicial disqualification has both a constitutional and a statutory basis. The Due Process Clauses of the Fifth and Fourteenth Amendments require that an individual be afforded a fair proceeding before the government may deprive him of life, liberty, or property.[30] Courts have long recognized that the right to a fair trial before an impartial tribunal is a basic requirement of the Due Process Clause.[31] The standard generally applied to disqualification under the Due Process Clause is disqualification for the appearance of bias,[32] which is confusingly similar to the standard applied to disqualification under § 455(a).[33] The Supreme Court has not distinguished between bias

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under § 144, see *infra* notes 35-41 and accompanying text. For a short description of § 455, including the standard for disqualification, see *infra* notes 42-60 and accompanying text.

30 "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

31 *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972) (compulsion to stand trial before the mayor, who has a financial interest in the proceeding, violates the Due Process Clause); *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). For a general discussion of the history of judicial disqualification in the United States and in Europe, see Putnam, *supra* note 3.

32 *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) ("We make clear that we are not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge.' " (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927))); *Murchison*, 349 U.S. at 136 ("Fairness . . . requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.").

33 It should be noted at the outset the possible confusion and ambiguity surrounding constitutional and statutory disqualification. As just mentioned the standard for disqualification for bias under the Due Process Clause is the appearance of bias. Under § 455(a), the disqualification standard is when the judge's "impartiality might reasonably be questioned," arguably similar to the due process standard. Moreover, the only Supreme Court case to disqualify a judge under § 455(a), Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), held that § 455(a) was designed to prevent even the "appearance of impropriety." *Id.* at 864.

Here lies the confusion. If the standard for disqualification under the Due Process Clause is the same as the standard for disqualification under the statute, then why is it necessary for a statute at all? The statutory disqualification standard should be broader than the due process disqualification standard or it serves no purpose. The Supreme Court has concluded that "most matters relating to judicial disqualification [do] not rise to a constitutional level." FTC v. Cement Inst., 333 U.S. 683, 702 (1948). For one of the few cases that distinguish constitutional disqualification and statutory disqualification under § 455(a), see United States v. Couch, 896 F.2d 78, 81 (5th Cir. 1990) ("As this and several other circuits have recognized, section 455 establishes a statutory disqualification standard more demanding than that required by the Due Process Clause."). *Couch* recognized that disqualification under the Due Process Clause and disqualification under § 455(a) both require merely the appearance of bias. However, *Couch* concluded that the due process standard requires disqualification if a reasonable *judge* would find it necessary to step aside, while § 455(a) requires disqualification if a reasonable *person* would question the judge's impartiality. *Id.* at 82. This distinction, one of the few put forward, is neither addressed by many courts nor altogether satisfying. No addi-

from a judicial source and bias from an extrajudicial source when applying the Due Process Clause to disqualification.[34]

B. *Disqualification for Bias Under 28 U.S.C. § 144*

Congress has addressed disqualification by defining situations that require judicial disqualification in the federal courts.[35] Prior to 1911, disqualification was generally limited to situations in which the judge had a conflicting pecuniary interest.[36] In 1911, Congress first recognized bias or prejudice as a ground for judicial disqualification.[37]

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tional support for the court's distinction was propounded in the opinion. What is the difference between a reasonable judge and a reasonable person? This interesting problem, seldom addressed, is beyond the scope of this Note.

[34] *See, e.g.*, Taylor v. Hayes, 418 U.S. 488 (1974) (disqualifying judge on due process grounds from trial of attorney on contempt charges arising from conduct at judicial proceeding before disqualified judge); *In re* Murchison, 349 U.S. 133 (1955) (disqualifying judge on due process grounds from presiding over contempt hearing to which he was the sole witness).

[35] Presently there are three federal disqualification statutes. Under 28 U.S.C. § 47, a judge is disqualified from hearing an appeal of a case or issue that he or she has tried. Section 144, the original bias disqualification statute, requires the judge to be disqualified if one of the parties submits a sufficient affidavit stating the reasons that the judge is biased or prejudiced. Section 455, the most recently amended disqualification statute, requires disqualification if the judge's impartiality might reasonably be questioned, among other, more specific reasons. For a general discussion of these provisions, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 665-80 (1985).

[36] *See* Leubsdorf, *supra* note 27, at 246 ("The list of disqualifying factors has expanded since the eighteenth century, when financial interest was the sole ground for recusal."). For a discussion of the common law approach to disqualification, see John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947). Sir William Blackstone's dismissal of bias as a valid basis for disqualification may have deterred its recognition in American jurisprudence until the twentieth century. " '[J]udges and justices cannot be challenged. For the law will not suppose the possibility of bias or favor in a judge.' " *Id.* at 610 n.15 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *361). Two early cases demonstrate how judges viewed disqualification in the nineteenth century. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall did not disqualify himself even though he was personally involved in the events that gave rise to the case. Thirteen years later, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), Chief Justice Marshall disqualified himself because he had a financial interest in the land at stake in the dispute.

Although one might consider a conflict of a pecuniary interest indicative of bias or at least the appearance of bias, courts and statutes have maintained these as separate concepts. Although bias has seldom been defined by the courts, one court viewed it as " 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons.' " Herrington v. County of Sonoma, 834 F.2d 1488, 1502 (9th Cir. 1987) (quoting United States v. Comforte, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980)), *cert. denied*, 489 U.S. 1090 (1989).

[37] The 1911 statute is now codified at 28 U.S.C. § 144 (1988):

> 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. . . .
>
> The affidavit shall state the facts and the reasons for the belief that bias or

The 1911 statute required disqualification when a party to any proceeding filed a "sufficient affidavit that the matter before whom the motion is pending has a personal bias."[38] Personal bias has been nebulously defined by some circuits as bias against a party,[39] while other circuits have indicated that it is simply a synonym for bias from an extrajudicial source.[40] The phrase "personal bias" has been recognized as the statutory basis for the extrajudicial source requirement.[41]

C. *Disqualification for Bias Under 28 U.S.C. § 455(a)*

After it was revised in 1974, § 455 recognized bias as a ground for disqualification. The revised § 455 differs considerably from its previous form.[42] The prior one-paragraph statute was transformed into a multiple-section, far-reaching statute in the hope of promoting

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prejudice exists. . . . It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id. (emphasis added).

[38] *Id.*

[39] Sections 144 and 455(b)(1) require disqualification if a judge has a "*personal bias or prejudice*" concerning a party. *See* 28 U.S.C. §§ 144, 455(b)(1) (1988 & Supp. II 1990) (emphasis added); *see also* Cintron v. Union Pacific R.R., 813 F.2d 917, 921 (7th Cir. 1987) ("Personal bias, to require recusal . . . must be against the party.").

[40] *See, e.g.*, United States v. Colon, 961 F.2d 41 (2d Cir. 1992) (personal bias means bias based on extrajudicial matters); United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (personal bias in disqualification statute means extrajudicial bias); Shore v. County of Mohave, 644 F.2d 1320, 1322 (9th Cir. 1981) (personal bias is the same as bias stemming from an extrajudicial source).

[41] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966) (refusing to disqualify judge for personal bias or prejudice from judicial source); *Colon*, 961 F.2d at 44 (personal bias means extrajudicial matters).

[42] Prior to 1974, 28 U.S.C. § 455 read:

> 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.A. § 455 (1968) (current version at 28 U.S.C. § 455 (1988 & Supp. II 1990)). The relevant provisions of the revised § 455 provide:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . .
>
> (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

"public confidence in the impartiality of the judicial process."[43]

One of the more significant changes in the amended version of § 455 was that the standard for disqualification was changed from subjective to objective.[44] Prior to 1974, disqualification under § 455 was voluntary, allowing disqualification if the judge subjectively believed it was "improper, in his opinion, for him to sit in the trial, appeal, or other proceeding therein."[45] Conversely, the present § 455 is mandatory. Section 455(a) now states that the judge "*shall* disqual-

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controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

. . . .

(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 policyholder 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.

(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.

28 U.S.C. § 455 (1988 & Supp. II 1990).

[43] H.R. REP. No. 1453, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (The general standard of § 455(a) "is designed to promote public confidence in the impartiality of the judicial process."); S. REP. No. 419, 93d Cong., 1st Sess. 5 (1973). *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988) (Section 455(a) was designed to promote "confidence in the judiciary by avoiding even the appearance of impropriety.").

[44] H.R. REP. No. 1453, *supra* note 43, at 5; S. REP. No. 419, *supra* note 43, at 5. *See Liljeberg*, 486 U.S. at 859 ("The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test.").

[45] 28 U.S.C.A. § 455 (1968) (current version at 28 U.S.C. § 455 (1988 & Supp. II 1990)).

ify himself . . . [if] his impartiality might reasonably be questioned."[46] Also, § 455(b) lists specific disqualifying conditions in which the judge "*shall* . . . disqualify himself."[47]

Another important change was the abolition of the "duty to sit" doctrine. Prior to 1974, a judge was obligated to decide close questions of disqualification in favor of presiding over the case.[48] This obligation, referred to as the duty to sit doctrine, was abolished in the 1974 revision of § 455.[49]

The major impetus to the 1974 modification of § 455 was Congress's desire to make the statutory grounds for judicial disqualification conform with Canon 3C of the Code of Judicial Conduct[50] relating to judicial disqualification for bias, prejudice, or conflict of interest.[51] The canons of the Code of Judicial Conduct—established by the American Bar Association and made mandatory on the federal judiciary by the Judicial Conference of the United States in 1973—provide binding ethical standards for the judiciary. Prior to the 1974 revision of § 455, some ethical provisions actually conflicted with the

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[46] 28 U.S.C. § 455(a) (1988 & Supp. II 1990) (emphasis added).

[47] 28 U.S.C. § 455(b) (1988 & Supp. II 1990) (emphasis added). For the text of the statute, see *supra* note 42.

[48] *See, e.g.*, Edwards v. United States, 334 F.2d 360, 362-63 (5th Cir. 1964) ("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 solid reason for recusation. . . . In the absence of a valid legal reason . . . [the judge] must sit."), *cert. denied*, 379 U.S. 1000 (1965).

[49] H.R. REP. NO. 1453, *supra* note 43, at 5; S. REP. NO. 419, *supra* note 43, at 5. The duty to sit doctrine was criticized because it detracted from public confidence in the impartiality of the judicial system by encouraging judges not to disqualify themselves even in situations where the public would reasonably think the judge was partial. *Id.* Most courts have recognized that the 1974 statute abolished the duty to sit doctrine. *E.g.*, Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

[50] Canon 3C of the Code of Judicial Conduct is substantially similar to the revised § 455, *supra* note 42.

[51] H.R. REP. NO. 1453, *supra* note 43, at 1 ("The purpose of the amended bill is to amend section 455 of title 28, United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice or conflict of interest."); S. REP. NO. 419, *supra* note 43, at 1. The Code of Judicial Conduct is prepared by the American Bar Association (the "ABA") to provide ethical guidelines for the judiciary to follow. The standards appearing in the Code of Judicial Conduct were adopted by the ABA in 1972, and were made mandatory on the federal judiciary by the Judicial Conference of the United States in 1973. The Judicial Conference also made any less restrictive statute or resolution inapplicable. The amended § 455 of 1974 made "the statutory and the ethical standard [for disqualification] virtually identical." *Id.* at 3. For a comprehensive discussion of Canon 3 of the Code of Judicial Conduct as it is applied to many state situations, see LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992).

statutory provisions, leaving the judge in a legal-ethical dilemma.[52] As a result of the 1974 revision, the ethical and legal standards for judicial disqualification are virtually identical.[53]

Liljeberg v. Health Services Acquisition Corp.[54] is the only Supreme Court case that has disqualified a judge under § 455(a), although the extrajudicial source requirement was not in issue. In *Liljeberg*, Judge Collins presided over a trial concerning the ownership of certain land.[55] During the trial, one of the litigants, John Liljeberg, Jr., was in negotiations with Loyola University to purchase university land for a hospital site.[56] Judge Collins, who was a trustee of Loyola University, ruled in favor of Liljeberg in the lawsuit, which directly impacted Liljeberg's ability to acquire land from Loyola University.[57] Judge Collins's relationship with Loyola was not discovered until after he had rendered his decision, and the judge claimed to have had no recollection of the real estate negotiations during the course of the trial.[58] Disqualifying Judge Collins, the Supreme Court concluded that the purpose of disqualification under § 455(a) was to avoid "even the appearance of impropriety,"[59] and that vacating a judgment was a proper remedy so long as it did not "undermin[e] the public's confidence in the judicial process."[60]

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52 One such dilemma set out in the Senate Report noted an ethical provision that required a judge to disqualify himself for any "judicial act in which his personal interests are involved." Section 455 permitted disqualification only if the interest was "substantial." The judge was left to determine if a particular interest was substantial. Also, with the duty to sit doctrine, he was compelled to decide a close question of disqualification in favor of sitting, even though it violated the ethical standard, which required disqualification for any interest. S. REP. NO. 419, *supra* note 43, at 2. *See id.* at 3 (When § 455 is amended, "federal judges would no longer be subject to dual standards governing their qualification to sit in a particular proceeding. The bill would make both the statutory and the ethical standard virtually identical.").

53 Although states take different approaches to disqualification under Canon 3C, at least some state courts seem to apply the extrajudicial source requirement. *See* Hartman v. Board of Trustees of Univ. of Ala., 436 So.2d 837 (Ala. 1983). However, it is not uncommon for a state court to disqualify a judge for bias even when the bias arose entirely within a judicial context. *See, e.g.*, State v. Harry, 311 N.W.2d 108 (Iowa 1981) (judge accused party of delaying tactics during plea negotiations and threatened to influence parole date unless defendant confessed).

54 486 U.S. 847 (1988).

55 *Id.* at 850.

56 *Id.*

57 *Id.* at 850, 856.

58 *Id.* at 858.

59 *Id.* at 864-65 ("The problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety.").

60 *Id.* at 864 ("We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the

II. HISTORY OF THE EXTRAJUDICIAL SOURCE REQUIREMENT

The first statute to recognize bias as a ground for disqualification, now codified at 28 U.S.C. § 144, required the moving party to submit a "sufficient" affidavit to the judge whom the party wanted disqualified, stating the reasons that the judge was biased.[61] The party was also obliged to submit a certificate of the counsel of record that the affidavit was made in good faith.[62] One of the first questions which faced the courts was whether the party alleging bias was required to prove that the judge was in fact biased, or whether the judge was required to accept the party's affidavit on its face, accepting the allegations as true for purposes of disqualification. In 1921, the Supreme Court answered this question in *Berger v. United States*.[63]

In *Berger*, the defendants, who were of German ancestry and charged with espionage, filed an affidavit alleging bias on the part of Judge Landis because he was prejudiced against Germans. The affidavit attributed to Judge Landis the following statements that were allegedly made to a German defendant in another proceeding:

> If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. . . . One must have a very judicial mind, indeed, not to be prejudiced against the German[-] Americans in this country. Their hearts are reeking with disloyalty. . . . You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.[64]

The Court concluded that the affidavit provided by the defendants was sufficient under the statute to mandate disqualification.[65] The Court reasoned that the actual veracity of the allegations in the affidavit was irrelevant, and the judge deciding the disqualification issue was to rule as if the statements were true, regardless of whether in fact

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particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.").

61 The Judiciary Act, ch. 231, § 21, 36 Stat. 1090 (1911) (current version at 28 U.S.C. § 144 (1988)). For the text of the statute, see *supra* note 37.

62 *Id.*

63 255 U.S. 22 (1921).

64 *Id.* at 28-29.

65 *Id.* at 34-35.

they were.[66] As part of its decision the Court declared that, "the bias or prejudice which can be urged against a judge [for disqualification purposes] must be based upon something other than rulings in the case."[67] This cursory language was to have a profound effect on disqualification jurisprudence as the foundation upon which later cases would establish the extrajudicial source requirement.

The Supreme Court clearly enunciated the extrajudicial source requirement in *United States v. Grinnell Corp.*,[68] which relied on *Berger* to solidify the doctrine. *Grinnell* was a civil antitrust action brought by the United States. Based on the judge's in-court statements, the defendants submitted affidavits alleging that the trial judge was "personally biased and prejudiced."[69] Without addressing whether or not the affidavits established bias on the part of the judge, the Supreme Court refused to disqualify him because the source of the alleged bias came from within a judicial proceeding. The Court stated that: "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[70] *Grinnell* is frequently referred to in disqualification cases involving both § 144 and the revised § 455.[71]

Grinnell and cases following it have attributed the extrajudicial source requirement to the phrase "personal bias" contained in

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66 There was strong evidence that the affidavit was replete with falsehoods and misstatements, but since the statute only required good faith affidavits and not true affidavits, the Court concluded that perjury was a sufficient deterrent to the intentional concoction of false statements, and consequently the judge was only to consider if disqualification would be required if the allegations were true. *Id.* at 35-36. As a practical matter this decision made quite a lot of sense, because the same judge who was being disqualified was deciding whether or not disqualification was appropriate. If the truth of the affidavits was significant, the judge would be encouraged to simply deny the truth of the allegations to dispose of the claim. The rule that the presiding judge should rule on disqualification motions has not received universal praise. *See* Leubsdorf, *supra* note 27, at 242 ("A bizarre rule calls on the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias.").

67 *Berger*, 255 U.S. at 31. Notice that the judge's comments occurred during a judicial proceeding, though not the one concerning the defendants' case. *Berger* only stated that the bias must be based on something other than the "rulings in the case." Under the extrajudicial source requirement established in later cases, and as it is used in this Note, the judicial nature of the judge's statements might preclude disqualification under the statute because they arose in a judicial setting.

68 384 U.S. 563 (1966).

69 *Id.* at 580-82.

70 *Id.* at 583.

71 *See, e.g.*, United States v. Page, 828 F.2d 1476, 1481 (10th Cir. 1987) (citing *Grinnell* for the proposition that § 455(a) requires disqualification only if the judge's bias is extrajudicial); Moore v. McGraw Edison Co., 804 F.2d 1026, 1032 (8th Cir. 1986) (citing *Grinnell* for the proposition that § 144 requires disqualification only when the judge's bias is extrajudicial).

§ 144.[72] Because the phrase "personal bias" does not appear in § 455(a), it would appear that there is no statutory reason to apply the extrajudicial source requirement to this statute. Although the Ninth Circuit has recognized the absence of the "personal bias" language in § 455(a), it has devised one of the few explanations for applying the extrajudicial source requirement to § 455(a).[73]

When Congress revised § 455 in 1974, it duplicated the "personal bias" language of § 144 in § 455(b)(1).[74] Consequently, the Ninth Circuit properly concluded that the extrajudicial source requirement for disqualification under § 144 applied to § 455(b)(1).[75] In *United States v. Olander*,[76] the Ninth Circuit concluded that because § 455(b)(1) is the only section of § 455 that explicitly mentions the term "bias," "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)."[77] Although the Ninth Circuit is correct that § 455(a) does not contain the word "bias," it is unclear why the use of "bias" in § 455(b)(1) would preclude bias from being an independent reason for disqualification under § 455(a), which merely requires disqualification if the judge's impartiality might reasonably be questioned. In *United States v. Sibla*,[78] the Ninth Circuit reasoned that § 455(b)(1) is merely a specific example of when a judge's impartiality might reasonably be ques-

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[72] *See, e.g.*, United States v. Colon, 961 F.2d 41, 44 (2d Cir. 1992) (personal bias means bias based on extrajudicial matters); United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (personal bias in disqualification statute means extrajudicial); Shore v. County of Mohave, 644 F.2d 1320, 1322 (9th Cir. 1981) (personal bias is the same as bias stemming from an extrajudicial source).

[73] It is not likely that Congress omitted the phrase "personal bias" in § 455(a) with the intent of removing the extrajudicial source requirement because it is not mentioned in the House or the Senate Reports. Congress may not have considered the extrajudicial source requirement at all when it drafted § 455(a). For a discussion of the changes that Congress made to § 455 and the reasons behind them, see *supra* notes 42-53 and accompanying text.

[74] Section 455(b)(1) provides that the judge shall be disqualified "[w]here he has a *personal bias* or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (1988 & Supp. II 1990) (emphasis added). For the text of the entire statute, see *supra* note 42.

[75] *See, e.g.*, Ronwin v. State Bar of Ariz., 686 F.2d 692, 700 (9th Cir. 1982) (test for disqualification under §§ 144 and 455(b)(1) are the same). The thesis of this Note, that as a matter of public policy the extrajudicial source requirement should not apply to § 455(a), could also apply to § 455(b)(1). But since the Supreme Court applied the extrajudicial source requirement to § 144, which contained the phrase "personal bias," it is at least understandable why courts would be reluctant to abandon the doctrine for § 455(b)(1), which also contains the phrase "personal bias." It is less clear why the doctrine was extended to § 455(a).

[76] 584 F.2d 876 (9th Cir. 1978), *vacated and remanded on different grounds*, 443 U.S. 914 (1979).

[77] *Id.* at 882.

[78] 624 F.2d 864 (9th Cir. 1980).

tioned under § 455(a).[79]

If the Ninth Circuit were correct that § 455(b)(1) is merely a specific example of when a judge's impartiality might reasonably be questioned under § 455(a), and that the term "bias" in § 455(b)(1) precludes a broader test for disqualification for bias under § 455(a), then it might also be correct that the extrajudicial source requirement must apply to § 455(a) as well as § 455(b)(1).[80] The Ninth Circuit, however, is not correct. The Supreme Court precluded this interpretation of § 455(a) in *Liljeberg v. Health Services Acquisition Corp.*,[81] the only Supreme Court case yet to disqualify a judge under § 455(a). In *Liljeberg*, the petitioner claimed that it was unnecessary to disqualify Judge Collins because he was unaware of the financial conflict of interest that resulted from his presiding over the case. The petitioner contended that § 455(a) should be read in light of § 455(b)(4),[82] which requires that the judge possess *knowledge* of a financial conflict of interest for disqualification purposes. The Court refused to accept the petitioner's argument, concluding that § 455(b)(4) was a "somewhat stricter provision" than § 455(a).[83] Analogous to the Supreme Court's decision in *Liljeberg*, § 455(a) should not be read in light of § 455(b)(1), which should be interpreted as a somewhat stricter provision than § 455(a).

III. GENERAL CIRCUIT APPROACH TO THE EXTRAJUDICIAL SOURCE REQUIREMENT IN § 455(A)

A. *The Extrajudicial Source Requirement as Applied to § 455(a)*

The Fifth Circuit was one of the first circuits to address the standards applicable to § 455 in *Davis v. Board of School Commissioners*.[84]

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[79] *Id.* at 867.

[80] Even if this were the case, it would not defeat the argument that the extrajudicial source requirement as applied to any statute is a method that courts use to avoid addressing alleged judicial bias, and that as a matter of public policy it should not be applied to disqualification. However, as will be shown, the Ninth Circuit does not have the best of the argument anyway.

[81] 486 U.S. 847 (1988). Recall that *Liljeberg* dealt with a judge who was a trustee for Loyola University, which was negotiating to sell land to Liljeberg. The judge's decision was necessary to allow Liljeberg to acquire the land, although the judge claimed he was unaware of the negotiations. For a discussion of the facts of *Liljeberg*, see *supra* notes 54-60 and accompanying text.

[82] Section 455(b)(4) states that the judge shall disqualify himself, if "[h]e *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 is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4) (1988 & Supp. II 1992) (emphasis added). For the text of the entire statute, see *supra* note 42.

[83] *Liljeberg*, 486 U.S. at 859-60 n.8.

[84] 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

In *Davis*, two black assistant school principals claimed they were denied a promotion because of their race and sought disqualification of the district judge because he was biased against them. They submitted affidavits pursuant to 28 U.S.C. § 144,[85] claiming that the judge had a personal bias against them and other black teachers, parents, and school children in their school system, based on negative remarks the judge made to their attorneys in an opinion in a prior proceeding.[86]

In affirming the district judge's refusal to disqualify himself, the Fifth Circuit made clear that, since *United States v. Grinnell*,[87] disqualification under § 144 required any alleged bias to stem from an extrajudicial source.[88] The court went on to discuss § 455, which it referred to as self-enforcing,[89] concluding that when interpreting § 455:

> [t]he determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context. This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.[90]

Since *Davis*, most circuits have agreed that the extrajudicial source requirement is an integral part of § 455.[91] Few courts, how-

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85 28 U.S.C. § 144 (1988). For the text of the statute, see *supra* note 37.

86 *Davis*, 517 F.2d at 1050. Part of the basis for the disqualification motion were statements made by the judge in a protective order relating to certain interrogatories and a contempt motion that the court had disallowed in another case. The judge asserted from the bench that:

> In a not too veiled effort to circumvent this Court's ruling thereon . . . plaintiff's counsel has now . . . attempted to propound the same set of interrogatories in an effort to elicit the same information and try to build a case on behalf of unknown others whom this Court has not been shown exist. Such subterfuge borders on the edges of contempt.

Id. at 1050 n.7.

87 384 U.S. 563, 583 (1966). For a discussion of *Grinnell*, see *supra* notes 68-71 and accompanying text.

88 *Davis*, 517 F.2d at 1051.

89 *Id.* By "self-enforcing" the court simply meant that § 455(a) applies whether a party files an affidavit or not. In other words, the provision provides for automatic disqualification, with or without a motion by one of the parties.

90 *Id.* at 1052.

91 *See, e.g.*, *In re* International Business Mach. Corp., 618 F.2d 923, 929 (2d Cir. 1980) (IBM's failure to establish extrajudicial bias precludes disqualification); *In re* School Asbestos Litig., 977 F.2d 764, 781 (3d Cir. 1992) (judge's participation in extrajudicial conference, in which he was exposed to arguments and evidence that would be presented at trial, requires disqualification); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989) (disqualification requires that bias stem from an extrajudicial source); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (a judge's controversy with a party's attorney is not extrajudi-

ever, have explained why § 455 should be read in light of § 144. In *Davis*, the Fifth Circuit said simply that the statutes should be read "*in pari materia*," or in reference to one another.[92] No explanation for this reading was given. Section 144 was the first statute to recognize bias as a ground for disqualification in 1911.[93] Section 455 was completely revised in 1974 to make the ethical standards for disqualification, which were adopted in the early 1970s, and the statutory standards for disqualification virtually identical.[94] It is unclear on what basis these statutes should be read in light of each other except that they both refer to disqualification.[95]

B. *Exceptions to the Extrajudicial Source Requirement in § 455(a)*

Circuit courts that generally apply the extrajudicial source requirement to § 455(a) have sometimes avoided applying the doctrine either by using alternative methods to disqualify judges or by creating exceptions to the requirement. This section explores how these alternative methods have been employed. If the extrajudicial source requirement were not applied to § 455(a), these alternative disqualification methods would be unnecessary.

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cial, and will not result in disqualification under § 144 or § 455), *cert. denied*, 425 U.S. 944 (1976); United States v. Nelson, 922 F.2d 311, 320 (6th Cir. 1990) (a defendant's allegations of bias that do not indicate any extrajudicial matters is insufficient to warrant disqualification), *cert. denied*, 111 S. Ct. 1635 (1991); United States v. Jones, 801 F.2d 304, 312 (8th Cir. 1986) (disqualifying bias must stem from an extrajudicial source); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (holding that a party's allegations about a judge's performance while presiding over her case do not arise from an extrajudicial source, and disqualification will not result); United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) (disqualification must be based on extrajudicial conduct); McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (holding that evidentiary rulings arise in a judicial setting and are not a basis for disqualification); United States v. Barry, 938 F.2d 1327, 1341 (D.C. Cir. 1991) (even if court's statements came from extrajudicial source as required, the statements do not indicate bias).

92 *Davis*, 517 F.2d at 1052.

93 *See supra* notes 35-41 and accompanying text.

94 *See supra* notes 42-53 and accompanying text.

95 *See* Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (reading statutes *in pari materia* "makes the most sense when the statutes were enacted by the same legislative body at the same time"); 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 rule 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."). *But see* Davis v. Barber, 853 F.2d 1418, 1425 (7th Cir. 1988) (" '[S]tatutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme.' " (quoting Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984))).

1. *The Use of the Due Process Clause to Avoid the Extrajudicial Source Requirement*

The Supreme Court has only disqualified state judges under the Due Process Clause, never a federal judge.[96] The reason for this could be that because the disqualification statutes are broader than due process requires, and because the statutes apply to federal judges, it is unnecessary to use the Due Process Clause to disqualify federal judges. In contrast to the disqualification of federal judges, the Due Process Clause is the Supreme Court's only method of disqualifying state judges. It is somewhat curious then, that in *Nicodemus v. Chrysler Corp.*[97] and *Haines v. Liggett Group Inc.*,[98] two federal circuits applied the Due Process Clause to disqualify federal judges. The only readily apparent reason that the Sixth and the Third Circuits applied the Due Process Clause was to circumvent the extrajudicial source requirement.

In *Nicodemus v. Chrysler*,[99] the plaintiff brought a sex discrimination suit against her employer. The district judge stated:

> I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can . . . .[100]

Neither Chrysler nor the plaintiff requested disqualification, but the Court of Appeals for the Sixth Circuit concluded, sua sponte, that this curative action was required. "While ordinarily this Court would simply find error, reverse and remand upon finding that unfair judicial procedures have resulted in a denial of due process, the Court is of the view that this case requires that more dramatic measures be taken."[101] The court arrived at this conclusion even though the judge's apparent bias arose only from judicially acquired knowledge, his presiding over the case, and was demonstrated only through judicial conduct, the judge's judicial colloquy.

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96 *See, e.g.*, Taylor v. Hayes, 418 U.S. 488 (1974) (state judge disqualified from presiding over contempt proceeding where the conduct leading to the contempt charges occurred during another proceeding at which he presided); *In re* Murchison, 349 U.S. 133 (1955) (state judge disqualified from hearing case in which he was the sole witness to conduct that occurred during a judicial proceeding).

97 596 F.2d 152 (6th Cir. 1979).

98 975 F.2d 81 (3d Cir. 1992).

99 596 F.2d 152 (6th Cir. 1979).

100 *Id.* at 155.

101 *Id.* at 157.

The Court of Appeals for the Third Circuit has also used the Due Process Clause to disqualify a federal judge for judicial bias. In the recent and highly publicized case of *Haines v. Liggett Group, Inc.*,[102] Judge Sarokin—after presiding over this liability lawsuit for five years—ordered defendant tobacco companies to disclose matters that the defendants insisted were privileged. The prologue to Judge Sarokin's opinion began:

> In 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.[103]

The Third Circuit did not doubt Judge Sarokin's ability to discharge his "judicial duties free from bias or prejudice,"[104] but rather concluded that in this case the prologue to his opinion created the appearance of partiality, which violated due process.[105]

Although the circuit courts in *Nicodemus* and *Haines* correctly applied the Due Process Clause to disqualification by not referring to the extrajudicial source requirement, it is unclear—other than to avoid the extrajudicial source requirement—why they did not apply § 455(a). It would seem that the Third and Sixth Circuits were able to evade the extrajudicial source requirement by disqualifying the re-

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102 975 F.2d 81 (3d Cir. 1992). *Haines* received substantial coverage in the popular press because of the controversial decision to disqualify Judge Sarokin, a well-respected district judge. Laurence Tribe of Harvard Law School commented that only the tobacco industry benefitted from the decision.

> The fact that [Judge Sarokin] used somewhat colorful language to describe what the record before him appeared to show really means he was more candid than some judges. . . . [R]eplacing him with a relative novice is likely to be good news for the industry, not because he is biased but because he's harder to deceive than someone who's new to the material.

David Margolick, *Judge Ousted From Tobacco Case Over Industry's Complaint of Bias*, N.Y. TIMES, Sept. 9, 1992, at A1, B4. For other popular coverage of the case, see *Judge Taken Off Key Suit on Smoking*, L.A. TIMES, Sept. 9, 1992, at D1; *U.S. Judge Removed from Tobacco Suit*, CHI. TRIB., Sept. 9, 1992, at C13.

103 975 F.2d at 97.

104 *Id.* at 98.

105 *Id.*

spective judges under the Due Process Clause. Instead, they should have abandoned the extrajudicial source requirement and applied § 455(a).

2. *The Pervasive Bias Exception to the Extrajudicial Source Requirement in § 455(a)*

In addition to the due process "exception," some courts have adopted a "pervasive bias" exception to the extrajudicial source requirement when applying § 455(a). In *Davis*,[106] the Fifth Circuit stated that, "we think there is an exception [to the extrajudicial source requirement] where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."[107] The Fifth Circuit did not define the phrase "pervasive bias" but it did indicate that there was an exception to the extrajudicial source requirement.

The exception noted in *Davis* was applied by the Fifth Circuit in *United States v. Holland*.[108] In *Holland*, the defendant was convicted for the transportation and concealment of stolen vehicles and sentenced to three years in prison. While the jury was deliberating, the judge, after notifying both parties, went into the jury room to clarify some issues. Neither party objected. On appeal, the Fifth Circuit reversed the conviction, concluding that the unrecorded discussions in the jury room denied the defendant his right to a complete transcript.[109] The defendant was retried and again convicted. Complaining that the defendant had "broken faith" with him by obtaining a reversal in the first trial after not objecting to his entering the jury room, the judge lengthened the defendant's sentence by one year.[110] The Fifth Circuit held that the extension of the defendant's sentence demonstrated pervasive bias, and consequently disqualified the district court judge under § 455(a).[111] The court did not articulate what made the judge's apparent bias "pervasive." A few other circuits have

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106 For a discussion of *Davis*, see *supra* notes 84-95 and accompanying text.

107 Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Courts applying the pervasive bias exception have not endeavored to define the term more specifically than the vague definition provided in *Davis*. *See, e.g.*, McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) ("An exception to . . . [the extrajudicial source requirement] occurs when the movant demonstrates 'pervasive bias and prejudice'." (quoting United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir. 1981)); Davis v. Commissioner, 734 F.2d 1302, 1303 (8th Cir. 1984) ("The courts have recognized an exception to [the extrajudicial source requirement] in extreme cases of pervasive personal bias and prejudice.").

108 655 F.2d 44 (5th Cir. 1981).

109 *Id.* at 45.

110 *Id.* at 46.

111 *Id.* at 47.

also recognized the pervasive bias exception.[112]

Both the due process exception and the pervasive bias exception to the extrajudicial source requirement in § 455(a) are unnecessary vehicles to circumvent the judicially created extrajudicial source requirement. If the requirement were not applied to § 455(a), as it is not in the First Circuit, neither exception would be necessary, and the courts could focus their attention on the alleged bias of the judge.

As it stands, most circuits can avoid addressing alleged bias merely by calling the bias judicial. This is not to say that many disqualification decisions would be decided differently, because the courts can always use the Due Process Clause or the pervasive bias exception for disqualification purposes if they conclude that a judge should be disqualified. However, justice would be better served, and the integrity of the judiciary better upheld, if courts would simply address alleged bias, and not avoid it through the extrajudicial source requirement.

IV. THE FIRST CIRCUIT'S APPROACH TO BIAS UNDER § 455(A)

The First Circuit has never recognized that the extrajudicial source requirement applied to § 455(a).[113] As early as 1976, the First Circuit recognized that a major purpose of § 455 was to "foster public confidence in the judicial system,"[114] and that disqualification may be

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112 *See, e.g.*, McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (holding where party alleging bias only points to several adverse rulings, pervasive bias exception to extrajudicial source requirement is not established); Khan v. Yusufji, 751 F.2d 162 (6th Cir. 1984) (judge's expression of outrage at party's use of legal system to avoid paying creditors is not pervasive bias); Davis v. Commissioner, 734 F.2d 1302, 1303 (8th Cir. 1984) (judge's response, "Oh, come on" to party's suggestion that the U.S. Mail altered stipulation of fact is not pervasive bias).

113 The Tenth Circuit has avoided addressing this issue directly, but contrasted the extrajudicial source requirement in § 455(b)(1) with the requirement to disqualify if the judge's impartiality might reasonably be questioned in § 455(a). Franks v. Nimmo, 796 F.2d 1230, 1234 (10th Cir. 1986) (" '[W]hile subsection (b)(1) requires recusal if the judge has actual personal bias or prejudice or extrajudicial knowledge of disputed evidentiary facts, subsection (a) requires recusal merely if the circumstances are such that the judge's "impartiality might reasonably be questioned." ' " (quoting United States v. Ritter, 540 F.2d 459, 462 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976))). This might indicate that the Tenth Circuit is leaning towards the First Circuit approach. *But see* United States v. Prichard, 875 F.2d 789 (10th Cir. 1989) (requiring disqualification only for bias from an extrajudicial source, but not mentioning upon which statute the decision is based).

The Seventh Circuit has also avoided this issue. When addressing disqualification for bias, the Seventh Circuit recognizes the objective nature of § 455(a), but has not specifically contrasted it with the extrajudicial source requirement. *See, e.g., In re* Mason, 916 F.2d 384, 385 (7th Cir. 1990) ("Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.").

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

required even for judicially acquired information.[115]

One rationale for the extrajudicial source requirement is that without it disqualifications would increase, creating an impossible burden on judicial administration.[116] However, the First Circuit approach has not led to a wave of disqualifications under § 455(a).[117] Perhaps the reason for this rests in the cautious manner in which the First Circuit addresses questions of bias. In *Blizard v. Frechette*,[118] a sex discrimination lawsuit, the trial judge used colorful language in his opinion, which denied the plaintiff any recovery. The judge subsequently rejected a disqualification request based on his comments.[119] The First Circuit affirmed the decision stating:

> 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). We do not hold that words

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115 United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) ("We recognize that . . . 28 U.S.C. § 455(a) . . . now permits disqualification of judges even if alleged prejudice is a result of judicially acquired information.").

116 *See* ABRAMSON, *supra* note 51, at 25 (disqualification for bias following judicial comments or rulings would lead to excessive disqualification motions and judge-shopping); Bloom, *supra* note 35, at 664 ("excessive disqualification would seriously damage the efficient administration of justice"); Hoekema, *supra* note 8, at 704 (judicial disqualification diminishes the efficiency of the judicial system).

117 *See, e.g.*, Panzardi-Alvarez v. United States, 879 F.2d 975, 983-84 (1st Cir. 1989) (rejecting § 455(a) disqualification for trial judge's clashes with counsel), *cert. denied*, 493 U.S. 1082 (1990); *In re* Cooper, 821 F.2d 833, 838-39, 843 (1st Cir. 1987) (rejecting § 455(a) disqualification for controversy between the judge and a party's attorney; also rejecting disqualification, even though the judge had a low opinion of the defendant); United States v. Mirkin, 649 F.2d 78, 81 (1st Cir. 1981) (rejecting § 455(a) disqualification for judge's adverse opinion of defendant's credibility); Blizard v. Frechette, 601 F.2d 1217, 1222 (1st Cir. 1979) (rejecting § 455(a) disqualification for judge's prior adverse rulings). Moreover, since § 455 was revised in 1974, the First Circuit has ruled in favor of disqualification for bias under § 455(a) in only one reported case (statistic based on LEXIS search of First Circuit cases). *See* Home Placement Serv., Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984) (disqualifying judge for granting interview to newspaper that was also a party to an unrelated action before him). In United States v. Chantal, 902 F.2d 1018 (1st Cir. 1980), the case used to introduce the distinction between a judicial and an extrajudicial source, the First Circuit accepted the appellant's disqualification argument but merely remanded the case for further proceedings because the trial judge had applied the wrong standard to disqualification under § 455(a). *See supra* notes 9-15 and accompanying text for a discussion of *Chantal*.

118 601 F.2d 1217 (1st Cir. 1979).

119 The language objected to was the following:

> In summary, I find that plaintiff is a person who is so *obsessed* with the notion that she has a right to become Deputy Commissioner of the Department [and] that she is unable to accept or perform any other task. I find that her irrelevant responses to work assignments have been so frustrating to her superiors as to warrant their giving her no meaningful role to play in the Department which means that she is, as she put in her own testimony, "vegetating" in her office at an expense to the taxpayers of some $25,000 a year. This situation is caused by her own shortcomings and not prejudice on the part of her superiors.

Id. at 1221 n.1.

> alone can never provide a factual basis to doubt impartiality; but these words, while enough to fuel an argument, do not suffice.[120]

The First Circuit adopted a refreshingly clear distinction between bias and reasonable conduct necessary for judicial decision making. According to the First Circuit, bias is not comprised simply of rulings that one party disagrees with, nor even of a judge's colorful locution. Rather, bias is conduct or knowledge that would lead a reasonable person to conclude that one of the parties is denied a fair trial because the presiding judge is not impartial.[121] Circuits that accept the extrajudicial source requirement would have avoided the First Circuit's discussion of bias by calling the judge's alleged bias judicial.

United States v. Chantal[122] presented a more recent expression of the First Circuit's rejection of the extrajudicial source requirement for a § 455(a) disqualification.[123] The court reiterated that "[t]he First Circuit . . . has repeatedly subscribed to what all commentators characterize as the correct view that . . . the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings."[124] The case was remanded so that the district judge could

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120 *Id.* at 1221.

121 *See, e.g.*, Panzardi-Alvarez v. United States, 879 F.2d 975, 984 (1st Cir. 1989) (judge's comments to defendant's attorney were not grounds for disqualification in the absence of a reasonable showing that the judge denied the defendant a fair trial), *cert. denied*, 493 U.S. 1082 (1990).

122 902 F.2d 1018 (1st. Cir. 1990). Recall that in *Chantal* the presiding judge had previously sentenced the defendant to twelve years in prison. At the prior sentencing hearing the judge expressed skepticism that the defendant could ever mend his ways. See *supra* notes 9-15 and accompanying text for a discussion of *Chantal*.

123 It is interesting to note that the author of the opinion was the late Judge John R. Brown of the Fifth Circuit, who was sitting by designation. Judge Brown made sure to insert in a footnote that the Fifth Circuit does not accept the First Circuit's interpretation of § 455(a). "Lest I commit myself to juridical harakiri I hastily acknowledge that at home I must and will follow the Fifth Circuit's holdings [that bias must originate from an extrajudicial source,] which from the vantage of the First Circuit is wrong." *Chantal*, 902 F.2d at 1022 n.10. Given the strength of the opinion, one might be curious as to how Judge Brown might have ruled if the issue were one of first impression.

124 *Id.* at 1022. The commentators to whom Judge Brown referred in his opinion are two commentators who wrote on the subject in the mid-1980s, Susan B. Hoekema and Seth E. Bloom. Hoekema said: "[T]he appropriate focus under section 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." Hoekema, *supra* note 8, at 717. Bloom defines judicial bias slightly differently than it is defined in this Note, contrasting it with personal bias as opposed to extrajudicial bias. Bloom defines personal bias as bias against a party, and he defines judicial bias as a judge's "judicial philosophy, personal background, or prior opinions on legal issues or the subject matter of the lawsuit." Bloom, *supra* note 35, at 680. Concluding that judges should be disqualified for certain judicial bias, he stated: "Since the judiciary's authority depends on public confidence in the impersonality and reasoned foundation of judicial decisions, it is essential

make the discretionary determination based on the court of appeals opinion.

Chantal squarely focused its decision on the judge's bias. It is possible that the Third and Sixth Circuits would avoid the extrajudicial source discussion in *Chantal* by relying on the Due Process Clause. It is possible that the Fifth, Eighth, and Eleventh Circuits would place a fact pattern like *Chantal* into their noted pervasive bias exception to the extrajudicial source requirement. The First Circuit, however, is the only one that deals directly with the issue, applying the objective test as § 455(a) requires, and focusing its attention on the judge's alleged bias at the outset.

V. APPLICATION OF THE EXTRAJUDICIAL SOURCE REQUIREMENT TO § 455(A) DETRACTS FROM PUBLIC CONFIDENCE IN THE INTEGRITY OF THE JUDICIAL SYSTEM

The fundamental goal of disqualification law in general, and of § 455(a) in particular, is to promote "public confidence in the impartiality of the judicial process."[125] The distinct and significant problem with applying the extrajudicial source requirement to disqualification under § 455(a) is that it detracts from this fundamental goal.

There have been several rationales posited for the existence of the judicially created extrajudicial source requirement. First, because most evidence of a judge's bias arises from within judicial proceedings,[126] excluding in-court information limits the quantity of disqualifications. It has been asserted that limiting the quantity of disqualifications is important to ease judicial administration, to promote confidence in the judiciary, and to inhibit judge-shopping.[127] Second, parties should be discouraged from inciting judges for the

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that judges be disqualified whenever the public may reasonably question their impartiality." *Id.* at 695.

125 H.R. REP. NO. 1453, *supra* note 43, at 5 (The general standard for disqualification under § 455(a) "is designed to promote public confidence in the impartiality of the judicial process."); S. REP. NO. 419, *supra* note 43, at 5; *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 871 (1988) ("Congress hoped that this objective standard [of § 455(a)] would promote public confidence in the impartiality of the judicial process"); Bloom, *supra* note 35, at 663 (The fundamental purpose of disqualification law is "maintaining public confidence in the integrity of the judicial system.").

126 Hoekema, *supra* note 8, at 712.

127 Seth E. Bloom noted these rationales for limiting the quantity of disqualifications. *See* Bloom, *supra* note 35, at 664. First, he explained, if standards for disqualification were too easily met, then the increasing frequency of disqualification might actually diminish public confidence in the judiciary by encouraging constant questioning of judicial impartiality. Second, frequent judicial disqualification would hinder judicial administration, especially if disqualification were to occur well into a proceeding. Third, if disqualification were easily

purposes of disqualification on appeal by making all of the judge's judicial comments immune from disqualification.[128] Third, without the rule judges would be inhibited from performing their central function, making rulings based on the evidence and the law.[129] A judge should feel free to rule without the apprehension created by the possibility that his statements will result in disqualification.[130]

Although the above reasons for the extrajudicial source requirement may be laudable, there is no empirical evidence that the extrajudicial source requirement achieves the posited goals. Moreover, the rationales for the doctrine do not outweigh the stated congressional desire that § 455(a)'s central purpose is to promote the integrity of the judicial system.[131] Abandonment of the extrajudicial source requirement will merely focus a court's attention on alleged bias, but there is no evidence that the number of actual disqualifications would dramatically increase. The First Circuit has applied § 455(a) to judicial bias for over two decades without any noticeable encumbrance to judicial decision making. Furthermore, there has been only one reported disqualification for bias in the First Circuit under § 455(a) since it was revised in 1974.[132] Although, it has refused to disqualify judges in a number of instances where § 455(a) has been invoked, the First Circuit has—faithful to the intent of the drafters of § 455(a)—focused its attention on the existence of the appearance of bias and not on the source of the alleged bias.[133]

The rationales posited for the extrajudicial source requirement will be examined in turn to determine if they create a strong policy rationale for maintaining the requirement. The first argument is that the extrajudicial source requirement limits judicial disqualification,

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obtained, then litigants would use it to dispose of judges that they feared for reasons other than their partiality. *Id.*

128 *See, e.g.*, Pau v. Yosemite Park, 928 F.2d 880, 885 (9th Cir. 1991) ("Cutting comments to counsel, particularly those relating to skill rather than good faith or integrity" do not require disqualification under § 455(a).); Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) ("A petitioner's deliberate attack on the trial judge calculated to disrupt the proceedings will not force a judge out of a case."), *cert. denied*, 449 U.S. 1086 (1981).

129 Hoekema, *supra* note 8, at 715.

130 *See, e.g.*, United States v. Colon, 961 F.2d 41 (2d Cir. 1992) (judge's prior imposition of two 15-year sentences was not sufficient to show an appearance of bias); *In re* International Business Mach. Corp., 618 F.2d 923, 929 (2d Cir. 1980) ("[A]dverse rulings by a judge can[not] per se create the appearance of bias under § 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias.").

131 H.R. REP. NO. 1453, *supra* note 43, at 5; S. REP. NO. 419, *supra* note 43, at 5.

132 *See* Home Placement Serv., Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984) (disqualifying judge for granting interview to newspaper that was a party to an unrelated action before him) (statistic based on LEXIS search of First Circuit cases).

133 *See, e.g.*, United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990).

which eases judicial administration, promotes confidence in the judiciary, and inhibits judge-shopping.[134] Even if abolishing the extrajudicial source requirement eased judicial administration to some extent, it is not at all clear that easing judicial administration should be the ultimate goal of a disqualification doctrine. If an additional judge, who would otherwise not be disqualified, is disqualified because he or she demonstrates an apparent bias towards one of the parties that arose from within a judicial proceeding, then that judge should be disqualified. Limiting the quantity of disqualifications merely for the benefit of judicial administration does not seem to be a sufficient rationale for creating a judicial zone of immunity.

The other arguments for limiting the quantity of disqualifications are similarly specious. It does not promote public confidence in the judiciary to allow an apparently biased judge to preside over a case. To hold otherwise would imply that the public would be more confident in the system if an apparently biased judge presided over a case than if that apparently biased judge were disqualified. It is absurd to assume that the public believes that judges are infallible and that disqualification would disillusion them.[135] Public confidence in the integrity of the judiciary would be better maintained if the public understood that the judiciary had an effective self-policing mechanism to prevent judges from hearing cases in which they had an apparent bias.

The prevention of judge-shopping is also not a valid rationale for applying the extrajudicial source requirement. Parties that attempt to infuriate the presiding judge for the purpose of using his or her comments in a disqualification motion will soon discover that such a claim is invalid.[136] The claim is invalid, not because the judge's comments are immune, but because a reasonable person, who was aware of all the circumstances, would not question the judge's impartiality. Courts should be encouraged to develop a jurisprudence defining ap-

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134 *See supra* note 127. One rather interesting example of a very litigious plaintiff that attempted to take advantage of the judicial system is the case of *In re* Martin-Trigona, 573 F. Supp. 1237 (D. Conn. 1983), *cert. denied*, 475 U.S. 1058 (1986). The plaintiff, who brought scores of cases to trial, praised the presiding judge until the judge ruled against him. He then began to lambaste the judge in letters and sued the judge and his wife. The plaintiff requested that the judge disqualify himself under § 455(a) because the judge's attorney in an unrelated personal matter had once had some dealings with the plaintiff. The judge refused to disqualify himself, noting that a reasonable person, with knowledge of all the surrounding circumstances, would not question his impartiality. *Id.* at 1242-43.

135 *See* Leubsdorf, *supra* note 27, at 249-52.

136 *See* Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) ("It behooves the courts to exercise restraint before making the hurling of epithets a rewarding sport for litigants.").

parent bias, which would limit disqualification to those situations in which a reasonable person, who was aware of all the circumstances, would expect that the judge's attitude toward one of the parties might affect the judge's ruling on an issue in the case.

The above arguments also apply to the posited rationale for the extrajudicial source requirement that a judge would be inhibited from making rulings on the case, if they were not immune from disqualification. Whether a judge should be disqualified because a ruling is apparently biased should be based on the appearance of bias, not on whether the apparent bias arose from a judicial setting.

There simply is no valid rationale to allow an apparently biased judge to sit on a case merely because his or her alleged bias arose from within a judicial proceeding. A judge's fair and unbiased resolution of an issue is based on the relevant evidence and law.[137] In contrast, bias indicates an unfair resolution, not a fair one that incidentally happens to be adverse to a particular party. Although it has seldom been defined by the courts, bias has been regarded as a state of mind that would make it difficult for a reasonable, fair-minded person to fairly judge the issues or people before him.[138] Just because a judge must make rulings during any proceeding does not imply that he may remain oblivious to unconscious bias that may pervade the proceeding. If the goal of judicial disqualification—to maintain public confidence in the integrity of the judicial system—is to be obtained, then alleged bias from both judicial and extrajudicial sources must be examined. If abolition of the extrajudicial source requirement compels certain judges to carefully consider their rulings to avoid tainting them with apparent bias, then this will bolster, not detract from, public confidence in the integrity of the judicial system.

When Congress revised § 455 in 1974, it did so with the express intent of promoting the integrity of the judicial system.[139] The lan-

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137 Judge's values are, of course, significant to judicial decision making and any minimization of this fact would be naive. It is reasonable, however, to say that society wants fair resolutions of judicial problems. What factors comprise bias, and which types of judges society wants, however, are beyond the scope of this Note. For an illuminating discussion of the qualities society desires in its judges, see generally Leubsdorf, *supra* note 27; Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988).

138 *See* Herrington v. County of Sonoma, 834 F.2d 1488, 1502 (9th Cir. 1987) (bias consists of " 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons' " (quoting United States v. Comforte, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980))), *cert. denied*, 489 U.S. 1090 (1989).

139 H.R. REP. NO. 1453, *supra* note 43, at 5; S. REP. NO. 419, *supra* note 43, at 5. Congress's failure to correct the erroneous interpretation of § 455(a) by the majority of the circuits may seem like an endorsement. Commentators have noted, however, that congressional inac-

guage of § 455(a) requires disqualification if the judge's impartiality "might reasonably be questioned."[140] When Congress enacted § 455(a), it intended to change the standard that the federal courts used to determine disqualification from a subjective one to an objective one.[141] The statute was "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 judges impartiality, he should disqualify himself and let another judge preside over the case."[142] It is not clear what useful purpose the extrajudicial source requirement serves, but it can only detract from public confidence in the integrity of the judicial system.

CONCLUSION

It seems that several circuits have addressed the failures of the extrajudicial source requirement. The Third and Sixth Circuits rely on due process to disqualify judges with judicially acquired bias. The Fifth, Eighth, and Eleventh Circuits adhere to a pervasive bias exception to the extrajudicial source requirement. Only the First Circuit avoids these unnecessary steps, by looking at the judge's possible bias, and applying the objective test mandated by Congress and recognized by the Supreme Court in *Liljeberg*. Commentators agree that "the appropriate focus 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."[143]

The overall goal of judicial disqualification is to maintain the in-

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tion is a poor indicator of congressional intent. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181-82 (1975) ("There could hardly be less reputable legislative material than legislative silence."). The Supreme Court most frequently relies on congressional inaction if there was active deliberation in response to administrative or judicial interpretations. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) ("A refusal by Congress to overrule . . . [a] construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the . . . construction has been brought to Congress'[s] attention through legislation specifically designed to supplant it."). Regarding § 455, neither the House nor the Senate Report mentions the extrajudicial source requirement. This indicates that Congress did not consider the extrajudicial source requirement when amending § 455, and consequently congressional silence should not be equated with congressional acquiescence.

140 28 U.S.C. § 455(a) (1988 & Supp. II 1990). For the text of the entire statute, see *supra* note 42.

141 H.R. REP. NO. 1453, *supra* note 43, at 5; S. REP. NO. 419, *supra* note 43, at 5.

142 *Id.*

143 Hoekema, *supra* note 8, at 717.

tegrity of the judicial system.[144] This lofty goal cannot be met by placing a needless prophylactic doctrine around disqualification jurisprudence and allowing judges the unnecessary opportunity to ignore alleged bias. As time progresses, the general public is becoming more acutely aware that judges are as susceptible to prejudice as other people.[145] To maintain the integrity of the judiciary, Congress and the Supreme Court require disqualification for the mere appearance of bias. The only way to ensure the continued integrity of the judicial system is to clearly proclaim that the extrajudicial source requirement, an excuse to avoid the real issue of bias, does not apply to § 455(a). In *Liteky v. United States*,[146] the Supreme Court has the opportunity to maintain the integrity of the judicial system by recognizing that there is no room for the extrajudicial source requirement in § 455(a), and allowing courts to start addressing the bias issue.

Adam J. Safer

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144 *See* H.R. REP. NO. 1453, *supra* note 43, at 5; S. REP. NO. 419, *supra* note 43, at 5; Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n.7 (1988).

145 *See* Leubsdorf, *supra* note 27, at 237-38, 247-52.

146 973 F.2d 910 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 2412 (1993). For a short discussion of *Liteky*, see *supra* notes 23-25 and accompanying text.