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Liteky v. United States: The Supreme Court Restricts the Disqualification of Biased Federal Judges Under Section 455(A)

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**LITEKY V. UNITED STATES: THE SUPREME COURT
RESTRICTS THE DISQUALIFICATION OF BIASED
FEDERAL JUDGES UNDER SECTION 455(A)**

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness.

—Judge Jerome Frank¹

I. INTRODUCTION

One of the basic tenets of our judicial system is the right of litigants to have a neutral and impartial judge preside over their case.² Over the last two hundred years, American legislatures and courts have sought to “secure the impartiality of trial judges by requiring judges to disqualify themselves in various circumstances.”³ The latest Supreme Court case to consider the issue of judicial disqualification was *Liteky v. United States*.⁴

This casenote addresses the development of judicial disqualification law before and through the *Liteky* decision, and it also analyzes and predicts *Liteky*'s impact on future cases. Part II briefly discusses the history of American judicial disqualification statutes. Part III traces the evolution of case law interpreting those statutes prior to *Liteky* and encompasses an overview of the development of the extrajudicial source doctrine⁵ and the

1. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2d Cir. 1943).

2. See, e.g., Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1985); Helena K. Kobrin, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 612 (1976).

3. Susan B. Hoekema, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMP. L.Q. 697, 697 (1987).

4. 114 S. Ct. 1147 (1994).

5. The extrajudicial source doctrine concerns the origin of a judge's bias. Under this doctrine, if bias or partiality arises from conduct within the courtroom, it cannot

pervasive bias exception.⁶ Part IV reviews the *Liteky* decision. Part V analyzes *Liteky*, addressing its actual and theoretical impact on judicial disqualification jurisprudence, and notes an alternative to statutory disqualification that attorneys can pursue to circumvent *Liteky*.

II. STATUTORY HISTORY OF JUDICIAL DISQUALIFICATION⁷

To appreciate the Court's holding in *Liteky*, it is essential to review the statutory basis for the decision.⁸ In 1911, Congress revised the Judicial Code, enacting Judiciary Act sections 20⁹

form the basis of a recusal claim.

6. The pervasive bias exception refers to a narrow circumstance through which a litigant could circumvent the extrajudicial source doctrine. It was first announced by the Fifth Circuit in *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), when the court held that "there is an exception (to the extrajudicial source rule) where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Id.* at 1051.

7. The international history of judicial disqualification law began with the basis of Roman civil law, the Code of Justinian, which provided that "[a]lthough a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before an issue joined, so that the cause go to another." Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923) (translating CODE J. 3.1.16). By the early seventeenth century, the prevailing common law view was expressed by Lord Coke: "Aliquis non debet esse iudex in propriis causa" (no man shall be a judge in his own case). *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (K.B. 1608); Margaret F. Evans, Comment, *Disqualification of Federal Judges—the Need for Better Guidelines*, 13 WAKE FOREST L. REV. 353, 356 (1977). As of 1852, the courts of England had broadened the disqualification concept to encompass proprietary interests. *Dimes v. Proprietors of the Grand Junction Canal*, 10 Eng. Rep. 301, 305 (1852) (holding that the judge was "incompetent to hear and decide the suit" because he "was the holder of shares in [the] company"). Over the next twenty years, British common law courts began to recognize that an additional ground for disqualification may be actual bias. *The Queen v. Meyer*, 1 Q.B.D. 173, 177 (1875) (stating that the justice was "substantially interested, though not in a pecuniary sense, so as to be likely to have a real bias in the matter").

8. The first United States statute that governed the disqualification of judges was enacted in 1792. An Act to Regulate the Process of the Courts in the United States, ch. 36, § 11, 1 Stat. 275, 278 (1792). In 1821, this statutory provision was expanded to require disqualification when the judge was related or otherwise connected to a party in the litigation. An Act for Regulating Process in the Courts of the United States ch. 51, 3 Stat. 643 (1821). The Due Process Clause of the Fourteenth Amendment, enacted in 1868, guarantees every litigant the right to an impartial court. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."); e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

9. The Judiciary Act, ch. 231, § 20, 36 Stat. 1087, 1090 (1911) (codified as

and 21.¹⁰ Section 21¹¹ was later revised and outlined the procedures that a party must follow in order to disqualify a district court judge when personal bias or prejudice was alleged.¹² Section 20 was also revised in 1948¹³ to specify the specific grounds for disqualification and was codified at 28 U.S.C. § 455.¹⁴ Section 455 was amended in 1974¹⁵ to reflect the provi-

amended at 28 U.S.C. § 455(a) (1988)). The relevant text of the section's 1911 version is as follows:

Whenever it appears that the judge . . . is in any way concerned in interest in any suit pending [before him] . . . as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty . . . to cause the fact to be entered on the records of the court.

Id.

10. The Judiciary Act § 21, 36 Stat. at 1087 (current version at 28 U.S.C. § 144 (1988)). Section 21's relevant text reads:

Whenever a party to any action . . . shall make and file an affidavit that the judge before whom the action . . . is to be tried or heard has a *personal bias and prejudice* either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein Every such affidavit shall . . . be filed not less than ten days before the beginning of the term of court.

Id. (emphasis added).

11. Judiciary and Judicial Procedure Act, ch. 646, § 144, 62 Stat. 869, 898 (1948) (codified as amended at 28 U.S.C. § 144 (1988)). The text of current § 144 states:

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

28 U.S.C. § 144 (1988).

12. The term "recusal" typically refers to the process by which a judge is disqualified. Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 787 n.3 (1993); see Putnam, *supra* note 7, at 1. Courts now commonly use the terms "recusal" and "disqualification" interchangeably. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 769 n.1 (3d Cir. 1992). This casenote will also use the terms interchangeably.

To file a recusal motion under § 144, one must file an affidavit which (1) "specifies the facts and the reasons for the belief that bias or prejudiced exists;" (2) is accompanied by "a certificate of counsel of record stating that it is made in good faith;" and (3) is filed "not less than ten days before the beginning of the term at which the proceeding is to be heard," unless good cause is shown otherwise.

13. Judiciary and Judicial Procedure Act, ch. 646, § 455, 62 Stat. 869, 908 (1948) (codified as amended at 28 U.S.C. § 455 (1970)). This older version of § 455 reads as follows:

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.

Id.

14. 28 U.S.C. § 455 (1988).

sions in Canon 3 of the ABA Code of Judicial Conduct.¹⁶ The primary statutory focus of this casenote is section 455(a) which states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."¹⁷

III. SECTION 455(A) BEFORE *LITEKY*

The extrajudicial source doctrine discussed in *Liteky*¹⁸ originated in a series of cases addressing section 21 and its successor, section 144. The doctrine, as currently applied to section 144 and section 455, is solely a creature of the judiciary.

A. *Early Cases*

Section 21 of the Judicial Code¹⁹ was the first American statute to recognize bias or prejudice as a ground for disqualification.²⁰ The extrajudicial source requirement addressed in *Liteky* had its basis in two Supreme Court cases that interpreted section 21.

The first Supreme Court case, *Ex parte American Steel Barrel Co.*,²¹ specifically addressed the newly enacted section 21 of the Judicial Code.²² The petitioners in that case alleged that the presiding judge manifested a strong bias and prejudice

15. Judicial Disqualification Act, Pub. L. No. 93-512, 88 Stat. 1609 (1979). The relevant text of the amended § 455 reads as follows:

(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.

Id. (emphasis added).

16. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

17. 28 U.S.C. § 455(a) (1988).

18. *Liteky v. United States*, 114 S. Ct. 1147, 1150-58 (1994).

19. The Judiciary Act, ch. 231, § 21, 36 Stat. 1087, 1090 (1911) (current version at 28 U.S.C. § 144 (1988)).

20. Safer, *supra* note 12, at 798.

21. 230 U.S. 35 (1913).

22. Section 21 was referred to but not discussed in *Glasgow v. Moyer*, 225 U.S. 420 (1912).

toward them throughout the proceedings.²³ In denying their motion for recusal, the Court held that any section 21 disqualification claim must be based on a showing of personal bias or prejudice.²⁴ The significance of the *Barrel* opinion lies in the passage that became the genesis of the extrajudicial source rule addressed in *Liteky*.²⁵ The court stated: “[Section 21] was never intended to enable a discontented litigant to oust a judge because of adverse rulings made [by that judge].”²⁶

The Supreme Court addressed section 21 again in 1921 in *Berger v. United States*.²⁷ *Berger* clarified *American Steel Barrel*'s holding by concluding that “[*Barrel*] establishes that the bias or prejudice which can be urged against a judge must be based upon something other than the rulings in the case.”²⁸ The language in *Berger* has had a “profound effect on disqualification jurisprudence as the foundation upon which later cases would establish the extrajudicial source requirement.”²⁹

B. *The Extrajudicial Source Doctrine*

At this point in its development, the extrajudicial source doctrine remained relatively narrow. However, forty-five years after *Berger*, the Court once again approached the issue of disqualification in a case involving section 21's successor.

23. *American Steel Barrel*, 230 U.S. at 38.

24. *Id.* at 43.

25. *Liteky*, 114 S. Ct. at 1150-58.

26. *American Steel Barrel*, 230 U.S. at 44. This quote, however, must be taken in the context of the entire sentence. The full sentence states that § 21 “was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending case.” *Id.* Furthermore, § 21 was not “intended to paralyze the action of a judge [by disqualifying him in the middle of a case] . . . [t]his is the plain meaning of the [ten-day filing requirement in section 21].” *Id.* This final piece of dicta concerning the ten-day requirement is significant for the sole reason that it was practically ignored by the Court until its resurrection by Justice Scalia in *Liteky*. See *infra* text accompanying notes 65-67.

27. 255 U.S. 22 (1921).

28. *Id.* at 31.

29. Safer, *supra* note 12, at 799.

1. *United States v. Grinnell Corp.*

Section 21, the predecessor to section 144,³⁰ was in question in the case *United States v. Grinnell Corp.*³¹ In denying a motion for disqualification under section 144 and relying on *Berger*, the Court stated that “[t]he alleged bias and prejudice to be disqualifying must stem from an *extrajudicial source* and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.”³² Thus, the Supreme Court in the *Grinnell* opinion announced the extrajudicial source requirement for the first time.³³ However, the Court failed to announce the statutory basis for its decision.

2. Personal Bias and Prejudice

The statutory “home” of the extrajudicial source doctrine developed after *Grinnell* and before *Liteky* was the phrase “personal bias and prejudice” found in section 144.³⁴ Because section 455(b)(1) also contains the personal bias and prejudice language of section 144,³⁵ the extrajudicial source requirement

30. The “personal bias and prejudice” language of § 21 was duplicated in § 144. 28 U.S.C. § 144 (1988).

31. 384 U.S. 563 (1966).

32. *Id.* at 583 (emphasis added).

33. Safer, *supra* note 12, at 799. The “extrajudicial” language used throughout these cases and this casenote had its origin in a number of circuit court cases. Prior to *Grinnell*, the Eighth Circuit held that “the bias contemplated by [§ 144] is a personal bias, extrajudicial in origin, that a judge may have against a particular defendant.” *Hodgdon v. United States*, 365 F.2d 679, 686 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967). *Hodgdon*’s authority for the previous statement came from another § 21 case, *Ferrari v. United States*, 169 F.2d 353 (9th Cir. 1948). In *Ferrari*, the Ninth Circuit interpreted § 21 to require a showing of a “judge is personal bias” as a prerequisite to disqualifying the judge. 169 F.2d at 355. The court further defined a judge’s personal bias as “an attitude of extrajudicial origin.” *Id.*

Ferrari’s authority for the use of the term “extrajudicial” in describing the prejudice or bias necessary under § 21 was *Craven v. United States*, 22 F.2d 605, 607 (1st Cir. 1927) (“Personal [as used in § 21] is in contrast with judicial; it characterizes an attitude of extra-judicial origin”). *Craven* was the first case, at the level of the United States Court of Appeals, to use the term “extrajudicial” in reference to a § 21 bias or prejudice motion.

34. Safer, *supra* note 12, at 799-800. For the text of § 144, see *supra* note 11.

35. 28 U.S.C. § 455(b)(1) (1988). For the text of § 455(b)(1), see *supra* note 15.

was universally extended to section 455(b)(1).³⁶ However, due to the fact that section 455(a) does not contain the personal bias or prejudice language of these other sections, a rift developed among the circuits as to the correct interpretation of section 455(a).

3. Circuit Split

The circuit courts split over whether section 455(a) was subject to the same extrajudicial source limitation as sections 144 and 455(b)(1).

a. *Davis v. Board of School Commissioners*

The Fifth Circuit in *Davis* was the first court to construe revised section 455(a) to contain the extrajudicial source requirement.³⁷ Reading sections 144 and 455 *in pari materia*,³⁸ the court held that the determination of bias under both statutes should be made on the basis of conduct extrajudicial in nature.³⁹ The impact of *Davis* was remarkable as many circuits adopted its interpretation that section 455(a) is subject to the extrajudicial source doctrine.⁴⁰ Nevertheless, bias arising

36. *E.g.*, *United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992) (holding that personal bias means prejudice based on extrajudicial matters); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981) (“[I]t is clear that by amending section 455 Congress intended to transfer the extrajudicial bias limitation contained in section 144 to section 455(b)(1).”), *cert. denied*, 456 U.S. 916 (1982).

37. *Davis v. Board of School Comm’rs*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

38. *Id.* *In pari materia* is defined as statutes “[u]pon the same matter or subject. Statutes ‘in pari materia’ are those relating to the same person or thing or having a common purpose.” BLACK’S LAW DICTIONARY 791 (6th ed. 1990). There is substantial disagreement as to whether § 144 and § 455(a) should be read together. *See* discussion *infra* notes 93-100 and accompanying text.

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

40. *E.g.*, *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989) (citing *Davis* for the proposition that recusal under § 455(a) must be predicated on extrajudicial conduct); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987) (citing *Grinnell* and alleging that bias must derive from an extrajudicial source); *Jaffe v. Grant*, 793 F.2d 1182, 1188-89 (11th Cir. 1986) (citing *Grinnell* in ruling that bias under § 455(a) must stem from an extrajudicial source); *United States v. Paul*, 748 F.2d 1204, 1211 (8th Cir. 1984) (citing *Grinnell* in holding that the alleged bias and prejudice must derive from an extrajudicial source); *United States v. Sibla*, 624 F.2d 864, 869 (9th Cir. 1980) (citing *Davis* in stating that § 455(a) requires recusal only when the bias

from an intrajudicial source could be the basis of a recusal motion if it fell within the bounds of one narrow exception. The Fifth Circuit held that "there is an exception [to the extrajudicial source doctrine] where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."⁴¹

b. *United States v. Chantal*

In contrast to the majority of circuits that interpreted section 455(a) to contain the extrajudicial source doctrine, the First Circuit did not recognize such a construction.⁴² The First Circuit's rejection of the extrajudicial source requirement for disqualification under section 455(a) was expressed in *United States v. Chantal*.⁴³ The court held that "[t]he First Circuit . . . has repeatedly subscribed to what all commentators characterize as the correct view that, unlike challenges under 28 U.S.C. § 144, the source of the asserted bias/prejudice in a section 455(a) claim can originate explicitly in judicial proceedings."⁴⁴

As a result of these inconsistent decisions, the Supreme Court granted certiorari to resolve the issue in *Liteky v. United States*.⁴⁵

stems from an extrajudicial source); *City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.) (per curiam) (stating disqualification under § 455(a) must be predicated upon extrajudicial conduct), *cert. denied*, 449 U.S. 834 (1980); *In re IBM*, 618 F.2d 923, 927 (2d Cir. 1980) (agreeing with *Davis* that the disqualifying conduct must be extrajudicial in nature); *Mayberry v. Maroney*, 558 F.2d 1159, 1162 n.16 (3d Cir. 1977) (citing *Davis* in announcing that recusal under § 455(a) should be made on the basis of extrajudicial conduct); *United States v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976) (citing *Grinnell* in holding that recusal under § 455 is to be confined to conduct extrajudicial in nature).

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

42. *Safer*, *supra* note 12, at 807.

43. 902 F.2d 1018 (1st Cir. 1990).

44. *Chantal*, 902 F.2d at 1022. Two of the commentators referred to in the *Chantal* opinion were Hoekema, *supra* note 3, at 717, and Bloom, *supra* note 2, at 676.

45. 113 S. Ct. 2412 (1993). The same issue was presented in 1992, but certiorari was denied. *Waller v. United States*, 112 S. Ct. 2321 (1992) (White & O'Connor, JJ., dissenting).

IV. *LITEKY V. UNITED STATES*A. *Facts and Procedural History*

On November 16, 1990, Father Ray Bourgeois, Charles Liteky, and John Liteky entered Fort Benning Military Reservation.⁴⁶ While there, the defendants spilled human blood on display cases, carpets, and walls of the School of the Americas at Fort Benning.⁴⁷ The three men committed the act to protest the killing of six Jesuit priests⁴⁸ in El Salvador by School of the Americas trainees.⁴⁹

Judge J. Robert Elliot presided over the defendants' trial in the district court.⁵⁰ Before their trial, the defendants requested that Judge Elliot recuse himself pursuant to 28 U.S.C. § 455 because he had presided over the 1983 trial of Father Bourgeois, which also involved a protest regarding El Salvador.⁵¹

Defendants' recusal motion was based on the conduct and statements of Judge Elliot during the course of Father Bourgeois' 1983 trial.⁵² On numerous occasions during the

46. Petitioners' Brief at 2, *Liteky v. United States*, 114 S. Ct. 1147 (1994) (No. 92-6921). Father Bourgeois is a Catholic priest, Charles Liteky is a Congressional Medal of Honor recipient and Catholic priest, and John Liteky is a peace activist and former seminarian. *Id.*

47. Brief for the United States at 6, *Liteky v. United States*, 114 S. Ct. 1147 (1994) (No. 92-6921).

48. Defendants were also protesting the killing of the priests' housekeeper and her daughter. All of the murders took place on November 16, 1989. Petitioners' Brief at 6.

49. Roland James, *Terrorism Schools*, PHOENIX GAZETTE, Apr. 28, 1994, at B4. Begun in Panama in 1946 and continued at Fort Benning, Georgia since 1984, the School of the Americas has trained thousands of Latin American soldiers in what is incorrectly termed "low intensity conflict." *Id.* In November 1989, when six Jesuits, their housekeeper and her daughter were murdered, 19 of the 27 officers who would be cited by the United Nations in the killings were trained at the School of the Americas. *Id.* Additionally, Panama's Manuel Noriega is a graduate of the school.

50. Brief for the United States at 3.

51. *Litkey*, 114 S. Ct. at 1157. Father Bourgeois was convicted in 1983 on three counts of trespass on government property in violation of 18 U.S.C. § 1382 (1988), two counts of unlawfully wearing a military uniform in violation of 18 U.S.C. § 702 (1988), and one count of misdemeanor assault, in violation of 18 U.S.C. § 113(d) (1988). Brief for the United States at 6; Petitioners' Brief at 3.

52. Neither Charles Liteky nor John Liteky were defendants in the 1983 trial. Brief for the United States at 6, n.3.

course of the trial, without objection from the prosecution, Judge Elliot interrupted defense counsel's cross-examination and "undertook to argue with and finally direct defense counsel how to continue with his cross-examination."⁵³ Furthermore, Judge Elliot led one of the prosecution's witnesses.⁵⁴ The judge also interrupted the closing argument of counsel for one of Bourgeois' co-defendants.⁵⁵ Despite the presentation of the 1983 evidence, defendants' motion to recuse Judge Elliot was denied.⁵⁶ After a jury trial, the defendants were convicted in the United States District Court for the Middle District of Georgia.⁵⁷

Defendants renewed their recusal claim on appeal,⁵⁸ citing an Eleventh Circuit case⁵⁹ and two Fifth Circuit cases.⁶⁰ The Eleventh Circuit held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal."⁶¹ The circuit court affirmed the district court's rejection of the recusal

53. Petitioners' Brief at 29-30.

54. *Id.* For example, Father Bourgeois faced an assault charge in the 1983 trial. *Id.* While on the stand, a witness "testified that Father Bourgeois hit him with an open hand . . . Judge Elliot, however, without any factual basis, led the witness to testify that Father Bourgeois hit him with a closed fist." *Id.*

55. *Liteky*, 114 S. Ct. at 1151. There was actually a laundry list of evidence from the 1983 trial that was introduced in an attempt to establish Judge Elliot's partiality. For example, the judge

[s]tat[ed] at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observ[ed] after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; . . . question[ed] witnesses; . . . and [gave] Bourgeois . . . an excessive sentence.

Id.

56. Brief for the United States at 7 ("matters arising out of the course of judicial proceedings are not a proper basis for recusal").

57. Brief for the United States at 2. Conviction was under 18 U.S.C. § 1361 (1988) ("Whoever willfully injures or commits any depredation against any property of the United States . . . shall be punished."). Father Bourgeois was sentenced to one year and four months imprisonment and Charles and John Liteky were sentenced to six months' imprisonment. *Id.* at 2. Each defendant was also fined \$636.47. *Id.* at 2.

58. *United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992) (per curiam), *aff'd*, 114 S. Ct. 1147 (1994).

59. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988).

60. *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

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

motion. The Supreme Court granted certiorari to resolve the question of whether section 455(a) "is subject to the limitation that has come to be known as the 'extrajudicial source' doctrine."⁶²

B. *Majority Opinion*

1. The Extrajudicial Source Doctrine

In its analysis of the extrajudicial source doctrine, the Court reviewed the relevant statutes in order to chronicle the doctrine's statutory history. As discussed earlier, all cases preceding *Liteky* found the doctrine's basis in the words "personal bias and prejudice."⁶³ However, the *Liteky* majority took a different approach. After discussing *Grinnell*⁶⁴ and *Berger*,⁶⁵ the Court turned to *American Steel Barrel*.⁶⁶ According to the Court, *American Steel Barrel* "relied not upon the word 'personal' in [section 21 of the Judicial Code], but upon its provision requiring the recusal affidavit to be filed ten days before the beginning of the court term."⁶⁷ The Court then concluded that it was erroneous to interpret the word "personal" as the basis of the extrajudicial source doctrine.⁶⁸

Searching for a new statutory home for the extrajudicial source doctrine, the Court turned to the words "bias and prejudice," describing them as pejorative terms.⁶⁹ The majority held that "the origin of the 'extrajudicial source' doctrine . . . is simply the pejorative connotation of the words 'bias or prejudice.'"⁷⁰

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

63. See *supra* notes 34-36 and accompanying text.

64. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); see *supra* notes 30-33 and accompanying text.

65. *Berger v. United States*, 255 U.S. 22 (1921); see *supra* notes 27-29 and accompanying text.

66. *Liteky*, 114 S. Ct. at 1154 (citing *Ex parte American Steel Barrell*, 230 U.S. 35 (1913)); see *supra* notes 21-26 and accompanying text.

67. *Liteky*, 114 S. Ct. at 1154; see *supra* note 26 and accompanying text.

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

69. *Id.* at 1155. "The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*." *Id.*

70. *Id.*

Following the historic origins discussion, the Court then addressed the main issue in the case: whether the extrajudicial source limitation applies to section 455(a).⁷¹ Because the word "personal" was not the origin of the extrajudicial source doctrine, the absence of the word in section 455(a) was not dispositive.⁷² However, the majority did find a foundation for the doctrine in section 455(a). The court reasoned that there is an equivalent pejorative connotation to the term "partiality" as there is to the terms "bias and prejudice."⁷³

Justice Scalia then embarked on renaming the extrajudicial source doctrine, deciding that it was more appropriate to speak of an extrajudicial source "factor."⁷⁴ Scalia reasoned that "[s]ince neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) 'extrajudicial source' factor . . . in recusal jurisprudence."⁷⁵ After a cursory, albeit less than convincing, discussion of the reasons why sections 455(a) and 455(b)(1) must be read together,⁷⁶ the Court concluded that the extrajudicial source doctrine (or factor) applied to section 455(a).⁷⁷

71. *Id.*

72. *Id.*

73. *Id.* at 1155-56. As the majority defined it, "[p]artiality' does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate." *Id.* at 1156.

74. *Id.* at 1157.

75. *Id.*

76. The Court first attempted to read the extrajudicial source doctrine into § 144 by providing an alternative rationale for the *Grinnell* decision: it is the ten-day filing requirement contained in both § 21 and § 144 that justified the extension of the extrajudicial source rule to § 144. *Liteky*, 114 S. Ct. at 1154. The Court does not ratify this rationale, however, because neither § 455(a) nor § 455(b)(1) contain such a ten-day requirement, and such reasoning would not justify the extension of the doctrine to § 455. *Id.* at 1160 (Kennedy, J., concurring). Citing absolutely no authority, the Court then flatly announces that "[i]t seems to us that the origin of the 'extrajudicial source' doctrine . . . is simply the pejorative connotation of the words 'bias or prejudice' in §§ 144 and 455(b)(1), and the converse of the word 'impartiality' in § 455(a). *Id.* at 1155-56.

77. *Id.* at 1156-57.

2. An Impossible Exception to the Extrajudicial Source Factor

In reinterpreting the extrajudicial source doctrine, the Court turned to *Grinnell*⁷⁸ for guidance. Justice Scalia elucidated the doctrine first announced in *Grinnell*⁷⁹ by stating that “*Grinnell* (the only opinion of ours to recite the doctrine) clearly meant by ‘extrajudicial source’ a source outside the judicial proceeding at hand—which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge.”⁸⁰ However, this limitation on the extrajudicial source doctrine was short-lived.

As in *Davis v. School Board of Commissioners*,⁸¹ *Liteky* adopted a type of “pervasive bias” exception to the extrajudicial source doctrine. Unfortunately, the scope of the exception is extremely narrow. Despite the fact that the majority interpreted *Grinnell* as recognizing earlier judicial proceedings as extrajudicial, the Court retreated to a new position:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a *deep-seated favoritism or antagonism* that would make fair judgment *impossible*.⁸²

78. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

79. See *supra* notes 30-33 and accompanying text.

80. *Liteky*, 114 S. Ct. at 1152. *Grinnell* cites *Berger v. United States*, 255 U.S. 22 (1921) as its authority because *Berger* “found recusal required on the basis of judicial remarks made in an earlier proceeding.” *Id.* at 1152 n.1.

81. 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

82. *Liteky*, 114 S. Ct. at 1157 (emphasis added). The Court in *Liteky* notes that an example of a statement that would make a fair judgment impossible was made by Judge Landis in *Berger v. United States*:

One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans in the country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests of the enemy at heart You are of the same mind that practically all the German-Americans are in this country Your hearts are reeking with disloyalty.

3. Disposition and Final Ruling of *Liteky*

The Court concluded that “[n]one of the grounds assert[ed] required disqualification.”⁸³ The grounds were inadequate because “[a]ll occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.”⁸⁴

V. ANALYZING *LITEKY*

A. *An Incorrect Interpretation of Section 455(a)*

1. No Reliance on Precedent

In formulating this new standard, the majority in *Liteky* did not rely on any of the Supreme Court’s earlier decisions that developed the extrajudicial source doctrine.⁸⁵ The Court did not depend on precedent because the line of cases from *American Steel Barrel* to *Grinnell* provided a “less than satisfactory rationale for reading the extrajudicial source doctrine” into section 455(a).⁸⁶

The Supreme Court realized that its holding in *Grinnell* placed undue weight on *Berger* and *American Steel Barrel* (which only addressed prior adverse rulings).⁸⁷ In the words of Justice Kennedy, “[t]here is a real difference . . . between a rule providing that bias must arise from an extrajudicial source [*Grinnell*], and one providing that judicial rulings alone can not sustain a challenge for bias [*American Steel Barrel*].”⁸⁸ As a post-hoc rationale to justify the holdings in *American Steel Barrel*, *Berger*, and *Grinnell*, the majority turned to the ten-day

Berger v. United States, 225 U.S. 22, 28-29 (1921).

83. *Liteky*, 114 S. Ct. at 1157.

84. *Id.* Judgment was entered for the United States, affirming the decision of the Eleventh Circuit. *Id.*

85. *Id.* at 1152.

86. *Id.* at 1159 (Kennedy, J., concurring).

87. *Id.*

88. *Id.*

requirement in sections 21 and 144 as the proper, though unexpressed, statutory basis of the extrajudicial source doctrine.⁸⁹ Despite their new reasoning, the Court provided no justification for the extension of the extrajudicial source doctrine to sections 455(a) and 455(b)(1). Neither of these sections contains a ten-day filing requirement.⁹⁰

Liteky also ignored *Liljeberg v. Health Services Acquisition Corp.*,⁹¹ a case dealing directly with section 455(a). Although *Liljeberg* did not address the extrajudicial source doctrine, it did enunciate the showing necessary for recusal under section 455(a).⁹² The Court held that "a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality."⁹³ The Supreme Court in *Liteky* conveniently ignored this binding precedent in announcing its new standard for recusal under section 455(a).

2. Implicitly Relying on Erroneous Statutory Construction

The *Liteky* majority cited no authority in extending the extrajudicial source requirement from sections 144 and 455(b)(1) to section 455(a).⁹⁴ Sections 144 and 455(b)(1) share identical lan-

89. *Id.* at 1154.

90. *Id.* at 1160 (Kennedy, J., concurring) ("Even if the ten-day requirement could justify reading the extrajudicial source rule into § 144, it would not suffice as to §§ 455(a) or 455(b)(1), which have no analogous requirement."). Using the ten-day requirement as the extrajudicial source doctrine's basis is also illogical because the filing requirement has always had an exception for good cause and "Congress abolished formal terms of court for United States district courts" in 1963. *Id.*; see 28 U.S.C. § 138 (1988).

91. 486 U.S. 847 (1988).

92. It is interesting to note the positions of the justices in the *Liteky* and *Liljeberg* decisions. In *Liteky*, Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor, Thomas and Ginsburg wrote the majority decision, while Justices Kennedy, Blackmun, Stevens, and Souter concurred. *Liteky*, 114 S. Ct. at 1150. In *Liljeberg*, Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and Kennedy wrote for the majority. Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissented. *Liljeberg*, 486 U.S. at 849. None of the majority in *Liljeberg* joined the majority in *Liteky*, despite the fact that the cases were decided only 7 years apart.

93. *Liljeberg*, 486 U.S. at 850.

94. *Liteky*, 114 S. Ct. at 1155-56.

guage in that the basis of a claim under either statute must be based on "personal bias or prejudice."⁹⁵ Because this language is shared, extending the decisions surrounding the phrase in one statute to the other statute is proper.⁹⁶ Under this standard of statutory construction, it was entirely reasonable for the extrajudicial source rule to be extended from section 144 to section 455(b)(1).

However, the reasons for an extension to section 455(a) are not so clear. *Davis v. School Board of Commissioners*⁹⁷ approached section 455 in a general manner, failing to address its subsections separately.⁹⁸ Construing sections 144 and 455 *in pari materia*, *Davis* concluded that the whole of section 455 is subject to the extrajudicial source rule.⁹⁹ Assuming that this is the same doctrine that *Liteky* implicitly recognized as extending the limitations of section 144 to section 455(b)(1), the Fifth Circuit had no justification in extending the extrajudicial source rule to section 455(a).¹⁰⁰

Generally, *in pari materia*, as a rule of construction, "cannot be used if the statute is clear and unambiguous. . . ."¹⁰¹ Section 455(a) is not ambiguous on its face. Therefore, the Su-

95. For the full text of § 144, see *supra* note 11; for the full text of § 455(b)(1), see *supra* note 15.

96. HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS, at 333-34 (1911); see *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317-18 (1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) ("It is . . . a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way . . . [including] prior judicial interpretations of the transplanted language.")

97. 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

98. *Id.* at 1051-52.

99. *Id.* at 1052. Less than four months after the decision in *Davis*, the Fifth Circuit retreated and clarified that holding in *Parrish v. Board of Comm'rs*, 524 F.2d 98, 103 (5th Cir. 1975). In *Parrish*, the court stated that § 455(a) "is general and does not rest on the personal bias and prejudice structure of" § 144 and § 455(b)(1). *Id.* Unfortunately, it seems that most courts in addressing § 455(a) have ignored *Parrish* and cited *Davis* as gospel.

100. At least one court has interpreted *Liteky* as construing § 144 and § 455(a) *in pari materia*. *Herskowitz v. Charney*, 1994 U.S. Dist. LEXIS 11594, at *6 (S.D.N.Y. Aug. 18, 1994) (citing *Liteky* in concluding that "the two sections [144 and 455(a)] should be construed *in pari materia*").

101. EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES, § 231, at 432 n.47 (1940).

preme Court did not need to rely on any source other than the face of section 455(a) in its analysis.

3. Ignoring the Intent and Purpose of Enacting Section 455(a)

The Court's interpretation that the "pejorative" connotation of the word "partiality" is the basis of the extrajudicial source doctrine in section 455(a) follows weak reasoning.¹⁰² The interpretation is unacceptable because it defeats the purpose for which the statute was enacted.

When revised section 455(a) was adopted in 1974, its goal was to avoid even the *appearance* of partiality.¹⁰³ The stated purpose for enacting section 455 was "to broaden and clarify the grounds for judicial disqualification."¹⁰⁴ *Liteky* directly counters these two purposes by constricting the grounds for disqualification via the extrajudicial source rule.

Congress' hope in enacting section 455(a) was to "promote public confidence in the impartiality of the judicial process."¹⁰⁵ One argument by those who would apply the extrajudicial source limitation to section 455(a) is that it would reduce the frequency of disqualification of federal judges, which, if left unchecked, would "tend to undermine public confidence in the judiciary by disparaging the general impartiality of judges."¹⁰⁶ However, it is absurd to argue that it "promote[s] public confi-

102. Their rationale is weak for the reasons spelled out by Justice Kennedy in his concurring opinion. "The court is correct to conclude that an allegation concerning some extrajudicial matter is neither a necessary nor a sufficient condition for disqualification under any of the recusal statutes." *Liteky*, 114 S. Ct. at 1160 (Kennedy, J., concurring). After announcing the presence of an "extrajudicial source factor," rather than "extrajudicial source doctrine," the majority found it unnecessary to "describe the consequences of that factor in complete detail." *Id.* at 1157. Again, citing no authority, the Court went on to announce the new "impossibility of fair judgment" standard. *Id.*

103. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 860 (1987) (quoting *Health Serv. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)) (emphasis added).

104. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6351.

105. 1974 U.S.C.C.A.N. at 6355; e.g., *Liljeberg*, 486 U.S. at 871 (Rehnquist, C.J., dissenting); Bloom, *supra* note 2, at 664; Safer, *supra* note 12, at 810; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 746 (1973).

106. Note, *supra* note 105, at 747.

dence in the judiciary to allow an apparently biased judge to preside over a case.¹⁰⁷ This appearance of partiality was the very result that section 455(a) was designed to prevent.

In the same vein of promoting public confidence in the judiciary, supporters of the application of the extrajudicial source doctrine to section 455(a) also argue that because the doctrine limits the number of disqualifications, its abandonment would result in litigants seeking "to disqualify one judge so the case will be heard by a judge they believe is more favorable to their side."¹⁰⁸ This "judge-shopping" argument is equally invalid because of the ethical constraints imposed on all attorneys. It implies that attorneys will file frivolous attacks on federal judges in order to find a judge favorable to their side. This argument, however, is negated by the Code of Professional Responsibility, which provides that "[a] lawyer shall not knowingly make false accusations against a judge."¹⁰⁹

4. Disregard for the Plain Language of Section 455

The *Liteky* majority made two mistakes in its interpretation of the language of section 455. First, it viewed sections 455(a) and (b) as overlapping in many respects, thus justifying the extension of the extrajudicial source rule to section 455(a).¹¹⁰ Although these two sections may overlap in any given situation, they do not operate in unison. The specific situations set out in subsection (b) "are in addition to the general standard set forth in subsection (a)."¹¹¹ Thus, just as a subsection (a) motion need not fall under any of the categories spelled out in subsection (b), neither must a subsection (b) motion fall within the general provision of subsection (a).

107. Safer, *supra* note 12, at 812. 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 the apparently biased judge were disqualified. *Id.*

108. Bloom, *supra* note 2, at 664; David C. Hjermfelt, *Statutory Disqualification of Federal Judges*, 30 KAN. L. REV. 255, 256 (1982).

109. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (1979).

110. *Liteky v. United States*, 114 S. Ct. 1147, 1156 (1994).

111. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

Second, a "plain-language" argument can also be made specifically with respect to section 455(a). Section 455(a) requires recusal when a judge's impartiality "might reasonably be questioned" and makes no mention of an extrajudicial source requirement.¹¹² With this lack of ambiguity on the face of the statute, it is clear that the proper focus for a section 455(a) recusal motion is not the source of the bias, but its effect on the judge.¹¹³

B. *Creation of a Per Se Rule Dismissing Allegations of Intrajudicial Partiality in Every Case*

The majority in *Liteky* professed to abandon the per se rule "which provides that 'matters arising out of the course of judicial proceedings are not a proper basis for recusal under section 455(a).'"¹¹⁴ However, the standard *Liteky* eventually develops "will be difficult to distinguish from a *per se* extrajudicial source rule, the very result the Court professes to reject."¹¹⁵

The majority deserted the strict extrajudicial source doctrine to the extent that they recognized that bias formed from an intrajudicial source *can* constitute the basis for a recusal motion under section 455(a).¹¹⁶ However, the Court nonetheless created a judicial zone of immunity¹¹⁷ in that a motion for recusal that alleges intrajudicial partiality will be sustained *only* where judges display the favoritism that would make fair judgment *impossible*.¹¹⁸

This impossibility standard is the practical equivalent of the per se rule that the majority sought to reject. Under this standard, a challenge under section 455(a) would fail "even if it were shown that an unfair hearing were likely, for it could be

112. For the full text of § 455(a), see *supra* note 15. It is quite possible that Congress did not even consider the extrajudicial source doctrine when it drafted section 455(a). Hjermfelt, *supra* note 108, at 717.

113. *E.g.*, *Liteky*, 114 S. Ct. at 1161-62 (Kennedy, J., concurring); Hoekema, *supra* note 3, at 717.

114. *Liteky*, 114 S. Ct. at 1159 (Kennedy, J., concurring) (quoting *Liteky v. United States*, 973 F.2d 910, 910 (11th Cir. 1992)).

115. *Id.* at 1161.

116. *See id.* at 1157.

117. Hoekema, *supra* note 3, at 715; see Safer, *supra* note 12, at 812.

118. *Liteky*, 114 S. Ct. at 1157.

argued that a fair hearing would be *possible* nonetheless.¹¹⁹ "The court's 'impossibility of fair judgment' test bears little resemblance to the objective standard Congress adopted in section 455(a): whether a judge's impartiality might reasonably be questioned."¹²⁰ This dichotomy between the face of the statute and the Court's interpretation of the statute is without justification.¹²¹

This is not to say that the extrajudicial source "factor," as Justice Scalia termed it, has no utility. It is, however, a disservice to the intent of the statute to apply the doctrine as a threshold inquiry to section 455(a). "The appropriate focus under section 455(a) is not whether a 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."¹²² The source of alleged bias may be relevant in determining whether or not there is a reasonable question of a judge's impartiality. It is unnecessary to resort to a nearly dispositive extrajudicial source factor as a threshold inquiry.¹²³

C. *Liteky's Impact: The Weakening of Section 455(a)*

The *Liteky* majority has sounded the death-knell on the broad protections that section 455(a) was created to provide. By creating a *per se* rule that dismisses allegations of intrajudicial partiality in virtually every case, the Court has substituted its 'impossibility of fair judgment' standard for the statutory man-

119. *Id.* at 1161 (Kennedy, J., concurring) (emphasis added).

120. *Id.*

121. *Id.*

122. Hoekema, *supra* note 3, at 717.

123. *Liteky*, 114 S. Ct. at 1163 (Kennedy, J., concurring). It is interesting to note that the majority provided an alternative rationale for the implementation of the extrajudicial source doctrine into § 455(a) for no other reason than to bolster a shaky decision.

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

Id. at 1156 (emphasis added).

date that "any judge . . . shall disqualify himself . . . [when] his impartiality might reasonably be questioned."¹²⁴

The impact of the *Liteky* decision can already be seen in a number of recent cases.¹²⁵ For example, in *In re Huntington Commons Assoc.*,¹²⁶ the Seventh Circuit denied a section 455(a) recusal claim despite the judge's predisposition in the matter because he did not demonstrate the "deep-seated and unequivocal antagonism that would render fair judgment impossible."¹²⁷ In addition, a number of courts have interpreted *Liteky* as leaving the prior extrajudicial source doctrine unchanged. "As [*Liteky*] recently held, recusal under 28 U.S.C. § 455(a) is limited to situations involving bias from 'extrajudicial sources.'¹²⁸

As these cases indicate, *Liteky* serves only to strengthen the extrajudicial source doctrine by establishing a precedent that squarely authorizes its application to section 455(a).¹²⁹ The direct result is a weakening of section 455(a). Recusal will be required not when a judge's impartiality might reasonably be questioned, but rather when his impartiality stems from an intrajudicial source which makes fair judgment impossible.¹³⁰ In the words of Justice Kennedy, "[t]hat is *too lenient* a test when the integrity of the judicial system is at stake."¹³¹

124. 28 U.S.C. § 455(a) (1988) (emphasis added). For the full text of section 455(a) see *supra* note 15.

125. *E.g.*, *Mitchell v. Kirk*, 20 F.3d 936, 938 (8th Cir. 1994) (per curiam) (applying the impossibility standard of *Liteky* in denying a § 455(a) recusal motion).

126. 21 F.3d 157 (7th Cir. 1994).

127. *Id.* at 158 (quoting *Liteky*, 114 S. Ct. at 1157).

128. *Industrial Ins. Co. v. Matsco Fin. Corp.*, No. C 92 2850 BAC, 1994 U.S. Dist. LEXIS 5628, at *1 (N.D. Cal. Apr. 28, 1994); *e.g.*, *United States v. Bertoli*, No. 94-5167, 1994 U.S. App. LEXIS 30055, at *89 (3d Cir. Oct. 29, 1994); *In re Adams*, 31 F.3d 389, 396 (6th Cir. 1994) ("The Supreme Court recently decided that the 'extrajudicial source' analysis articulated in *Grinnell* applies to motions for recusal under Section 455(a) . . ."); *Herskowitz v. Charney*, No. 93 Civ. 5248 (MGC), 1994 U.S. Dist. LEXIS 11594, at *6 (S.D.N.Y. Aug. 18, 1994); *Betts v. Registration & Disciplinary Comm'n*, No. 93 C 5883, 1994 U.S. Dist. LEXIS 8477, at *3 (N.D. Ill. June 21, 1994) ("In *Liteky*, the Supreme Court made it clear that the "extra-judicial source" doctrine applies to § 455(a).").

129. See *Liteky*, 114 S. Ct. at 1157.

130. *Id.* Apparently, impartiality stemming from extrajudicial sources will be subjected to the objective standard on the face of § 455(a).

131. *Id.* at 1162 (Kennedy, J., concurring) (emphasis added).

D. *Avoiding Liteky's Extrajudicial Source Factor*

In light of the solidification of the extrajudicial source rule as applied to section 455(a), one option exists for a practitioner to pursue to avoid the rule and the statute altogether—a procedural due process claim on appeal. A basic requirement of procedural due process is the right to a trial by an impartial judge.¹³² In fact, “[i]mpartiality and the appearance of impartiality” in a judicial officer are the *sine qua non* of the American legal system.¹³³ Thus, under the Due Process Clause as interpreted by the Supreme Court, there is a violation of a litigant’s constitutional rights occurs whenever the litigant is subjected to a decision by a judge who is either in fact biased or appears to be biased.¹³⁴

There are two advantages to pursuing a recusal claim under the Due Process Clause. First, the claim can be used against both state and federal judges due to the incorporation doctrine, whereas a section 455(a) claim can only be made against a federal judge. Second, and most importantly in light of the *Liteky* decision, a recusal claim under the Due Process Clause takes the extrajudicial source doctrine completely out of consideration by the reviewing judge.¹³⁵ The main practical disadvantage to utilizing a due process claim is that it generally can only be raised on appeal.

VI. CONCLUSION

Impartiality in our judiciary is essential to the effective functioning of the American legal system. In enacting section 455(a), Congress sought to “broaden and clarify the grounds for

132. *In re Murchison*, 349 U.S. 133, 136 (1955).

133. *Haines v. Liggett Group*, 975 F.2d 81, 98 (3d Cir. 1992) (quoting *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982)); *e.g.*, *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (“[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”).

134. *See Commonwealth Coatings*, 393 U.S. at 150.

135. For an example of two cases where a litigant has successfully pursued Due Process recusal claims, see *Haines*, 975 F.2d 81 (3d Cir. 1992) and *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979).

judicial disqualification.”¹³⁶ However, the achievement of that goal was clouded by numerous circuit court decisions interpreting section 455(a) as containing the extrajudicial source doctrine.¹³⁷ In *Liteky v. United States*, the Supreme Court had a chance to effectuate the purpose for enacting section 455(a) by removing the extrajudicial source limitation from it. Nevertheless, the Court further entrenched the doctrine, while professing to abandon it. The extrajudicial source doctrine is an unnecessary impediment to the fair administration of our laws: “Every man is equally entitled to protection by law; but when the laws undertake to add . . . artificial distinctions . . . the humble members of society . . . who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government.”¹³⁸

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136. Act of Oct. 9, 1974, Pub. L. No. 93-512, 1974 U.S.C.C.A.N. 6351.

137. See *supra* notes 37-43 and accompanying text.

138. ANDREW JACKSON, VETO OF THE BANK BILL (1832) reprinted in BARTLETT'S FAMILIAR QUOTATIONS, at 418:3 (15th ed. 1980).

