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Professional Responsibility Survey: Recusal

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PROFESSIONAL RESPONSIBILITY SURVEY: RECUSAL

At the end of this survey article, five Tenth Circuit Court of Appeals judges offer their thoughts and opinions on the subject of judicial recusal. In general, the participants discuss the policy considerations underlying recusal motions and the implications of denying or granting these motions.

INTRODUCTION

The Tenth Circuit cases regarding judicial ethics during the survey period focused exclusively on recusal. The term "recusal" refers to the process by which a judge is disqualified from a case because of self-interest, bias, or prejudice.[1] The provisions of 28 U.S.C. § 455 govern recusal of federal judges.[2] Section 455 provides two separate grounds for recusal. First, § 455(a) sets out the general standard requiring a judge to disqualify himself when "his impartiality might reasonably be questioned."[3] Second, § 455(b) lists specific instances, in addition to situations in which a judge's "impartiality might reasonably be questioned," that necessitate recusal.[4]

Each of the recusal cases that the Tenth Circuit decided during the survey period involved a motion to recuse based on § 455(a). The analysis of the

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1. "[R]ecusal . . . refers to the process by which a judge is disqualified." BLACK'S LAW DICTIONARY 1277 (6th ed. 1990); *see also* 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). Canon 3(C) of the American Bar Association Code of Judicial Conduct governs recusal. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972).

2. 28 U.S.C. § 455 (1994).

3. "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)

4. Section 445 (b) provides:

> He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually, or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(b); *see also* Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1049 (1993) (commenting that § 455(b) may be seen as a list of per se circumstances requiring recusal in situations involving actual bias rather than situations involving subsection (a)'s concern with the public's perception of bias).

surveyed cases focuses primarily on the legislative policies behind the recusal statute. With that in mind, Part I of this Survey traces the statute's legislative history, which reflects the principles underlying 28 U.S.C. § 455(a). Parts II through V discuss the four recusal cases that the Tenth Circuit decided during the survey period.

Part II explores the Tenth Circuit's treatment of judicial biases stemming from extrajudicial[5] sources. In *Maez v. Mountain States Telephone & Telegraph, Inc.*,[6] the alleged bias arose from the judge's professional relationship with the defendant.[7] The Tenth Circuit focused on the temporal context of the relationship and determined that the acquaintanceship did not mandate recusal.[8] Part III examines the Tenth Circuit's approach to bias stemming from intrajudicial[9] sources. In *United States v. Young*,[10] the court held that recusal was unnecessary because the alleged bias stemmed from an intrajudicial source and the judge did not display a "deep-seated favoritism or antagonism."[11] Part IV discusses the implications of the Tenth Circuit's timeliness requirement for § 455 motions. In *United States v. Stenzel*,[12] the court determined that the recusal issue was not preserved for appeal because the motion to recuse was not timely made.[13] Finally, Part V considers the proper remedy for a violation of § 455. In *King v. Champion*,[14] the court concluded that the district judge should have recused himself. The court, however, did not remand the case because the district judge was not required to make credibility determinations or determine disputed facts.

I. HISTORICAL EVOLUTION OF 28 U.S.C. § 455(A)

Prior to the 1975 amendment, § 455(a) contained a subjective test of the judge's impartiality.[15] This subjective test, referred to as the "actual partiality standard," required recusal if the judge himself believed that partiality existed.[16] Whether other reasonable persons thought the judge appeared biased

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5. "Extrajudicial" refers to "[t]hat which is done, given, or effected outside the course of regular judicial proceedings." BLACK'S LAW DICTIONARY 586 (6th ed. 1990).

6. 54 F.3d 1488 (10th Cir. 1995).

7. *Maez*, 54 F.3d at 1508.

8. *Id.*

9. "Intrajudicial," conversely, is that which is done, given, or effected within the course of judicial proceedings.

10. 45 F.3d 1405 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995).

11. *Young*, 45 F.3d at 1415.

12. 49 F.3d 658 (10th Cir.), *cert. denied*, 116 S. Ct. 123 (1995).

13. *Stenzel*, 49 F.3d at 661.

14. 55 F.3d 522, 524 (10th Cir. 1995).

15. Prior to 1975, § 455 provided that:

> 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 trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1968).

16. Kevin D. Swan, Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 815-16 (1987) (discussing § 455 (a) and Congress's utilization of "a standard of actual impartiality based on the judge's per-

was immaterial.[17] Commentators contended that the actual partiality standard did little to encourage public confidence in the judicial system.[18] These critics reasoned that public perception of impartiality determines the extent of public confidence in the integrity of the judiciary and, further, the appearance of bias was as harmful to this faith as actual bias.[19]

In response to this criticism, the American Bar Association (ABA) introduced an objective standard, or the "appearance of partiality test."[20] This test inquires whether "a reasonable person, knowing all of the circumstances, would be led to question the judge's impartiality."[21] In 1975, Congress codified the ABA's objective standard at 28 U.S.C. § 455(a).[22] The codified standard requires a judge to disqualify himself if his "impartiality may reasonably be questioned."[23] If a reasonable basis exists for the motion, the judge should recuse himself.[24] Congress explained that it replaced the subjective standard with the objective standard in order to clarify and broaden the grounds for judicial disqualification and to foster public confidence in the judiciary.[25]

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ception").

17. *Id.* at 816. "Section 455 relied upon judges to recuse themselves when certain circumstances rendered it improper, in [their] opinion, for them to hear the case." *Id.*

18. *Id.*; *see also* Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1481-82 (1981); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 764 (1973).

19. Swan, *supra* note 16, at 816 (stating that "it is the public's perception of neutrality, not that of the judiciary, which governs the public's faith in the judicial system").

20. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972). Canon 3(C)(1) provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." *Id.*; *see also* Swan, *supra* note 16, at 816 (explaining that in response to criticism of the actual impartiality standard the ABA introduced the appearance of impartiality standard in 1972).

21. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972); E. Thode, Reporter's notes to the Code of Judicial Conduct 49 (1973); *see also* Swan, *supra* note 16, at 816 ("The test requires an objective determination of only the appearance of impartiality, not actual impartiality. If a reasonable person, knowing all of the circumstances, would be led to question the judge's impartiality the judge should recuse him or herself.").

22. 28 U.S.C. § 455 (1994). Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id; see also* Swan, *supra* note 16, at 816-17 (explaining that once a judge's impartiality is questioned, the judge decides only whether there is a reasonable basis for the question).

23. 28 U.S.C. § 455(a). The Supreme Court interpreted the amended § 455(a) in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). The *Liljeberg* court held that

> [t]he goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Liljeberg, 486 U.S. at 860.

24. Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 256-57 (5th Cir.) (noting that if there is a question about the judge's impartiality, and she finds that the basis for the doubt is reasonable, she must recuse herself), *cert. denied*, 439 U.S. 859 (1978).

25. H.R. REP. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.S.C.A.N. 6351, 6354-55 (describing Congress's intent that the amendment support the public's confidence in the impartiality of the judiciary). The Supreme Court further interpreted Congress's intent, stating:

> The statute was amended . . . to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct . . . . The general language of subsection (a) was designed to promote public confidence in

II. BIASES STEMMING FROM EXTRAJUDICIAL SOURCES: *MAEZ V. MOUNTAIN STATES TELEPHONE & TELEGRAPH, INC.*[26]

A. *Background: The Objective Standard in the Tenth Circuit*

The Tenth Circuit applies § 455(a)'s objective test in judicial recusal cases.[27] In *United States v. Cooley*,[28] the court held that when deciding whether to affirm a judge's denial of a recusal motion, the proper analysis asks "whether a reasonable person armed with the relevant facts would harbor doubts about the judge's partiality."[29] The *Cooley* court explained that the standard is purely objective and that the "inquiry is limited to outward manifestations and reasonable inferences drawn therefrom."[30] A "reasonable factual basis" for questioning the judge's impartiality, however, must exist.[31]

B. Maez v. Mountain States Telephone & Telegraph, Inc.[32]

1. Facts

The plaintiffs, former managers at defendant Mountain States Telephone and Telegraph, Inc. (Mountain Bell), appealed a district judge's denial of their § 445 motion to recuse.[33] The plaintiffs contended that the judge should have recused himself due to his association with Mountain Bell.[34] Specifically, the judge previously worked for Mountain Bell from 1955 through the early 1960s, had served for one year as Mountain Bell's in-house legal staff, had special knowledge of the internal workings of Mountain Bell, and had a professional acquaintance with Mountain Bell's general counsel.[35] The judge personally knew one of the defendants, and had business associations with other defendants dating back twenty years.[36] The district judge held that there was an insufficient basis for a reasonable person to be concerned that the

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the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.

Liljeberg, 468 U.S. at 858 n.7 (citations omitted).

26. 54 F.3d 1488 (10th Cir. 1995).

27. *See* United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993), *cert. denied*, 115 S. Ct. 2250 (1995); United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992), *cert. denied*, 115 S. Ct. 114 (1994); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987).

28. 1 F.3d 985 (10th Cir. 1993). The *Cooley* judge's participation in a television interview by Barbara Walters mandated recusal when, during the course of the interview, the judge discussed the abortion protest which was at issue in the case. *Cooley*, 1 F.3d at 995.

29. *Id.* at 993.

30. *Id.*

31. *Id.*

32. 54 F.3d 1488 (10th Cir. 1995).

33. *Maez*, 54 F.3d at 1495.

34. *Id.* at 1493.

35. *Id.*

36. *Id.*

judge "might be biased or prejudiced with respect to [the] claims of any of the parties or counsel."[37]

2. Decision

The Tenth Circuit affirmed, refusing to find an abuse of discretion in the district judge's denial of the motion to recuse.[38] After reiterating the objective test set forth in *Cooley*, the court held that the requisite doubts were not raised merely because the judge "worked for or even represented Mountain Bell some thirty years ago and may have socialized with fellow Mountain Bell employees."[39] The court noted that this particular judge had heard three prior cases involving claims and allegations against Mountain Bell where counsel (in all three cases) had perceived no "appearance of impartiality."[40]

C. *Analysis*

The Tenth Circuit's decision in *Maez* reflects the practical realities in the judicial process and the legal profession. One such reality is that a judge will inevitably have numerous social and professional relationships.[41] A judge frequently exploits these professional relationships to obtain judicial office. In practice, a judge will not terminate these relationships or social connections once appointed.[42] A judge's responsibility to set aside personal biases and rule impartially is an inherent requirement of the job; a different rule would require recusal in a prohibitive number of cases. These practical limitations must be weighed against the risk of harm to public confidence in the judicial system created by the appearance of a partial judiciary.

The *Maez* court reasoned that "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."[43] Prior to the 1975 amendment of § 455(a), case law interpreting the statute implied a "duty to sit."[44] Thus, in the past judges chose to err on the side of hearing the case when counsel questioned their impartiality.[45] Congress's amendment of § 455 in 1975, however, included an explicit repudiation of this duty to sit.[46] In proposing the amendment, the House

37. *Id.*
38. *Id.* at 1508.
39. *Id.*
40. *Id.*
41. A New York court recently addressed this issue in a high-profile case involving Andy Warhol's estate. Hayes v. The Andy Warhol Foundation, 637 N.Y.S.2d 708 (N.Y. App. Div. 1996). The chief beneficiary of the estate claimed that the judge was a social acquaintance of the lawyer of the estate. *Id.* The court, however, deemed the motion to recuse "belated," and denied it. *Id.*
42. *See* Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (commenting that "litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench"), *cert. denied*, 491 U.S. 904 (1989).
43. *Maez*, 54 F.3d at 1508 (quoting Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987)).
44. Swan, *supra* note 16, at 816 (noting that cases interpreting § 455 inferred a "duty to sit," and judges presumed that they should hear a case unless it would be improper to do so).
45. *Id.* (stating that "in a situation where there were only doubts about their impartiality, judges would err on the side of hearing the case"); *see* Harold S. Levy, *Judicial Recusals*, 2 PACE L. REV. 35, 46 (1982).
46. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5, *reprinted in* U.S.S.C.A.N. 6351, 6354-55.

Judiciary Committee disclaimed the duty to sit by specifically requiring adjudication of close or questionable cases in favor of recusal.[47] Thus, the Tenth Circuit's reference to such a duty may be inconsistent with congressional intent.

D. *Other Circuits*

The *Maez* refusal to mandate recusal for the judge's mere familiarity with the party is consistent with case law in other circuits. The First, Second, Fourth, and Federal Circuits have upheld the denial of a recusal motion when the relationship giving rise to the alleged bias terminated some time ago.[48]

III. BIASES STEMMING FROM INTRAJUDICIAL SOURCES: *UNITED STATES V. YOUNG*[49]

A. *Background*

Sections 144[50] and 455(b)[51] govern recusal of federal judges.[52] Under §§ 144 and 455(b)(1), the judge's personal bias or prejudice must stem from outside the course of regular judicial proceedings.[53] The legal community

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(1974). With the adoption of the new § 455, Congress removed the duty to sit. *Id.* Now a judge should seek to "err on the side of caution and [recuse] himself in a questionable case." Postashnick v. Port City Constr. Co., 609 F.2d 1101, 1112 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1981); *see also* Swan, *supra* note 16, at 817 (explaining that the new § 455 repudiates the duty to sit and requires that judges decide doubtful cases on the side of caution and recusal).

47. H.R. REP. NO. 1453.

48. United States v. Lovaglia, 954 F.2d 811, 817 (2d Cir. 1992) (stating that because the judge's relationship with the party ended seven or eight years prior to sentencing, the judge did not abuse his discretion in refusing to recuse himself); *In re* Allied Signal Inc., 891 F.2d 974, 976 (1st Cir. 1989) (holding that a business relationship between the judge and the lawyer that took place eight years prior to the case, and before the judge's appointment, did not cast significant doubt on the judge's impartiality); *Simkins Indus.*, 847 F.2d at 1117 (noting that the judge's brief association with the Sierra Club that terminated over a decade before adversary proceedings commenced did not form the basis for reasonably questioning a district judge's impartiality); Maier v. Orr, 758 F.2d 1578, 1581 (Fed. Cir. 1985) (concluding that a trial judge's former association with the Air Force did not reasonably raise appearance of partiality); Brody v. President & Fellow of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (finding that a trial judge's graduation from the defendant university did not in itself constitute a reasonable basis for recusal motion), *cert. denied*, 455 U.S. 1027 (1982).

49. 45 F.3d 1405 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995).

50. *See* 28 U.S.C. § 144 (1994). As with § 455, this statute applies if a judge has a personal bias or prejudice towards a party. *Id.* Section 144 mandates that the party file a timely recusal motion along with an affidavit stating the facts that suggest the judge's personal bias. *Id.* When faced with a § 144 motion to recuse, the judge rules on the legal sufficiency of the motion but not on the truth of the matters alleged. The affidavit is sufficient if the facts alleged, assuming that they are true, would convince a reasonable person that bias exists. *Id.*; *see* Abramson, *supra* note 4, at 1050 n.11 (commenting on the procedure for filing a § 144 motion).

51. 28 U.S.C. § 455(b) (1994).

52. *See* 28 U.S.C. §§ 144, 455.

53. *See* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (explaining that in a motion for disqualification under § 144, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source"); United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981) (holding that the extrajudicial source limitation applies to §§ 144 and 455(b)(1)), *cert. denied*, 456 U.S. 916 (1982); Lori M. McPherson, Liteky v. United States: *The Supreme Court Restricts the Disqualification of Biased Federal Judges Under Section 455(a)*, 28 U. RICH. L. REV. 1427, 1432-

refers to this requirement as the extrajudicial source doctrine.[54] However, because § 455(a) does not contain the phrase "personal bias and prejudice," circuit courts are divided over whether the extrajudicial source requirement extends to § 455(a).[55] This confusion exists within the Tenth Circuit: the limitation has been applied inconsistently to § 455(a) motions.[56]

The Supreme Court granted certiorari in *Liteky v. United States*[57] to resolve the inconsistent decisions among the circuit courts regarding whether § 455(a) was subject to the same extrajudicial source limitation as § 455(b)(1).[58] The Supreme Court held that the word "personal" in the phrase "personal bias and prejudice" in § 455(b)(1) did not form the basis of the extrajudicial source limitation.[59] Rather, the limitation originated from the

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33 (1994) ("The statutory 'home' of the extrajudicial source doctrine . . . was the phrase 'personal bias and prejudice' found in section 144. Because section 455(b)(1) also contains the personal bias and prejudice language of section 144, the extrajudicial source requirement was universally extended to section 455(b)(1)."); Safer, *supra* note 1; Serena Viswanathan, *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 1144, 1145-48 (1995) (explaining that §§ 144 and 455(b)(1) provide for recusal when the judge has a bias stemming from an extrajudicial source).

54. One example of a motion to recuse originating from an intrajudicial source appears in a high-profile New York state case involving the $1.2 billion estate of tobacco heiress Doris Duke. The movants claimed the facts necessitated recusal because the judge created an appearance of impropriety when he removed the movants as co-executors in a prior meeting. *In re* Will of Duke, 632 N.Y.S.2d 532, 533 (N.Y. App. Div. 1995).

55. United States v. Chantal, 902 F.2d 1018, 1022 (1st Cir. 1990) (holding that "unlike challenges under 28 U.S.C. Sec. 144, the source of the asserted bias/prejudice in a Section 455(a) claim can originate explicitly in judicial proceedings"); United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) (holding that recusal under § 455(a) must be predicated on extrajudicial conduct); *In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987) (stating that bias must derive from extrajudicial source); Davis v. Board of Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (holding that § 455(a) contained the extrajudicial source doctrine), *cert. denied*, 425 U.S. 944 (1976); *see* McPherson, *supra* note 53, at 1428-33 (explaining the origin of the confusion in the circuit courts).

56. *See* United States v. Cooley, 1 F.3d 985, 994 n.7 (10th Cir. 1993) (noting the inconsistencies in the Tenth Circuit regarding application of the extrajudicial source doctrine); United States v. Page, 828 F.2d 1476, 1481 (10th Cir.) (stating that the extrajudicial source rules apples to § 455(a) and § 455(b)(1)), *cert. denied*, 484 U.S. 989 (1987); Franks v. Nimmo, 796 F.2d 1230, 1234 (10th Cir. 1986) (holding that the extrajudicial source rule applies to § 455(b)(1), but holding nothing specific as to § 455(a)); United States v. Hines, 696 F.2d 722, 728 (10th Cir. 1982) (stating that § 455 (b)(1) requires recusal for actual bias, but that subsection (a) requires it for the mere appearance of impartiality).

57. 114 S. Ct. 1147 (1994). In 1991, the government charged petitioners with willful destruction of federal property, for spilling human blood on various objects at the Fort Benning Military reservation. *Liteky*, 114 S. Ct. at 1150. Before trial, the petitioners moved to disqualify the district judge pursuant to § 455(a). *Id.* The motion was based on events that had occurred during and after a trial in 1983 involving the same petitioner and the same judge. *Id.* at 1150-51. In the earlier trial, the petitioner, a Catholic priest, was convicted of various misdemeanors committed during protest action. *Id.* at 1151. Petitioner claimed that recusal was necessary in the 1991 case because the judge had displayed impatience and animosity towards the petitioner and his beliefs. *Id.* The judge denied the motion to recuse, reasoning that matters arising out of judicial proceedings were not the proper basis for recusal. *Id.* The petitioners were convicted and appealed, claiming the judge violated § 455(a) by refusing to recuse himself. *Id.* The Eleventh Circuit affirmed, agreeing that matters arising out of the course of judicial proceedings are not the proper basis for recusal. *Id.*

58. *Id.* at 1150; *see* McPherson, *supra* note 53, at 1434 (noting that the Supreme Court granted certiorari to resolve the inconsistent circuit decisions).

59. *Liteky*, 114 S. Ct. at 1154. The Court stated:

connotations of the words "bias and prejudice."[60] The Court then held that although § 455 does not expressly include this statutory language, the word "partiality" has the same negative connotation as the words "bias and prejudice."[61] The Court concluded that the basis for a § 455(a) motion to recuse should stem from an extrajudicial source.[62]

The Court, however, did indicate a possible exception to the extrajudicial source requirement. A bias stemming from an intrajudicial source may constitute the basis for a § 455(a) motion to recuse if it displays "a deep-seated favoritism or antagonism that would make fair judgment impossible."[63] Therefore, the Court concluded that generally neither a judge's critical, disapproving, or hostile remarks during judicial proceedings, nor her expressions of impatience, dissatisfaction, annoyance, or anger, mandate recusal.[64]

B. United States v. Young[65]

1. Facts

Laina Young appealed a conviction on two counts of money laundering, contending that the district judge erred by denying her § 455(a) recusal motion.[66] The grounds for the motion included comments made by the judge during the scheduling conference regarding Young's "obvious" fate in the trial.[67] Young claimed that the judge's remarks demonstrated an inappropriate bias against her such that "his impartiality might reasonably be questioned" under § 455(a).[68]

> In our view . . . the basis of the modern "extrajudicial source" doctrine, is not the statutory term "personal" . . . . Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are never appropriate . . . . [I]nterpreting the term "personal" to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine . . . a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal" bias and would provide no basis for the judge's recusing himself.

Id.

60. *Id.* at 1155.

61. *Id.* at 1155-56.

62. *Id.* at 1156.

63. *Id.* at 1157. The court provided an example of deep-seated antagonism by referring to a World War II espionage case against German-American defendants where the court depicted their hearts as "reeking with disloyalty." *Id.*

64. *Id.*

65. 45 F.3d 1405 (10th Cir. 1995).

66. *Young*, 45 F.3d at 1414.

67. *Id.* at 1414-15. The judge's controversial remarks were:

> And bear in mind this: that the obvious thing that's going to happen to Ms. Young is that she's going to get convicted, and then they're going to sprinkle her and bless her with immunity, and then she's going to get to testify. And then she's going to pull the same act on me again, and then she's going to county jail for at least 30 if not 60 or 90 days for contempt.

Id. at 1414.

68. *Id.* at 1415.

2. Decision

On appeal, the Tenth Circuit held that the judge's remarks in the scheduling conference did not require recusal.[69] Relying on the Supreme Court's recent interpretation of § 455(a) in *Liteky*,[70] the court concluded that since the judge did not express this opinion based upon knowledge gathered outside the course of judicial proceedings, and since the comments, viewed in the context of the case, did not display a deep-seated favoritism or antagonism that would make fair judgement impossible, recusal was unwarranted.[71] The court reasoned that while the comments reflected the judge's belief that the jury would likely convict Young, they did not indicate that the judge could not fulfill his responsibilities impartially.[72]

C. *Analysis*

The Tenth Circuit's opinion in *Young* made a significant contribution to the analysis of recusal cases by clarifying the grounds for a § 455(a) motion to recuse. Specifically, *Young* marks the Tenth Circuit's extension of the extrajudicial source requirement to § 455(a) in accordance with the Supreme Court's decision in *Liteky*. This requirement invalidates § 455(a) motions based on bias deriving from an intrajudicial source, unless it is so extreme that it reveals a "deep-seated favoritism or antagonism" that renders executing a fair judgment impossible. Thus, *Young* demonstrates the Tenth Circuit's belief that statements of opinion by the judge based on knowledge gathered in the course of judicial proceedings should be analyzed differently than similar statements originating from extrajudicial sources.

The court treats extrajudicial and intrajudicial biases differently because of practical realities inherent in the judiciary. Specifically, the extrajudicial source rule recognizes that judges naturally form opinions about the parties based upon the information obtained in the course of judicial proceedings.[73] Thus, it would be unrealistic to expect the judge in *Young* not to have formed opinions about what the jury would likely conclude.

Furthermore, applying the extrajudicial source limitation to § 455(a) decreases the risk that the parties might use the recusal process to disqualify one

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69. *Id.* at 1416.

70. For a discussion of *Liteky v. United States*, see *supra* notes 57-64 and accompanying text.

71. *Young*, 45 F.3d at 1416.

72. *Id.*

73. The Fifth Circuit expressed this idea in their explanation of the extrajudicial source rule:

> [A] judge is not merely a passive observer. He must . . . shrewdly observe the strategies of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court house dramas called trials, he could never render decisions.

United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 325 (5th Cir. 1980) (quoting *In re* I.B.M. Corp., 618 F.2d 923, 930 (2d Cir. 1980)).

judge in order to obtain a judge whose disposition is more favorable to their position. In fact, Congress recognized this potential for "judge-shopping."[74] The report advised courts to avoid interpreting the statute in such a way that a party's fear of an adverse ruling would be treated as a reasonable questioning of the judge's impartiality.[75]

The *Young* court did not address whether a reasonable person, armed with the relevant facts, would harbor doubts about the judge's partiality. The Court declined to apply this objective standard because the alleged bias did not stem from an extrajudicial source. In effect, the extrajudicial source rule replaces the statute's objective test with the "deep-seated favoritism or antagonism" standard if the alleged predisposition originates from facts adduced at trial.[76] Thus, the extension of the extrajudicial source requirement to § 455(a) narrowed the grounds available for recusal. Such constriction, however, conflicts with the policy underlying the recusal statute.[77] By amending § 455(a) in 1975 to encompass an objective test, Congress intended to promote public confidence in the impartiality of the judicial process by broadening and clarifying the grounds for recusal.[78] The Tenth Circuit's narrow interpretation of § 455(a), however, may weaken the public's faith in the judiciary by ruling against recusal, despite the fact that the judge's "impartiality may reasonably be questioned." This is particularly true where the alleged bias stems from an intrajudicial source but does not reach the level of "deep-seated favoritism or antagonism."[79]

D. *Other Circuits*

The full impact of *Liteky's* extension of the extrajudicial source rule to § 455(a) remains unclear. The Seventh Circuit recently denied a § 455(a) recusal claim despite the judge's predisposition in the case because he did not display the "deep-seated and unequivocal antagonism that would render fair judgment

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74. H. REP. NO. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.S.C.A.N. 6351, 6355 (1974). "Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." *Id.* Judges "must be alert to avoid the possibility that those who would question [their] impartiality are in fact seeking to avoid the consequences of [the judges] expected adverse decision." *Id.*

75. *Id.*

76. *See* McPherson, *supra* note 53, at 1445-46 (commenting that the Court has substituted the "impossibility of fair judgment" standard for the statute's "impartiality might reasonably be questioned" standard).

77. *Id.* at 1446 (commenting that the interpretation defeats the purpose for which the statute was enacted and sounds the "death-knell" on the broad protections that § 455 seeks to provide).

78. H.R. REP. NO. 1453. The Supreme Court explained that

> [t]he statute was amended to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct . . . . 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.

Liljeberg, 468 U.S. at 858.

79. Safer, *supra* note 1, at 812 (remarking that allowing an apparently biased judge to try the case does not promote public confidence in the judiciary, and to suggest otherwise implies that the public would be more confident if an apparently biased judge presided over the case, rather than if the judge were disqualified).

impossible."[80] There is still some uncertainty as to how circuits will apply the "deep-seated favoritism or antagonism" standard to recusal cases involving biases stemming from intrajudicial sources.

IV. PRESERVING RECUSAL FOR APPELLATE REVIEW: *UNITED STATES V. STENZEL*[81]

A. *Background*

A motion for recusal under 28 U.S.C. § 455 may be filed at any time.[82] Section 455 also provides a guideline for the judge to decide when self-recusal is necessary.[83] Thus, either the judge or a litigant may assert a § 455 motion to recuse. The Tenth Circuit requires that the party make a § 455 motion in a timely manner in order to obtain review.[84] Once it grants review, the court of appeals determines whether the trial judge abused her discretion by denying the recusal motion.[85]

B. United States v. Stenzel[86]

1. Facts

Robert Stenzel was convicted under the Assimilative Crimes Act[87] for "concealing his identity, disorderly conduct, failure to exhibit evidence of financial responsibility, and failure to exhibit evidence of vehicle registration."[88] During the trial, the district court judge informed the parties that he had been stationed at the military base where the criminal acts occurred, and that he had recently been the Honorary Commander of the Air National Guard.[89] Mr. Stenzel's counsel asked the judge whether he felt that this

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80. *In re* Huntington Commons Assoc., 21 F.3d 157 (7th Cir. 1994).

81. 49 F.3d 658 (10th Cir. 1995).

82. 28 U.S.C. § 455 (1994).

83. *Id.*

84. Wilner v. University of Kansas, 848 F.2d 1020, 1023 (10th Cir. 1988) (finding that the recusal motion was not timely when plaintiff moved for recusal four and one-half years into the case), *cert. denied*, 488 U.S. 1031 (1989); Singer v. Wadman, 745 F.2d 606, 608 (10th Cir. 1984) (noting that party seeking recusal failed to act in a timely fashion), *cert. denied*, 470 U.S. 1028 (1985).

85. United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993); United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992), *cert. denied*, 115 S. Ct. 114 (1994); Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987).

86. 49 F.3d 658 (10th Cir. 1995).

87. 18 U.S.C. § 13 (1994). The Assimilative Crimes Act provides federal jurisdiction for state crimes committed on federal property. *Id.*

88. *Stenzel*, 49 F.3d at 659.

89. *Id.* at 661. The record states:

> Q: And that's the Wyoming gate at Kirtland where this incident allegedly occurred, is that correct?
>
> A.: Yes, ma'am.
>
> THE COURT: For the record, I'm well acquainted with the base. I was stationed there years ago and I have also recently been the Honorary Commander of the Air Force National Guard, so I know what it is.
>
> MS. ROSENSTEIN [Stenzel's counsel]: I was unaware of that, Your Honor. Does the Court feel that that would be an apparent conflict?

"would be an apparent conflict."[90] The judge responded that it would not be a conflict, and Mr. Stenzel's counsel replied, "Okay."[91] On appeal, Mr. Stenzel contended that the district court judge erred in not recusing himself due to his relationship with the military.[92]

2. Decision

The Tenth Circuit Court held that the conversation between the district court judge and Mr. Stenzel's counsel about a possible conflict of interest did not constitute a request for recusal.[93] Additionally, the court noted that Mr. Stenzel's counsel did not develop, in the record, any basis for disqualification of the district judge.[94] Consequently, Mr. Stenzel did not make a timely objection, and the recusal issue was not preserved for appeal.[95]

C. *Analysis*

Stenzel confirms the Tenth Circuit's timeliness requirement regarding § 455 motions to recuse. Timeliness preserves judicial resources by limiting the issues reviewed on appeal. Furthermore, a contrary decision may encourage litigants to manipulate the judicial process by delaying motions to recuse to "wait and see" whether judgment will be in favor of the opposing party. Congress's concern with "judge shopping" is equally relevant upon the trial's completion.[96] Although the equities do not favor the losing party requesting recusal after an adverse judgment, the timeliness requirement creates an inherent risk that the litigant will be denied the right to a neutral and impartial judge. In *Stenzel*, the Court never analyzed whether a reasonable person would harbor doubts about the district judge's partiality because the recusal issue was not preserved for appellate review. A possibility therefore exists that recusal was necessary and that the failure to recuse may have denied Mr. Stenzel his right to an impartial tribunal. The timeliness requirement seems particularly unfair in *Stenzel*, where counsel had previously expressed concern that the judge might have a conflict of interest.

D. *Other Circuits*

The Fifth, Eighth, and Eleventh Circuits have also held that failure to file a timely recusal motion bars the party from claiming on appeal that the judge was biased.[97] The Third and Ninth Circuits, however, have held that failure to

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THE COURT: No, I said I'm acquainted with the base.
MS. ROSENSTEIN: Okay.

Id.

90. *Id.*
91. *Id.*
92. *Id.* at 660-61.
93. *Id.* at 661.
94. *Id.*
95. *Id.*
96. *See* discussion *supra* notes 73-78 and accompanying text.
97. McKinney v. Pate, 20 F.3d 1550, 1562 (11th Cir. 1994) (stating that defendant must

file a timely recusal motion in the trial court does not constitute waiver of the claim, but results in a higher burden of proof on appeal.[98] Additionally, some circuits have distinguished between recusal motions based on the appearance of impartiality and motions based on actual bias, imposing a timeliness requirement only on the motions based on the appearance of impartiality.[99]

V. REMEDIES: *KING V. CHAMPION*[100]

A. *Background*

Section 455 does not specify the proper remedy upon a finding that the trial judge issued an erroneous recusal decision,[101] which leaves the task of constructing a remedy for a violation of § 455(a) to the judiciary. The Supreme Court, in *Liljeberg v. Health Services Acquisition Corp.*, offers some direction.[102] The *Liljeberg* Court advised that when determining whether to vacate a judgment for a violation of § 455, a court should "consider the risk of injustice to the parties in the 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."[103]

B. King v. Champion[104]

1. Facts

Oklahoman Doyle Kent King was convicted in state court of "assault and battery with intent to commit a felony."[105] After appealing his conviction, King filed a habeas petition in federal court, claiming that the delay in adjudicating his appeal violated his constitutional right to due process.[106] The court joined Mr. King's habeas case together with other similar habeas cases and referred to the group as the "Harris cases."[107] A panel of three federal district judges presided over the factually similar cases.[108]

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object to bias in a pre-trial motion to recuse before trial or as soon as alleged bias is discovered), *cert. denied*, 115 S. Ct. 898 (1995); United States v. Bauer, 19 F.3d 409, 414 (8th Cir. 1994) (holding that § 455 claims "will not be considered unless timely made"); United States v. York, 888 F.2d 1050, 1053-56 (5th Cir. 1989) (construing § 455 to require timeliness); *see supra* note 41 (noting a denial of a motion to recuse due to "belatedness" in a high-profile case involving Andy Warhol's estate).

98. United States v. Bosh, 951 F.2d 1546, 1548-49 (9th Cir. 1991), *cert. denied*, 504 U.S. 989 (1992); United States v. Schreiber, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

99. United States v. Murphy, 768 F.2d 1518, 1539-41 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Unites States v. Slay, 714 F.2d 1093, 1094-95 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984).

100. 55 F.3d 522 (10th Cir. 1995).

101. 29 U.S.C. § 455 (1994).

102. 486 U.S. 847, 863-64 (1988).

103. *Liljeberg*, 486 U.S. at 864.

104. 55 F.3d 522 (10th Cir. 1995).

105. *King*, 55 F.3d at 523.

106. *Id.*

107. *Id.*; *see* Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

108. *King*, 55 F.3d at 523.

One of the panel judges, Judge Brett, also presided over an evidentiary hearing concerning King's case.[109] Judge Brett determined that King's evidence was insufficient, and denied King's petition for habeas relief.[110] King appealed the district court's denial of habeas relief and also insisted that Judge Brett erred by not recusing himself from the evidentiary hearing.[111] Because Judge Brett's uncle was a member of the Oklahoma Court of Criminal Appeals during the period of excessive time delay alleged in many of the *Harris* cases, King argued on appeal that Judge Brett was required to recuse himself under § 455.[112] Furthermore, the *Harris* civil rights claims named Judge Brett's uncle as a party.[113]

2. Decision

The Tenth Circuit held that Judge Brett should have recused himself from the habeas action pursuant to § 455.[114] The court also held, however, that the judge's failure to recuse himself did not necessitate vacating the judge's opinion.[115] The court reasoned that a vacation of the judgment and remand were unnecessary since further delay would only add to the injuries that King allegedly suffered due to the state court delays.[116] The court also justified its conclusion by explaining that Judge Brett based his decision on the delay claim almost entirely on undisputed facts, and the resolution of the case at the evidentiary hearing did not require him to make any credibility determinations.[117]

C. *Analysis*

King represents the Tenth Circuit's position that absent credibility issues or disputed facts, a new trial is not the proper remedy.[118] Arguably, in a case where the judge is not compelled to determine which version of the facts is true, or who has told the truth, impartiality is less crucial and a new trial might waste judicial resources and entail unnecessary duplication.

The issue that the Tenth Circuit faced in *King* is directly attributable to Congress's failure to specify appropriate remedial measures for violations of § 455. Despite the holding in *King*, the principles underlying § 455 suggest that if recusal were necessary at the trial level, the appropriate remedial measure would be to remand for a new trial. The legislative history of § 455 illustrates

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 524. The court reached this conclusion by relying on *Harris*, which found that Judge Brett should have recused himself but holding that his failure to do so did not require vacation of the panel's decision. *Id.* (citing Harris v. Champion, 15 F.3d 1538, 1572 (10th Cir. 1994)). Rather, the proper remedial action was for the judge to recuse himself from all further proceedings related to those matters. *Id.* (citing *Harris*, 15 F.3d at 1571).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

Congress's recognition that the appearance of impartiality is as damaging to the public confidence in the judicial process as actual bias. Thus, Congress drafted the statute to inhibit both actual bias and the appearance of bias. If the statute exists to avoid even the appearance of impartiality, it appears inconsistent to limit the determination of an appropriate remedy to an examination of what the district court judge was actually required to do at the trial.

CONCLUSION

The legislative history of § 455 reveals that Congress intended to establish an objective standard designed to promote public confidence in the integrity of the judicial process. The recusal statute attempts to preserve this confidence by protecting one of the underlying principles of the American judicial system, the right to an impartial tribunal.

The Tenth Circuit's case law regarding motions to recuse based on § 455(a) illustrates the court's reluctance to overturn the denial of a motion to recuse at the district court level. In three of the four cases handed down on this issue during the survey period, the court found recusal unnecessary. In the remaining case, the court found recusal appropriate, but did not remand or vacate the decision. The decisions as a whole reflect the Tenth Circuit's long-standing belief that § 455(a) "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."[119]

Ultimately, the judge with the alleged prejudice knows whether or not the bias exists. Regardless of the judge's perception, the litigant and the general public believe that the litigant is being deprived of a fair trial. In this way, the effect of the Tenth Circuit's tolerance for the appearance of partiality may ultimately be to injure the public confidence in the essential fairness and integrity of the judicial system.

Amy J. Shimek

119. United States v. Hines, 696 F.2d 722, 729 (10th Cir. 1982).