SUPREME COURT OF THE UNITED STATES

No. 92–6921

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY AND ROY LAWRENCE BOURGEOIS,
PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 7, 1994]

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN, JUSTICE STEVENS and JUSTICE SOUTER join, concurring in the judgment.

The Court's ultimate holding that petitioners did not assert sufficient grounds to disqualify the district judge is unexceptionable. Nevertheless, I confine my concurrence to the judgment, for the Court's opinion announces a mistaken, unfortunate precedent in two respects. First, it accords nearly dispositive weight to the source of a judge's alleged partiality, to the point of stating that disqualification for intrajudicial partiality is not required unless it would make a fair hearing impossible. Second, the Court weakens the principal disqualification statute in the federal system, 28 U. S. C. §455, by holding—contrary to our most recent interpretation of the statute in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847 (1988)—that the broad protections afforded by subsection (a) are qualified by limitations explicit in the specific prohibitions of subsection (b).

We took this case to decide whether the reach of §455(a) is limited by the so-called extrajudicial source rule. I agree with the Court insofar as it recognizes

that there is no *per se* rule requiring that the alleged partiality arise from an extrajudicial source. In my view, however, the Court places undue emphasis upon the source of the challenged mindset in determining whether disqualification is mandated by §455(a).

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." For present purposes, it should suffice to say that §455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of Law is the impartiality of its judges in fact and appearance. So in one sense it could be said that any disqualifying state of mind must originate from a source outside law itself. That metaphysical inquiry, however, is beside the point. The relevant consideration under §455(a) is the appearance of partiality, see *Liljeberg, supra,* at 860, not where it originated or how it was disclosed. If, for instance, a judge presiding over a retrial should state, based upon facts adduced and opinions formed during the original cause, an intent to ensure that one side or the other shall prevail, there can be little

doubt that he or she must recuse. Cf. *Rugenstein* v. *Ottenheimer,* 78 Ore. 371, 372, 152 P. 215, 216 (1915) (reversing for judge's failure to disqualify himself on retrial, where judge had stated: "`This case may be tried again, and it will be tried before me. I will see to that. And I will see that the woman gets another verdict and judgment that will stand.'").

I agree, then, with the Court's rejection of the *per se* rule applied by the Court of Appeals, which provides that "matters arising out of the course of judicial proceedings are not a proper basis for recusal" under §455(a). 973 F. 2d 910, 910 (CA11 1992). But the Court proceeds to discern in the statute an extrajudicial source interpretive doctrine, under which the source of an alleged deep-seated predisposition is a primary factor in the analysis. The Court's candid struggle to find a persuasive rationale for this approach demonstrates that prior attempts along those lines have fallen somewhat short of the mark. This, I submit, is due to the fact that the doctrine crept into the jurisprudence more by accident than design.

The term "extrajudicial source," though not the interpretive doctrine bearing its name, has appeared in only one of our previous cases: *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966). Respondents in *Grinnell* alleged that the trial judge had a personal bias against them, and sought his disqualification and a new trial under 28 U. S. C. §144. That statute, like §455(b)(1), requires disqualification for "bias or prejudice." In denying respondents' claim, 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." *Id.*, at 583.

Although *Grinnell*'s articulation of the extrajudicial source rule has a categorical aspect about it, the decision, on closer examination, proves not to erect a

per se barrier. After reciting what appeared to be an absolute rule, the Court proceeded to make a few additional points: that certain in-court statements by the judge "reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for"; that during the trial the judge "repeatedly stated that he had not made up his mind on the merits"; and that another of the judge's challenged statements did not "manifes[t] a closed mind on the merits of the case," but rather was "a terse way" of reiterating a prior ruling. *Ibid.* Had we meant the extrajudicial source doctrine to be dispositive under §144, those further remarks would have been unnecessary.

More to the point, *Grinnell* provides little justification for its announcement of the extrajudicial source rule, relying only upon a citation to *Berger* v. *United States*, 255 U. S. 22, 31 (1921). The cited passage from *Berger*, it turns out, does not bear the weight *Grinnell* places on it, but stands for the more limited proposition that the alleged bias "must be based upon something other than rulings in the case." *Ibid.* *Berger*, in turn, relies upon an earlier case advancing the same narrow proposition, *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44 (1913) (predecessor of §144 "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise"). There is a real difference, of course, between a rule providing that bias must arise from an extrajudicial source, and one providing that judicial rulings alone cannot sustain a challenge for bias. *Grinnell*, therefore, provides a less than satisfactory rationale for reading the extrajudicial source doctrine into §144 or the disqualification statutes at issue here. It should come as little surprise, then, that the Court does not enlist *Grinnell* to support its adoption of the doctrine.

The Court adverts to, but does not ratify, *ante,* at 9,

an alternative rationale: the requirement in §144 that a litigant's recusal affidavit "be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard," unless "good cause [is] shown for failure to file it within such time." If a litigant seeking disqualification must file an affidavit 10 days before the beginning of the term, the argument goes, the alleged bias cannot arise from events occurring or facts adduced during the litigation. See *Berger, supra,* at 34–35. That rationale fails as well. The 10-day rule has been an anachronism since 1963, when Congress abolished formal terms of court for United States district courts. See 28 U. S. C. §138. In any event, the rule always had an exception for good cause. And even if the 10-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.

The Court is correct to reject yet another view, which has gained currency in several Courts of Appeals, that the term "personal" in §§144 and 455(b)(1) provides a textual home for the extrajudicial source doctrine. *Ante*, at 8–10.

Given the flaws with prior attempts to justify the doctrine, the Court advances a new rationale: The doctrine arises from the pejorative connotation of the term "bias or prejudice" in §§144 and 455(b)(1) and the converse of the term "impartiality" in §455(a). *Ante*, at 10, 12–13. This rationale, as the Court acknowledges, does not amount to much. It is beyond dispute that challenged opinions or predispositions arising from outside the courtroom need not be disqualifying. See, *e.g.*, *United States* v. *Conforte*, 624 F. 2d 869, 878–881 (CA9), cert. denied, 449 U. S. 1012 (1980). Likewise, prejudiced opinions based upon matters disclosed at trial may rise to the level where recusal is required. See, *e.g.*, *United States* v. *Holland*, 655 F. 2d 44 (CA5 1981);

Nicodemus v. *Chrysler Corp.*, 596 F. 2d 152, 155–157, and n. 10 (CA6 1979). From this, 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. *Ante*, at 14. The Court nonetheless proceeds, without much explanation, to find "a significant (and often determinative) `extrajudicial source' *factor*" in those statutes. *Ibid.* (emphasis in original).

This last step warrants further attention. I recognize along with the Court that, as an empirical matter, doubts about a judge's impartiality seldom have merit when the challenged mindset arises as a result of some judicial proceeding. The dichotomy between extrajudicial and intrajudicial sources, then, has some slight utility; it provides a convenient shorthand to explain how courts have confronted the disqualification issue in circumstances that recur with some frequency.

To take a common example, litigants (like petitioners here) often seek disqualification based upon a judge's prior participation, in a judicial capacity, in some related litigation. Those allegations are meritless in most instances, and their prompt rejection is important so the case can proceed. Judges, if faithful to their oath, approach every aspect of each case with a neutral and objective disposition. They understand their duty to render decisions upon a proper record and to disregard earlier judicial contacts with a case or party.

Some may argue that a judge will feel the "motivation to vindicate a prior conclusion" when confronted with a question for the second or third time, for instance upon trial after a remand. Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How. L. J. 228, 229–230 (1957). Still, we accept the notion that the "conscientious judge will, as far as possible, make himself aware of his biases of this

character, and, by that very self-knowledge, nullify their effect." *In re J. P. Linahan, Inc.*, 138 F. 2d 650, 652 (CA2 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office. As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4(a) ("The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant"). The public character of the prior and present proceedings tends to reinforce the resolve of the judge to weigh with care the propriety of his or her decision to hear the case.

Out of this reconciliation of principle and practice comes the recognition that a judge's prior judicial experience and contacts need not, and often do not, give rise to reasonable questions concerning impartiality.

There is no justification, however, for a strict rule dismissing allegations of intrajudicial partiality, or the appearance thereof, in every case. A judge may find it difficult to put aside views formed during some earlier proceeding. In that instance we would expect the judge to heed the judicial oath and step down, but that does not always occur. If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source. As I noted above, the central inquiry under §455(a) is

the appearance of partiality, not its place of origin.

I must part, then, from the Court's adoption of a standard that places all but dispositive weight upon the source of the alleged disqualification. The Court holds that opinions arising during the course of judicial proceedings require disqualification under §455(a) only if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Ante*, at 15. That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts. In practical effect, the Court's standard will be difficult to distinguish from a *per se* extrajudicial source rule, the very result the Court professes to reject.

The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in §455(a): whether a judge's "impartiality might reasonably be questioned." The statutory standard, which the Court preserves for allegations of an extrajudicial nature, asks whether there is an appearance of partiality. See *Liljeberg*, 486 U. S., at 860 ("[t]he goal of section 455(a) is to avoid even the appearance of partiality") (internal quotation marks omitted); *United States* v. *Chantal*, 902 F. 2d 1018, 1023 (CA1 1990). The Court's standard, in contrast, asks whether fair judgment is impossible, and if this test demands some direct inquiry to the judge's actual, rather than apparent, state of mind, it defeats the underlying goal of §455(a): to avoid the appearance of partiality even when no partiality exists.

And in all events, the "impossibility of fair judgment" standard remains troubling due to its limited, almost preclusive character. As I interpret it, a §455(a) challenge would fail even if it were shown that an unfair hearing were likely, for it could be argued that a fair hearing would be possible nonetheless. The integrity of the courts, as well as the interests of the parties and the public, are ill-

served by this rule. There are bound to be circumstances where a judge's demeanor or attitude would raise reasonable questions concerning impartiality but would not devolve to the point where one would think fair judgment impossible.

When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.

In matters of ethics, appearance and reality often converge as one. See *Offutt* v. *United States*, 348 U. S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice"); *Ex parte McCarthy*, [1924] 1 K. B. 256, 259 (1923) ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen

to be done"). I do not see how the appearance of fairness and neutrality can obtain if the bare possibility of a fair hearing is all that the law requires. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "`generat[es] the feeling, so important to a popular government, that justice has been done'") (quoting *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 172 (1951) (Frankfurter, J., concurring)).

Although the source of an alleged disqualification may be relevant in determining whether there is a reasonable appearance of impartiality, that determination can be explained in a straightforward manner without resort to a nearly dispositive extrajudicial source factor. I would apply the statute as written to all charges of partiality, extrajudicial or otherwise, secure in my view that district and appellate judges possess the wisdom and good sense to distinguish substantial from insufficient allegations and that our rules, as so interpreted, are sufficient to correct the occasional departure.

The Court's effort to discern an "often dispositive" extrajudicial source factor in §455(a) leads it to an additional error along the way. As noted above, the Court begins by explaining that the pejorative connotation of the term "bias or prejudice" demonstrates that the source of an alleged bias is significant under §§144 and 455(b)(1). The Court goes on to state that "it is unreasonable to interpret §455(a) (unless the language *requires* it) as implicitly eliminating a limitation explicitly set forth in §455(b)." *Ante*, at 13 (emphasis in original). That interpretation, the Court reasons, "would cause the statute, in a significant sense, to contradict itself." *Ibid.*

We rejected that very understanding of the

interplay between §§455(a) and (b) in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847 (1988). Respondent in *Liljeberg* sought to disqualify a district judge under §455(a) because the judge (in his capacity as trustee of a university) had a financial interest in the litigation, albeit an interest of which he was unaware. Petitioner opposed disqualification, and asked us to interpret §455(a) in light of §455(b)(4), which provides for disqualification only if the judge "knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding." According to petitioner, the explicit knowledge requirement in §455(b)(4) indicated that Congress intended a similar requirement to govern §455(a). See *Liljeberg*, 486 U. S., at 859, n. 8. Otherwise, petitioner contended, the knowledge requirement in §455(b)(4) would be meaningless. *Ibid.*

In holding for respondent, we emphasized that there were "important differences" between subsections (a) and (b), and concluded that the explicit knowledge requirement under §455(b)(4) does not apply to disqualification motions filed under §455(a). *Id.*, at 859–860, and n. 8. *Liljeberg* teaches, contrary to what the Court says today, that limitations inherent in the various provisions of §455(b) do not, by their own force, govern §455(a) as well. The structure of §455 makes clear that subsections (a) and (b), while addressing many of the same underlying circumstances, are autonomous in operation. Subsection 455(b) commences with the charge that a judge "shall also disqualify himself in the following circumstances"; Congress' inclusion of the word "also" indicates that subsections (a) and (b) have independent force. Section 455(e), which permits parties to waive grounds for disqualification arising under §455(a), but not §455(b), provides further specific textual confirmation of the difference.

The principal distinction between §§455(a) and (b)

is apparent from the face of the statute. Section 455(b) delineates specific circumstances where recusal is mandated; these include instances of actual bias as well as specific instances where actual bias is assumed. See 28 U. S. C. §455(b)(1) ("personal bias or prejudice"); §455(b)(2) (judge "served as [a] lawyer in the matter in controversy" while in private practice); §455(b)(3) (same while judge served in government employment); §455(b)(4) ("financial interest" in the litigation); §455(b)(5) (judge "within the third degree of relationship" to a party, lawyer, or material witness). Section 455(a), in contrast, addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion. See *Liljeberg, supra,* at 860.

Because the appearance of partiality may arise when in fact there is none, see, *e.g.*, *Hall* v. *Small Business Admin.,* 695 F. 2d 175, 179 (CA5 1983); *United States* v. *Ritter*, 540 F. 2d 459, 464 (CA10), cert. denied, 429 U. S. 951 (1976), the reach of §455(a) is broader than that of §455(b). One of the distinct concerns addressed by §455(a) is that the appearance of impartiality be assured whether or not the alleged disqualifying circumstance is also addressed under §455(b). In this respect, the statutory scheme ought to be understood as extending §455(a) beyond the scope of §455(b), and not confining §455(a) in large part, as the Court would have it. See *ante*, at 13–14, n. 2. The broader reach of §455(a) is confirmed by the rule permitting its more comprehensive provisions, but not the absolute rules of §455(b), to be waived. See 28 U. S. C. §455(e). And in all events, I suspect that any attempt to demarcate an "area of overlap" (*ante*, at 13) between §455(a) and (b) will prove elusive in many instances.

Given the design of the statute, then, it is wrong to impose the explicit limitations of §455(b) upon the

more extensive protections afforded by §455(a). See *Liljeberg, supra,* at 859–861, and n. 8. The Court's construction of the statute undercuts the protection Congress put in place when enacting §455(a) as an independent guarantee of judicial impartiality.

The Court describes in all necessary detail the unimpressive allegations of partiality, and the appearance thereof, in this case. The contested rulings and comments by the trial judge were designed to ensure the orderly conduct of petitioners' trial. Nothing in those rulings or comments raises any inference of bias or partiality. I concur in the judgment.