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Judicial Impartiality in Recent Civil Rights Victories: An Analysis of the Disqualification of Judge Shira Scheindlin In *Floyd V. New York City*

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JUDICIAL IMPARTIALITY IN RECENT CIVIL RIGHTS VICTORIES: AN ANALYSIS OF THE DISQUALIFICATION OF JUDGE SHIRA SCHEINDLIN IN *FLOYD V. NEW YORK CITY*

JOEY KAVANAGH*

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I. INTRODUCTION

On October 31, 2013, a panel of the United States Court of Appeals for the Second Circuit ruled that New York Southern District Judge Shira Scheindlin lacked the requisite impartiality to rule on the high profile civil rights case *Floyd v. City of New York*.¹ The panel concluded that Judge Scheindlin’s impartiality could reasonably be questioned under 28 U.S.C. §

1. See 538 F. App’x 101 (2d Cir. 2013) (analyzing Judge Shira Scheindlin’s bias, or the potential appearance of bias, under 28 U.S.C. § 455).

455 and vacated her August 12 ruling against the City of New York.² Two years earlier, the Northern District of California examined Judge Vaughn Walker's impartiality in another high profile civil rights case, *Perry v. Schwarzenegger*.³ The Northern District of California concluded, however, that Judge Walker's impartiality could not be questioned under § 455, the same statute analyzed by the Second Circuit in *Floyd*.⁴

This Comment argues that the *Perry* court applied the appropriate standard required by § 455(a) and properly declined to speculate as to Judge Walker's bias, while the Second Circuit erred in *Floyd* by applying a lower standard for disqualification and gave too much weight to characterizations of Judge Scheindlin in the media.⁵ Part II of this Comment reviews the language of 28 U.S.C. § 455(a), the case law interpreting the statute, and the procedural history of *Perry* and *Floyd*.⁶ Part III argues that the Second Circuit should not have disqualified Judge Scheindlin because she did not make statements to the media that discussed the merits of the *Floyd* case, nor did her statements in a related case, *Daniels*, warrant an exception to the extrajudicial source doctrine.⁷ Part IV offers policy arguments to amend the vague language of § 455, which would allow for a more uniform application of the statute across the federal system.⁸ Part V concludes that the vagueness of the statutory language may have contributed to its misapplication in *Floyd*.⁹

2. See 28 U.S.C. § 455(a) (2012) (noting that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”).

3. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1121 (N.D. Cal. 2011) (assessing the defendant-intervenors' motion to disqualify trial Judge Vaughn Walker due to his sexual orientation and the fact that the case concerned gay marriage rights in California).

4. See *id.* at 1133 (denying the defendant-intervenors' motion and finding no evidence that Judge Walker would be incapable of being impartial).

5. See, e.g., *Perry*, 790 F. Supp. 2d at 1129 (applying an understanding of the reasonable person who is familiar with the facts and law of the underlying challenge to Judge Walker's impartiality).

6. See *infra* Part II (discussing the federal appellate and Supreme Court litigation over § 455).

7. See *infra* Part III (using the *Perry* ruling to highlight the inconsistent approach taken by the Second Circuit in *Floyd*).

8. See *infra* Part IV (proposing changes to the statutory language of § 455 to enable courts to consistently apply the standard).

9. See *infra* Part V (concluding that the vague language of § 455 led to its inconsistent application in *Floyd* and *Perry*).

II. BACKGROUND

A. 28 U.S.C. § 455 and the Case Law Interpreting It

28 U.S.C. § 455, enacted by Congress in 1970, governs the disqualification of federal judges for impartiality and financial or fiduciary interest.¹⁰ Subsection (a) of § 455 provides a general standard for the disqualification of judges whose impartiality might reasonably be questioned.¹¹ Subsection (b) of § 455 provides additional self-recusal standards for federal judges due to personal involvement in the case or financial and fiduciary interests.¹²

Federal judges are presumed to be impartial.¹³ The test for disqualification under § 455(a) is an objective test that views the judge's conduct from the perspective of a reasonable third-person; one who does not engage in speculation but considers the specifically alleged facts suggesting bias that the challenging party advances.¹⁴ *United States v. Holland* helped articulate this reasonable person perspective.¹⁵ In *Holland*, the defendant was charged with mailing threats to the President of the United States, and when he discovered the trial judge's phone number he left the judge threatening messages as well.¹⁶ The trial judge did not recuse himself and the Ninth Circuit agreed that recusal was not warranted under § 455.¹⁷ The Ninth Circuit reasoned that, although threats are not to be taken

10. See 28 U.S.C. § 455(a) (2012) (providing for the disqualification of federal justices, judges, and magistrates for impartiality, financial, or fiduciary interest).

11. See generally Maria G. Roberson, Annotation, *Construction and application of 28 U.S.C.A. § 455(a)*, 40 A.L.R. FED. 954 (1978) (discussing the history of the disqualification statute from its origins as a subjective test to its currently objective test).

12. See 28 U.S.C. § 455(b) (2012) (enumerating several scenarios, such as where a judge has previously worked as an attorney on the case, where disqualification is warranted).

13. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1129 (N.D. Cal. 2011) (explaining that federal judges are presumed to be impartial and are expected to rule on their assigned cases).

14. See *United States v. Holland*, 519 F.3d 909, 913-14 (9th Cir. 2008) (illustrating that the 1974 amendment removed the subjectivity of "in [the judge's] opinion" and replaced it with an objective test of a reasonable third party).

15. See generally *id.* (analyzing a judge's duty to recuse himself based on threats made against the judge by a defendant in a pending case).

16. See *id.* at 911 (recalling that the defendant, who had been previously convicted of violent crimes, left threatening voice messages for the judge ruling on his guilty plea).

17. See *id.* at 917 (affirming the trial judge's decision not to recuse as the threats were insufficient for a reasonable person to question the judge's impartiality).

lightly, the analysis of a judge's impartiality is not from the perspective of a "partly-informed-man-in-the-street."¹⁸ Rather § 455(a) mandates recusal only when an objective and informed member of the public, with knowledge of the underlying facts and law, would find a reasonable basis for doubting the judge's impartiality.¹⁹ Consequently, though perhaps a passing member of the public may have found the threats sufficient to justify recusal, the Ninth Circuit found that a knowledgeable observer who understands that judges have a "strong duty to sit" would not have supported recusal.²⁰

Section 455 calls for disqualification in circumstances that constitute an appearance of partiality, even where no actual bias is shown.²¹ Additionally, the bias required for recusal must be extrajudicial—meaning the statements or actions by the judge must occur *outside* of court—and the § 455 analysis not based upon in court rulings or comments made in the proceeding at issue.²² This is known as the extrajudicial source doctrine, which, except in the rarest instances of favoritism, requires that the disqualification analysis ignore what the judge has said or learned from his participation in the instant case.²³

I. Liteky v. United States and Limited Exceptions to the Extrajudicial Source Doctrine in Extreme Circumstances

The extrajudicial source doctrine requires that for an impartiality analysis, a judge's in court statements will not be considered except in rare circumstances.²⁴ In *Liteky v. United States*, the Supreme Court refused to

18. See *id.* at 914 (distinguishing the informed reasonable person who understands the presumption that judges hear a case they are assigned to from a passing observer who may be shocked by threats against a judge).

19. See *In re United States*, 666 F.2d 690, 695 (1st Cir. 1980) (finding rumors, innuendos, and erroneous information published as fact insufficient to support a finding of factual bias).

20. See *Holland*, 519 F.3d at 916-17 (ruling that, based on the presumption that judges hear assigned cases, the defendant's threats did not warrant a § 455 disqualification).

21. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (establishing, after a 1976 amendment to the statute, that the § 455 disqualification applies where the objective appearance of bias, and not actual bias, is shown).

22. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) (applying the extrajudicial doctrine for disqualification, meaning that the source of bias or impartiality must be out-of-court or extrajudicial).

23. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (holding that a judge's "terse" exclusion of what he felt to be irrelevant evidence was insufficient to warrant disqualification, due to the extrajudicial source doctrine).

24. See *Liteky*, 510 U.S. at 551 (explaining that the extrajudicial source doctrine

grant a recusal motion based on a judge's admonition of the defense, its witnesses, and the defendant throughout the course of the trial.²⁵ At issue in *Liteky* was whether a judge's alleged "anti-defendant" tone and his "cutting off" of defense witness testimony could be considered for a § 455(a) analysis despite occurring in court during the proceeding at issue.²⁶ The Supreme Court ruled that the conduct complained of would not be considered because it occurred in court and did not rise to the level of "deep-seated" favoritism to justify an exception to the extrajudicial source doctrine.²⁷

The extrajudicial source doctrine, however, provides for a rare exception, allowing a judge's in court statement to weigh on his impartiality when the judge's statements exhibit such a high degree of favoritism that fair judgment would be impossible.²⁸ In *United States v. Antar*, a judge stated in court that his goal from the start of the case was to give back to the public.²⁹ Despite the extrajudicial source doctrine's presumption that only out-of-court statements or actions by a judge are applicable under § 455(a), the Third Circuit in *Antar* ruled that the trial judge's proclamation that his goal was to give back to the public provided a stark example of the antagonism to a party that justified an exception under *Liteky*.³⁰ Despite occurring in court, the Third Circuit found the judge's statements to exhibit such a high degree of favoritism to justify disqualification.³¹

requires that only out-of-court, or extrajudicial statements by a judge bear on his impartiality).

25. *See id.* at 542 (discussing underlying facts of the recusal motion, where the defendant was convicted for willful destruction of property at a Military Reserve).

26. *See id.* at 542-43 (examining whether displays of impatience with the defense during trial was sufficient to justify an exception to the extrajudicial source doctrine).

27. *See id.* at 555 (crafting a limited exception to the extrajudicial source doctrine where an in-court statement can be considered when the evidence of an extreme animosity to a party makes the judge unable to render fair judgment).

28. *See id.* at 551 (finding that despite the existence of the exception, the general presumption favors the exclusion of in court statements by a judge for a § 455 analysis).

29. *See United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) (finding an exception to the extrajudicial source doctrine where the judge made it clear to the parties that his goal in the case was different than what it should have been).

30. *See id.* at 576 (ruling that the trial judge's stated wishes provided the government such an easy path to conviction that fair judgment was virtually impossible).

31. *See id.* at 584 (recognizing the limited nature of an extrajudicial source doctrine exception while remanding the case to a different trial judge).

While the exception provided in *Antar* saw the existence of extreme favoritism, predictions by a judge about the outcome of a trial made in court, even against a criminal defendant, are not sufficient to warrant an exception to the extrajudicial source doctrine.³² In *United States v. Young*, the defendant was convicted in district court in Colorado for two counts of money laundering, and the trial judge stated during a guilty plea colloquy that if the defendant proceeded to trial, she obviously would be convicted.³³ The Tenth Circuit concluded that the trial judge's "prediction" to defense counsel did not support a finding of deep seated favoritism, thereby affirming the limited circumstances that permit an extrajudicial source doctrine exception.³⁴ The Tenth Circuit found the judge's statement insufficient to warrant an exception because the judge's remarks about what the jury may find does not impact his ability to render fair judgment, nor did it indicate that he would be unable to carry out his responsibilities impartially.³⁵ Consequently, the court refused to disqualify the *Young* judge under § 455(a).³⁶

2. *Extraordinary Circumstances and Statements to the Media: Nichols v. Alley and U.S. v. Cooley*

Two Tenth Circuit cases from the mid-nineties explain the kind of conduct that may cause a reasonable observer to question a judge's impartiality in highly publicized cases.³⁷ Statements that a judge makes to the media can raise the appearance of bias when the judge discusses the parties' claims in a case, such as appearing on television criticizing a party

32. See, e.g., *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995) (refusing to grant a recusal where the trial judge stated in pretrial that it was clear the defendant would be convicted).

33. See *id.* (describing the colloquy between defense counsel and the trial judge, where the judge stated that a preview of the "coming attractions" involved the defendant being convicted and sent to county jail).

34. See *Liteky*, 510 U.S. at 554 (maintaining that, absent a limited exception, the § 455 analysis is confined to out-of-court statements and actions by a judge).

35. See *Young*, 45 F.3d at 1415-16 (explaining that nothing in the judge's prediction of the case's outcome evinced deep seated favoritism or an unwillingness to rule impartially).

36. See *id.* at 1416 (affirming the defendant's conviction and finding no § 455 violations based on the judge prediction of guilt).

37. See *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (finding the appearance of bias in a trial of a bombing suspect where the bomb detonated a block away from the judge's chambers); *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (addressing the recusal of a judge who appeared on *Nightline* discussing the merits of a case he was hearing).

or conducting “secret interviews” discussing the specific claims.³⁸ In *Cooley*, the defendants were charged with willfully impeding United States Marshals during an abortion protest.³⁹ The district judge who presided over the case, Judge Patrick Kelly, chose to conduct an interview with Barbara Walters on *Nightline*, in which he stated in part that the abortion protesters were breaking the law.⁴⁰ On appeal, the Tenth Circuit concluded that Judge Kelly abused his discretion in denying the recusal motion because the judge’s voluntary appearance on a national television show to discuss and offer his opinion on ongoing protests, the legality of which he was charged with determining, created the appearance of bias in the mind of a reasonable person under § 455(a).⁴¹

Nevertheless, judges cannot control all that is written about them, and media interviews do not cause *per se* disqualification because reporters’ personal opinions or characterizations of judges do not generally cause a reasonable observer to question a judge’s impartiality.⁴²

When considering a motion to disqualify, reviewing courts engage in several factual analyses, such as examining statements that judges make to the media, threats made against the judge, and a judge’s relationship with the parties.⁴³ In *Nichols v. Alley*, the petitioner was an accomplice to the Oklahoma City Bombing that killed 169 people.⁴⁴ Nichols requested recusal of the judge assigned to the case, Judge Wayne Alley, because the

38. See, e.g., *United States v. Microsoft*, 253 F.3d 34, 115-16 (D.C. Cir. 2001) (holding that a federal judge’s interviews discussing the merits of an ongoing antitrust case, with hand-picked reporters, gave rise to an appearance of bias).

39. See *id.* at 989 (describing the basis for the charges, where protesters scaled the walls of a Kansas abortion clinic and blocked access to the clinic from the inside).

40. See *id.* at 995 (recounting Judge Kelly’s appearance on *Nightline*, where he stated that the clinic protesters were acting illegally and that he would make sure that his injunctive order against the protesters would be honored).

41. See *Cooley*, 1 F.3d at 995 (finding that Judge Kelly’s conduct so displayed the appearance of bias that it could not survive an abuse of discretion review standard, let alone *de novo*).

42. See *Nichols*, 71 F.3d at 351 (enumerating several factual scenarios, such as media reports characterizing or misattributing quotes to the judge, prior rulings, and familiarity with the parties, as insufficient to find of the appearance of partiality under § 455(a)).

43. See *id.* (recounting the common impartiality analyses claims based on rumor, innuendo, and speculation, that do not give rise to a finding of § 455(a) partiality).

44. See generally Nancy Gibbs, *The Blood of Innocents*, TIME, June 24, 2001, <http://www.content.time.com/time/nation/article/0,8599,134077,00.html> (describing the scene on the ground when a bomb was detonated at the Alfred P. Murrah federal building in Oklahoma City killing over 160 people and wounding several hundred more).

judge's courtroom and chambers was a mere one block away from the bombing and the blast shattered the windows of his chambers and injured a member of his staff.⁴⁵ The Tenth Circuit, while systematically examining the standards for recusal and bias, found that these extraordinary facts gave rise to an appearance of bias despite no fault on the part of Judge Alley.⁴⁶ The court ruled that, based on the damage cause to Judge Alley's chambers and his proximity to the blast, a reasonable observer could question Judge Alley's impartiality.⁴⁷ Although the facts of *Nichols* are very unusual, its significance stems from the fact that the *Nichols* court extensively discussed the circumstances such as speaking on the merits of the case or having a fiduciary interest in the outcome that give rise to the appearance of partiality.⁴⁸ *Nichols* supports the rule that, absent unusual circumstances such as a party destroying the judge's chambers, mere statements to the media, threats made against the judge, and prior rulings by a judge are insufficient for disqualification.⁴⁹

3. *Hormel v. Helvering and Review of Issues Not Raised Below*

Although reviewing courts are generally limited to the issues raised by parties below, there is an exception where not allowing the reviewing court to rule on the issue would constitute a plain miscarriage of justice.⁵⁰ In *Hormel v. Helvering* the Supreme Court established that, in order to prevent the plain miscarriage of justice, a reviewing court may consider and rule on issues not raised by the lower court or the parties.⁵¹ The

45. See *Nichols*, 71 F.3d at 349-50 (noting the destruction that the bomb caused in Judge Alley's chambers, including the injury of a member of his staff, destruction of the skylight, and breaking of windows).

46. See *id.* at 352 (acknowledging that Judge Alley did nothing wrong, however still finding that Judge Alley's case is outside the scope of traditional § 455 analyses).

47. See *id.* (finding that the unique relationship between Judge Alley and the defendant would lead a reasonable observer to question his impartiality due to the impact that the defendant's actions had on Judge Alley's life).

48. See *id.* at 351 (describing the factual circumstances, including speculation, threats, media appearances, and prior rulings, that courts examine under § 455(a) and distinguishing the extraordinary facts of *Nichols* from these facts).

49. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1129 (N.D. Cal. 2011) (explaining that § 455(a) carries a presumption of judicial impartiality that the challenging party must overcome to receive the remedy of disqualification).

50. See *Hormel v. Helvering*, 312 U.S. 552, 555 (1941) (recognizing that, despite a limited exception, a reviewing court may only rule on issues raised by the parties in the lower court).

51. See *id.* at 557 (finding that, where the judge's statements make fair judgment appear impossible, a reviewing court may consider in-court statements).

petitioner in *Hormel* was a taxpayer who did not include trust income in his returns, and the Board of Tax Appeals concluded that he acted appropriately under the two Internal Revenue Code provisions argued for by the Commissioner, §§ 166 and 167.⁵² On appeal, the Commissioner argued successfully to the Eighth Circuit that § 22(a) applied even though the applicability of that statute was not raised below.⁵³ The Supreme Court upheld the Eighth Circuit decision, despite the general understanding that reviewing courts should confine their analysis to issues raised below, because the Commissioner did not have the benefit of § 22(a) at the time of the Tax Board ruling and it would have been impossible for the Commissioner to make the 22(a) arguments to the Tax Board.⁵⁴ Therefore, the Supreme Court concluded that the Eighth Circuit properly ruled by allowing a consideration of § 22(a) in order to prevent a plain miscarriage of justice.⁵⁵

B. The Perry Litigation and Impartiality Ruling

In 2008, California voters passed Proposition 8, which limited the definition of marriage to one man and one woman and thereby outlawed same-sex marriage in the state.⁵⁶ Two same-sex couples filed suit against the Governor of California alleging violations of due process and equal protection under the Fourteenth Amendment.⁵⁷ Proponents of Proposition 8 intervened on behalf of the defendants, and the city and county of San Francisco intervened on behalf of the plaintiffs.⁵⁸

52. See *id.* at 554-55 (highlighting the Tax Board of Appeals' ruling that the petitioner's trust income was not taxable under Internal Revenue Code § 167, and therefore the Commissioner should not have assessed a deficiency).

53. See *id.* at 560 (holding that to limit all appellate considerations to only issues raised below would, in the instance of § 22(a), defeat rather than promote the ends of justice).

54. See *id.* at 558 (avoiding a hard and fast limit of appellate review and allowing for special circumstances where a court may examine issues not raised previously).

55. See *In re Reassignment of Cases*, 736 F.3d 118, 129 (2d Cir. 2013) (noting Justice Black's proclamations in *Hormel* set the stage for appellate review of issues not raised in the lower courts).

56. See Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, http://www.nytimes.com/2008/11/06/us/politics/06ballot.html?_r=0 (reporting that California voters passed Proposition 8 with 52% of the vote in an added referendum portion to the 2008 ballot).

57. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (chronicling the history of Perry's underlying challenge to Proposition 8, which alleged that the amendment violated same-sex couples' right to equal protection).

58. See Press Release, City Attorney of San Francisco, San Francisco Moves to

On August 4, 2010, Judge Vaughn Walker of the Northern District of California ruled that Proposition 8 was unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment.⁵⁹ In response, the defendant-intervenors challenged Judge Walker's ruling in the case, arguing that Judge Walker's sexual orientation and his same-sex relationship diminished his ability to rule impartially.⁶⁰ Another judge in the Northern District of California, Judge James Ware, analyzed the defendant-intervenors' motion to disqualify and ultimately denied their request.⁶¹ Judge Ware concluded that Judge Walker's impartiality could not reasonably be questioned under § 455 because, like other minority groups, Judge Walker's sexual orientation does not alone create actual bias nor the appearance of bias.⁶² Therefore, Judge Ware's ruling concluded that under § 455(a), a reasonable, thoughtful person with knowledge of the underlying facts and law could not question a judge's impartiality based on speculation that the judge's membership in a minority class would limit his ability to rule impartially in a case affecting that class.⁶³

C. *The Floyd Litigation and Impartiality Ruling*

In January 2008, a class-certified group of African Americans and Latin Americans filed a suit against the NYPD in *Floyd v. City of New York* alleging that their Fourth and Fourteenth Amendment rights had been violated by the NYPD stop-and-frisks conducted without reasonable articulable suspicion.⁶⁴ The case was assigned to Judge Shira Scheindlin,

Intervene in Federal Challenge to Proposition 8 (July 23, 2009) (explaining that the city has a "unique public sector perspective" on having to enforce a discriminatory law).

59. See *Perry*, 704 F. Supp. 2d at 991 (applying strict scrutiny to invalidate Proposition 8 under Due Process, but rational basis to invalidate it under Equal Protection).

60. See *Judge Who Struck Down Proposition 8 Knew Case Would Go Far*, NATIONAL PUBLIC RADIO (June 29, 2013) (downloaded using NPR's media player) (explaining in an interview how Judge Walker predicted that his sexual orientation would be at the forefront of the litigation).

61. See generally *Perry*, 790 F. Supp. 2d at 1129 (N.D. Cal. 2011) (assessing Judge Walker's ability to rule on the *Perry* case under § 455(a) based on claimed bias due to the judge's sexual orientation).

62. See *id.* at 1128-29 (N.D. Cal. 2011) (analogizing that disqualifying Judge Walker for his membership in a class would be akin to disqualifying other groups, such as women, from ruling on cases that involved issues affecting women as a whole).

63. See *id.* at 1131 (refusing to speculate that Judge Walker's interest in marrying his partner would cause a well-informed, thoughtful observer to question Judge Walker's impartiality).

64. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658 (S.D.N.Y. 2013) (agreeing with the plaintiffs, after the presentation of statistics compiled over several

who had been a federal judge since 1994.⁶⁵ On August 12, 2013, following a nine-week trial, Judge Scheindlin held that the City of New York indeed violated the plaintiffs' rights under the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.⁶⁶

The Second Circuit chose to review Judge Scheindlin's impartiality *sua sponte* because of comments she made to the media while the case was being litigated and comments she made to the plaintiffs in *Daniels v. City of New York*, an action that also dealt with NYPD civil rights violations.⁶⁷ During a motion to extend the settlement period in *Daniels*, Judge Scheindlin engaged in a colloquy with the plaintiffs.⁶⁸ Specifically, she told the *Daniels* plaintiffs that New York City violated its own anti-profiling policy and that the plaintiffs had proof of racial profiling in a "good constitutional case."⁶⁹ Judge Scheindlin additionally told the *Daniels* plaintiffs that they could mark their claim as related to the *Floyd* litigation.⁷⁰

Furthermore, while *Floyd* was being litigated, Judge Scheindlin conducted interviews with *The New Yorker* and *The New York Law Journal*, where she discussed the many civil rights suits she has heard against the NYPD, and a mayoral report that found that she granted motions to suppress more frequently than her colleagues.⁷¹ Additionally,

years, that the implementation of the NYPD's stop-and-frisk policy is racially discriminatory).

65. See Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, NEW YORKER, May 17, 2013, http://www.newyorker.com/reporting/2013/05/27/130527fa_fact_toob (describing Judge Scheindlin's background and her experience as a judge in civil rights cases, hearing suits against police officers and New York City since her appointment in 1994).

66. See *Floyd*, 959 F. Supp. 2d at 658 (ruling that, based on the statistics showing the prevalence of unjustified stops of innocent blacks and Hispanics, the city is liable for violating the plaintiffs' Fourth and Fourteenth Amendment rights).

67. See *In re Reassignment of Cases*, 736 F.3d 118, 135-37 (2d Cir. 2013) (recognizing that Judge Scheindlin felt that the NYPD had violated its own anti-discrimination and anti-profiling policies based on the plaintiffs' claims).

68. See *id.* at 137 (discussing the NYPD's compliance, or lack of compliance, with its own written rule concerning racial profiling).

69. See *id.* at 135 (suggesting to the plaintiffs that they may have a basis to bring suit against the city for Fourth and Fourteenth Amendment violations).

70. See *id.* at 142 (identifying the racial profiling by the NYPD under a probable cause analysis in *Daniels* as related to the racial profiling under reasonable articulable suspicion analysis in *Floyd*).

71. See Larry Nuemeister, *NY 'frisk' judge calls criticism 'below-the-belt,'* ASSOCIATED PRESS, May 19, 2013, <http://www.news.yahoo.com/ny-frisk-judge-calls->

Judge Scheindlin described herself as a jurist who is skeptical of law enforcement.⁷² Judge Scheindlin also discussed with the media a letter written by the New York Lawyers Association, which purported to show that Judge Scheindlin is biased against law enforcement.⁷³ In the article published by *The New Yorker*, titled “A Judge Takes On Stop-and-Frisk,” Judge Scheindlin described her commitment to uphold the Bill of Rights and spoke about her interactions with the NYPD in her time as a federal judge, during which she has found that police had lied, discriminated against people of color, and violated the rights of citizens.⁷⁴

In the fall of 2013, the Second Circuit reviewed Judge Scheindlin’s impartiality *sua sponte*, citing *Hormel* as its justification for doing so.⁷⁵ On October 31, 2013, the panel issued a short order declaring that by making the above statements, Judge Scheindlin ran afoul of Canon 3C of the Judicial Code of Conduct, thereby vacating her decision and removing her from the case.⁷⁶ However, on November 13, the same Second Circuit panel issued a follow up to its October 31 order, relaxing its critique of Judge Scheindlin, but nonetheless affirming her disqualification.⁷⁷ In the opinion issued on November 13, the Second Circuit elaborated on its findings of bias, and focused specifically on Judge Scheindlin’s conduct under 28 U.S.C. § 455(a).⁷⁸ The court did not conclude that Judge Scheindlin was

criticism-below-belt-160257320.html (describing Judge Scheindlin’s interactions with the NYPD in court where she says she has seen examples of discrimination and lying on the stand).

72. See *id.* (distinguishing herself from judges who are “a little more timid to maybe disagree with the U.S. Attorney’s Office”).

73. See Mark Hamblett, *Stop-and-Frisk Judge Relishes her Independence*, N.Y.L.J., May 20, 2013, <http://www.newyorklawjournal.com/id=1202600625151> (describing Judge Scheindlin’s civil-rights centered jurisprudence).

74. See Toobin, *Rights and Wrongs*, *supra* note 65, at 2 (framing the then-ongoing *Floyd* litigation around Judge Scheindlin’s history with the NYPD, which extended back to civil rights cases she has heard against the city since 1994).

75. See *In re Reassignment of Cases*, 736 F.3d 118, 129 (2d Cir. 2013) (invoking *Hormel*’s review of issues not raised below in order to prevent a plain miscarriage of justice).

76. See *generally* *Ligon v. City of New York*, 538 F. App’x 101 (2d Cir. 2013) (concluding, beyond just a finding of § 455 bias, that Judge Scheindlin ran afoul of the Code of Conduct for United States Judges).

77. See *In re Reassignment of Cases*, 736 F.3d at 129 (establishing that the court made no findings that Judge Scheindlin has engaged in judicial misconduct).

78. See *id.* at 123 (illustrating that § 455(a) is an objective test that does not require actual bias, but only the appearance of bias, to justify disqualification).

actually biased.⁷⁹ Instead, it reasoned that Judge Scheindlin's comments about the validity of the plaintiff's claim in *Daniels*, along with her comments to the media about her unfavorable history with the NYPD, taken together, created the *appearance* of bias such that she should be disqualified under § 455(a).⁸⁰ The court thereafter denied Judge Scheindlin's motion to protest, concluding that she lacked standing to challenge the reassignment.⁸¹ The Second Circuit's ruling, and the outcome of that ruling, offers a more stringent application of § 455 than in *Perry*, and leads to unpredictable results for federal courts applying the § 455 disqualification statute.⁸²

III. ANALYSIS

A. The Second Circuit Misapplied § 455(a) in Concluding that Judge Scheindlin's Impartiality Could Reasonably be Questioned Because the Court Lowered the Reasonable Person Standard Articulated in § 455(a) Case Law.

Comparing the standards applied by the Northern District of California's assessment of Judge Ware in *Perry* with the Second Circuit's assessment of Judge Scheindlin in *Floyd* illustrates the errors that the Second Circuit made in applying § 455(a).⁸³ First, while the *Perry* court considered the proper burden to overcome in disqualifying a federal judge, the Second Circuit incorrectly applied a lower standard that more easily triggered disqualification.⁸⁴ Second, the Second Circuit did not engage in a § 455

79. *See id.* at 129 (establishing that the court made no finding of actual bias in Judge Scheindlin's case, just the appearance of bias).

80. *See id.* at 125, 129 (concluding that, given the public scrutiny of the *Floyd* litigation, Judge Scheindlin's comments in *Daniels* gave the appearance of steering the case to her docket).

81. *See In re Motion of Dist. Judge*, 736 F.3d 166, 170-71 (2d Cir. 2013) (finding, in part, that Judge Scheindlin has no standing to protest her reassignment).

82. *Compare Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1133 (N.D. Cal. 2011) (finding no appearance of bias with Judge Walker under § 455), *with In re Reassignment of Cases*, 736 F.3d at 129 (ruling that a judge's statements to the media and a colloquy with the plaintiffs in a related case contravened § 455).

83. *See generally Perry*, 790 F. Supp. 2d at 1133 (assessing Judge Walker's appearance of impartiality based on the defendant-intervenors' claim that his sexual orientation barred impartial judgment under § 455(a)); *In re Reassignment of Cases*, 736 F.3d at 129 (analyzing Judge Scheindlin's appearance of impartiality under § 455(a)).

84. *See Perry*, 790 F. Supp. 2d at 1129 (acknowledging the substantial burden that a party challenging a judge's impartiality bears).

reasonable person analysis, which views the reasonable person as one with knowledge of the underlying facts and law.⁸⁵ Finally, the extrajudicial source doctrine, and its application to Judge Scheindlin's case, does not support a finding of the appearance of impartiality under § 455 because her statements in *Daniels* do not rise to the level of favoritism that warrant an exception.⁸⁶

1. The Northern District of California Applied the Appropriate Standard Because it Acknowledged the Heavy Burden to Show that a Judge's Impartiality May Reasonably be Questioned.

The analysis under § 455 begins with the presumption that a judge is impartial, which creates a heavy burden for the party seeking disqualification.⁸⁷ In its opinion, the Northern District of California cited the substantial burden in its assessment of Judge Walker under § 455(a) and upheld that burden by refusing to speculate as to whether Judge Walker was biased merely because of his sexual orientation.⁸⁸ The Northern District of California maintained that questioning Judge Walker's impartiality merely on the basis of his involvement in a same sex relationship would force the court to accede to unsubstantiated suspicion that is insufficient under § 455(a).⁸⁹ Section 455(a) requires a fact-specific analysis, and the defendant-intervenors carried the burden of providing articulable facts giving rise to a finding of partiality.⁹⁰ To meet their burden, the defendant-intervenors needed to allege specific facts beyond a mere generalization that Judge Walker's sexual orientation influenced his

85. See, e.g., *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008) (recognizing that in the context of § 455(a), the reasonable person is someone who "understand[s] all the relevant facts" and "has examined the record and law").

86. See *Liteky v. United States*, 510 U.S. 540, 551 (1994) (explaining that under the extrajudicial source doctrine, opinions held by judges because of what they learned in earlier proceedings are not to be characterized as bias or prejudice).

87. See *Holland*, 519 F.3d at 911-12 (noting that the proposition that a judge should participate in their cases absent legitimate reason is derived from Article III of the Constitution).

88. See *Torres v. Chrysler Fin. Co.*, No. C 07-00915 JW, 2007 WL 3165665, at *1 (N.D. Cal. 2007) (establishing that a federal judge is presumed to be impartial, and the party seeking disqualification must meet a high burden to show bias).

89. See *Clemens v. U.S. District Court for the Central District of California*, 428 F.3d 1175, 1180 (9th Cir. 2005) (articulating that the party challenging a judge cannot meet the § 455 burden by speculating about a relationship, without evidence of bias).

90. See *id.* at 1178 (articulating that the § 455(a) analysis is fact-specific and focuses on the unique circumstances in the present case, without engaging in speculation).

potential bias, which they failed to do, and the Northern District appropriately denied their motion.⁹¹

On the other hand, the Second Circuit panel in its opinion issued on November 13, 2013, did not acknowledge the substantial burden to overcome the presumption that a judge lacks impartiality.⁹² Perhaps, the Second Circuit did not acknowledge the burden a party bears because a party did not actually raise the issue.⁹³ Nevertheless, the Supreme Court precedent that the Second Circuit relied on for its *sua sponte* justification, *Hormel v. Helvering*, allows for appellate review of an issue not raised below in “exceptional” cases with “peculiar” circumstances.⁹⁴ Therefore, the Second Circuit, in invoking *Hormel*, would presumably mention the extraordinary circumstances of Judge Scheindlin’s bias or the plain miscarriage of justice that would result from allowing her to preside over the case.⁹⁵ In other words, by citing *Hormel* as its justification for reviewing judge Scheindlin’s impartiality *sua sponte*, the court implicitly acknowledged that her case is peculiar, or alternatively, that not doing so would result in a plain miscarriage of justice.⁹⁶ Yet, the Second Circuit’s opinion is replete with language softening its criticism of Judge Scheindlin and in fact, the court conceded that she may not be biased.⁹⁷ By invoking *Hormel*, which allows for review of issues not raised below only in peculiar circumstances or to present a miscarriage of justice, one would expect that the Second Circuit’s opinion would speak to the injustice that would result

91. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1133 ((N.D. Cal. 2011) (taking the defendant-intervenors’ argument to its logical conclusion and refusing to find that membership in a minority precludes a judge from ruling on a case that affects that class).

92. See *In re Reassignment of Cases*, 736 F.3d 118, 129 (2d Cir. 2013) (explaining that, though the issue of recusal was not raised either by the parties or the judge herself in the district court or this court, there is no barrier to reassigning the cases *sua sponte*).

93. See *id.* at 129 (addressing Judge Scheindlin’s impartiality *sua sponte*, as neither party raised the issue nor invoked § 455).

94. See *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (identifying exceptional cases or peculiar circumstances as justification for a reviewing court to consider issues not raised below).

95. See *id.* at 558 (noting the general presumption that appellate courts do not weigh on issues not raised below or preserved for appeal, except when there is a plain miscarriage of justice).

96. See *In re Reassignment of Cases*, 736 F.3d at 129 (appealing to Justice Black’s proclamation in *Hormel*, that an appellate court may pass upon issues not raised below in order to prevent injustice to the parties).

97. See *id.* at 124 (emphasizing that the court makes no findings of misconduct, actual bias, or actual partiality, in contrast to its October 31 ruling that found that Judge Scheindlin violated the Code of Judicial Ethics).

if the court did not step in.⁹⁸ Instead, the Second Circuit's admission that Judge Scheindlin lacked actual bias belies the notion that Judge Scheindlin's case was extraordinary such that it risked injustice under *Hormel*.⁹⁹ While no actual bias was found in the *Nichols* case as well, the *Nichols* court made clear that Judge Alley's case was unusual in that no direct factual comparison can be made to the standard § 455 analyses such as media interviews or relationships with the parties.¹⁰⁰ Therefore, while both *Floyd* and *Nichols* found that a judge was not actually biased, the *Floyd* court focused on the *common* § 455(a) analyses such as media interviews.¹⁰¹ Though both cases illustrate disqualification without actual bias, *Nichols* is distinguishable in that Judge Alley's disqualification was due to the "extraordinary circumstances" of Judge Alley's chambers being destroyed—so extraordinary that the court found "no case to look to for guidance."¹⁰²

As the *Perry* court stated, disqualification of a federal judge places a high burden on the challenging party, and *Hormel* requires appellate review only in exceptional circumstances, such as where a party could not make an argument at trial that could be made on appeal due to a subsequent Supreme Court decision.¹⁰³ Therefore, because Judge Scheindlin's recusal was not raised below, the Second Circuit must contend with the already high standard of recusal in addition to the "exceptional circumstances"

98. See *Hormel*, 312 U.S. at 557 (crafting a limited exception for appellate intervention on a new issue where not doing so would result in a miscarriage of justice).

99. Compare *In re Reassignment of Cases*, 736 F.3d at 124 (softening the court's earlier ruling that Judge Scheindlin ran afoul of the Judicial Code and finding no actual bias, only the appearance of bias), with *Hormel*, 312 U.S. at 557 (calling for appellate review of an issue not raised below *only* in circumstances that risk the plain miscarriage of justice).

100. See *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (acknowledging that there "is no similar case" with which to compare the "extraordinary" facts of Judge Alley's chambers being destroyed by the defendant he would later have to rule over).

101. Compare *In re Reassignment of Cases*, 736 F.3d at 125-29 (analyzing Judge Scheindlin based on statements that she made to the media and to the plaintiffs in another case), with *Nichols*, 71 F.3d at 352 (assessing Judge Alley based on the fact that his chambers was one block away from a bomb detonation that the defendant was partially responsible for).

102. See *Nichols*, 71 F.3d at 352 (maintaining that the § 455 analysis is a factual one, but there are nevertheless no cases with such a extraordinary facts to offer a direct comparison).

103. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1129 (N.D. Cal. 2011) (acknowledging that the party challenging a federal judge's impartiality carries a substantial burden to justify the removal of the judge).

requirement from *Hormel*.¹⁰⁴ However, because the court spent much of the opinion mitigating its criticism of Judge Scheindlin, its reliance on *Hormel* to justify Judge Scheindlin's disqualification is misplaced.¹⁰⁵

Additionally, the factual differences between the two cases illustrate why the Second Circuit erred in relying on *Hormel*.¹⁰⁶ For instance, in *Hormel*, the Commissioner actually raised the § 22(a) arguments to the appellate court, while New York City did not argue in the District Court or on appeal that Judge Scheindlin should be disqualified.¹⁰⁷ Unlike in *Hormel*, where the § 22(a) argument had not been applied to the taxpayer's situation until after the lower court ruling, in *Floyd* the City had ample opportunity to argue that Judge Scheindlin should be disqualified.¹⁰⁸ Judge Scheindlin's interviews with *The New Yorker* and *The New York Law Journal* were published in May 2013, a few months prior to her August 2013 ruling, meaning the City could have raised her impartiality during the proceedings.¹⁰⁹ Conversely, in *Hormel*, the Supreme Court had not authorized § 22(a)'s application to the taxpayer until after judgment had been rendered in the taxpayer's favor.¹¹⁰ Therefore, the Commissioner was "injusticed" in *Hormel* because it *could* not have made an argument to the lower court that was later raised on appeal whereas the City could have, but

104. See *Hormel*, 312 U.S. at 557 (allowing an appellate court to consider an issue not raised below only in order to prevent injustice to one of the parties).

105. Cf. Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER, Oct. 31, 2013, <http://www.newyorker.com/online/blogs/newsdesk/2013/10/the-preposterous-removal-of-judge-scheidlin.html> (arguing, after his interviews became the subject of the ruling, that the Second Circuit mischaracterized Judge Scheindlin's statements to the press).

106. See *In re Reassignment of Cases*, 736 F. 3d at 129 (turning to *Hormel* to justify ruling on Judge Scheindlin's impartiality despite the issue not being raised by either party at the district or circuit level).

107. Compare *Hormel*, 312 U.S. at 554-56 (discussing the Eighth Circuit ruling, where the Commissioner first introduced the § 22(a) argument after the Supreme Court ruled that § 22(a) was applicable to trust income), with *In re Reassignment of Cases*, 736 F. 3d at 129 (acknowledging that Judge Scheindlin's impartiality was reviewed *sua sponte*).

108. See *In re Reassignment of Cases*, 736 F.2d at 125-29 (assessing Judge Scheindlin's impartiality based on media interviews that were published while she was hearing the case).

109. See, e.g., Toobin, *Rights and Wrongs*, *supra* note 65, at 1 (discussing with Judge Scheindlin her prior in-court interactions with the NYPD while the *Floyd* case was being litigated).

110. See *Hormel*, 312 U.S. at 559 (noting that the Commissioner could not make use of § 22(a) in the lower court because the Supreme Court had not yet rendered it applicable to trust income like petitioner's until its subsequent decision in *Helvering*).

chose not to make the disqualification argument in the lower court.¹¹¹ These factual differences show why *Floyd* was not a “plain miscarriage of justice” as illustrated by *Hormel*, especially when considered in light of the softening of its initial criticism of Judge Scheindlin that characterized the order issued on November 13.¹¹²

2. The Northern District of California Correctly Applied the Knowledgeable Reasonable Person Standard Under § 455(a), While the Second Circuit Relied on a Less-informed Reasonable Person that Lowered the Standard for Disqualification

The Northern District of California relied on a complete definition of who the reasonable person is under a § 455(a) analysis.¹¹³ A § 455(a) reasonable person is not just a passing observer, but rather someone with knowledge of the facts and law of the underlying action.¹¹⁴ The reasonable person under § 455(a) does not contemplate a member of the general public who is unaware of the current litigation and its underlying issues.¹¹⁵ The Northern District of California recognized as much by stating that the challenging party must carry the heavy burden.¹¹⁶ The Second Circuit, on the other hand, discussed a general reasonable “observer” without any mention of the individual with familiarity of the facts and law of the underlying action, which is inconsistent with § 455(a).¹¹⁷

The Second Circuit’s understanding of the reasonable person under § 455(a) effectively lowered the standard to trigger disqualification because it

111. *See id.* at 558 (allowing for appellate review of issues not raised below in circumstances that would result in a “miscarriage of justice”).

112. *See, e.g., In re Reassignment of Cases*, 736 F.3d at 124 (finding that Judge Scheindlin was not actually biased, and mitigating its criticisms of Judge Scheindlin from the original order that found she violated the Code of Judicial Conduct).

113. *See* 28 U.S.C. § 455(a) (2012) (mandating recusal when a reasonable *person* may question a federal justice, judge, or magistrate’s impartiality).

114. *See Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1129 (N.D. Cal. 2011)(citing *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008)) (recognizing that in the context of § 455(a), the reasonable person is not someone who is overly sensitive to bias but rather a reasonable thoughtful observer that understands the facts and law).

115. *See id.* at 1130 (maintaining that a fact is not necessarily a basis for questioning a judge’s impartiality merely because it might lead to public questioning of the judge’s impartiality).

116. *See id.* (acknowledging that judges are presumed to be impartial and that blanket statements about a judge’s bias due to his membership in a class are insufficient to overcome this presumption).

117. *See generally In re Reassignment of Cases*, 736 F.3d 118, 125 (2d Cir. 2013) (noting that the reasonable observer in this situation would find partiality).

did not consider that a reasonable person is someone who has examined the facts and law of the current case.¹¹⁸ The requirement that a reasonable person has examined the record of the case heightens the standard, or makes the reasonable person less sensitive to bias, because the Ninth Circuit in *Holland* explained that the § 455 reasonable person does not mandate recusal upon mere suspicion of bias.¹¹⁹ The Second Circuit argued that Judge Scheindlin's interviews could cause a reasonable observer to question her impartiality.¹²⁰ However, the Second Circuit consistently used the language "reasonable *observer*" as a perspective from which it analyzed Judge Scheindlin's impartiality.¹²¹ This reasonable observer is not the same as the reasonable person who is familiar with the case and law at hand, as evidenced by the fact that the defendants, surely familiar with the record, the law, and Judge Scheindlin's interviews, did not request recusal.¹²² In *Holland*, the Ninth Circuit distinguished the appropriate standard—the knowledgeable reasonable person—from a "partially-informed-man-in-the-street."¹²³ Moreover, in *Holland*, the judge was faced with threats from the defendant who had a violent history yet the Ninth Circuit found that these threats may alarm a passerby, but not one with knowledge of the law that judges have a duty to sit in the cases they are assigned.¹²⁴ The Second Circuit failed to acknowledge that the § 455 reasonable person has knowledge of the presumption that judges should hear their assigned cases.¹²⁵ In other words, unlike the *Perry* court, the

118. See, e.g., *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008) (noting that in the § 455(a) analysis, the reasonable person is thoughtful and not unduly suspicious).

119. See *id.* (discussing the fact that a reasonable person should be well-informed about the facts and law under § 455(a)).

120. See *In re Reassignment of Cases*, 736 F.3d at 125-26 (holding that a reasonable *observer* may question Judge Scheindlin's impartiality due to the comments she made to the press and her colloquy with the *Daniels*' plaintiffs).

121. See *id.* at 124, 126 (discussing the colloquy with the plaintiffs in *Daniels* to the extent that it would cause a reasonable "observer" to question Judge Scheindlin's impartiality).

122. See *id.* at 128 (noting that neither party raised the issue of Judge Scheindlin's impartiality).

123. *Holland*, 519 F.3d at 914 (recalling that the § 455 analysis is not subjective and is not concerned with a judge's personal feelings, but rather how a thoughtful third person would interpret the judge's impartiality).

124. See *id.* at 915-16 (establishing that the threats made by the defendant—an individual who had been previously convicted of armed robbery and assault with a deadly weapon—still did not mandate recusal under a § 455(a) reasonable person analysis).

125. See *In re Reassignment of Cases*, 736 F.3d at 124-29 (analyzing Judge

Second Circuit did not begin its analysis from the perspective of a reasonable observer who is familiar with the facts and law of the case, and in so doing, misapplied the § 455(a) standard for disqualification.¹²⁶

B. Judge Scheindlin's Interviews with The New Yorker and The New York Law Journal are Insufficient to Show the Appearance of Bias Because She Does Not Speak about the Merits of the Claims in the Floyd Case

The Second Circuit erred in ruling that the interviews Judge Scheindlin conducted with *The New Yorker* and *The New York Law Journal* could cause one to question her impartiality because the reporters made the characterizations of Judge Scheindlin and she did not discuss the merits of the *Floyd* case in those interviews.¹²⁷ The Tenth Circuit's opinion in *Cooley* is instructive of the type of judge-media interactions that normally do not justify recusal.¹²⁸

Looking first to the piece in *The New Yorker*, the characterizations of Judge Scheindlin and descriptions of her battles with the NYPD are made by the author, Jeffery Toobin, and not by the judge herself.¹²⁹ For instance, the title of the article, "A Judge Takes on Stop-and-Frisk" evokes Judge Scheindlin's stance on the merits of NYC's stop and frisk policy.¹³⁰

Scheindlin's interviews with the media and her statements in *Daniels* from the perspective of a reasonable observer, not a well informed third person with knowledge of a judge's duty to sit).

126. *Compare Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1129 (N.D. Cal. 2011) (recognizing that the reasonable person under § 455(a) is well-informed with the facts and law at hand), with *In re Reassignment of Cases*, 736 F.3d at 124 (characterizing the § 455(a) analysis as a reasonable observer, without mention of the requirement that the hypothetical person be familiar with the underlying facts and law). See also *Holland*, 519 F.3d at 914 (recognizing that in the context of § 455(a), the reasonable person is not someone who is "hypersensitive or unduly suspicious").

127. See *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144*, 20 FEDERAL JUDICIAL CENTER (2002), available at <https://bulk.resource.org/courts.gov/fjc/recusal.pdf> [hereinafter FEDERAL JUDICIAL CENTER] (outlining that Circuit Court interpretations of § 455(a) permit judges to speak to reporters during ongoing litigation, so long as characterizations about the case are made by the reporters and not the judge).

128. See *United States v. Cooley*, 1 F.3d 985, 993-94 (10th Cir. 1993) (discussing the factual circumstances such as prior rulings, statements in court by the judge, and mere familiarity with the parties as not giving rise to finding of partiality).

129. See, e.g., Toobin, *Rights and Wrongs*, *supra* note 65, at 1 (describing that in various decisions, Judge Scheindlin has found that police lied and discriminated on the basis of race).

130. See *id.* (framing the piece as a judge taking on the NYPD's policy, without having the judge comment on the actual stop-and-frisk policy at hand in the case).

Moreover, the statements Judge Scheindlin does make in the interview, namely that she believes in upholding the Constitution and Bill of Rights, is consistent with what judges are permitted to say according to *Cooley*.¹³¹ In *Cooley*, Judge Kelly essentially expressed a dedication to uphold the law, which is insufficient to justify disqualification under § 455.¹³² However, unlike Judge Kelly in *Cooley*, Judge Scheindlin did not discuss the merits of the *Floyd* case, nor did she state her opinion about the legality of the parties' positions, as Judge Kelly did in his *Nightline* interview.¹³³ In the interview, Judge Scheindlin made statements about her background and her past career as a federal judge, but did not weigh in on the validity of the plaintiffs' claims against the NYPD.¹³⁴ The statements discussing the merits of the *Floyd* case are instead attributed to Darius Charney, co-lead counsel for the plaintiffs.¹³⁵ Furthermore, in the *New York Law Journal* piece mentioned in the Second Circuit's ruling against Judge Scheindlin, the author made clear that Judge Scheindlin was not discussing the merits of the *Floyd* case.¹³⁶

Therefore, the articles written about Judge Scheindlin stand in stark contrast to two recent instances where judges' media interactions have caused them to be disqualified because Judge Scheindlin does not discuss the merits of the claims by the *Floyd* parties in her interviews.¹³⁷ For example, in *United States v. Microsoft*, a federal judge discussed with

131. See, e.g., *Cooley*, 1 F.3d at 993-94 (illustrating that a judge expressing a dedication to uphold the law is insufficient to reasonably question that judge's impartiality).

132. See *Nichols v. Alley*, 71 F.3d at 351 (instructing that a judge's statement of a willingness to uphold the law is not a proper justification for finding that the judge lacked the requisite impartiality under § 455(a)).

133. See *Cooley*, 1 F.3d at 995 (disqualifying a federal judge for appearing on television while a case was being litigated and stating that the defendant was breaking the law).

134. See generally Toobin, *Rights and Wrongs*, *supra* note 65, at 1 (outlining Judge Scheindlin's personal background, her legal career, and her time as a federal judge since 1994).

135. See *id.* at 1-2 (discussing, with counsel for the plaintiffs, the statistics that the plaintiffs brought to argue that the NYPD's policy violates their rights).

136. See Hamblett, *supra* note 73 (establishing that the ongoing proceedings in *Floyd* were "off the table" in his interview with Judge Scheindlin).

137. Compare Toobin, *Rights and Wrongs*, *supra* note 65, at 1-2 (interviewing a judge who appears openly in an online article to discuss her career while the comments about a high profile case are limited to the author and statements by the litigants) with FEDERAL JUDICIAL CENTER, *supra* note 127, at 34-35 (describing cases where judges were disqualified for speaking about parties' claims and met with hand-picked reporters to discuss cases).

secret reporters the merits of the underlying case.¹³⁸ Likewise, in *United States v. Cooley*, the presiding judge spoke directly on the merits of the proceedings by stating, on television, that the protestors were breaking the law.¹³⁹ By comparison, Judge Scheindlin did not speak on the merits of either case or give peculiarly “secret interviews” with “select reporters.”¹⁴⁰ As such, although judges are discouraged from appearing in the media while a case is being litigated, Judge Scheindlin’s conduct in speaking with the media and the content of those interviews is within the parameters set forth in *Microsoft* and *Cooley*.¹⁴¹

Nichols and *Floyd* are analogous because they both deal with the impartiality of federal judges in highly publicized cases, and *Nichols* is especially instructive because it illustrates the factual circumstances that give rise to a questioning of impartiality under § 455 in such a high-profile case.¹⁴² The only statements on the merits of the claims in *Floyd* are by the author or the lawyers as quoted by the author, as are the characterizations of Judge Scheindlin, which the *Nichols* court made clear was not to be considered as indicative of the judge’s lack of impartiality.¹⁴³ Therefore, the Second Circuit erred in finding the appearance of bias in Judge Scheindlin’s interviews with *The New Yorker* and *The New York Law Journal* because she did not speak about the merits of the case and the validity of the parties’ claims.¹⁴⁴

138. See FEDERAL JUDICIAL CENTER, *supra* note 127, at 34 (relying on the facts supporting disqualification in the *Microsoft* case, where the judge conducted interviews with select reporters and spoke on the merits of the actual case).

139. See *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (noting that the trial judge stated on *Nightline* that the defendant abortion protestors were acting illegally and that his injunction against them was to be honored).

140. Compare Toobin, *Rights and Wrongs*, *supra* note 65, at 1-2 (discussing Judge Scheindlin’s background and history as a federal judge), with FEDERAL JUDICIAL CENTER, *supra* note 127, at 34-36 (illustrating the circumstances in *Cooley* and *Microsoft*, where judges spoke to the media discussing the parties’ claims).

141. See *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (instructing that a judge’s statements to the media are not indicative of partiality under § 455(a) as long as the judge does not personally speak as to the merits of the case or make characterizations about the claims of the parties).

142. See *id.* at 349 (describing the media attention that the Oklahoma City bombing received and the publicized trials of bombers Timothy McVeigh and Terry Nichols); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (chronicling the NYPD’s controversial stop and frisk policy and the media attention that followed).

143. See generally Toobin, *Rights and Wrongs*, *supra* note 65 (describing Judge Scheindlin’s judicial history with the NYPD as a “battle” and citing attorneys for the plaintiffs who discuss their claims about the NYPD’s stop and frisk policy).

144. See FEDERAL JUDICIAL CENTER, *supra* note 127, at 20 (highlighting the case

C. The Second Circuit Ruled Incorrectly in Finding that Judge Scheindlin's Comments to the Plaintiffs in Daniels Weighed on her Impartiality Because the Extrajudicial Source Doctrine Precludes Their Consideration in a § 455(a) Analysis.

The extrajudicial source doctrine precludes a reviewing court from considering, for disqualifying purposes, a judge's statements in court during the proceeding.¹⁴⁵ This bar on "judicial sources" applies to prior proceedings, especially those involving the same defendant, as well as related cases.¹⁴⁶ The NYPD is named as the defendant in each suit, and both *Floyd* and *Daniels* concern a racially based constitutional claim against the same entity.¹⁴⁷ In that regard, both *Floyd* and *Daniels* concern constitutional violations by the NYPD.¹⁴⁸ *Floyd* alleges that the NYPD violated the plaintiffs' Fourth and Fourteenth Amendment Rights by conducting racially discriminatory and ineffective stop and frisks while *Daniels* involves a lack of probable cause arrest claim that the NYPD racially profiled the plaintiff.¹⁴⁹ Therefore, the extrajudicial source doctrine should bar Judge Scheindlin's in-court statements to the plaintiffs' attorney in *Daniels* from bearing on her impartiality in *Floyd*, because the cases present related claims against the same defendant and do not warrant an extrajudicial source doctrine exception.¹⁵⁰ Moreover, Judge Scheindlin instructed the plaintiffs during her colloquy in *Daniels* that they could mark their claim as "related" to *Floyd*, thereby acknowledging the link between

law that emphasizes that judges cannot control everything that is written about them and are not *per se* biased for appearing in the media while a case is being litigated).

145. See *Liteky v. United States*, 510 U.S. 540, 551 (1994) (ruling that opinions held by judges as a result of what they learned in earlier proceedings are not to be characterized as "bias" or "prejudice.").

146. See *id.* (establishing that it is "normal and proper" for a judge to sit in successive trials regarding the same defendant and that these proceedings are not extrajudicial sources).

147. See *In re Reassignment of Cases*, 736 F.3d 118, 137 (2d Cir. 2013) (advising the plaintiff in *Daniels* that he could mark his case as a related case, given the nature of its claims).

148. See *Daniels v. City of New York*, No. 03 Civ. 0809, 2003 WL 22510379, at *1 (S.D.N.Y. Nov. 5, 2003) (describing the suit as a *pro se* false arrest claim against an NYPD officer for a lack of probable cause).

149. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013) (presenting a constitutional claim against the NYPD for illegal search and seizures under the City's stop and frisk policy).

150. See FEDERAL JUDICIAL CENTER, *supra* note 127, at 20 (noting that under the extrajudicial source doctrine a judge's statements during proceedings do not influence her impartiality).

the two cases.¹⁵¹

1. Judge Scheindlin's Colloquy in Daniels Should Not Have Been Considered Because it Does Not Fit into an Exception to the Extrajudicial Source Doctrine.

Although the extrajudicial source doctrine precludes in-court statements by the judge from consideration under § 455(a), there are exceptions, in rare circumstances, where the judge's favoritism would make fair judgment impossible.¹⁵² However, Judge Scheindlin's comments to the plaintiffs in *Daniels* are more akin to the permissible prediction of guilt in *United States v. Young*, and less like the exception to the extrajudicial source doctrine granted in the judge's impermissible statement of his goals in *United States v. Antar*.¹⁵³ In *Daniels*, Judge Scheindlin told the plaintiffs that they had a good constitutional case.¹⁵⁴ This is essentially weighing in on the merits of a party's case, which is permissible *in court* under the extrajudicial source doctrine because in court predictions about the outcome of a case do not raise the appearance of bias.¹⁵⁵ In *Young*, the judge stated that the defendant would "obviously" be convicted, and the Tenth Circuit concluded that this statement did not trigger an exception to the extrajudicial source doctrine because the prediction gave no indication that the judge would lack impartiality in ruling on evidence or instructing the jury should the case go to trial.¹⁵⁶ In other words, the statement by the

151. Compare *Daniels*, at *1 (presenting a racial-profiling claim against the NYPD for an unfounded arrest) with *Floyd*, 959 F. Supp. 2d at 578 (challenging, based upon racial inequities, the NYPD's use of stop and frisks in making unwarranted stops of minorities).

152. See *Liteky v. United States*, 510 U.S. 540, 541 (1994) (recognizing that, despite the general presumption that in-court statements will not be considered, there is an allowance for exceptions where the judge displays extreme favoritism).

153. Compare *United States v. Young*, 45 F.3d 1405, 1415 (10th Cir. 1995) (refusing to grant recusal when a judge stated in court pre-trial that the defendant will "obviously" be convicted) with *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995) (granting recusal under an exception to the extrajudicial source doctrine because the judge stated that his goal from the start was to give back to the public what the defendant fraudulently took).

154. See *In re Reassignment of Cases*, 736 F.3d 118, 135-38 (2d Cir. 2013) (instructing the plaintiffs that they have a strong claim against the NYPD for violating its own anti-racial profiling policy).

155. See *Liteky*, 510 U.S. at 542 (instructing that the appearance of partiality cannot stem from the current proceedings).

156. See *Young*, 45 F.3d at 1414-15 (describing the colloquy between the trial judge and defense counsel, where the judge tells counsel that "the preview of the coming attractions" entails his client being convicted and going to county jail).

judge in *Young* was not prejudicial, or enough of a showing of favoritism, to allow the reviewing court to consider the in-court statement in a § 455(a) analysis.¹⁵⁷ Judge Scheindlin's colloquy with the plaintiffs discussed the prospect of filing a later case, and is less prejudicial than the prediction of guilt before trial from *Young*, because Judge Scheindlin's statement concerned merely the *filing* of a later case while the judge's statement in *Young* concerned the defendant's guilt or innocence in an ongoing case.¹⁵⁸

Therefore, at most, Judge Scheindlin's comments are on par with the statements in *Young*, and they do not rise to the level of *Antar*, which called for an exception to the extrajudicial source doctrine.¹⁵⁹ In *Antar*, the judge's statement that his goal was to give back to the public what the defendant took evinces a bias that existed before the current case, whereas the extrajudicial source doctrine contemplates biases that are created and espoused during the current trial.¹⁶⁰ Therefore, the judge in *Antar* showed his bias *before* the merits of the actual case were presented to him whereas Judge Scheindlin spoke on the validity of the plaintiff's claim as it was presented to her *throughout* the colloquy and earlier proceedings.¹⁶¹ The judge in *Antar* evinced such a high degree of antagonism to the defendant, and in fact stated that his goal at trial was something other than what it should have been, while Judge Scheindlin did not show an improper goal—or any goal—as she spoke on the validity of the plaintiff's claims.¹⁶² Therefore, because Judge Scheindlin's statements to the plaintiffs do not evince an improper goal as in *Antar*, and instead speak to the validity of a parties' claim as in *Young*, the Second Circuit should not have considered

157. See *Liteky*, 510 U.S. at 542 (demonstrating that in-court statements and actions of a judge can only be considered in the rarest circumstances where there is evidence of deep-seated favoritism or antagonism that precludes a fair judgment).

158. Compare *Young*, 45 F.3d at 1414 (excluding the consideration of a statement by the judge of the defendant's obvious guilt), with *In re Reassignment of Cases*, 736 F.3d at 121 (considering a judge's statements to a plaintiff on the merits of his case before a claim has been filed).

159. See *United States v. Antar*, 53 F.3d 568, 573 (3d Cir 1995) (finding an exception to the extrajudicial source doctrine as the judge's statement of his goal to give back to the public made a fair judgment appear impossible).

160. See *id.* at 576 (illustrating how the judge's statements of giving back to the public at the outset of the case evince an appearance of bias that may have existed prior to the current proceeding).

161. See *id.* at 578 (noting that the when a judge forms his opinions in a separate civil case, he must be careful to not have those opinions spill over to his goal in a criminal case).

162. See *In re Reassignment of Cases*, 736 F.3d at 138 (speaking in court on the chance of success of the plaintiffs prospective claims against the NYPD).

the colloquy due to the extrajudicial source doctrine.¹⁶³

2. Judge Scheindlin's History of Jurisprudence, though Mentioned in an Extrajudicial Source, Should Not Weigh on her Impartiality Because it Concerns In Court Statements and Actions that are Protected by the Extrajudicial Source Doctrine.

Judges cannot control everything that is written about them.¹⁶⁴ Consequently, Judge Scheindlin's history of jurisprudence mentioned in *The New Yorker* and the *New York Law Journal* articles should not have been considered because prior adverse rulings are not to be considered in a § 455(a) analysis.¹⁶⁵ *Nichols* and the extrajudicial source doctrine make clear that prior adverse rulings do not weigh on a judge's impartiality under § 455(a).¹⁶⁶ Additionally, the New York County Lawyers Association criticized the mayoral report as incomplete and based on a small sample size.¹⁶⁷ To consider it would then require a reviewing court to engage in speculation that the *Nichols* court barred from § 455 analysis.¹⁶⁸ Therefore, Judge Scheindlin's previous rulings mentioned in the article should not be considered because they are prior adverse rulings barred by the extrajudicial source doctrine.¹⁶⁹ Additionally, even if the previous ruling study was relevant, its small size render it inadequately supported to be more than impermissible speculation.¹⁷⁰

163. See FEDERAL JUDICIAL CENTER, *supra* note 127, at 22 (finding that circuit courts have followed *Liteky's* analysis in generally denying consideration of judicial statements under a § 455(a) analysis).

164. See *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (noting that judges are not responsible for reporters' and authors' opinions about them under a § 455(a) analysis).

165. See generally Toobin, *Rights and Wrongs*, *supra* note 65 (alluding to a study conducted by the New York City Mayor's Office that found that Judge Scheindlin suppressed more evidence as fruits of illegal searches than any of her colleagues).

166. See *Nichols*, 71 F.3d at 351 (articulating that prior adverse rulings do not justify a finding of partiality under § 455(a)).

167. See Neumeister, *supra* note 71 (mentioning the New York County Lawyers Association's dismissal of the report by the Mayor's office as based on too small a sample size).

168. See *Nichols*, 71 F.3d at 351 (precluding "rumor and speculation" from a finding of bias or the appearance of impartiality under a § 455(a) analysis).

169. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) (noting that, per the extrajudicial source doctrine, in court statements and prior adverse rulings are not grounds for disqualification).

170. See *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1122 (N.D. Cal. 2011) (illustrating that § 455(a) recusal does not call for a reviewing court to engage in speculation).

In the circuit decisions refusing to grant recusal motions based on statements made during the current trial, the judge had made comments critical to the criminal defendant.¹⁷¹ For instance, in *Young* the judge stated pre-trial that the defendant would obviously be convicted.¹⁷² In Judge Scheindlin's case, her comments and previous rulings appear to favor the criminal defendant in that she grants motions to suppress more frequently than her colleagues and described herself as skeptical of law enforcement; likewise, they should be equally barred from consideration under the extrajudicial source doctrine.¹⁷³ Stating the she is skeptical of law enforcement is akin to a statement of upholding the law, and does not speak on the merits of any one case that the judge is hearing.¹⁷⁴ Judge Scheindlin's in court statements or rulings for the defendant are analogous to the judge in *Young's* in court statements for the government, in that they express a willingness to uphold the law, and are thus insufficient to find the appearance of bias.¹⁷⁵ Similarly, Judge Scheindlin's statements are distinguishable from the *Antar* judge's statements *against* the criminal defendant because she never stated an improper pretrial goal such as giving back what the NYPD took to the public.¹⁷⁶ Therefore, Judge Scheindlin's comments to the plaintiffs in *Daniels* and her previous adverse rulings against the NYPD should not have been considered to weigh on her impartiality under § 455(a).¹⁷⁷ Reviewing the Second Circuit's disqualification of Judge Scheindlin highlights certain instances where the

171. See, e.g., *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995) (finding no appearance of bias where a federal judge stated prior to trial that the "obvious" outcome was that the criminal defendant would be convicted).

172. See *id.* (describing the judge's guilty plea colloquy with the defendant where the judge predicted that "the coming attractions" would see the defendant convicted).

173. See Neumeister, *supra* note 71 (referring to a Bloomberg administration study that found that sixty percent of Judge Scheindlin's fifteen written "search-and-seizure" rulings since she took the bench in 1994 had gone against law enforcement).

174. See *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (establishing that media interviews alone do not raise the appearance of bias, except where a judge discusses the merits of the parties' positions in an ongoing case).

175. See *Nichols v. Alley*, 71 F. 3d 347, 351 (10th Cir. 1995) (listing prior adverse rulings and a willingness to uphold the law—in court or out of court—as insufficient to disqualify under § 455(a)).

176. See *United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) (ordering disqualification where a judge stated that his goal from the outset was to give back to the public what the defendant took because the judge's statement evinced such a high degree of favoritism that fair ruling would be impossible).

177. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) (affirming the general bar on extrajudicial statements in consideration of a federal judge's impartiality).

court erred.¹⁷⁸ First, the Second Circuit misapplied the § 455(a) standard for disqualification by not acknowledging that a § 455(a) reasonable person is one with knowledge of the underlying facts and law.¹⁷⁹ Additionally, the Second Circuit erred in finding that the media interviews with Judge Scheindlin showed the appearance of bias, because the characterizations of the judge's leanings were made by the author and the statements about the merits of the *Floyd* case were attributed by to lawyers involved with the case.¹⁸⁰ Finally, the court misapplied the extrajudicial source doctrine in considering Judge Scheindlin's statements to the plaintiffs in *Daniels* without providing a justification for the extreme circumstances that warrant an extrajudicial source doctrine exception.¹⁸¹

IV. POLICY RECOMMENDATIONS

Different circuit courts have applied different understandings of § 455(a).¹⁸² Section 455(a) provides for a fact-specific analysis, but the statute does not give guidance on what type of factual scenarios lead to an appearance of bias.¹⁸³ Subsection (a) consists of one sentence, and unlike subsection (b), it does not specifically outline scenarios that give rise to a finding of partiality.¹⁸⁴ The vagueness of § 455(a) is evident in the

178. See *In re Reassignment of Cases*, 736 F.3d 118, 129 (2d Cir. 2013) (analyzing Judge Scheindlin's conduct from the perspective of a reasonable observer as a opposed to a well-informed reasonable person with knowledge of the facts and law).

179. See *Nichols*, 71 F.3d at 351 (10th Cir. 1995) (instructing that, for § 455(a) purposes, judges are not responsible for reporters' personal opinions about them or characterizations of the judge in the media).

180. See *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (holding that media interviews alone do not raise the appearance of bias, provided the judge does not discuss the merits of a case over which he or she is presiding).

181. See *Liteky*, 510 U.S. at 555 (affirming the extrajudicial source doctrine's presumption that in court statements do not weigh on a judge's impartiality except in circumstances where fair judgment would be impossible).

182. Compare *In re Reassignment of Cases*, 736 F.3d at 129 (applying a reasonable person standard that does not mention the underlying knowledge of the facts) with *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1121 (N.D. Cal. 2011) (analyzing conduct from the perspective of a reasonable person with knowledge of the underlying facts and law).

183. See 28 U.S.C. § 455 (a) (2012) (providing a one sentence review standard whereby a federal judge should be disqualified if his or her impartiality could reasonably be questioned).

184. See *id.* at § 455(b) (providing that, in addition the test from subsection (a), a federal judge shall also disqualify himself or herself where the judge has served as a lawyer in the controversy, has a financial or fiduciary interest in the matter, or he or she has served as a witness in the case).

divergent outcomes and applications of the statute, its standard, its conception of reasonableness, and what the statute calls a reviewing court to consider.¹⁸⁵

A. The § 455(a) Standard is Too Vague Because it has Resulted in Different Applications Across the Federal Circuits, as Seen in the Outcomes of Perry and Floyd.

Both the Northern District of California in *Perry* and the Second Circuit in *Floyd* considered a trial judge's impartiality under § 455(a); however, they applied different interpretations of the statute that resulted in different outcomes for the respective trial judges.¹⁸⁶ § 455(a) governs the conduct of federal judges, meaning it covers judges in the Northern District of California and the Second Circuit alike and it should thus be uniformly applied.¹⁸⁷ However, in *Perry*, the Northern District of California applied the reasonableness language from the statute to mean an informed, thoughtful person with knowledge of the facts and the law.¹⁸⁸ On the other hand, in *Floyd*, the Second Circuit only considered Judge Scheindlin's bias from the perspective of a "reasonable observer" without mention of the knowledge and informed requirements mentioned by the *Perry* court.¹⁸⁹

The vagueness of the statute results in different applications of the recusal standard across different federal circuits, with the Ninth Circuit applying a higher standard for recusal, and the Second Circuit applying a lower standard for disqualification.¹⁹⁰ The § 455 standard originates from Canon 3C of the Code of Judicial Conduct and the Ninth Circuit's

185. See, e.g., *In re Reassignment of Cases*, 736 F.3d at 129 (finding that recusal was required based partially on judicial sources, despite the extrajudicial source doctrine's limitation on consideration of in court statements by a federal judge).

186. Compare *id.* (applying § 455(a) and finding the appearance of impartiality, thereby disqualifying Judge Scheindlin), with *Perry*, 790 F. Supp. 2d at 1121 (analyzing a judge's conduct under § 455(a) and finding no appearance of bias).

187. See FEDERAL JUDICIAL CENTER, *supra* note 127, at 1 (illustrating that, while § 144 aims at *actual* bias, § 455 governs the *appearance* of bias for federal judges).

188. See *Perry*, 790 F. Supp. 2d at 1128-29 (noting that, under Ninth Circuit case law, the reasonable person envisioned by § 455(a) is thoughtful and informed on the underlying facts at law of the case when viewing a judge's impartiality).

189. See *In re Reassignment of Cases*, 736 F.3d at 127 (examining Judge Scheindlin's comments to the plaintiffs in *Daniels* from the perspective of a reasonable observer, and finding that these statements give rise to the appearance of bias).

190. See Brian P. Leitch, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 IOWA L. REV. 525, 536 (1982) (illustrating the differing interpretations of § 455 across the federal circuits, focusing specifically on the Ninth, Fifth, and Third Circuits).

application of § 455 has retained part of the bias in fact, as opposed to appearance, requirements.¹⁹¹ This tension between bias in fact and bias in appearance has since been resolved mainly in favor of the appearance standard as evidenced by the Second Circuit.¹⁹² However, the ambiguity in the progress of the interpretation of § 455, even in the Second Circuit, is still present, as seen by the mention of Judicial Canon 3C in its first opinion about Judge Scheindlin.¹⁹³ This mention of Canon 3C and its bias in fact finding was later limited to § 455(a) by the Second Circuit in its second opinion on November 13, but the ambiguous requirements of § 455 show through in this discrepancy.¹⁹⁴ Therefore, the applications of § 455 in recent years have seen inconsistent applications across, and even within, the Courts of Appeals.¹⁹⁵ This ambiguity, and the inconsistent application of § 455, must be cured so that federal judges and reviewing courts have clear guidelines as to what conduct warrants disqualification.¹⁹⁶

B. Section 455(b) Provides a Separate Test and Provides More Factual Guidelines for Reviewing Courts That, If Similar Guidelines were Included in Subsection (a), May Cure its Ambiguity.

In contrast to the one-sentence standard provided by subsection (a), subsection (b) provides an additional test for partiality that includes a number of fact-specific guidelines to aid reviewing courts.¹⁹⁷ The inconsistency in the application of (a) could be remedied by providing more guidelines as to factual determinations of the appearance of bias that

191. See *id.* (describing the influence that Judicial Code Canon 3C has on the bias in fact interpretation of § 455 in the Ninth Circuit).

192. See *id.* at 535-37 (chronicling the general shift in interpretation of § 455 from requiring a finding bias-in-fact to one of merely requiring the a finding of the appearance of bias in the federal circuit courts).

193. See *Ligon v. City of New York*, 538 F. App'x 101 (2d Cir. 2013) (finding that Judge Scheindlin's conduct during the Floyd litigation caused her to "run afoul" of Canon 3C(1) of the Code of Conduct for United States Judges).

194. See *In re Reassignment of Cases*, 736 F.3d at 129 (qualifying the panel's earlier ruling and stating that it found no actual bias or code of conduct violations but reiterating that Judge Scheindlin's impartiality could still be reasonably questioned under § 455(a)).

195. Compare *Ligon*, 538 F. Appx. at 101 (finding bias-in-fact under § 455 and under Canon 3C) with *In re Reassignment of Cases*, 736 F. 3d at 129 (finding no actual bias under § 455 for the same judge under the same circumstances).

196. See 28 U.S.C. § 455(a)-(b) (providing several tests, both objective and subjective, for the disqualification or self-recusal of federal judges).

197. See, e.g., § 455(b)(1) (calling for a judge to disqualify himself where he or she has personal bias or prejudice toward a party or personal knowledge of the disputed facts of that may be introduced as evidence in the proceeding).

has been explored in the § 455(a) case law.¹⁹⁸ Where subsection (b)(4) discusses the improper financial stake that supports a finding of the appearance of bias, subsection (a) could add a provision that discusses the extrajudicial source doctrine and its very narrow exceptions.¹⁹⁹ Likewise, where subsection (b)(2) discusses a judge's prior work as a lawyer on the matter, an addition to subsection (a) could explain the extent—or lack thereof—that judges can discuss an ongoing proceeding in the media.²⁰⁰ Subsection (a) is not necessarily inferior to subsection (b) due to its brevity, however its inconsistent application in the *Perry* and *Floyd* cases, and its history of confusion among the federal circuits, illustrates that the statute may need to be revised and expanded.²⁰¹

IV. CONCLUSION

§ 455(a) governs the impartiality of federal judges, and calls for disqualification where a judge's impartiality may reasonably be questioned.²⁰² The Second Circuit misapplied this statute in its disqualification of Judge Scheindlin because it failed to consider that a reasonable person is one who is informed in the facts and law, it improperly concluded that Judge Scheindlin's media interviews during the proceedings gave the appearance of bias, and it erroneously considered in-court statements that Judge Scheindlin made to the plaintiffs in *Daniels*.²⁰³ A comparison of the Second Circuit's ruling against Judge Scheindlin with the Northern District of California's ruling for Judge Walker illustrates the ambiguity surrounding § 455(a), an ambiguity that may be cured by adding additional factual guidelines as in § 455(b).²⁰⁴

198. See, e.g., *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (discussing seven unique factual circumstances—from judge's prior opinions, public statements, colloquies with the parties—and how those circumstances reflect judicial impartiality under § 455(a)).

199. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) (ruling that in court statements by a judge are not part of the § 455 analysis, except in rare circumstances showing extreme favoritism).

200. See *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (disqualifying a judge who appeared on television and stated that one of the parties in a current case he was hearing was clearly breaking the law).

201. See *Leitch*, *supra* note 190, at 535-36 (discussing the varying interpretations of the standard provided by § 455 across the federal circuits).

202. See *id.* at 526 (outlining the purpose of § 455 since its inception in 1974).

203. See e.g., *In re Reassignment of Cases*, 736 F.3d 118, 125-26 (2d Cir. 2013) (analyzing Judge Scheindlin's colloquy with the plaintiffs in *Daniels* from the perspective of a reasonable "observer").

204. See 28 U.S.C. § 455(b)(1)-(5) (providing various additional guidelines to

analyze a federal judge's duty to recuse himself for bias or prejudice).