

Commonwealth immediately appealed our denial of the recusal motion to the Court of Appeals in a petition for a writ of mandamus. On that day, the Court of Appeals denied the mandamus petition, citing Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 1155-57 (1994). In Re: Commonwealth of Pennsylvania, No. 97-1280 (3d Cir. Apr. 17, 1997).

On April 21, 1997, we granted Lambert's habeas petition, Lambert v. Blackwell, 962 F.Supp. 1521 (E.D. Pa. 1997), and the next day respondents filed their notice of appeal. The motions panel denied respondents' motion to stay in an unpublished opinion, finding, inter alia, that "[t]he Commonwealth has not demonstrated that it is likely to prevail on the merits of its appeal." See Lambert v. Blackwell, Nos. 97-1281, 97-1283 and 97-1287, slip op. at 3 (3d Cir. May 9, 1997). On December 29, 1997, a later panel reversed. Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997). Over four judges' dissent, on January 26, 1998 the Court of Appeals denied Lambert's petition for rehearing en banc. Lambert surrendered on February 4, 1998. She petitioned for a writ of certiorari on April 23, 1998. Id., petition for cert. filed (U.S. Apr. 23, 1997)(Supreme Court docket no. 97-8812).

After filing her certiorari petition, Lambert filed with the Court of Appeals a renewed motion for her release during the pendency of her petition in the Supreme Court. The panel, construing Fed. R. App. P. 23(d), held that, "the initial order here, releasing Lambert to the custody of her attorneys, was made

by the district court with the consent of the Commonwealth on April 16, 1997", and held that this was the Order that, within the meaning of Rule 23(d), "expressly covers review by the Supreme Court." Lambert v. Blackwell, Nos. 97-1281, 97-1283, and 97-1287, slip op. at 5 (3d Cir. May 6, 1998). The Court of Appeals directed that Lambert should be released "under such conditions as the district court considers may be necessary", id. at 8-9. On its own motion, the Court of Appeals on May 12, 1998 referred the issue of release to the en banc court. In a not-for-publication opinion, the en banc court on August 3, 1998 reversed the panel's Order, over five judges' dissents. Id. (3d Cir. Aug. 3, 1998).¹

When Lambert on March 30, 1999 filed her second amended petition, we ordered the parties to brief "whether this Court can or should take any action with respect to the second amended petition." Ord. of Mar. 30, 1999 at 1-2. After receiving the parties' submissions in April of 1999, we took no action in view of the ongoing state proceedings and the pending certiorari petition.

On December 18, 2000, the Superior Court of Pennsylvania afforded Lambert no relief on her state post-conviction claims, and on January 29, 2001 she filed her third

¹ Four days later, Ms. Lambert filed an application with Justice Souter, in his capacity as Circuit Justice, for release from custody. U.S. Sup. Ct. Docket No. A98-118 (Aug. 7, 1998). Justice Souter denied the application three days later. Id. (Aug. 10, 1998).

amended petition with us. The next day, we ordered the parties to brief whether this Court could or should take any action on the third amended petition while Lambert's petition for certiorari reposed in the Supreme Court. After the parties completed their briefing, we on February 21, 2001 declined to act on Lambert's third amended petition pending resolution of the petition for certiorari. Lambert v. Blackwell, 2001 WL 185511 (E.D. Pa. Feb. 21, 2001). Two days later, respondents filed the instant motion for recusal of assigned judge, to which Lambert responded on March 12, 2001.

On March 19, 2001, the Supreme Court denied Lambert's petition for a writ of certiorari.

II. Overview of the Law of Recusal

The respondents have based their recusal motion on 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."²

² It is well-established, if not entirely intuitive, that the resolution of such a motion is entrusted to the judge who is the subject of the motion. See, e.g., United States v. Balistrieri, 779 F.2d 1191, 1202-03 (7th Cir. 1985) ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge."). As Judge Kozinski put it with his customary pungency, "Like it or not, therefore, the responsibility for ruling on [such a motion] devolves on [the assigned judge] alone." In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994).

Liteky v. United States, supra, is the controlling authority on § 455(a) recusal motions.³ In surveying what conduct may or may not form the basis for a meritorious recusal motion under § 455(a), the Supreme Court noted that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task". Id. at 550-51. The Supreme Court emphasized that "[a]lso not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings." Id. at 551. Pertinent to the instant motion, the Court immediately added, "It has long been regarded as normal and proper for a judge to sit in the same case

³ Under a parallel statute, 28 U.S.C. § 144, "there came to be generally applied in the courts of appeals a doctrine, more standard in its formulation than clear in its application, requiring . . . that '[t]he alleged bias and prejudice to be disqualifying [under § 144] must stem from an extrajudicial source'." Liteky, 510 U.S. at 544 (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). Liteky makes clear, however, that "[s]ince neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) 'extrajudicial source' factor, than of an 'extrajudicial source' doctrine, in recusal jurisprudence". Id. at 554-55. Here, respondents do not contend that this Court's alleged bias derives from a source outside judicial proceedings. Resp'ts' Br. at 14.

upon its remand, and to sit in successive trials involving the same defendant." Id.

Liteky then summarized the law as follows:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible

Id. at 555 (internal citations omitted).

Our Court of Appeals has consistently applied Liteky's holding that "only in the rarest circumstances" can there be a valid "basis for a bias or partiality motion" when there is no extrajudicial source involved. See, e.g., SecuraComm Consulting Inc. v. Securacom, Inc., 224 F.3d 273, 278 (3d Cir. 2000)(holding that a judge's "negative comments" about defendant in a written opinion after a bench trial, as well as his actions surrounding the scheduling of a hearing, did not support recusal); Blanche Road Corp. v. Bensalem Twp., 57 F.3d 253, 266 (3d Cir.), cert. denied, 516 U.S. 915 (1995)(holding that, in the absence of an extrajudicial source of bias, recusal not required in second trial because "the judge criticized plaintiffs for attempting to

mislead the jury and became short-tempered with plaintiffs' counsel" during the first trial); United States v. Antar, 53 F.3d 568, 576 (3d Cir. 1995) (holding that recusal was required where the district judge, "in stark, plain and unambiguous language, told the parties that his goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper"); United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1994), cert. denied, 517 U.S. 1137 (1996) (holding that recusal not required based upon "rulings and statements made by the judge during the proceedings" absent extrajudicial sources "unless, looked at objectively, 'they display a deep-seated favoritism or antagonism that would make fair judgment impossible'") (quoting Liteky).

With this survey of recusal jurisprudence in mind, we turn to the merits of respondents' motion.

III. Motion for Recusal

A. Factual Basis

Respondents cite as a basis for the pending recusal motion events that occurred before the filing of their first recusal motion on April 17, 1997, including the scheduling of status conferences and handling of the evidentiary hearing.

Resp'ts' Br. ¶¶ 1-7, at 2-5.⁴ Although we have previously held

⁴ Note 4 of respondents' memorandum questions how this case was assigned to this Judge in the first place, given Local Rule 40.1(b)'s suggestion that it should have gone to a Judge "stationed in Reading, Allentown or Easton." All we can say on
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that nothing we did before April 17, 1997 warranted recusal, we will nevertheless reconsider those events in the larger context of the motion's current iteration.

Soon after we denied respondents' last motion to recuse, we issued a "ninety-page opinion, in which [we] condemned, in the strongest terms possible, Lambert's prosecution and conviction in the Lancaster County Court of Common Pleas, concluding that, in terms of prosecutorial misconduct, it had no peer in the annals of English-speaking jurisprudence". Id. ¶ 8 (citing Lambert v. Blackwell, 962 F.Supp. 1521, 1550 n.42 (E.D. Pa. 1997)). On appeal, our Court of Appeals ultimately vacated our order granting Lambert's petition, and in accordance with that Court's mandate we subsequently dismissed Lambert's petition without prejudice. Apart from the underlying memorandum opinion itself, which respondents cite at length, id. at ¶¶ 8-14, at 5-8, respondents also point to actions we took after Lambert's subsequent motion to our Court of Appeals for her release from custody during the pendency of her petition for certiorari. Id. ¶¶ 19-23, at 9-10.⁵

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this subject was that the case came to our docket by the purely random action of the Clerk's "wheel", which is really a deck of cards that is reshuffled each day.

⁵ These paragraphs relate to the timing and logistics involved when a panel of our Court of Appeals initially granted Lambert's petition for release on May 6, 1998, but later stayed that order pending a rehearing en banc. In the meantime, and in accordance with the panel's direction, we had scheduled a bail hearing for May 8, 1998 and ordered the respondents to produce
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Respondents next address Lambert's filing of her second amended petition and note that we have not acted on that petition. Id. ¶¶ 26-27, at 10-11. Lastly, respondents state that upon the filing of Lambert's third amended petition, we ordered (as we had done with her second petition) the parties to address whether, in light of the pendency of her certiorari petition, we had any authority to act upon her most recent filing with us. Id. ¶ 29, at 12. Respondents correctly note that we then issued a memorandum deferring action on the third amended petition in view of the pending certiorari petition. Id. ¶ 30, at 12; see also Lambert v. Blackwell, 2001 WL 185511 (E.D. Pa. Feb. 21, 2001).

B. Legal Analysis

Based on these predicates, respondents contend that the timing of our actions, as well as our decision to schedule an evidentiary hearing and permit discovery based on Lambert's first amended petition, demonstrate partiality.⁶ Notably, respondents point to early in the case and contend that "those seeds of doubt [as to our impartiality] would have been sown in any reasonable mind in the earliest moments of this case when the Court made

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Lambert (who had been in custody in Lancaster County) for that hearing.

⁶ Respondents complained in April of 1997 about our granting "overreaching" and "offensive" discovery in its motion to stay our April 21, 1997 decision. The motions panel summarily rejected these contentions. Lambert v. Blackwell, Nos. 97-1281, 97-1283 and 97-1287, slip. op. at 4 (3d Cir. May 9, 1997).

important procedural rulings favoring Lambert" granting discovery and setting a hearing date "without even waiting to receive the respondents' answer to the petition". Id. at 15 (emphasis added).⁷ Procedural rulings do not, however, constitute a valid basis for a § 455(a) motion under Liteky, 510 U.S. at 555.

As to our conduct during the evidentiary hearing, "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish bias or partiality. Liteky, 510 U.S. at 555-56.⁸ We do not believe that our conduct during the hearing rose to such a level as to "display a deep-seated favoritism or antagonism that would make fair judgment

⁷ Lambert disagrees with this characterization of the scheduling matters. She states that respondents never objected to the scope of discovery or to any specific discovery, beyond their first objection to allowing discovery at all, based on the exhaustion issue, Pet.'s Resp. at 21. She also notes that, over her objection, we allowed the respondents forty-five days in which to answer the first amended petition. Id. at 24. The January 16 and February 13 conferences were both transcribed, and are thus a part of the public record.

⁸ Indeed, "[a] judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune." Id. at 556. As an example of judicial remarks during a trial that may form the basis for a recusal motion, Liteky cites a World War I espionage case against German-American defendants, in which the district court judge was alleged to have said: "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty'". Id. at 555 (citing Berger v. United States, 255 U.S. 22, 28 (1921)). Respondents cite no remarks approaching that level.

impossible" within the ambit of Liteky. Id. at 555.⁹ Indeed, on April 17, 1997, the Court of Appeals, citing Liteky, denied respondents' petition for a writ of mandamus on the recusal issue.

Respondents do not argue, nor could they, that our initial granting of Lambert's petition is a proper basis for recusal. Rather, respondents rely upon the "hyperbolic", "overly dramatic", and "intemperate" language in our April, 1997 memorandum opinion. Resp'ts' Br. at 18 (citing a (supposedly) confidential memorandum opinion that Chief Judge Becker issued on February 22, 2000, attached to the brief at App. C).¹⁰ Accepting the respondents' characterizations of our language as true for purposes of deciding the motion, we do not believe that hyperbole or intemperance in a ruling after a protracted bench trial warrants recusal under Liteky and its Third Circuit progeny. Indeed, the proper forum and manner in which to challenge such a ruling is through an ordinary appeal in the Court of Appeals; this was the course respondents took in 1997, with success.

It is also worth noting that respondents' contention about language proves too much. As rehearsed above, four Court

⁹ Under Liteky we use an objective, rather than subjective standard, 510 U.S. at 548. See also Bertoli, 40 F.3d at 1412.

¹⁰ Chief Judge Becker's opinion dismissed a judicial misconduct complaint that had been filed against this Judge and held that the allegations could not stand because they either related directly to the merits of the Judge's decisions and procedural rulings or were frivolous, J.C. No. 99-50 (Feb. 22, 2000) at 9 (Becker, C.J.).

of Appeals judges on January 26, 1998 dissented from the decision not to rehear Lambert's appeal en banc. Three judges -- Nygaard, Lewis and McKee -- joined Judge Roth's opinion, which stated, in relevant part,

I am familiar with the merits of the habeas proceeding from reading large portions of the transcript of the proceedings before the district court. As a result, I am aware of the evidence of prosecutorial misconduct that occurred during Lambert's original trial. I find it to be truly shocking.

134 F.3d at 525 (Roth, J., dissenting sur petition for rehearing). To be sure, Judge Roth and her colleagues were not called upon to canvass the entire record of those proceedings, and thus did not write at length as we of necessity did. But respondents' displeasure with our language can only differ in the quantity, but not the quality, of equally strong expressions from these dissenters. See also id. (referring to "other flagrant violations of Lambert's right to due process"). It is hard to believe respondents would subject these dissenters to a motion for recusal because some would regard their words as "overly dramatic" or "hyperbole".

Respondents also rely on the "[p]ublic discourse in the popular media" as a proper basis for recusal, Resp'ts' Br. at 18. They point to the fact that a witness in the April, 1997 hearings subsequently filed a judicial misconduct complaint against this Judge. Id. If we were to recuse based on letters to the editor, signatures on a petition, and a (dismissed) judicial misconduct

complaint,¹¹ then we would only encourage future litigants or aggrieved parties who disagree with a district judge's rulings to do the same in hopes of winning a recusal.¹² While these lay expressions are certainly evidence that some members of the public strongly disagree with our April, 1997 opinion -- which they are perfectly entitled to do -- that disagreement is not evidence of the "degree of [judicial] favoritism or antagonism required" for recusal under Liteky and its progeny. And it should hardly need saying that courts cannot decide cases by any form of plebiscite.¹³

¹¹ Such complaints are legion in the federal courts. Jeffrey N. Barr & Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993). Barr and Willging found that over ninety percent of the 2,405 filings under 28 U.S.C. § 372(c) between 1980 and 1991 that they studied were found to be without merit. Id. at 52 tbl. 9. In the last three years, the number of filings reached 2,513, with well over ninety percent dismissed without corrective action. 2000 Admin. Office of U.S. Courts Judicial Business of the United States Courts 35 tbl. 11.

¹² We claim no originality in making this observation. As the Pennsylvania Supreme Court put it over two hundred years ago:

Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion....

Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 326, 1 L.Ed. 155 (Pa. 1788).

¹³ As Judge Kozinski aptly put it in denying a motion that he recuse himself, "Service as a public official means that
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Although we have addressed, and rejected, the merits of respondents' motion for recusal, we believe that the delay in filing the instant motion supplies an additional basis for denying it. United States v. Matarano, 866 F.2d 62, 67 (3d Cir. 1989), cert. denied, 493 U.S. 1077 (1990), noted that laches may bar an untimely motion for recusal. As the Matarano panel observed where recusal was first raised at a resentencing, when "the facts were available at the initial sentencing proceeding, the issue of laches may be dispositive." Id. at 67.

Here, respondents had several occasions, following their last attempt in April of 1997, to move for recusal and did not. We were involved in a January 6, 1998 conference regarding procedure (including the logistics of Lambert's return to custody) after the Court of Appeals reversed and respondents took no exception to the propriety of our participation. We promptly gathered the parties together when in May of 1998 the Court of Appeals directed Lambert's release upon bail conditions we were to set; again, at no time did respondents interpose any such objection.¹⁴ We solicited briefs from the parties following the

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one may not be viewed favorably by every member of the public. Federal judges have the extraordinary protections of life tenure to shield them from such pressures." In re Bernard, 31 F.3d at 846 n.8.

¹⁴ Respondents Mem. ¶ 21, at 9 now takes issue with the promptness of our scheduling of the bail hearing. It is hard to fathom how a district court's immediate compliance with a Court of Appeals order involving a party's liberty can by that compliance cast any shadow of bias.

filing of Lambert's second amended petition in March of 1999, and we again sought the parties' views in January, 2001 following the filing of Lambert's third amended petition. Neither order provoked a question regarding our impartiality. Only after we issued a memorandum that held against Lambert's position and in favor of respondents' did respondents file the instant motion to recuse.¹⁵ As respondents have not provided any explanation for the delay, the instant motion is, accordingly, also denied as untimely.

Lastly, our conclusion is fortified by the sheer bulk and complexity of the record in this protracted litigation. As our Court of Appeals recently noted, "there must be a more compelling standard for recusal under § 455(a) after the conclusion of a trial than before its inception." Martin v. Monumental Life Ins. Co., 240 F.3d 223, 237 (3d Cir. 2001). As the Court of Appeals in Martin went on to say, in language pertinent to this case, "[a]fter a massive proceeding such as this, when the court has invested substantial judicial resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion." Id. These powerful institutional interests also tip against recusal here.

¹⁵ A glance at the docket in this matter is also telling. The respondents' first motion to recuse is docketed at entry number 73; the instant motion is number 160. The respondents had ample opportunity in the intervening time since April 21, 1997 to file a motion to recuse.

One other point deserves mention. It is well-established that, as Judge Ditter put it, "a judge also has an affirmative duty not to recuse himself or herself in the absence of such proof" of disqualification, Massachusetts Sch. of Law at Andover v. Am. Bar Ass'n, 872 F.Supp. 1346, 1349 (E.D. Pa. 1994), aff'd 107 F.3d 1026, 1042-43 (3d Cir. 1997), cert. denied, 522 U.S. 907, 118 S.Ct. 264 (1997); see also United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)("[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." (citation omitted)). Judges in regular active service thus do not have the luxury of avoiding the cases assigned them. This reality of everyday federal court life is rooted in those courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them",¹⁶ an obligation that applies to each of the judges in regular active service who comprise those courts.

We therefore are affirmatively obliged to exercise that "virtually unflagging obligation" and will deny respondents' motion.

¹⁶ Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976)(quoting McClellan v. Carland, 217 U.S. 268, 281, 30 S.Ct. 501, 504 (1910)).

