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JUDICIAL DISQUALIFICATION ON APPEAL

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I. INTRODUCTION

Federal judges are statutorily disqualified from hearing cases whenever their "impartiality might reasonably be questioned."[1] Although this provision was codified nearly a half-century ago, the Supreme Court has recognized that the underlying interest it protects is a fundamental part of constitutional due process.[2] "Justice must satisfy the appearance of justice," the Court has written, and as a result "[t]he Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[3]

The appearance-based disqualification statute plays two important roles. First, it promotes confidence in the judiciary—people can trust that judges will apply the law impartially. Second, it applies even when a judge fails to recognize his or her own partiality, offering a protective buffer in situations where the risk of such partiality is excessively high.

When litigants seek disqualification of a federal district court judge based on an appearance of partiality, however, the challenged judge personally rules on the disqualification motion.[4] It is not until appeal that a neutral third party weighs in on the reasonableness of the challenge to the judge's impartiality.[5] Because trial-court procedure leaves it to the trial judge to decide whether he or she "is or appears to be biased," then-Professor (now Judge) Karen Nelson Moore wrote three decades ago that "swift review is essential to ensure impartiality."[6]

Such swift review is especially important during a time of political discord. Growing partisan division among the public and a heightened emphasis on judicial appointments in the political process have created a situation where individuals view judges through the lens of partisan affiliation.[7] Senator McConnell recently gave a speech in which he talked

1. 28 U.S.C. § 455(a) (2012).

2. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

3. *Id.*

4. RICHARD E. FLAMM, RECUSAL AND DISQUALIFICATION OF JUDGES: FOR CAUSE MOTIONS, PEREMPTORY CHALLENGES AND APPEALS 775–76 (2018) (explaining that "the vast majority of judges" have concluded a § 455 motion "must be filed with the challenged judge herself; and that such judge may or even should be the one to rule on it," and that "many federal courts" have concluded that there is "an affirmative duty to do so.").

5. The procedures in the states offer much greater variation. *Id.*

6. Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 853 (1984).

7. *See* Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 739 (2018) ("Hardening partisan identities mean that there is less middle ground on political issues and less cooperation among those with differing political views. As a result, the public

of how "we" had "flipped" several circuits and planned to flip more.[8] His political opponents took an opposite, though equally politicized view, arguing that McConnell had "stolen" a Supreme Court seat by delaying Senate action on a judicial nomination until after a presidential election and change in administration.[9] Partisan rancor heightens distrust of the judiciary.

Appellate review stands out as one of the primary tools capable of counteracting distrust in the judiciary, whether that distrust arises from partisan politics or from other sources.[10] Appellate review offers disappointed litigants a chance to be heard. Even when litigants lose on appeal, the very process of being able to present their complaints to a higher forum "promotes a sense of procedural fairness and leaves people feeling better about the outcome."[11]

The appellate process therefore plays an important role in safeguarding the appearance of justice. The disqualification statute, however, is silent on appellate procedure. As a result, various splits have emerged, creating inconsistencies in the review of disqualification for apparent partiality.[12] Reconciling these procedures is important to protect the benefits of appellate review—that is, to ensure that individuals receive fair treatment and an equal opportunity to be heard in the litigation process.

This article examines the appellate procedures employed in the review of judicial disqualification and recommends mechanisms to standardize appellate review. After this introduction, Part II offers background explaining the constitutional basis and statutory provisions governing judicial disqualification and explores various situations that can give rise to recurring challenges over the appearance of impartiality. Part III examines the different mechanisms by which parties can appeal appearance-based disqualification, including appellate review after final

increasingly scrutinizes judges and judicial candidates for signs of political agreement, distrusting those perceived to support the opposing political party.").

8. Professor Josh Blackman attended the speech and reported that Senator McConnell stated, "We have flipped the 2nd Circuit, the 3rd Circuit, and we will flip the 11th circuit." @JoshMBlackman, TWITTER (Nov. 13, 2019, 8:08 PM), https://twitter.com/joshmblackman/status/1195146526890299392?lang=en [https://perma.cc/CW4U-SH2X]. Professor Blackman also shared a brief video of the speech. *Id.*

9. Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES, Dec. 24, 2016.

10. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1274 (2013) (explaining that the right to appeal "protects a litigant's dignity by diffusing the power of an individual judge—a diffusion that is especially important in an era where the power of the trial judge is larger than ever before.").

11. *Id.*

12. *See infra* Parts III and IV.

judgment, mandamus review, discretionary appeals, and collateral-order appeals. Part IV delves deeper into the areas of circuit disagreement, examining the standard of review, the review of a trial judge's decision to recuse, review of cases in which the parties failed to raise disqualification issues with the trial court, and the applicability of the harmless-error doctrine. Ultimately, the article recommends that the federal courts standardize appellate review of disqualification orders to minimize confusion and promote confidence in an impartial judiciary.

II. JUDICIAL DISQUALIFICATION IN FEDERAL COURT

Federal disqualification standards provide broad grounds for recusal with limited mechanisms for enforcement. The broadest of the disqualification standards requires federal judges to disqualify themselves whenever their "impartiality might reasonably be questioned."[13] The statute is intended to protect the appearance of justice by "establish[ing] an objective standard that operates regardless of actual bias" in cases where there is "some reasonable basis for alleging bias."[14]

Although the standard calls for objectivity, it provides little help in achieving objective application of the statute, most notably because a challenged judge is required to personally rule on the motion calling their impartiality into question. As both courts and scholars have come to recognize in recent years, objectivity is in the eye of the beholder—and individuals are not good at recognizing their own biases.[15] Psychological research has shown that people are likely to overattribute bias to other parties even as they underestimate their own.[16] Judges are not immune to the bias blind spot, and they may even have a higher personal stake in a self-image of impartiality. As Professor Charles Geyh has explained, "[i]nsofar as being impartial is a defining feature of the 'good' judge in

13. 28 U.S.C. § 455(a) (2012); Moore, *supra* note 6, at 832 ("In 1974 Congress substantially amended the personal involvement provision, 28 U.S.C. § 455, in an attempt to clarify the kind of involvement with the matter in controversy that warrants judicial disqualification."); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.' As the Court has recognized, however, 'most matters relating to judicial disqualification [do] not rise to a constitutional level.'") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) and FTC v. Cement Institute, 333 U.S. 683, 702 (1948)).

14. Moore, *supra* note 6, at 832.

15. Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 783 (2004).

16. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 41 (2007) (explaining that people may discount their own biases because of "unwarranted reliance on their introspections for assessing personal bias," as well as "their assumption that their own perceptions directly reflect 'objective reality'").

the ethical dimension, judges who implement disqualification rules in the procedural dimension would seem to have a personal interest in the outcomes of challenges to their own impartiality."[17] As a result, he explains, "many lawyers have long been reluctant to seek disqualification of judges**,** who are unlikely to second-guess their own impartiality and who may take umbrage at the suggestion that their impartiality is in doubt."[18]

Concerns about the objective review of disqualification standards have led many states to experiment with different procedures. Some states require a different judge to rule on the disqualification motion, while others offer litigants a single peremptory challenge to disqualify a judge without the need to make an evidentiary showing.[19] Numerous scholars have recommended that the federal courts adopt similar procedures.[20] At the current time, however, the courts have not yet done so. As a result, appellate review remains the primary mechanism for objective review of a judge's qualification to sit in a given case.

A. The History of Judicial Disqualification in Federal Court

Federal judicial disqualification statutes date back to the founding era, with the first adopted in 1792.[21] In the ensuing centuries, Congress has amended and modified disqualification standards and procedures, "enlarging the enumerated grounds for seeking disqualification almost

17. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 546 (2013).

18. *Id.*

19. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond A Failed Standard*, 56 ARIZ. L. REV. 411, 468 (2014) ("Eighteen states provide for the automatic disqualification of a trial court judge upon the timely request of a party.").

20. James Sample, *The Agnostic's Guide to Judicial Selection*, 67 DEPAUL L. REV. 219, 243 (2018); Melinda A. Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors*, 7 ST. MARY'S J. LEGAL MAL. & ETHICS 238, 303 (2017); Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 849 (2015); Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1194 (2015); Suzanne Levy, Comment, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1194 (2014); Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 210 (2011); Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J. L. & POL. 359, 384 (2011); Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 731 (2011); Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005).

21. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 21 (3d. ed. 2017).

every time."[22] Originally, the statute focused on cases in which the judge possessed a "direct, pecuniary interest in the cause."[23] Later, a new provision was added to allow parties to challenge the trial judge's alleged bias against the complainant or in favor of the opposing party.[24] The grounds for disqualification were enlarged again in 1974, when Congress for the first time adopted a provision addressing the appearance of impartiality, requiring judges to disqualify themselves whenever their "impartiality might reasonably be questioned."[25]

Under the current statutory scheme, these provisions are codified in different places. The provision allowing a party to assert "that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party," is now found at 28 U.S.C. § 144. Proceeding under that statute requires the challenging party to submit a "timely and sufficient affidavit" explaining the "facts and reasons" behind the allegation of bias. The remaining grounds for disqualification are codified at 28 U.S.C. § 455. Section 455(b) now provides the specific grounds for judges to disqualify themselves even without such an affidavit, including situations where the judge "has a personal bias or prejudice concerning a party" or "personal knowledge of disputed evidentiary facts"; where the judge previously served as counsel in the case; where the judge's spouse or other close relative is a party; or where the judge has a financial interest (of any amount) in "the subject matter in controversy."[26]

The appearance-based standard is found in § 455(a), requiring 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." While the particular grounds for disqualification found in § 455(b) cannot be waived by the parties, the standard found in § 455(a) can be waived "provided it is preceded by a full disclosure on the record of the basis for disqualification."[27]

When a challenge is brought under either § 455(a) or (b), the challenged judge is the one who hears and decides the motion for disqualification. A number of scholars have suggested that it would be

22. *Id.*
23. *Id.*
24. *Id.*
25. 28 U.S.C. § 455(a) (2012).
26. 28 U.S.C. § 455(b) (2012).
27. 28 U.S.C. § 455(a) (2012).

preferable for a different judge to rule on such challenges,[28] and some states have adopted procedures that allow a different judge to hear similar motions. However, the federal courts have not yet adopted broad-based rules that would require or even allow a different judge to hear the challenge. Therefore, parties challenging a judge's impartiality must weigh the risk both that the motion may be denied and that the allegation of perceived bias will cause the judge to feel—even if only unconsciously—offended by the allegation.[29]

B. The Constitutional Basis of Judicial Disqualification

Although statutes requiring judicial disqualification date back to the founding era, it is only recently that the Supreme Court has articulated the constitutional basis for disqualification. The constitutional issue has arisen when cases come to the Supreme Court for review from the states—if the state's supreme court did not find disqualification required under state law, then the only question for the Supreme Court to decide is whether the United States Constitution would require it.

In recent years, the Supreme Court has twice held that constitutional due process required a state trial judge to disqualify himself. First, in *Caperton v. A.T. Massey Coal Co.*, the Court addressed a situation where one donor had contributed an outsized amount to the campaign of a candidate for the West Virginia Supreme Court.[30] The Court explained that the donor had suffered a $50 million adverse verdict prior to the election and that it knew that the election winner would review that verdict. With this knowledge, but without any "allegation of a quid pro quo agreement,"[31] the party donated $2.5 million to a political action committee supporting a judicial challenger for a position on the Supreme Court of West Virginia and made another $500,000 in independent expenditures.[32] In total, this money was "more than the amount spent by

28. *See, e.g.*, Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on A Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 660 (2015); *see also* authorities cited *supra* note 20.

29. Judges are expected to keep themselves above the fray. Nonetheless, one practice guide acknowledges candidly that "some judges resent being challenged on minor matters and may carry over their resentment to future cases." *Challenges for Cause*, CAL. PRAC. GUIDE CIV. TRIALS & EV. Ch. 3-A. *See also* W. Bradley Wendel, *Campaign Contributions and Risk-Avoidance Rules in Judicial Ethics*, 67 DEPAUL L. REV. 255, 280 (2018) ("Well-known psychological tendencies create blind spots when someone is asked to evaluate her propensity to engage in wrongdoing. We have a strong tendency to view ourselves as competent, ethical, and deserving.").

30. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009).

31. *Id.* at 871.

32. *Id.* at 873.

all other . . . supporters."[33] With this financial backing, the challenger won, and he refused to recuse himself from the donor's case when it came before his court.[34] The Supreme Court held that while not every campaign contribution will require a judge to recuse from hearing a case involving the donor, this particular one created "a serious, objective risk of actual bias."[35]

Less than a decade later, in *Williams v. Pennsylvania*, the Supreme Court again held that disqualification was required as a matter of constitutional due process.[36] In the *Williams* case, Ronald Castille had served as a Pennsylvania district attorney in the 1980s and approved the decision to seek the death penalty against defendant Terrance Washington.[37] Decades later, Castille served on the Pennsylvania Supreme Court when Washington sought review of a habeas petition seeking relief from that death sentence.[38] Castille denied a motion to disqualify himself, concluding that his efforts on the case as D.A. were too limited and too long ago to require recusal.[39] The Supreme Court, however, concluded that due process required the judge's disqualification, noting "a risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'"[40]

In both *Caperton* and *Williams*, the Supreme Court applied a constitutional standard significantly narrower than the federal statute would require.[41] The Court acknowledged that the broader standard required by federal statute and by more states requires broad appearance-based recusal. The constitutional standard, by contrast, encompasses only those cases where—even when actual bias cannot be proven—the situation is such that it creates "an unacceptable risk of actual bias."[42]

C. Analyzing the Appearance of Impartiality

Courts addressing disqualification motions based on an appearance of bias work within this statutory and constitutional framework. Those

33. *Id.*
34. *Id.* at 874–875.
35. *Id.* at 871.
36. Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016).
37. *Id.* at 1901–1902.
38. *Id.* at 1901.
39. *Id.* at 1904.
40. *Id.* at 1907.
41. *Id.*
42. *Id.* at 1908.

statutory and constitutional requirements, however, are much easier to state than they are to apply. What exactly does it mean to have reasonable doubts about a judge's impartiality? Although each case raises unique facts and concerns, there are recurring areas where questions (some of them reasonable, some of them less so) arise about a judge's impartiality.

1. Failure to Recognize One's Own Bias

One recurring concern is a judge's failure to recognize his or her own bias. Today, the so-called "bias blind spot" is a staple of legal and psychological research.[43] But even in earlier eras, there were cases in which courts found it reasonable to hold doubts about a judge's self-professed neutrality.

In an espionage case arising against the backdrop of World War I, the defendants alleged that "Judge Kenesaw Mountain Landis ha[d] a personal bias and prejudice against" them based on their German and Austrian backgrounds.[44] Not only did Judge Landis disagree, but he commented from the bench on his perceived lack of such a bias, stating:

> One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty . . . You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty.[45]

Judge Landis may have believed that his strong "judicial mind" allowed him to avoid prejudice in the case, but the Supreme Court disagreed. A majority of the Court concluded that Landis was disqualified for actual prejudice.[46] Three justices, on the other hand, dissented, suggesting that the defendants had not made a showing that Judge Landis' general feelings about Germans (then a country at war with the United States) extended to the defendants personally; they had "disclose[d] no adequate ground for believing that personal feeling existed against any one of them."[47] The subsequent adoption of § 455(a), however, was intended to put that debate to rest by ensuring that statements raising even

43. Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 306 (2013); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

44. Berger v. United States, 255 U.S. 22, 28 (1921).

45. *Id.* at 29.

46. *Id.* at 36.

47. *Id.* at 42 (McReynolds, J., dissenting).

a question about the judge's ability to be impartial would be sufficient to require disqualification.[48]

2. Circumstances Create External Pressure

In other cases, there may be nothing in a judge's words or actions to indicate actual bias, but the situation nevertheless puts so much pressure on a judge that a reasonable observer would worry that the judge could not remain impartial. This type of pressure was cited in both *Caperton* and *Williams*.[49] Even though the judge may be perfectly impartial, the judge would be disqualified based on reasonable fears that the judge could be susceptible to pressure, whether consciously or unconsciously.

This type of external pressure was recently cited as a reason not to retain a state judge who inadvertently resigned from the bench.[50] On April 1, 2019, just three months after taking the bench as a newly elected district judge, Bill McLeod of Harris County, Texas, announced his intent to run for the Texas Supreme Court.[51] Unfortunately, however, he was unaware of a provision in the Texas Constitution stating that "at any time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held . . . ."[52] McLeod had thus accidentally resigned from the position he had held for only three months.

Another constitutional provision could have saved his job, at least temporarily: it allowed the county commissioners to appoint him to remain until a successor was appointed. The county commissioners declined to retain McLeod, however, based on concerns about the appearance of impartiality.[53] Under the holdover provision, the county commissioners would have the authority to dismiss him at any time. "I think voters deserve a judge who can be absolutely independent, as he was elected to be," one of the commissioners reportedly said. "This would put us in the untenable position that he would no longer be an unbiased person, because he would be beholden to Commissioners Court."[54] Furthermore, the commissioners noted, McLeod would almost certainly

48. Moore, *supra* note 6, at 834 ("[T]he appearance-of-bias test under section 455(a) is easier to satisfy than the bias-in-fact test of sections 144 and 455(b)(1).").

49. *See supra* Part II.B.

50. Debra Cassens Weiss, *Newly Elected Judge Accidentally Resigns; County Commissioners Appoint Replacement*, A.B.A. J., April 10, 2019.

51. *Id.*

52. TEX. CONST. art. 16, § 65.

53. Zach Despart, *Commissioners Court Appoints Replacement for Harris County Judge Who Quit By Mistake*, HOUS. CHRON., April 9, 2019.

54. *Id.*

have to recuse himself in any case involving the county—the pressure to rule in favor of a party with the power to terminate his job at any time would give rise to reasonable questions about the judge's ability to remain impartial.[55]

3. Connections and Experience

Finally, judges often have experience or connections that cause litigants to raise questions about the judge's ability to be impartial. Of course, the closest of these connections—including situations where the judge's spouse, parents, or children are litigants or parties—requires automatic disqualification under § 455(b). Other connections, however, can also give rise to questions about the judge's impartiality. Courts in this area have struggled to draw a line between those situations where the questions are reasonable enough to require recusal, and those where the questions of impartiality are too speculative or too attenuated to meet the reasonableness standard.

Courts have held that a judge's close, personal friendship with a party or an attorney can give rise to questions about a judge's impartiality, though not every close friendship will do so—the question very much depends on the overall facts and circumstances.[56] The First Circuit explained that "when a judge presides in an area where he and his family have lived for one or more generations, the numbers of people who have, directly or indirectly, helped family members, relatives, close friends, and friends of friends would form a large and indeterminate community."[57] Requiring disqualification on a tenuous basis or for a speculative reason based on these connections would "severely constrict" the judge's role and "would reflect a more jaundiced view as to when there should be a reasonable doubt about a judge's impartiality than accords with the public perception."[58]

In other cases, political views may exist alongside connections. A federal judge on the Sixth Circuit denied a disqualification motion based on her husband's service in the Ohio state legislature.[59] The case required her to rule on the constitutionality of a statute where her husband was one of six co-sponsors, but was neither the author of the bill nor a party to the

55. *Id.*
56. FLAMM, *supra* note 21, at 491–93.
57. *In re* United States, 666 F.2d 690, 697 (1st Cir. 1981).
58. *Id.*
59. Libertarian Party of Ohio v. Husted, 808 F.3d 279 (6th Cir. 2015).

subsequent lawsuit.[60] The disqualification motion relied on two inferences—first, that the judge's husband would feel a "stake in the measure," and second, that the judge's personal relationship to her husband would cause a reasonable observer to believe that she might favor the government in an effort to protect her husband's reputation.[61] Both of these asserted interests were ruled too attenuated to support appearance-based disqualification.

Courts have recognized that even though § 455(a) provides a very broad standard, it is important to establish a baseline of reasonableness for such challenges. Allowing disqualification too easily even for unreasonably attenuated fears or suspicions can backfire, allowing parties to manipulate the system and encouraging the very type of suspicion and distrust that the statute is attempting to avoid.[62] As a result, courts are especially resistant to the idea that judges should recuse based on the parties' own prejudices. Thus, for example, "a well-founded disqualification motion will rarely be predicated on a judge's race or ethnicity"[63] or on a judge's gender, sexual orientation or disability.[64] Instead, courts recognize that "a federal judge has an affirmative obligation, both to her fellow judges and to the parties in the case, not to recuse herself freely, lightly, or unnecessarily, when valid grounds have not been raised."[65]

60. Libertarian Party of Ohio v. Husted, Case No. 15-4270 (6th Cir. Dec. 22, 2015) (Batchelder, J., denying appellants' motion to disqualify).

61. *Id.*

62. *See, e.g.*, *In re* Allied–Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) ("[W]hen considering disqualification, the district court is *not* to use the standard of 'Caesar's wife,' the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.").

63. FLAMM, *supra* note 4, at 542; MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 157 F.3d 956, 963 (2d Cir. 1998) ("[I]t is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background.").

64. *See* Charles Malarkey, Note, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J 695, 725 (1990) ("[T]he same considerations that lead one to conclude that a judge's race, sex, ethnicity, or religion is not a sufficient basis, in itself, to infer bias, apply with equal validity to a judge's sexual orientation."); Thorpe v. Zimmer, Inc., 590 F. Supp. 2d 492, 494 (S.D.N.Y. 2008) ("Zimmer has failed to show that my two knee replacement surgeries have any relationship to the evidentiary facts at issue in this case, and I fail to see how an objective person could reasonably question my impartiality simply because I have two prosthetic knees.").

65. FLAMM, *supra* note 4, at 830–31.

III. VEHICLES FOR APPELLATE REVIEW

How should appellate courts review judicial disqualification decisions involving the appearance of partiality? The disqualification statute does not address appellate review. The primary mechanism for review of most issues, of course, is an appeal after final judgment.[66] In recent decades, courts have been increasingly willing to review the denial of disqualification motions earlier. However, this shift has occurred on an *ad hoc* basis, and the federal courts do not always agree on the appropriate timing or vehicle for review.[67]

A. Review after Final Judgment

Ordinarily, error in trial proceedings is assessed only after final judgment, allowing the aggrieved litigant at trial to take a single appeal.[68] This final-judgment rule allows appellate courts to avoid ruling on matters that become moot through the course of litigation, protects the independence of trial judges from needless intrusion, and avoids the expense and delay that would be caused by piecemeal appeals.[69]

Delaying appellate review until after trial-court proceedings have terminated can also carry significant disadvantages, however. These disadvantages are particularly prominent in the review of judicial disqualification motions. Whether or not the judge decides to recuse, a disqualification decision does not terminate the case—the merits of the case remain to be decided. Waiting until after final judgment to determine whether disqualification was proper therefore risks a substantial waste of court resources if disqualification was required. The amount of wasted time and effort may be substantial. After all, disqualification motions are

66. 28 U.S.C. § 1291 (1982); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356–58 (2010) (explaining the historical development of the final-judgment rule).

67. At least part of the confusion stems from an underlying lack of cohesion in appellate review—especially interlocutory review. For a deeper analysis of the issues involved on appeal, see generally Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1852 (2018); Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767 (2018); Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371 (2017). The recommendations put forth by Professor Lammon in this volume would also substantially simplify and standardize the interlocutory review of judicial disqualification orders. *See generally* Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639 (2020).

68. 28 U.S.C. § 1291 (2012) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

69. John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 203 (1994).

typically filed early in the litigation when the judge is first assigned to the case. Federal-court litigation, however, may continue for months or even years.[70]

Distinguishing the underlying basis of the recusal motion may offer guidance on timing. Motions based on the appearance of partiality generally refer to the judge's pre-existing experience and connections with the subject matter, the parties, or the attorneys. These matters are knowable before trial and are primarily based on contested interpretations, not on contested facts. In these circumstances, interlocutory review can be most effective and there is little reason to wait until after trial to review the matter, as waiting would result in significant cost and wasted effort. Motions based on actual bias, on the other hand, often point to the judge's comments or rulings during the course of litigation. In such a case it may be useful to wait until the end of proceedings to review the entire record in determining the existence of bias or partiality.

Furthermore, when it comes to motions based on the appearance of partiality, courts have also pointed to the difficulty of providing a full remedy on appeal. The D.C. Circuit recently concluded that "ordinary appellate review following a final judgment is 'insufficient' to cure 'the existence of actual or apparent bias," because "it is too difficult to detect all of the ways that [actual] bias can influence a proceeding."[71] Even reversing a judgment for "apparent bias . . . fails to restore public confidence in the integrity of the judicial process."[72] If disqualification based on appearance is meant to protect trust in the impartiality of the judicial system, then waiting until after final judgment to rectify the appearance of bias undercuts that goal. As a result, most federal courts have recognized that judicial disqualification questions cannot always wait until after final judgment.[73]

70. *See* Institute for the Advancement of the American Legal System, Civil Case Processing in the Federal District Courts: A 21st Century Analysis 38 (2009) (acknowledging that "about 35% of [civil] cases took more than one year to resolve, and the longest cases took ten years or more before a final resolution was reached.").

71. *In re* Mohammad, 866 F.3d 473, 475 (D.C. Cir. 2017) (quoting *In re* Al-Nashiri, 791 F.3d. 71, 79 (2015)).

72. *Id.*

73. *See, e.g.*, *In re* Al-Nashiri, 921 F.3d 224, 233 (D.C. Cir. 2019) (quoting *In re* Al-Nashiri, 791 F.3d. at 79) ("[O]rdinary appellate review following a final judgment is insufficient to remove the insidious taint of judicial bias."); *In re* Aetna Cas. & Sur. Co., 919 F.2d 1136, 1143 (6th Cir. 1990) (joining "the clear consensus view" supporting interlocutory review "of a motion to disqualify based on conflict of interest and appearance of partiality under 28 U.S.C. § 455"); *but see In re* Cargill, Inc., 66 F.3d 1256, 1264 n.10 (1st Cir. 1995) ("Just as orders disqualifying or refusing to disqualify counsel 'can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal,' we see

B. Mandamus Review

When appellate courts grant interlocutory review of the denial of a disqualification motion, they typically do so by accepting a petition for writ of mandamus under the authority of the All Writs Act.[74] The standard of mandamus relief was traditionally very high, typically requiring a showing of a "usurpation of power" rather than "mere error."[75] In recent decades federal courts have showed a greater willingness to grant mandamus relief.[76] Even under today's more permissive environment, however, mandamus relief still requires a high threshold and is subject to the appellate court's discretion.[77]

In spite of the high showing required for mandamus relief generally, almost as soon as the federal code was amended to require disqualification based on appearance, some courts allowed for interlocutory review of the disqualification decision. A decade after the change, now-Judge (then-Professor) Karen Nelson Moore reported that a majority of the circuits allowed mandamus review when trial judges refused to recuse themselves, while a minority (notably, the Third, Sixth, and Seventh Circuits) held that mandamus was not available to review judicial disqualification.[78]

Over time, the circuits have converged on agreement that mandamus is available to review the wrongful denial of a disqualification decision—at least in certain cases. The Sixth Circuit, for example, refused to allow mandamus review of disqualification orders at all until 1990, and only then joined the other circuits in permitting at least the possibility of interlocutory review.[79]

The Seventh Circuit, by contrast, did a complete about-face. In 1986, the circuit was listed as one of the remaining holdouts refusing interlocutory review in Judge Moore's article. When it later reversed course and allowed mandamus review of disqualification motions based on the appearance of bias, it held for decades that mandamus was the *only*

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no reason why orders pertaining to judicial disqualification cannot be effectively reviewed at that time and in that manner.") (quoting Richardson–Merrell, Inc. v. Koller, 472 U.S. 424, 438 (1985)).

74. 28 U.S.C. § 1651 (2012).

75. Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 HARV. L. REV. 595, 599–600 (1973).

76. Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 288 (1993) ("In recent years, that standard has been relaxed.").

77. FED. R. APP. P. 21.

78. Moore, *supra* note 6, at 839.

79. *See In re* Aetna Cas. & Sur. Co., 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc) ("To the extent . . . that our prior case authority may be deemed to hold that we will not entertain or consider a petition for mandamus following refusal of a district court to disqualify . . . we now disavow such case precedent.").

vehicle to challenge the denial of disqualification. The court did not permit parties who failed to file a mandamus petition to seek review of a disqualification decision after final judgment, holding that parties who failed to seek mandamus review forfeited their right to challenge the disqualification ruling.[80] It was not until 2016 that the court overruled this long line of precedent and allowed a disqualification decision to be reviewed after final judgment.[81]

By the late 2010s, the circuits were all in agreement that mandamus could offer a potential remedy—at least in certain circumstances—for the wrongful denial of appearance-based disqualification motions. This convergence in theory, however, did not necessarily create uniformity in practice. Even though mandamus relief has become more common over the last half-century, it is still considered a form of extraordinary relief subject to significant discretion. As a result, there remains substantial disagreement over mandamus use and procedure.

The discretionary basis of mandamus—and its historical designation as "extraordinary" relief that should be only rarely invoked—means that it can be difficult to predict when mandamus relief will be available. Availability turns on norms and practice within each circuit, but there is significant variation among the circuits. The Second Circuit has been especially likely to grant mandamus review, writing that there are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself."[82] The court concluded that interlocutory review was important, writing that "[a] claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits."[83] It should be noted, however, that while mandamus *review* is relatively easy to obtain in the Second Circuit, mandamus *relief* is significantly less so, and requires the petitioner to

80. *See In re* City of Milwaukee, 788 F.3d 717, 719 (7th Cir. 2015) ("A mandamus petition is the proper way to challenge the denial of a recusal motion."); U.S. v. Glavin, 580 F. App'x 482, 484 (7th Cir. 2014) ("The denial of a motion for recusal under § 455(a) must be challenged immediately by a mandamus action, and Glavin's failure to do so would prevent our review."); Reed v. Lincare, Inc., 524 F. App'x 261, 262 (7th Cir. 2013) ("[T]o the extent that Reed's recusal motion is construed as invoking 28 U.S.C. § 455(a), Reed waived any challenge to the district court's denial of the motion by failing to file a petition for writ of mandamus.").

81. *See* Fowler v. Butts, 829 F.3d 788 (7th Cir. 2016).

82. *In re* Int'l Bus. Machines Corp., 618 F.2d 923, 926 (2d Cir. 1980).

83. *Id.* at 926–27.

satisfy "the burden of establishing that its right is 'clear and indisputable.'"[84]

C. Discretionary Appeals and Collateral Orders

Other vehicles beyond mandamus could offer alternate ways to provide interlocutory review of judicial disqualification orders.[85] In theory, both discretionary appeals and collateral-order appeals offer alternatives to mandamus review. In practice, however, these mechanisms have lagged far behind mandamus as a potential review vehicle for judicial disqualification.

1. Discretionary Appeals

District courts may certify discretionary interlocutory appeals.[86] Such discretionary appeals require the district judge to find that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and to therefore certify the question to the appellate court.[87] Once certified, the appellate court can choose to accept or deny interlocutory review.[88]

Although commentators have recommended greater use of the provision, the federal courts have almost never found this standard to be satisfied in disqualification cases.[89] Scholar Richard Flamm identifies two reasons for this difficulty. First, judicial disqualification motions—especially those based on an appearance of partiality—rarely raise "controlling question[s] of law" of the type certification is intended to answer.[90] After all, the crux of the decision is fundamentally a reasonableness determination. That is, given the facts and circumstances set out in the motion, is it reasonable to harbor doubts as to the judge's ability to remain impartial? This analysis is necessarily a predominantly "fact-intensive" inquiry rather than a question of law. And even if the analysis of those facts carries within it a legal question, that legal question

84. *Id.* at 927.

85. *See* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1294 (2007) (recommending the standardization of appellate procedures).

86. 28 U.S.C. § 1292(b) (2012).

87. *Id.*

88. *Id.*

89. FLAMM, *supra* note 4, at 1037.

90. *Id.* at 1038.

is likely to bear at most a tangential relationship to the underlying merits of the case, and is therefore unlikely to be a "controlling" question.[91]

A second and potentially higher hurdle is the judge's initial evaluation. Section 455(a) requires judges to recuse when their impartiality "might reasonably be questioned."[92] As a result, a judge who denies such a motion is necessarily deciding that there is no reasonable basis on which to question his or her impartiality. Once that decision is made, there would be no basis for the judge to find that there is a "substantial ground for difference of opinion."[93] The judge's denial of the motion logically "necessarily implies" that there is no such ground for a difference of opinion.[94] Of course, a judge who thinks that the question is a close one may grant the motion to recuse and still certify the issue to the appellate court, as one federal judge did in a case involving a power company where the resolution of the action could potentially have led to a slight reduction of the judge's utility bill.[95] Similarly, another judge sua sponte recused himself but certified an appeal of that order after the local newspaper ran "a series of . . . articles that questioned his attitude toward class actions and attorneys' fees awards."[96]

2. Cohen Collateral-Order Appeals

The collateral-order doctrine also offers a potential vehicle for appellate review, and it does not have the weaknesses of discretionary appeals under 1292(b). The collateral-order doctrine, often referred to as the *Cohen* collateral-order doctrine, is a common-law doctrine that allows appellate courts to hear appeals from rulings that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[97]

When the collateral-order doctrine applies, it makes it easier for the parties to seek appellate review. Because the underlying orders are

91. *See* Solimine, *The Renaissance of Permissive Interlocutory appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. 607 (2020) (noting that courts "continue to tangle over the precise meaning" of these elements).

92. 28 U.S.C. § 455(a) (2012).

93. 28 U.S.C. § 1292(b) (2012).

94. FLAMM, *supra* note 4, at 1038; Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 883 (1978).

95. *In re* Va. Elec. & Power Co., 539 F.2d 357, 360 (4th Cir. 1976).

96. Haas v. Pittsburgh Nat'l. Bank, 627 F.2d 677, 679 (3d Cir. 1980).

97. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

"collateral" to the merits of the underlying case, the order itself is treated as final, and parties are allowed an appeal as of right—they need not seek judicial permission or rely on discretionary writs, and they need not wait until the resolution of the entire case. Furthermore, the collateral-order doctrine applies categorically. That is, "the operative inquiry is not whether the [particular ruling in question] is important, separable from the merits, and incapable of review after final judgment in a particular case—rather, the question is whether these requirements can be met for an entire category of cases."[98]

In many ways, the *Cohen* collateral-order doctrine should be a perfect fit for appearance-based judicial disqualification. There is no doubt that the judge's appearance of bias is collateral to the merits of the claim. By comparison, for example, discovery orders based on privilege claims are often intertwined with the merits of a case, especially when the privilege is less than absolute, and courts must balance the importance of the right at issue against a party's need for the information.[99] But no such balancing test occurs in judicial disqualification decisions, and the merits of the underlying suit should have no influence on the judge's qualification to hear the case.

The other prongs similarly fit well with judicial disqualification. Allowing the appellate court to review the ruling offers finality to the question of whether the judge is qualified to sit. And the appellate courts already seem to be persuaded by the importance of the issue and the difficulty of waiting to decide it until after final judgment, because all circuits have already held that disqualification motions can be heard by mandamus.

So why have courts not applied the collateral-order doctrine to judicial disqualification motions? Scholars, including Judge Moore, have suggested that the collateral-order doctrine would be a good fit for judicial disqualification review.[100] Court decisions denying collateral-order review are not compelling in their reasoning. For the most part, these decisions deny collateral-order review with a conclusory statement that the matter can be reviewed after final judgment.[101] Of course, that conclusion conflicts with the fact that all circuits have agreed that the risk

98. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 764 (2006).

99. *Id.*

100. *See, e.g.*, Moore, *supra* note 6, at 861.

101. *In re* Corrugated Container Antitrust Litig., 614 F.2d 958, 960–61 (5th Cir. 1980) ("Precisely because disqualification issues are reviewable following entry of judgment, as a threshold matter the *Cohen* doctrine is unavailing.").

of harm in waiting to review the order supports interlocutory review by mandamus.[102] The Second Circuit stated that the argument in favor of allowing collateral-order review "is not altogether unpersuasive," but ultimately held that mandamus "is better adapted to prompt disposition of such claims." The court therefore decided to "join other courts of appeals in holding that an order denying an application for disqualification of a judge is not a final decision appealable" as of right.[103]

Another answer is the realist one suggested by Professor Solimine in this symposium—that the collateral-order doctrine, if not entirely defunct, is at least in the winding-down phase, where categories previously granted collateral-order status may continue to be heard, but no new categories can be added.[104] The doctrine, after all, was developed as a common-law relief valve before the adoption of the discretionary-appeal statute.

Certainly, the Supreme Court has been reluctant to expand the collateral-order doctrine in recent decades, deferring instead to statutory and rulemaking processes to create new appellate pathways as needed.[105] Ten years ago, the Supreme Court refused to extend the *Cohen* collateral-order doctrine to the appeal of attorney-client privilege claims, writing that "the class of collaterally appealable orders must remain 'narrow and selective in its membership,'" an admonition that "has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable."[106] The Court warned against allowing the collateral-order doctrine to "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered."[107] At the same time, however, the Court has also declined opportunities either to eliminate the doctrine altogether or to limit it to pre-existing categories. As Professor Solimine points out, the Court had a good opportunity to limit the doctrine in a recent case where the Fifth Circuit had applied the collateral-order doctrine to a discovery order that was challenged on First Amendment religious grounds.[108] The Court's decision not to hear the case may suggest that the collateral-order doctrine still has some continuing validity. Nevertheless, however good a fit the

102. *See* discussion *supra* Part III.B.

103. Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966).

104. *See* Solimine, *supra* note 91.

105. Mohawk Indus. v. Carpenter, 558 U.S. 100, 113 (2009).

106. *Id.* (quoting Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 48 (1995)).

107. *Id.* at 106.

108. *See* Solimine, *supra* note 91 (citing Whole Woman's Health v. Tex. Cath. Conf. of Bishops, 139 S. Ct. 1170 (2019)).

doctrine may be, there has been no indication that courts are willing to expand the collateral-order doctrine to judicial disqualification rulings.

IV. HARMONIZING STANDARDS OF APPELLATE REVIEW

An appellate court's review of a disqualification decision depends upon the appropriate standard. Differences between the circuits in the standard of review compounds the questions surrounding the appropriate vehicle for review. As a result, there is a notable lack of clarity as to the standard by which a disqualification decision will be evaluated. This lack of clarity extends to the degree of deference given to the district court, the power of the appellate court to review decisions granting as well as denying disqualification, the proper standard to apply when a party failed to seek disqualification in the trial court, and the relevance of a harmless-error analysis.

A. Abuse of Discretion or De Novo Review

Most circuits apply an abuse-of-discretion standard when reviewing disqualification rulings based on an appearance of bias.[109] Others, including the Fourth, Seventh, and Tenth Circuits, have at least sometimes applied *de novo* review—though not always consistently.[110] In many cases, there is likely to be little difference between the two standards. The underlying rule is one of reasonableness, but reasonableness that is heavily weighted toward one side—that is, when would a reasonable observer have cause to doubt the judge's impartiality in a given case? The underlying standard is not an ordinary question of law, as is typical in *de novo* review. Nor is it a question for which the trial judge can reasonably

109. Pinkston v. Univ. of S. Fla. Bd. of Trs., 752 Fed. App'x. 756 (11th Cir. 2018); Akins v. Knight, 863 F.3d 1084, 1086 (8th Cir. 2017); Glick v. Edwards, 803 F.3d 505, 508 (9th Cir. 2015); Decker v. GE Healthcare Inc., 770 F.3d 378, 388 (6th Cir. 2014); Cox v. Onondaga Cty. Sheriff's Dept., 760 F.3d 139, 150 (2d Cir. 2014).

110. FLAMM, *supra* note 4, at 1107 (noting the Fourth Circuit generally applies *de novo* review to questions of judicial bias, though it applies an abuse of discretion standard to other bases for disqualification); in the Fourth Circuit, *see also* People Helpers Found., Inc. v. City of Richmond, Va., 12 F.3d 1321, 1325 (4th Cir. 1993) ("This court reviews questions of judicial bias de novo."); in the Seventh Circuit, *see In re* Sherwin-Williams Co., 607 F.3d 474, 477 (7th Cir. 2010) ("Mandamus is the appropriate vehicle for a challenge to a district judge's denial of a motion to recuse based on appearance of bias. Our review is de novo."); *but see* Tezak v. United States, 256 F.3d 702, 716 (7th Cir. 2001) ("A district court judge's decision not to recuse himself is reviewed under an abuse of discretion standard."); in the Tenth Circuit, *see* Sac & Fox Nation of Okla. v. Cuomo, 193 F.3d 1162, 1168 (10th Cir. 1999) (noting disqualification for an appearance of bias is "generally" reviewed for an abuse of discretion, but that when the trial judge does not "create a record or document her decision not to recuse," then the court will apply a *de novo* standard).

exercise broad discretion, such as where the judge reviews the reasonableness of an attorney's fee or the admissibility of evidence at trial. Instead of the judge acting within a range of conduct where any reasonable choice would be upheld, the reasonableness evaluation is all one sided—if it is reasonable at all to question the judge's impartiality, then the judge has no discretion. He or she is disqualified under § 455(a).

Other scholars have pointed out the problematic applicability of the abuse-of-discretion standard. Professor Basset has written that "[i]n light of the existing anomaly requiring district judges to rule on motions involving their own partiality, and the undeniable importance of judicial impartiality to due process, the abuse of discretion standard accords too much deference to the trial judge's determination."[111] Professors Freer and Cooper, writing in the latest edition of *Federal Practice and Procedure*, also expressed support for a *de novo* standard of review. They acknowledged that few courts have yet adopted the *de novo* standard, but concluded nonetheless that "[b]ecause the disqualification statutes are mandatory and reflect a societal interest in an impartial judiciary, there is a strong argument that appellate courts should apply a *de novo* standard in reviewing recusal decisions."[112]

The Supreme Court has not yet settled the question. It has, however, addressed an analogous situation that, though factually distinct, requires a similar type of analysis: that is, deciding when a police officer possessed a "reasonable suspicion" sufficient to support a traffic stop.[113] In both types of cases, the court must review the reasonableness of an underlying position (that is, reasonable suspicion of illegal activity for the traffic stop, and reasonable questions about a judge's impartiality for a recusal motion). And in both cases, once reasonableness is established, there is a single determination of power to act, rather than a range of actions that may be taken—reasonable suspicions means the traffic stop is allowable, and reasonable cause to question a judge's impartiality prevents the judge from sitting.

In *Ornelas*, the Supreme Court overruled earlier circuit precedent that applied an abuse-of-discretion standard to traffic stops.[114] The Court noted that the underlying analysis is a mixture of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed,

111. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1235 (2002).

112. RICHARD D. FREER & EDWARD H. COOPER, 13D FEDERAL PRACTICE AND PROCEDURE, § 3553 (Charles A. Wright & Arthur R. Miller eds., 3d ed. 2008).

113. Ornelas v. United States, 517 U.S. 690, 698 (1996).

114. *Id.*

and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[115] The Court noted that in reviewing trial-court determinations of reasonable suspicion, it had never deferred to the trial judge, but had instead provided "independent appellate review."[116] Such *de novo* review, the Court held, "tends to unify precedent" and offer guidance for future cases. The Court concluded that "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[117]

The same principles apply with equal force when it comes to the review of judicial disqualification motions. Again, the legal standard is clearly established under § 455, and the underlying facts are rarely disputed. The only question is whether those facts give rise to a reasonable question about the judge's impartiality. If they do, the judge must step aside—there is no room for the exercise of discretion within that process. Thus, deference to the judge's decision making is unwarranted. The need for standardization, however, still remains—litigants need guidance as to which situations will reasonably give rise to an inference of partiality, and which will not. Independent appellate review under the *de novo* standard can offer that guidance.

B. Post-Recusal Appellate Review

In addition to questions about the appropriate standard of review, there is also disagreement among the federal courts about whether the trial judge's *grant* of an appearance-based recusal motion can be reviewed on appeal. Most appeals, after all, deal with the judge's denial of a motion. In the most common scenario, a party asserts that the circumstances raise a question as to the judge's appearance of impartiality, and the judge denies the motion, leaving the appellate court to rule on whether the judge should continue with the case. Questions about a judge's decision to recuse are rarer, perhaps in part because the judge may have alternate grounds to support the recusal—perhaps an admitted sense of partiality, a close relationship with a party or counsel, a financial interest, or a previous connection with the case. In such a case, disqualification may be so clearly required that no party raises a point of error.

In other cases, however, judges may conclude that even though they do not believe themselves to be biased, the appearance of partiality is

115. *Id.* at 696–97 (quoting Pullman–Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).
116. *Id.*
117. *Id.*

strong enough to warrant their recusal. Freer and Cooper suggest that perhaps this decision should be unreviewable in its entirety, writing that "[a]s a matter of policy, there is a very strong argument that this decision should not be reviewable at any stage. After all, it is difficult to conclude that anyone is harmed by having a case proceed before a judge who is qualified to hear it."[118] They note that the Seventh Circuit has adopted this position.[119] In *Hampton v. City of Chicago*, the court explicitly held that litigants have no protectable interest in having any particular judge decide their case. The court left open the possibility that the public interest might require standardization of recusal decisions, but found such a conclusion to be premature. The court wrote that if it would later "appear that unfounded recusals impede the administration of justice in the circuit, the circuit council would take appropriate action, but the interest being vindicated would be that of the public in the administration of justice, and not the interest of a particular litigant."[120]

Other courts, however, have been more lenient in allowing at least occasional review of such decisions.[121] As noted above, in at least two cases out of the Third and Fourth Circuits, judges have granted an appearance-based motion, but at the same time certified the disqualification question to the appellate court under § 1292(b).[122] The Ninth Circuit has agreed with the Seventh Circuit that review of a decision granting disqualification should not ordinarily be subject to appeal, but it suggested that mandamus relief may be available in the rare situation where the time to get a new judge up to speed on a case would "greatly disrupt" the proceedings.[123] Likewise, the Sixth Circuit has also reviewed at least one such case.[124]

Although appeals of decisions granting disqualification are much rarer than appeals of decisions denying it, there is more merit to the appellate review of such decisions than the Seventh Circuit's denial would suggest. It is true that in any one case litigants' due process rights are fully

118. RICHARD D. FREER & EDWARD H. COOPER, *supra* note 112.

119. *Id.* (citing Hampton v. City of Chicago, 643 F.2d 478, 479 (7th Cir. 1981)).

120. *Hampton*, 643 F.2d at 479.

121. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 104 (Fed. Jud. Center, 2d. ed. 2010).

122. *See supra* Part II.C.i.

123. *In re* Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020 (9th Cir. 1981), *cause dismissed sub nom.* Ariz. v. U.S. Dist. Court for the Dist. of Ariz., 459 U.S. 961 (1982), *and aff'd sub nom.* Ariz. v. Ash Grove Cement Co., 459 U.S. 1190 (1983) ("Ultimately, if dissatisfied with the district judge's decision and confident that the litigation will be greatly disrupted, a party may seek a writ of mandamus from the court of appeals.").

124. Kelley v. Metro. Cty. Bd. of Ed. of Nashville & Davidson Cty., Tenn., 479 F.2d 810, 811 n.1 (6th Cir. 1973).

vindicated by trial before any qualified judge. But as the Supreme Court has noted, one of the major benefits of the appellate process is to clarify and standardize the law.[125] This feature of appellate law is subverted, however, if appellate courts can review only cases where disqualification is denied. Such a limitation would cause a systematic distortion, as appellate courts could push back against outlier decisions wrongfully denying disqualification, but would be forced to leave outlier decisions granting disqualification untouched.[126] The effect of such one-sided appellate review would be to push the law too far toward recusal, as judges would be inclined in close cases to err on the side of recusal, knowing that the decision could not be overturned. Over time, the weight of such incentives could very well inadvertently shift the window of perceived reasonableness.

Such a systemic change, if it were to occur, could ultimately threaten due process. The primary purpose of appearance-based judicial review, after all, is not to protect the interests of individual litigants—if that were the only interest, the appellate court could safely ignore questions of bias in favor of simply addressing the merits of the case as necessary to ensure that the case's ultimate outcome comported with the law. Instead, however, appearance-based disqualification is intended to protect the trust that the larger population places in the judiciary.

That trust, in turn, requires that judges deny disqualification motions based on unreasonable suspicions and unfounded allegations. Thus, courts have held that "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited," and "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."[127] Courts have acknowledged that rumor and speculation can cause the public to distrust a judge's impartiality—but giving in to unfounded charges "would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge."[128]

125. Ornelas v. United States, 517 U.S. 690, 698 (1996).

126. *See* Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 213 (2008) (explaining how one-sided appellate review also creates "systemic bias" in circuits that refuse to review decisions granting new trials).

127. *In re* Aguinda, 241 F.3d 194, 201 (2d Cir. 2001); *see also* Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) ("There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.").

128. *In re* United States, 666 F.2d 690, 695 (1st Cir. 1981); *see also* U.S. v. Snyder, 235 F.3d 42, 46 n. 1 (1st Cir. 2000) ("Section 455(a) modified, but did not eliminate, the duty to sit doctrine. The duty to sit doctrine originally not only required a judge to sit in the absence of any reason to recuse, but also required a judge to resolve close cases in favor of sitting rather than recusing. Section 455(a) eliminated the latter element of the doctrine, but not the former.") (citations omitted). *But see*

Thus, appellate courts have an important role to play both in ensuring that judges step aside when reasonable appearances require it, as well as ensuring that judges retain jurisdiction over cases in the face of unfounded rumor, speculation, or spurious allegation. Review of decisions granting disqualification probably do differ in one important way from the review of decisions denying it, however. When a judge refuses to disqualify, as noted above, courts will often grant interlocutory review—but they will also allow review after final judgment in cases where the parties did not seek interlocutory review. And while interlocutory review may be preferable to avoid wasted time and effort, review after final judgment still protects against a statutorily or even constitutionally disqualified judge from proceeding with the case.

When a judge grants a recusal order, however, that decision should likely be reviewed only through interlocutory review. After final judgment, the equities are different—by this point, another judge would have put substantial time into the case. And unlike the situation where the judge refused to recuse, in this case the judge who put the time and effort into the case is neither statutorily nor constitutionally disqualified. The cost to the court and parties of rehearing the case is likely too high to warrant post-judgment review.

C. Raising the Appearance of Bias for the First Time on Appeal

In some cases, parties raise the appearance of bias only on appeal, having failed to move for disqualification in the trial court. This happens only after final judgment; interlocutory review, by contrast, could only be available when the trial court had first made a ruling. After final judgment, however, it is not uncommon for an appellate court to be faced with an appeal from a party that failed to seek disqualification of the trial judge and failed "even to alert that court as to the existence of its concerns."[129]

Ordinarily, a party who fails to raise a point of error in the trial court forfeits that claim on appeal. The Sixth Circuit has followed that rule for judicial disqualification, concluding that the failure to raise the issue in the court below precludes appellate review.[130] The majority of the other

Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 958 (2009) ("The duty to sit is an outdated, problematic doctrine unhelpful to twenty-first century questions of disqualification. . . . The ABA, the states, the judiciary and the legal profession should affirmatively declare that close questions be decided in favor of recusal.").

129. FLAMM, *supra* note 4, at 1125.

130. *Id.*; Grider Drugs, LLC v. Express Scripts, Inc., 500 F. App'x 402, 406 (6th Cir. 2012) ("Recusal arguments such as this one, based on 28 U.S.C. § 455(a), which are not brought before the district court, are deemed waived."); Cook v. Cleveland State Univ., 13 F. App'x 320, 322 (6th Cir.

circuits, however, have concluded that "claims about a judge's qualifications of impartiality" must receive at least some attention on appeal in order to ensure fundamental fairness.[131] Thus, for example, the Eighth Circuit has held that "[o]rdinarily, we review a judge's refusal to recuse for an abuse of discretion. However, when a recusal claim is not raised below, we apply a lower standard of appellate review and review only for plain error."[132] Other courts have similarly stated that they would "search the record for 'clear,' 'manifest,' 'obvious,' 'palpable,' or 'plain,' error."[133]

The circuits applying the "plain error" standard in disqualification cases haven't explained the basis for it. The standard was "developed in federal criminal cases and was eventually codified in Criminal Rule 52(b),"[134] which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[135] Although the text of the rule itself requires only that the error be "plain" and affect "substantial rights," the federal courts have interpreted the standard quite restrictively, so that in "most cases this means that the error must have been prejudicial and it must have affected the outcome of the district court proceedings."[136] Additionally, in criminal cases the Supreme Court has stated that "plain" error "is synonymous with 'clear' or, equivalently, 'obvious' error."[137] The federal circuit courts have not consistently decided whether (or to what extent) the "plain error" standard should apply in civil litigation.[138] Nor is it obvious whether a civil "plain error" standard would be interpreted the same way as the criminal standard.

2001) ("Th[e] general rule bars an appellate court from considering a recusal issue that was not initially raised in the trial court.").

131. FLAMM, *supra* note 4, at 1125; United States v. Pearson, 203 F.3d 1243, 1276 (10th Cir. 2000); United States v. Arache, 946 F.2d 129, 140 (1st Cir. 1991); Osei-Afriyie by Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 886 (3d Cir. 1991). *See also* United States v. Gray, 105 F.3d 956, 968 (5th Cir. 1997).

132. Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 663 (8th Cir. 2003) (internal citations omitted).

133. FLAMM, *supra* note 4, at 1126 (citing cases from a variety of state and federal jurisdictions).

134. KENNETH W. GRAHAM, JR., 21 FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5043 (Charles A. Wright & Arthur R. Miller eds., 2d ed., August 2019 Update).

135. FED. R. CRIM. P. 52(b).

136. PETER J. HENNING, THE PLAIN ERROR RULE, 3B FEDERAL PRACTICE & PROCEDURE CRIMINAL § 856 (Charles A. Wright & Peter J. Henning) (4th ed.).

137. United States v. Olano, 507 U.S. 725, 732 (1993).

138. GRAHAM, *supra* note 134 ("Though the Civil Rules lack an equivalent provision, some opinions suggest the doctrine can be invoked in civil cases as well.") (citing ML Healthcare Servs., LLC v. Publix Super Markets, Inc., 881 F.3d 1293, 1305–06 (11th Cir. 2018)).

These differences may not be relevant to disqualification cases, however; instead, the standard applied to judicial disqualification may have a different basis entirely. The Seventh Circuit, after examining this conflicting precedent from other jurisdictions, concluded that the statute itself precluded a finding of forfeiture.[139] It noted that § 455(e) allows parties to waive the appearance of bias under § 455(a), but only after the judge makes a "full disclosure on the record" and the litigant affirmatively waives disqualification.[140] The court also noted that the Supreme Court had twice "allowed litigants to seek disqualification despite the absence of a protest in the court where the disqualified judge sat."[141] The court therefore held that failure to raise the disqualification issue would not preclude a later assignment of error on appeal. The court did not, however, specify whether a different standard of review would apply when the party failed to challenge the ruling below, or whether a "plain error" standard should generally apply to § 455(a) cases.

It is understandable why appellate courts would want to try to walk an intermediate path with the standard of appeal, and the "plain error" standard, familiar in criminal cases, may be attractive to judges. The appellate courts want to avoid upholding clear cases of judicial disqualification and to preserve both the appearance and the reality of impartiality on the bench. At the same time, the appellate courts also do not want to create incentives for parties to delay raising questions of apparent bias—and especially do not want parties to be able to wait and see if they win at trial and raise questions of bias only if they lose.[142] These are the same policy considerations that led to the development of Rule 52(b) in the Federal Rules of Criminal Procedure.[143]

But this intermediate standard may sound better in theory than it works in practice. When it comes to the appearance of bias, it is not clear that there is a significant difference between "plain error," and either "de novo" or "abuse of discretion" review. In appearance-based disqualification cases, there is rarely a dispute over the facts. Instead, the dispute is about how a reasonable observer would view those facts. With no factual question in the mix, that analysis will look similar under any of the standards of review.

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139. Fowler v. Butts, 829 F.3d 788, 794 (7th Cir. 2016).

140. *Id.*

141. *Id.* (citing Nguyen v. United States, 539 U.S. 69 (2003) and Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016)).

142. FLAMM, *supra* note 4, at 1126 (noting that even though review is preserved under the majority rule, "[t]his does not mean, however, that a party who fails to preserve its objection to a lower court's qualifications pays no price.").

143. *See supra* note 135.

A more fruitful approach might be to apply the constitutional standard for disqualification when a party fails to raise a statutory claim at trial. This is the approach that the Supreme Court takes when reviewing state-court disqualification issues, after all, and it represents the "outer boundaries of judicial disqualification" rather than the more protective measures authorized by legislation or court rule.[144] Once the state supreme courts have found disqualification to be unnecessary under state law, the only question for the Supreme Court to resolve is whether constitutional due process requires something more. Thus, the Court concluded in *Caperton v. A.T. Massey Coal Co.*,[145] that a party's multi-million-dollar campaign support created "significant and disproportionate influence" requiring disqualification. Likewise, in *Williams v. Pennsylvania*, the Court held that a judge's earlier participation in the case as a prosecutor required disqualification as a matter of constitutional due process.[146]

Applying the constitutional standard would allow the appellate courts to ensure that due process safeguards are satisfied while still discouraging neglect or delay in disqualification proceedings. Under the constitutional standard, courts would not have to apply the statutory formulation that requires disqualification whenever a judge's impartiality "might reasonably be questioned."[147] Instead, the court would apply a narrower standard, requiring disqualification only when the situation "g[ives] rise to an unacceptable risk of actual bias."[148]

It is possible that the plain-error standard now applied by appellate courts is already intended to mirror the constitutional standard.[149] If so, the appellate courts should offer greater clarification. After all, even the most "plain" or "obvious" appearance problem does not necessarily create a higher risk of actual bias. Likewise, the divergence of practice between circuits does not suggest the recognition of an underlying constitutional standard—in particular, the Sixth Circuit's finding of waiver or forfeiture by failure to raise disqualification in the trial court is inconsistent with the Supreme Court's procedural protection of due process rights.[150]

144. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009).

145. *Id.*

146. Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016).

147. 28 U.S.C. § 455(a) (2012).

148. *Williams*, 136 S. Ct. at 1908.

149. *See* United States v. Olano, 507 U.S. 725, 732 (1993) (setting forth the plain error test, the third prong of which is that the purported error must "affect[] substantial rights"); *see also* HENNING, *supra* note 136 ("[T]he cases have given the distinct impression that 'plain error' is a concept appellate courts have found impossible to define, save that they know it when they see it.").

150. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'").

Interpreting such forfeiture to extend only to the statutory grounds, but not to constitutional ones, would better align with Supreme Court precedent and would offer greater consistency in disqualification cases.

D. Harmless Error

An appellate court's determination that the trial court judge erred is often not the end of the analysis.[151] In most contexts an appellate court will proceed to analyze whether the error was "harmless."[152] The doctrine of harmless error is similar to the doctrine of plain error—in fact, both are codified in Rule 52 of the Rules of Criminal Procedure.[153] Both focus on the substantial rights of the defendant. But where "plain error" applies to matters that a defendant failed to raise at trial, "harmless error" applies when the defendant did raise the issue, but nonetheless the trial judge's erroneous ruling did "not affect substantial rights" and therefore "must be disregarded."[154] Unlike plain error, harmless error has been solidly integrated into civil practice as well as criminal.[155]

But even though harmless error is common in both civil and criminal litigation, the degree to which circuit courts of appeals should apply the doctrine of "harmless error" to disqualification motions (and particularly to violations of § 455(a)) is not completely settled.[156] When a reviewing court concludes that a trial judge should have stood recused but erroneously refused or failed to do so, what is the appropriate remedy? After all, trial court judges generally enjoy broad discretion in conducting trials,[157] as evidenced by the exceedingly permissive "abuse of discretion"

151. *See, e.g.*, United States v. Garcia, 496 F.3d 495, 515 (6th Cir. 2007) (holding that the district court erred in admitting documentary evidence, but affirming the defendant's conviction because the error was harmless); United States v. Crowley, 529 F.2d 1066, 1069–71 (3d Cir. 1976) (holding that although the defendant was erroneously denied his right to counsel on his motion to withdraw his guilty plea, the error was harmless).

152. Harmless error is "[a] trial-court error that does not affect a party's substantive rights or the case's outcome." *Harmless Error*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, an appellate finding of harmless error generally forecloses reversal, remand, or other remedies that would "reopen" litigation after a final judgment. *See also* 28 U.S.C. § 2111 (2012); FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a).

153. FED. R. CRIM. P. 52.

154. FED. R. CRIM. P. 52(a).

155. FED. R. CIV. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

156. This section limits consideration to appeals of the recusal question after final judgment, as the interlocutory mandamus or collateral-order context would not reach "harmless error." When an appellate court considers the recusal question before a final judgment is issued, harmless error review would be by definition inapplicable as the case has not reached an "outcome."

157. *See generally* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

standard of appellate review.[158] With broad discretion as the rule rather than the exception for many decisions made in the midst of a trial, can a § 455 violation truly be "harmless?"[159]

Courts' applications of the harmless-error doctrine in the recusal context need clarification because of the considerable confusion that has arisen under existing precedent. The Supreme Court has suggested in dicta that the doctrine of harmless error may apply in some disqualification cases, writing that "[a]s in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a)."[160] The Sixth Circuit, on the other hand, has declined to apply the doctrine, concluding that "[b]ecause of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding."[161]

The best approach may be to abandon the "harmless error" nomenclature and instead honestly and forthrightly affirm a judgment notwithstanding the defect when the balance of the equities requires not opening closed litigation. This may be the preferred approach for two reasons. First, the Supreme Court's opinion in *Liljeberg*[162] has led to confused application of "harmless error" in recusal review. While courts typically call it a "harmless error" analysis, their application of Supreme Court precedent when crafting a remedy looks like a separate remedial test. And second, calling the error "harmless" discounts the effect that trial in front of an erroneously unrecused judge has on public confidence in the judicial system.[163]

158. Circuit courts' recitations of the standard are illustrative. *E.g.*, Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 536 (6th Cir. 2012) ("An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment."); Int'l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993) ("An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.") (quotation omitted).

159. This section does not analyze in depth harmless error when judicial failures to recuse rise to the level of constitutional violations, as the Supreme Court has proscribed finding harmless error in this context. Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016) ("[A]n unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.").

160. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988).

161. Anderson v. Sheppard, 856 F.2d 741, 746–747 (6th Cir. 1988).

162. *Liljeberg*, 486 U.S. 847.

163. *See, e.g.*, Christopher Brett Jaeger & Jennifer S. Trueblood, *Thinking Quantum: A New Perspective on Decisionmaking in Law*, 46 FLA. ST. U. L. REV. 733, 784 (2019) (arguing that appellate courts likely over-apply the doctrine of harmless error, in part because it can be hard to know what result the trial court would have reached in the absence of error).

In the Supreme Court's "first significant interpretation"[164] of § 455(a), the Court concluded that the district court judge violated the statute by failing to recuse and then proceeded to analyze whether this error required vacatur.[165] When considering the appropriate remedy for a § 455 violation, particularly when the underlying litigation was final and the case was before the Court on a motion to vacate judgment under Federal Rule of Civil Procedure 60(b)(6)[166] rather than on direct appeal, the Court left open the door for harmless error in the recusal context.[167]

With the Supreme Court seemingly allowing for a harmless-error remedial analysis, courts have treated *Liljeberg* as creating a new balancing test in the § 455 context, leading to confusion when courts call this a "harmless error" analysis. *Liljeberg* presents three factors to consider when crafting a remedy:

> [I]n determining whether a judgment should be vacated for a violation of § 455 (a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.[168]

The *Liljeberg* test may strike the appropriate balance, but this balancing test is different in kind from normal "results-based" harmless error contexts, which focus on the effect of the error on the result reached at trial.[169] Courts have applied the *Liljeberg* factors while calling the analysis a "harmless error" review.[170] But unlike "results-based" harmless error tests that focus on the impact of the error on the result of the trial,

164. Kenneth M. Fall, Note, Liljeberg v. Health Services Acquisition Corp.*: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 WIS. L. REV. 1033, 1035 (1989).

165. *See Liljeberg*, 486 U.S. at 861–870.

166. Rule 60(b)(6) allows a litigant to move for relief from judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6).

167. *Liljeberg*, 486 U.S. at 862.

168. *Id.* at 864.

169. *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1823 (2017). *See also* Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1336–40 (1994) (noting "uncertainty" in how courts test for harmless error, and that there "at least three" different approaches). Despite the numerous approaches, each typically focuses on the impact at the trial below. *See id.*

170. *Compare* United States v. Amico, 486 F.3d 764, 777 (2d Cir. 2007) (applying the *Liljeberg* balancing factors on direct appeal when crafting a remedy and noting the inquiry is not a "traditional harmless-error analysis"), *with In re* Continental Airlines Corp., 901 F.2d 1259, 1263 (5th Cir. 1990) (stating "the 'harmless error' rule applies to a breach of a judge's duty to stand recused" but then reciting and applying the *Liljeberg* factors), *and* Williamson v. Ind. Univ., 345 F.3d 459, 464 (7th Cir. 2003).

Liljeberg's second and third factors expressly direct a reviewing court to consider the extrinsic effects of the failure to recuse—and appropriately so. After all, § 455 seeks to promote public confidence in the judiciary;[171] ignoring the extrinsic effects of a violation cuts against the purpose of the law. Appropriateness notwithstanding, this test is still not a typical "harmless error" analysis.

One possible reason for this persistence in nomenclature may be that appellate courts are familiar with the concept of harmless error, when a defect in the proceedings below cannot be ignored yet could not have affected the outcome of the case.[172] But regardless of the reason, calling a district court judge's failure to stand recused "harmless error" ignores the fundamental concern that "justice must satisfy the appearance of justice."[173] At this stage in the § 455 analysis, the appellate court must have necessarily concluded that the district court judge's "impartiality might reasonably be questioned"[174] or that the judge was statutorily disqualified per § 455(b). Because § 455 aims to protect public confidence in judicial proceedings, the argument is strong that a judge whose impartiality might reasonably be questioned can never "harmlessly" adjudicate a dispute—especially considering the broad discretion judges retain in conducting trials. Because the judge's impartiality could be questioned, public confidence in judicial proceedings will necessarily be harmed in such a case.

That is not to say that reversal or remand should be mandatory in all instances.[175] As previously noted, reopening and relitigating closed cases is costly to parties as well as courts. This is especially so in cases, for example, where there are many parties, the judge's conflict of interest is extremely minor, or litigation has spanned multiple years.[176] Indeed, the *Liljeberg* balancing test may even strike the proper balance by directing appellate courts to consider the extrinsic effects of a judge's failure to stand recused on the entire judicial system and future litigants. But courts should not confuse this for a typical "harmless error" analysis and should

171. *See Liljeberg*, 486 U.S. at 860.

172. *See* Harry T. Edwards, *To Err is Human, but Not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1168–70 (1995).

173. *Liljeberg*, 486 U.S. at 864 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

174. 28 U.S.C. § 455(a) (2012).

175. There is a forceful argument that "harmless-error" doctrine in recusal law, no matter what the nomenclature, should be discarded in its entirety in criminal trials. When a judge violates § 455 and thus the judge's impartiality might reasonably be questioned, it is hard to imagine the failure to recuse did not affect the criminal defendant's substantial rights.

176. *See Liljeberg*, 486 U.S. at 862 n.9 (raising the issue of "[l]arge, multidistrict class actions" with "hundreds or even thousands" of parties).

accordingly abandon the nomenclature. A more appropriate approach would be for a court to forthrightly affirm the final judgment (or deny a motion for relief from judgment) notwithstanding the district court judge's failure to stand recused.

V. CONCLUSION

Adjudication by an impartial decision maker is one of the most fundamental cornerstones of due process. The interest is so essential that constitutional due process guards against even the appearance of partiality in judicial actions.[177] But how can the judiciary ensure the appearance of impartiality—especially in an era of ever-increasing polarization of opinion?

Under our modern litigation system, appellate courts play an important role both in correcting error and in standardizing the application of law to ensure that justice is applied fairly. In order to play those roles effectively when litigants raise a judicial disqualification challenge, the appellate courts should standardize their own procedures for handling the review of disqualification claims. Regularly accepting review of judicial disqualification motions—both on an interlocutory basis and after final judgment—and harmonizing the standards of review on appeal would offer greater clarity about the standards for recusal and would thus heighten the public's trust in the judiciary.

177. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)) ("The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.'").