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## Mandamus and Recusal: Promoting Public Confidence in the Judicial Process

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## MANDAMUS AND RECUSAL: PROMOTING PUBLIC CONFIDENCE IN THE JUDICIAL PROCESS

*Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.*<sup>1</sup>

### I. INTRODUCTION

The judiciary occupies a unique place in the American system of government as an impartial, nonpartisan arbiter of justice.<sup>2</sup> The judiciary aspires to preserve both the reality and the appearance of its neutrality.<sup>3</sup> Recent public debate examining the neutrality of Supreme Court Justices highlights the importance of promoting public confidence in the judiciary by preserving the appearance of impartiality.<sup>4</sup> Most recently, Supreme Court Justice Antonin Scalia raised eyebrows when he joined Vice Presi-

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<sup>1</sup> Republican Party of Minn. v. White, 536 U.S. 765, 817-18 (2002) (Ginsburg, J., dissenting).

<sup>2</sup> Mistretta v. United States, 488 U.S. 361, 407 (1989) (considering judicial involvement in drafting of Sentencing Guidelines promulgated by United States Sentencing Commission). Justice Blackmun attested that the “legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” *Id.*

<sup>3</sup> See *White*, 536 U.S. at 721-22 (Stevens, J., dissenting) (quoting *Mistretta*, 488 U.S. at 407) (expressing concern that judicial involvement in policy formation may erode public confidence in judicial impartiality).

<sup>4</sup> See Dave Denison, *Judging the Judges*, BOSTON SUNDAY GLOBE, March 7, 2004, at H1 (describing use of mantra “judicial activism” in recent political debate); see also Linda Greenhouse, *Supreme Court to Consider Case on “Under God” in Pledge to Flag*, N.Y. TIMES, October 15, 2003, at A1 (noting Scalia’s recusal from case considering constitutionality of Pledge of Allegiance after publicly expressing views on litigated issue); see also David G. Savage & Richard A. Serrano, *Ginsburg defends NOW involvement*, L.A. TIMES, March 14, 2004, available at [http://www.boston.com/news/nation/articles/2004/03/14/ginsburg\\_defends\\_NOW\\_involvement/](http://www.boston.com/news/nation/articles/2004/03/14/ginsburg_defends_NOW_involvement/) (reporting Ginsburg’s defense of her involvement in NOW Legal Defense and Education funds yearly lecture series); Christopher Marquis, *Contesting the Vote, Challenging a Justice: Job of Thomas’s Wife Raises Conflict-of-Interest Questions*, N.Y. TIMES, December 12, 2000, at A26 (reporting Virginia Lamp Thomas’s work collecting resumes for Bush cabinet appointments during pendency of Florida recount case); Jill Zuckman, *Justice Scalia’s Son a Lawyer in Firm Representing Bush Before Top Court*, CHI. TRIB., November 29, 2000, at 13 (noting Scalia’s son employed by firm representing Bush in Florida recount challenge); *Id.* (describing Rhenquist’s decision to sit on antitrust case even though son employed by firm representing litigant Microsoft); Neil A. Lewis, *Justice Breyer Severs Ties to Lloyd’s Syndicate*, N.Y. TIMES, November 11, 1994, at A24 (describing Breyer’s sale of Lloyd’s investment due to recurring conflict of interest).

dent Dick Cheney on an overnight duck-hunting trip on the Louisiana bayou.<sup>5</sup> Critics questioned the trip's propriety because two weeks earlier the Supreme Court had granted certiorari to review discovery orders mandating disclosure of documents produced by the National Energy Policy Development Group, an advisory committee chaired by Cheney.<sup>6</sup> Emphatically denying any impropriety, Scalia denied litigant Sierra Club's motion requesting his recusal.<sup>7</sup>

Constitutional due process guarantees litigants the right to a trial before a fair and objective judge.<sup>8</sup> Judicial impartiality is of a constitutional nature, thereby requiring courts to guard against even the appearance of bias.<sup>9</sup> The judiciary considers neutrality so fundamental to the integrity of the judicial process that the judicial code of ethics mandates impartiality.<sup>10</sup>

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<sup>5</sup> See David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, January 17, 2004, available at <http://www.latimes.com/news/nationworld/nation/la-na-ducks17jan17,17777211.story?coll=la-headlines-nation> (reporting controversy engendered by Scalia's duck-hunting trip with Cheney).

<sup>6</sup> See *Cheney v. United States Dist. Court*, 124 S. Ct. 958 (2003) (granting review of appellate court judgment denying government's petition for writ of mandamus vacating district court judge's discovery order); Gina Holland, *Scalia, Cheney trip stirs protests; Critics see conflict of interest*, CHI. TRIB., January 31, 2004, at 14 (reporting on Chief Justice Rhenquist's dismissal of inquiries by Senators Patrick Leahy and Joseph Lieberman into propriety of Scalia and Cheney's trip); *Too Close for Comfort: Scalia should recuse himself from case against Dick Cheney*, COLUMBUS DISPATCH, January 23, 2004, at 10A (arguing Scalia should recuse himself from Cheney case because appearance of impropriety would irreparably damage public confidence); *Duck Blind Justice*, ST. PETERSBURG TIMES, January 21, 2004, at 12A (arguing trip created appearance of impropriety because Cheney's conduct critical to substance of appeal).

<sup>7</sup> See *Cheney v. United States Dist. Court*, 124 S. Ct. 1391, 1401 (2004) (concluding that Justice's impartiality could not reasonably be questioned). In denying Sierra Club's motion, Scalia emphasized the consequences of recusal at the Supreme Court level on the outcome of cases. See *id.* at 1394-95. Scalia also asserts that allowing the allegations of investigative journalists to dictate recusal decisions would severely undermine the presumption of judicial neutrality. See *id.* at 1402. In addition, Scalia noted that friendship between high-ranking officials of the executive and judicial branches is common throughout history. See *id.* at 1400-01.

<sup>8</sup> See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding trial by judge with direct financial interest in case denial of procedural due process); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148 (1968) (extending *Tumey's* constitutional impartiality requirement to members of arbitration panels).

<sup>9</sup> See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (disqualifying judge to protect due process rights and to guard against appearance of impropriety despite lack of actual bias).

<sup>10</sup> See MODEL RULES OF JUDICIAL CONDUCT Canon 3(b)(5)(1999). The code states in pertinent part:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic

Recusal statutes provide one mechanism for ensuring judicial neutrality.<sup>11</sup> Modern recusal statutes allow for the disqualification of judges during trial due to either actual or apparent bias.<sup>12</sup> These statutes are principally concerned with fostering public faith in the administration of justice.<sup>13</sup>

Petitions to appellate courts for writs of mandamus ordering reassignment during litigation of the case-in-chief or on remand offer litigants an alternative method of remedying judicial prejudice.<sup>14</sup> Mandamus is not a writ of right, and is traditionally considered an extraordinary remedy.<sup>15</sup> Appellate review of the denial of motions to recuse, whether or not via a writ of mandamus, challenges the relationship between the federal courts of appeals and the district courts.<sup>16</sup>

This Note addresses the writ of mandamus as an instrument for protecting judicial impartiality and promoting public confidence in the judicial process. This Note also contemplates factors the federal courts of appeals consider when invoking their power to order cases reassigned by the district courts. Part II chronicles the history of supervisory and advisory mandamus; the evolution of recusal for bias; and, finally, the interrelationship of mandamus, recusal, and the final decision rule.<sup>17</sup> Part III addresses the courts of appeals' varying approaches to evaluating mandamus petitions requesting the reassignment of cases for alleged bias or prejudice.<sup>18</sup> Part IV contemplates the broadening scope of supervisory mandamus and

status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. *Id.*

<sup>11</sup> See 28 U.S.C. § 144 (2002) (outlining procedure for disqualification based on affidavit); 28 U.S.C. § 455(a) (2002) (outlining procedure for disqualification based on motion of party or judge). See generally 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 63.61 (3d ed. 1999) (detailing procedural differences between §§ 144 and 455(a)). Section 144 requires the party asserting bias or prejudice to file an affidavit at least ten days prior to the beginning of the term at which the proceeding is to be heard, unless the party can show cause for failure to file a timely affidavit. See *id.* Section 455, however, does not impose a time limit upon the party filing a motion seeking the judge's disqualification. See *id.* The moving party must file the motion as soon as it becomes aware of facts demonstrating partiality. See *id.*

<sup>12</sup> See FED. R. CIV. P. 63 advisory committee's note (1999) (highlighting substantial change in rule that includes disqualification for bias).

<sup>13</sup> See 12 MOORE, *supra* note 11, ¶ 63.20[3] (stressing requirement primarily concerned with public-at-large's confidence in integrity of judicial process).

<sup>14</sup> See *In re DaimlerChrysler Corp.*, 294 F.3d 697, 701 (5th Cir. 2002) (ordering reassignment of case on remand due to judicial hostility toward petitioner).

<sup>15</sup> See *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (citing mandamus proper only when no other remedy at law available); 55 C.J.S. § 10 (1998) (characterizing grant or denial of writ as within discretion of court).

<sup>16</sup> See *infra* notes 55-63 and accompanying text (describing tension between final decision rule and review through mandamus petitions of orders denying recusal).

<sup>17</sup> See *infra* notes 20-63 and accompanying text.

<sup>18</sup> See *infra* notes 64-85 and accompanying text.

the propriety of employing mandamus as an alternative to traditional methods of judicial disqualification.<sup>19</sup> Part V concludes that a broad approach coupled with clear procedural rules would not only strengthen public faith in the judicial process, but would also maintain the presumption of judicial impartiality.

## II. HISTORY

### A. *Evolution of Mandamus*

The All Writs Act grants the federal courts of appeals the power to issue writs to the lower courts either mandating or prohibiting certain action.<sup>20</sup> Traditionally, such writs issued only when an appellate court deemed lower court action a “usurpation of power.”<sup>21</sup> Such usurpation usually consisted of an exercise of jurisdiction amounting to a clear and indisputable impropriety.<sup>22</sup> The Federal Rules of Appellate Procedure assert that mandamus will lie only upon a showing of an indisputable right to relief or in exceptional circumstances.<sup>23</sup> In addition, the federal rules require petitioners to demonstrate not only a clear abuse of discretion or conduct amounting to a usurpation of judicial authority, but also the lack of alternative means for relief.<sup>24</sup>

Despite these stringent requirements, however, the variety of situations in which the courts of appeals grant writs of mandamus has broad-

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<sup>19</sup> See *infra* notes 86-94 and accompanying text.

<sup>20</sup> See 28 U.S.C. § 1651 (2002) (granting all courts created by Congress power to issue all writs necessary and appropriate in aid of their jurisdictions).

<sup>21</sup> See *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) (granting writ and reversing injunction issued by district court). Recognizing that the issued injunction fell outside the scope of the case, the Court determined that any harm created by the injunction could not be redressed through a decision on the merits. See *id.* at 217. The Court therefore held that equity jurisdiction did not reach the issues considered by the district court in granting the injunction. See *id.* at 221. The Court clarified that mandamus, while not appropriate to correct “mere error,” may be used to correct errors arising from lower courts’ “usurpation of power.” *Id.* at 217. See also Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 288 (1993) (describing traditional standards for issuance of writ as “exacting”).

<sup>22</sup> See Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 HARV. L. REV. 595, 599-600 (1973) (describing definitions of “power” in early judicial opinions). The author suggests that “power” as used in *De Beers* is a flexible concept. See *id.* at 599. While mandamus is inappropriate to review “mere error,” mandamus need not be confined to jurisdictional errors. See *id.*

<sup>23</sup> See FED. R. APP. P. 21 (setting forth procedure for petition, deriving power to issue writs from 28 U.S.C. § 1651).

<sup>24</sup> See 12 MOORE, *supra* note 11 at ¶ 63.71 (explaining Federal Rule of Appellate Procedure Rule 21’s two-step process to obtain writ of mandamus ordering recusal).

ened.<sup>25</sup> In the landmark case *La Buy v. Howes Leather Co.*,<sup>26</sup> the Supreme Court determined that the federal courts of appeals may properly employ writs of mandamus to perform a supervisory function over the federal district courts.<sup>27</sup> The Court considered this supervisory role essential to the effective administration of justice.<sup>28</sup> *La Buy* held that the federal courts of appeals may use writs of mandamus to prevent or deter an action of the district court that may or may not occur in the future.<sup>29</sup> This sort of interlocutory appeal circumvents the final decision rule and contradicts the principle of mandamus as an extraordinary remedy.<sup>30</sup>

The notion of advisory mandamus, in which appellate courts advise lower courts on novel issues of law through consideration of mandamus petitions, flows from principles supporting supervisory mandamus.<sup>31</sup> In *Schlagenhauf v. Holder*,<sup>32</sup> the Supreme Court carved out an exception to the collateral order doctrine in which appellate courts may review novel questions of law on an interlocutory basis.<sup>33</sup> In *Schlagenhauf*, the petitioner was the first litigant ordered to undergo a physical examination as part of pretrial discovery in a negligence action.<sup>34</sup> The petitioner immediately sought a writ of mandamus from the appellate court, challenging the district court's power to compel such an examination.<sup>35</sup> This petition cir-

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<sup>25</sup> See Geyh, *supra* note 21 at 288 (noting writ's use to discourage or prevent erroneous practices, as well as to resolve novel questions of law); see also *infra* note 32-33 and accompanying text (describing innovative uses of mandamus).

<sup>26</sup> 352 U.S. 249 (1957).

<sup>27</sup> See *id.* at 255-56 (deeming appellate courts' use of prerogative writs to review interlocutory matters proper exercise of discretion).

<sup>28</sup> See *id.* at 259 (noting issuance of writs within judges' sound discretion). "We believe that supervisory control of the District Courts by the Court of Appeals is necessary to proper judicial administration in the federal system." *Id.* Cf. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1480-82 (1984) (critiquing expansive use of supervisory power by intermediate federal courts despite lack of express statutory grant).

<sup>29</sup> See Note, *supra* note 22 at 609 (discussing supervisory mandamus as appellate tool for deterrence of future judicial behavior).

<sup>30</sup> See *id.* at 610 (asserting supervisory mandamus falls outside traditional use of writ); see also *infra* notes 55-63 and accompanying text (explaining final decision rule).

<sup>31</sup> See Note, *supra* note 22 at 611 (explaining appellate court supervision of lower courts may extend to settling novel questions of law).

<sup>32</sup> 379 U.S. 104 (1964).

<sup>33</sup> See *id.* at 110 (holding lower court's order constituted abuse of discretion that may be addressed through mandamus petition). The petitioner argued that the district court lacked the power to order him to submit to a physical examination because his physical condition was not "in controversy" as defined by Rule 35 of the Federal Rules of Civil Procedure. *Id.*

<sup>34</sup> See *id.* (stating challenged order for examination first of its kind in any federal decision).

<sup>35</sup> See *id.* at 109 (describing petitioner's course of action in challenging order for medical examination).

cumvented the final decision rule because it requested review of an order that was neither dispositive nor a final judgment.<sup>36</sup> Nevertheless, the Court declared that when the issue under review in the petition for mandamus is a “basic, undecided question,” an appellate court can properly advise a district court of the contours of the applicable Federal Rule of Civil Procedure.<sup>37</sup> Advisory mandamus thus allows the appellate court to review issues of first impression during the litigation of a case without any finding that the district court has exceeded its jurisdiction.<sup>38</sup>

Following the advent of supervisory and advisory mandamus, the use of the writ has expanded into other areas.<sup>39</sup> For example, in the anti-trust litigation producing *In re International Business Machines Corporation (IBM)*,<sup>40</sup> the Second Circuit invoked the writ to order the district court to end the convoluted thirteen-year-long litigation.<sup>41</sup> In the recent asbestos tort case *In re DaimlerChrysler Corporation*,<sup>42</sup> the Fifth Circuit issued a writ of mandamus ordering the case reassigned on remand.<sup>43</sup> *DaimlerChrysler* illustrates mandamus as a form of appellate review that enables litigants to challenge a judge’s denial of a recusal motion without awaiting final judgment.<sup>44</sup>

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<sup>36</sup> See 28 U.S.C. § 1291 (2002) (granting circuit courts appellate power over “final orders,” except those immediately appealable as of right to Supreme Court).

<sup>37</sup> See *Schlagenhauf*, 379 U.S. at 110 (stating appellate courts may use discretionary powers in determining whether or not to grant writs).

<sup>38</sup> See Note, *supra*, note 22 at 616 (exploring implication of Court’s determination that advisory mandamus may be used to clarify novel issues). The author contends that *Schlagenhauf* authorizes appellate courts to grant mandamus petitions solely in an effort to expeditiously settle novel questions of law without reference to the traditional mandamus “power” analysis. See *id.* But see *In re Atlantic Pipe Corp.*, 304 F.3d 135, 139-40 (1st Cir. 2002) (holding petitioner need not show irreparable harm when mandamus petition is advisory in nature). In *Atlantic Pipe*, petitioner’s opponent argued mandamus was improper because petitioner would not suffer irreparable harm from nonbonding arbitration. See *id.* Rejecting this argument, the First Circuit held that mandamus was proper because the petition addressed a “systematically important issue as to which the court has not yet spoken.” *Id.* at 140.

<sup>39</sup> See Steven Wisotsky, *Extraordinary Writs: “Appeal” by Other Means*, 26 AM. J. TRIAL ADVOC. 577, 586-91 (2003) (detailing use of mandamus to challenge various discovery orders). Litigants may file mandamus petitions to prevent irreparable harm resulting from compelled disclosure of privileged information or trade secrets. See *id.* In addition, litigants or news agencies affected by pretrial gag orders may contest such orders through mandamus petitions. See *id.*

<sup>40</sup> 687 F.2d 591, 597 (2d Cir. 1982).

<sup>41</sup> See *id.* at 597 (stating former party-opponents both sought writ of mandamus to end litigation after judge refused to do so). See generally Maryellen Fullerton, *Exploring the Far Reaches of Mandamus*, 49 BROOK. L. REV. 1131 (1983) (discussing Second Circuit’s use of mandamus to end litigation in *IBM*).

<sup>42</sup> 294 F.3d 697 (5th Cir. 2002).

<sup>43</sup> See *DaimlerChrysler*, 294 F.3d at 701 (granting mandamus petition requesting reassignment on remand due to trial judge’s displayed hostility toward defendants).

<sup>44</sup> See *id.* at 701 (ordering reassignment of case on remand despite judge’s “good faith

### B. Statutory Disqualification Mechanisms

Recusal is the statutory method of judicial disqualification due to disability, bias, or partiality.<sup>45</sup> When a judge is deemed “unable to proceed,” the Federal Rules of Civil Procedure guide his or her replacement.<sup>46</sup> Another judge may proceed with the trial if the original judge is unable to continue because of death, illness, disability, retirement, or resignation.<sup>47</sup> The statutory phrase “unable to proceed” is now also interpreted consistently with disqualification.<sup>48</sup> First, disqualification is warranted where a judge, due to a personal stake in the litigation, has a direct bias either against or in favor of a party.<sup>49</sup> Second, disqualification is required when a judge may be tempted to base his judgments on personal knowledge of the facts at issue.<sup>50</sup>

Courts have construed district court judges’ duty to recuse themselves for bias or prejudice as an objective one requiring judges to avoid

effort” to regain impartiality). *See also* Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 (1984) (noting most courts assume propriety of immediate review of denials of recusal motions).

<sup>45</sup> *See* FED. R. CIV. P. 63 (detailing district court’s power to reassign case when initial trial judge deemed “unable to proceed”). *See generally* 12 MOORE, *supra* note 11 ¶ 63.20 (explaining nature and scope of impartiality requirement, as well as standards for determining impartiality). A judge’s impartiality must be evaluated objectively. *Id.* at ¶ 63.20[4]. Moore observes that “[t]he standard for recusal is whether a reasonable person, with knowledge and understanding of all the relevant facts, would conclude that the judge’s impartiality might reasonably be questioned.” *Id.*

<sup>46</sup> *See* FED. R. CIV. P. 63. Rule 63 states the following:

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

*Id.*

<sup>47</sup> *See* 12 MOORE, *supra* note 11 at ¶ 63.20 (offering definitions of the phrase “unable to proceed”).

<sup>48</sup> *See* 12 MOORE, *supra* note 11 at ¶ 63.03[3] (explaining 1991 rule amendments broadened scope of “inability” to include judicial bias).

<sup>49</sup> *See* 18 U.S.C. § 455 (2002) (requiring judge’s recusal when he or she has pecuniary interest in litigation, has served as counsel for party, or has family members serving as counsel for party).

<sup>50</sup> *See* United States v. Microsoft Corp., 56 F.3d 1448, 1463 (1995) (ordering reassignment after determining trial judge based finding on his own research about Microsoft’s practices, not on evidence presented at trial); 12 MOORE, *supra* note 11, at ¶ 63.20 (detailing disqualification for bias and extrajudicial knowledge). *But see* Liteky v. United States, 510 U.S. 540, 548-49 (1994) (limiting extrajudicial source doctrine as one factor among many considered in determining judicial bias).

even the appearance of partiality.<sup>51</sup> Judges must recuse themselves when an objective observer could reasonably question their neutrality, regardless of whether they are actually biased.<sup>52</sup>

When the presiding judge does not pursue recusal, a party may move for disqualification.<sup>53</sup> Courts have also noted that a judge has as much of a duty not to recuse him or herself when disqualification is not warranted as to recuse when disqualification is warranted.<sup>54</sup>

### C. *Mandamus and the Final Decision Rule*

The Judicial Code grants the courts of appeals jurisdiction to review “final decisions” from the district courts.<sup>55</sup> Final decisions are generally

<sup>51</sup> See *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (describing goal of § 455(a) to protect against appearance of partiality). The Court held that the judge need not even be personally aware of the facts giving rise to the appearance of partiality. See *id.* But see *Liljeberg*, 486 U.S. at 879 (Rhenquist, C.J., dissenting) (asserting appearance standard did not require judge’s disqualification where judge lacked actual knowledge of financial interest in litigation).

<sup>52</sup> See 28 U.S.C. § 455(a) (2002) (stating judge subject to disqualification when partiality reasonably questioned); *Liljeberg*, 486 U.S. at 860 (characterizing inquiry as independent of judge’s actual knowledge); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 71 (2000) (noting objective standard requires awareness by judges that observers of judicial process more likely to question judicial impartiality). In *Liljeberg*, the Court recognized that “people who have not served on the bench are often too willing to indulge suspicions and doubts concerning the integrity of judges.” *Liljeberg*, 486 U.S. at 864-65. But see Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 747 (1973) (considering implications of applying strict applying appearance of bias standard to judicial disqualification analysis). The author posits that an increased willingness by appellate judges to order disqualification of trial judges arguably undermines the presumption of judicial neutrality. See *id.*

<sup>53</sup> See 28 U.S.C. § 144 (permitting parties to file motion and affidavit attesting to judge’s perceived bias and requesting reassignment).

<sup>54</sup> See *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) (noting affidavits accompanying motion to recuse must establish personal rather than judicial bias). In *Bray*, the appellant had not only written articles calling for the trial judge’s impeachment, but also collected signatures supporting the judge’s removal. See *id.* In upholding the trial judge’s denial of appellant’s motion, the court stressed that the appellant must show facts demonstrating the judge’s personal bias or prejudice. See *id.* That the judge had previously expressed an opinion on a relevant point of law is insufficient to establish personal bias. See *id.* See also *Rosen v. Sugarman*, 357 F.2d 794, 797-98 (2d Cir. 1966) (asserting obligation to proceed especially strong, absent colorable claim of prejudice, when judge highly familiar with case).

<sup>55</sup> See 28 U.S.C. § 1291. Section 1291 states in pertinent part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The ju-

those decisions that terminate the litigation on the merits and leave the court only to execute the judgment.<sup>56</sup> The collateral order doctrine, however, creates an exception to the final decision rule.<sup>57</sup> Interlocutory appeals are traditionally reserved for orders that are conclusive, resolve important questions of law independent of the merits, and are effectively unreviewable on appeal from a final judgment.<sup>58</sup> Additionally, denial of a motion is not a final order appealable as of right.<sup>59</sup>

Mandamus has evolved into an accepted medium for interlocutory review of orders denying recusal motions.<sup>60</sup> In this regard, current practice diverges from the courts' traditional disfavor of mandamus as a medium for interlocutory appeal.<sup>61</sup> Although a denial of a motion may be appealed from the final judgment, courts have held that postponed appellate review is insufficient to support granting mandamus relief.<sup>62</sup> In addition, an in-

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risdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

*Id.*

<sup>56</sup> See *Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999) (interpreting term "final decision" in § 1291 to bar appellate review until final judgment entered); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (explaining history of final decision rule). See generally Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 548-51 (1932) (chronicling development of final decision rule).

<sup>57</sup> See *Cunningham*, 527 U.S. at 204 (describing exception for "small category" of appeals from orders not terminating litigation). The Court noted that issues inextricably linked with the merits of a case fall outside the scope of the exception to the final decision rule. See *id.* at 206.

<sup>58</sup> See *id.* (outlining characteristics of collateral order); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995) (determining order denying county commission's summary judgment motion not collateral order). But see *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (holding remand to state court of removed case constitutes collateral order because remand terminates federal jurisdiction).

<sup>59</sup> See Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267, 280 (1988) (arguing courts of appeals lack jurisdiction in absence of final judgment or controlling question of law); Nelson Moore, *supra* note 44 (establishing grant or denial of motion to recuse constitutes neither final order nor permissible exception). See generally 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3553 (2d ed. 1984) (describing application of final decision rule).

<sup>60</sup> See Geyh, *supra* note 21 at 297 (describing mandamus as remedy for appealing denial of motion to recuse).

<sup>61</sup> See *Will v. United States*, 389 U.S. 90, 97 (1967) (disfavoring government's mandamus petition as form of piecemeal appeal); Fullerton, *supra* note 41 at 1150 (examining *IBM* case as expansion of interlocutory appellate procedure).

<sup>62</sup> See Weinstein, *supra* note 59, at 281 (characterizing courts of appeals' increasing recourse to mandamus as expansion of appellate jurisdiction); Fullerton, *supra* note 41 (noting statutory and common law disapproval of piecemeal appeals).

crease in interlocutory review risks straining the limited resources of the district courts.<sup>63</sup>

### III. DIFFERING APPROACHES TO APPELLATE REVIEW OF RECUSAL MOTIONS

#### A. *Circuits that Interpret "Appearance" Narrowly*

The First Circuit maintains that mandamus is a discretionary writ and should only issue upon a showing of clear error.<sup>64</sup> The First Circuit requires that claims of bias be supported by a factual basis, and that the factual allegations "provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality."<sup>65</sup> Comments related to the judge's opinion of parties, if based on the party's behavior during the litigation, do not meet the First Circuit's clear error standard.<sup>66</sup> While the recusal statutes aim to preserve the appearance of impartiality, they prohibit reassignment on the basis of unsupported speculation.<sup>67</sup>

When evaluating petitions for mandamus alleging judicial bias, the Second, Sixth, and Ninth Circuits employ a three-part test tending to weigh against reassignment.<sup>68</sup> These circuits consider whether the original judge would have substantial difficulty setting aside previously-expressed views

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<sup>63</sup> See Weinstein, *supra* note 59 at 281. Judge Weinstein quotes from *New York City Housing Development v. Hart*, 796 F.2d 976, 978 (7th Cir. 1986), stating that "a practice of ready recusal, coupled with a rule that requires the judge to whom the case is reassigned revisit all of the rulings after the filing of a motion to disqualify, would multiply the work of judges who already have much to do." *Id.* See also Nelson Moore, *supra* note 44 (noting propriety of interlocutory review of judges' refusal to recuse entails balancing various interests). Nelson Moore intimates that immediate appellate review of orders denying motions to recuse requires consideration of two basic policies; first, the interest in judicial economy promoted by the final decision rule, and, second, the confidence in neutrality fostered by the disqualification statutes. See *id.*

<sup>64</sup> See *In re Marisol Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997) (noting mandamus almost always withheld absent demonstration petitioner "clearly" entitled to relief).

<sup>65</sup> See *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (quoting *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998)) (describing test as balance between preserving appearance of impartiality and preventing judge shopping). The court notes that "recusal on demand would provide litigants with a veto against unwanted judges." *Boston's Children First*, 244 F.3d at 167.

<sup>66</sup> See *Martinez-Catala*, 129 F.3d at 220 (asserting judge forming negative opinion of party does not necessarily constitute "clear showing" of bias or prejudice).

<sup>67</sup> See *id.* (quoting *United States v. Chantel*, 902 F.2d 1018, 1023 (1st Cir. 1990)) (stating recusal may not be based on "irrational, highly tenuous speculation").

<sup>68</sup> See Gary Young, *High Court Unleashes Patent Splits*, NAT'L L.J., July 15, 2002, at B5 (describing circuit split regarding factors courts of appeals consider in determining whether or not to reassign).

or findings, whether reassignment is advisable to protect the appearance of justice, and whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.<sup>69</sup> The three-part test enables courts of appeals to avoid chastising trial judges because, on balance, it reassigns cases in the interest of justice.<sup>70</sup>

### B. Circuits that Interpret "Appearance" Broadly

While the Third, Eleventh, and D.C. Circuits maintain that mandamus is an extraordinary remedy, they apply a test that tends to favor reassignment on remand.<sup>71</sup> These circuits consider reassignment appropriate where the district court judge engages in conduct that generates an appearance of impropriety or lack of impartiality in the mind of a reasonable member of the public.<sup>72</sup> They also stress that the appearance of an unbiased tribunal is essential to the function of the judiciary "as a neutral, impartial administrator of justice."<sup>73</sup>

The Third Circuit contends that mandamus is an appropriate vehicle to preserve the appearance of an impartial tribunal.<sup>74</sup> Mandamus, in the Third Circuit's view, fulfills the goal of not only correcting harm to the litigant, but also preserving public confidence in the integrity of the judicial process.<sup>75</sup> The Third Circuit holds that while review on appeal from

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<sup>69</sup> See, e.g., *United States v. Nat'l Med. Enter., Inc.*, 792 F.2d 906, 914 (9th Cir. 1986) (denying government's request for recusal after determining judge would not have substantial difficulty conducting fair proceeding); *In re IBM*, 687 F.2d 591, 604 (2d Cir. 1982) (issuing mandamus directing district court judge to terminate litigation without ordering him to recuse); *Bercheny v. Johnson*, 633 F.2d 473, 476 (6th Cir. 1980) (applying three-part test to compel resentencing hearing before a different judge); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (outlining three-part test, but tending more to reassignment when judge sits as factfinder).

<sup>70</sup> See *Bercheny*, 633 F.2d at 476 (noting reassignment order not intended to comment negatively upon original judge).

<sup>71</sup> See *Young*, *supra* note 68 (outlining Third, Eleventh, and D.C. Circuits' test for reassignment).

<sup>72</sup> See *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (asserting reassignment warranted when judge's conduct creates significant risk of undermining public confidence in judicial neutrality); *United States v. White*, 846 F.2d 678, 695 (11th Cir. 1988) (ordering case reassigned on remand because judge's rulings adversely affected appearance of justice). In *Torkington*, the Eleventh Circuit considered the three prongs of the Second Circuit test. *Torkington*, 874 F.2d at 1447. The court determined that the appearance of impartiality controlled and ordered the case reassigned on remand. See *id.*

<sup>73</sup> See *Haines v. Liggett Group*, 975 F.2d 81, 98 (3d Cir. 1992) (quoting *Torkington*, 874 F.2d at 1447) (ordering reassignment after determining judge's comments published in newspaper harmed appearance of neutrality).

<sup>74</sup> See *Alexander v. Primerica Holdings*, 10 F.3d 155, 162 (3d Cir. 1993) (stating mandamus proper method of reviewing judge's order refusing to recuse under 28 U.S.C. § 455).

<sup>75</sup> See *id.* (stressing maintaining appearance of justice essential to accomplishing judicial process goals). The court noted that the trial judge need not harbor actual bias

final judgment may cure harm to the litigant, it fails to adequately cure harm to public faith in judicial neutrality.<sup>76</sup>

### C. Seventh Circuit Procedural Rule

The Seventh Circuit frames the issue procedurally, requiring litigants to move for mandamus immediately after the judge grants or denies a recusal motion under § 144.<sup>77</sup> The court reviews a district court judge's denial of a motion to recuse for abuse of discretion or a showing of prejudice, but only if the petitioner requests a writ of mandamus immediately following the denial.<sup>78</sup> Failure to request the writ at that time constitutes waiver.<sup>79</sup> Consequently, when a litigant raises a judicial bias argument for the first time on appeal, the Seventh Circuit applies a plain error standard of review.<sup>80</sup> District court judges are presumed impartial, and the writ is not granted readily.<sup>81</sup>

### D. Fifth Circuit Flexible Test

With its recent *DaimlerChrysler* decision, the Fifth Circuit signaled that it will continue to consider both tests in determining whether reassignment on remand is warranted, but declined to definitively adopt either approach.<sup>82</sup> In *DaimlerChrysler*, the district court judge characterized the defendant automakers' behavior as "the most manipulative and craven

against the defendant to render mandamus proper. *See id.* Rather, reassignment serves to promote public confidence in the judicial process. *See id.*

<sup>76</sup> *See* *Madden v. Myers*, 102 F.3d 74, 78 (3d Cir. 1996) (holding mandamus petitions challenging failure to recuse not prohibited by Prison Litigation Reform Act). In *Madden*, the court echoed *Primerica's* assertion that mandamus petitions for reassignment assist in curing not only harm to the litigants in a specific case, but also harm to the public's perception of the judicial process. *See id.* In addition, *Madden* is an example of mandamus in the criminal context. *See id.* at 77.

<sup>77</sup> *See* 12 MOORE, *supra* note 11 at ¶ 63.71 (describing Seventh Circuit procedural requirements).

<sup>78</sup> *See* *United States v. Towns*, 913 F.2d 434, 443 (7th Cir. 1990) (holding criminal defendant's appeal from final decision of trial judge's refusal to recuse not properly preserved). The court makes clear that unlike motions to recuse for *actual* bias under § 144, denials of motions brought pursuant to § 455 must be immediately appealed through a petition for mandamus. *See id.*

<sup>79</sup> *See* *United States v. Sidener*, 876 F.2d 1334, 1336 (7th Cir. 1989) (holding defendant's recusal argument waived by failure to petition for mandamus immediately after denial of recusal motion).

<sup>80</sup> *See* *United States v. Ramusack*, 928 F.2d 780, 784 (7th Cir. 1991) (applying plain error standard to bias argument raised for first time on appeal).

<sup>81</sup> *See* *United States v. Baskes*, 687 F.2d 165, 170 (7th Cir. 1981) (stating petitioner bears "substantial burden" in overcoming presumption of judicial impartiality).

<sup>82</sup> *See* *DaimlerChrysler*, 294 F.3d at 701 (stating Fifth Circuit's precedent has "expressly declined" to adopt one specific test).

approach to litigation that [the] Court [had] ever witnessed."<sup>83</sup> The Fifth Circuit, citing various other opinions expressed by the district court judge, held that the evidence of bias met the requirements for both tests.<sup>84</sup> In *DaimlerChrysler*, the Fifth Circuit declined to delineate a standard to govern mandamus petitions requesting reassignment.<sup>85</sup>

#### IV. THE BROADENING SCOPE OF SUPERVISORY MANDAMUS

Public confidence in judicial independence is essential to the judiciary's legitimacy, especially during periods of intense political polarization.<sup>86</sup> Recent political debate suggests that the citizenry values and demands an independent judiciary.<sup>87</sup> The judicial branch derives its power from the citizenry's belief that the judicial process is a neutral one capable of resolving legal disputes without regard to the political, socioeconomic, cultural, or ethnic attributes of the parties.<sup>88</sup> Therefore, preserving not only the reality, but also the appearance of impartiality remains a fundamental concern of the judiciary.<sup>89</sup>

Although mandamus petitions requesting appellate review of recusal motions circumvent the final decision rule, they perform a legitimate and important function by promoting public confidence in judicial independence.<sup>90</sup> As the *DaimlerChrysler* decision illustrates, however, the maze of criteria employed by the courts of appeals in determining whether or not to grant mandamus petitions ordering recusal and reassignment ofers litigants little consistency across circuits.<sup>91</sup>

The Fifth Circuit test allows appellate courts the flexibility to examine recusal issues on a case-by-case basis, weighing the facts and circumstances of each case with the importance of preserving the appearance of

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<sup>83</sup> See *id.* (quoting district court judge's memorandum accompanying his order denying recusal motion).

<sup>84</sup> See *id.* (holding judge's hostility toward defendants, as evidenced by responses to various defense motions, met standards of both tests). The appellate court also commented that the district court judge's remarks during the course of the litigation indicated that it would be "exceedingly difficult" for the judge to regain impartiality. *Id.*

<sup>85</sup> See *id.* (holding "hostility" toward petitioners exhibited by district court judge satisfies both tests).

<sup>86</sup> See Denison, *supra* note 4 (describing political controversy generated by alleged "judicial activism").

<sup>87</sup> See *supra* notes 5-6 and accompanying text (discussing recent public debate regarding impartiality of Supreme Court Justices).

<sup>88</sup> See *supra* notes 1-3 and accompanying text (quoting Supreme Court Justices regarding importance of judiciary's reputation).

<sup>89</sup> See *supra* note 10 and accompanying text (citing Judicial Cannon of Ethics).

<sup>90</sup> See *supra* notes 55-63 and accompanying text (discussing mandamus and final decision rule).

<sup>91</sup> See *supra* notes 64-85 and accompanying text (outlining various approaches to appellate review of recusal motions employed by circuit courts).

neutrality.<sup>92</sup> The Seventh Circuit procedural approach provides litigants clear guidelines and preserves the presumption of judicial neutrality.<sup>93</sup> A test combining the flexibility of the Fifth Circuit's test with the clarity of the Seventh's would prevent burdening the courts with frivolous and untimely mandamus petitions while promoting public confidence in the judicial process.<sup>94</sup>

## V. CONCLUSION

Recent public debate examining the impartiality of Supreme Court Justices demonstrates that appearances do matter.

The American judicial system is a source of great pride to Americans; inextricably linked to that pride is the presumption that the system is impartial and unbiased. Those who sit on the bench shoulder the burden of upholding the integrity of the system not only in fact, but also in spirit.

Mandamus petitions seeking interlocutory appellate review of recusal motions provide an important mechanism for promoting public faith in the judicial process. Such petitions further the goal of ensuring that all those who approach the courthouse door do so with utmost confidence that justice is administered freely, unfettered by bias or predisposition.

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<sup>92</sup> See *supra* notes 82-85 and accompanying text (describing recent Fifth Circuit case applying broad, flexible approach to recusal motion review).

<sup>93</sup> See *supra* notes 77-81 and accompanying text (highlighting Seventh Circuit's application of waiver to recusal motion analysis).

<sup>94</sup> See *supra* notes 63-64 and accompanying text (arguing liberal grant of recusal motions may increase burden of courts and manipulation by litigants).