JUDICIAL IMPARTIALITY AND THE EXTRAJUDICIAL DIVIDE

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The criminal prosecution of former National Security Advisor Michael T. Flynn arising out of his surreptitious contacts with Russian Ambassador Sergey Kislyak before President Trump assumed office was controversial in many respects. The case received extraordinary publicity. A key aspect of the case that received little attention, however, was Flynn's effort to have the D.C. Circuit Court of Appeals wrest his case away from U.S. District Judge Emmet Sullivan based on the judge's alleged hostility toward him. Judge Sullivan, who would have sentenced Flynn for his admitted crime but for President Trump's pardon, had harshly criticized Flynn's conduct in open court. Flynn desperately did not want to be sentenced by Judge Sullivan. Flynn's effort to disqualify Judge Sullivan rightly failed, however, because the judge's alleged partiality was rooted in the facts of the case, and his comments that supposedly evidenced his antagonism toward Flynn reflected opinions he formed during the proceedings. In sum, there was no extrajudicial basis to disqualify Judge Sullivan.

The necessity of an extrajudicial source to disqualify a judge for alleged bias or partiality is a settled aspect of judicial ethics. The extrajudicial source doctrine generally insulates judges against disqualification for a real or perceived lack of impartiality grounded in the performance of their judicial duties. The doctrine rests on the principle that an extrajudicial source of partiality normally is necessary to disqualify a judge because judges will naturally form opinions and conclusions about parties and their claims during litigation, and no reasonable person with full knowledge of the facts would correspondingly doubt their impartiality. Yet, there are times when judges' impartiality may reasonably be questioned based on actions taken, rulings made, knowledge gained, or opinions formed during proceedings. Long story short, judges can, in fact, be disqualified for alleged partiality with "intrajudicial" roots. The standard to disqualify judges based on intrajudical factors, however, is difficult to satisfy.

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Judges' possible disqualification based on intrajudicial factors is a critical issue for courts and for trial and appellate lawyers, yet it has escaped scholarly attention. This article fills that void. The article uses General Flynn's case as a teaching tool to highlight and explain in a useful fashion judges' disqualification based on alleged intrajudicial bias or partiality.

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I. INTRODUCTION

Former National Security Advisor Michael T. Flynn's criminal prosecution arising out of his communications with Russian Ambassador Sergey Kislyak before President Trump assumed office was controversial and unusual in many respects.[1] By way of background, on December 1, 2017, Flynn "pled guilty to willfully and knowingly making materially false statements and omissions to the Federal Bureau of Investigation ("FBI"), in violation of 18 U.S.C. § 1001(a)(2)," regarding his conversations with Kislyak.[2] District Judge Rudolph Contreras accepted Flynn's guilty plea and found that he entered into his plea agreement with the government "knowingly, voluntarily, and intelligently."[3] Shortly thereafter, Flynn's case was randomly reassigned to District Judge Emmet Sullivan.[4] During a December 18, 2018 sentencing hearing, Judge Sullivan conducted a lengthy plea colloquy occasioned by statements in one of Flynn's filings which seemed to challenge the validity of his FBI interview.[5] In response,

1. *See generally In re* Flynn, 973 F.3d 74, 91–92 (D.C. Cir. 2020) (en banc) (Rao, C.J., dissenting) (providing the history of the investigation that resulted in Flynn's prosecution); United States v. Flynn, 411 F. Supp. 3d 15, 22–23 (D.D.C. 2019) (discussing Flynn's criminal conduct).

2. *Flynn*, 411 F. Supp. 3d at 21.

3. *Id.*

4. *Id.*

5. *Id.*

Flynn unconditionally reaffirmed his guilty plea.[6] The colloquy forced Flynn "to admit publicly that he knew lying to the bureau was illegal and that he was guilty of a crime."[7]

Judge Sullivan had harsh words for Flynn during the sentencing hearing. At one point, the judge pointed to the American flag in his courtroom and said that Flynn's misconduct "[a]rguably . . . undermine[d] everything this flag . . . stands for."[8] Judge Sullivan also said that Flynn arguably "sold [his] country out" and asked one of the federal prosecutors whether Flynn "could be charged with 'treason.'"[9] And, while Judge Sullivan stated that when imposing sentence he would consider Flynn's cooperation with the government as a condition of his guilty plea, he reiterated that he was "not hiding [his] disgust, [his] disdain," for Flynn's admitted crime.[10]

Judge Sullivan postponed Flynn's sentencing to allow Flynn to cooperate with the government pursuant to his plea agreement.[11] Thereafter, Flynn retained new lawyers, moved to withdraw his guilty plea, proclaimed his innocence, accused the prosecutors of misconduct, and asserted that the government had breached the plea agreement.[12] In an extraordinary step, the government subsequently moved to dismiss all charges against him with prejudice under Federal Rule of Criminal Procedure 48(a).[13] But, instead of granting the government's motion to dismiss, Judge Sullivan appointed retired District Judge John Gleeson as amicus curiae to oppose the government's motion and to analyze whether Flynn might be held in criminal contempt of court for perjury.[14] Flynn swiftly petitioned the United States Court of Appeals for the District of Columbia Circuit for a writ of mandamus.[15] In seeking mandamus, Flynn sought to compel Judge Sullivan to grant the government's motion to dismiss and to vacate Gleeson's appointment as amicus curiae.[16] A divided panel of the court ordered Judge Sullivan to grant the government's motion to dismiss.[17] The full court then granted rehearing en banc, denied Flynn's petition, and left the case with Judge Sullivan to be decided "with appropriate dispatch."[18]

6. *Id.*

7. Spencer S. Hsu, Matt Zapotosky & Carol D. Leonnig, *Michael Flynn's Sentencing Delayed After Judge Tells the Ex-Trump Adviser He Might Not Avoid Prison Time*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/world/national-security/michael-flynn-trumps-former-national-security-adviser-scheduled-to-be-sentenced/2018/12/17/19ce1bb4-0247-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/U2JG-AJHG].

8. *Id.*

9. *Id.*

10. *Id.*

11. *In re* Flynn, 973 F.3d 74, 92 (D.C. Cir. 2020) (en banc) (Rao, C.J., dissenting).

12. *Id.*

13. *Id.* at 76 (majority opinion).

14. United States v. Flynn, No. 17-232 (EGS), 2020 WL 2466326, at *1 (D.D.C. May 13, 2020).

15. *In re Flynn*, 973 F.3d at 77.

16. *Id.*

17. *In re* Flynn, 961 F.3d 1215, 1227 (D.C. Cir. 2020), *reh'g en banc granted, order vacated by* 973 F.3d 74 (D.C. Cir. 2020) (en banc).

18. *In re Flynn*, 973 F.3d at 85.

Judge Sullivan never got the chance to decide the case. President Trump pardoned Flynn on November 25, 2020.[19] On December 8, 2020, Judge Sullivan denied the government's motion to dismiss as moot.[20]

In re Flynn—as the case was styled on mandamus—was unusual in that Judge Sullivan appointed amicus counsel to oppose the government's motion to dismiss the charges against Flynn rather than deferentially granting the motion, and because Judge Sullivan retained private lawyers to represent him in the mandamus proceeding.[21] Further, in addition to defending his actions on mandamus, Judge Sullivan sought en banc review of the panel decision directing him to grant the government's Rule 48(a) motion.[22] The case was controversial principally due to Attorney General William Barr's alleged abuse of his authority in facilitating the government's motion to dismiss the charges against Flynn despite prosecutors having him dead to rights.[23]

An aspect of the case that drew little attention was Flynn's attempt to have his case reassigned to a different district judge upon remand.[24] Although Flynn specified no authority as a basis for his request, it could have been predicated on the requirement of judicial impartiality established in 28 U.S.C. § 455(a).[25] Section 455(a) states: "[a]ny justice, judge, or magistrate judge of the United

19. Rosalind S. Helderman & Josh Dawsey, *Trump Pardons Former National Security Adviser Michael Flynn, Who Pleaded Guilty to Lying to the FBI*, WASH. POST (Nov. 25, 2020), https://www.washingtonpost.com/politics/michael-flynn-trump-pardon/2020/11/25/3cd79198-2e65-11eb-bae0-50bb17126614_story.html [https://perma.cc/RJ6P-V65F]; Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html [https://perma.cc/H9YW-M4KY].

20. United States v. Flynn, 507 F. Supp. 3d 116, 136–37 (D.D.C. 2020).

21. Normally, the opposing party nominally represents the judge in a mandamus proceeding. Here, because the government did not oppose Flynn's petition, the judge had to retain counsel. *Id.* at 124–25.

22. *In re Flynn*, 973 F.3d at 77, 79 ("An active member of the Court also made a *sua sponte* suggestion that the case be reheard *en banc*.").

23. *See* Steven J. Harper, *Barr Battles the Rule of Law*, LITIG., Fall 2020, at 49, 53–54; Mark Mazzetti, Charlie Savage & Adam Goldman, *How Michael Flynn's Defense Team Found Powerful Allies*, N.Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/06/28/us/politics/michael-flynn-sidney-powell.html [https://perma.cc/L4Z2-8PFX]; Paul Waldman, *A Retired Judge's Sharp Rebuke of William Barr Confirms the Worst*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/opinions/2020/06/10/retired-judges-sharp-rebuke-william-barr-confirms-worst [https://perma.cc/76KW-GB7K]; Alexander Mallin, *Nearly 2K Former DOJ Officials Call for AG Barr to Resign over Flynn Case*, ABC NEWS (May 11, 2020, 10:32 AM), https://abcnews.go.com/Politics/2000-doj-officials-call-ag-barr-resign-flynn/story?id=70615677 [https://perma.cc/NB9H-X448]; *William Barr's Perversion of Justice*, N.Y. TIMES (May 9, 2020), https://www.nytimes.com/2020/05/09/opinion/sunday/michael-flynn-william-barr-justice-department.html [https://perma.cc/6SYN-GH95]; Katie Benner & Charlie Savage, *Dropping of Flynn Case Heightens Fears of Justice Dept. Politicization*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/08/us/politics/barr-flynn-case-justice-department.html [https://perma.cc/N68W-7TTT]; Neal K. Katyal & Joshua A. Geltzer, *The Appalling Damage of Dropping the Michael Flynn Case*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/08/opinion/michael-flynn-trump-barr.html [https://perma.cc/N5DQ-8NGU]; Paul Rosenzweig, *An Attack on a Fundamental Principle of Justice*, ATL. (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/attack-fundamental-principle-justice/611395 [https://perma.cc/9KWH-G5A5]; David A. Graham, *Why Michael Flynn Is Walking Free*, ATL. (May 7, 2020), https://www.theatlantic.com/ideas/archive/2020/05/michael-flynn-learned-to-play-by-trumps-rules/611332 [https://perma.cc/D62H-QAMY].

24. *In re Flynn*, 973 F.3d at 77.

25. *See id.* at 83–84 (discussing possible bases for Flynn's reassignment request).

States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[26] Alternatively, Flynn might have invoked 28 U.S.C. § 455(b)(1), which requires a judge's disqualification where the judge "has a personal bias or prejudice concerning a party."[27] Regardless of the statutory underpinning,[28] the *In re Flynn* court denied Flynn's request to reassign his case.[29] The ruling likely did not surprise many trial and appellate lawyers even given the unusual nature of the case. After all, lawyers generally believe that a judge's alleged partiality must originate from an extrajudicial source to require disqualification.[30] Judge Sullivan's alleged partiality, on the other hand, was rooted in the facts of the case, and his comments reflected impressions he formed during the proceedings.[31] On the record before the court, there was no extrajudicial basis to replace him as the judge in Flynn's case.[32]

The necessity of an extrajudicial source to disqualify a judge for alleged partiality is an established aspect of judicial ethics.[33] As the Supreme Court stated more than fifty years ago, to be disqualifying, a judge's "alleged bias and prejudice . . . must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[34] Courts continue to recite the extrajudicial source requirement for judges' disqualification today.[35]

The extrajudicial source doctrine generally insulates judges against disqualification for a real or perceived lack of impartiality grounded in the performance of their judicial duties.[36] The doctrine rests on the principle that an extrajudicial source of partiality normally is needed for disqualification because judges naturally form opinions and conclusions about parties and their claims during litigation, and no reasonable person who knows the facts would

26. 28 U.S.C. § 455(a) (2018).

27. *Id.* § 455(b)(1) (2018).

28. The court might also have reassigned the case under 28 U.S.C. § 2106, which provides in pertinent part that an appellate court may remand a case and "require such further proceedings to be had as may be just under the circumstances." *Id.* § 2106 (2018).

29. *In re Flynn*, 973 F.3d at 82–85.

30. *See* CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES SAMPLE, JUDICIAL CONDUCT AND ETHICS § 4.08 (6th ed. 2020) (noting that a judge's disqualification for bias or prejudice normally requires an extrajudicial source).

31. *In re Flynn*, 973 F.3d at 84.

32. *See id.* at 83–85 (discussing the bases for Judge Sullivan's alleged hostility toward Flynn).

33. *See* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

34. *Id.*

35. *See, e.g.*, Lenk v. Monolithic Power Sys., Inc., 754 F. App'x 554, 556 (9th Cir. 2018) (stating that the district court did not abuse its discretion by denying the plaintiff's requests for recusal because the plaintiff did not prove "extrajudicial bias or prejudice"); Israel v. Dep't of Corr., 460 P.3d 777, 786 (Alaska 2020) (declining to disqualify the judge where the plaintiff did not identify an extrajudicial source of bias); Carter v. Carter, 957 N.W.2d 623, 644 (Iowa 2021) (quoting State v. Bear, 452 N.W.2d 430, 435 (Iowa 1990)) ("The party seeking disqualification must show that the judge's 'alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case.'"); Frawley v. Frawley, 597 S.W.3d 742, 759 (Mo. Ct. App. 2020) (stating that a judge's "disqualifying bias must arise from an extrajudicial source"); People v. Singh, 98 N.Y.S.3d 207, 209 (App. Div. 2019) (quoting *Grinnell Corp.*, 384 U.S. at 583); Dahl v. Dahl, 459 P.3d 276, 295 (Utah 2015) ("[P]arties claiming bias must demonstrate that the alleged bias stems from an extrajudicial source.").

36. People v. Roehrs, 440 P.3d 1231, 1237 (Colo. App. 2019).

correspondingly doubt their impartiality.[37] At the same time, the doctrine "does not automatically shield a judge from disqualification due to a judge's courtroom knowledge or activities."[38] In other words, while the extrajudicial source doctrine *generally* holds that a judge's alleged partiality must stem from an extrajudicial source to mandate disqualification, the doctrine does not establish an absolute or exclusive rule.[39] There are times when judges' impartiality may be reasonably questioned based on actions taken, rulings made, knowledge gained, or conclusions or opinions formed within the confines of proceedings.[40]

Long story short, judges can, in fact, be disqualified for partiality with alleged "intrajudicial" roots.[41] The standard for judges' disqualification based on intrajudical factors, however, is very difficult to satisfy.[42]

This Article analyzes judicial impartiality and related disqualification issues on the intrajudicial side of the extrajudicial divide. Part II outlines the principles which govern judges' disqualification where their impartiality might reasonably be questioned.[43] Part III discusses the seminal Supreme Court case on disqualification based on intrajudicial sources of partiality, *Liteky v. United States*.[44] Part IV analyzes the circumstances in which judges' alleged intrajudicial partiality regularly is an issue: (a) cases involving adverse rulings by the judge; (b) judges' expression of critical or disparaging conclusions or opinions about parties or lawyers based on facts learned or events that occurred during proceedings, including prior proceedings with common parties or lawyers; and (c) judges' conduct in the ordinary course of case administration.

37. CHARLES G. GEYH, FED. JUD. CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 34 (3d ed. 2020).

38. *Roehrs*, 440 P.3d at 1238.

39. *See id.* (discussing the scope of the extrajudicial source doctrine).

40. *See, e.g.*, United States v. Franco-Guillen, 196 F. App'x 716, 718–19 (10th Cir. 2006) (concluding that the district judge's statements at a hearing linking the defendant's Hispanic heritage with a tendency to lie violated 28 U.S.C. § 455(a) because they would cause a reasonable person to question the judge's impartiality even if the judge was not actually biased against the defendant based on his ethnicity); People v. Swilley, 934 N.W.2d 771, 796–97 (Mich. 2019) (deciding that the way the judge questioned defense witnesses during trial "pierced the veil of judicial impartiality"); Cook v. State, 606 S.W.3d 247, 257 (Tenn. 2020) (concluding that a judge conducting post-conviction proceedings should have disqualified himself based on his courtroom comments).

41. *See* Stringer v. Astrue, 252 F. App'x 645, 647–48 (5th Cir. 2007) (quoting Liteky v. United States, 510 U.S. 540, 555 (1994)) ("Recusal can be based on extrajudicial factors (bias based on family relationships or other extra-judicial influences) or intrajudicial factors (bias based on 'facts introduced or events occurring in the course of the current proceedings, or of prior proceedings')."); Brown v. State, 414 P.3d 660, 661 n.3 (Alaska 2018) ("There is a line of authority requiring recusal when a judicial officer hears, learns, or does something intrajudicially so prejudicial that further participation would be unfair.").

42. *See* Bach v. Bagley, 229 P.3d 1146, 1154 (Idaho 2010) ("[T]he standard for recusal of a judge, based simply on information that he has learned in the course of judicial proceedings, is extremely high.").

43. Lawyers and courts often use the terms "recuse" or "recusal" interchangeably with "disqualify" or "disqualification" where a judge exits a case for ethical reasons. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 1 n.2 (2019). They may also use "recusal" to describe a judge's unprompted or voluntary withdrawal from a case and "disqualification" to characterize a judge's removal ordered by another court. Because judicial ethics rules and related statutes—as well as many court opinions—employ the term "disqualification" to describe judges' replacement in all contexts, this Article does the same.

44. 510 U.S. 540, 541 (1994).

Finally, Part V examines appellate courts' reassignment of cases on remand based on the original judge's allegedly questionable impartiality.

II. THE JUDICIAL IMPARTIALITY FRAMEWORK

Litigants are entitled to impartial judges.[45] The requirement that judges perform their duties impartially is mandated by the Model Code of Judicial Conduct.[46] Canon 2 states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently."[47] Rule 2.11(A) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to" the circumstances specified in the rule's six subparts.[48] The specified circumstance relevant here resides in Rule 2.11(A)(1), which requires a judge's disqualification in a proceeding because of "personal bias or prejudice concerning a party or a party's lawyer."[49] Under Rule 2.11(A), however, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether" any of the rule's specific provisions—including Rule 2.11(A)(1)—apply.[50] "Impartiality" for judicial ethics purposes describes the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before [the] judge."[51]

A party may move to disqualify a judge based on the judge's alleged partiality, but such a motion is not a prerequisite to disqualification under Rule 2.11(A).[52] Judges must disqualify themselves whenever their impartiality might reasonably be questioned, regardless of whether a party moves for disqualification on that basis.[53] In this sense, Rule 2.11(A) is self-enforcing.[54]

45. Miller v. Sam Houston State Univ., 986 F.3d 880, 893 (5th Cir. 2021); *In re* Cullins, 481 P.3d 774, 789 (Kan. 2021); Hammons v. Hammons, 289 So. 3d 1214, 1221 (Miss. Ct. App. 2020); Casey v. Casey, 270 P.3d 109, 112 (Okla. 2011); *Cook*, 606 S.W.3d at 253; *In re* Marriage of Rounds, 423 P.3d 895, 900 (Wash. Ct. App. 2018).

46. MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2010).

47. *Id.*

48. *Id.* r. 2.11(A).

49. *Id.* r. 2.11(A)(1); *see* State v. Sawyer, 305 P.3d 608, 611 (Kan. 2013) ("Circumstances in which a judge's impartiality might reasonably be questioned cover, among others, those in which the judge has a personal bias or prejudice concerning a party or a party's lawyer.").

50. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 1 (AM. BAR ASS'N 2010); *see also* Advisory Op. No. 12, 2012 WL 3144430, at *1 (Advisory Comm. on Jud. Conduct of the D.C. Cts. 2012) ("A judge is disqualified whenever the judge's impartiality might reasonably be questioned, even if none of the specific rules in Rule 2.11(A) applies.").

51. MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS'N 2010).

52. Cook v. State, 606 S.W.3d 247, 254 (Tenn. 2020).

53. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 2 (AM. BAR ASS'N 2010).

54. *See In re* Marriage of O'Brien, 958 N.E.2d 647, 660 (Ill. 2011) ("All judges in Illinois are expected to consider, *sua sponte*, whether recusal is warranted as a matter of ethics under the Judicial Code."); State v. Van Huizen, 435 P.3d 202, 206 (Utah 2019) ("[I]t is the judge's obligation to recuse when it is required, regardless of whether a motion to disqualify is filed.").

In federal courts, judges' impartiality is assured through 28 U.S.C. § 455, which is modeled on Rule 2.11.[55] Section 455(a) states: "[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."[56] Then, § 455(b), similar to what Rule 2.11(A) does in its subparts,[57] identifies specific grounds for judges' disqualification.[58] A federal judge may be disqualified for actual or perceived partiality under § 455(a) even if none of the specific grounds for disqualification listed in § 455(b) applies in the case.[59] Section 455(a), like Rule 2.11(A), is self-enforcing.[60]

A judge's decision whether to disqualify herself is generally entrusted to the judge's sound discretion in the first instance.[61] Judges are presumed to be impartial.[62] This presumption holds even where the judge has prior experience with the litigation, the issues in dispute, or the parties.[63]

Consistent with the presumption of impartiality, a party that moves to disqualify a judge bears a heavy burden.[64] Whether a judge should be disqualified is measured against an objective standard.[65] The test for a judge's disqualification is whether "a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality."[66]

55. GEYH, *supra* note 37, at 14.

56. 28 U.S.C. § 455(a) (2018).

57. Rule 2.11(A)(1)–(6) and § 455(b)(1)–(4) differ in that Rule 2.11(A) treats the specific grounds for disqualification as a non-exclusive list of scenarios in which a judge's impartiality might reasonably be questioned, while § 455(b) treats them as bases for disqualification separate from, and in addition to, disqualification based on a judge's questionable impartiality. GEYH, *supra* note 37, at 14. In most cases, this is "a distinction without a difference—disqualification is required if the specific or general provisions are triggered, regardless of whether the specific provisions are characterized as a subset of or separate from the general." *Id.*

58. 28 U.S.C. § 455(b)(1)–(4) (2018).

59. GEYH, *supra* note 37, at 14.

60. Jenkins v. Anton, 922 F.3d 1257, 1271 (11th Cir. 2019) (quoting United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)); Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 517 F.2d 1044, 1051 (5th Cir. 1975).

61. Flores v. U.S. Dep't of Just., 391 F. Supp. 3d 353, 365 (S.D.N.Y. 2019) (quoting Lamborn v. Dittmer, 726 F. Supp. 510, 514 (S.D.N.Y. 1989)); Xyngular Corp. v. Schenkel, 160 F. Supp. 3d 1290, 1298 (D. Utah 2016); Chawla v. Appeals Ct., 120 N.E.3d 326, 328 (Mass. 2019); State v. Lierman, 940 N.W.2d 529, 544 (Neb. 2020); State v. McCabe, 987 A.2d 567, 573 (N.J. 2010).

62. United States v. Williams, 949 F.3d 1056, 1061 (7th Cir. 2020) (noting that this presumption is rebuttable); United States v. Woods, 978 F.3d 554, 570 (8th Cir. 2020) (applying 28 U.S.C. § 455(a)); State v. Macias, 469 P.3d 472, 479 (Ariz. Ct. App. 2020); Isom v. State, 563 S.W.3d 533, 546 (Ark. 2018); Indy Diamond, LLC v. City of Indianapolis, 132 N.E.3d 417, 427 (Ind. Ct. App. 2019); *In re* A.A., 951 N.W.2d 144, 176 (Neb. 2020); *In re* Paternity of B.J.M., 944 N.W.2d 542, 547 (Wis. 2020).

63. Adoption of Iliana, 135 N.E.3d 275, 283 (Mass. App. Ct. 2019).

64. *Woods*, 978 F.3d at 570 (quoting United States v. Minard, 856 F.3d 555, 557 (8th Cir. 2017)); Pearl River Cnty. Bd. of Supervisors v. Miss. State Bd. of Educ., 289 So. 3d 301, 309 (Miss. 2020); Tilson v. Tilson, 948 N.W.2d 768, 783 (Neb. 2020).

65. Johnson v. Steele, 999 F.3d 584, 587 (8th Cir. 2021); *Williams*, 949 F.3d at 1061; Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 75 (Ga. 2018); *In re* Howes, 880 N.W.2d 184, 195 (Iowa 2016); Presbyterian Church (U.S.A.) v. Edwards, 594 S.W.3d 199, 200 (Ky. 2018); Day v. State, 285 So. 3d 171, 176 (Miss. Ct. App. 2019); *Tilson*, 948 N.W.2d at 783; Cook v. State, 606 S.W.3d 247, 255 (Tenn. 2020); State v. Solis-Diaz, 387 P.3d 703, 706 (Wash. 2017).

66. *In re* Russell, 211 A.3d 426, 433 (Md. 2019); *see also* Burke v. Regalado, 935 F.3d 960, 1054 (10th Cir. 2019) ("The test under § 455(a) is . . . whether a reasonable person might question the judge's impartiality. . . . Similarly, the test is not whether someone could conceivably question a judge's impartiality but whether a reasonable person, knowing all relevant facts, would harbor doubts."); State v. Wallace, 918 N.W.2d 64, 69 (N.D.

The "reasonable person" described here is not a judge,[67] but rather an average citizen.[68] A judge does not qualify as a reasonable person or objective observer for judicial disqualification purposes for the practical reason that judges' immersion in the process of "dispassionate decision making" and sensitivity to their duty to decide cases on the merits may cause them to consider bias or partiality allegations to be less credible or serious than a lay observer would.[69] At the other end of the spectrum, the hypothetical reasonable person cannot be someone who is "unduly suspicious or concerned about a trivial risk that a judge may be biased."[70] Speculation about a judge's partiality will not support disqualification.[71]

Because a judge's alleged partiality is evaluated objectively, disqualification may be required even where the judge subjectively believes that she is impartial,[72] or where there has been no showing that the judge is actually biased or prejudiced.[73] Here, appearances count.[74] At the same time, a judge weighing disqualification may properly consider whether a party is seeking her ouster "for suspect tactical and strategic reasons."[75] Similarly, a party or lawyer who attempts to bait a judge into displays of alleged bias or prejudice has no right to the judge's disqualification.[76] "A judge is presumed to be impartial even after extreme provocation."[77] In all instances, however, whether a judge should be disqualified for partiality is a fact-specific determination.[78]

Finally, for now, litigants aggrieved by judges' refusal to disqualify themselves may challenge those decisions on appeal. Judges' decisions not to disqualify themselves when their impartiality is reasonably questioned, or when they are accused of bias, are normally reviewed on appeal for an abuse of

2018) (quoting State v. Murchison, 687 N.W.2d 725, 729 (2004)) (stating that a court must "determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality").

67. United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1999).

68. Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1310 (10th Cir. 2015).

69. *DeTemple*, 162 F.3d at 287.

70. *Id.*

71. Erlinger v. Federico, 242 So. 3d 1177, 1181 (Fla. Dist. Ct. App. 2018); Carter v. Carter, 957 N.W.2d 623, 644 (Iowa 2021); State v. Trujillo, 222 P.3d 1040, 1043 (N.M. Ct. App. 2009).

72. Arbuckle Simpson Aquifer Prot. Fed'n of Okla., Inc. v. Okla. Water Res. Bd., 343 P.3d 1266, 1271 (Okla. 2013).

73. Tilson v. Tilson, 948 N.W.2d 768, 783 (Neb. 2020).

74. *See* Cook v. State, 606 S.W.3d 247, 254 (Tenn. 2020) ("Judges must be fair and impartial both in fact and in perception.").

75. *In re* Brady, 610 B.R. 625, 631 (E.D. Mo. 2019); *see also* Conklin v. Warrington Twp., 476 F. Supp. 2d 458, 463 (M.D. Pa. 2007) ("[T]he court must consider whether attacks on a judge's impartiality are simply subterfuge to circumvent anticipated adverse rulings.").

76. *In re* Est. of Boland, 450 P.3d 849, 860 (Mont. 2019).

77. People v. Jackson, 793 N.E.2d 1, 19 (Ill. 2001).

78. *See, e.g.*, United States v. Carey, 929 F.3d 1092, 1104 (9th Cir. 2019) (quoting United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008)) (referring to disqualification under 28 U.S.C. § 455(a)); United States v. González-González, 362 F. Supp. 3d 62, 67 (D.P.R. 2019) ("Each case implicating section 455(a) is *sui generis*, requiring a fact-specific analysis."); State v. Riordan, 209 P.3d 773, 775 (N.M. 2009) (stating that "disqualification requires an examination of the specific facts in the case"); *In re* Sullivan, 135 A.3d 1164, 1175 (Pa. Ct. Jud. Discipline 2016) ("Disqualification must be determined on a case-by-case basis.").

discretion.[79] That approach aligns with the principle that individual judges are ordinarily in the best position to evaluate their impartiality,[80] such that the decision to disqualify is initially entrusted to their discretion. The abuse of discretion standard of review "allows a range of choice for the [trial] court, so long as that choice does not constitute a clear error of judgment."[81]

A minority of courts review judges' refusal to disqualify themselves de novo.[82] De novo review is the most favorable standard of review for an appellant because the appellate court affords the trial court's decision no deference.[83] An appellate court applying de novo review is writing on a clean slate.[84]

In the occasional case where a party challenges a judge's refusal to disqualify herself for the first time on appeal, the appellate court will either (1) deem the issue waived and decline to consider it,[85] or (2) review the judge's decision solely for plain error.[86] Appellate review for plain error "is 'narrow and

79. Johnson v. Steele, 999 F.3d 584, 587 (8th Cir. 2021); Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228, 1239 (10th Cir. 2020); Tejero v. Portfolio Recovery Assocs., 955 F.3d 453, 463 (5th Cir. 2020) (identifying 28 U.S.C. §§ 144, 455(a) & 455(b)(1)); Shuler v. Duke, 792 F. App'x 697, 705 (11th Cir. 2019); Smalls v. Riviera Towers Corp., 782 F. App'x 201, 206 (3d Cir. 2019); *Ex parte* George, 962 So. 2d 789, 791 (Ala. 2006); Griswold v. Homer Advisory Plan. Comm'n, 484 P.3d 120, 130 (Alaska 2021); McKinney v. State, 583 S.W.3d 399, 402 (Ark. Ct. App. 2019); State v. Milner, 155 A.3d 730, 737 (Conn. 2017); Serdula v. State, 845 S.E.2d 362, 367 (Ga. Ct. App. 2020); Oyamot v. Kawailoa Dev., LLP, No. CAAP-15-0000948, 2019 WL 6353384, at *4 (Haw. Ct. App. Nov. 27, 2019); State v. Millsap, 704 N.W.2d 426, 432 (Iowa 2005); Grubb v. Smith, 523 S.W.3d 409, 428 (Ky. 2017); Sibley v. Doe, 135 A.3d 883, 891 (Md. Ct. Spec. App. 2016); Mathiesen v. Michaud, 229 A.3d 527, 530 (Me. 2020); Hosier v. State, 593 S.W.3d 75, 94 (Mo. 2019); Rivero v. Rivero, 216 P.3d 213, 233 (Nev. 2009); *Riordan*, 209 P.3d at 775; Rath v. Rath, 911 N.W.2d 919, 927 (N.D. 2018); Pinnell v. Palmateer, 114 P.3d 515, 521 (Or. Ct. App. 2005); Lewis v. Lewis, 234 A.3d 706, 722 (Pa. Super. Ct. 2020); Prieto v. Commonwealth, 721 S.E.2d 484, 493 (Va. 2012); Hill v. Stubson, 420 P.3d 732, 744 (Wyo. 2018).

80. *In re* Marriage of Lonvick, 995 N.E.2d 1007, 1019 (Ill. App. Ct. 2013); *Lewis*, 234 A.3d at 721 n.5 (quoting *In re* A.D., 93 A.3d 888, 892 (Pa. Super. Ct. 2014)).

81. Alloco v. City of Coral Gables, 159 F. App'x 921, 923 (11th Cir. 2005) (quoting United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc)) (internal quotation marks omitted).

82. *See, e.g.*, United States v. Barr, 960 F.3d 906, 919 (7th Cir. 2020) ("We review preserved claims under § 455(a) *de novo*."); Wall v. State, 238 So. 3d 127, 142 (Fla. 2018) ("The legal sufficiency of a motion to disqualify [a judge] is a question of law, which this [c]ourt reviews de novo."); State v. Dorsey, 701 N.W.2d 238, 246 (Minn. 2005) ("Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo."); Ybarra v. State, 247 P.3d 269, 272 (Nev. 2011) (quoting PETA v. Bobby Berosini, Ltd., 894 P.2d 337, 340 (Nev. 1995), *overruled on other grounds by* Towbin Dodge, LLC v. Dist. Ct., 112 P.3d 1063 (Nev. 2005)).

83. Quick v. City of Austin, 7 S.W.3d 109, 116 (Tex. 1998).

84. *See* Rivera-Colón v. AT&T Mobility P.R., Inc. 913 F.3d 200, 206 (1st Cir. 2019) (analogizing de novo review to scrutinizing an appeal with a clean slate).

85. *See, e.g.*, United States v. DiPina, 230 F.3d 477, 486 (1st Cir. 2000) ("It does not appear that DiPina moved below for the judge's recusal or otherwise raised the issue of bias, and we therefore consider it waived."); Greenfield v. Wurmlinger, 349 P.3d 1182, 1196–97 (Idaho 2015) ("In the absence of a motion for disqualification, we will not review the issue of whether a judge should have disqualified himself or herself because there is no decision by the judge and no factual record developed from which grounds for disqualification can be discerned."); State v. Buttercase, 893 N.W.2d 430, 439 (Neb. 2017) (quoting Tierney v. Four H Land Co., 798 N.W.2d 586, 592 (Neb. 2011)); Zundel v. Zundel, 945 N.W.2d 297, 301 (N.D. 2020) ("Because judicial bias was not raised in the district court, we decline to address it for the first time on appeal.").

86. *See, e.g.*, United States v. Wedd, 993 F.3d 104, 115 (2d Cir. 2021) (applying the plain error standard where the defendant raised a 28 U.S.C. § 455(a) argument for the first time on appeal); United States v. Delorme, 964 F.3d 678, 680–81 (8th Cir. 2020) (quoting Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 663 (8th Cir. 2003)); United States v. Perez, 956 F.3d 970, 974 (7th Cir. 2020) ("Perez did not move during sentencing for the

confined to the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings.'"[87] Reversal is required only if the error prejudiced the party's substantial rights "and would result in a miscarriage of justice" if not corrected.[88] The obvious lesson for lawyers given the risk of waiver and the unfavorable plain error standard of review is to move for a judge's disqualification in the trial court promptly upon learning of the facts that allegedly justify disqualification.[89]

III. THE SUPREME COURT DECIDES *LITEKY*

As entrenched as the extrajudicial source doctrine plainly is, the mere presence of an extrajudicial source of bias or prejudice is not enough, in and of itself, to disqualify a judge.[90] Plus, as a practical matter, judges' disqualifications based on extrajudicial sources of alleged bias are rarely justified when the case facts are evaluated objectively.[91] As the Ninth Circuit has colorfully explained, "[w]e cannot expect judges to live as moles, roving about the limited underground landscape of the official record but never perceiving the illuminated world at the surface."[92] As a result, the application of the extrajudicial source doctrine significantly limits litigants' ability to disqualify judges. So, it was noteworthy when, in *Liteky v. United States*,[93] the Supreme Court was called upon to decide whether the extrajudicial source doctrine restricts judges' duty to disqualify themselves when their impartiality might reasonably be questioned under 28 U.S.C. § 455(a).[94]

judge's recusal under § 455(a). We review challenges raised for the first time on appeal for plain error."); Parish-Carter v. Avossa, 760 F. App'x 865, 868 (11th Cir. 2019) ("Because Parish-Carter did not argue for recusal below, we review only for plain error whether the judges should have *sua sponte* recused themselves."); DeMattio v. Plunkett, 238 A.3d 24, 45 (Conn. App. Ct. 2020) ("We review, however, an unpreserved claim of judicial bias under the plain error doctrine."); State v. Van Huizen, 435 P.3d 202, 207–08 (Utah 2019) (recognizing plain error review but concluding that the judge did not commit plain error). *But see In re* M.C., 8 A.3d 1215, 1224 (D.C. 2010) (expressing reluctance to apply the plain error doctrine and explaining why).

87. *Fletcher*, 323 F.3d at 663 (quoting Chem-Trend, Inc. v. Newport Indus., 279 F.3d 625, 629 (8th Cir. 2002)).

88. *Id.* at 664.

89. *See* Lomas v. Kravitz, 170 A.3d 380, 390 (Pa. 2017) ("[A] party must seek recusal of a jurist at the earliest possible moment, *i.e.*, when the party knows of the facts that form the basis for a motion to recuse. If the party fails to present a motion to recuse at that time, then the party's recusal issue is time-barred and waived."); Cook v. State, 606 S.W.3d 247, 254 (Tenn. 2020) ("[A] claim of judicial bias may be deemed waived if a litigant either fails to file a written recusal motion or fails to file a written recusal motion in a timely manner after learning the facts that form the basis of the request.").

90. United States v. Lechuga, 820 F. App'x 261, 263 (5th Cir. 2020).

91. *See, e.g.*, Klayman v. Lim, 830 F. App'x 660, 663–64 (D.C. Cir. 2020) (rejecting the appellant's claim that the district judge's pre-confirmation political activities required his disqualification); United States v. Carey, 929 F.3d 1092, 1104–05 (9th Cir. 2019) (reasoning that a magistrate judge's review of, and reference to, a newspaper article reporting on the conduct of the defendant that the magistrate found guilty in a bench trial did not necessitate the magistrate's disqualification); Stephens v. Alliant Techsystems Corp., 714 F. App'x 841, 843–44 (10th Cir. 2017) (rejecting the plaintiff's claim that the judge's church membership reasonably called into question his impartiality).

92. *Carey*, 929 F.3d at 1105.

93. 510 U.S. 540, 541 (1994).

94. *Id.* (quoting the statute).

A. The Majority Opinion

The petitioners in *Liteky*, John Liteky, Charles Liteky, and Roy Bourgeois, were criminally charged with vandalizing federal property at Fort Benning while protesting the government's involvement in the civil war in El Salvador.[95] Before their 1991 trial, they moved to disqualify U.S. District Judge J. Robert Elliott based on his conduct in a 1983 bench trial in which Bourgeois, a Catholic priest, was convicted of several misdemeanors committed during another protest at Fort Benning.[96] They argued that Judge Elliott's disqualification was required because, in the prior case, "the judge had displayed 'impatience, disregard for the defense and animosity' toward Bourgeois, Bourgeois's codefendants, and their beliefs."[97] Specifically, they claimed that Judge Elliott's bias in the current case was apparent from his conduct in the 1983 bench trial, including:

> [S]tating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues material to [the] trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing Bourgeois that closing argument was not a time for "making a speech" in a "political forum"; and giving Bourgeois what petitioners considered to be an excessive sentence.[98]

They also contended that Judge Elliott had to be disqualified because, in the 1983 case, he had interrupted the closing argument of one of Bourgeois's codefendants to admonish the lawyer to confine his remarks to the evidence that had been admitted at trial.[99]

Judge Elliott denied the disqualification motion because "matters arising from judicial proceedings were not a proper basis for recusal."[100] Then, at the start of the trial, Bourgeois's lawyer told Judge Elliott that the petitioners' defense would focus on the political motivation for their crimes, which was to protest the government's role in the unrest in El Salvador.[101] The judge indicated that he would permit the petitioners to explain their political agenda in opening statement and to testify about their activism, but he would not indulge monologues about related government policy.[102] When Bourgeois's lawyer started to explain the situation in El Salvador in his opening statement, the prosecutor objected, and Judge Elliott stated that he would not allow the

95. *Id.* at 542.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 542–43.
100. *Id.* at 543.
101. *Id.*
102. *Id.*

petitioners to discuss Salvadoran events.[103] "He then instructed defense counsel to limit his remarks to what he expected the evidence to show."[104]

Bourgeois renewed his disqualification motion at the close of the government's case, adding as grounds for disqualification the judge's remarks during opening statement and his unspecified scolding of the Litekys, who were pro se.[105] Judge Elliott again denied the motion and the petitioners were subsequently convicted.[106]

Bourgeois and the Litekys appealed their convictions to the Eleventh Circuit, where they argued that Judge Elliott violated 28 U.S.C. § 455(a) when he declined to disqualify himself.[107] In a per curiam opinion, the Eleventh Circuit endorsed the judge's application of the extrajudicial source doctrine and affirmed the men's convictions.[108] The Supreme Court then granted certiorari.[109]

In the Supreme Court, the petitioners contended that the extrajudicial source doctrine did not apply to disqualification under § 455(a).[110] There was a respectable body of case law support for the view that the extrajudicial source doctrine applied only where a judge is to be disqualified for personal bias or prejudice, as provided for in 28 U.S.C. §§ 144 and 455(b)(1).[111] Section 144 states in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit 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, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.[112]

Section 455(b)(1) provides that a district judge must disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]"[113] In contrast, § 455(a) "proscribes all partiality, not merely the 'personal' sort."[114] Nevertheless, the petitioners' argument did not persuade the Court:

> In our view, . . . the basis of the modern "extrajudicial source" doctrine, is not the statutory term "personal"—for several reasons. First and foremost, that explanation is simply not the semantic success it pretends to be. Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are never appropriate. . . . Secondly, interpreting the term "personal" to create a

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. United States v. Liteky, 973 F.2d 910, 910 (11th Cir. 1992) (per curiam).
109. *Liteky*, 510 U.S. at 543.
110. *Id.* at 546.
111. *Id.* at 548–49.
112. 28 U.S.C. § 144 (2018).
113. *Id.* § 455(b)(1).
114. *Liteky*, 510 U.S. at 548.

> complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal" bias, and would provide no basis for the judge's recusing himself.[115]

Rather, the *Liteky* Court reasoned that the key to the extrajudicial source doctrine is appreciating the negative connotation of the words "bias" and "prejudice" in §§ 144 and 455(b)(1).[116] As the Court explained:

> Not all unfavorable disposition towards an individual (or his case) is properly described by those terms. . . . The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess. . . . The "extrajudicial source" doctrine is one application of this pejorativeness requirement to the terms "bias" and "prejudice" as they are used in §§ 144 and 455(b)(1) with specific reference to the work of judges.
>
> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. . . . Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.[117]

The Court further observed that judges' disqualification is not restricted to cases in which the alleged bias or prejudice arises out of an extrajudicial source.[118] Although most judicial disqualifications may be attributable to extrajudicial sources of bias or prejudice toward a party or a party's lawyer, those cases should not be understood to mean that disqualifying bias or prejudice *requires* an extrajudicial source.[119] A judge's "favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."[120]

After probing the extrajudicial source doctrine with respect to statutes that require personal bias or prejudice to disqualify a judge, the Court analyzed whether § 455(a) required an extrajudicial source of partiality for

115. *Id.* at 550.
116. *Id.*
117. *Id.* at 550–51.
118. *Id.* at 551.
119. *Id.*
120. *Id.*

disqualification.[121] The petitioners argued that it did not based on the absence of the word "personal" in the statute, but that argument went nowhere for the reasons previously outlined.[122] They also maintained that because § 455(a) requires judges' disqualification "in any proceeding" in which their impartiality might reasonably be questioned,[123] disqualification need not be predicated on an extrajudicial source.[124] That argument failed, however, because the same could be said about §§ 144 and 455(b)(1), which "apply *whenever* bias or prejudice exists, and not merely when it derives from an extrajudicial source."[125] The argument was also unconvincing "because the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable," and the term "partiality" is equally pejorative.[126] Additionally, even if the negative connotation of "partiality" was an insufficient basis to embed the extrajudicial source doctrine in § 455(a), the statutory requirement that questions about a judge's impartiality be reasonable would achieve the same result.[127]

Ultimately, the Court concluded that the extrajudicial source doctrine applies to judges' disqualification under § 455(a).[128] After doing so, however, the Court minimized the effect of its conclusion:

> [T]here is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) "extrajudicial source" factor, than of an "extrajudicial source" doctrine, in recusal jurisprudence.[129]

This case did not merit detailed application of the extrajudicial source factor.[130] The Court thought it sufficient to state first that "judicial rulings alone almost never constitute a valid basis" for disqualifying a judge.[131] They are instead grounds for appeal.[132] Second, judges' conclusions or opinions formed on the basis of facts learned or events that occurred in a proceeding or prior

121. *Id.*
122. *Id.* at 551–52.
123. 28 U.S.C. § 455(a) (2018).
124. *Liteky*, 510 U.S. at 552.
125. *Id.*
126. *Id.* (citing AMERICAN HERITAGE DICTIONARY 1319 (3d ed. 1992)).
127. *Id.*
128. *Id.* at 554.
129. *Id.* at 554–55.
130. *Id.* at 555.
131. *Id.*
132. *Id.*

proceeding will justify disqualification for bias or partiality only where "they display a deep-seated favoritism or antagonism that would make fair judgment impossible."[133] Consequently, a judge's remarks during a trial "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."[134] Third, but intertwined with the second point, judges' ordinary administration of proceedings in their courts does not reasonably call their impartiality into question or support accusations of bias even if they display frustration or impatience with lawyers or parties in the process.[135]

Application of these principles made this an easy case.[136] None of the petitioners' arguments were valid.[137] Their first disqualification motion challenged the district judge's rulings and comments during the 1983 trial.[138] Their second disqualification motion complained about his admonishment of Bourgeois's lawyer and the Litekys in open court.[139] The petitioners' additional allegations of partiality were similarly predicated on the district judge's rulings and ordinary efforts at courtroom administration.[140] None of the conduct by the judge about which they complained (1) stemmed from an extrajudicial source; or (2) reflected "deep-seated and unequivocal antagonism" on the judge's part that would have "render[ed] fair judgment impossible."[141] Accordingly, the *Liteky* Court affirmed the Eleventh Circuit's judgment.[142]

B. The Concurring Opinion

Justice Kennedy issued a concurring opinion joined by Justices Blackmun, Stevens, and Souter.[143] Justice Kennedy agreed that there was no basis to disqualify Judge Elliott, but he disliked the standard the majority adopted for disqualification under § 455(a) for alleged intrajudicial partiality:

> The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's "impartiality might reasonably be questioned." The statutory standard, which the Court preserves for allegations of an extrajudicial nature, asks whether there is an appearance of partiality. . . . The Court's standard, in contrast, asks whether fair judgment is impossible, and if this test demands some direct inquiry to the judge's actual, rather than apparent, state of

133. *Id.*
134. *Id.*
135. *See id.* at 556 ("A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.").
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 557 (Kennedy, J., concurring).

> mind, it defeats the underlying goal of § 455(a): to avoid the appearance of partiality even when no partiality exists.
>
> And in all events, the "impossibility of fair judgment" standard remains troubling due to its limited, almost preclusive character. . . . The integrity of the courts, as well as the interests of the parties and the public, are ill served by this rule.[144]

Justice Kennedy reasoned that a judge's disqualification should be required where a detached observer would reasonably question the judge's impartiality, regardless of whether the observer's doubt had extrajudicial or intrajudicial underpinnings.[145] Given the importance the law assigns to the appearance of judges' impartiality, the Court's standard for disqualification based on an intrajudicial source—which would allow a judge to remain on a case if there was "the bare possibility of a fair hearing"—was not justifiable.[146] In Justice Kennedy's view, while the source of a judge's alleged bias may be relevant in deciding whether the judge's impartiality may reasonably be questioned, there is no need to adopt "a nearly dispositive extrajudicial source factor."[147] He would have simply applied the plain language of § 455(a) to all disqualification disputes.[148]

Justice Kennedy's disagreement with the standard for disqualification adopted by the majority, and preference for a standard that tracked the language of the statute, did not, however, translate into a low or even moderate standard for disqualification.[149] He believed that § 455(a) still required a "high threshold" for disqualification.[150] In his view, a judge should be disqualified under § 455(a) "only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute."[151]

C. Summary

Asked whether the extrajudicial source doctrine applied to judges' disqualification under § 455(a), the *Liteky* Court answered affirmatively.[152] More importantly, however, the Court apparently crafted a new federal court standard for disqualification based on intrajudicial factors.[153] Now, only where a judge's alleged partiality has extrajudicial origins does § 455(a) apply according to its

144. *Id.* at 563–64 (citations omitted).

145. *Id.* at 564.

146. *Id.* at 565.

147. *Id.*

148. *Id.*

149. *See id.* at 557–58 ("[I]t should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings.").

150. *Id.* at 558.

151. *Id.*

152. *Id.* at 554 (majority opinion).

153. *See id.* at 555 ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.").

terms.[154] *Liteky* is important also because some state courts have extended its test for disqualification based on alleged intrajudicial partiality beyond motions filed under § 455(a) in federal cases to disqualification motions based on Rule 2.11(A) or other sources of state law.[155] That development is perhaps understandable given that § 455(a) and Rule 2.11(A) almost mirror one another, but it is by no means required.[156] Furthermore, even where courts have not adopted the *Liteky* standard for disqualification, they have factored some of its principles into their judicial disqualification decisions, as we will see in the next Part.

IV. INTRAJUDICIAL DISQUALIFICATION FOLLOWING *LITEKY*

Regardless of whether a court follows *Liteky* or bases its decision on Rule 2.11(A), disqualifying a judge for alleged intrajudicial partiality requires the movant to satisfy an "extremely high" standard.[157] This standard applies equally in cases involving (a) adverse rulings by the judge; (b) judges' expressions of critical or allegedly disparaging conclusions or opinions based on facts learned or events that occurred during proceedings, including prior proceedings with common parties; and (c) judges' conduct in the course of ordinary case administration.

A. Adverse Judicial Rulings

It is unquestionably true, as the *Liteky* court observed with slight qualification,[158] that adverse judicial rulings alone are not a sufficient reason to

154. Joe Phillips & Se-In Lee, *Recusing the Fact-Finder Judge: An Argument for Restricting the "Extra-Judicial Source" Test*, JUDICATURE, July-Aug. 2011, at 8; *see* Tripp v. Exec. Off. of the President, 104 F. Supp. 2d 30, 34 (D.D.C. 2000) ("To . . . compel recusal under Section 455(a), the moving party must demonstrate the court's reliance on an 'extrajudicial source' that creates an appearance of partiality or, . . . where no extrajudicial source is involved, the movant must show a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'") (quoting *Liteky*, 510 U.S. at 555).

155. *See, e.g.*, People v. Nassar, No. 345699, 2020 WL 7636250, at *4 (Mich. Ct. App. Dec. 22, 2020) (quoting an earlier case using the language from *Liteky*); State v. Bard, 181 A.3d 187, 198 (Me. 2018) (quoting *Liteky*, 510 U.S. at 555); Passero v. Fitzsimmons, 81 N.E.3d 814, 820 (Mass. App. Ct. 2017) (quoting *Liteky*, 510 U.S. at 555); Tilson v. Tilson, 948 N.W.2d 768, 784 (Neb. 2020) ("Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."); Avilez v. State, 333 S.W.3d 661, 675 (Tex. App. 2010) (quoting *Liteky*, 510 U.S. at 555–56).

156. *Compare* 28 U.S.C. § 455(a) (2018) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."), *with* MODEL CODE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS'N 2020) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances.").

157. Bach v. Bagley, 229 P.3d 1146, 1154 (Idaho 2010).

158. *See Liteky*, 510 U.S. at 555 ("[J]udicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion.") (emphasis added).

disqualify a judge.[159] This principle applies even where a ruling is erroneous.[160] An errant ruling, without more, is grounds for appeal—not for the judge's disqualification.[161] For a judicial ruling to support a finding of partiality and therefore justify the judge's disqualification under *Liteky*, the moving party must demonstrate entrenched antagonism or favoritism by the judge that prevents her from rendering a fair decision.[162] The seemingly more lenient standard expressed in Rule 2.11(A) and equivalent state statutes is also hard to satisfy.[163] Applying either standard, the party seeking disqualification "must point to specific words or actions" by the court in its ruling that evidence partiality.[164] In some cases, a judge's partiality may be discerned from "repeated misapplication of fundamental, rudimentary legal principles" in ways that favor one party over another.[165]

Courts' general rejection of adverse rulings as a basis for disqualifying a judge is a sensible approach. Were the rule otherwise, a party could disqualify a judge anytime the judge ruled against it.[166] The result would be chaos in the courts.

It is extraordinarily rare that a judge's ruling reflects alleged partiality extreme enough to merit disqualification but such cases occasionally surface.[167]

159. Jasmin v. Santa Monica Police Dep't, 828 F. App'x 347, 350 (9th Cir. 2020); United States v. Johnston, 814 F. App'x 142, 147 (7th Cir. 2020); Calhoun v. Villa, 761 F. App'x 297, 301 (5th Cir. 2019) (involving adverse rulings in other cases); Stocks v. State, 586 S.W.3d 168, 171 (Ark. 2019); Severson & Werson, P.C. v. Sepehry-Fard, 249 Cal. Rptr. 3d 839, 850 (Ct. App. 2019); Gattis v. State, 955 A.2d 1276, 1286 (Del. 2008); Oliva v. Fla. Wildlife Fed'n, 281 So. 3d 531, 539 (Fla. Dist. Ct. App. 2019); Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 82 (Ga. 2018); Arquette v. State, 290 P.3d 493, 518 (Haw. 2012); Woods v. State, 98 N.E.3d 656, 664 (Ind. Ct. App. 2018); State *ex rel.* M.B., 217 So. 3d 555, 566 (La. Ct. App. 2017); State v. Mouelle, 922 N.W.2d 706, 716 (Minn. 2019); *In re* Michael N., 925 N.W.2d 51, 65 (Neb. 2019); George v. Al Hoyt & Sons., Inc., 27 A.3d 697, 713 (N.H. 2011); Holzem v. Presbyterian Healthcare Servs., 388 P.3d 255, 262 (N.M. Ct. App. 2016); State v. Hunter, 914 N.W.2d 527, 540 (N.D. 2018); State *ex rel.* White v. Woods, 130 N.E.3d 271, 273–74 (Ohio 2019); *In re* Adele B., 229 A.3d 671, 682 (R.I. 2020) (quoting *In re* Antonio, 612 A.2d 650, 654 (R.I. 1992)); *In re* L.B., 587 S.W.3d 472, 479 (Tex. App. 2019); Ainsworth v. Chandler, 107 A.3d 905, 911 (Vt. 2014); Hill v. Stubson, 420 P.3d 732, 745 (Wyo. 2018).

160. Lopez v. DeVito, 824 F. App'x 683, 688 (11th Cir. 2020); People v. Silveria, 471 P.3d 412, 504 (Cal. 2020) (quoting People v. Armstrong, 433 P.3d 987, 1035 (Cal. 2019)).

161. *Lopez*, 824 F. App'x at 688.

162. State v. Bard, 181 A.3d 187, 198–99 (Me. 2018) (quoting *Liteky*, 510 U.S. at 555); Passero v. Fitzsimmons, 81 N.E.3d 814, 820 (Mass. App. Ct. 2017) (quoting *Liteky*, 510 U.S. at 555); Tilson v. Tilson, 948 N.W.2d 768, 784 (Neb. 2020); Avilez v. State, 333 S.W.3d 661, 675 (Tex. App. 2010) (quoting *Liteky*, 510 U.S. at 555–56).

163. *See, e.g.*, Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001) ("The burden of proof required for recusal of a trial judge is an onerous one."); *In re* Disqualification of George, 798 N.E.2d 23, 23 (Ohio 2003) ("A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice *must be compelling* to overcome these presumptions.") (emphasis added).

164. Pederson v. Arctic Slope Reg'l Corp., 421 P.3d 58, 73 (Alaska 2018).

165. Hoalcraft v. Smithson, No. M2000-01347-COA-R10-CV, 2001 WL 775602, at *16 (Tenn. Ct. App. July 10, 2001).

166. Seiwert v. Seiwert, 299 So. 3d 558, 560 (Fla. Dist. Ct. App. 2020).

167. *See, e.g.*, United States v. Antar, 53 F.3d 568, 576 (3d Cir. 1995), *overruled on other grounds by* Smith v. Berg, 247 F.3d 532 (3d Cir. 2001) (explaining that a district judge's stated goal in a criminal proceeding to enforce a repatriation order in a concurrent civil proceeding and return fraudulently obtained funds to the public displayed extreme antagonism toward the criminal defendant); United States v. Holland, 655 F.2d 44, 47 (5th Cir. 1981) (concluding that the judge's impartiality might reasonably be questioned based on his increase of the

They tend to be indistinguishable from cases in which judges' courtroom comments are so egregious as to require disqualification, which should not surprise, since written rulings offer the opportunity for reflection, review, and revision that extemporaneous remarks from the bench do not. *United States v. Franco-Guillen*[168] is a representative case.

In *Franco-Guillen*, the judge set aside defendant Felipe Franco-Guillen's guilty plea and slated the case for trial after Franco-Guillen expressed dissatisfaction with his pre-sentence report ("PSR") during his sentencing hearing.[169] Franco-Guillen complained through his interpreter that the sentencing range in his PSR exceeded the sentence that his lawyer said he would receive in exchange for his guilty plea.[170] In setting aside Franco-Guillen's guilty plea, the judge said, "I will not put up with this from these Hispanics or anybody else, any other defendants."[171] The judge then essentially doubled down:

> Now, I'm not putting up with this. I've got another case involving a Hispanic defendant who came in here and told me that he understood what was going on and that everything was fine and now I've got a [form] from him saying he can't speak English. And he is lying because he told me he could.[172]

The Tenth Circuit reversed Franco-Guillen's conviction and ordered that on remand his case be assigned to a different judge.[173] In doing so, the *Franco-Guillen* court stated the obvious: "The judge's statements on the record would cause a reasonable person to harbor doubts about his impartiality, without regard to whether the judge actually harbored bias against Franco–Guillen on account of his Hispanic heritage."[174] Although the judge's statements may have simply reflected frustration with Franco–Guillen's seeming change of heart between his plea hearing and sentencing hearing, the appearance of impropriety created by the judge's references to Hispanic defendants and their capacity for honesty was impossible to overcome when viewed objectively.[175]

Cook v. State[176] is also exemplifying. *Cook* was a post-conviction proceeding in which Brice Cook alleged that his defense lawyers in the second of his two murder trials (his first conviction was reversed on appeal), Lorna McCluskey and William Massey, rendered ineffective assistance.[177] He specifically alleged that they did not convey a favorable plea offer to him.[178] The judge who heard Cook's motion for post-conviction relief also presided at his

defendant's sentence because of his unhappiness with the defendant for successfully appealing his prior conviction by criticizing the judge's actions during an earlier trial).

168. 196 F. App'x 716 (10th Cir. 2006).
169. *Id.* at 717.
170. *Id.*
171. *Id.*
172. *Id.* at 718.
173. *Id.* at 719.
174. *Id.*
175. *Id.*
176. 606 S.W.3d 247 (Tenn. 2020).
177. *Id.* at 250.
178. *Id.*

second trial.[179] At the conclusion of the post-conviction hearing, the judge denied Cook's motion in a ruling from the bench:

> I've tried cases, multiple cases, as a trial lawyer against Lorna McCluskey and William Massey. I tried death penalty cases against Lorna McCluskey and William Massey. Those are two of the most preeminent lawyers in Memphis, in Shelby County, Tennessee. Two of the most preeminent lawyers in the United States of America. Two of the most preeminent lawyers in the world.
>
> As Ms. McCluskey has testified, she's a fellow in an organization that will not admit more than one percent of all trial lawyers in the world. Mr. Massey is one of the leading lawyers in criminal defense practice. . . . These are two very, very talented, very good lawyers, very aggressive lawyers that will fight tooth and nail for their client.
>
> And it's almost absolutely laughable that a lawyer can come to court and say I believe Ms. McCluskey and Mr. Massey ineffectively represented Mr. Cook and these are some things that maybe they should have done differently, sitting back as a Monday morning quarterback. . . .
>
> It reminds me of what Judge Axley used to say when I . . . was first assigned to Judge Axley's court. And Judge Axley used to tell me, "Mr. Coffee, it's kind of like generals in a war. They sit up on a hill on their white horses, beautiful white steed horses, don't do anything. And after the battle is over, they ride down into the middle of the conflict when people have lost their lives and that war is over and they try to tell those folks how they should have fought that battle differently, how they could have fought that battle better, when all they did was stand up on a hill on a white steed and look down at the action when these folks in the trenches are fighting this war and people are dying all around them."
>
> * * *
>
> These are two of the best trial lawyers in the world. There is absolutely nothing before this Court that would cause this Court to conclude that Mr. William Massey and Ms. Lorna McCluskey were deficient in their representation of [the petitioner].
>
> There is nothing in this record that would cause the Court to question for a moment that these lawyers were not prepared in their representation of [the petitioner].[180]

The judge continued his rant, in the process criticizing Cook's post-conviction counsel and the Tennessee process for challenging convictions outside of appeals:

> And it is almost painful when lawyers start attacking other lawyers. . . . These lawyers did the absolute best they could. Did not the best they could, but did an exemplary job. And even getting Mr. Cook a new trial in the beginning, which this Court finds, frankly, that there was skeptical grounds in which that motion was granted.

179. *Id.*

180. *Id.* at 251–52 (all but the first alteration in original).

> But convinced another Judge to grant a new trial, tried this case, and did absolutely everything that any reasonable lawyer could have done. And a jury found Mr. Cook guilty of first degree murder in another trial.
>
> And it is something that bothers this Court and it's something that's unique to Tennessee. I practiced law in Houston for eight years. . . .
>
> In the eight years in the State of Texas, Harris County, Texas, I may have seen three or four post-conviction petitions in . . . in eight years. But it's part of the game—and I do use the word game—that goes on in Tennessee. . . .
>
> A person is tried. A person is tried and convicted by a jury, receives excellent representation from his lawyers, and will turn around on a post-conviction and sue a lawyer, in essence, and say, "My lawyers did a bad job. They did an absolutely horrible job for me and, therefore, I should be given a third trial."
>
> Mr. Cook has wholly failed to prove ineffective representation. He's wholly failed to prove that he was prejudiced by his attorneys. He has wholly failed to sustain any of these allegations that are contained in some 70-plus pages of writings as to why Ms. McCluskey and Mr. Massey ineffectively represented him. This Court finds that Lorna McCluskey and Bill Massey, William Massey, provided excellent representation for Mr. Cook.[181]

On appeal, Cook argued that the judge should have disqualified himself, but the Tennessee Court of Criminal Appeals held that he had waived that issue by failing to seek disqualification below.[182] Cook then appealed to the Tennessee Supreme Court.[183]

The Tennessee Supreme Court explained that while litigants must normally move to disqualify judges in the trial court or risk waiving the ability to challenge their impartiality on appeal, there are times that judges must disqualify themselves *sua sponte* under Rule 2.11.[184] Here, the judge should have disqualified himself without Cook having to file a motion.[185] "[A] person of ordinary prudence in the judge's position knowing all of the facts known to the judge would find a reasonable basis for questioning the judge's impartiality . . . based on the comments the . . . judge made at the conclusion of the hearing when denying [Cook] relief."[186] The judge's statements in his ruling indicated that his decision to deny Cook's motion was based on his personal experience with, and admiration for, Cook's defense lawyers.[187] Indeed, his personal regard for Massey and McCluskey was so high that he simply refused to believe that they

181. *Id.* at 252–53.
182. *Id.* at 253.
183. *Id.*
184. *Id.* at 255.
185. *Id.*
186. *Id.*
187. *Id.*

could be ineffective in any case, no matter the facts.[188] To be impartial, a judge must keep an open mind, and the judge here did not.[189]

The *Cook* court was even more troubled by the judge's derogatory remarks about Tennessee's post-conviction procedures for protecting criminal defendants' rights and the conduct of post-conviction petitioners and their lawyers.[190] The judge disparaged Tennessee's post-conviction procedures, which he demeaned as a "game," expressed his preference for Texas law based on his experience practicing there, and compared Cook's post-conviction lawyers and other lawyers with similar practices to aloof generals who cowardly second-guess the soldiers in the trenches.[191] Looking at matters objectively, the *Cook* court easily determined that a reasonable person who knew all the facts would conclude from the judge's comments that he denied Cook's petition for relief "based as much on [his] disdain for and disagreement with Tennessee law on post-conviction procedures and dissatisfaction with post-conviction petitioners and their lawyers as on the evidence presented at the hearing."[192]

After discussing additional evidence of the judge's partiality,[193] the court turned to the State's only viable argument for affirming Cook's conviction: waiver.[194] The State argued that Cook waived his claim that the judge should have been disqualified by not moving for disqualification contemporaneously with the offending comments, and then by failing to file a disqualification motion in the nearly two months between the time of the hearing and the judge's entry of his order denying Cook's petition for relief.[195] The court disagreed.[196] Because the judge should have disqualified himself *sua sponte* under Rule 2.11, Cook's failure to seek his disqualification below was not determinative.[197] Rather, the judge's comments were so egregious, and his disdain for the proceeding he was charged with conducting was so sweeping, that he should have known to disqualify himself.[198] "Under these unique circumstances," no disqualification motion was required, and Cook waived nothing.[199]

The *Cook* court reversed the Court of Criminal Appeals and remanded the case to the trial court for a new hearing before a different judge.[200] The court expressed no opinion on the merit of Cook's underlying constitutional claims.[201]

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 255–56.
192. *Id.* at 256.
193. *Id.* at 256–57 (discussing numerous actions and decisions by the judge during the hearing that might have been permissible in other instances, but which were tainted by the judge's comments to the point that his impartiality might have reasonably been questioned based on them).
194. *Id.* at 257.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 258.
201. *Id.* at 257.

Notably, the Tennessee Supreme Court did not apply the *Liteky* standard for disqualifying the judge; rather, it applied the language of Rule 2.11(A).[202] Had the court applied the *Liteky* standard,[203] however, the judge's ruling doubtlessly would have met it. The judge's entrenched views concerning the capabilities of Cook's defense lawyers, the character or motivations of post-conviction petitioners, and the nature of Tennessee's post-conviction remedial regime made fair judgment impossible.[204]

Because disqualification cases are fact-specific,[205] it is difficult to predict the rare circumstances when a judge's ruling either reasonably calls into question the judge's impartiality under Rule 2.11(A) or reflects a level of antagonism or favoritism that requires the judge's disqualification under *Liteky*. It sometimes seems that insofar as appellate courts are concerned, a trial court judge's disqualifying partiality is like hardcore pornography: they know it when they see it.[206] The decisions in *Franco-Guillen* and *Cook*, however, suggest two situations that should generally qualify under either standard. The first is where the judge's ruling appears to be animated by a party's race, gender, sexual orientation, or national origin.[207] Indeed, Rule 2.11(A)(1) contemplates this situation.[208] The second is where the challenged ruling indicates that the judge has predetermined or prejudged material issues in the case in a way that is unfair to the complaining party.[209] Of course, in both instances, the judge's ruling must be viewed from the perspective of a reasonable person fully versed in the relevant facts.[210]

B. Judges' Expression of Conclusions and Opinions Formed During Proceedings

While indefensible, the judge's derogatory comments in *Franco-Guillen* evidence judges' human tendency to form opinions and conclusions about parties and lawyers during proceedings. These opinions and conclusions may be

202. *See id.* at 254 (quoting Tennessee's version of Rule 2.11(A)).

203. Liteky v. United States, 510 U.S. 540, 555 (1994).

204. *See Cook*, 606 S.W.3d at 255–56 (discussing the bases for questioning the judge's impartiality).

205. *See* Jackson v. State, 21 A.3d 27, 36 (Del. 2011) ("Any inquiry into the question of whether a judge's impartiality might reasonably be questioned is case specific.") (footnote omitted).

206. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("[C]riminal laws . . . are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.") (footnotes omitted).

207. United States v. Franco-Guillen, 196 F. App'x 716, 717–18 (10th Cir. 2006). In this instance, the judge might also be disqualified under other or more specific rules or statutes. *See, e.g.*, 28 U.S.C. § 455(b)(1) (2018) (stating that judges should disqualify themselves if they have a personal bias or prejudice against a party or a party's lawyer).

208. *See* MODEL CODE OF JUD. CONDUCT r. 2.11(A)(1) (AM. BAR ASS'N 2020) (identifying a judge's personal bias against a party or a party's lawyers as one circumstance in which a judge's impartiality might reasonably be questioned).

209. *Cook*, 606 S.W.3d at 251–53, 255; *see also* Buschardt v. Jones, 998 S.W.2d 791, 803 (Mo. Ct. App. 1999) (concluding that the judge's oral pronouncement of his ruling in which he specifically told the litigants that he ruled the same way in every case like theirs created "an appearance of partiality indicating a fixed prejudgment and an inclination not to fairly weigh the evidence").

210. *See supra* notes 65–68 and accompanying text.

legitimately critical or disdainful, as where a judge must analyze a criminal defendant's conduct in connection with sentencing;[211] consider whether to revoke a criminal defendant's parole, probation, or supervised release from incarceration;[212] decide whether to sanction a party for contempt;[213] evaluate a party's or witness's credibility;[214] or invoke the court's inherent authority to sanction a lawyer for conduct amounting to bad faith.[215] Returning to *In re Flynn*,[216] recall that during Flynn's sentencing hearing, Judge Sullivan pointed to the American flag in his courtroom and declared that Flynn's misconduct "[a]rguably . . . undermine[d] everything this flag . . . stands for."[217] Judge Sullivan also said that Flynn arguably "sold [his] country out" and asked one of the federal prosecutors whether Flynn "could be charged with 'treason.'"[218] Finally, while commenting on the possible worth of Flynn's cooperation with the government, the judge cautioned that he was "not hiding [his] disgust, [his] disdain," for Flynn's admitted crime.[219] Nevertheless, the *In re Flynn* court concluded that the judge's remarks were not grounds for reassigning the case to a different judge.[220] That was the correct decision, because Judge Sullivan's

211. *See, e.g.*, United States v. Andreis, 802 F. App'x 272, 274 (9th Cir. 2020) (holding that the district judge's disqualification was not required where her comments about the defendant made at his prior sentencing were based on the defendant's testimony and the judge was required under 18 U.S.C. § 3553(a) to consider the defendant's history and characteristics, as well as the need to protect the public from the defendant's further crimes); United States v. Harrill, 91 F. App'x 356, 357 (5th Cir. 2004) (stating that the district judge's statements about the defendant's credibility during a sentencing hearing did not merit the judge's disqualification); C.D. v. State, 458 P.3d 81, 89 (Alaska 2020) ("The statements C.D. highlights as reflecting bias are part of the court's required findings regarding the 'seriousness' of C.D.'s crimes. It was acceptable to consider whether the crimes were committed in the heat of passion or 'in cold blood' in evaluating their seriousness.") (footnotes omitted); Sullivan v. State, 281 So. 3d 1146, 1172 (Miss. Ct. App. 2019) (finding no evidence of bias or pre-judgment of the issues where the judge described the defendant as a predator and as dangerous based on the evidence and the parties' arguments, and said that he intended to do everything he could to make sure the defendant never hurt another child).

212. *See, e.g.*, United States v. Eagle Chasing, 965 F.3d 647, 651–52 (8th Cir. 2020) (concluding that the district court did not err in denying the defendant's disqualification motion based on comments the judge made in revoking the defendant's supervised release from prison).

213. *See, e.g.*, Elinger v. Federico, 242 So. 3d 1177, 1181–82 (Fla. Dist. Ct. App. 2018) (finding no basis to disqualify the judge based on his comments during a contempt hearing); Indy Diamond, LLC v. City of Indianapolis, 132 N.E.3d 417, 427 (Ind. Ct. App. 2019) (finding no reason to disqualify the trial judge where her comments that apparently reflected her personal opinion "were made in the context of contempt proceedings and were merely observations supported by the evidence").

214. *See, e.g.*, *In re* Interest of J.K., 915 N.W.2d 91, 99 (Neb. 2018) ("[T]he judge's comment, regarding a determination of [the complainant's] credibility, was based solely on the evidence presented during the hearing, which expressed neither favoritism nor antagonism. . . . As a result, the judge's impartiality could not be questioned by a reasonable person."); *In re* Marriage of Rounds, 423 P.3d 895, 900 (Wash. Ct. App. 2018) ("A finding that a party lacks credibility does not mean the judge is biased.").

215. Inherent authority sanctions require the lawyer to have acted in bad faith. Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017); *In re* Goode, 821 F.3d 553, 559 (5th Cir. 2016); *In re* Partington, 463 P.3d 900, 907 (Haw. 2020); Brewer v. Lennox Hearth Prods., 601 S.W.3d 704, 716 (Tex. 2020).

216. 973 F.3d 74 (D.C. Cir. 2020) (en banc).

217. Hsu et al., *supra* note 7.

218. *Id.*

219. *Id.*

220. *In re Flynn*, 973 F.3d at 83–84.

comments merely reflected his view of the wrongfulness of Flynn's conduct based on facts revealed in the case.[221]

As the court's ruling in *In re Flynn* illustrates, judges' comments and statements of conclusions or opinions based on information learned or events occurring in the course of proceedings generally do not justify disqualification for alleged partiality.[222] The same is true where the predicate facts or events were revealed or occurred in a prior proceeding involving the judge, and the judge's disqualification is sought in a subsequent proceeding involving a common party or parties.[223] The general rule logically recognizes that "[f]orming an opinion of litigants and issues based on what is learned in the course of judicial proceedings is necessary to a judge's role in the judicial system."[224]

Judges' expressions of frustration and impatience with parties or their lawyers, or statements reflecting skepticism about the merits of parties' claims do not alone support disqualification.[225] Similarly, judges' use of blunt or colorful language when commenting on an aspect of a case, standing alone, does not reflect partiality.[226] Although judges frequently temper their remarks during proceedings out of either caution or courtesy, they "are not required either to mince words or to sugar-coat their views" when communicating with litigants or lawyers who appear before them.[227]

Alemarah v. General Motors, LLC[228] illustrates appellate courts' tolerance of judges' expressions of anger, frustration, or impatience with parties and lawyers. There, Nosoud Alemarah sued General Motors ("GM") for

221. *See, e.g.*, United States v. Pulido, 566 F.3d 52, 62–63 (1st Cir. 2009) (explaining that the judge's statement in a prior, related case that the defendant was "a thoroughly corrupt police officer" was not disqualifying under 28 U.S.C. § 455(a) with respect to the defendant's sentencing hearing because it was based on information revealed during the proceedings).

222. *In re Flynn*, 973 F.3d at 84; Downs v. Downs, 440 P.3d 294, 300 (Alaska 2019) (quoting Hanson v. Hanson, 36 P.3d 1181, 1186 (Alaska 2001)); People *ex rel.* S.G., 91 P.3d 443, 447 (Colo. App. 2004); State v. Bard, 181 A.3d 187, 198 (Me. 2018); Tilson v. Tilson, 948 N.W.2d 768, 784 (Neb. 2020); Marko v. Marko, 816 N.W.2d 820, 827 (S.D. 2012).

223. Frey v. EPA, 751 F.3d 461, 472 (7th Cir. 2014); Amy S. v. State, 440 P.3d 273, 282 n.31 (Alaska 2019); *People ex rel. S.G.*, 91 P.3d at 448; *Tilson*, 948 N.W.2d at 784; *Marko*, 816 N.W.2d at 827. In the same vein, a judge's allegedly unfavorable experience with a lawyer in a prior case generally will not support the judge's disqualification for alleged partiality based on the lawyer's participation in a subsequent case. United States v. Barr, 960 F.3d 906, 919–20 (7th Cir. 2020).

224. Cain-Swope v. Swope, 523 S.W.3d 79, 89 (Tenn. Ct. App. 2016).

225. *See, e.g.*, United States v. McChesney, 871 F.3d 801, 808 (9th Cir. 2017) ("Although the district court at times showed some wry impatience at McChesney's requests, jocular comments are no basis for recusal."); *Cain-Swope*, 523 S.W.3d. at 89 ("Judicial expressions of impatience, dissatisfaction, annoyance, and even anger towards counsel, the parties, or the case, will not ordinarily support a finding of bias or prejudice unless they indicate partiality on the merits of the case."); Haynes v. Union Pac. R.R. Co., 598 S.W.3d 335, 356 (Tex. App. 2020) (concluding that the trial judge's disqualification for alleged bias based on his expressions of "frustration, impatience, and even skepticism regarding the ultimate merit" of the plaintiff's claims was not warranted).

226. United States v. Bowen, 799 F.3d 336, 359 (5th Cir. 2015); United States v. Caramadre, 807 F.3d 359, 374 (1st Cir. 2015); *see, e.g.*, *Ex parte* Montgomery Cnty. Dep't of Human Res., 294 So. 3d 811, 817 (Ala. Civ. App. 2019) (stating that the judge's characterization of termination-of-parental-rights as a "draconian" remedy did not require her disqualification for bias).

227. *Caramadre*, 807 F.3d at 374.

228. 980 F.3d 1083 (6th Cir. 2020).

discrimination.[229] GM moved for summary judgment and Senior District Judge Bernard Friedman arranged to hear the motion at Wayne State University's law school as an educational exercise.[230] Alemarah's lawyer, Raymond Guzall III, e-mailed a court administrator to object to the law school forum as being stressful for Alemarah and added:

> [N]either of the parties [sic] attorneys nor any judge would be able to completely set aside the theater atmosphere of attempting to educate students and play to the crowd which will detract from the job which needs to be performed by the attorneys and the court. Arguments will be overly drawn out and skewed for the purposes of educating and playing to the students, as will the commentaries of the court.[231]

A few days later, Judge Friedman sent Guzall a letter in which he agreed to relocate the hearing and stated:

> Your additional comments I found to be highly offensive and entirely uncalled for. They reveal your lack of understanding of the purpose of hearing motions at a law school and your unfamiliarity with how the Court conducts these proceedings. Contrary to your uninformed assumptions, there is no "theater atmosphere," no one "play[s] to the crowd," the oral arguments are not "overly drawn out and skewed for the purpose of educating and playing to the students," and the attorneys are not called upon to "perform." Motion hearings held at a law school are official court proceedings, and the same procedures and rules, including those concerning decorum, apply there just as they do in the courtroom.[232]

Judge Friedman concluded the letter with criticism and threatened consequences:

> Your objection to holding motion hearings at Wayne makes clear to me that you do not appreciate your professional obligation to participate in activities that are beneficial to the public. I therefore intend to ask Chief Judge Denise Page Hood, who is also the chair of this Court's pro bono program, to place your name on the list of attorneys who are to be assigned cases through this program.[233]

Judge Friedman subsequently cancelled the hearing and granted GM summary judgment.[234] Alemarah moved for reconsideration, which Judge Friedman caustically denied.[235] Alemarah then unsuccessfully moved to disqualify the judge.[236] In denying the last motion, Judge Friedman stated that

229. *Id.* at 1085.

230. *See id.* at 1085–86.

231. *Id.* at 1086–87 (alterations in original). Guzall was never identified by name as the subject of the district court's ire in the opinion. He was so identified in a subsequent story about the Sixth Circuit's refusal to reconsider its opinion in the case. Adrian Cruz, *6th Cir. Won't Reconsider Refusal to DQ Judge in GM Case*, LAW360 (Dec. 21, 2020, 9:56 PM), https://www.law360.com/legalethics/articles/1339840/6th-circ-won-t-reconsider-refusal-to-dq-judge-in-gm-case?nl_pk=0d2d5ad2-8193-4ae0-bc6d-89b8ec2c5091&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics [https://perma.cc/9Z6W-7G4C].

232. *Alemarah*, 980 F.3d at 1087.

233. *Id.*

234. *Id.*

235. *Id.* (describing Alemarah as "apparently having been shocked awake" by the ruling).

236. *Id.*

Alemarah had merely imagined that his letter to Guzall was "angry" and accused her of "hallucinating" when she alleged that he had retaliated against them.[237] Alemarah appealed to the Sixth Circuit, which affirmed summary judgment for GM and Judge Friedman's refusal to disqualify himself, "albeit with some concerns" about the latter issue.[238]

The *Alemarah* court rejected Judge Friedman's characterization of his comments—especially his jab at Alemarah for hallucinating—as ordinary admonitions of a litigant.[239] Plus, "a reasonable observer could conclude that the [judge's] statement in [his] letter to Alemarah's counsel (which was itself out of the ordinary)—that '[y]our additional comments I found to be highly offensive and entirely uncalled for'—was an expression of anger" by the judge.[240] Even so, none of those comments were "'so extreme as to display clear inability to render fair judgment.'"[241]

The court viewed Judge Friedman's threat to arrange pro bono assignments for Guzall as a closer call.[242] The judge's plan could easily be considered punitive despite his claim that his sole purpose was to educate Guzall about his duty to serve the legal profession.[243] But the judge's promise of pro bono learning experiences had to be considered in context, which, in this case, included several prior frivolous motions by Alemarah.[244] In that light, Judge Friedman's stated plan reflected a tolerable expression of anger, annoyance, dissatisfaction, or frustration with Guzall.[245] Accordingly, while the court did not condone Judge Friedman's threat, it held that he did not abuse his discretion in denying Alemarah's disqualification motion.[246]

The Sixth Circuit was probably correct that Judge Friedman's stinging comments about the merits of Alemarah's motions for reconsideration and disqualification were permissible—if regrettable—expressions of annoyance or frustration with Alemarah and Guzall. The judge's plan to punish Guzall through involuntary pro bono representations, however, was disqualifying and the *Alemarah* court erred in holding otherwise. If Alemarah had filed frivolous motions, Judge Friedman had the ability to sanction her, Guzall, or both. Forcing pro bono matters on Guzall, however, could have financially harmed Guzall, would have taught him nothing other than resentment for the court, and was unlikely to benefit the poor clients he would have been forced to represent. The judge's intended action was antagonistic and unfair.

To reiterate, judges will be disqualified for negative comments or remarks about cases, parties, or lawyers with an intrajudicial foundation only where those

237. *Id.*
238. *Id.* at 1085.
239. *Id.* at 1087 (quoting Liteky v. United States, 510 U.S. 540, 556 (1994)).
240. *Id.* (final alteration in original).
241. *Id.* (quoting *Liteky*, 510 U.S. at 551).
242. *Id.*
243. *Id.*
244. *Id.* at 1087–88.
245. *Id.* (quoting *Liteky*, 510 U.S. at 555–56).
246. *Id.* at 1088.

comments or remarks are "so extreme that they reflect an utter incapacity to be fair."[247] Or, as the Supreme Court reasoned in *Liteky* and the Sixth Circuit partly followed too closely in *Alemarah*, judges' conclusions or opinions derived from information learned or events that occurred in a pending or prior proceeding justify disqualification for partiality only where they reflect entrenched antagonism or favoritism that forecloses fair judgment.[248] Again, this is a heavy burden, however phrased.[249] *Publix Supermarkets, Inc. v. Olivares*[250] is a recent case in which the party seeking the judge's disqualification successfully carried that burden.

Olivares arose out of a wrongful death case in which a Publix truck driver was using his cell phone with a hands-free device at the time of the fatal accident at issue.[251] The plaintiff moved to amend her pleadings to add a punitive damage claim based on the driver's cell phone usage.[252] Publix opposed the motion on the theory that neither a driver's use of a hands-free cell phone while driving nor a company policy permitting that practice could be a basis for punitive damages because neither one was illegal.[253] At the hearing on the plaintiff's motion, the trial judge "made multiple comments showing his predisposition that cell phone use while driving, even if legal, is dangerous and should not be allowed."[254] Nonetheless, he denied Publix's disqualification motion.[255] The *Olivares* court granted Publix's resulting petition for a writ of prohibition.[256]

As the *Olivares* court explained, "the trial judge's multiple comments denigrating Publix's position regarding its cell phone policy would create fear in a reasonable person that Publix would not receive a fair trial."[257] Going one step further, the judge's remarks "tended to show a disdain not only for Publix's legal position but for the company's lack of a policy prohibiting cell phone use while driving."[258] Consequently, he "should have disqualified himself."[259]

The timing of a judge's negative comments about a party can sometimes be critical, as *State v. Howard* demonstrates.[260] The defendant in that case, Ramondo Howard, was a career criminal who faced possible prison time for violating the terms and conditions of his probation.[261] Before his probation violation hearing, his defense lawyer moved to withdraw from his representation.[262] Addressing Howard at the hearing on his lawyer's motion to

247. Cain-Swope v. Swope, 523 S.W.3d 79, 89 (Tenn. Ct. App. 2016).
248. *Liteky*, 510 U.S. at 555 (1994); *Alemarah*, 980 F.3d at 1087.
249. United States v. Perez, 956 F.3d 970, 975 (7th Cir. 2020).
250. 292 So. 3d 803, 804 (Fla. Dist. Ct. App. 2020).
251. *Id.* at 803.
252. *See id.* at 803–04.
253. *Id.*
254. *Id.* at 804.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. 23 A.3d 1133, 1137–38 (R.I. 2011).
261. *Id.* at 1134.
262. *Id.*

withdraw, the judge said: "[W]hen I looked at your cases and your record and your age, I very quickly came to the conclusion that you need to be warehoused. I've given up hope on you because you just violate the law constantly."[263] The judge added: "The more I look at your record, the more I believe you are beyond rehabilitation."[264] The judge then granted the lawyer's motion to withdraw and ordered the appointment of new counsel for Howard.[265]

Howard thereafter moved to disqualify the judge based on his comments at the withdrawal hearing.[266] The judge denied the motion.[267] A few weeks later, the judge conducted Howard's probation violation hearing, held that he had violated the terms of his probation, and entered judgment against him.[268] Howard appealed to the Rhode Island Supreme Court.[269]

On appeal, the State contended that the judge had simply used colorful language in ruling against Howard, such that the judge was not required to disqualify himself.[270] The Rhode Island Supreme Court disagreed, and explained that it was "the opinion that [the judge] expressed, *and the time at which he chose to convey it*, rather than his choice of language, that suggest[ed] the appearance of bias and a preconceived notion about the merits of the case."[271] The judge's harsh comments about Howard likely would not have warranted disqualification had he made them at the close of the evidence at Howard's probation violation hearing or when he sentenced Howard.[272] But because the judge aired his negative opinions about Howard before the probation violation hearing began, the *Howard* court was left to conclude that the judge objectively displayed "a 'clear inability to render fair judgment.'"[273] The court thus reversed the judgment against Howard.[274]

Judges are especially susceptible to allegations of partiality where they interrogate witnesses in hearings or trials.[275] That observation should not be construed to mean, however, that judges cannot, or should not, question witnesses during proceedings, or that it is not occasionally helpful or necessary for them to do so. A judge may appropriately question witnesses to reasonably

263. *Id.* at 1134–35 (emphasis omitted).
264. *Id.* at 1135 (emphasis omitted).
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 1137.
271. *Id.* (emphasis added).
272. *Id.*
273. *Id.* (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)).
274. *Id.* at 1138.
275. *See, e.g.*, Reyes-Melendez v. INS, 342 F.3d 1001, 1006–08 (9th Cir. 2003) (finding that when questioning the petitioner, the immigration judge acted as a partisan advocate rather than as a neutral factfinder); Harris v. Lafayette LIHTC, LP, 85 N.E.3d 871, 878–79 (Ind. Ct. App. 2017) (reversing the judgment where the court's questions belittled the plaintiff for living in government-subsidized housing and for not making a relatively small disputed rent payment); People v. Swilley, 934 N.W.2d 771, 796–97 (Mich. 2019) (deciding that the way the judge questioned defense witnesses during trial "pierced the veil of judicial impartiality").

expedite proceedings, clarify issues or testimony, or understand evidence.[276] What a judge may not do is appear to become a participant or advocate in a proceeding.[277] For instance, a judge may not attempt to impeach a witness or ask questions that undermine a witness's credibility.[278] Nor may a judge question a witness with the intent to make a substantive point or advance a theory or argument,[279] or elicit testimony from a witness to develop evidence that supports or defeats a party's claim or defense.[280]

C. Judges' Conduct in the Ordinary Course of Case Administration

As the Supreme Court stated in *Liteky*, "[a] judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—[are] immune" from partiality challenges.[281] This principle is consistent with (or perhaps an aspect of) the general rule that judges' comments and expression of conclusions or opinions based on information learned or events occurring during proceedings generally do not justify their disqualification for alleged partiality. But here, too, judges may make statements when managing proceedings that reasonably call into question their impartiality.[282] The typical concern is the judge's predetermination or prejudgment of a material issue—perhaps on a blanket or uniform basis—in a way that precludes fair consideration or resolution of a matter.[283]

In *People v. Steger*,[284] for example, Mark Steger was convicted in a municipal court of violating a New York traffic law related to the use of a cell phone.[285] Before his trial started, the prosecutor offered to allow him to plead guilty to a reduced charge.[286] The judge refused to accept the plea.[287] When asked why, the judge responded that "it was a blanket policy that no reductions were

276. *See, e.g.*, E.T. v. Dep't of Child. & Fams., 261 So. 3d 593, 595–97 (Fla. Dist. Ct. App. 2019) (holding that the trial judge's questioning of two witnesses did not violate the mother's due process rights in a termination of parental rights case); Ward v. State, 138 N.E.3d 268, 277 (Ind. Ct. App. 2019) (finding no basis for disqualification where the judge's questions were not calculated to discredit or impeach the witness); *In re* Child. of Jamie P., 236 A.3d 449, 457 (Me. 2020) (approving questions that were intended to clarify and uncover facts that were essential to the court's ultimate findings and judgment).

277. *See E.T.*, 261 So. 3d at 595 (quoting R.W. v. Dep't of Child. & Fams., 189 So. 3d 978, 980 (Fla. Dist. Ct. App. 2016)).

278. *Swilley*, 934 N.W.2d at 789. *But cf.* SEC v. Antar, 44 F. App'x 548, 552 (3d Cir. 2002) (explaining that it was proper in a bench trial where credibility determinations were critical for the judge to assertively question witnesses to understand the complicated financial transactions at issue).

279. *Swilley*, 934 N.W.2d at 792.

280. Marwan v. Sahmoud, 306 So. 3d 248, 253 (Fla. Dist. Ct. App. 2020).

281. Liteky v. United States, 510 U.S. 540, 556 (1994).

282. *See, e.g.*, State v. Dixon, 217 So. 3d 1115, 1123 (Fla. Dist. Ct. App. 2017) (concluding that the judge's lenient pre-trial release policy in cases where the State did not file criminal charges within 21 days of a defendant's arrest regardless of the circumstances "gave the State a well-founded fear that it would not receive fair and impartial treatment when it announced its unreadiness to file [the defendant's] charges on the twenty-first day" following his arrest).

283. *Id.* at 1122–23.

284. 97 N.Y.S.3d 818 (Cnty. Ct. 2019).

285. *Id.* at 818.

286. *Id.*

287. *Id.*

given in this type of case."[288] The judge further explained that his refusal reflected "a personal policy that 'we have between both judges. We don't reduce cell phone tickets.'"[289]

Steger appealed his conviction.[290] The appellate court concluded that the judge's "blanket [no plea] policy" called into question his impartiality.[291] "Closing the door to plea bargaining for every cell phone violation gives an impartial observer the impression that the judge may be favoring conviction of the charge."[292] The *Steger* court determined that the appropriate remedy was to reverse Steger's conviction and transfer the case to a different municipal court for resolution.[293]

V. REASSIGNMENT TO A DIFFERENT JUDGE ON REMAND

Finally, a party that has appealed a judge's refusal to disqualify herself or has petitioned an appellate court for extraordinary relief on the same basis may request that the court reassign the case to a different judge upon remand or return to the trial court.[294] This remedy is available in both federal and state courts.[295] A party may seek a trial judge's reassignment for the first time on appeal or by order on mandamus[296] "where, for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 819.

292. *Id.*

293. *Id.* at 819–20.

294. State v. McEnroe, 333 P.3d 402, 407 (Wash. 2014).

295. *See, e.g.*, United States v. Khan, 997 F.3d 242, 249–50 (5th Cir. 2021) (reassigning the case on remand after the district judge "packed the record with hostile remarks against the government and its attorneys" that "reveal[ed] a level of prejudice—not just skepticism—against the government as a party in th[e] case"); Miller v. Sam Houston State Univ., 986 F.3d 880, 884 (5th Cir. 2021) (reassigning the case on remand where the district judge grossly restricted the plaintiff's discovery, dismissed some of the plaintiffs' claims sua sponte, told the plaintiff's lawyer, "I will get credit for closing two cases when I crush you. . . . How will that look on your record?", and later granted the defendants summary judgment); Beach Mart, Inc. v. L&L Wings, Inc., 784 F. App'x 118, 130 (4th Cir. 2019) (concluding that reassignment to a different district judge was appropriate "to promote 'the appearance of justice'"); Sentis Grp., Inc. v. Shell Oil Co., 559 F.3d 888, 904–05 (8th Cir. 2009) (reassigning the case on remand because a fully informed reasonable person would doubt the district judge's impartiality after the judge repeatedly directed profanity at the plaintiffs' and their lawyers—albeit out of understandable frustration with their conduct— refused to allow the plaintiff's lawyers to fully explain themselves at a sanctions hearing, misconstrued its own discovery orders against the plaintiffs, and ultimately dismissed the case as a sanction); State v. Wright, 131 A.3d 310, 324 (Del. 2016) (directing reassignment of the case to a new judge on remand); State v. Solis-Diaz, 387 P.3d 703, 706 (Wash. 2017) ("Erroneous rulings generally are properly grounds for appeal, not for recusal. . . . But where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge.") (citation omitted).

296. As the Second Circuit noted in *Federal Insurance Co. v. United States*, 882 F.3d 348 (2d Cir. 2018), mandamus is a separate and distinct remedy; it is not an appeal. *Id.* at 361–62.

merits, or otherwise prejudged the issue."[297] Appellate courts may also direct the reassignment of cases to different judges on remand on their own initiative.[298]

An appellate court's reassignment of a case to a different trial judge is "a rare and disfavored" remedy.[299] Federal courts apply three standards when deciding whether reassignment is appropriate.[300] Under the first test, the court applies the express language of § 455(a) to decide whether to reassign the case.[301] "In accordance with that standard, recusal or reassignment is appropriate where [the judge's] 'impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'"[302] Second, some courts apply the § 455(a) standard as articulated in *Liteky*, such that reassignment is appropriate "only in the exceedingly rare circumstance" that a district judge's rulings or comments are "'so extreme as to display clear inability to render fair judgment.'"[303] Any comments or rulings by a judge that would merit reassignment under *Liteky* would also justify reassignment under the express language of § 455(a).[304] Finally, other courts apply a three-factor test:

> [W]hether the original judge would reasonably be able on remand to have substantial difficulty in laying aside his previously expressed views or findings that have been declared erroneous; whether reassignment is advisable to preserve the appearance of justice; and whether the efficiency costs involved in reassignment outweigh the benefits to the appearance of fairness.[305]

297. *McEnroe*, 333 P.3d at 407 (footnotes omitted).

298. *See, e.g.*, Seachris v. Brady-Hamilton Stevedore Co., 994 F.3d 1066, 1084 (9th Cir. 2021) ("The tone of the ALJ's decision and the manner in which the ALJ evaluated the evidence suggest that the ALJ may not be able to provide [the claimant's lawyer] with a fair and impartial hearing on remand. Accordingly, we sua sponte direct that the [Benefits Review Board] reassign this matter to a different ALJ on remand to avoid the appearance of partiality."); United States v. McCall, 934 F.3d 380, 384 (4th Cir. 2019) (quoting United States v. Neal, 101 F.3d 993, 1000 n.5 (4th Cir. 1996)).

299. United States v. Bowen, 799 F.3d 336, 359 (5th Cir. 2015).

300. In doing so, they are deciding whether reassignment is appropriate under the federal statute that mechanizes the remedy, 28 U.S.C. § 2106 (2018). *See* Cline v. Dart Transit Co., 804 F. App'x 307, 316 (6th Cir. 2020) ("Under 28 U.S.C. § 2106, we have the authority to reassign a case to a different district court judge on remand.").

301. Sentis Grp., Inc. v. Shell Oil Co., 559 F.3d 888, 904 (8th Cir. 2009).

302. *Id.* (quoting *In re* Kan. Pub. Emps. Ret. Sys., 85 F.3d 1353, 1358–59 (8th Cir. 1996)).

303. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 763 (D.C. Cir. 2014) (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)); Dupree v. Laster, 389 F. App'x 532, 535 (7th Cir. 2010); United States v. Wecht, 484 F.3d 194, 213–14 (3d Cir. 2007).

304. *Wecht*, 484 F.3d at 214 (quoting Liteky v. United States, 510 U.S. 540, 555–56 (1994)).

305. United States v. Bowen, 799 F.3d 336, 359 (5th Cir. 2015) (quoting *In re* DaimlerChrysler Corp., 294 F.3d 697, 700–01 (5th Cir. 2002)); *see also* Ketcham v. City of Mount Vernon, 992 F.3d 144, 152 (2d Cir. 2021) (describing the three-factor test along the same lines (quoting Gonzalez v. Hasty, 802 F.3d 212, 225 (2d Cir. 2015))); Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 728–29 (4th Cir. 2021) (stating the test similarly (quoting United States v. North Carolina, 180 F.3d 574, 582–83 (4th Cir. 1999))); United States v. Lanier, 988 F.3d 284, 298–99 (6th Cir. 2021) (expressing the three-factor test similarly (quoting Rorrer v. City of Stow, 743 F.3d 1025, 1049 (6th Cir. 2014))).

Whether one approach is superior to the others is arguable; none of them yields many reassignments.[306] State courts also apply different standards for reassignment, although they tend to hew closely to the language of Rule 2.11(A) and cases applying the rule.[307]

Returning once more to *In re Flynn*[308] as a learning exercise, Flynn asked the D.C. Circuit to reassign his case to a different district judge based on Judge Sullivan's rulings adverse to him, principally including the judge's refusal to grant the government's motion to dismiss the case and his order appointing Gleeson as amicus curiae to oppose the government's motion.[309] But, again, a judge's adverse rulings are almost never a valid basis for a bias or partiality challenge, regardless of whether they are urged in connection with a trial court disqualification motion or a plea for reassignment on appeal.[310] Neither Judge Sullivan's unwillingness to grant the government's motion to dismiss out of the gate nor his appointment of Gleeson as amicus curiae neared "the 'very high standard'" required to reassign the case.[311]

Flynn also argued that reassignment was warranted based on Judge Sullivan's courtroom statements that allegedly reflected the judge's "outrage" and "deep-seated antagonism" toward him.[312] This argument failed as well.[313] Judge Sullivan's opinions about the seriousness of Flynn's admitted crime and his related conduct were tethered to the proceedings.[314] Nothing about the judge's statements signaled his inability to fairly sentence Flynn when the time came.[315]

Retreating, Flynn contended that Judge Sullivan's participation in the mandamus proceeding created an appearance of partiality that required his disqualification in the underlying criminal case under § 455(a).[316] That argument was doomed from the start, however, because if Flynn was correct, then every mandamus petitioner seeking to disqualify a district judge would succeed if the district judge merely responded to the petition.[317] That could not be. Such a result

306. *See Bowen*, 799 F.3d at 359 (describing reassignment as "a rare and disfavored order"); *In re Kellogg Brown & Root*, 756 F.3d at 763 (explaining that reassignment is an option "only in the exceedingly rare circumstance" identified in *Liteky*, which represents "a very high standard").

307. *See, e.g.*, State v. Wright, 131 A.3d 310, 324 (Del. 2016) ("Because of this and other comments of record, we have concluded that 'the public's confidence in the impartial administration of justice would be enhanced if' a new judge presided over Wright's case on remand.") (footnotes omitted); State v. Clothier, 894 P.2d 257, 260 (Kan. Ct. App. 1995) (reassigning the case because the judge's remarks "would create a reasonable doubt concerning the judge's impartiality in the mind of a reasonable person"); State v. Solis-Diaz, 387 P.3d 703, 706 (Wash. 2017) ("Erroneous rulings generally are properly grounds for appeal, not for recusal. . . . But where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge.") (citation omitted).

308. 973 F.3d 74 (D.C. Cir. 2020) (en banc).

309. *Id.* at 83.

310. *Id.*

311. *Id.* (quoting *In re Kellogg Brown & Root*, 756 F.3d at 763).

312. *Id.*

313. *Id.* at 83–84.

314. *See id.* at 84.

315. *Id.* at 83–84.

316. *Id.* at 84.

317. *Id.*

would, most obviously, "swallow the dictates of § 455."[318] It would also contravene existing case law.[319] Nor did Judge Sullivan's act of filing a petition for rehearing en banc after the divided panel of the court ordered him to grant the government's motion to dismiss change the calculus:

> [T]he District Judge participated in the mandamus proceeding at this Court's invitation, and nothing about that participation created a reasonable impression of partiality, nor could it. Having come that far, the further step of filing a petition for rehearing did not, on its own, create a reasonable impression of partiality, especially as nothing in the en banc petition itself indicates bias in connection with the underlying criminal case. Indeed, any views the District Judge has conveyed in his briefing before us come from what he has learned in carrying out his judicial responsibilities.[320]

In the end, the court saw no sign of intrajudicial partiality and refused to reassign Flynn's case to a different judge.[321] Judge Sullivan remained on the case when it resumed in district court.[322]

The *In re Flynn* court reached the correct result under *Liteky* and under the plain language of § 455(a). The judge's refusal to immediately grant the government's motion to dismiss and his decision to appoint amicus curiae were legally sound,[323] and his critical comments were based on information learned during the proceedings. But Flynn faced another barrier to reassignment that he overlooked or underestimated: the standard of review. Because this was a mandamus proceeding, Flynn had to show that his right to relief was "'clear and indisputable.'"[324] Alternatively, had he moved to disqualify Judge Sullivan, lost, and then appealed that ruling, the court would have reviewed Judge Sullivan's decision for an abuse of discretion.[325] Abuse of discretion is a challenging standard of review for an appellant, but it beats a "clear and indisputable" standard.

VI. CONCLUSION

In re Flynn is an interesting case not just because of its political overtones but because it opened a rare high-profile window into the law of judicial disqualification. As the case shows, the longstanding extrajudicial source doctrine that generally insulates judges against disqualification for partiality grounded in the performance of their judicial duties is not absolute or exclusive.[326] In some instances, judges' impartiality may reasonably be

318. *Id.*
319. *Id.* (citing *In re* Moore, 955 F.3d 384, 388 (4th Cir. 2020)).
320. *Id.* at 84–85.
321. *Id.* at 82–85.
322. *Id.* at 85.
323. *See* United States v. Flynn, 507 F. Supp. 3d 116, 126–35 (D.D.C. 2020) (articulating the reasons for not granting the government's unopposed Rule 48(a) motion to dismiss).
324. *In re Flynn*, 973 F.3d at 84 (quoting Cheney v. United States Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 381 (2004)).
325. *See In re* Moore, 955 F.3d 384, 388 (4th Cir. 2020).
326. *In re Flynn*, 973 F.3d at 84–85.

questioned based on actions taken, rulings made, knowledge gained, or conclusions or opinions formed during proceedings. In short, judges can be disqualified for alleged intrajudicial partiality. The standard for disqualification based on intrajudical factors, however, is extremely hard to satisfy.[327] *In re Flynn* amply illustrates the general rule that judges' rulings, negative comments, or remarks about litigants or lawyers based on facts learned or events that occurred during litigation, and ordinary efforts at courtroom administration will almost never support disqualification. That is as it should be: judges' erroneous rulings ordinarily are grounds for appeal, not disqualification,[328] and reasonable people understand that judges will naturally form opinions and conclusions about parties and their claims during litigation without compromising their impartiality.

If there is controversy associated with disqualification for intrajudicial partiality, it relates to the test for disqualification to be applied by a reviewing court. Both Rule 2.11(A) and 28 U.S.C. § 455(a) provide that disqualification is required where the judge's impartiality might reasonably be questioned.[329] The Supreme Court, however, has held that judges' conclusions or opinions that rest on facts learned or events that occurred in a proceeding justify disqualification for partiality under § 455(a) only if they reflect a deep-seated favoritism or antagonism which would render fair judgment impossible.[330] The Supreme Court standard has also found its way in whole or part into state court opinions.[331]

Whether that controversy is real, however, is debatable. Even courts that apply the seemingly more lenient language of Rule 2.11(A) and § 455(a) in intrajudicial partiality cases rarely disqualify the judges for the reasons outlined above. The objective standard for disqualification compels that result. Fortunately, that is also the correct result in most cases. On a daily basis, the vast majority of judges perform their duties impartially and thoughtfully—just as Judge Sullivan did in Flynn's case.

327. *Id.* at 83.
328. *See id.* at 82–83.
329. MODEL CODE OF JUD. CONDUCT R. 2.11(A) (AM. BAR ASS'N 2020); 28 U.S.C. § 455(a) (2018).
330. Liteky v. United States, 510 U.S. 540, 541 (1994).
331. *Cf.* State v. Wright, 131 A.3d 310, 321 (Del. 2016).