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Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant to Appeal the Denial of a Recusal Motion Even After Entering an Unconditional Guilty Plea

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I. INTRODUCTION

> One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.[1]

A suspect is charged with a federal crime, obtains legal counsel, and finds out who his judge will be. Because of a prominent rumor circulating in the community that the defendant once had an affair with the judge's wife,[2] the defendant questions the judge's ability to be fair with him. He and his counsel file a timely[3] motion for recusal un-

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

2. These hypothetical facts are loosely borrowed from an actual case. See *United States v. Brinkworth*, 68 F.3d 633, 635 (2d Cir. 1995) and *infra* discussion Part IV.B.2. Under 28 U.S.C. § 455(a), the reasons for moving for the judge's disqualification must, of course, have a reasonable basis. *See* 28 U.S.C. § 455(a) (1994); *see also* H.R. REP. NO. 93-1453, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 [hereinafter HOUSE REPORT] ("Disqualification for lack of impartiality must have a *reasonable* basis."). Specific grounds for recusal are also listed in 28 U.S.C. § 455(b).

3. Circuits are split as to whether there is a timeliness requirement to § 455(a). In some jurisdictions, failure to present a timely motion for recusal is fatal to the defendant's case. *See, e.g., Brinkworth*, 68 F.3d at 639 (citing Apple v. Jewish Hosp., 829 F.2d 326, 333 (2d Cir. 1987)).

der 28 U.S.C. § 455(a).[4] The judge promptly denies the motion with little to no comment. Discouraged, and now worried, the defendant considers plea bargaining. The prosecutor, who knows about the rumor, proposes a bargain that includes a recommendation to the judge of a lightened sentence in exchange for the defendant's unconditional guilty plea. The defendant and his counsel repeatedly try bargaining to condition the plea on being able to appeal the denied motion to recuse, but the prosecutor steadfastly refuses: "It's all or nothin'. Take this deal, or take your chances with the judge at trial." The defendant reluctantly signs the plea. The prosecutor and defense counsel inform the judge of the plea agreement,[5] and the judge sets a date for sentencing. At sentencing, the judge acknowledges the prosecutor's lightened sentence suggestion, but decides that this defendant deserves a harsher sentence. Irate and feeling that the judge has been biased against him, the defendant tries to appeal the denial of the recusal motion.[6]

A split currently exists in the United States Courts of Appeals as to whether this criminal defendant will be able to appeal the judge's denial of his motion to recuse. In 1988, the Tenth Circuit first decided the issue in *United States v. Gipson*.[7] In *Gipson*, the court held that only a charge of actual bias[8] would survive a guilty plea.[9] Two

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In other jurisdictions, no strict timeliness requirement applies to § 455(a). *See, e.g.*, United States v. Kelly, 888 F.2d 732, 747 (11th Cir. 1989). For further discussion, see *infra* Part II.D.2.

4. *See* 28 U.S.C. § 455 (1994). Congress wrote this section to be self-executing, i.e., the judge would recuse himself. *See* Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993) (requiring judge to recuse himself sua sponte under § 455 whenever impartiality might reasonbly be questioned). However, parties may also make a motion to recuse. *See* 28 U.S.C. § 455; *see also* Michele Dickey, *Authority of the Trial Judge*, *in* Twenty-Seventh Annual Review of Criminal Procedure, 86 GEO. L.J. 1659, 1662 (1998).

5. *See* FED. R. CRIM. P. 11.

6. A harsh sentence is not the only reason criminal defendants might seek appeal of the denial of recusal motion, although it seems the most likely reason. By itself, a stiff sentence is not grounds for reversal. *See* FED. R. CRIM. P. 11(c)(1). Being innocent of the charges is another obvious reason a defendant might want to appeal the motion.

Some might argue that the Federal Sentencing Guidelines alleviate any concern regarding the harshness of sentences. That is simply not the case. Prosecutors still have many options in charging and in plea bargaining which can put them more in control of sentencing than judges are. *See* United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring) ("Assistant U.S. Attorneys ("AUSAs") have been heard to say, with open candor, that there are many 'games to be played,' both in charging defendants and in plea bargaining, to circumvent the Guidelines.").

7. United States v. Gipson, 835 F.2d 1323, 1325 (10th Cir. 1988).

8. Section 455(b) deals with issues of actual bias. Section 455(a) deals only with the appearance of impartiality. The statute reads:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

years later, the First Circuit came out the other way in *United States v. Chantal*, holding that Chantal's § 455(a) challenge to the trial judge's qualification was not waived by his guilty plea.[10] Circuits addressing the issue since these two decisions have aligned themselves with one of the two sides.[11] The First and Second Circuits allow a criminal defendant to appeal the denied recusal motion following an unconditional guilty plea—the Fifth, Seventh and Tenth Circuits do not.

This Note argues that criminal defendants who have entered unconditional guilty pleas following a denial of a motion to recuse under § 455(a) should be able to appeal the recusal decision even without reserving the right to appeal it in their guilty pleas.[12] Part II of this Note discusses the history and purpose behind 28 U.S.C. § 455(a), and how the appearance of judicial impartiality is a necessary element for the effective functioning of the judicial system. Part III explores plea

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(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. §§ 455(a), (b) (1994). In the context of requesting the judge's disqualification, then, the *Gipson* court held that appearance of impartiality would not survive a guilty plea, but actnal bias would (e.g., a § 455(b) infraction). *See Gipson*, 835 F.2d at 1325. Other issues that would withstand a guilty plea are jurisdictional issues, such as failure of the indictment to charge an offense, lack of subject matter jurisdiction, double jeopardy, etc. *See* Christine M. Guidubaldi & Steve Kim, *Guilty Pleas*, 86 GEO. L.J. 1510, 1522-23 (1998); *see also* note 4

9. *See Gipson*, 835 F.2d at 1325.

10. United States v. Chantal, 902 F.2d 1018, 1020 (1st Cir. 1990).

11. The Seventh Circuit aligned itself with the *Gipson* decision in *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989), as did the Fifth Circuit in *United States v. Hoctel*, 154 F.3d 506, 508 (5th Cir. 1998). The Second Circuit aligned itself with the *Chantal* decision in *United States v. Brinkworth*, 68 F.3d 633, 638 (2d Cir. 1995); however, the defendant did not prevail because his motion was not timely. *See id.* at 639. As of the publication of this Note, other circuits have not yet addressed the issue.

12. For a discussion of unconditional guilty pleas, see *infra* Part III.B.1.

bargaining in our criminal justice system, and the judge's crucial role in guaranteeing the voluntariness of guilty pleas. Part IV describes how the five circuit courts addressing the issue so far have resolved the question of whether a criminal defendant may appeal a denied recusal motion after entering an unconditional guilty plea. Part V argues that because of the importance of public confidence in the impartiality of the criminal justice system, the importance of ensuring that criminal defendants' guilty pleas are truly voluntary, and the improbability of prosecutorial and judicial consent to a guilty plea conditioned on reserving the right to appeal the denial of the recusal motion, federal courts should recognize that an unconditional guilty plea is not a per se waiver of the defendant's right to disqualify the judge when his[13] impartiality is reasonably in question.

II. A LOOK AT JUDICIAL RECUSAL

A. Construing Recusal with Reference to the Values it Protects

An impartial judiciary is essential to the proper functioning of our judicial system. Two purposes are served by the requirement that judges be impartial: protecting the procedural due process rights of defendants,[14] and maintaining public confidence in the integrity of the judicial system.[15] It is a general rule that the appearance of partiality

13. The vast majority of federal court judges are male, *see* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1705 (1991), as are federal criminal defendants, *see* U.S. DEPT. JUSTICE, CRIME IN THE UNITED STATES 225 (1996) (finding that, in 1995, males accounted for approximately 80% of all arrestees). Throughout this Note, the male pronoun will be used to refer to both criminal defendants and judges for ease of reference.

14. The Due Process Clauses of the Fifth and Fourteenth Amendments entitle defendants to a "neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Tumey v. Ohio, 273 U.S. 510, 523, 532-35 (1927); *In re* Parr, 13 B.R. 1010, 1019 (E.D.N.Y. 1981) (stating that the Fifth Amendment bars trials where "appearance of justice is not satisfied"). A colorable argument also exists that the Sixth Amendment's language ("In all criminal prosecutions, the accused shall enjoy the right te a . . . trial, by an impartial jury") could be interpreted to require an impartial adjudicator, thereby also requiring a judge, in the absence of a jury, to be impartial. *See* U.S. CONST. amend. VI.

15. *See* Amy J. Shimek, *Professional Responsibility Survey: Recusal*, 73 DENV. U. L. REV. 903, 917 (1996); Lawrence J. Hand, Jr., Casenoto, Liteky v. Unitod States*: Jeopardizing Judicial Integrity*, 40 LOY. L. REV. 995, 996-97 (1995) (citing 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3541, at 548-49 (1984)); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMP. L.Q. 697, 705 (1987).

is as damaging to public confidence as its actual existence.[16] Court authority is grounded on confidence in the judiciary, which in turn is grounded in the belief that specific judicial decisions remain uninfluenced by the personal biases or interests of the judge.[17] Without this necessary degree of reverence,[18] the judicial system would cease to function effectively.[19]

1. Public Confidence in the Judicial System

The federal judiciary relies, for purposes of enforcement of its decisions, on the continued public belief in the legitimacy and neutrality of the judicial process. As Judge William Bodoh said, "The judiciary does not have an army to enforce its decisions and orders. . . . Throughout the history of our nation, courts have relied upon the underlying confidence of the public in the fairness and impartiality of the judicial system to obey court orders without being coerced."[20] In order to safeguard public confidence, some mechanism must ensure the impartiality of judges. Congress placed the responsibility of policing impartiality squarely on the shoulders of federal judges through the self-enforcement of recusal statutes, 28 U.S.C. § 455,[21] as well as the duty to rule on litigants' motions for recusal under 28 U.S.C. § 144.[22]

This policing responsibility is especially important in the federal court system. In state courts, the judges are usually accountable to the electorate and can be ousted if the public distrusts their objec-

16. *See* United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (citing Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980); United States v. McDonald, 576 F.2d 1350 (9th Cir. 1978)); *see also* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 745 (1973).

17. *See Conforte*, 624 F.2d at 881 (citing Note, *Disqualification of Judges and Justices in the Federal Courts*, *supra* note 16, at 747).

18. Professor David Blanck has called for empirical research on the "appearance of justice" in the judicial system in general, and the criminal justice system specifically. In his article, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887, 888 (1996), Professor Blanck quotes Judge Cordell's opening remarks at the "Appearance of Justice" Conference at Princeton University on November 11, 1995: "[But] when we talk about the [current] social norms and the appearance of justice, we have got young [black] men—and Latino males—coming into a system that doesn't appear fair to them. . . . There's got to be different approaches taken." His article focuses on the societal need for a criminal justice system that is, and appears te be, above reproach, and suggests that the legal community should search out ways te remedy any flaws. Professor Blanck also quotes the words delivered by Professor Paul Robinson at the Conference: "We need te have a criminal justice system which speaks with moral authority, which means it has to have the appearance of fairness. . . . That's one part of making law more powerful—by increasing its appearance of doing justice." *Id.* at 926.

19. *See generally* text accompanying *supra* note 17.

20. William T. Bodoh, *On Judging Judges*, 55 OHIO ST. L.J. 889, 890 (1994).

21. *See* 28 U.S.C. § 455 (1994).

22. *See id.* § 144.

tivity.[23] Federal judges, on the other hand, are appointed for life tenure,[24] and therefore are quite immune to voters' whims.[25] The only meaningful checks on their power short of impeachment are: (1) institutional obeisance to the dictates of the legislature; and, (2) self-imposed ethical obligations, both of which embody self-enforcing mechanisms to ensure the integrity of the judiciary.[26] Recusal statutes therefore are powerful enforcement mechanisms to check the power of the judiciary.

2. Individual Rights of Litigants

Although somewhat secondary to the need for public confidence in judicial integrity, due process rights of litigants are certainly an important concern behind recusal in general.[27] If courts started ignoring the procedural rights of litigants, confidence in the judicial process would plummet. In this sense, these two concerns are inseparably linked. But courts have held that depriving a defendant of his right to an impartial judge is, in and of itself, sufficient grounds for reversal.[28]

B. The Evolution of Federal Recusal Statutes in the United States

Early in the nation's history, Congress recognized the critical need for an impartial federal judiciary. The first federal recusal statute, enacted in 1792, required judges to disqualify themselves from cases in which they had an improper interest or had been counsel to a

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23. *See* DANIEL R. GRANT & H.C. NIXON, STATE AND LOCAL GOVERNMENT IN AMERICA 397 (2d ed. 1968) (discussing the political roles played by judges); *see also* MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY: SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 2-18 (1987) (detailing the methods for judicial selection/election/retention in the states).

24. *See* U.S. CONST. art. III, § 1.

25. *See* Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 307 (1996) (noting that the supposed independence of federal judges from political influence is one of the arguments in favor of judicial review).

26. *Cf.* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-80 (1993) (arguing that the federal judiciary is more majoritarian than countermajoritarian, and is subject to meaningful checks on its power).

27. *See supra* note 14; *see also* HOUSE REPORT, *supra* note 2, at 6355 ("Litigants ought not have to face a judge where there is a reasonable question of impartiality."). The secondary nature of the concern for an individual litigant's procedural rights is evidenced by the number of times "public confidence in the integrity of the judicial process" is stated as the main purpose behind the 1974 amendments (at least 4 times in the House Report alone). *Id.* at 6351-57.

28. *See* Tumey v. Ohio, 273 U.S. 510, 532-35 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 867-68 (1988) (vacatur will be available for infractions of § 455(a) if, inter alia, fairness to the particular litigants requires it).

party.[29] An 1821 statute broadened the bases of disqualification to cover any relationship the judge had with a party that would render his continuing as judge improper, but left it within the judge's discretion as to whether or not he should sit.[30]

In 1911, Congress enacted a statute, now codified as 28 U.S.C. § 144, that establishes a procedural method for litigants to disqualify judges on the basis of "personal bias or prejudice."[31] The procedural requirements include a "timely" and "sufficient" affidavit, setting forth the reasons supporting the alleged bias or prejudice.[32] Courts have interpreted the words "personal bias or prejudice"[33] to mean that the source of the bias may not originate in judicial proceedings.[34] Because courts have demanded strict adherence to § 144's procedural requirements,[35] however, commentators have suggested that it is not as efficacious for disqualifying a judge with a bias as Congress originally intended.[36]

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29. *See* Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278, *cited in* Liteky v. United States, 510 U.S. 540, 544 (1994).

30. *See* Act of Mar. 3, 1821, ch. 51, 3 Stat. 643, *cited in Liteky*, 510 U.S. at 544; *see also* Jeremy S. Brumbelow, Case Note, Liteky v. United States: *The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 ARK. L. REV. 1059, 1066 (1995) ("In 1821, Congress expanded the recusal statute to cover any judicial relationship or connection with a party that, in the judge's opinion, would make it improper to sit.").

In 1891, Congress enacted 28 U.S.C. § 47, which prohibits a federal judge from hearing an appeal from a case he decided as a trial judge. *See* 28 U.S.C. § 47 (1994). This statutory requirement cannot be waived or avoided by the parties. *See* Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 344 (1913).

31. 28 U.S.C. § 144 (1994).

32. *Id.*

33. *Id.*

34. *See generally* discussion *infra* Part II.D.3 (regarding the extrajudicial source limitation).

35. *See, e.g.*, Berger v. United States, 255 U.S. 22, 34 (1921) (affidavit must state supporting factual grounds with particularity); Davis v. Commissioner of Internal Revenue, 734 F.2d 1302, 1303 (8th Cir. 1984) (conclusory allegations of bias or prejudice are legally and factually insufficient); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (affidavit must be sworn to or affirmed by party, not counsel; otherwise "invalid"); Morrison v. United States, 432 F.2d 1227, 1229 (5th Cir. 1970) (per curiam) (counsel must certify that affidavit is filed in good faith; such certificate must be filed with the affidavit); United States v. Thomas, 299 F. Supp. 494, 498-500 (E.D. Mo. 1968) (litigants must be in strict compliance with procedural requirements, or will not benefit from protections).

36. *See* 13A WRIGHT ET AL., *supra* note 15, § 3542, at 555; *see also* Brumbelow, *supra* note 30, at 1069-70; *see generally* David C. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. KAN. L. REV. 255 (1982); Bernard Schwartz, *Disqualification for Bias in the Federal District Court*, 11 U. PITT. L. REV. 415 (1950). Apparently there is some evidence in the legislative history that Congress meant for recusal under § 144 to be automatic, and judges were not to pass on the sufficiency of the affidavit. *See* Mark T. Coberly, Comment, *Caesar's Wife Revisited—Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1216 (1977) (noting that several commentators are dissatisfied with the current recusal procedures and advocate an automatic disqualification scheme).

To supplement a litigant's ability to get a judge to recuse himself with a requirement that a judge act affirmatively to recuse himself, Congress enacted the forerunner of the current 28 U.S.C. § 455 in 1948.[37] In its original form, § 455 called for a federal judge's disqualification in situations where the judge, "in his opinion," thought it improper for him to sit.[38] Although technically self-enforcing,[39] because the judge had discretion regarding what was improper, the statute lacked meaningful enforcement mechanisms. Courts quickly articulated a "duty to sit" doctrine that required judges "faced with a close question on disqualification" to resolve the issue in favor of not disqualifying themselves.[40]

Recusal statutes thus evolved until the American Bar Association adopted the Model Code of Judicial Conduct[41] in 1972.[42] Canon 3C of the 1972 Code greatly enlarged the previous bases for judicial disqualification.[43] Two short years later, in an effort to harmonize the divergent requirements of the recusal statutes and the ABA's Canons, Congress voiced its approval of the ABA Code when it amended 28 U.S.C. § 455 to adopt the Code's provisions.[44] In so doing, Congress separated what would become known as the "appearance of bias" test from the enumerated grounds for disqualification into two statutory provisions. In 28 U.S.C. § 455(b), Congress listed the bases that would require disqualification, and set § 455(a) up as a "catch-all" provision.[45] In other words, § 455(a) and (b) together represent all the situations where a judge's impartiality might reasonably be questioned: subsection (b) lists those that the drafters could think of, subsection (a) stands in for those they could not.[46]

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37. *See* Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (amended by Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, 1609 (codified at 28 U.S.C. § 455 (1994))).

38. *Id.*; *see also* HOUSE REPORT, *supra* note 2, at 6354-55.

39. *See* 28 U.S.C. § 455 (1970).

40. HOUSE REPORT, *supra* note 2, at 6354-55; *see also* Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias, A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057, 2067 (1994) (noting that the self-enforcement provision was largely superfluous).

41. MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972). The current version is Canon 3E (2000).

42. *See* COMISKY & PATTERSON, *supra* note 23, at 68-69 (discussing the histerical development of the ABA Code of Judicial Conduct).

43. *See id.* For a good discussion of the relevant differences between the old Canons of Judicial Ethics and the new Model Code of Judicial Conduct, see HOUSE REPORT, *supra* note 2, at 6352-53.

44. *See* HOUSE REPORT, *supra* note 2, at 6353-55.

45. *See id.* at 6354.

46. *See id.; see also, e.g.*, United States v. Conforte, 624 F.2d 869, 880-81 (9th Cir. 1980).

C. Recusal Under 28 U.S.C. § 455(a)

Upon the enactment of § 455(a), the statutory concept of appearance of bias first appeared.[47] The stated purpose of the appearance of bias provision was to "enhance public confidence in the impartiality of the judicial system."[48] The legislative history of § 455(a) mentions the rights of litigants, but its primary focus is on promoting public confidence in the integrity of the judicial process.[49] The two are inseparably linked: "[t]he public's confidence in the judiciary . . . may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted."[50]

In codifying the ABA's appearance of bias concept, Congress incorporated small but important alterations into the language of the statute. Rather than using the ABA's permissive language ("should")[51] regarding whether disqualification was called for, Congress chose to mandate disqualification by using a more restrictive word choice ("shall").[52] Also, rather than combining the appearance of bias language with the enumerated grounds for disqualification,[53] Congress separated them, giving each its own discrete structure.[54] These differences evidence congressional intent to "broaden and clarify the grounds for judicial disqualification."[55]

Congressional amendments to § 455 served many other purposes. For instance, Congress removed the "so-called 'duty to sit'" requirement whereby judges should not disqualify themselves in a close call.[56] Furthermore, § 455 does not have the procedural baggage attendant to its sister provision, 28 U.S.C. § 144. There are no explicit

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47. 28 U.S.C. § 455(a) now provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Canon 3C(1) read: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972). The 2000 version is Canon 3E(1), and has an important change: the "should" from the 1972 version was changed to "shall" by the Aug. 10, 1999 amendment. *See* ABA HOUSE OF DELEGATES, REPORT 123.

48. HOUSE REPORT, *supra* note 2, at 6354.

49. *See generally* discussion *supra* Part II.A.

50. *In re* School Asbestos Litig., 977 F.2d 764, 776 (3d Cir. 1992).

51. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

52. *See* 28 U.S.C. § 455(a) (1994). The ABA remedied this inconsistency in 1999. *See* CODE OF JUDICIAL CONDUCT Canon 3E(1) (2000).

53. *See* MODEL CODE OF JUDICIAL CONDUCT Canons 3C(1)(a)-(b) (1972).

54. *See* 28 U.S.C. §§ 455(a)-(b). See *supra* note 8 for full text of statute. This change may suggest that Congress thought § (a) was not just the catchall provision for everything not enumerated in § (b); otherwise, the structure of Canon 3C would have been sufficient. On the other hand, it may suggest that Congress made the change to improve clarity.

55. HOUSE REPORT, *supra* note 2, at 6351.

56. *Id.* at 6355.

timeliness requirements, affidavit requirements, etc., thus making its operation easier.[57] Section 455 is also addressed to judges themselves: it is self-executing, placing the burden on judges to comply with the statute on their initiative.[58]

The most remarkable change Congress accomplished through the amendments to § 455(a) was the creation of an objective standard for evaluating judicial impartiality.[59] The inquiry under § 455(a) is whether a reasonable person knowing the facts and circumstances would "harbor doubts" as to the judge's impartiality.[60] This test is based on the inferences a reasonable person would make, not on the subjective opinion of the judge,[61] nor on a litigant's fear of an adverse decision.[62] Inquiry into whether the judge is in fact impartial is irrelevant to the disqualification determination.[63]

D. Limits on the Operation of the Federal Recusal Statute

Limitations operate on § 455, including waiver, a timeliness requirement, the extrajudicial source doctrine, and deferential appellate review. All of these limits can have important consequences on a challenge to a judge's decision not to recuse himself.

1. Waiver Under 28 U.S.C. § 455(e)

Under 28 U.S.C. § 455(e), waiver of a defendant's right to have the judge recuse himself is available for violations of § 455(a), but not for § 455(b).[64] Waiver under § 455(e) does have one procedural re-

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57. *Compare* 28 U.S.C. § 455, *with* 28 U.S.C. § 144.

58. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-61 (1988).

59. *See* Liteky v. United States, 510 U.S. 540, 548 (1994); *Liljeberg*, 486 U.S. at 860-61.

60. Edelstein v. Wilentz, 812 F.2d 128, 131 (3d Cir. 1987); *see also, e.g.*, Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993); United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992); Union Carbide Corp. v. United States Cutting Serv., Inc., 782 F.2d 710, 715 (7th Cir. 1986); United States v. Martorano, 620 F.2d 912, 919 (1st Cir. 1980).

61. *See* HOUSE REPORT, *supra* note 2, at 6354-55 (removing the phrase "in his opinion" from § 455 to accomplish an objective standard).

62. *See id.* at 6355 ("Nothing in this proposed legislation should be read te warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial."); *see also* United States v. Corr, 434 F. Supp. 408, 412-13 (S.D.N.Y. 1977).

63. *See Liljeberg*, 486 U.S. at 860-61 (quoting with approval the language of the appellate court: "an appearance of partiality is created even though no actual partiality exists"); *accord In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987); United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979); Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978).

64. The rationale behind allowing waiver for violations of § (a) but not of § (b) is not entirely clear. Canon 3F of the Code of Judicial Conduct contemplates a "remittal of disqualification," which applies to *all* relevant grounds for disqualification. *See* MODEL CODE OF JUDICIAL

quirement: it must be "preceded by a full disclosure on the record of the basis for disqualification."[65] While waiver of a § 455(a) violation is permissible, courts have ruled that it should be exercised with the utmost restraint and limited only to marginal cases.[66] Furthermore, the legislative history behind § 455(a) explicitly calls for "a more strict treatment of waiver."[67] According to *Johnson v. Zerbst*, a waiver must be "an intentional relinquishment or abandonment of a known right or privilege," i.e., it must be voluntary and knowing.[68] In addition, the judge must carefully examine the evidence for waiver.[69]

2. Timeliness Requirement

Timing can be important to judicial recusal. Because § 455(a) is self-enforcing, a judge may decide on his own to recuse himself at any time—indeed, the judge is required to do so even if facts casting doubt on his impartiality come to light after a judgment has been entered.[70] The case differs somewhat, however, if it is a party who first moves for

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CONDUCT Canon 3F (2000). Remittal and waiver are entirely different concepts. A remittal is a procedure whereby the judge discloses on the record the basis for his disqualification, and the parties, independently and outside of the judge's participation, agree in writing that the judge is no longer disqualified. *See id.* This procedure conceals the identity of any party who declines to furnish a remittal, and lessens the chance that a party would feel coerced into consenting. *See id.* At least one circuit court has recognized the advisability of this method. *See* Hardy v. United States, 878 F.2d 94, 98 n.5 (2d Cir. 1989). For the text of § 455(a) and (b), see *supra* note 8.

65. 28 U.S.C. § 455(e) (1994). If there is a factual dispute concerning the facts underlying a motion to disqualify, this must be fully developed in the record. *See* Barksdale v. Emerick, 853 F.2d 1359, 1362 (6th Cir. 1988). Furthermore, a waiver proffered by a party does not require the judge to forego recusal when his impartiality might reasonably be questioned. *See* Unitod States v. Pepper & Potter, Inc., 677 F. Supp. 123, 126 (E.D.N.Y. 1988).

66. *See, e.g.*, United States v. Kelly, 888 F.2d 732, 745-46 (11th Cir. 1989). The Eleventh Circuit recognized the clear potential for coercion when a judge advises the parties of a possible conflict, and then asks them to indicate their approval of the judge remaining in the case. *See id.* In support of its finding, the Eleventh Circuit cited *In re National Union Fire Insurance Co.*, 839 F.2d 1226, 1231 (7th Cir. 1988) and *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 (2d Cir. 1978). *See id.* at 746. The Eleventh Circuit further opined that an appropriate use of waiver would be when a party becomes aware of marginally questionable circumstances, and the parties together present the judge with a joint agreement to waive recusal. *See id.* at 745 & n.23.

67. HOUSE REPORT, *supra* note 2, at 6357.

68. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (requiring that the defendant know of the existence of the right and voluntarily give up that right).

69. *See* 28 U.S.C. § 455(e); *see also* Hodges v. Easton, 106 U.S. 408, 412 (1882) ("[E]very reasonable presumption should be indulged against . . . waiver" of a jury trial); *accord* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (same); Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights.").

70. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861 (1988) ("[T]o the extent [§ 455(a)] can also, in proper cases, be applied retroactively, the judge . . . is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary.").

the judge's recusal. Although there is no explicit timeliness requirement in § 455, most courts have imposed a rule to prohibit parties from judge-shopping and strategically concealing the ethical issues to avoid an adverse judgment.[71] The general rule is that if a party knows of circumstances that could lead a reasonable person to question the judge's impartiality, but does not make a motion for recusal within a reasonable time after discovering these facts, that party may forfeit any available relief under 28 U.S.C. § 455.[72]

3. The Extrajudicial Source Limitation

The source of the alleged impartiality is also important to the disqualification analysis. Following the amendments to § 455(a), a debate arose in the circuits as to whether the conduct[73] alleged as the basis for the recusal motion had to originate outside of judicial proceedings.[74] This doctrine came to be known as the extrajudicial source doctrine, and originated in the context of 28 U.S.C. § 144 motions regarding disqualification for personal bias or prejudice.[75] The doctrine requires that if the challenged judicial conduct arose in the context of the judge's duties *as judge* in a case, that conduct could not serve as the basis for recusal.[76] A majority of the circuits determined that the doctrine applied to § 455(a) as well.[77] Commentators, however, have

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71. *See, e.g.*, Summers v. Singletary, 119 F.3d 917, 920-21 (11th Cir. 1997) (citing E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992); United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990); United States v. York, 888 F.2d 1050, 1053 (5th Cir. 1989); Willner v. University of Kan., 848 F.2d 1023, 1029 (10th Cir. 1988); Oglala Sioux Tribe v. Homestead Mining Co., 722 F.2d 1407, 1414 (8th Cir. 1983)); *see also* Brumbelow, *supra* note 30 at 1072 n.70.

72. *See generally* cases listed *supra* note 71.

73. Conduct might include actions, comments, knowledge, or attitudes on which a party would base its recusal motion.

74. *See* Liteky v. United States, 510 U.S. 540, 546 (1994) (citing these cases for the proposition that the extrajudicial source doctrine applies to § 455(a): United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992); United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990); McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986); Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980)). The Court also cited *United States v. Chantal*, 902 F.2d 1018, 1023-24 (1st Cir. 1990) and *United States v. Coven*, 662 F.2d 162, 168-69 (2d Cir. 1981) for the proposition that the doctrine does *not* apply to § 455(a).

75. *See* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Berger v. United States, 255 U.S. 22, 31 (1921).

76. *See* cases listed *supra* note 74.

77. *See, e.g.*, United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989); *In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987); Jaffe v. Grant, 793 F.2d 1182, 1188-89 (11th Cir. 1986); United States v. Faul, 748 F.2d 1204, 1211 (8th Cir. 1984); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980); City of Cleveland v. Krupansky, 619 F.2d 576, 578 (6th Cir. 1980) (per curiam); *In re*

almost uniformly argued that considering the differences in the statutory language, the differing postures of the two statutes,[78] as well as congressional intent, the extrajudicial source doctrine has no legitimacy in the § 455(a) context.[79]

In 1994, the Supreme Court decided *Liteky v. United States*, confirming that § 455(a) was subject to the extrajudicial source limitation.[80] While declining to hold that this limitation amounted to a per se rule, the *Liteky* Court recognized that the absence of an extrajudicial source would often be determinative in the recusal determination.[81] The Court did, however, leave open a small avenue of opportunity by recognizing the possibility of a "pervasiveness" exception to the extrajudicial source limitation.[82] Under this exception, if a party could prove that a judge's bias, although from an intrajudicial source, is "so extreme as to display clear inability to render fair judgment,"[83] or "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible,"[84] then recusal would still be mandated by § 455(a). Clearly the *Liteky* decision greatly narrowed the intended scope of § 455(a), thereby frustrating congressional policy choices, and potentially endangering public confidence in the integrity of the judicial system.[85]

IBM, 618 F.2d 923, 927 (2d Cir. 1980); Mayberry v. Maroney, 558 F.2d 1159, 1162 n.16 (3d Cir. 1977); United States v. Haldeman, 559 F.2d 31, 134 (D.C. Cir. 1976); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975). *But see Chantal*, 902 F.2d at 1023-24; *Coven*, 662 F.2d at 168.

78. *See generally* discussion *supra* Part II.C.

79. *See* Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 676 (1985); Hoekema, *supra* note 15, at 717; *see also* Brumbelow, *supra* note 30, at 1090-92 (attacking *Liteky* majority's analysis); Toni-Ann Citera, *A Look at the Extrajudicial Source Doctrine Under 28 U.S.C. § 455(a)*, 85 J. CRIM. L. & CRIMINOLOGY 1114, 1127 (1995); Hand, Jr., *supra* note 16, at 1009-10 (stating that "interpretation of § 455(a) is far from complete," and "the Court's new standard will . . . sacrifice, or at least erode, judicial integrity"); Shawn P. Flaherty, Case Note, Liteky v. United States*: The Entrenchment of an Extrajudicial Source Factor in the Recusal of Federal Judges Under 28 U.S.C. § 455(a)*, 15 N. ILL. U. L. REV. 411, 427-29 (1995) (discussing the failings of the *Liteky* decision); Lori M. McPherson, Case Note, Liteky v. United States*: The Supreme Court Restricts the Disqualification of Biased Federal Judges Under Section 455(a)*, 28 U. RICH. L. REV. 1427, 1441-43 (1994) (criticizing the *Liteky* majority's extension of the extra-judicial source requirement to § 455(a)); *see generally* Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 810-15 (1993) (questioning legitimacy of extrajudicial source requirements). *But see* Carton, *supra* note 41, at 2092-95 (supporting the maintenance of the "extrajudicial limitation").

80. Liteky v. United States, 510 U.S. 540, 553-54 (1994).

81. *Id.* at 554-55.

82. *Id.* at 551.

83. *Id.*

84. *Id.* at 555.

85. *See supra* notes 78-79 and accompanying text.

4. Appellate Review

The operation of § 455(a) is further limited by the standard for review on appeal, the availability of review, and the application of the harmless error doctrine to disqualification decisions. The legislative history behind the 1974 amendments sets the abuse of discretion standard as the standard for appellate review of disqualification issues.[86] Courts uniformly apply the abuse of discretion standard on appellate review, which gives a high degree of deference to the disqualification determination made by the trial judge.[87] Courts are not uniform, however, on exactly when and how appellate review is available. Many litigants demand a petition for writ of mandamus to challenge the judge's refusal to recuse himself.[88] But a writ of mandamus, however, has historically been an extraordinary remedy, reserved for only the most egregious cases.[89] Some courts will allow an interlocutory appeal,[90] and others will not hear the appeal at all until the judgment is final.[91] Courts uniformly apply the harmless error rule to appeals under § 455(a).[92] The Supreme Court has held, however, that

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86. "The issue of disqualification is a sensitive question of assessing all the facts and circumtances [sic] in order to determine whether the failure to disqualify was an *abuse of sound judicial discretion*." HOUSE REPORT, *supra* note 2, at 6355 (emphasis added).

87. *See, e.g.*, David v. City & County of Denver, 101 F.3d 1344, 1351 (10th Cir. 1996); United States v. Mizell, 88 F.3d 288, 299 (5th Cir. 1996); *In re* Adams, 31 F.3d 389, 396 (6th Cir. 1994); Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993); Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1460 (1st Cir. 1992).

88. *See, e.g.*, United States v. Horton, 98 F.3d 313, 316-17 (7th Cir. 1996); *In re* School Asbestes Litig., 977 F.2d 764, 770 (3d Cir. 1992), as amended; *In re* City of Houston, 745 F.2d 925, 927 (5th Cir. 1984) (mandamus is an extreme remedy, and will only lie in extraordinary circumstances); *In re* IBM, 618 F.2d 923, 926-27 (2d Cir. 1980). *Compare In re* United States, 666 F.2d 690, 695 (1st Cir. 1981) (mandamus available), *with* United States v. Parrilla Bonilla, 626 F.2d 177, 179 n.2 (1st Cir. 1980) (indicating exercise of appellate jurisdiction equally available with exercise of mandamus power).

89. *See, e.g., In re* City of Houston, 745 F.2d 925, 927 (5th Cir. 1984); *In re* Corrugated Container Antitrust Litig., 614 F.2d 958, 961-62 (5th Cir. 1980); SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (noting that the court has traditionally been "extremely reluctant to make use of the extraordinary remedy of mandamus"); Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958) (dealing with recusal under § 144, and stating that a writ is an extraordinary remedy to be "employed justifiably only when rare and exceptional circumstances are present").

90. *See, e.g.*, Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1045 (E.D.N.Y. 1975). An interlocutory appeal is an appeal of a trial judge's decision before the final judgment in the case. *See* BLACKS LAW DICTIONARY 94 (7th ed. 1999).

91. *See, e.g., In re* City of Detroit, 828 F.2d 1160, 1166-67 (6th Cir. 1987) (noting the court's "strong belief in the values inherent in the 'final judgment rule' "); City of Cleveland v. Krupansky, 619 F.2d 576, 578 (6th Cir. 1980); Scarrella v. Midwest Fed. Sav. & Loan, 536 F.2d 1207, 1210 (8th Cir. 1976) (stating that a writ of mandamus is only available after final judgment).

92. *See, e.g.*, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988); *In re* Continental Airlines Corp., 901 F.2d 1259, 1263 (5th Cir. 1990); United States v. Vespe, 868 F.2d 1328, 1342 (3d Cir. 1989); Parker v. Connors Steel Co., 855 F.2d 1510, 1525-26 (11th Cir. 1988);

there is a difference between "trial errors" and "structural defects," and that only the former would be subject to harmless error analysis.[93] Structural errors, therefore, are constitutional errors that require reversal.[94] Because these three limits requiring the judgment to be final, and the difficult burdens of showing abuse of discretion and showing non-harmless error on the operation of § 455(a) on appeal can be quite severe, they may have the effect of eliminating not only invalid, but potentially valid appearance of partiality claims. Should that occur, the only cases which would survive would be the ones in which something akin to actual bias could be proven. This, of course, clearly frustrates the congressional purpose behind § 455(a).[95]

III. PLEA BARGAINING AND THE CRIMINAL JUSTICE SYSTEM

A. The Predominance of Plea Bargaining and Guilty Pleas

Plea bargaining is entrenched in the American criminal justice system. As commentators note, plea bargaining is the behind the scenes "horse trading" that "determines who goes to jail and for how long. . . . It is not some adjunct to the criminal justice system; it is the criminal justice system."[96] A 1995 study, for example, reported that about 92% of all federal criminal defendants entered a plea of guilty or *nolo contendere*.[97]

Barry v. United States, 528 F.2d 1094, 1100 (7th Cir. 1976); *see also* FED. R. CRIM. P. 52 (defining harmless error).

93. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (citing Gideon v. Wainwright, 372 U.S. 335 (1963) and Tumey v. Ohio, 273 U.S. 510 (1927)) for the proposition that having a biased judge is a structural error that will never be subject to harmless error. It is unclear why the appearance of bias would not be a structural error as well. *Tumey* does not stand for the proposition that the judge in that case was *actually* biased, only that "[e]very procedure [offering] a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey*, 273 U.S. at 532. Furthermore, that decision rested on a violation of the defendant's due process rights, which seem, under *Fulminante*, to be a trial error. So, the apparent assumption that only *actual* bias will be grounds for autematic reversal is flawed. The distinction must be something finer than the difference between apparent bias and actual bias, and must rest on grounds other than whether the error affected the individual's trial or the judicial process in general.

94. *See Fulimante*, 499 U.S. at 309-10.

95. *See generally* discussion *supra* Part II.C.

96. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

97. *See* U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 476 (1995). In comparison, of those who went to trial, about 71% were convicted. Of the 54,980 total federal defendants, approximately 85% were convicted. *See id.*

Plea bargaining in general has garnered both strong support and widespread criticism.[98] Support is usually tendered by the participants in the process, such as attorneys and judges.[99] Most criticism of the process comes from academia, with opponents asserting its unfairness and inefficiency.[100] Although the efficacy of plea bargaining is beyond the purview of this Note, it is probably safe to assume that plea bargaining is now permanently ingrained in our concepts of ordered justice.[101]

Despite debate over whether plea bargaining should be abolished, even supporters of the process recognize its flaws. For instance, commentators earnestly defending the place of plea bargaining in our criminal justice system still recognize that the system does not adequately provide for the identification of innocent defendants.[102] Fair and accurate results are a related concern. Some commentators have suggested that sentencing should be reworked so that prosecutors' recommendations to the judge for a particular sentence would be a ceiling, rather than a floor.[103]

Moreover, when deciding whether individual plea agreements should be enforced, commentators have suggested applying classical contract law analysis to the agreement.[104] The logical starting place, then, is the presumption of enforceability.[105] The theoretical inquiry

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A *nolo contendere* is a plea that does not admit the charges, but does not deny them either. It literally means "no contest," and will have the same effect as a guilty plea, but cannot be used against the defendant in another action. *See* BLACK'S LAW DICTIONARY 1070 (7th ed. 1999).

98. *See* Scott & Stuntz, *supra* note 96, at 1911-12.

99. Although a small number of veterau prosecutors and defense attorneys disapprove of the plea bargaining process, most do not; even philosophical opponents of plea bargaining recognize the need for and desirability of such a system. *See, e.g.*, MILTON HEUMANN, PLEA BARGAINING 158-59 (1978).

100. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37; Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

101. *See* HEUMANN, *supra* note 99, at 157 ("Its abolition is an impossibility."); *see also* Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 165 (1981) ("Giveu this reliance of the criminal justice system on plea bargaining, its elimination in the foreseeable future is unlikely.").

102. *See* Scott & Stuntz, *supra* note 96, *passim*.

103. *See id.* at 1959-60; *see also* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 177, 198 (1996).

104. *See* Scott & Stuntz, *supra* note 96, *passim*.

105. *See id.* at 1917.

becomes whether this presumption is overcome when a plea bargain is challenged on the grounds that the process or the product of the bargain is defective. The primary inquiry becomes whether either the manner in which the bargain was contrived or the actual outcome undermines the social utility of the bargain or is fundamentally unfair.[106] Just as in contract law, one would assume that the presumption of enforceability would rarely be overcome. However, those few cases embodying truly disturbing plea bargains—i.e., those that offend our notions of fundamental fairness and due process—are the correct target for judicial resources aimed at remedying the resulting social and individual injustices.

B. The Anatomy of a Guilty Plea: The Procedures

1. Federal Rules of Criminal Procedure: Rule 11

Rule 11 of the Federal Rules of Criminal Procedure governs federal criminal pleas.[107] In general, pleas may take three forms: not guilty, guilty, or *nolo contendere*.[108] Guilty pleas may take one of two forms: conditional or unconditional. A conditional plea "reserv[es] in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion."[109] Conditional guilty pleas must have the consent of the prosecutor and approval of the judge.[110] An unconditional guilty plea, by implication, does not reserve the right to appeal any adverse pretrial decisions. Rule 11(e) contemplates three available bargains:[111] a plea in exchange for dismissal or reduction of some of the charges;[112] a plea in exchange for a

106. *See id.* Professors Scott and Stuntz are most concerned with rebutting the argument that these objections—that the social utility or fundamental fairness of the bargain is undermined by the process or the outcome of the bargain—rendered the entire institution of plea bargaining futile and unjust. *See id.* They argue instead that inequalities in individual bargains can and should be dealt with individually within the court system, just as civil contract enforcement is handled. If the application of contract principles renders some plea agreements suspect, then judicial resources should be aimed at remedying those deficiencies. When the bargains themselves are faulty (e.g., contracts of enslavement) or when there is such a disparity in bargaining power that one party is essentially deprived of the benefits of its bargain (e.g., contracts of adhesion), the courts refuse to enforce those contracts rather than banning contracting altogether. *See id.*

107. FED. R. CRIM. P. 11.

108. *See* FED. R. CRIM. P. 11(a)(1); *see also supra* note 97 (explaining *nolo contendere*).

109. FED. R. CRIM. P. 11(a)(2).

110. *See id.*

111. Because the definition of "conditional guilty plea" deals only with reserving issues for appeal, any of these three bargains can be either conditional or unconditional.

112. *See* FED. R. CRIM. P. 11(e)(1)(A).

sentencing recommendation;[113] or, a plea in exchange for a specific sentence.[114]

2. Protections for the Defendant Pleading Guilty

Defendants have neither a constitutionally guaranteed right to plea bargain,[115] nor a right to plead guilty.[116] If plea bargaining does occur, however, Rule 11 governs the conduct of the parties and the court during negotiations. The procedures in Rule 11(c)-(g) are intended to help form a complete record of the factors relevant to determining voluntariness at the time the plea is entered, and to make the constitutionally required determination that a defendant's guilty plea is in fact voluntary.[117] These protections, to the extent that they ensure an individual's "substantial rights," are designed to guarantee that the plea bargaining process satisfies the Due Process Clause.[118] Technical variations from Rule 11's procedures that do not affect "substantial rights" are subject to harmless error analysis on appeal.[119]

Rule 11(c) requires that the court apprise the defendant of the possible consequences of his plea. These include information regarding the maximum and minimum penalties provided by the law under which the defendant is charged, including the fact that the judge can depart from the sentencing guidelines in certain circumstances.[120] The court must also remind the defendant of his right to the assistance of counsel,[121] to a jury trial, to confront his accusers, and to refuse to in-

113. *See* FED. R. CRIM. P. 11(e)(1)(B). This may also be an agreement that the prosecutor will not oppose a defendant's request for a particular sentence. *See id.* Judges, however, are not bound by prosecutors' recommendations regarding sentencing. *See id.*

114. *See* FED. R. CRIM. P. 11(e)(1)(C). The court has discretion to reject the specific sentence. In that instance, the court will usually allow the defendant to withdraw the plea. *See* FED. R. CRIM. P. 11(e)(2).

115. *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977); *see also* Nguyn v. United States, 114 F.3d 699, 704 (8th Cir. 1997) (prosecutor has prerogative to offer package deal or no deal at all); United States v. West, 2 F.3d 66, 69 (4th Cir. 1993) (plea agreement has no constitutional significance unless and until consummated by judgment of court); Guidubaldi & Kim, *supra* note 8, at 1510.

116. *See* North Carolina v. Alford, 400 U.S. 25, 38 nn.10-11 (1970) (under certain circumstances, a judge may refuse te accept the defendant's plea).

117. *See* McCarthy v. United States, 394 U.S. 459, 465-66 (1969); *see also* FED. R. CRIM. P. 11(d).

118. *McCarthy*, 394 U.S. at 466.

119. FED. R. CRIM. P. 11(h).

120. *See* FED. R. CRIM. P. 11(c)(1).

121. *See* FED. R. CRIM. P. 11(c)(2).

criminate himself.[122] The court is not required, however, to inform the defendant of possible collateral consequences of pleading guilty.[123]

Rule 11(d) embodies the voluntariness inquiry.[124] Rule 11(e) governs the court's duties when notifying the parties of his acceptance or rejection of the plea. Rule 11(f) is the requirement that the judge satisfy himself that the plea being entered has a factual basis. Rule 11(g) requires that the plea colloquy be captured in the record, including the advice the court gives the defendant, the voluntariness inquiry, and the accuracy inquiry.[125] These rules ensure that the judge makes a thorough inquiry into the legitimacy of the plea and that an adequate basis exists in the record so that an appellate court may evaluate the plea process.

3. Judicial and Prosecutorial Consent to a Conditional Plea

In order for a defendant to enter a conditional guilty plea, he must get the consent of the prosecutor and the approval of the judge.[126] Prosecutors and judges often may have legitimate concerns about consenting to a conditional plea.[127] The court may refuse to accept a conditional plea for any reason or for no reason at all.[128] The purpose behind conditional pleas is to prevent the waste of judicial resources expended on a trial just so that a defendant who has lost a pretrial motion may preserve that issue on appeal.[129] For these reasons, at least one court has held that for a conditional plea to be appropriate, the issue preserved for appeal should be dispositive of the case.[130]

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122. *See* FED. R. CRIM. P. 11(c)(3).

123. *See generally* Budeiri, *supra* note 101. These may include consequences such as three-strikes laws, loss of voting rights and others. *See id.*

124. *See* FED. R. CRIM. P. 11(d); *see generally* discussion *infra* Part III.B.5.

125. It is imperative to have a complete record of the transaction on appeal. *See* FED. R. CRIM. P. 11(g) advisory committee's note.

126. *See* FED. R. CRIM. P. 11(a)(2).

127. These legitimate concerns include a desire for finality, a concern that if the defendant succeeds on appeal, the delay that has ensued could hamper a subsequent trial, and avoiding increased appellate litigation. It is equally possible, however, for judges and prosecutors to have illegitimate motives for withholding consent te conditional pleas. *See generally* discussion *infra* Part V.B.

128. *See* United States v. Davis, 900 F.2d 1524, 1527 (10th Cir. 1990).

129. *See* FED. R. CRIM. P. 11 advisory committee's note; *see also* JAMES C. CISSELL, FEDERAL CRIMINAL TRIALS 176 (4th ed. 1996). This is entirely possible because many decisions are not appealable until a final judgment has been entered in the case.

130. *See* United States v. Wong Ching Hing, 867 F.2d 754, 758 (2d Cir. 1989).

4. The Role of the Judge in Guilty Pleas

While it is primarily the duty of the judge to ensure the defendant's plea is voluntary, knowing, and uncoerced,[131] the judge may not participate in the plea negotiation itself.[132] Instead the judge's role is supervisory as the parties come to the judge after they have decided on a deal.[133] This is where the protections of Rule 11 come into operation. The judge has three primary duties regarding the guilty plea—making sure the plea: is truly voluntary,[134] has a basis in fact,[135] and would further the effective administration of justice.[136] The court must inform the defendant of the constitutional rights he is waiving by pleading guilty.[137]

Because the judge has broad discretion over whether to accept or reject the plea,[138] commentators have suggested that this inverts the traditional/contract structure:

> [I]n contract terms the bargain is not really between the defendant and the prosecutor, since the prosecuter can make only token commitments. The true contracting parties are the defendant and the judge. The prosecuter acts as the judge's negotiating agent, but the judge retains the authority to accept or reject his agent's work.[139]

This is particularly dangerous, because rather than a bargaining model where the bargaining parties are on roughly equal footing, the judge/defendant bargaining model shows a severe disparity in bargaining power.[140] Furthermore, a public perception that the judge is

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131. *See, e.g.*, Fogus v. United States, 34 F.2d 97, 98 (4th Cir. 1929). As the Advisory Committee's Notes point out, Rule 11 is substantially a restatement of this concept. FED. R. CRIM. P. 11 advisory committee's note. *See generally* Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567 (1996).

132. *See* FED. R. CRIM. P. 11(e)(1)(C); *see also* United States v. Casallas, 59 F.3d 1173, 1176, 1178 (11th Cir. 1995) (pointing out to defendant the difference between potential post-trial sentence and plea bargain, and advising him te confer with his lawyer, was impermissible intervention in plea negotiations); *accord* United States v. Anderson, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (threatening to forbid prosecutor to accept plea to fewer than all thirty counts charged). A judge may be able to cure the defect of his impermissible intervention by permitting the defendant to withdraw his plea. *See* United States v. Washington, 109 F.3d 459, 464 (8th Cir. 1997).

133. *See* FED. R. CRIM. P. 11(e)(5).

134. *See* FED. R. CRIM. P. 11(c), (d).

135. *See* FED. R. CRIM. P. 11(f).

136. *See* FED. R. CRIM. P. 11(b) (regarding a *nolo contendere* plea); 11(e)(2)-(4) (regarding the judge's discretion to accept or reject a plea).

137. *See* FED. R. CRIM. P. 11(c)(3)-(4).

138. *See* FED. R. CRIM. P. 11(e)(3)-(4); *see also* Santobello v. New York, 404 U.S. 257, 262 (1971); *accord* United States v. Aguilera, 654 F.2d 352, 353 (Former 5th Cir. 1981); Unitod States v. Moore, 637 F.2d 1194, 1196 (8th Cir. 1981); United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980); United States v. Jackson, 563 F.2d 1145, 1147 (4th Cir. 1977).

139. Scott & Stuntz, *supra* note 96, at 1954-55.

140. *See id.* at 1955.

undertaking increased participation in the plea bargaining process could have negative consequences.[141] If a judge convinces a defendant to accept a plea, the judge is no longer objective but is now acting as an advocate in the process. And when judges lose their objective status, it undermines the public's faith in the criminal justice system.[142]

5. Is the Plea Truly Voluntary?

A guilty plea is itself a conviction,[143] as well as an admission of all the elements or material facts of the charge.[144] A guilty plea may waive nonjurisdictional defects occurring before the plea,[145] as well as some constitutional rights.[146] The Supreme Court has been reluctant, however, to hold that a guilty plea waives all nonjurisdictional errors.[147] A guilty plea does not waive jurisdictional errors.[148] In *Menna v. New York*, the Supreme Court defined jurisdictional issues (i.e., nonwaivable issues) as those that are directed at protecting something other than the truth-seeking process.[149] These would include a double jeopardy claim,[150] a claim that the indictment fails to state an of-

141. *See* FED. R. CRIM. P. 11(e) (evidencing a concern that increased participation by judges is harmful).

142. *See* Scott & Stuntz, *supra* note 96, at 1955 n.155.

143. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

144. *See* United States v. Broce, 488 U.S. 563, 569 (1989).

145. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258, 267 (1973) (guilty plea waived defendant's objection that he was deprived of his constitutional right because blacks had been excluded from the grand jury which indicted him); United States v. Robinson, 20 F.3d 270, 273 (7th Cir. 1994) (guilty plea to bank robbery waived 41-year-old third-year law student's objection to, inter alia, change of venue on grounds that it denied her the right to counsel of her choice); United States v. Vaughan, 13 F.3d 1186, 1187-88 (8th Cir. 1994) (guilty plea waived defendant's objection that his indictment violated a previous plea agreement).

146. *See Boykin*, 395 U.S. at 243 (waives constitutional rights to trial by jury, to confront accusers, and the privilege against self-incrimination).

147. *See* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("Neither *Tollett* nor our earlier cases on which it relied, e.g., *Brady* and *McMann*, stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations.") (citations omitted), *cited with approval in* United States v. Broce, 488 U.S. 563, 573 (1989) ("[w]aiver was not the basic ingredient of this line of cases," referring to the *Brady* trilogy) (citation omitted).

148. *See supra* note 8.

149. *See Menna*, 423 U.S. at 63 n.2:

> A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. . . . [T]he claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

150. *See id.*

fense,[151] and a claim that the trial judge lacked impartiality.[152] By implication, all other rights are waivable.

Because of the possibility of waiving such important rights, it is imperative that the plea be "voluntary and knowing."[153] As stated earlier, it is the court's responsibility to ensure the plea is voluntary. But once the judge has satisfied himself that it is voluntary, a strong presumption of voluntariness attaches.[154] Should the defendant wish to challenge voluntariness by way of appeal, he must satisfy a heavy burden of persuasion.[155] To prove that the plea was involuntary, the defendant must show that the "fear of the possible consequences of not pleading guilty destroyed [the defendant's] ability to balance the risks and benefits of going to trial."[156] It is possible, but not easy,[157] to invalidate a plea as unknowing and involuntary if the judge does not fulfill his duties under Rule 11.[158]

IV. CURRENT TREATMENT OF THE APPEALABILITY OF A DENIED RECUSAL MOTION AFTER ENTRY OF AN UNCONDITIONAL GUILTY PLEA

The circuit courts are currently split as to whether an unconditional guilty plea constitutes a waiver of the appeal of a denied recusal motion under § 455(a). Of the five circuits having decided the issue, three circuits have concluded that an unconditional guilty plea constitutes a waiver of all nonjurisdictional issues, including a claim that

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151. *See, e.g.*, United States v. Ruelas, 106 F.3d 1416, 1418 (9th Cir. 1996); United States v. Fitzhugh, 78 F.3d 1326, 1330 (8th Cir. 1996).

152. *See* United States v. Troxell, 887 F.2d 830, 833-34 (7th Cir. 1989) (guilty plea did not waive challenge of judge's actual bias); United States v. Gipson, 835 F.2d 1323, 1324-25 (10th Cir. 1988) (guilty plea did not waive judge's refusal to recuse himself under 28 U.S.C. § 455(b)(3)).

153. McCarthy v. United States, 394 U.S. 459, 466 (1969) (for guilty plea to be valid under Due Process Clause, it must be voluntary and knowing; relying on *Zerbst* test for waiver of constitutional rights).

154. *See* Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); United States v. Abreo, 30 F.3d 29, 31 (5th Cir. 1994) United States v. Vaughan, 13 F.3d 1186, 1187 (8th Cir. 1994).

155. *See* United States v. Ranum, 96 F.3d 1020, 1025 (7th Cir. 1996).

156. *See* Guidubaldi & Kim, *supra* note 8, at 1532 & n.1386 (citing Brady v. United States, 397 U.S. 742, 750-51 (1970) (holding that "guilty plea [was] voluntary even though motivated by desire to avoid death penalty because defendant's ability to balance risks of going to trial not overcome by threat of death penalty")).

157. Rule 11(h) provides for a harmless error analysis for any technical violations of the rule. *See* FED. R. CRIM. P. 11(h). For a discussion of harmless error, *see supra* Part II.D.4.

158. *See, e.g., McCarthy*, 394 U.S. at 467 (guilty plea invalid under Rule 11 (now 11(d)) because judge did not address defendant individually to determine voluntariness); United States v. Medina-Silverio, 30 F.3d 1, 3-4 (1st Cir. 1994) (guilty plea invalid under Rule 11(c) because judge did not conduct plea colloquy, only incorporated plea agreement into record by reference).

the judge's impartiality might reasonably be questioned.[159] The other two circuits have concluded the opposite—that an unconditional guilty plea does not foreclose the possibility of review of a denied recusal motion.[160] The stances are irreconcilable. The cases have split on how § 455(a) and Rule 11 should interact in a criminal case. Either the Supreme Court should grant certiorari a case to reconcile the disagreement, or Congress should amend § 455 to clarify how it interrelates with Rule 11.

A. Unconditional Guilty Plea is Waiver of All Nonjurisdictional Issues Including a Denied Recusal Motion

1. *United States v. Gipson*

A United States Court of Appeals first considered the issue in 1988. In *United States v. Gipson*, the Tenth Circuit addressed whether Gipson's unconditional guilty plea constituted a waiver of his right to appeal the denial of a recusal motion pursuant to 28 U.S.C. § 455.[161] Gipson had moved for the trial judge's recusal on the grounds that the judge was a United States Attorney when the defendant had been convicted of a similar offense.[162] The trial judge then inquired into the previous case and determined that he had not participated in the preparation or prosecution of that case.[163] He thereafter denied the recusal motion.[164] Gipson then entered an unconditional guilty plea, but appealed after sentencing.[165]

The court of appeals held that a plea waives the right to appeal a denial of recusal under § 455(a), but not under § 455(b).[166] The reasoning rested on the statutory language of § 455(e), which allows waivers under subsection (a) but not subsection (b). The court reasoned further: "[i]f a party can waive recusal, it would follow that denial of recusal is a pretrial defect which is sublimated within a

159. *See* United States v. Hoctel, 154 F.3d 506, 508 (5th Cir. 1998); United States v. Troxell, 887 F.2d 830, 833 (7th Cir. 1989); United States v. Gipson, 835 F.2d 1323, 1325 (10th Cir. 1988).

160. *See* United States v. Brinkworth, 68 F.3d 633, 638 (2d Cir. 1995); United States v. Chantal, 902 F.2d 1018, 1021 (1st Cir. 1990).

161. *See* United States v. Gipson, 835 F.2d 1323, 1324 (10th Cir. 1988).

162. *See id.*

163. *See id.* Had he in fact participated in the first prosecution, the judge's recusal would have been mandated by § 455(b)(3). *See id.* at 1326. Thus, Gipson's argument boiled down to a § 455(a) claim.

164. *See id.*

165. *See id.*

166. *See id.* at 1325.

guilty plea and thereafter unavailable as an issue for appeal."[167] In relation to § 455(b), the court said § 455(e) creates a jurisdictional limitation on the ability of a judge to hear a specific case.[168] The court noted what it called the "dichotomous situation" presented by the statute: that parties are permitted to waive the appearance of judicial partiality, but are prohibited from waiving the presumption of the fact of partiality.[169]

2. *United States v. Troxell*

One year after *Gipson*, the Seventh Circuit addressed the same issue. In *United States v. Troxell*, the defendant entered an unconditional guilty plea to two charges: the first for cocaine distribution, and the second for failing to appear for sentencing in the first case.[170] Judge Mills presided over both cases.[171] Troxell filed two separate motions requesting the judge to recuse himself, one in each case.[172] The judge denied both motions.[173] After the guilty plea, Troxell appealed.[174] In determining that the motion for recusal in the narcotics case was at best a § 455(a) challenge, the court said it "need not review Troxell's claim that Judge Mills should have recused himself."[175] The court stated that a denial of a motion for recusal based on § 455(a) could only be challenged with a writ of mandamus,[176] and thus it was not reviewable on direct appeal. It reasoned that when "a judge proceeds in a case when there is [only] an appearance of impropriety . . . the injury is to the judicial system as a whole [rather than] to the substantial rights of the parties."[177]

The court emphasized that once a judgment is entered in a case in which an appearance of impropriety exists, the damage to the public's perception of the judiciary is already done and cannot be remedied

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167. *Id.*
168. *See id.*
169. *Id.*
170. *See* United States v. Troxell, 887 F.2d 830, 831 (7th Cir. 1989).
171. *See id.* at 832.
172. *See id.* at 832-33.
173. *See id.* at 832.
174. *See id.*
175. *See id.* at 833. The motion to recuse for the bail-jumping charge found its fate in the extrajudicial source doctrine. The court said even if Judge Mills was actually prejudiced against Troxell, his comments failed to reflect any knowledge gained outside of the judicial process. *See id.* at 834. The court did cite *Gipson*, however, for the proposition that charges of actual bias survive a guilty plea. *See id.* at 833.
176. *See id.*
177. *See id.*

by a direct appeal.[178] Therefore, *Troxell* is similar to *Gipson* in the holding that a § 455(a) challenge does not survive an unconditional guilty plea.

3. *United States v. Hoctel*

In the 1998 decision of *United States v. Hoctel*, the Fifth Circuit entered the debate, and joined in on the side of the *Gipson* and *Troxell* decisions.[179] Hoctel was indicted for mail and wire fraud arising out of a horse-selling scheme.[180] The two United States Marshals assigned to security in the courtroom were to be witnesses against Hoctel, so Hoctel filed a motion to have them relieved of their courtroom duties in connection with the case.[181] This motion was granted, but Hoctel then filed a motion seeking to have the trial judge recuse himself based on his assertion that the judge's daily interaction with the two marshals might lead a reasonable person to question the judge's ability to be impartial toward the defense.[182] The judge denied the motion. Hoctel then pled guilty to aiding and abetting and mail fraud.[183]

On appeal, the Fifth Circuit found that Hoctel's unconditional gnilty plea, as well as his specific waiver of any appeal other than a sentencing departure, waived his § 455(a) challenge.[184] The court gave a brief account of the conflicting arguments in *Gipson*, *Chantal*, and *Brinkworth*, before agreeing with *Gipson*.[185] The court based its short opinion on the solitary rationale that the statutory scheme of § 455 clearly contemplated the availability of a waiver of § 455(a), and the defendant was not precluded from waiving his § 455(a) claim.[186] The court noted, in conclusion, that Hoctel did not produce any evidence to suggest that his waiver was uninformed or involuntary.[187]

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178. *See id.* (citing Durham v. Neopolitan, 875 F.2d 91, 97 (7th Cir. 1989)).

179. United States v. Hoctel, 154 F.3d 506 (5th Cir. 1998).

180. *See id.* at 506.

181. *See id.*

182. *See id.*

183. *See id.* at 507. His plea agreement specifically waived his right to appeal his sentence on any ground except an upward departure from the applicable sentencing guideline range. *See id.* It was, therefore, an unconditional specific sentence guilty plea, because the plea was not conditioned on being able to appeal any adverse pretrial motions. *See generally* discussion *supra* Part III.B.1. (regarding the difference between conditional and unconditional guilty pleas).

184. *See id.* at 508.

185. *See id.* Although the *Troxell* decision by the Seventh Circuit, *supra* Part IV.A.2, had been made nine years earlier, the court failed to discuss that opinion.

186. *See id.*

187. *See id.*

B. Unconditional Guilty Plea Does Not Waive Ability to Challenge a Denied Recusal Motion

1. United States v. Chantal

The First Circuit addressed the issue in 1990 in *United States v. Chantal.*[188] Chantal was first brought before the trial judge on drug charges in July 1987.[189] He pled guilty and was released on bail pending sentencing.[190] While out on bail, Chantal "was caught red-handed" in a second drug incident in September, and that indictment was returned in December.[191] In the meantime, Chantal's sentencing hearing occurred for the first indictment in October (after he had been caught in the second incident, but before he was indicted for it).[192]

The judge, unaware of the second indictment, characterized him as an "unreconstructed drug trafficker" in which he could have "no confidence whatever that he will change his ways in the future."[193] When Chantal came before the same judge on the second drug charge, he filed a motion requesting the judge to recuse himself because of the forceful remarks made at the sentencing hearing on the first charge.[194] The judge denied the motion, and Chantal entered a guilty plea.[195] Chantal appealed.

In a thorough and well-reasoned opinion, the First Circuit held that Chantal's unconditional guilty plea did not foreclose the possibility of an appeal from the denial of a motion to recuse under § 455(a).[196] The court based its decision on a number of grounds. First, the court looked at Congress's purpose in enacting § 455(a), and expressed its disagreement that Congress would have intended that its purpose ("to assure actions by judges who are not only impartial but appear to be") could be "so unintelligibly eradicated by a plea engendered by the immediate prospect of a trial/decision by a biased judge."[197] Second, the court briefly addressed waiver, in essence saying that attainment of adjudication by a court that was impartial in fact and appearance was

188. United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990).
189. *See id.* at 1019.
190. *See id.*
191. *Id.* at 1020.
192. *See id.*
193. *Id.* The circuit court described the trial judge's remarks as "irretractible but regrettable off-the-cuff judgments" expressing "a considered judgment, not only as to the past but as to the future." *Id.*
194. *See id.*
195. *See id.*
196. *See id.* at 1021.
197. *Id.*

not something that could be casually waived, except as authorized by the statute—i.e., a guilty plea was not a clear waiver.[198] Third, the court battled the prosecution's argument that Chantal should have entered a conditional guilty plea under Rule 11(a)(2). The court recognized the irony in "asking the statutorially disqualified judge for consent to appeal his disqualification" under Rule 11, as well as trying to force prosecutorial consent in the scope of broad prosecutorial discretion regarding plea bargaining.[199] The court asserted that it would be "incongruous to hold that for one seeking the benefit of [the protections of § 455(a)] the consent would have to be obtained from the very judge whose qualifications are under attack."[200] The circuit court reversed and remanded the case, with a gentle note to the trial judge to redetermine whether his impartiality might reasonably be questioned by a responsible, reasonable person, in light of his statements about Chantal.[201]

2. *United States v. Brinkworth*

In 1995, in *United States v. Brinkworth*,[202] the Second Circuit expressed its agreement with the First Circuit's decision in *Chantal*. In this case, Brinkworth was charged in a multi-count indictment with conspiracy, tax fraud, and mail fraud.[203] He filed a § 455(a) motion to disqualify the judge shortly before trial started, and based the motion on the fact that the judge had supervised two offices that had prosecuted Brinkworth several years before the current charges, and on a rumor that Brinkworth had had a past relationship with the judge's wife.[204] Five supporting affidavits, and a separate evidentiary offering

198. *See id.*

199. *Id.*

200. *Id.*

201. *See id.* at 1024. The case also rested on the First Circuit's refusal to require the challenged conduct to be extrajudicial in nature. *See id.* This was important because the trial judge's actions were based solely on information obtained in judicial proceedings, and in most other jurisdictions could not have served as the basis for a recusal motion. *See* Liteky v. United States, 510 U.S. 540, 544 (1994); *see also* discussion *supra* Part II.D.3. In light of *Liteky*, the *Chantal* court's ultimate decision would likely not be the same today unless the defendant tried to argue that this conduct fell within the "pervasiveness" exception. *See supra* notes 82-84 and accompanying text. However, the proposition that a denial of a recusal motion is still subject to review regardless of a guilty plea is still good law in the First Circuit.

202. United States v. Brinkworth, 68 F.3d 633 (2d Cir. 1995).

203. *See id.* at 635-36.

204. *See id.* at 635. The rumor was "prevalent in the community," but the parties denied any such relationship. *Id.*

by the government, accompanied the motion.[205] The judge denied the motion.[206] Brinkworth asked the judge if he would agree to a plea conditioned on the appeal of the denied motion to recuse.[207] The judge declined to approve a conditional plea, noting that the *Chantal* decision may control the issue, and that under that decision Brinkworth would be able to appeal even after entering an unconditional plea.[208] Brinkworth then entered an unconditional guilty plea to one count of falsifying tax returns.[209] Following sentencing by a different judge, Brinkworth appealed.[210]

The Second Circuit was squarely confronted with the question of whether it could review the trial judge's refusal to recuse himself under § 455(a). The government offered the standard argument—that a guilty plea waives all but specifically reserved and jurisdictional defenses.[211] The court then undertook an evaluation of the *Chantal* and *Gipson* decisions. In rejecting *Gipson* as formalistic, the court noted that *Gipson* was based on the idea that a denial of a recusal motion is a pretrial defect that a guilty plea waives, rather than an error that affects the integrity of the entire judicial process.[212] In accepting the reasoning of *Chantal*, the court reiterated that Congress did not intend § 455(a) to be circumvented so easily.[213] Further, the court reasoned that because a judge has authority over both § 455(a) motions and Rule 11(a)(2) conditional guilty pleas, he could effectively deny the defendant any outlet for review of these decisions simply by denying one, and refusing to approve the other.[214] An interest in judicial economy also compelled this decision, because, as the court noted, if a defendant had no way to preserve this critical issue on appeal without going to trial, he would force the issue by insisting on a trial that need not occur.[215] Ultimately, however, the court refused to grant Brinkworth relief because his motion was not filed timely.[216]

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205. *See id.* at 636. The government offered a witness who said he had overheard the judge say that " '[i]f Kevin [Brinkworth] thinks he is getting his case out of my Court, he has another thing [sic] coming.' " *See id.*

206. *See id.* The stated reasons were that it was not timely, was based on rumors and false information, and was an apparent attempt to judge-shop for a judge that would commit to a specific sentence under Rule 11(e)(1)(C), which the judge here would not do. *See id.*

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.* at 636-37.

211. *See id.* (citing United States v. Doyle, 348 F.2d 715, 718 (2d Cir. 1965)).

212. *See id.* at 638.

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.* at 639-40.

V. WHEN UNCONDITIONAL GUILTY PLEAS AND § 455(a) RECUSAL MOTIONS MEET

If the goals of the criminal justice system are truth and justice, we disserve those goals by not allowing a criminal defendant to challenge his own unconditional guilty plea by way of appeal on the grounds that the judge who accepted the plea did not appear impartial. It is imperative that our judiciary appear impartial, as evidenced by Congress's enactment of 28 U.S.C. § 455. It is equally imperative that criminal defendants have the proper protections when choosing to make guilty pleas, as evidenced by Rule 11. The policy choices behind both 28 U.S.C. § 455(a) and Rule 11 should not be completely undermined just because they happen to coincide in a single case. The waiver doctrine, as applied in this context, does not sufficiently guarantee the realization of the goals of both the appearance of impartiality in the judiciary and the voluntariness of criminal guilty pleas. The guarantees embodied in Rule 11 are futile if the judge guarding them does not appear impartial toward the individual criminal defendant. Judicial economy will be served by a rule that allows a criminal defendant to enter an unconditional guilty plea (foregoing trial) but still retain the right to appeal a denied motion to recuse. The proper remedy in some cases is to allow the criminal defendant to withdraw his plea an appeal of the denied recusal motion. This rule will serve the interests of justice, avoid even the appearance of judicial bias, and protect the rights of a criminal defendant charged with a federal crime.

A. The Case Against Waiver

Although § 455(e) clearly contemplates the availability of a waiver to § 455(a),[217] in most cases an unconditional guilty plea alone, following a denial of a recusal motion, will not meet the requirements of waiver. This is true for a number of reasons. Since § 455(a) is mandatory and self-enforcing, it should only be waivable when the judge is not aware of the existence of the circumstances calling his impartiality into question.[218] Otherwise a judge will not have an incentive to recuse himself or may even act in bad faith. Also, an unconditional guilty plea, to be quite literal, does not satisfy the requirement under § 455(e) that the basis for the disqualification be set out in the record.

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217. *See generally* discussion *supra* Part II.D.1 (discussing § 455(e)).

218. *See generally id.* (describing the difference between waiver and remittal, and suggesting remittal is what was contemplated by Congress in § 455(e)).

As explained above, an unconditional guilty plea does not usually specifically waive anything, much less set out the facts necessary under subsection (e) for finding a specific waiver.

Furthermore, the requirements of a waiver under § 455(e), although simple, hint at what Congress intended a waiver of a § 455(a) claim to mean. Section 455(e) speaks of a waiver "being accepted provided it is *preceded by a full disclosure* on the record of the basis for disqualification."[219] Canon 3E of the ABA's Code of Judicial Conduct and the Eleventh Circuit in *United States v. Kelly* recognized this as a remittal requirement,[220] by which the parties could agree, on their own, that the judge should not be disqualified despite the appearance of impropriety. This type of waiver furthers the purpose of bolstering public confidence in the judiciary, because, in essence, the judge would be saying on the record, "There are circumstances present that would make it look bad for me to stay on my own, and I am willing to step down to avoid that perception. However, if the parties agree that I am not biased, and should handle their case, I'll stay." In that case, the public could not have an objection to the judge's continuing to hear the action, because both parties will have made an informed decision that the judge is in fact not biased. Therefore, public confidence in the impartiality of the judiciary would not be harmed.

Moreover, a waiver under § 455(e) seems to indicate that the parties agree to continue with the case, with the full participation of the judge. A guilty plea, however, is the antithesis of this; it is a quick and easy way to remove the participation by the judge. It is in essence a reaction to the judge's refusal to recuse himself—"if you won't step down as judge, I will get out of your courtroom as quickly as possible to avoid potentially biased decisions." Under these circumstances, a guilty plea is the lesser of two evils—going to trial with a biased judge or pleading guilty to a knowable range of penalties and trying to appeal later. In this instance, choosing to plead guilty actually furthers the purpose of encouraging confidence in the judicial system. The public will surely be less aware, at any rate, of a guilty plea accepted by a potentially biased judge than it will be of a full blown trial in front of that same judge.

Once a criminal defendant has made a motion requesting the judge to recuse himself, it is illogical to assume that because the judge refuses, all public concern for judicial integrity will be eliminated. Because a judge's decision on the question of whether his impartiality might reasonably be questioned will in some cases be incorrect, those

219. 28 U.S.C. § 455(e) (1994) (emphasis added).
220. *See generally* discussion *supra* Part II.D.1.

people that question the judge's impartiality will not be satisfied unless the judge's decision on this issue is affirmed on appeal or the parties subsequently agree that the judge is not biased. And subsequent agreement by the parties is unlikely if one party has already requested the judge to step down.

The inquiry into the voluntariness of the waiver is also hindered by entry of a guilty plea following the judge's refusal to recuse himself. The need for the waiver to be voluntary is particularly acute in this context because of the unique power disparity between a judge whose impartiality is reasonably in question and the defendant standing before him for judgment.[221] One could imagine the unique paradox of having to choose between pleading guilty or going to trial with a judge who does not reasonably appear impartial. Furthermore, the fear of the possible consequences of going to trial with a judge whose impartiality the defendant has already questioned could severely limit the defendant's ability to make a rational cost-benefit analysis of going to trial. Having to make this Hobson's choice is fundamentally unfair to the defendant, particularly because the judicial system itself would be at fault for his quandary.[222]

B. The Futility of Rule 11's Guarantees if Guarded by a Judge Who Does Not Appear Impartial

Because a judge has the power to accept or reject guilty pleas,[223] as well as deny recusal motions,[224] it is extremely important that when these two powers meet, there is a check on their operation to ensure that one does not influence the other. As explained earlier, judges have a central role in the acceptance of guilty pleas, on a number of levels. First, the judge can withhold his approval of a conditional plea that reserves the right to appeal one of his orders, and essentially force a defendant to either waive the right, or go through the time, expense, and humiliation of trial to reserve it.[225] In a normal criminal case, that may not necessarily be a problem.[226] When combined with a

221. *See generally* discussion *supra* Part III.B.4.

222. The quandary is particularly distasteful here because, as opposed to an average criminal defendant, this defendant is not at fault for placing himself in this situation. The defendant has simply requested the opportunity to have a reasonably impartial judge hear his case, and, by no fault of his own, has been denied that opportunity.

223. *See generally* discussion *supra* Part III.B.4.

224. *See generally* discussion *supra* Part II.C.

225. *See generally* discussion *supra* Part III.B.4.

226. In a normal criminal case, the prospects of going to trial are not so terrible as compared to pleading guilty. The benefits of going to trial, of course, are the possibilities of being acquitted or getting a light sentence. For a defendant faced with what appears to be an impartial judge,

circumstance where the judge's impartiality is in question, however, the very essence of judicial fairness is at stake. As the court stated in *Chantal*, no one would seriously argue that a judge would always arbitrarily withhold consent to a conditional plea reserving the right to challenge the judge's appearance of impartiality.[227] But requiring that the judge consent to such a challenge is completely contrary to the stated purpose behind § 455[228] as well as fundamental fairness. As an initial matter, it assumes that the alleged bias will not affect the judge's decision on the particular recusal motion, even though the potential bias may be enough to affect all of the judge's decisions. Without meaningful review of the trial court's decision to refuse recusal, the judge would have unfettered discretion. The judge might refuse any but the harshest plea bargains that almost force the defendant to go to trial, where he is subject to the worst available punishments. After a trial, the defendant's only recourse is to appeal the recusal decision, which is going to be given a high degree of deference by the reviewing court.[229] This, in and of itself, could indicate that such a criminal defendant has no choice whatsoever in the plea bargaining context.

Rule 11 would also be completely undermined if it was administered by a judge that reasonable people believe is not capable of impartial judgment. The prophylactic measures in Rule 11 become absolutely meaningless when a defendant stands before a judge whose impartiality is in doubt, and is questioned regarding the sufficiency of the factual basis for the plea, the voluntariness of the plea, and the suitable punishment for the charge. The defendant would be forced to pay lip service to an agreement that is involuntary or coerced.

The possibility of prosecutorial and judicial collusion is also very real in this context. Knowing that the judge should recuse himself, but will not, and knowing that the judge can keep the defendant from being able to appeal the decision, the prosecutor would be free to require the defendant to plead unconditionally so long as he could remind him of the enormous costs of going to trial, both in time, money, humiliation, and the likely outcome under a judge whose impartiality is questionable.[230] The normal plea bargaining protections would not

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however, it cannot be said that the benefits of going to trial could even theoretically outweigh the costs in terms of fairness, accuracy, and the prospect of acquittal or reduced punishment. To that defendant, no such benefits exist.

227. *See* United States v. Chantal, 902 F.2d 1018, 1021 (1st Cir. 1990).

228. *See id.*

229. *See generally* discussion *supra* Part II.D.4.

230. The worst case scenario for the criminal defendant here would be trial. As stated before, this is not true for the average defendant. *See generally* Schulhofer, *supra* note 100. In

exist for this defendant. He could not rely on bargaining principles to check prosecutorial discretion, because the defendant would have no real ability to refuse the plea offered by the government. He could not rely on the judge's objectivity to ensure that the end result is fair. Finally, he could not rely on the possibility of appeal to check both the prosecutor and the judge, because the judge could foreclose that option altogether.

C. Judicial Economy Concerns Cut Both Ways

In its quest for finality, the court system has embraced the concept of waiver to foreclose options in order to achieve a final decision. This is true for a number of reasons; the most important is that judicial resources are scarce and decisions have to be made as to where, when, and for what causes those resources will be spent.[231] The social utility of a guilty plea is that our already overloaded judicial system does not have to spend as many resources as it usually would for a trial to get the same result.[232] Given the benefits of plea bargains, arguments for not allowing defendants to appeal certain issues after they plead guilty should be based on reasoning that benefits derived from allowing these appeals are outweighed by their costs. Conversely, an argument for allowing such appeals is that the costs in resources are worth the societal or individual benefit derived from their outcomes.

By not allowing a defendant to appeal a denial of a recusal motion after pleading guilty unconditionally, the judicial system might be forcing an innocent defendant to give up his right to a trial without a biased judge and instead choose to plead guilty. Not only is the individual harmed, but society is harmed from the diminished public confidence in a defendant not being able to obtain review of the decisions of an apparently biased judge. In the alternative, society is harmed if the defendant goes to trial with the biased judge because the appearance of bias diminishes public confidence in the judiciary.

By allowing criminal defendants to appeal the denied recusal motion, we can insert a check into the system to ensure that individual and societal needs are correctly balanced. It is quite possible to do this without sacrificing judicial economy. A criminal defendant, faced with what appears to be a partial judge, may request the judge's re-

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all of his articles, Schulhofer marshalls the argument that plea bargaining is inherently problematic, because a trial is preferable for the average defendant.

231. *See* Santobello v. New York, 404 U.S. 257, 260-61 (1971).

232. *See id.*

cusal. If the judge refuses to step down, the defendant may plead guilty unconditionally, and forego the time and expense of trial. Following sentencing, the criminal defendant may either accept his sentence and serve his time,[233] or decide to appeal the denied recusal motion. Should the appeal be successful, the defendant will be back in the position he was in before the denied recusal motion. Thus, not only will the judicial system have been spared the embarrassment of a public trial adjudicated by a judge who does not reasonably appear impartial, but the judicial resources involved in having a full-blown trial just to be able to reserve the right to appeal the denied recusal motion will have been saved.

D. The Appropriate Remedy

Deciding that a judge's refusal to recuse himself should be reviewable even following a defendant's unconditional guilty plea does not end the inquiry. Not every violation of § 455(a) should result in the defendant being released without a new trial.[234] Some courts have held that an improper denial of a § 455(a) motion should be remedied by vacating the judgment even though the defendant has suffered no actual prejudice.[235] But the proper remedy in the context of guilty pleas is to allow the defendant to withdraw his plea,[236] and require that, upon rehearing, the case be heard by another judge. This remedy would further the goal of § 455 by ensuring restored public confidence in the ability of the judicial system to right public wrongs. It would further the goals behind Rule 11 as well by ensuring that defendants are afforded the ability to have a determination made of their guilt by a judge that is not only impartial, but appears to be so.

To the objection that allowing these appeals will open the floodgates for defendants seeking to overturn their convictions, a plausible response exists. Four limitations exist on the operation of both § 455 and Rule 11.[237] The first and most obvious is the harmless error rule, which would filter out those cases where the error has not had an outcome-determining effect on the plea negotiations.[238] Second,

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233. The defendant, with the assistance of his counsel, can make a cost-benefit analysis of the likelihood of receiving a better or worse sentence on rehearing. At least sometimes the defendant would be happy with his sentence, and no further appeal would be necessary.

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

235. *See id.* at 868; Presten v. United States, 923 F.2d 731, 735 (9th Cir. 1991); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111-12 (5th Cir. 1980).

236. This is exactly the remedy supplied in Rule 11 for a conditional guilty plea. *See* FED. R. CRIM. P. 11(a)(2).

237. *See generally* discussion *supra* Parts II.D. and III.B.

238. *See supra* notes 93-95, 119 and accompanying text.

the fact that a defendant's remedy is limited to withdrawing his plea may also serve to deter those who would assert frivolous claims, because the government would be free to retry them or renegotiate another plea under a different judge. Third, timeliness, although not a universal limitation, may still serve to exclude some defendants who sleep on their rights.[239] Fourth, the extrajudicial source doctrine, alive and well since *Liteky*, is also an important limitation.[240] Defendants must still find the underlying bases for the challenge somewhere besides the judicial proceedings themselves.

Explicit waiver is not foreclosed by this argument, either. An explicit waiver would be a statement in the plea agreement that lays out the full factual basis for the recusal and specifically waives appeal of the denied recusal motion. Should the parties choose to waive their right to recuse the judge clearly and explicitly after a full disclosure on the record, they are certainly free to do so.[241] An unconditional guilty plea, however, should not be presumed to be such a waiver.

VI. CONCLUSION

Courts should reinterpret § 455(a) in the context of Rule 11 so as to further the goals of both when they intersect in a given case. This would ensure that criminal defendants are afforded the protections of Rule 11, and these protections are guarded by a judge whose impartiality cannot reasonably be questioned. If this cannot be effectuated by judicial interpretation, Congress should step in and clarify its intent to require judges to step down when § 455(a) requires them to do so, regardless of whether or not a criminal defendant subsequently pleads guilty to the charge.

The purpose behind 28 U.S.C. § 455 is frustrated if courts refuse to allow defendants who have entered unconditional guilty pleas to appeal a previous denial of a recusal motion on the basis that they waived their challenge. The only way to ensure that Congress's goal of ensuring public confidence in the integrity and impartiality of the federal judiciary is if courts recognize that an unconditional guilty

239. *See generally* discussion *supra* Part II.D.2.

240. *See generally* discussion *supra* Part II.D.3.

241. *See* 28 U.S.C. § 455(e) (1994). Concerns regarding possible coercive tactics for obtaining an explicit waiver also exist. Explicit waivers, however, have an automatic check to determine their voluntariness on appeal, if needed. An explicit waiver can be appealed directly on its own merits. A guilty plea, however, must be attacked on the voluntariness of the entire plea, not on just any discrete waiver contained therein. *See generally* discussion *supra* Part III.B.5.

plea is not a clear waiver of the right to have a judge that is not only impartial, but appears to be so.

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