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## Disqualification of Federal Judges - Third Circuit Orders District Judge James McGirr Kelly to Disqualify Himself so as to Preserve the Appearance of Justice under 28 U.S.C. 455

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DISQUALIFICATION OF FEDERAL JUDGES—THIRD CIRCUIT  
ORDERS DISTRICT JUDGE JAMES MCGIRR KELLY TO DISQUALIFY  
HIMSELF SO AS TO PRESERVE “THE APPEARANCE OF JUSTICE”  
UNDER 28 U.S.C. § 455

*In re School Asbestos Litigation* (1992)

I. INTRODUCTION

The impartiality and neutrality of judges is an indispensable feature of the American justice system. An impartial judiciary is imperative to ensure procedural fairness to individual litigants<sup>1</sup> and to preserve public confidence in the integrity of the judicial process.<sup>2</sup> Realizing these objectives requires that judges be neutral and unbiased in fact. Preserving public confidence, however, additionally requires that judges present an appearance of scrupulous impartiality even in the absence of any actual bias.<sup>3</sup> For the judiciary to maintain its authority in the public eye,

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1. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (declaring that as matter of procedural fairness, “[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases”); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (holding that “neutral and detached judge in the first instance” is individual right fundamentally guaranteed by Due Process Clause of Fourteenth Amendment); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971) (concluding that due process interest in fair administration of justice mandated disqualification of judge who had been verbally insulted and attacked throughout trial by defendant representing himself); see also Gary L. Karl, *Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and A Proposed Procedure*, 46 ALB. L. REV. 229, 229 (1981) (noting that “[i]f a judge is biased toward or against one of the parties, or if he is prejudiced about the subject matter of the suit to the extent that he is unable to hear both sides with an open mind, his participation deprives the litigants of due process”).

2. See Karl, *supra* note 1, at 234 (commenting that “the legitimacy of the federal judiciary’s authority rests on a public perception of fairness and impartiality in judicial decisionmaking”). One commentator has described this central concern for maintaining public confidence in the judiciary as follows:

Without armies to carry out their judgments, courts are dependent on the consent of the governed no less than the other branches to make their pronouncements law. When the image of the judiciary is tarnished, the moral authority of the court is critically undermined. The appearance of partiality, whether based on the judge’s apparent economic self-interest, his class or race prejudices, or simple carelessness about the concerns of citizens and the public, is the greatest threat that confronts our judges.

JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* at x (1974).

3. See Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 863 (recognizing that “[c]ourts strive to achieve and maintain an appearance of justice—an appearance, that is to say, of scrupulous fairness and total impartiality—because the authority of judicial tribunals ultimately rests upon public confidence”).

"justice must satisfy the appearance of justice" at all times.<sup>4</sup>

In order to maximize both actual and apparent impartiality in federal judicial decisionmaking, Congress enacted 28 U.S.C. § 455, a statutory framework for judicial disqualification.<sup>5</sup> Section 455(a) requires a district judge to disqualify himself or herself from a case if under the circumstances a reasonable person would question the judge's impartiality.<sup>6</sup>

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4. *Offutt v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.) (holding that judge who became personally embroiled with defense attorney during trial must be disqualified from presiding at subsequent contempt proceedings).

5. *See* 28 U.S.C. § 455 (1988). Section 455, entitled "Disqualification of justice, judge, or magistrate," provides in pertinent part:

(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:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

....

*Id.*; *see* H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 [hereinafter HOUSE REPORT] (stating that judicial disqualification statute is "designed to promote public confidence in the impartiality of the judicial process"); *see also* *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988) (noting that "the very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible" because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges"). For a compilation of law review commentary on the various forms of judicial disqualification at both federal and state levels, *see* Kenneth S. Kilimnik, *Recusal Standards for Judges in Pennsylvania Cause For Concern*, 36 VILL. L. REV. 713, 713 n.1 (1991).

6. 28 U.S.C. § 455(a). Congress substantially amended § 455(a) in 1974. Prior to this amendment, § 455(a) did not include an objective "reasonable person" standard. Instead, the statute mandated disqualification only when a judge thought it "improper, in his opinion, for him to sit" on the case because the judge had "a substantial interest, ha[d] been of counsel, [was] or ha[d] been a material witness, or [was] . . . related to or connected with any party or his attorney." Act of June 25, 1948, ch. 646, § 455, 62 Stat. 907, 908. From this early version of the statute emerged the "duty to sit" concept. Based on this perceived sense of judicial duty or obligation to preside, judges tended to resolve close questions on disqualifying themselves in favor of staying on the case. *See* *Edwards v. United States*, 334 F.2d 360, 362-63 n.2 (5th Cir. 1964) (judge concluding that he had "no right to disqualify himself and must sit" even though he believed that "to insure complete fairness to both sides, and especially the appearance of fairness to the appellants, [he] should recuse" himself from the case), *cert. denied*, 379 U.S. 1000 (1965); *see also* Barton, Note, *supra* note 3, at 869-70 & n.43 (discussing "duty to sit" concept). The current objective standard set forth in the 1974 amendment to § 455(a) was modeled after Canon 3C(1) of the Code of Conduct for United States Judges. HOUSE REPORT, *supra* note 5, at 3-4, *reprinted in* 1974 U.S.C.C.A.N. at 6353-54. By amending § 455(a), Congress expressly intended to abolish this "so-called 'duty to sit' that ha[d] become a gloss on the existing statute." *Id.* at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6355.

In *In re School Asbestos Litigation*,<sup>7</sup> the United States Court of Appeals for the Third Circuit issued a writ of mandamus pursuant to section 455(a), ordering Judge James McGirr Kelly of the United States District Court for the Eastern District of Pennsylvania to disqualify himself from an extraordinarily complex nationwide asbestos class action suit.<sup>8</sup> This decision reveals that even in the context of massive megalitigation,<sup>9</sup> the Third Circuit will not hesitate to disqualify a presiding district judge in order to fulfill the central congressional goal of section 455(a)—to maintain an appearance of impartiality and thereby sustain public confidence in the judicial system.

This Casebrief first traces the circumstances that raised questions as to Judge Kelly's impartiality and led to mandamus petitions requesting his disqualification from *In re School Asbestos Litigation*.<sup>10</sup> This Casebrief then examines the Third Circuit's reasoning in ordering Judge Kelly to disqualify himself based upon its finding of an appearance of partiality under section 455(a).<sup>11</sup> Finally, this Casebrief considers the implications of Judge Kelly's disqualification and concludes that the Third Circuit effectively served the congressional goals underlying section 455(a) by ordering Judge Kelly to disqualify himself.<sup>12</sup>

## II. BACKGROUND AND FACTS

### A. *A Brief History of the Litigation*

In early 1983, four public school districts filed class action suits in the United States District Court for the Eastern District of Pennsylvania against various members of the asbestos industry.<sup>13</sup> These school dis-

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7. 977 F.2d 764 (3d Cir. 1992).

8. *Id.* at 770. For a complete discussion of the circumstances surrounding Judge Kelly's disqualification, see *infra* notes 21-52 and accompanying text.

9. See *School Asbestos*, 977 F.2d at 778 n.14 (noting "extraordinary size and complexity of this megalitigation, which may take several years to try").

10. For a detailed discussion of the circumstances casting doubt upon Judge Kelly's impartiality, see *infra* notes 21-44 and accompanying text.

11. For a complete discussion of the Third Circuit's analysis, concluding that Judge Kelly must be disqualified under § 455, see *infra* notes 53-87 and accompanying text.

12. For a discussion of the practical implications of judicial disqualification, see *infra* notes 88-90 and accompanying text. For a discussion of how the Third Circuit's decision to disqualify Judge Kelly furthered the congressional objectives underlying § 455, see *infra* notes 91-92 and accompanying text.

13. *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 425 (E.D. Pa. 1984). Three of the plaintiff school districts were located in the Eastern District of Pennsylvania and one was located in the District of South Carolina. *Id.* at 424-25. The district court's jurisdiction was based on diversity of citizenship. *Id.* at 425.

Asbestos-related actions taken by the Environmental Protection Agency (EPA) in the early 1980s precipitated the filing of these class actions. *Id.* In 1982, the EPA promulgated a series of proposed regulations requiring all public and private schools in the United States to test for asbestos in their school buildings. *Id.*; see 40 C.F.R. §§ 763.100-.119 (1983) (regulations promulgated pursuant to Toxic Substances Control Act, 15 U.S.C. § 2605 (1988)). The EPA

districts sought recovery for property damage that they alleged arose from the use of asbestos in the construction of their school buildings, and from the conspiratorial withholding of information about asbestos hazards by members of the industry.<sup>14</sup> In 1984, the district court consolidated the four cases and certified the school district plaintiffs as a nationwide class.<sup>15</sup> The lawsuit subsequently expanded as over 30,000 elementary and secondary school districts filed claims against more than fifty defendants in the asbestos industry.<sup>16</sup>

Judge Kelly presided over *In re School Asbestos Litigation* for almost a decade after the inception of the original class actions,<sup>17</sup> issuing hundreds of pretrial orders throughout the course of discovery and pretrial

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developed these regulations upon determining that the presence of asbestos in schools created "a serious hazard to the health of schoolchildren and school employees." *Asbestos Sch.*, 104 F.R.D. at 425. Partially in recognition of the financial burden generated by the EPA regulations, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980. *Id.*; see 20 U.S.C. §§ 3601-3611 (1988). This statute allocated funds for interest-free loans to schools, so that the schools could afford to conduct the testing mandated by the EPA. *Asbestos Sch.*, 104 F.R.D. at 425; see 20 U.S.C. § 3605 (1988). The statute further instructed the United States Attorney General "to investigate and report to Congress which parties should bear the ultimate financial and legal responsibility for school asbestos abatement remedial action." *Asbestos Sch.*, 104 F.R.D. at 425; see 20 U.S.C. § 3607(b) (1988). In August 1981, the Attorney General reported to Congress that the asbestos industry should be held fully accountable for all remedial action. *Asbestos Sch.*, 104 F.R.D. at 425; see HOUSE COMM. ON EDUC. AND LABOR, 97TH CONG., 1ST SESS., THE ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT TO THE CONGRESS 15 (Comm. Print 1981) (discussing potential defendants in asbestos industry) [hereinafter ATTY. GEN. REPORT]. The Attorney General also concluded that schools could rely upon state common law to recover from the industry. *Id.* at 425-26; see ATTY. GEN. REPORT, *supra*, at 86-233 (discussing common law theories of recovery). The publication of this report triggered the filing of the plaintiffs' class actions. *Asbestos Sch.*, 104 F.R.D. at 426.

14. *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 110343, at \*1 (E.D. Pa. June 17, 1991).

15. *Asbestos Sch.*, 104 F.R.D. at 433. The district court granted plaintiffs' motions for class certification under Federal Rule of Civil Procedure 23(b) and certified both a nationwide opt-out class action for compensatory damages and a mandatory class action for punitive damages. *Id.* at 433, 438. On appeal, the Third Circuit reluctantly affirmed the certification of the opt-out class action for compensatory damages, noting the potential unmanageability of the litigation. *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, and *cert. denied*, 479 U.S. 915 (1986). The Third Circuit vacated the certification of the mandatory class action for punitive damages. *Id.* at 1011.

16. *Asbestos Sch.*, 1991 WL 110343, at \*1. The lawsuit involves claims for property damage based on "theories of negligence, strict tort liability, intentional tort, breach of warranty, concert of action, and civil conspiracy." *School Asbestos*, 789 F.2d at 999. The plaintiffs seek recovery for the costs of removing, repairing and containing the asbestos products used in the construction of their schools. *Asbestos Sch.*, 1991 WL 110343, at \*1. The defendants include miners, bulk suppliers, brokers, assemblers, manufacturers, distributors, and contractors involved with asbestos and asbestos-containing products. *Id.*

17. *School Asbestos*, 977 F.2d at 771.

motions.<sup>18</sup> The first phase of the trial was set to begin in early February 1992, but in January 1992, several defendants filed mandamus petitions with the Third Circuit requesting Judge Kelly's disqualification.<sup>19</sup> At that time, the district court stayed proceedings pending the Third Circuit's decision on the mandamus petitions.<sup>20</sup>

B. *The Circumstances Giving Rise to Petitions For Judge Kelly's Disqualification*

In November 1986, Dr. Irwin J. Selikoff invited Judge Kelly, who had then been presiding over *In re School Asbestos Litigation* for almost four years, to attend a scientific conference on diseases caused by asbestos inhalation.<sup>21</sup> Judge Kelly declined the invitation due to pressures in court scheduling but expressed interest in attending a similar conference in the future.<sup>22</sup>

In a pretrial order issued during August 1988, Judge Kelly established a funding procedure for the school district plaintiffs.<sup>23</sup> Through this procedure, plaintiffs could apply under seal for installments of up to \$50,000 from the settlement funds paid into escrow by settling defend-

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18. *Id.* Throughout pretrial litigation, various challenges to Judge Kelly's orders reached the Third Circuit either by interlocutory appeal or mandamus petition. *See, e.g., In re School Asbestos Litig.*, 921 F.2d 1338 (3d Cir. 1990) (holding that mandamus petition was not appropriate to compel decertification of class when interlocutory appeal available), *cert. denied*, 111 S. Ct. 1623 (1991); *In re School Asbestos Litig.*, 921 F.2d 1330 (3d Cir. 1990) (affirming pretrial ruling that nonsettling defendants lack standing to challenge settlement by another defendant), *cert. denied*, 111 S. Ct. 1622 (1991); *In re School Asbestos Litig.*, 921 F.2d 1310 (3d Cir. 1990) (denying mandamus petitions asking for dismissal of class action complaints on basis of lack of subject matter jurisdiction), *cert. denied*, 111 S. Ct. 1623 (1991); *In re School Asbestos Litig.*, 920 F.2d 219 (3d Cir. 1990) (staying appeals against one defendant due to bankruptcy petition); *In re School Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988) (vacating pretrial order requiring asbestos manufacturers and suppliers association to disclose involvement in litigation when communicating with members of plaintiff class).

19. *School Asbestos*, 977 F.2d at 772.

20. *Id.*

21. *Id.* at 778. Dr. Selikoff is a prominent expert on asbestos-related diseases from the Mount Sinai School of Medicine in New York City. *Id.* Judge Kelly discussed the idea of attending the conference with District Judge John P. Fullam, a member of the Judicial Conference Committee on Codes of Conduct. *Id.* at 779 & n.16. Judge Fullam opined that Judge Kelly's attendance at the conference would not create an ethical problem as long as the conference was open to the public, involved subjects that would be useful in administering the court's business, and did not publicize Judge Kelly's attendance for promotional purposes. *Id.* at 779 n.16.

22. *Id.* at 779. Judge Kelly indicated that his interest in attending an asbestos conference was based on "the fact that approximately fifty percent of [the District Court for the Eastern District of Pennsylvania's] civil caseload related to asbestos personal injury matters." *Asbestos Sch.*, 1991 WL 110343, at \*1. Judge Kelly felt that "judicial education about the scientific aspects" of asbestos could be beneficial to asbestos case management. *School Asbestos*, 977 F.2d at 778-79.

23. *School Asbestos*, 977 F.2d at 779.

ants.<sup>24</sup> This procedure thus enabled plaintiffs to defray their reasonable litigation expenses.<sup>25</sup> In December 1989, Judge Kelly approved ex parte the class plaintiffs' request for \$50,000 from these funds to support a scientific conference on the hazards of asbestos.<sup>26</sup>

In February 1990, Dr. Selikoff invited Judge Kelly to attend the Collegium Ramazzini Conference on the Third Wave of Asbestos Disease.<sup>27</sup> Dr. Selikoff did not mention in his invitation, however, that the class plaintiffs had predominantly funded this conference and that Judge Kelly had ex parte approved this funding.<sup>28</sup> Evidently unaware of the connection between the conference and the plaintiffs, Judge Kelly accepted the invitation.<sup>29</sup>

In March and April 1990, the plaintiffs' executive committee supplied the Collegium Ramazzini with the names of scientists who were

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24. *Id.* The district court permitted the plaintiffs to make these requests under seal in order to prevent any prejudicial effect which might result from disclosure to the defendants of the exact amounts and uses of the settlement funds by the plaintiffs. *Asbestos Sch.*, 1991 WL 110343, at \*1. For a discussion of the Third Circuit's evaluation of the propriety of this ex parte funding approval procedure, see *infra* note 53.

25. *School Asbestos*, 977 F.2d at 779.

26. *Id.* The plaintiffs' executive committee developed the idea for the asbestos conference. *Id.* This committee believed that the asbestos industry was sponsoring one-sided conferences on asbestos dangers. *Id.* Consequently, the executive committee contacted Dr. Selikoff, whom plaintiffs perceived to be "a world-renowned expert, yet a neutral in asbestos litigation," about coordinating an alternative research conference on the hazards of exposure to asbestos. *Id.* Dr. Selikoff made arrangements to have the Collegium Ramazzini, a non-profit academic group of environmental and occupational health scientists, organize the conference. *Id.* As president of this organization, Dr. Selikoff ultimately supervised the conference. *Id.*

In their application for the use of settlement funds, the plaintiffs stated that they "believe[d] that a balanced view of issues concerning asbestos in buildings . . . [was] not being presented to the public or scientific community," and that "an unbiased, scientific investigation . . . [was] necessary, indeed essential, to a fair resolution . . . of the issues involved in this litigation." *Asbestos Sch.*, 1991 WL 110343, at \*2 (second alteration in original) (quoting Plaintiffs' December 1, 1989 Application Under Seal, at 1-2). The plaintiffs further stated that the conference would be supervised by Dr. Selikoff. *School Asbestos*, 977 F.2d at 779.

27. *School Asbestos*, 977 F.2d at 779. Earlier in February and prior to this invitation, the plaintiffs' executive committee had contacted Dr. Selikoff and suggested that he "send a notice or invitation to Judge Kelly 'so that he [would be] advised of the progress and details [of the conference].'" *Id.*

28. *Id.*

29. *Id.* Judge Kelly later commented that he assumed that Dr. Selikoff's invitation was merely a follow-up to Judge Kelly's earlier expression of interest. *Id.* Judge Kelly also indicated that he had "made no connection between Plaintiffs' December 1, 1989 application for funds and Dr. Selikoff's February 15, 1990 invitation to attend the Third Wave Conference." *Asbestos Sch.*, 1991 WL 110343, at \*9. Judge Kelly further stated that at the time he accepted the invitation he was "not cognizant" of any involvement by plaintiffs or plaintiffs' counsel in his invitation to, nor the funding, organization, or content of the conference. *Id.*

expected to be called at trial as expert witnesses for the plaintiffs.<sup>30</sup> The Collegium invited many of these experts to make presentations at the Third Wave Conference.<sup>31</sup> In addition, the committee provided the Collegium with the names of several judges who were handling asbestos cases at that time.<sup>32</sup> The Collegium invited many of the named judges to attend the conference as guests of the sponsors<sup>33</sup> and offered to waive their \$250 registration fee and to pay for their hotel accommodations.<sup>34</sup> Judge Kelly was among the judges accepting the Collegium's invitation.<sup>35</sup> Consequently, the plaintiffs' settlement fund indirectly paid for Judge Kelly's expenses.<sup>36</sup>

The Third Wave Conference took place from June 7 to June 9, 1990 in New York City.<sup>37</sup> Judge Kelly was one of fifteen state and federal judges who ultimately attended.<sup>38</sup> The promotional literature and press releases publicizing the conference emphasized the attendance of these judges and highlighted that a "grant" approved by a federal court had partially funded the conference.<sup>39</sup>

In July 1990, following the Third Wave Conference, the plaintiff class filed a list of eighteen expert witnesses expected to testify at trial.<sup>40</sup> Thirteen of these trial experts had made presentations at the conference.<sup>41</sup> In March 1991, Judge Kelly attempted to narrow the issues to be litigated during the first phase of trial by recommending that the issue of the dangerousness of asbestos products be dropped from the case.<sup>42</sup> This issue was among those addressed at the Third Wave Conference.<sup>43</sup> Judge Kelly commented that the dangerousness of asbestos

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30. *School Asbestos*, 977 F.2d at 780.

31. *Id.*

32. *Id.* at 779.

33. *Id.* at 780.

34. *Asbestos Sch.*, 1991 WL 110343, at \*3. The judges were, however, responsible for their meals and transportation expenses. *Id.*

35. *School Asbestos*, 977 F.2d at 780.

36. *Id.*

37. *Id.* Fifty-six presentations were made at the conference. *Id.* The Third Circuit commented that the views expressed by the conference speakers were "overwhelmingly consistent with the plaintiffs' position." *Id.* Judge Kelly claimed that, with the exception of introducing himself to Dr. Selikoff, he did not communicate with any of the conference speakers. *Id.*

38. *Id.*

39. *Id.*

40. *School Asbestos*, 977 F.2d at 780.

41. *Id.* According to the Third Circuit, "if Judge Kelly noticed the overlap [between the conference speakers and the trial experts], he made no mention of it to the parties." *Id.* In September 1990, several defendants requested a meeting with Judge Kelly "to discuss his role in approving funding for the conference." *Id.* Judge Kelly responded by writing to the defendants and detailing his participation in the ex parte funding approval process for the conference, but he declined a meeting with the defendants. *Id.*

42. *Id.* at 780 & n.20.

43. *Id.* at 780.



products was generally acknowledged and was thus a topic "beyond this case."<sup>44</sup>

Through "hard-fought discovery" in early 1991, the defendants eventually learned the full details concerning the plaintiffs' connections to the asbestos conference attended by Judge Kelly.<sup>45</sup> In April 1991, twelve defendants made motions requesting that Judge Kelly disqualify himself under sections 455(a) and (b)(1) of the federal judicial disqualification statute.<sup>46</sup> These defendants asserted that Judge Kelly's impartiality had become reasonably questionable and that he had gained personal knowledge of disputed evidentiary facts by his attendance at the asbestos conference.<sup>47</sup>

While Judge Kelly conceded that the defendants might legitimately view the circumstances of his attendance as potentially prejudicial to their interests,<sup>48</sup> he refused to disqualify himself from the case.<sup>49</sup> Instead, he opted to preclude those experts who had appeared at the conference from providing expert testimony for the plaintiffs at trial.<sup>50</sup> Judge Kelly later modified this order to allow these expert witnesses to testify at trial, but only as to "purely factual information" and not as to

44. *Id.* at 780 & n.20. Specifically, Judge Kelly expressed the following opinion in a March 21, 1991 pretrial conference:

I don't think there is anyone in this courtroom that does not concede that at least Congress and the administrative agencies believe that asbestos is hazardous and I believe the Court can take notice of Congressional legislation, [and] the administrative regulations, generally banning asbestos . . . [as well as] the thousands of court cases throughout the nation which have resulted in awards being made against asbestos manufacturers and suppliers due to injuries sustained by exposure to asbestos.

Therefore, I am not going to get into is asbestos dangerous and at what level. I think we are beyond that. . . .

. . . .

I do not, at least in this first stage of the case, want to discuss asbestos hazards. It's beyond this case.

*Id.* at 780-81 n.20.

45. *School Asbestos*, 977 F.2d at 780.

46. *Id.* at 781; see 28 U.S.C. § 455(a) and (b)(1). For the text of subsections (a) and (b)(1) of § 455, under which defendants requested Judge Kelly's disqualification, see *supra* note 5.

47. *School Asbestos*, 977 F.2d at 781.

48. *Asbestos Sch.*, 1991 WL 110343, at \*11. Judge Kelly further stated that he "would not have attended the Third Wave Conference had [he] known of the various connections which existed between Plaintiffs, Plaintiffs' counsel, and the conference." *Id.* at \*10.

49. *Id.* at \*13.

50. *Id.* When faced with the motions for disqualification filed by the defendants, Judge Kelly believed he had three options: disqualify himself, deny the motions and proceed normally, or deny the motions and prohibit the conference participants from appearing as witnesses for plaintiffs at trial. *School Asbestos*, 977 F.2d at 781. For a discussion of the Third Circuit's view that Judge Kelly's choice of the third option was an improper attempt to fashion a remedy, see *infra* notes 71-74 and accompanying text.

expert opinions.<sup>51</sup> Finally, in January 1992, the mandamus petitions at issue in *In re School Asbestos Litigation* seeking Judge Kelly's disqualification under section 455 came before the Third Circuit.<sup>52</sup>

### III. THE THIRD CIRCUIT'S ANALYSIS

The Third Circuit began its analysis in *In re School Asbestos Litigation* by considering the propriety of mandamus as a means to challenge a district judge's refusal to disqualify himself or herself from a case under section 455.<sup>53</sup> Specifically, the court examined whether its 1958 deci-

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51. *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 195721, at \*2 (E.D. Pa. Sept. 30, 1991). Judge Kelly noted that his rationale for modifying the order was that totally prohibiting plaintiffs' expert witnesses from testifying at trial could "in retrospect be considered overly broad." *Id.* Moreover, Judge Kelly stated that allowing the plaintiffs' expert witnesses to testify at trial, albeit as "fact witnesses only," would ensure that the plaintiffs could not "assert that the preclusion of their witnesses from trial [was] tantamount to a dismissal of their case." *Id.* at \*3.

52. *School Asbestos*, 977 F.2d at 772. The first mandamus petition, filed by defendant Pfizer, Inc., challenged Judge Kelly's refusal to disqualify himself under § 455(a). *Id.* at 770. Two companion petitions were filed by defendants ACandS, Inc., and Asten Group, Inc. *Id.* These defendants not only sought an order requiring Judge Kelly to disqualify himself, but also requested that the Third Circuit vacate certain rulings adverse to them. *Id.* The defendants claimed that these rulings had become "tainted by the appearance of partiality." *Id.* For a discussion of the Third Circuit's decision requiring Judge Kelly to disqualify himself, see *infra* notes 64-70 and accompanying text. Defendant Kaiser Cement Corp. filed a fourth mandamus petition. *School Asbestos*, 977 F.2d at 770. This petition requested that the Third Circuit order the district court to discontinue the ex parte process of approving the class plaintiffs' use of escrowed settlement funds and to unseal all past ex parte applications for such funds. *Id.* at 781. Two additional mandamus petitions, filed by defendants W.R. Grace & Co.-Conn. and Georgia-Pacific Corp., requested that the Third Circuit order the district court to consider their motions for summary judgment, which Judge Kelly had dismissed as untimely. *Id.* at 770. Finally, defendant Kaiser Cement and a group of five other defendants jointly filed two mandamus petitions. *Id.* at 771. These petitions challenged Judge Kelly's tentative trial plan and his decision to use the "strictest jurisdiction" hybrid tort standard. *Id.* at 781. The Third Circuit concluded that these claims were unripe for adjudication in light of Judge Kelly's disqualification. *Id.*

53. *School Asbestos*, 977 F.2d at 774. The Third Circuit preliminarily observed that mandamus is an extraordinary writ, available only in rare cases when a petitioner has "no other adequate means to obtain the desired relief" and demonstrates a "'clear and indisputable' right to issuance of the writ." *Id.* at 772 (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)). Moreover, the court cautioned that even under these circumstances, the issuance of a writ of mandamus is a highly discretionary exercise of judicial power that "must not be used as a mere substitute for appeal." *Id.* (quoting *Westinghouse Electric Corp. v. Republic of Phillipines*, 951 F.2d 1414, 1422 (3d Cir. 1991) (finding mandamus inappropriate means to review district court's order denying discovery of documents claimed to be privileged, because order was properly reviewable on appeal from final judgment)). The Third Circuit also noted that "the traditional use of mandamus has been 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Id.* at 773 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26

(1943) (finding mandamus inappropriate to compel district court to reinstate defendants' pleas in abatement to criminal indictment because "no abuse of judicial power" was involved in striking of pleas)). Nevertheless, the court recognized that mandamus is a flexible remedy whose "proper use cannot be wholly reduced to formula." *Id.* (quoting *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988) (finding mandamus appropriate to require district judge to hear reverse discrimination case before original jury, after judge ordered discharge of jury on basis that parties had exercised peremptory challenges during voir dire on racial grounds)). Thus the Third Circuit opined that mandamus may also be properly utilized in order to "prevent a district court from usurping a power that it lacks and to rectify clear abuses of discretion." *Id.* The court further noted that mandamus may be particularly appropriate in order to "further supervisory and instructional goals, and where issues are unsettled and important." *Id.* For a further discussion of the use of mandamus as an "internal judicial control device" in the federal courts, see generally Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 *BUFF. L. REV.* 37, 39 (1982).

The Third Circuit prefaced its analysis of mandamus availability in § 455(a) actions with a general discussion of the standards governing mandamus relief in the Third Circuit. *School Asbestos*, 977 F.2d at 772-73. In examining the general availability of mandamus relief, the court addressed the seminal mandamus procedure decision in the Third Circuit, *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965) (en banc). *School Asbestos*, 977 F.2d at 773. The plaintiffs believed that *Rapp's* holding created a potential impediment to the court's consideration of the defendants' mandamus petitions. *Id.* In *Rapp*, the Third Circuit had held that because mandamus should be reserved for extraordinary cases only, "petitions for the writ *should allege* that an unsuccessful request was made for certification [of an interlocutory appeal] under [28 U.S.C.] § 1292(b), or why such an application was inappropriate in the circumstances." *Rapp*, 350 F.2d at 813 (emphasis added). The plaintiffs in *School Asbestos* maintained that the Third Circuit had established a bright-line rule in *Rapp* precluding a court from considering mandamus petitions unless a petitioner first sought an interlocutory appeal under § 1292(b) or alleged with particularity why an interlocutory appeal would not be feasible. *School Asbestos*, 977 F.2d at 773. The plaintiffs argued that the *Rapp* rule prohibited the Third Circuit from considering the mandamus petitions because none of the defendants filing mandamus petitions had first sought certification of an interlocutory appeal, and most of them had failed to allege why such relief would be unavailable. *Id.* The Third Circuit, however, rejected the class plaintiffs' interpretation of *Rapp*. *Id.* First, the court noted that while *Rapp* expressed the court's preference that mandamus petitioners either seek certification of an interlocutory appeal under § 1292(b) or explain why this would not be feasible, *Rapp* did not establish a rigid rule barring consideration of mandamus petitions that failed to do so. *Id.* The court further noted that the preference it articulated in *Rapp* must be "read in connection with" the unique circumstances in *Rapp*, in which a district judge had become involved as a respondent in mandamus proceedings and had appointed defendants' counsel to represent him. *Id.* at 774. Second, the court emphasized that by using the terminology "should allege" rather than "must allege," the *Rapp* court intended to avoid "establish[ing] an inflexible pleading requirement." *Id.* at 774. Consequently, the Third Circuit declined to dismiss any of the defendants' mandamus petitions "for failure to address the availability of interlocutory appeal." *Id.*

In addition to addressing the issues of judicial disqualification and availability of mandamus in *School Asbestos*, the Third Circuit also considered the propriety of the ex parte funding procedure established by Judge Kelly to approve plaintiffs' use of escrowed settlement funds. *School Asbestos*, 977 F.2d at 788-91. The Third Circuit held that this ex parte funding approval procedure was permissible and that the district judge replacing Judge Kelly should be free to use

sion in *Green v. Murphy*<sup>54</sup> would foreclose the use of mandamus for reviewing section 455 judicial disqualification decisions.<sup>55</sup> In *Green*, the Third Circuit held that a district judge's refusal to disqualify himself or herself for actual bias under 28 U.S.C. § 144, a judicial disqualification statute predating section 455,<sup>56</sup> was only reviewable after final judge-

this procedure. *Id.* at 790. Hence, the Third Circuit refused to issue a writ of mandamus requiring the district court to discontinue the funding procedure. *Id.* at 789. In doing so, the court observed that "the plaintiffs' litigation expenses are . . . none of the defendants' business." *Id.* at 790. The court further noted that "[d]isclosing the documentation of the plaintiffs' costs would reveal elements of the plaintiffs' litigation strategy . . . and financial position . . . provid[ing] the defendants a potential strategic advantage to which they are not entitled." *Id.* In addition, the Third Circuit agreed with Judge Kelly's view that the plaintiffs "should not have to wait until the long-distant conclusion of this litigation for reimbursement of their reasonable expenses" from the settlement fund. *Id.* at 789. The Third Circuit recommended, however, that the new presiding district judge assign responsibility for approving any future ex parte requests for settlement fund disbursements to "a magistrate judge or special master not otherwise involved in the litigation." *Id.* at 790. In the court's opinion, this measure would ensure that the continued use of the ex parte approval procedure would not create "the appearance of an alliance between the district court and the plaintiffs" nor appear to be "forbidden ex parte advocacy on the merits" by the new district judge. *Id.* at 788.

Furthermore, the Third Circuit addressed the issue of whether the district court acted impermissibly in dismissing several defendants' summary judgment motions as untimely without having previously set deadlines for filing. *Id.* at 791-95. The court first concluded that mandamus is an appropriate means to compel a district judge to consider the merits of an issue after the judge has refused to do so. *Id.* at 792. Next, the court held that while a district court may freely impose "reasonable time limitations on summary judgment motions for purposes of judicial economy and fairness, it acts with impermissible arbitrariness and in clear excess of its authority where . . . it dismisses a summary judgment motion as untimely without having previously set deadlines for the filing of such motions." *Id.* at 795. Nonetheless, the Third Circuit noted that it could not issue a writ of mandamus compelling consideration of the merits of the summary judgment motions to the non-party—and as yet unidentified—incoming district judge. *Id.* Therefore, the Third Circuit simply recommended that the incoming judge reconsider the merits of the summary judgment motions in question. *Id.*

Finally, the Third Circuit considered several defendants' challenges to Judge Kelly's trial plan. *Id.* at 795-98. Specifically, the defendants objected to the order in which Judge Kelly decided the issues should be litigated and his decision to use the "strictest jurisdiction" hybrid tort standard. *Id.* at 795, 796. However, the Third Circuit refused to address the merits of these issues, observing that these issues were unripe for adjudication in light of Judge Kelly's disqualification. *Id.* at 796, 797. The Third Circuit recommended that the defendants raise the arguments again later, if necessary, upon the incoming district judge's formulation of a new trial plan. *Id.* at 798.

54. 259 F.2d 591 (3d Cir. 1958) (en banc).

55. *School Asbestos*, 977 F.2d at 774-76.

56. 28 U.S.C. § 144 (1988). Section 144 is entitled "Bias or prejudice of judge" and provides in pertinent part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or

ment and was not rectifiable by mandamus petition.<sup>57</sup> The plaintiffs therefore contended that, by analogy, *Green* would preclude the defendants' use of mandamus to challenge Judge Kelly's failure to disqualify himself under section 455.<sup>58</sup> Conversely, the mandamus petitioners argued that the Third Circuit should not extend the *Green* rule to cases involving judicial disqualification under section 455, but rather should

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in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

*Id.*

Two basic differences exist between § 144 and § 455. First, § 144 requires a party to file a legally sufficient affidavit certified by counsel in order to compel judicial disqualification. See 28 U.S.C. § 144. By contrast, § 455 is "addressed directly to judicial officers, requiring them to act *sua sponte* when confronted with situations requiring their disqualification." *School Asbestos*, 977 F.2d at 775; see 28 U.S.C. § 455(a). Second, while § 144 narrowly applies to circumstances involving a judge's actual personal bias against a party, § 455 applies to a much broader set of circumstances in which a judge has created an appearance of partiality although he or she may not harbor any bias in fact. See 28 U.S.C. §§ 144, 455(a). For a more detailed discussion of § 144, see Brian P. Leitch, Note, *Judicial Disqualification in the Federal Courts: A Proposal To Conform Statutory Provisions To Underlying Policies*, 67 IOWA L. REV. 525, 528-30, 545-46 (1982) (comparing and contrasting § 144 and § 455 and proposing that Congress develop unified federal judicial disqualification statute); Ellen M. Martin, Note, *Disqualification of Federal Judges For Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 140-48 (1976) (discussing interrelation between judicial disqualification statutes § 144 and § 455 and recommending revocation of "vestigal" § 144 and clarification of amended § 455).

57. *School Asbestos*, 977 F.2d at 775 (citing *Green v. Murphy*, 259 F.2d 591, 594 (3d Cir. 1958) (en banc)). In *Green*, the defendant sought to have Judge Murphy of the United States District Court for the Middle District of Pennsylvania disqualified from presiding over his criminal trial pursuant to § 144. *Green*, 259 F.2d at 592. The defendant alleged that Judge Murphy was "personally prejudiced against [him] by reason of [their] long continued and close political and social relationship." *Green*, 259 F.2d at 593. Accordingly, the defendant argued that "by reason of [Judge Murphy's] desire to prove his integrity and lack of favoritism, he [would] be unable to [conduct] a fair and impartial trial." *Id.* Judge Murphy found these allegations legally insufficient and thus refused to disqualify himself from the case. *Id.* The defendant subsequently filed a mandamus petition with the Third Circuit seeking to compel Judge Murphy to disqualify himself. *Id.* at 592. A sharply divided Third Circuit sitting *en banc* held that "Judge Murphy's present decision [not to disqualify himself] [would be] subject to review only when and if the petitioner [was] convicted and sentenced" and that mandamus relief was inappropriate because appeal from final judgment would be an adequate means of relief. *Id.* at 594. However, a concurring opinion in *Green* emphasized that "in extraordinary enough circumstances it might be proper for th[e] court to use mandamus . . . to prevent a district judge from arbitrarily or scandalously disregarding his plain duty to disqualify himself [under § 144] . . . but that such circumstances d[id] not appear in this case." *Id.* at 595 (Hastie, J., concurring). In his concurring opinion, Judge Hastie further asserted that all allegations of judicial bias should "receive final adjudication as soon as possible, even via mandamus, in order to bolster public confidence in the courts and to eliminate the tension created by unresolved claims of bias." *School Asbestos*, 977 F.2d at 775 n.8 (discussing *Green v. Murphy*, 259 F.2d 591, 595 (3d Cir. 1958) (Hastie, J., concurring)).

58. *School Asbestos*, 977 F.2d at 774.

limit *Green's* application to cases arising under section 144.<sup>59</sup>

The Third Circuit acknowledged preliminarily that *Green* was still viable and would effectively preclude the use of mandamus to challenge a district judge's refusal to disqualify himself or herself for actual bias under section 144.<sup>60</sup> However, the court declined to extend the *Green* rule to bar the use of mandamus to remedy a district judge's refusal to disqualify himself or herself under section 455.<sup>61</sup> Accordingly, the

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59. *Id.* at 775. For a discussion of the relationship between § 144 and § 455, see *supra* note 56.

60. *School Asbestos*, 977 F.2d at 776. In arriving at this conclusion, the Third Circuit considered whether three Third Circuit cases decided subsequent to *Green*, involving mandamus availability in the context of judicial disqualification decisions, affected *Green's* holding. *Id.* at 774-76. First, the court examined whether *Rapp* overruled or limited *Green*. *School Asbestos*, 977 F.2d at 775. Although the *Rapp* decision permitted mandamus review of a district judge's refusal to disqualify himself under a precursor to the present version of § 455, the Third Circuit concluded that *Rapp's* holding was limited to its unique facts and left *Green* undisturbed. *Id.* For a discussion of *Rapp*, see *supra* note 53.

The Third Circuit next examined *City of Pittsburgh v. Simmons*, 729 F.2d 953 (3d Cir. 1984). In *City of Pittsburgh*, the Third Circuit had cited *Green* and concluded that a district judge's refusal to disqualify himself or herself "is reviewable only after final judgment." *School Asbestos*, 977 F.2d at 776 (quoting *City of Pittsburgh*, 729 F.2d at 954). The mandamus petition at issue in *City of Pittsburgh*, however, did not specify whether disqualification of the judge was sought under § 144 or § 455. *School Asbestos*, 977 F.2d at 776. Consequently, the Third Circuit stated in *School Asbestos* that it would not read *City of Pittsburgh* "as having taken any position on section 455 petitions given that *Green* was a section 144 case." *Id.*

Finally, the Third Circuit briefly discussed *Moody v. Simmons*, 858 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). In *Moody*, the court held mandamus to be an appropriate remedy when a district judge continued to preside over a case after declaring an intention to disqualify himself or herself under § 144. *School Asbestos*, 977 F.2d at 776 (citing *Moody v. Simmons*, 858 F.2d 137, 143-44 (3d Cir. 1988)). The *School Asbestos* court noted, however, that because the *Moody* decision "did not grapple with" *Green* or *City of Pittsburgh* as precedents, it should be read narrowly to approve of mandamus relief only under the specific circumstances present in *Moody*. *Id.*

61. *School Asbestos*, 977 F.2d at 776. In making this determination, the Third Circuit compared the underlying interests sought to be protected by § 144 and § 455 respectively. *Id.* The court concluded that a "crucial difference" existed between the two statutes, such that *Green* should not be extended to the § 455 context. *Id.* Specifically, the court noted that while both statutory provisions are designed to safeguard the interests of individual litigants in a fair trial, § 455 also endeavors to preserve public confidence in the integrity of the judiciary. *Id.* (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 (1988)). The Third Circuit further observed that "[w]hile review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent." *Id.*

Furthermore, the court noted that although the Seventh Circuit has held that mandamus relief is not available to challenge judicial disqualification under § 144, the Seventh Circuit has not "extend[ed] precedents concerning review of section 144 rulings to expanded section 455." *School Asbestos*, 977 F.2d at 776 (citing *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977)). In *Morgan*, the United States Court of Appeals for the Seventh Circuit authorized manda-

Third Circuit joined a majority of circuits in holding that mandamus is an appropriate means to challenge a district judge's disqualification decision under section 455.<sup>62</sup> In reaching this conclusion, the court noted that mandamus review of section 455 disqualification decisions "is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear."<sup>63</sup>

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mus review of § 455 disqualification rulings, holding that "the specificity and legislative intent of section 455 are sufficiently different from section 144 to warrant a departure from our previous position [that mandamus relief was not available to challenge section 144 disqualification decisions]." *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977).

62. *School Asbestos*, 977 F.2d at 776. The following circuits have held mandamus to be an appropriate means to challenge the disqualification decision of a district judge pursuant to § 455: *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (stating that "the issue of judicial disqualification presents an extraordinary situation suitable for the exercise of our mandamus jurisdiction"); *In re IBM Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980) (taking position that "there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself'" (quoting *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966))); *In re Rodgers*, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976) (noting that "refusal to disqualify is reviewable by mandamus"); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 961 n.4 (5th Cir.) (acknowledging "authority to review on mandamus the question of disqualification"), *cert. denied*, 449 U.S. 888 (1980); *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (joining "clear consensus view that we can and should consider a petition for mandamus to disqualify based on conflict of interest and appearance of partiality"); *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (departing from previous position of not "mak[ing] use of the extraordinary remedy of mandamus against a district judge [for purposes of disqualification]"); *Liddell v. Board of Education*, 677 F.2d 626, 643 (8th Cir. 1982) (holding that judge's determination not to disqualify himself or herself is reviewable by petition for writ of mandamus); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982) (noting that "if dissatisfied with the district judge's decision [not to disqualify himself or herself] and confident that the litigation will be greatly disrupted [by this decision], a party may seek a writ of mandamus from the court of appeals [to compel the judge's disqualification]"); *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) (noting that "[t]here is no question but that a mandamus petition may be used to force the disqualification of a district court judge").

63. *School Asbestos*, 977 F.2d at 778. The Third Circuit opined that mandamus is particularly appropriate for review of § 455 judicial disqualification decisions because "the adjudication of a case by a judge with an actual or apparent bias is an 'abuse of judicial power' . . . [and] a threat to the integrity of the judicial system," which generates the type of extraordinary circumstances needed to justify mandamus relief. *Id.* (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 31 (1943)). The Third Circuit further emphasized that it did not base its decision authorizing mandamus review of refusals to disqualify on the magnitude of the litigation. *Id.* at 778 n.14. The mandamus petitioners had argued at length that mandamus was peculiarly appropriate because of the "extraordinary size and complexity of th[e] megalitigation." *Id.* In addition, the petitioners maintained that a "colossal waste of judicial and litigants' resources . . . would result if th[e] court refused mandamus but ruled on appeal that disqualification was required," thereby necessitating vacatur of the judgment and myriads of pretrial orders. *Id.* The Third Circuit responded that while the magnitude and complexity of a case "may assist in creating the extraordinary circumstances necessary to invoke mandamus, they are not alone sufficient." *Id.*

Next, the Third Circuit considered the circumstances surrounding Judge Kelly's attendance at the Third Wave Conference.<sup>64</sup> The Third Circuit concluded that under the circumstances, it was compelled to issue a writ of mandamus directing Judge Kelly to disqualify himself pursuant to section 455(a).<sup>65</sup> As a preliminary matter, the Third Circuit indicated that it focused its inquiry on "whether a reasonable person, knowing all the acknowledged circumstances, might question the district judge's continued impartiality."<sup>66</sup> The court then suggested that a rea-

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Moreover, in concluding that mandamus is a proper means to challenge § 455 judicial disqualification decisions, the Third Circuit emphasized that interlocutory and final appeals should not be considered "presumptively adequate means of relief." *Id.* at 778. In fact, the Third Circuit recognized that interlocutory appeal under 28 U.S.C. § 1292(b) would ordinarily be an inadequate remedy. *Id.* at 777. The court first noted that meeting the requirements for certification of an interlocutory appeal may be problematic when the issue sought to be certified is judicial disqualification. *Id.* In order to meet the requisite requirements for certification of an interlocutory appeal under § 1292(b), the district judge "[ (1) ] shall be of the opinion that such order involves a controlling question of law [ (2) ] as to which there is substantial ground for difference of opinion and [ (3) ] that an immediate appeal from the order may materially advance the ultimate determination of the litigation." 28 U.S.C. § 1292(b) (1988). According to the Third Circuit, a disqualification decision is a "fact-intensive, somewhat discretionary issue collateral to the merits." *School Asbestos*, 977 F.2d at 777. As such, it is unlikely that a court will consider such a decision to be a "controlling question of law" under the statute. *Id.* (quoting 28 U.S.C. § 1292(b)). The Third Circuit further explained that a district judge's refusal to disqualify himself or herself from a case "necessarily indicates a belief that his or her partiality cannot reasonably be questioned." *Id.* (quoting 28 U.S.C. § 1292(b)). As a result, the court reasoned that a judge is unlikely to perceive "substantial ground for difference of opinion" on the matter, as required by the statute. *Id.* (quoting 28 U.S.C. § 1292(b)). In addition, because disqualification is likely to delay instead of accelerate the progress of a case, the court noted that it is unlikely that a judge would conclude that certifying the disqualification issue for interlocutory appeal would "materially advance the ultimate determination of the litigation." *Id.* (quoting 28 U.S.C. § 1292(b)). Finally, the *School Asbestos* court opined that because some judges might consider a request for disqualification a "personal attack," they might be "less inclined to certify the issue if they believe that disqualification is not required." *Id.*; see generally Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829 (1984) (discussing need for immediate appellate review of trial court decisions refusing to disqualify and recommending congressional amendment to judicial disqualification statutes to explicitly provide for immediate review).

64. *School Asbestos*, 977 F.2d at 778-81. For a detailed discussion of the facts surrounding Judge Kelly's attendance at the asbestos conference, see *supra* notes 21-39 and accompanying text.

65. *School Asbestos*, 977 F.2d at 781. The Third Circuit did not reach petitioners' alternative argument that § 455(b)(1) mandated Judge Kelly's disqualification due to his alleged "personal knowledge of disputed evidentiary facts concerning the proceeding," because the court concluded that Judge Kelly's disqualification was mandated by § 455(a). *Id.* (quoting 28 U.S.C. § 455(b)(1)). For the text of §§ 455(a) and (b)(1), see *supra* note 5.

66. *School Asbestos*, 977 F.2d at 781. The Third Circuit noted that the additional issue of whether the plaintiff class had "engaged in a calculated plan to lure Judge Kelly and other judges to a deliberately biased conference in order to



sonable person might believe that Judge Kelly's "plaintiff-subsidized" attendance at a distinctly pro-plaintiff asbestos conference would bias Judge Kelly in favor of the school district plaintiffs.<sup>67</sup> Alternatively, the court posited that, upon learning of the plaintiffs' involvement in the asbestos conference, a reasonable person could conclude that Judge Kelly would react with resentment toward the plaintiffs "for compromising him" and would thus harbor bias against the plaintiffs.<sup>68</sup>

The Third Circuit emphasized that it did not find that Judge Kelly was actually biased, either in favor of, or against, the plaintiffs.<sup>69</sup> Although the court believed that Judge Kelly remained impartial in fact, the court recognized that section 455(a) mandated Judge Kelly's disqualification because "regardless of his actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted."<sup>70</sup>

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prejudice them" was beyond the scope of its inquiry under the objective standard of § 455(a). *Id.* In the words of the court, "whether plaintiffs' counsel were calculating or merely careless is immaterial. Our role is not to ascribe blame to anyone." *Id.*

67. *Id.* at 782. The Third Circuit also expressed concern about Judge Kelly's pretrial comment that the level at which asbestos becomes hazardous was an issue "beyond this case." *Id.* For a full discussion of the context and content of Judge Kelly's pretrial comment, see *supra* note 44 and accompanying text. The court opined that "reasonable but suspicious minds" among the public might perceive Judge Kelly's comment as suggesting that as a result of attending the asbestos conference, Judge Kelly had prematurely concluded that the defendants' asbestos products were hazardous, a position quite favorable to the plaintiffs. *School Asbestos*, 977 F.2d at 782.

68. *School Asbestos*, 977 F.2d at 782. Upon disqualifying from trial all of plaintiffs' expert witnesses who gave presentations at the asbestos conference, Judge Kelly had expressed his opinion that plaintiffs' counsel had been "truly careless in the way they proceeded regarding the Third Wave Conference." *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 110343, at \*11 (E.D. Pa. June 17, 1991). Judge Kelly had also opined that plaintiffs' counsel had "disregard[ed] the integrity of the judicial process." *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 195721, at \*2 (E.D. Pa. Sept. 30, 1991).

Judge Kelly further cited the Third Circuit case of *Hagens v. Henry Weber Aircraft Distributors, Inc.*, 852 F.2d 60 (3d Cir. 1988), in support of his decision to bar the plaintiffs' expert witnesses from testifying. *Asbestos Sch.*, 1991 WL 195721, at \*2. In *Hagens*, the Third Circuit had upheld the preclusion of expert witnesses from trial as an appropriate sanction to be imposed by a district court for plaintiffs' failure to comply with discovery orders. *Hagens*, 852 F.2d at 63-64. Judge Kelly's remarks admonishing the plaintiffs' counsel, taken together with his "sanction" of precluding plaintiffs' expert witnesses from testifying, could certainly lead a reasonable person to conclude that Judge Kelly might have become angry or frustrated with the plaintiffs "for compromising him." See *School Asbestos*, 977 F.2d at 782.

69. *School Asbestos*, 977 F.2d at 782.

70. *Id.* The Third Circuit summarized the facts giving rise to an appearance of partiality as follows:

[Judge Kelly] attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that [Judge Kelly] himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, [Judge Kelly] was, in his

In concluding that Judge Kelly must disqualify himself from the pending litigation, the Third Circuit observed that immediate disqualification was the sole remedial option available under section 455(a).<sup>71</sup> The court explained that although Judge Kelly's decision to preclude all conference participants from testifying as expert witnesses for the plaintiffs at trial was innovative, it was wholly unauthorized by section 455(a).<sup>72</sup> Thus, the court found this to be an impermissible remedial

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own words, exposed to a Hollywood-style 'pre-screening' of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial.

*Id.* at 782. The court then added that it "need not decide whether any of these facts alone would have required disqualification . . . [because] together they create[d] an appearance of partiality that mandate[d] disqualification." *Id.* Further, the court referred to *In re Murchison*, 349 U.S. 133 (1955), to support its decision to disqualify Judge Kelly. *Id.* In *Murchison*, the United States Supreme Court recognized that "such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136. The *Murchison* Court recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The Third Circuit supplemented its decision to disqualify Judge Kelly under § 455(a) with a discussion of various Canons of the Code of Conduct for United States Judges and of the Judicial Conference's Advisory Committee interpretations of these Canons. *School Asbestos*, 977 F.2d at 783. As a preliminary matter, the court recognized that the language of § 455(a) was modeled after the virtually identical language of Canon 3C(1) of the Code. *Id.* Hence, the court observed that an appearance of partiality requiring disqualification under § 455(a) is "likely if [a judge's] conduct is inconsistent with the related canons of judicial ethics." *Id.*

The Third Circuit first cited Advisory Opinion No. 67 interpreting Canon 5C(4), a canon concerning the receipt of gifts by judges. *Id.* This opinion recognized the benefits of judicial education and noted that judges "need not shy away from attending seminars merely because particular views are emphasized." *School Asbestos*, 977 F.2d at 783 n.24. However, the opinion further advised judges to refrain from attending "educational seminars related to a litigation issue if the sponsor or source of funding is involved, or likely to be involved, in the litigation." *Id.* at 783. The Third Circuit noted that the plaintiffs were the predominant source of funding for the asbestos conference that Judge Kelly attended, although Judge Kelly was unaware of this fact at the time he attended the conference. *Id.* The Third Circuit also noted Advisory Opinion No. 17 interpreting Canon 2B, concerning external influences on judges, and Canon 6B, concerning expense reimbursement for judges. *Id.* The latter opinion stated that "an appearance of impropriety may arise if lawyer organizations identified with a particular viewpoint regularly advanced in litigation pay for a judge's hotel and travel expenses." *School Asbestos*, 977 F.2d at 783-84.

The Third Circuit noted that because the plaintiffs had predominantly funded the conference and had "maintained a close association with the Collegium Ramazzini for purposes of the conference, a reasonable person could impute the Collegium[s] subsidization of Judge Kelly's conference expenses to the plaintiffs . . . creat[ing] an untoward appearance." *Id.* at 784.

71. *School Asbestos*, 977 F.2d at 783.

72. *Id.*

measure.<sup>73</sup> Specifically, the Third Circuit noted that section 455(a) "clearly requires that judges *shall* disqualify themselves" when an appearance of partiality arises, "rather than attempt creative, alternative remedies such as disqualification of witnesses."<sup>74</sup>

In addition, the Third Circuit noted that under the United States Supreme Court's 1988 decision in *Liljeberg v. Health Services Acquisition Corp.*,<sup>75</sup> Judge Kelly's lack of awareness of the circumstances giving rise to an appearance of impropriety was immaterial in determining whether he should be disqualified.<sup>76</sup> In *Liljeberg*, the Supreme Court held that a judge may violate section 455(a) even if he or she does not possess actual knowledge of the circumstances generating an appearance of impropriety.<sup>77</sup> While the *Liljeberg* Court recognized that it would be impossible for a judge to disqualify himself or herself without first hav-

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73. *Id.* For a discussion of Judge Kelly's decision to exclude plaintiffs' expert witnesses who had lectured at the asbestos conference from testifying at trial instead of disqualifying himself, see *supra* notes 48-51 and accompanying text.

74. *Id.* at 783.

75. 486 U.S. 847 (1988).

76. *School Asbestos*, 977 F.2d at 784. In *Liljeberg*, the United States Supreme Court affirmed vacatur of a final judgment rendered by Judge Collins of the United States District Court for the Eastern District of Louisiana, after Judge Collins failed to disqualify himself under § 455. *Liljeberg*, 486 U.S. at 870. The court affirmed vacatur under Federal Rule of Civil Procedure 60(b)(6). *Id.* Judge Collins was a member of the Board of Trustees of Loyola University at the time Loyola was actively negotiating the sale of a parcel of land to Liljeberg, part owner in a real estate brokerage firm, to construct a hospital. *Id.* at 855. During these negotiations, Judge Collins presided over a dispute between Liljeberg and Hospital Affiliates International (HAI), a health management company involved in the plan to construct the hospital. *Id.* According to the Court, "the success and benefit to Loyola of the negotiations [with Liljeberg] turned, in large part, on Liljeberg prevailing in the litigation before Judge Collins." *Id.* at 850. While Judge Collins regularly attended Loyola Board meetings, he professed to have no actual knowledge of Loyola's interest in the outcome of the litigation over which he presided. *Id.* at 855. After Judge Collins ruled in favor of Liljeberg, defendant HAI learned of Judge Collins' association with Loyola and sought to have the judgment vacated on the ground that Judge Collins improperly failed to disqualify himself from the case under § 455. *Id.* at 850. In deciding to affirm the circuit court's vacatur of Judge Collins' judgment, the Supreme Court noted that despite Judge Collins' purported lack of awareness of his fiduciary interest in the litigation, his participation in the case generated a strong appearance of impropriety in the public eye, warranting disqualification under § 455. *Id.* at 867. For a thorough discussion of the *Liljeberg* case, see Kenneth M. Fale, *Liljeberg v. Health Services Acquisition Corp.—The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 WIS. L. REV. 1033, (concluding that *Liljeberg* "will encourage scrutiny and, in appropriate cases, disqualification of federal judges, thus maintaining public confidence in the judicial system").

77. *Liljeberg*, 486 U.S. at 859. Specifically, the *Liljeberg* Court declared that "[s]cienter is not an element of a violation of § 455(a)." *Id.* The Court further elaborated that "advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process—does not depend on whether or not the judge actually knew of facts creating an appearance of impro-

ing actual knowledge of the facts creating an appearance of impropriety,<sup>78</sup> the Court ruled that a judge must “disqualify himself or herself retroactively upon discovery of the facts that led to the current appearance of partiality.”<sup>79</sup> Based upon *Liljeberg*, the Third Circuit concluded that even though Judge Kelly stated that he was completely unaware of the connection between the plaintiffs and the asbestos conference at the time he attended the conference,<sup>80</sup> he was required to disqualify himself as soon as he learned of the facts creating an appearance of partiality.<sup>81</sup>

Finally, the Third Circuit addressed the propriety of vacating Judge Kelly's pretrial rulings in light of his disqualification.<sup>82</sup> The court noted

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priety, so long as the public might reasonably believe that he or she knew.” *Id.* at 859-60.

78. *School Asbestos*, 977 F.2d at 784; see *Liljeberg*, 486 U.S. at 861. The *Liljeberg* Court recognized that “requiring disqualification based on facts the judge does not know would of course be absurd . . . even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know.” *Liljeberg*, 486 U.S. at 861.

79. *Liljeberg*, 486 U.S. at 861. The Court explained that under § 455 a judge is simply “called upon to rectify an oversight” by disqualifying himself or herself upon learning of the circumstances creating an appearance of impropriety. *Id.*

80. *School Asbestos*, 977 F.2d at 784. The Third Circuit indicated that it could not “assume that a reasonable person would believe that Judge Kelly simply forgot the connection between Selikoff, the conference, and the [plaintiffs as the] source of funding for the conference.” *Id.* Even if this assumption could be made, the court indicated that it could not “further assume that a reasonable person would believe that this episode will have no prospective [prejudicial] effect on the litigation.” *Id.* Quoting the *Liljeberg* opinion, the Third Circuit noted that a “judge's forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality.” *Id.* (quoting *Liljeberg*, 486 U.S. at 860 (quoting *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983))).

81. *School Asbestos*, 977 F.2d at 784. The court noted that Judge Kelly had become aware of the facts creating doubt as to his impartiality by the time the motions to disqualify him were filed by the defendants in April 1991. *Id.* For a discussion of when Judge Kelly gained knowledge of the facts creating an appearance of impropriety, see *supra* notes 45-52 and accompanying text.

The Third Circuit also speculated that Judge Kelly may have refused to disqualify himself upon learning of the circumstances giving rise to an appearance of partiality because he “felt duty-bound to shepherd this extraordinarily complicated and protracted litigation to its conclusion and out of concern about creating additional delay.” *School Asbestos*, 977 F.2d at 784. The court underscored, however, that a judge has no “duty to sit” under the current version of § 455, but rather has a duty to disqualify himself or herself whenever a reasonable person would question his or her impartiality. *Id.* Indeed, the Third Circuit recognized that the appearance of partiality created by Judge Kelly's attendance at the asbestos conference was “precisely the kind [of episode] that Congress contemplated in broadening section 455” to include an objective “reasonable person” standard and in eliminating the “duty to sit” concept. *Id.* For a further discussion of the historical “duty to sit” concept under § 455, see *supra* note 6.

82. *School Asbestos*, 977 F.2d at 785-88. In determining the appropriate scope of vacatur, the Third Circuit applied a balancing of interests test derived from the *Liljeberg* decision. *Id.* (citing *Liljeberg*, 486 U.S. at 864). In *Liljeberg*, the Court set forth several factors to consider in deciding whether to vacate a ruling

that although it was ordering Judge Kelly to disqualify himself, "wholesale vacatur" of Judge Kelly's pretrial orders was not warranted as an additional remedial measure.<sup>83</sup> Rather, the Third Circuit opined that vacatur of rulings in complex megalitigation "ought to be as limited as possible while remaining consistent with the purposes of section 455."<sup>84</sup> The court considered several options in determining the appropriate extent of vacatur.<sup>85</sup> Ultimately, however, the Third Circuit decided that

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under Federal Rule of Civil Procedure 60(b). *Liljeberg*, 486 U.S. at 864. Specifically, the Third Circuit indicated that, according to *Liljeberg*, a court should "consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* (citing *Liljeberg*, 486 U.S. at 864). The Third Circuit applied the *Liljeberg* factors in evaluating the propriety of vacating Judge Kelly's prior pretrial rulings. *School Asbestos*, 977 F.2d at 785. Specifically, the court considered whether "the likelihood of actual bias and the harm from upsetting and delaying this massive litigation" outweighed the "systemic interests—including the likely extent of lost public confidence in the district court's rulings, and the strong public interest in avoiding unnecessary, costly duplication of work and in propelling this case to a speedy and just conclusion." *Id.*

83. *School Asbestos*, 977 F.2d at 787. According to the Third Circuit, the litigation need not "return to square one, or even to where it stood on June 6, 1990, the day before Judge Kelly attended the Third Wave Conference." *Id.* at 785.

84. *Id.* at 786. The Third Circuit preliminarily emphasized that "[t]here need not be a draconian remedy for every violation of § 455(a)." *Id.* at 785 (quoting *Liljeberg*, 486 U.S. at 862). In addition, the court recognized that "vacatur of more than a handful of orders would upset tremendously this huge yet fragile litigation, to the severe disadvantage of the plaintiffs and numerous defendants." *Id.* at 787.

In concluding that vacatur should be as limited as possible in the context of massive megalitigation, the Third Circuit found support in the decisions of several other federal courts. *Id.* at 786; see, e.g., *In re Allied-Signal Inc.*, 891 F.2d 967, 972-73 (1st Cir. 1989) (noting that § 455(a) violation is not sufficient justification for retrial of entire phase of megalitigation), *cert. denied*, 495 U.S. 957 (1990); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir.) (applying *Liljeberg* in a § 455(b) case and refusing on fairness grounds to vacate judgment after over six years of litigation), *cert. denied*, 490 U.S. 1047 (1989); *In re Cement & Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1081-82 (D. Ariz. 1981) (recommending that rulings made prior to discovery of § 455(b) violation be kept intact).

85. *School Asbestos*, 977 F.2d at 786. First, the Third Circuit considered vacating all of Judge Kelly's pretrial orders subsequent to June 7, 1990, the date on which Judge Kelly's attendance at the Third Wave Conference created an appearance of impropriety. *Id.* Second, the court suggested vacating all orders after September 1990, when Judge Kelly became aware of the facts creating the appearance of impropriety and thus should have disqualified himself. *Id.* Third, the court proposed vacating all of Judge Kelly's pretrial orders following the defendants' motions for his disqualification, filed on April 18, 1991. *Id.* Fourth, the Third Circuit suggested selectively vacating orders on a purely qualitative basis depending upon the "nexus between the order and the subject of the Third Wave Conference." *Id.* Finally, the court proposed that it could vacate orders based upon some combination of chronological and qualitative approaches. *Id.*

"none of Judge Kelly's orders were infected with actual bias," and the court chose not to vacate any of Judge Kelly's past rulings.<sup>86</sup> Instead, the Third Circuit authorized the incoming district judge to reconsider particular rulings at his or her discretion.<sup>87</sup>

## V. CONCLUSION

In *In re School Asbestos Litigation*, the Third Circuit emphatically declared that it will consider no litigation too massive or complex to disqualify a presiding district judge in order to maintain the appearance of impartiality fostered by section 455(a). The disqualification of a judge in complex and protracted litigation may, however, substantially retard the expeditious resolution of a case and hinder administrative efficiency.<sup>88</sup> Moreover, disqualification inevitably creates a "gargantuan task" for the incoming judge to become familiar with the pending litigation.<sup>89</sup> The burdens of disqualification may thus appear to far outweigh the benefits, particularly when a judge harbors no actual bias toward the litigants, but instead has created an appearance of partiality through his or her conduct.<sup>90</sup> While recognizing these potential burdens, the Third Circuit nevertheless acknowledged its responsibility under section

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86. *Id.* at 787.

87. *Id.* The Third Circuit opined that this would be the most appropriate remedy, because "the new judge may bring a different perspective to the case and may have different ideas about how it should be tried." *Id.* In order to prevent undue delay, the Third Circuit instructed the parties to file all motions for reconsideration within 30 days of the assignment of the new incoming district judge. *Id.*

88. *School Asbestos*, 977 F.2d at 784; see Leitch, Note, *supra* note 56, at 548 (recognizing "delay suffered by parties and the outlay of judicial resources necessary to change judges after a disqualification"); see also Diane C. Boniface, *Class Actions: Establishing A More Effective Judicial Disqualification Standard*, 50 OHIO ST. L.J. 1291 (1989) (examining difficulties in applying § 455 in context of "complex, multi-party litigation" and arguing for statutory disallowance of disqualification under such circumstances).

89. *School Asbestos*, 977 F.2d at 784.

90. See HOUSE REPORT, *supra* note 5, at 5, reprinted in 1974 U.S.C.C.A.N. at 6355. Through § 455(a), Congress clearly expressed its view that in balancing these competing considerations, the interest in maintaining the appearance of judicial impartiality prevails over the interest in minimizing interference with judicial efficiency. See Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 267 (1978) (noting that "the primary focus" in applying § 455 "must be upon the need for a judicial system that is not only impartial in fact, but also appears to render disinterested justice" so that "the administrative concerns" in applying § 455 "merit only secondary consideration"). In addressing the importance of preserving the appearance of judicial impartiality, one commentator has noted:

Just as litigants have a right to a fair trial, the public requires a judicial system that maintains the appearance of fairness. Indeed, the appearance of justice may well be even more important in the long run than the fact of impartiality. Courts depend for their power almost entirely on the *perceived* legitimacy of their activities.

Recent Development, *Mitchell v. Sirica: The Appearance of Justice, Recusal, And the*

455(a) to disqualify Judge Kelly so that "the outcome of this massive, important, and widely followed case" would not "be shrouded with suspicion" in the public eye.<sup>91</sup>

In requiring Judge Kelly to disqualify himself under section 455(a), the Third Circuit guaranteed that "reasonable but suspicious minds" would not perceive a taint in the ultimate outcome of *In re School Asbestos Litigation* based on an appearance of judicial impropriety.<sup>92</sup> Accordingly, the Third Circuit effectively fulfilled the congressional purpose underlying section 455(a)—to ensure that public confidence in the integrity of the judicial process is carefully preserved.

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*Highly Publicized Trial*, 61 VA. L. REV. 236, 250 (1975). Moreover, as another commentator has eloquently elaborated:

In an age when images . . . often blend so confusingly with reality, does not the appearance of justice have something to do with the reality of justice? If justices and judges would pay more attention to appearances, would there not be more hope that they are performing their tasks justly? . . . To be sure, it is not enough that justice merely appear to be done; but the appearance of justice is an indispensable element of justice itself.

MACKENZIE, *supra* note 2, at 241.

91. *School Asbestos*, 977 F.2d at 785; see generally J. Stratton Shartel, *Legal Experts Divided on Impact of Judicial Disqualification Decisions*, 7 NO. 1 INSIDE LITIG. 1 (Jan. 1993) (discussion of § 455, *School Asbestos* case, and the opinions of various law professors and litigators on judicial disqualification).

92. *Id.* at 782.