CONSTITUTIONAL LAW — FIRST AMENDMENT — SEVENTH CIRCUIT UPHOLDS ENDORSEMENT AND PERSONAL SOLICITATION CLAUSES OF WISCONSIN CODE OF JUDICIAL CONDUCT. — *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).

Nine years ago, in *Republican Party of Minnesota v. White*,[1] the Supreme Court used strict scrutiny to invalidate a Minnesota law prohibiting state judicial candidates from publicly expressing their views on legal and political issues.[2] Though scholars have disagreed over the extent of *White*'s holding,[3] federal courts have applied its strict scrutiny framework to strike down a variety of similar speech restrictions on judicial candidates.[4] Recently, in *Siefert v. Alexander*,[5] the Seventh Circuit broke this trend by upholding restrictions on the ability of judicial candidates to make political endorsements and personally solicit campaign contributions. Beyond creating a circuit split,[6] *Siefert* is notable as the first circuit decision to subject a judicial speech restriction not to strict scrutiny, but rather to a more deferential balancing test designed to evaluate the constitutionality of restrictions on the speech of public employees. However, in accommodating this test to the unique circumstances of elected judges, *Siefert* both stripped it of its original rationale and ignored the emphasis that the Supreme Court has placed on recusal as a remedy for judicial due process violations.

At issue in *Siefert* were three clauses of the Wisconsin Code of Judicial Conduct, which governs Wisconsin's nonpartisan state judicial elections.[7] The first clause at issue stated, "No judge or candidate for judicial office or judge-elect may . . . [b]e a member of any political

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[1] 536 U.S. 765 (2002).

[2] *Id.* at 788.

[3] *Compare* Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 233 (2004) (concluding that most judicial speech restrictions are still constitutional after *White*), *with* Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 64 (2008) (arguing that most judicial speech restrictions are unconstitutional after *White*).

[4] *See, e.g.*, Jenevein v. Willing, 493 F.3d 551, 560 (5th Cir. 2007); Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005); Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d. 1021, 1025 (D.N.D. 2005). State courts, however, have been more willing to uphold such regulations. *See, e.g.*, *In re* Kinsey, 842 So. 2d 77, 86–87 (Fla. 2003) (per curiam); *In re* Dunleavy, 838 A.2d 338, 350 (Me. 2003); *In re* Watson, 794 N.E.2d 1, 6 (N.Y. 2003) (per curiam); *In re* Raab, 793 N.E.2d 1287, 1290 (N.Y. 2003) (per curiam).

[5] 608 F.3d 974 (7th Cir. 2010).

[6] *Compare id.* at 977 (upholding endorsement and personal solicitation restrictions), *and* Bauer v. Shepard, 620 F.3d 704, 710–11 (7th Cir. 2010) (same), *with* Carey v. Wolnitzek, 614 F.3d 189, 203–04 (6th Cir. 2010) (striking down endorsement and personal solicitation restrictions), Wersal v. Sexton, 613 F.3d 821, 842 (8th Cir. 2010) (same), *and Weaver*, 309 F.3d at 1322–23 (striking down personal solicitation restriction).

[7] *Siefert*, 608 F.3d at 978.

party."[8] The second clause prohibited judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms."[9] The third clause stated that a judge or judicial candidate "shall not personally solicit or accept campaign contributions," but could establish a committee to do so.[10]

Respondent Judge James Siefert was an elected judge on the Wisconsin Circuit Court for Milwaukee County.[11] An active Democrat prior to joining the bench, Judge Siefert wanted to rejoin the Democratic Party and list his membership on candidate questionnaires.[12] Judge Siefert also wished to endorse President Barack Obama and Wisconsin Governor Jim Doyle.[13] Finally, Judge Siefert desired to personally solicit campaign contributions from potential donors.[14] Seeking to carry out his plans without incurring disciplinary action from the Wisconsin Judicial Commission, Judge Siefert filed an action under 42 U.S.C. § 1983 to enjoin the Commission from enforcing the relevant clauses of the Code of Judicial Conduct.[15] Both Judge Siefert and the Commission filed motions for summary judgment.[16]

The district court granted Judge Siefert's motion and declared all three clauses unconstitutional.[17] Looking to *White*, the court subjected all three provisions to strict scrutiny review, which placed a burden on the Commission to prove that the restrictions were "narrowly tailored to further a compelling state interest by the least restrictive means."[18] The court concluded that the state failed to meet this burden, as all three clauses were underinclusive[19] and served compelling interests more easily met by less restrictive means, such as recusal.[20]

The Seventh Circuit affirmed in part and reversed in part. Writing for the panel, Judge Tinder[21] began by observing a tension within First Amendment law: while cases such as *White* made it clear that "judges are free to communicate their ideas to voters,"[22] other cases es-

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8 WIS. SUP. CT. R. 60.06(2)(b)–(b)(1).

9 *Id.* 60.06(2)(b)(4).

10 *Id.* 60.06(4).

11 *Siefert*, 608 F.3d at 977. Judge Siefert was first elected in 1999. *Id.*

12 *Id.*

13 *Id.* At the time of filing the complaint, Judge Siefert wished to endorse President Obama for the 2008 election. *Id.* Jim Doyle subsequently announced that he would not seek another term as governor. *Id.* at 977 n.1.

14 *Id.* at 977.

15 *Id.*

16 *Id.*

17 Siefert v. Alexander, 597 F. Supp. 2d 860, 890 (W.D. Wis. 2009).

18 *Id.* at 867 (citing Johnson v. California, 543 U.S. 499, 505 (2005)).

19 *Id.* at 881 (party affiliation); *id.* at 885–86 (endorsement); *id.* at 887 (personal solicitation).

20 *Id.* at 882 (party affiliation); *id.* at 886 (endorsement); *id.* at 888 (personal solicitation).

21 Judge Tinder was joined by Judge Flaum.

22 *Siefert*, 608 F.3d at 981.

tablished that the government has "some leeway to proscribe certain categories of speech among citizens to promote the efficient performance of governmental functions."[23] Into this latter category fell cases such as *Pickering v. Board of Education*,[24] which evaluated the constitutionality of speech restrictions on public employees by weighing the employee's free speech interest against the government's interest in efficient public services.[25] The panel's decision was an "attempt to harmonize these two strains of First Amendment law."[26]

The panel found the party affiliation ban to be governed by the first strain of cases, as it was "squarely within the ambit of the Supreme Court's analysis in *White*."[27] According to the panel, such a ban most impacted a candidate's ability to express his or her political views, which formed the "core" of protected speech under *White*.[28] The provision was thus subject to strict scrutiny, which it failed by being underinclusive and serving a compelling interest better addressed through recusal.[29]

In contrast to its treatment of the party affiliation clause, the panel upheld the endorsement clause, examining it through the *Pickering* balancing test. Unlike affiliation with a political party, the endorsement of other candidates "is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign."[30] The panel found this distinction consistent with the Supreme Court's previous distinctions "between 'partisan political activities' and 'mere expressions of views.'"[31] Falling on the "partisan political activities" side, a judge's interest in endorsing other candidates could be weighed against Wisconsin's interest in a reputable and efficient judiciary.[32] The panel concluded that such a balancing tipped in favor of Wisconsin's interest "in having its judges act and appear judicial rather than as political authorities."[33]

The panel addressed the issues raised by Judge Siefert's status as an elected official by explaining that application of the *Pickering* test was supported not only by the government's status as an employer, but also by its "duty to promote the efficiency of the public services it per-

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[23] *Id.* at 980 (citing Citizens United v. FEC, 130 S. Ct. 876, 899 (2010)).

[24] 391 U.S. 563 (1968). Judge Tinder also cited *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), two subsequent applications of *Pickering*. *See Siefert*, 608 F.3d at 980.

[25] *Pickering*, 391 U.S. at 568.

[26] *Siefert*, 608 F.3d at 981.

[27] *Id.*

[28] *Id.* (quoting Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002)).

[29] *Id.* at 982–83, 982 n.3.

[30] *Id.* at 984.

[31] *Id.* (quoting Biller v. U.S. Merit Sys. Prot. Bd., 863 F.2d 1079, 1089 (2d Cir. 1988)).

[32] *Id.* at 985.

[33] *Id.* at 987.

forms."[34] According to the panel, Wisconsin's diminished authority over Judge Siefert was overcome by the fact that inefficient performance of Judge Siefert's public function could violate due process.[35] The state's heightened interest in due process provided a "sufficient basis for restricting certain suspect categories of judicial speech."[36] Furthermore, due process constrained judges in a manner that made them closer to the employees in *Pickering* than to elected legislators.[37]

The panel also upheld the personal solicitation clause. According to the panel, the solicitation clause was a campaign contribution regulation, and thus subject to "closely drawn" scrutiny.[38] Applying this reduced level of scrutiny, the panel found that the prohibition of Judge Siefert's personal solicitation of funds was sufficiently closely drawn to Wisconsin's interest in preventing judicial corruption and partiality to survive a First Amendment challenge.[39]

Judge Rovner dissented in part. Though agreeing with the majority's conclusions on the party affiliation and personal solicitation clauses, Judge Rovner argued that strict scrutiny was the appropriate standard for evaluating the endorsement clause.[40] Judge Rovner noted that all previous restrictions on the speech of elected officials had been subject to strict scrutiny,[41] while use of the *Pickering* test had been limited to nonelected employees.[42] The speech of elected judges was therefore subject to strict scrutiny, and was better distinguished from speech of elected legislators by "giv[ing] proper weight to the exceedingly compelling interest the state has in ensuring an impartial and fair judiciary."[43] Using strict scrutiny, Judge Rovner would have struck down the endorsement clause as underinclusive for not applying to nonpartisan endorsements.[44]

Siefert, like other cases determining the constitutionality of judicial speech restrictions, presented an initial choice between two competing

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[34] *Id.* at 985.

[35] *Id.* ("[W]e are not concerned merely with the efficiency of those services, but that the work of the judiciary conforms with the due process requirements of the Constitution; this tips the balance even more firmly in favor of the government regulation.").

[36] *Id.* at 984.

[37] *Id.* at 985 ("The observation that elected judges are 'ultimately accountable to the voters' seems irrelevant to the due process issue. A judge must also be accountable to her responsibilities under the Fourteenth Amendment.").

[38] *Id.* at 988 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)) (internal quotation marks omitted).

[39] *Id.* at 989–90.

[40] *Id.* at 990–91 (Rovner, J., dissenting in part).

[41] *Id.* at 992–93 (citing Republican Party of Minn. v. White, 536 U.S. 765, 781–82 (2002); Bond v. Floyd, 385 U.S. 116, 133 (1966); Wood v. Georgia, 370 U.S. 375, 395 (1962)).

[42] *Id.* at 993.

[43] *Id.* (citing Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993)).

[44] *Id.* at 995.

speech frameworks: strict scrutiny and the *Pickering* test.[45] While neither of these approaches fully addressed the concerns of an elected judiciary, choosing the *Pickering* test over strict scrutiny raised the issue of whether the government could truly be the "employer" of an elected official. The majority skirted this question, however, by instead emphasizing the unique due process obligations that judges owe to litigants. Though plausibly distinguishing judges from other elected officials, this justification ignores both the underlying premise of *Pickering* and the role that recusal already plays in protecting due process. As an arguably new speech framework created to solve a problem with a preexisting remedy, the majority's balancing test ultimately fails as a compelling alternative to strict scrutiny.

Siefert finds itself part of a controversy over judicial speech restrictions that is in many ways also a debate over the proper role of elected judges.[46] Opponents of judicial speech restrictions view the very process of an election as transforming judges into politicians,[47] thereby entitling judges' speech to the same strict scrutiny protection that is given to the speech of other elected officials.[48] In contrast, supporters of judicial speech restrictions point to the distinct post-election function of judges as distinguishing them from ordinary politicians.[49] The Supreme Court, which had previously hinted at the former conception of judges as politicians,[50] reaffirmed its preference for this view in *White*.[51] It accordingly assumed that strict scrutiny was the proper standard of review for judicial speech restrictions.[52]

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[45] *Siefert* also adopted a third test — closely drawn scrutiny — for the solicitation clause. *Siefert*'s adoption of this third test is not discussed, as it was premised on the notion that judicial and legislative elections should be subject to the *same* standard of review for solicitation restrictions. *Id.* at 988 (majority opinion).

[46] *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 272 (2008) ("The debate over judicial selection, then, is to some extent a debate over the judicial role.").

[47] *See, e.g.*, Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 736 (2002) ("The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents. By making this choice, the states, by definition, are turning judges into politicians.").

[48] *See* Weaver v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002) ("[W]e do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns.").

[49] *See* Margaret H. Marshall, *Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law*, 24 SYDNEY L. REV. 455, 467–68 (2002) ("The *White* decision ignores an important distinction: Politicians break faith with the people when they abandon their advocacy. Judges break faith with the people when they abandon their neutrality.").

[50] *See* Chisom v. Roemer, 501 U.S. 380, 398–99 (1991) (classifying state supreme court justices as "representatives" for purposes of voting rights statute).

[51] *See* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("[The] complete separation of the judiciary from the enterprise of 'representative government' . . . is not a true picture of the American system.").

[52] *Id.* at 774.

In contrast, those who believe that judges are defined by their post-election duty to interpret the law impartially have pointed to the *Pickering* balancing test as an alternative framework for evaluating judicial speech restrictions.[53] The *Pickering* test, which relies on the government's increased authority as an employer, permits the government to balance its interest in efficient public functions against its employees' right to free speech.[54] *Pickering* and its progeny have most frequently appeared in the judicial election context because of their potential ramifications for defining a compelling state interest within strict scrutiny.[55] But others have also suggested that *Pickering*'s balancing test could be applied to elected judges on the ground that they too are "public employees."[56] Though subject to some skepticism,[57] this approach was explicitly left open by Justice Kennedy in his *White* concurrence,[58] and presents an obvious choice for those looking to avoid a strict scrutiny framework that has consistently been "fatal in fact."[59]

But although the *Pickering* balancing test is the primary alternative to strict scrutiny, applying the balancing test to elected judges poses clear obstacles. Even beyond the dissent's recognition of the speech protections afforded to elected politicians,[60] *Pickering*'s applicability to elected judges is hampered by its underlying legal justification: that the government's authority as an employer gives it a greater ability to regulate speech than it has as a sovereign.[61] Unlike with appointed or

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[53] *See* Leita Walker, Note, *Protecting Judges from* White*'s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 414 (2007).

[54] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[55] *See* Wendy R. Weiser, *Regulating Judges' Political Activity After* White, 68 ALB. L. REV. 651, 696 (2005) ("Although *Letter Carriers* does not address judicial independence or separation of powers, its holding depends on a judgment that it is desirable for executive branch employees to be independent of politics. The implications of that interest, therefore, are directly applicable to the implications of the interest in judicial independence; in both cases, it is appropriate to restrict partisan political activity.").

[56] *See* Walker, *supra* note 53, at 414.

[57] *See* Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 79 n.134 (2006) (arguing that "*White* suggests that judges are not 'employees'"); Matthew J. Medina, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1098 n.139 (2004) (describing an analogy to *Letter Carriers* as "inapposite").

[58] Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) ("Whether the rationale of *Pickering* . . . could be extended to allow a general speech restriction on sitting judges — regardless of whether they are campaigning — in order to promote the efficient administration of justice, is not an issue raised here.").

[59] Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[60] *See Siefert*, 608 F.3d at 992–93 (Rovner, J., dissenting in part).

[61] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly

hired civil servants, it is difficult to identify what government official would be the "employer" of an elected judge, who is selected by the public and operates with little direct supervision. And while the government may still have an interest in an efficient judicial system, an efficiency interest alone does not justify use of a balancing test.[62]

Siefert's answer was to blend the threshold inquiry of *Pickering* — whether the government had authority as an employer — with its substantive inquiry — the extent of the government's efficiency interest. The majority contended that even if a judge's elected status diminished the government's authority as an employer, this deficit was overcome by the government's exceptionally compelling interest in protecting a litigant's due process rights.[63] This rather purposivist reasoning[64] stretches the logic of *Pickering*, perhaps even to the point of creating a *new* test.[65] But despite any novelty, the majority's attention to due process did make a valid distinction between the judiciary and other elected officials, and plausibly created a test recognizing judges' status as in between that of legislators and that of executive branch employees.[66]

Yet in making due process its rationale for extending *Pickering* to elected judges, the majority missed a potentially fatal point: the Supreme Court has repeatedly emphasized the remedy of recusal as an adequate protection against judicial due process violations. The majority did not address the fact that Supreme Court cases dealing with denial of an impartial forum have consistently looked to recusal as the solution.[67] Nor did it consider that the Supreme Court has been reluc-

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from those it possesses in connection with regulation of the speech of the citizenry in general."); *see also* Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) ("We have never explicitly answered this question, though we have always assumed that its premise is correct — that the government as employer indeed has far broader powers than does the government as sovereign.").

62 *See Waters*, 511 U.S. at 675 (plurality opinion) ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.").

63 *Siefert*, 608 F.3d at 985. The majority was likely referring to a litigant's right to an impartial tribunal, which could be compromised by campaign speech. *See* Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-*White *World*, 55 DRAKE L. REV. 691, 705–07 (2007).

64 The majority essentially argued that the fact that a restriction would likely pass the *Pickering* balancing test formed part of the justification for using that test. *See Siefert*, 608 F.3d at 985.

65 *Id.* at 991 (Rovner, J., dissenting in part) (describing the majority opinion as having "manufactured a new balancing test").

66 *See* W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 117 (2001) (arguing that elected judges should be characterized as "quasi-political" because of their competing obligations to the rule of law and democratic accountability (internal quotation marks omitted)).

67 *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

tant to use due process as a justification for restricting the speech of other parties.[68] For the Court, due process does not require a balancing test; "due process requires recusal."[69]

This precedent makes relying on due process to depart from strict scrutiny a very tenuous proposition. Though it would be difficult to argue that recusal resolves every issue accompanying judicial elections,[70] the Court has made it clear that recusal does adequately address due process concerns. And even while this claim could be contested,[71] the simple presence of recusal as a due process protection speaks against the use of the *Pickering* balancing test. In weighing an elected official's right to free speech against a litigant's right to due process, the fact that the litigant already has *some* existing protection would seem to tip the scales in favor of strict scrutiny. Further, justifying the majority's modified test as a response to the unique situation of judges is undercut by the fact that recusal ultimately offers a concomitantly unique remedy.

A wiser course of action for the majority would have been to stay within a strict scrutiny framework. Though certainly more difficult, upholding a campaign speech restriction under strict scrutiny is not impossible.[72] Most importantly for supporters of speech restrictions, the exact definition of the state's compelling interest remains unclear,[73] and could be shifted to have a broader scope.[74] Judges are obviously not the same as legislators. But if the differences between the two cannot be articulated in any way other than as a more pressing state interest, with its constitutional element already remedied by recusal, then similar restrictions on their speech should warrant similar levels of scrutiny.

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[68] *See* Citizens United v. FEC, 130 S. Ct. 876, 910 (2010) ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

[69] *Caperton*, 129 S. Ct. at 2257.

[70] *See, e.g.*, Pamela S. Karlan, *The Supreme Court, 2008 Term — Comment: Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 100–01 (2009) (noting the problems of a due process right to recusal as an individualized remedy for structural problems).

[71] *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 614–15 (2004) (arguing that recusal is not an adequate safeguard against some instances of judicial due process violations).

[72] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 845 (2006) (noting that campaign speech regulations have a twenty-four percent survival rate under strict scrutiny in federal courts).

[73] *Compare* Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (defining the state's compelling interest of "impartiality" as "the lack of bias for or against either *party* to the proceeding" (internal quotation marks omitted)), *with Caperton*, 129 S. Ct. at 2266 (describing public confidence in the integrity of the judiciary as a "vital state interest").

[74] *See* Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DEPAUL L. REV. 529, 539–49 (2010) (looking to precedent to argue for a recusal standard based on the *appearance* of partiality).