

has no bearing on the case before us. The problem here is not just what the District Judge said, but to whom he said it and when. His crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy—all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. *See Liteky*, 510 U.S. at 555–56; CODE OF CONDUCT Canon 3A(6) (exception to prohibition on public comments for “statements made in the course of the judge’s official duties”). But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge’s remarks would be reported. Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore, that the District Judge’s interviews with reporters created an appearance that he was not acting impartially, as the Code of Conduct and § 455(a) require.

D. Remedies for Judicial Misconduct and Appearance of Partiality

1. Disqualification

Disqualification is mandatory for conduct that calls a judge’s impartiality into question. *See* 28 U.S.C. § 455(a); *In re School Asbestos Litig.*, 977 F.2d 764, 783 (3d Cir. 1992). Section 455 does not prescribe the scope of disqualification. Rather, Congress “delegated to the judiciary the task of fashioning the remedies that will best serve the purpose” of the disqualification statute. *Liljeberg*, 486 U.S. at 862.

At a minimum, § 455(a) requires prospective disqualification of the offending judge, that is, disqualification from the judge's hearing any further proceedings in the case. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463–65 (D.C. Cir. 1995) (per curiam) (“*Microsoft I*”). Microsoft urges retroactive disqualification of the District Judge, which would entail disqualification antedated to an earlier part of the proceedings and vacatur of all subsequent acts. Cf. *In re School Asbestos Litig.*, 977 F.2d at 786 (discussing remedy options).

“There need not be a draconian remedy for every violation of § 455(a).” *Liljeberg*, 486 U.S. at 862. *Liljeberg* held that a district judge could be disqualified under § 455(a) after entering final judgment in a case, even though the judge was not (but should have been) aware of the grounds for disqualification before final judgment. The Court identified three factors relevant to the question whether vacatur is appropriate: “in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to 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.* at 864. Although the Court was discussing § 455(a) in a slightly different context (the judgment there had become final after appeal and the movant sought to have it vacated under Rule 60(b)), we believe the test it propounded applies as well to cases such as this in which the full extent of the disqualifying circumstances came to light only while the appeal was pending. See *In re School Asbestos Litig.*, 977 F.2d at 785.

Our application of *Liljeberg* leads us to conclude that the appropriate remedy for the violations of § 455(a) is disqualification of the District Judge retroactive only to the date he entered the order breaking up Microsoft. We therefore will vacate that order in its entirety and remand this case to a different District Judge, but will not set aside the existing Findings of Fact or Conclusions of Law (except insofar as specific findings are clearly erroneous or legal conclusions are incorrect).

This partially retroactive disqualification minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. Although the violations of the Code of Conduct and § 455(a) were serious, full retroactive disqualification is unnecessary. It would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect.

Most important, full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication. The District Judge's conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice. There is no reason to presume that everything the District Judge did is suspect. *See In re Allied-Signal Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989); *cf. Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301-02 (D.C. Cir. 1988). Although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected his factual findings.

The most serious judicial misconduct occurred near or during the remedial stage. It is therefore commensurate that our remedy focus on that stage of the case. The District Judge's impatience with what he viewed as intransigence on the part of the company; his refusal to allow an evidentiary hearing; his analogizing Microsoft to Japan at the end of World War II; his story about the mule—all of these out-of-court remarks and others, plus the Judge's evident efforts to please the press, would give a reasonable, informed observer cause to question his impartiality in ordering the company split in two.

To repeat, we disqualify the District Judge retroactive only to the imposition of the remedy, and thus vacate the remedy order for the reasons given in Section V and because of the appearance of partiality created by the District Judge's misconduct.

2. Review of Findings of Fact and Conclusions of Law

Given the limited scope of our disqualification of the District Judge, we have let stand for review his Findings of Fact and Conclusions of Law. The severity of the District Judge's misconduct and the appearance of partiality it created have led us to consider whether we can and should subject his factfindings to greater scrutiny. For a number of reasons we have rejected any such approach.

The Federal Rules require that district court findings of fact not be set aside unless they are clearly erroneous. *See* FED. R. CIV. P. 52(a). Ordinarily, there is no basis for doubting that the District Court's factual findings are entitled to the substantial deference the clearly erroneous standard entails. But of course this is no ordinary case. Deference to a district court's factfindings presumes impartiality on the lower court's part. When impartiality is called into question, how much deference is due?

The question implies that there is some middle ground, but we believe there is none. As the rules are written, district court factfindings receive either full deference under the clearly erroneous standard or they must be vacated. There is no *de novo* appellate review of factfindings and no intermediate level between *de novo* and clear error, not even for findings the court of appeals may consider sub-par. *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988) ("The District Court's lack of precision, however, is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding."); *Anderson v. City of Bessemer City*, 470 U.S. 564, 571-75 (1985) (criticizing district court practice of adopting a party's proposed factfindings but overturning court of appeals' application of "close scrutiny" to such findings).

Rule 52(a) mandates clearly erroneous review of all district court factfindings: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). The rule "does not make exceptions or purport to exclude certain categories of factual findings from

the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); see also *Anderson*, 470 U.S. at 574–75; *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855–58 (1982). The Supreme Court has emphasized on multiple occasions that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Anderson*, 470 U.S. at 573 (quoting *Zenith*).

The mandatory nature of Rule 52(a) does not compel us to accept factfindings that result from the District Court's misapplication of governing law or that otherwise do not permit meaningful appellate review. See *Pullman-Standard*, 456 U.S. at 292; *Inwood Labs.*, 456 U.S. at 855 n.15. Nor must we accept findings that are utterly deficient in other ways. In such a case, we vacate and remand for further factfinding. See 9 MOORE'S FEDERAL PRACTICE § 52.12[1] (Matthew Bender 3d ed. 2000); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2577, at 514–22 (2d ed. 1995); cf. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard*, 456 U.S. at 291–92.

When there is fair room for argument that the District Court's factfindings should be vacated *in toto*, the court of appeals should be especially careful in determining that the findings are worthy of the deference Rule 52(a) prescribes. See, e.g., *Thermo Electron Corp. v. Schiavone Constr. Co.*, 915 F.2d 770, 773 (1st Cir. 1990); cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Thus, although Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias. See *S. Pac. Communications Co. v. AT & T*, 740 F.2d 980, 984 (D.C. Cir. 1984); *Cooley*, 1 F.3d at 996 (disqualifying district judge for

appearance of partiality but noting that “the record of the proceedings below . . . discloses no bias”).

In light of this conclusion, the District Judge’s factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review. In reaching these conclusions, we have not ignored the District Judge’s reported intention to craft his factfindings and Conclusions of Law to minimize the breadth of our review. The Judge reportedly told Ken Auletta that “[w]hat I want to do is confront the Court of Appeals with an established factual record which is a fait accompli.” AULETTA, WORLD WAR 3.0, at 230. He explained: “part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own.” *Id.* Whether the District Judge takes offense, mild or severe, is beside the point. Appellate decisions command compliance, not agreement. We do not view the District Judge’s remarks as anything other than his expression of disagreement with this court’s decision, and his desire to provide extensive factual findings in this case, which he did.

VII. CONCLUSION

The judgment of the District Court is affirmed in part, reversed in part, and remanded in part. We vacate in full the Final Judgment embodying the remedial order, and remand the case to the District Court for reassignment to a different trial judge for further proceedings consistent with this opinion.

CERTIFICATE OF SERVICE

I, Christine Peyton, hereby certify that on this 24th day of July 2001, I caused copies of the foregoing "Motion for Leave to File Supplemental Authority" to be delivered by U.S. mail to the following:

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