Fundamental Fairness

Disqualification and Recusal of Federal Appellate Judges

By Jason W. Anderson and Rory D. Cosgrove

Every litigant is entitled to a "neutral and detached" judge. Every judge therefore must constantly evaluate whether his or her impartiality "might reasonably be questioned."

Judicial disqualification and recusal are fundamental to a fair legal system. ("Disqualification" technically refers to a judge's withdrawal on a party's motion, as required by law, while "recusal" refers to withdrawal on a judge's own initiative. But the terms are often used interchangeably in practice and in this article.) The most basic principle is a familiar one. As stated by James Madison, "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, at 59 (J. Cooke ed. 1961). As a corollary to that maxim, neither may any person be allowed to choose the judge in his or her own cause, either directly or indirectly. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Supplementing these fundamental principles, more specific rules have been developed to promote fairness, as well as the appearance of fairness, in cases in which a judge may have an interest or bias that may affect the judge's ability to be fair and evenhanded.

Recusals by federal appellate judges are not uncommon; most occur outside the spotlight, without any published memorandum, let alone media coverage. Calls for recusal can also be politically charged. Two months before Justice Brett Kavanaugh's confirmation to the Supreme Court of the United States, three prominent lawyers—Professor Laurence H. Tribe, the Honorable Timothy K. Lewis, and former Ambassador Norman L. Eisen—published a paper arguing that if confirmed, Justice Kavanaugh would be required to recuse himself from cases involving issues concerning the president who nominated him—Donald J. Trump—and specifically cases arising from the special counsel's inquiry into possible Russian meddling in the 2016 presidential election. Laurence H. Tribe, Hon. Timothy K. Lewis, & Norman L. Eisen, *Unresolved Recusal Issues Require a Pause in the Kavanaugh Hearings*, Governance Studies at Brookings (Sept. 4, 2018). A month before the confirmation, Professor Tribe expanded his view of the scope of required recusal to include cases involving groups that Justice Kavanaugh, by then, had "attack[ed]" during the con-

■ Jason W. Anderson is a shareholder, and Rory D. Cosgrove is an associate, of Carney Badley Spellman PS, in Seattle, where they are members of the firm's appellate-practice group. They represent civil litigants in high-stakes appeals in state and federal courts. Mr. Anderson and Mr. Cosgrove are active members of the DRI Appellate Advocacy Committee, and both serve on the executive committee of the King County Bar Association's Appellate Section. Mr. Cosgrove wants to thank his wife for her support in writing this article.

firmation hearings. Lawrence H. Tribe, *All the Ways a Justice Kavanaugh Would Have to Recuse Himself*, N.Y. Times, Oct. 1, 2018. The drumbeat for recusal will no doubt intensify if and when cases come before the Court that concern the president and presidential power.

This article will summarize the legal standards that result in disqualification and recusal in the federal appellate courts, discuss a sampling of cases illustrating the types of concerns that may or may not disqualify a federal appellate judge, and the method to seek disqualification in an appropriate case.

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Governing Legal Standards

Three sources of law principally provide the governing legal standards for disqualification. A federal statute provides that any federal justice, judge, or magistrate shall recuse "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. §455(a), as well as in specific, enumerated circumstances. *Id.* §455(b). The Code of Conduct for United States Judges also sets forth standards for disqualification, and while it does not apply to justices of the Supreme Court, it applies to all other federal judges. More fundamentally, due process requires recusal in certain cases.

One narrow exception to disqualification exists: the ancient common-law "rule of necessity." *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1163 (9th Cir. 2006). Under this rule, a federal appellate judge may hear and decide a case, despite a personal interest in the matter, when the case cannot otherwise be heard. *United States v. Will*, 449 U.S. 200, 213 (1980). The rule is based on the legal maxim that "where all are disqualified, none are disqualified." *Ignacio*, 453 F.3d at 1164–65. This, of course, seldom happens in practice.

28 U.S.C. §455(a)

Under §455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The statute defines a "proceeding" to include "appellate review." 28 U.S.C. §455(d)(1). Disqualification is mandatory for conduct that reasonably calls into question a judge's impartiality. *Liteky v. United States*, 510 U.S. 540, 548 (1994).

Congress amended the statute in 1974 "to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted Code of Judicial Conduct, Canon 3C." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). Section 455(a) "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test and by avoiding even the appearance of impropriety whenever possible." *Id.* at 858 n.7, 865.

The statute is self-executing; a judge must both inquire without a request from the parties and continually evaluate any potential conflict at all stages of the appeal.

Section 455(a) operates as a "catchall" recusal provision to supplement the specifically enumerated grounds for judicial disqualification under §455(b). *Liteky*, 510 U.S. at 548. Because the appearance of bias may arise when no bias exists in fact, the reach of §455(a) is much broader than §455(b). It is for this reason that disqualification motions are typically brought under §455(a).

Courts apply an objective standard of reasonableness in determining if disqualification is required under §455(a). *Liteky*, 510 U.S. at 548. Disqualification is required "if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003) (internal quotation marks and citation omitted). The question of disqualification "is to be judged objectively as a reasonable person with knowledge of all the facts would judge." *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995). A judge is presumed to be impartial, and the party seeking disqualification bears the heavy burden of proving otherwise. *Fletcher*, 323 F.3d at 664. But even when the disqualification question is close, the judge "whose impartiality might reasonably be questioned must recuse" from hearing the appeal. *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980).

Unlike the grounds for disqualification in §455(b), parties may waive §455(a) after full disclosure. *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 167–68 (4th Cir. 2014). In addition, although §455(a) defines a circumstance that mandates disqualification of federal appellate judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress left the judiciary the task of "fashioning the remedies that will best serve the purpose" of the disqualification statute. *Liljeberg*, 486 U.S. at 862. Indeed, the Supreme Court has suggested that a harmless-error analysis would apply to "busy judges who inadvertently overlook a disqualifying circumstance." *Id.*

The Code of Conduct for United States Judges

The Judicial Conference adopted the Code of Conduct for United States Judges in 1973. It applies to all federal district and circuit judges. The Code of Conduct can be found on the website for United States Courts.

The Code of Conduct "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary." *United States v. Microsoft Corp.*, 253 F.3d 34, 111 (D.C. Cir. 2001). The Code of Conduct directs federal judges to avoid both actual impropriety and its appearance. *In re Complaint of Judicial Misconduct*, 816 F.3d 1266, 1267 (9th Cir. 2016) (citing Canon 2). Judges must not only be impartial, but the public must perceive them to be so. The Code of Conduct admonishes judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety in all activities." Code of Conduct for United States Judges, Canon 2A.

The Supreme Court stated long ago that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14

(1954). A judge must be satisfied that he or she is "actually unbiased toward the parties in each case and that his impartiality is not reasonably subject to question." *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994). For instance, under Canon 3C, a judge must recuse in a proceeding in which his or her "impartiality might reasonably be questioned," mirroring 28 U.S.C. §455(a).

The test for judicial disqualification under the impartiality provisions of the Code of Conduct is, similar to §455(a), an objective one based on public perception. *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1174 (9th Cir. 2017).

The Code of Conduct contains no enforcement mechanism. *Microsoft Corp.*, 253 F.3d at 114. But there are remedies extrinsic to the Code, such as §455(a), discussed earlier. Violations of the Code of Conduct may give rise to a violation of §455(a) "if doubt is cast on the integrity of the judicial process." *Id.*

The Due Process Clause

The Due Process Clause of the Fourteenth Amendment guarantees litigants the right to objective impartiality from the state-court judiciaries. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972). (All of the due-process cases cited in this article involve the Fourteenth Amendment's applicability to the state-court judiciaries. While the Due Process Clause of the Fifth Amendment technically would apply to federal judges, that clause has yet to be applied in the disqualification context to ensure litigants in federal court the right to a "neutral and detached judge." *Id.* at 62.) The "Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Caperton*, 556 U.S. at 883. That clause "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

As the Supreme Court suggested in *Caperton v. A.T. Massey Coal Co.*, rarely do cases of perceived bias rise to a level that will violate a party's right to due process. 556 U.S. at 872, 876. That is because "[m]ost questions of recusal are addressed by more stringent and detailed ethical rules[.]" *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899, 1908 (2016). The Supreme Court has recognized only a few circumstances in which an appearance of bias requires recusal of appellate judges to ensure due process. *Greenway v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011). Typically, the Supreme Court has mandated recusal only where an appellate judge has a direct, personal, or substantial connection to the outcome of a case or to the parties. *See, e.g.*, *Williams*, 136 S. Ct. at 1905 (holding that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding defendant's case."); *Caperton*, 556 U.S. at 872 (concluding that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" where a party was a substantial donor to a judge's election campaign); *Lavoie*, 475 U.S. at 824–25 (holding that when a justice on the Alabama Supreme Court cast the deciding vote and authored the opinion in a case, while he had "at least one very similar bad-faith-refusal-to-pay lawsuit against [the appellant] in another Alabama court," due process was violated); *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that "no man is permitted to try cases where he has an interest in the outcome"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (concluding that judges should not preside over cases where they have a "direct, substantial pecuniary interest" in the outcome).

Federal Appellate Judges' Self-Application of the Rules

As with most other legal standards, applying the standards governing judicial disqualification and recusal becomes more difficult in cases in which the proper result is not obvious. But unlike with most other legal standards, the result is determined in the first instance by the person—the judge or justice—whose conduct is being challenged. And at least in the case of a Supreme Court justice's recusal decision, there is no opportunity for review of that determination.

Numerous authors have discussed the leading decisions by federal appellate courts on judicial disqualification. *See, e.g.*, James Sample, David Pozen, & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice (2008); Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59 (2005); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213 (2002). Many of those decisions reviewed if recusal of a district court or state appellate judge was required. *See, e.g.*, *Caperton*, 556 U.S. at 868; *Lavoie*, 475 U.S. at 813. This discussion will not address those decisions; instead it will focus on disqualification of federal appellate judges. Reviewing a sampling of cases gives some sense of how these issues tend to be resolved by federal appellate judges deciding whether their own recusal is required.

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Social Relations with a Party While the Case Is Pending

While a case was pending before the Supreme Court on whether Vice President Dick Cheney and other officials were subject to the procedural and disclosure requirements of a federal law, Justice Scalia went on a widely publicized hunting trip with the vice president. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004). An environmental group moved for Justice Scalia's recusal. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 514 U.S. 913 (2004).

In a published memorandum, Justice Scalia denied the motion, concluding that the circumstances were not such that his impartiality might reasonably be questioned. *Cheney*, 514 U.S. at 913. Justice Scalia emphasized that several other hunters participated in the trip, and contrary to news reports, he spent no significant time alone with the vice president. He further reasoned, in part, that although friendship with a party is a ground for recusal when

the party's "personal fortune" or "personal freedom" is at issue, "it has traditionally *not* been a ground for recusal where *official action* is at issue[.]" *Id.* at 916. Justice Scalia also believed that his recusal "would… encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." *Id.* at 927.

One must wonder if anyone is truly able to judge his or her own ability to remain partial, particularly when presented with a motion challenging that very trait.

Financial Interest in the Outcome

A case came before the Second Circuit in 2007 that involved a settlement on behalf of a class of authors whose work had been reproduced in electronic databases, including online legal research databases, without their consent. *See In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136 (2d Cir. 2007).

After "extensive pre-argument preparation," two judges on a Second Circuit panel—Circuit Judges John M. Walker, Jr., and Ralph K. Winter, Jr.,—realized that they likely were members of the class and could share in the settlement, given that their copyrighted law review articles and speeches had been reproduced in the defendants' databases. *In re Literary Works*, 509 F.3d at 139. Citing 28 U.S.C. §455(f), the judges determined that their recusal was not required because they immediately renounced what small financial interest they might have had in the case. *Id.* at 141–42.

Attendance at a Conference on a Related Topic

A significant issue in a particular murder trial was whether blood found at the crime scene had come from the defendant. *United States v. Bonds*, 18 F.3d 1327 (6th Cir. 1994). The district court admitted DNA evidence, and the jury convicted the defendant. *Id.* at 1328. After filing a petition for rehearing en banc of the panel decision affirming the conviction, the defendant moved for Circuit Judge Danny J. Boggs to recuse himself on the basis that he attended a conference on DNA evidence, the content of which allegedly was biased in favor of the use and reliability of such evidence. *Id.* at 1329.

In denying the motion, Judge Boggs stated as a rule that "a judge's interest or expertise in a given area, or his methods of informing himself as to a given area of the law, do not constitute grounds for recusal unless they come within some other, specific grounds for recusal." *Bonds*, 18 F.3d at 1329. He found that those grounds were not present. *Id.* at 1330.

Interest in Possible Future Employment

Years before a particular case was argued, Circuit Judge Winter, mentioned above, had a conversation with a member of one of the law firms representing a party in the case. *In re CBI Holding Co.*, 424 F.3d 265, 266 (2d Cir. 2005). During that conversation, after the judge mentioned that he was about to go on senior status, the lawyer stated that if the judge were considering retirement, the firm would be interested in discussing employment. *Id.* Several days later, the judge informed the firm that he expected to continue serving as a federal judge. *Id.*

When the case argued by the lawyer from that firm came up for argument, the judge disclosed the communications but determined that his recusal was not required, reasoning, "Five years have passed, and discussions were of a very general nature." *CBI Holding*, 424 F.3d at 267.

Interest in Personal Safety and Security

After allegedly purchasing explosive fertilizer from an undercover FBI agent and selling it to another, who was posing as a terrorist, a man was charged with attempting to destroy a federal building—the Dirksen Courthouse in downtown Chicago, which houses both the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit. *In re Nettles*, 394 F.3d 1001, 1002 (7th Cir. 2005).

After the district-court judge denied the defendant's motion for recusal, a Seventh Circuit panel, in a decision authored by Circuit Judge Richard A. Posner, granted a petition for mandamus, concluding that the district-court judge's recusal was required. *Nettles*, 394 F.3d at 1002–03. The panel members also recused themselves from any further proceedings in the case, to be replaced by judges from other circuits. *Id.* at 1003. The court reasoned that although the actual threat to the courthouse was "nil," "the next time [the defendant] might be more careful and succeed in his aim." *Id.* The court further reasoned that "[a] reasonable observer would think that a judge who works in the Dirksen building would want [the defendant] to be convicted and given a long sentence, rather than to be set free[.]" *Id.*

Religious Beliefs at Odds with a Party's Legal Position

An abortion clinic sued protesters seeking damages under the Racketeer Influenced and Corrupt Organizations (RICO) Act. *See Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995). After filing a petition for rehearing of a decision reversing in part and vacating in part a favorable judgment, the clinic moved for recusal of Circuit Judge John T. Noonan, Jr., on the basis that his "fervently-held religious beliefs" as a practicing Catholic would compromise his ability to apply the law. *Id.* at 400. Judge Noonan denied the motion, concluding that a rule that no judge with religious beliefs that condemn abortion could sit on an abortion case would "effectively impose[] a religious test on the federal judiciary." *Id.* at 401.

What Is the Common Thread?

If there is a common thread in the cases, it is that while having judges decide their own ability to be impartial may be "somewhat surprising (and not entirely comfortable)," *In re Bernard*, 31 F.3d at 843, judges for the most part seem to take the issue seriously and address the concerns earnestly. Yet one must wonder if anyone is truly able to judge his or her own ability to remain partial, particularly when presented with a motion challenging that very trait.

Procedure for Seeking Disqualification of a Federal Appellate Judge

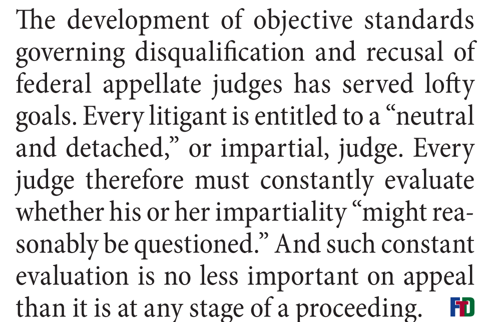
The device of an affidavit of prejudice does not apply to federal appellate judges. *Pilla v. Am. Bar Ass'n*, 542 F.2d 56, 58 (8th Cir. 1976). A party seeking to recuse or disqualify a federal appellate judge ordinarily must do so by motion. *Bernard*, 31 F.3d at 843. (The Federal Rules of Appellate Procedure do not prescribe specific procedures or methods for seeking disqualification.) As mentioned, the motion is decided by the judge whose impartiality is being questioned. *Pilla*, 542 F.2d at 58; *see also United States v. Balistrieri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985) (stating that disqualification decisions under 28 U.S.C. §455(a) "should be made by the judge sitting in the case"), *overruled on other grounds by Fowler v. Butts*, 829 F.3d 788 (7th Cir. 2016). No rule allows "for referring disqualification motions to someone else." *Bernard*, 31 F.3d at 843; *see also Miles v. Ryan*, 697 F.3d 1090, 1090 (9th Cir. 2012).

Because federal appellate judges do not take lightly motions for recusal, counsel should consider the implications of filing one before doing so. An unsuccessful recusal motion may affect a party's credibility and may leave the party in the unfortunate position of remaining before a judge whose ability to hear and decide the case fairly the party has called into question. *See, e.g.*, *Miles*, 697 F.3d at 1092 (determining that a motion to recuse Circuit Judge Susan P. Graber from a capital-murder case because her father was murdered nearly 40 years earlier lacked "even colorable merit" and caused Judge Graber to "relive" the event). And even if the recusal motion is successful, there may be consequences in future cases for both counsel and clients who are likely to appear before the same judge again. Counsel should thus advise clients that a motion for recusal warrants use only on careful, tactical evaluation.

When must a party bring a motion for disqualification or recusal? While §455 does not expressly include a timely filing requirement, most federal circuits have judicially imposed one, despite the text's silence. *See, e.g.*, *Kolon Indus. Inc.*, 748 F.3d at 169; *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 789–91 (8th Cir. 2009); *United States v. Rogers*, 119 F.3d 1377, 1380–83 (9th Cir. 1997); *United States v. York*, 888 F.2d 1050, 1053–55 (5th Cir. 1989). The party generally must bring the motion "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Hoich*, 560 F.3d at 790 (internal quotation marks and citations omitted); *see also Miles*, 697 F.3d at 1092 ("Although new counsel was substituted while the case was pending, there is no reason why the information… recited in the recusal motion, derived from a very simple Internet search, could not have been found by the former lawyers or the new ones before the opinion issued."). Absent a timeliness requirement, parties might use recusal motions for strategic purposes, withholding them "pending a resolution of their dispute on the merits, and then if necessary invoke §455 in order to get a second bite at the apple." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992).

Conclusion

The development of objective standards governing disqualification and recusal of federal appellate judges has served lofty goals. Every litigant is entitled to a "neutral and detached," or impartial, judge. Every judge therefore must constantly evaluate whether his or her impartiality "might reasonably be questioned." And such constant evaluation is no less important on appeal than it is at any stage of a proceeding. FTD



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