JUDICIAL INQUIRY COMMISSION

DATE ISSUED: October 5, 2016 ADVISORY OPINION 16-930

DISQUALIFICATION/RECUSAL: JUDGE REVIEWING CONSTITUTIONALITY OF STATUTE HE/SHE VOTED ON WHEN STATE LEGISLATOR

ISSUE

Is a judge disqualified from hearing a case contesting the constitutionality of legislation that the judge voted on while a member of the state legislature? **ANSWER:** A judge is not disqualified to hear a case because he/she had been a member of the legislature enacting a statute involved in litigation before him/her, even if the constitutionality of the statute is an issue. However, there may exist special circumstances that create a situation in which a person of ordinary prudence might reasonably question the judge's impartiality, which would disqualify the judge from hearing the case.

FACTS

Before taking the bench, the inquiring judge served in the state legislature. While there, the judge voted on a bill establishing a certain criminal offense. The defendant, charged under the statute at issue, is challenging the constitutionality of the statute and has filed a motion for the judge to recuse based on the judge's status as a legislator during the passage of the bill. The judge does not recall any details about the legislation or its passage, including whether he/she voted on it. However, a review of the legislative record shows the inquiring judge did cast a vote on the statute at issue.

DISCUSSION

Foremost, although legal error and unethical misconduct are not mutually exclusive, and acts done in the exercise of judicial discretion may, in some circumstances, constitute unethical misconduct, the Commission does not have the authority to give its independent opinion as to the appropriate ruling on a motion to recuse filed in a specific case. Advisory Opinion 09-902. Once a motion to recuse is filed, the questions expand beyond ethical considerations to factual and legal ones in a potentially adversarial context. Thus, the Commission provides only general advice regarding the application of the Alabama Canons of Judicial Ethics for the judge's determination of the recusal issues. Although the canons are also used to define legal standards of judicial conduct, Ex parte Cotton, 638 So. 2d 870 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996), and have the force of law, the opinions of the Commission are rendered in connection with only the ethical conduct of the judge, are not binding, and do not affect a party's rights or remedies. Ex parte Balogun, 516 So. 2d 606 (Ala. 1987), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996).

A judge's decision regarding disqualification or recusal should be made only after due consideration for his/her office and the Alabama Canons of Judicial Ethics. A judge is

disqualified, pursuant to Canon 3C(1), in any proceeding in which his/her "impartiality might reasonably be questioned." The judge presiding over a case involving legislation he/she was previously involved with should examine the attendant circumstances by using the objective test under Canon 3C(1): "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" In re Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality – whether there is an appearance of impartiality. Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994). This test may sometimes cause disqualification of a judge who has no actual bias. Advisory Opinion 14-928.

Alabama case-law provides that "[a] judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in [the] litigation before him . . . ." In re Sullivan, 219 So. 2d 346, 353 (Ala. 1969), quoted favorably in Borders v. City of Huntsville, 875 So. 2d 1168 (Ala. 2003). In Borders, the Alabama Supreme Court affirmed the trial court's order denying the defendant's motion to recuse. Id. at 1176. The Court found that, under Sullivan, the trial judge was not disqualified to hear a case in which "he was a state senator when the Legislature enacted and amended the statutes" upon which the defendants based their immunity claims. Id. But note, neither Sullivan nor Borders involved the review of a statute's constitutionality by the legislator-turned-judge.

Other jurisdictions follow the same general rule. See Buell v. Mitchell, 274 F.3d 337, 346 (6th Cir. 2001) ("[a] judge is not automatically disqualified from a case on the basis of having sponsored or voted upon a law in the state legislature that he is later called upon to review as a judge . . . sponsorship of a law is similar to the expression of an opinion on a legal issue, which does not create the appearance of impropriety"); Williams v. Mayor & Council of City of Athens, 122 Ga. App. 465, 177 S.E.2d 581 (1970) (trial judge who drafted challenged city ordinance while acting as city attorney was not required to disqualify himself for violation of ordinance in which question of ordinance's constitutionality was raised); Newburyport Redevelopment Auth. v. Commonwealth, 9 Mass. App. Ct. 206, 401 N.E.2d 118, 144 (1980) (rejecting contention that judge should have recused himself because he was a member of the Massachusetts legislature when bill that was subject of litigation was enacted); Leaman v. Ohio Dept. of Mental Retardation, 825 F.2d 946, 949-50 & n. 1 (6th Cir.1987) (noting a legislator-turned-judge's decision to not recuse was consistent with the practice of three former U.S. Supreme Court justices who routinely presided in cases involving legislation passed while they were members of Congress).

Research reveals only one instance in which a judge has taken a contrary position. In Limeco, Inc. v. Division of Lime, 571 F. Supp. 710 (N.D. Miss. 1983), the judge immediately recused himself when he became aware of a conflict arising from a vote 41 years earlier in the state legislature. While a legislator, the judge voted against a bill that created the defendant, a state-owned agency. Id. Despite his minor involvement with the bill and the large passage of time, the judge believed his earlier vote was a sufficient expression of his opinion on the case before him to call his impartiality into question. Id. But see Buell, 274 F. 3d at 347 (quoting United States v. Alabama, 828 F.2d 1532, 1543 (11th Cir. 1987) ("It appears to be an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.")).

Although Alabama case-law holds that there is no rule of automatic disqualification for a judge who, as a legislator, voted on legislation at issue in his/her court, this should not be the end of a legislator-turned-judge's disqualification analysis using the Sheffield objective test. Under Canon 3C(1), the judge must make an objective determination as to whether the subjective facts known to him/her create a reasonable basis for questioning his/her impartiality, for there may exist special circumstances that create a situation in which a person of ordinary prudence might reasonably question the judge's impartiality, which would disqualify the judge from hearing the case.[1]

In addition, where the constitutionality of a statute the legislator-turned-judge previously voted on is an issue, the legislative history of the statute may be highly relevant. As a member of the legislature during the bill's passage, a judge could have extra-judicial knowledge of committee discussions, altered statutory language, etc., which could require the judge's disqualification under Canon 3C(1)(a). Under 3C(1)(a), a judge must disqualify in a proceeding in which he/she has "personal knowledge of disputed evidentiary facts concerning the proceeding." Should the legislative history of the statute become an issue, and should the judge recall extra-judicial facts concerning the statute's passage in the statehouse, then disqualification should be examined under the requirements of Canon 3C(1)(a).

Assuming he/she has no bias or prejudice, the inquiring judge is not disqualified under Canon 3C(1) or the objective test under Canon 3C(1)(a). The inquiring judge has no knowledge of

[1] The Commission recognizes that in some cases, a judge's legislative activities may be intimately connected with the facts of a particular case, which could run afoul of Canon 3C(1). See, e.g., United States v. Alabama, 828 F.2d at 1543–44 (holding that district judge must be disqualified not because of his "views expressed ... as a political figure and member of the Alabama State Senate," but because "[d]uring his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit").

extra-judicial facts and there are no extraordinary circumstances in the facts presented. With a pending motion to recuse, the determination to recuse is properly left to the inquiring judge's discretion.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 3C; 3C(1); 3C(1)(a)

Alabama Advisory Opinions 09-902; 14-928

Ex parte Balogun, 516 So. 2d 606 (Ala. 1987), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

Borders v. City of Huntsville, 875 So. 2d 1168 (Ala. 2003)

Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001)

Ex parte Cotton, 638 So. 2d 870 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

Ex parte Duncan, 638 So. 2d 1332 (Ala. 1994)

Hall v. Small Business Administration, 695 F.2d 175 (5th Cir.1983)

Leaman v. Ohio Dept. of Mental Retardation, 825 F.2d 946 (6th Cir.1987)

Limeco, Inc. v. Division of Lime, 571 F. Supp. 710 (N.D.Miss.1983)

Newburyport Redevelopment Auth. v. Commonwealth, 9 Mass. App. Ct. 206, 401 N.E.2d 118 (1980)

In re Sheffield, 465 So. 2d 350 (Ala. 1984)

In re Sullivan, 219 So. 2d 346 (Ala. 1969)

United States v. Alabama, 828 F.2d 1532 (11th Cir.1987)

Williams v. Mayor & Council of City of Athens, 122 Ga. App. 465, 177 S.E.2d 581 (1970)