

JUDICIAL DISQUALIFICATION WHEN A SOLICITOR GENERAL MOVES TO THE BENCH

By Ronald D. Rotunda*

Introduction

It has been over forty years since a Solicitor General has moved to the High Court. Now that Elena Kagan has followed in Thurgood Marshall's footsteps—when she moved from standing in front of the bench to sitting behind it—she has to navigate a strict judicial disqualification statute that did not exist in 1967, when Thurgood Marshall (the grandson of a slave) left his position as Solicitor General to become Supreme Court Justice.

When Elena Kagan was first nominated, she said that she would disqualify herself only in cases in which she was listed as one of the authors of the Solicitor General's brief filed before the court.¹ However, a federal statute specifically governs this situation, and, as my testimony before the Judiciary Committee explained, it imposes a far stricter obligation on federal government employees. It requires disqualification in every case where a government employee has participated as a lawyer or as an adviser or expressed an opinion concerning the merits of the particular case in controversy.²

In response to that statute, Justice Kagan has now disqualified herself in about fifty percent of the cases (twenty-five of the fifty-one cases so far this Term).³ We should not be surprised if that percentage does not drop substantially for the next year or so. For example, she may have to disqualify herself in cases testing the constitutionality of the new medical care overhaul, popularly called Obamacare, if she earlier expressed an opinion about cases now in litigation.

The Federal Recusal Statute

The basic federal disqualification statute is found at 28 U.S.C.A. § 455. The relevant subsection is § (b)(3), along with §§ (d)(1), (e). The statute provides:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge 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:

...

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

...

.....

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(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation . . .

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) [Omitted].⁴

In interpreting §455(d)(1), we must take into account that it appears to be augmented by 28 U.S.C.A. § 455(a), which requires that any federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And, to emphasize that Congress considered this new disqualification to be significant, Congress added a kicker: § 455(e) provides that the parties cannot waive the disqualification that § 455(b)(3) imposes.

Congress enacted § 455(b)(3) in response the 1972 decision of Laird v. Tatum.⁵ Respondents in Laird moved to disqualify Justice Rehnquist because "of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."⁶ At the time, Rehnquist was in the Office of Legal Counsel. He was not responsible for preparing for litigation, arguing cases, or writing briefs.

Justice Rehnquist acknowledged that the parties seeking to disqualify him were—

substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.⁷

Justice Rehnquist also conceded that he had referred to Laird v. Tatum, by name, "in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin."⁸ Nonetheless, he refused to disqualify himself.⁹

At the time of this case, the relevant statutory language in title 28 was much less expansive. It read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest,

has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.¹⁰

Applying this language of the statute, Justice Rehnquist refused to disqualify himself. The relevant clause of the statute required that he have been counsel in the litigation, and he certainly was not that.

While Rehnquist's view of the statute was certainly a very reasonable interpretation, many people thought that Rehnquist should have recused himself and that Congress should revise the statute to make that clear. Indeed, that is what Congress did. It amended the language¹¹ and changed the statutory test so that it now covered any federal judge who had "participated as counsel, *adviser* or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." The statute no longer requires that the judge have appeared as "of counsel." There is no requirement that the government lawyer (now judge or justice) have appeared on the brief.

Clearly, Rehnquist would have had to disqualify himself in *Laird v. Tatum*, pursuant to the test of this amended statute. The scope of that statute as applied to Solicitor General Kagan is the focus of this essay.

First, it is clear that §455 applies to all federal judges, including those on the Supreme Court. It refers, after all, to any "*justice, judge, or magistrate judge of the United States.*" In addition, the disqualification that §455(b)(3) imposes is so important that the parties cannot waive it.¹² Not all disqualification provisions govern the Justices,¹³ but this clause certainly does.

Under this standard, Solicitor General Kagan obviously must recuse herself in all cases in which she is counsel of record. However, her obligation to disqualify herself does not stop there. She also must recuse herself in all situations where she was an *adviser* "concerning the proceeding" or where she "*expressed an opinion concerning the merits of the particular case in controversy.*"

The statute defines "proceeding" broadly, to include "pretrial, trial, appellate review, or other stages of litigation."¹⁴ "Proceeding" is not limited to trial because it includes all stages of litigation. The question is whether it includes steps preparatory to litigation, even if those steps occur before a case is actually filed. We know that other federal judicial rules governing disqualification refer to "proceeding" and acknowledge that a proceeding can be "pending" or "impending."¹⁵

In addition, the United States Courts webpage advises that:

Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, *earlier involvement in the case as a lawyer*, or a financial interest in any party or subject matter of the case.¹⁶

The lawyer may have been involved in advising how the litigation should be structured, in which case she would have had "earlier involvement in the case as a lawyer."

It is not unusual for a lawyer to be involved in preparation before the client files a particular case. Preparing for expected litigation to be filed by or against the client is what good litigators do. That advice is not part of "pretrial" in the sense that there is no motion or discovery in connection with pretrial matters. However, it is part of "pretrial" in the sense that it occurs prior to expected litigation; one of the "stages of litigation" occurs when the lawyer is preparing for particular litigation that one expects to file or to defend. Either pre-litigation strategy or pre-litigation investigation is one of the things that lawyers do.

For example, *United States v. Arnpriester*¹⁷ held that §455(b)(3) applies and requires a judge to disqualify himself in a criminal case because he was the U.S. Attorney at the time of an "investigation *preceding* the indictment"¹⁸ that eventually led to indictment. The court emphasized: "there can be no prosecution unless it is preceded by investigation."¹⁹ The court relied on both §§ 455(a) [impartiality might reasonably have been questioned] & 455(b)(3) [he had served in government employment as counsel in connection with indictment] in reaching its result. The trial judge was not personally involved in the investigation. It simply occurred under his watch.

Hence, if General Kagan was offering advice in connection with particular litigation that the United States would file, or the United States expected that particular litigation would be brought against it, it is likely that §455(b)(3)—as augmented by §455(a)—would apply.

We do not know in how many cases Justice Kagan must disqualify herself now that she has been confirmed, but this statute assuredly requires disqualification in many instances where she is not counsel of record. The statute does not limit disqualification to cases where General Kagan's name is on the brief, nor does the statute require that she express her opinion "in writing."

For example, the news reports that General Kagan "played a key role in authorizing a brief" challenging a 2007 Arizona law requiring all Arizona employers to use the federal government's E-Verify program to check the legal status of new employees. She informed the Judiciary Committee that on April 12, 2010, she recommended that the federal government take the position that the federal law preempts Arizona law.²⁰ It does not matter that her name was not on the brief or that she was no longer Solicitor General at the time the government filed the brief. Congress drafted section 455(b)(3) to mandate disqualification without regard to who is counsel of record.

Several years ago, the Solicitor General's office²¹ handled or offered advice on many of the detainee cases, even in the lower courts, and gave advice on many legal issues related to those cases. I do not know if the Solicitor General's office is still involved in that issue. If it is, General Kagan should disqualify herself in those cases because she was involved as an "adviser" or "*expressed an opinion concerning the merits of the particular case in controversy.*"²² The advice, given the language of the statute, would relate to the "merits of the particular case" and not simply observations about law in general or law involving another case, as opposed to law in the particular case that is now before her as a Supreme Court Justice. It is not necessary

that she be listed as “of counsel” on the brief or be counsel of record. The fact that she gave advice about the proceeding is all that is necessary to require her to disqualify herself. The Solicitor General will have to search her records and make sure that she disqualifies herself in such circumstances.²³

Similarly, if the Administration has asked her advice (and she has given it) on the constitutionality of proposed legislation in connection with contemplated litigation so that it can be said that she has expressed an opinion concerning the merits of a particular case in controversy, she should disqualify herself if that case ever comes to the Supreme Court.

There are only a few cases that interpret this section.²⁴ None involve the Solicitor General, but that is not surprising because it has been over forty years since a Solicitor General has moved to the High Court.²⁵ Yet, the same basic principles discussed above still apply. We do not know if the Department of Justice (e.g., the Office of Legal Counsel) or the White House asked her advice on how to structure health care legislation in order to prepare for particular litigation, or if she has “expressed an opinion concerning the merits” of the litigation that various states have recently filed. If she has, she must disqualify herself if that case goes to the Supreme Court.

In short, Solicitor General Kagan should disqualify herself in all instances where participated as counsel, “*adviser* or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” Her disqualification does not limit itself to cases where she is counsel of record. Under 28 U.S.C.A. § 455(b)(3), General Kagan must recuse herself from:

- Cases in which she approved appeals and/or amicus filings, whether or not she was “counsel of record”;
- Cases where she gave advice about or “*expressed an opinion concerning the merits of the particular case*” in the lower courts, or approved of lower court briefs in a case, although she is not listed a counsel on the brief;
- Cases in which she sat in on meetings with counsel and thereby “*participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy,*” even though Deputy Solicitor General Neal K. Katyal is now listed as the counsel of record;²⁶
- Cases in which the Supreme Court asked the Solicitor General whether it should hear the case;
- Cases before the time she was officially confirmed as Solicitor General if she gave advice or *expressed an opinion concerning the merits of the particular case* with government lawyers who would soon become subordinate to her once she was officially confirmed;
- Cases in litigation where the Department of Justice or other government lawyers (e.g., lawyers in the office of Counsel to the President) may have asked for her views on questions of constitutional significance or where she offered other legal advice; and,

• Cases in the lower courts in which the Department of Justice solicited her views.

> In all of these circumstances, it does not matter if her advice was oral or written, because the statute does not draw that distinction.

> And, if she recuses herself, her disqualification is not subject to waiver by the parties, pursuant to 28 U.S.C.A. § 455(e), which provides that no Justice “*shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).*”

Senator Leahy’s Proposed Recusal Statute: Using Retired Justices

With the problem of disqualification in mind, Senator Patrick Leahy has introduced legislation that would authorize retired Supreme Court Justices to return to the Court to decide cases when one or more of the Court’s members are recused.²⁷ There are only three retired Justices now (Stevens, Souter, or O’Connor). Justice Stevens, in fact, suggested the idea that he or another retired Justice could become the deciding vote if there is a four to four tie.²⁸

This proposal carries with it a very important policy defect: it will make the law unstable. If the pinch-hitter is on the bench pursuant to the Leahy proposal, we will know—at the very moment that the Court renders its decision—that the deciding factor is a person who will leave the bench the moment after the decision. If we have a four to four tie, the decision is not precedent. The Court can decide the issue at some later time, when the disqualifying factor is gone. But, under the Leahy proposed law, we do not know if lower courts must treat the decision as binding precedent, or if the Supreme Court treats this opinion as binding itself when the full Court (the “real Court”) decides the issue.

In addition, the Leahy proposal is unconstitutional, for reasons that Chief Justice Hughes presented nearly seventy-five years ago. There is nothing new under the sun. In 1937, Franklin Delano Roosevelt tried to expand the number of Justices who could sit on the Court. Most people do not realize that only a statute (and not the Constitution) limits the number of Justices to nine. FDR’s plan would have given him six new Justices to appoint.

Senator Leahy’s proposal does not increase the number of Justices, but his proposal suffers from a basic constitutional flaw—one that also existed in part of FDR’s ill-fated Court-packing plan. Because FDR would have new appointees, the number of Justices would increase to fifteen. That is a large number, so part of the plan proposed that the Court could sit in special divisions or panels that would not include all the Justices.

Chief Justice Hughes, in response to an inquiry from Senator Wheeler, wrote that it would not only be inadvisable for the Court to sit in panels, but would appear to violate the constitutional requirement that there shall be “one Supreme Court.” A contemporary observer reported that Hughes’ letter was the “most powerful weapon” for those who opposed packing the Court.²⁹

Senator Leahy's proposed law shares the same constitutional flaw that Hughes identified. There is not "one" Supreme Court if one group of Justices decides one case while a Supreme Court with different membership decides another case.

After Justice William Douglas retired from the Court, he kept his office there. There came a time when he wanted to write an opinion and publish it with the other opinions. Douglas thought that even though he was retired he still was part of the Court and could cast a vote. No member of the Court agreed with him, and he never filed his opinion. The modern Court, like the Court of 1937, knows that there cannot be one Supreme Court if the membership changes from case to case.

Endnotes

1 Senate Committee on the Judiciary, Committee Hearing on the Nomination of Elena Kagan, July 1, 2010, 2010 WL 2637747 (F.D.C.H.).

2 28 U.S.C.A. § 455(d)(1), (e).

3 Ronald D. Rotunda, *The Point of No Return: Kagan's Recusals Are No Excuse for Retiree Curtain Calls*, WASH. TIMES, Oct. 11, 2010, at B3.

4 Emphasis added.

5 409 U.S. 824 (1972).

6 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

7 409 U.S. 824, 825-26 (Memorandum of Rehnquist, J.).

8 409 U.S. 824, 826-27 (Memorandum of Rehnquist, J.).

9 He elaborated on his views in William Rehnquist, *Sense and Nonsense about Judicial Ethics*, 28 RECORD OF ASSOC. OF THE BAR OF THE CITY OF N.Y. 694, 708-713 (1973).

10 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

11 1974 U.S. Code, CONGRESSIONAL & ADMINISTRATIVE NEWS 6351, 6355-6356 (1974), H.R. REP. 93-1453, H.R. Rep. No. 1453, 93th Cong., 2nd Sess. 1974, 1974 U.S.C.A.N. 6351, 1974 WL 11635 (Leg. Hist.) refers specifically to the result in *Laird v. Tatum*:

Subsection (b)(3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (409 U.S. 824) his decision not to disqualify himself because of prior testimony before a congressional committee.

12 28 U.S.C.A. § 455(e).

13 See discussion in RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §10.0-2(c), & n. 7 (Thomson-West; ABA Center for Professional Responsibility 2010-2011 ed.) (The federal judicial code excludes covering Supreme Court Justices.).

14 28 U.S.C.A. §455(d)(1).

15 *E.g.*, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at 35 & n.155 (Fed. Judicial Center 2002) (discussing *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)), [http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/\\$file/recusal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/$file/recusal.pdf); see also Ronald D. Rotunda, *Judicial Comments on Pending Cases: the Ethical Restrictions and the Sanctions—A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611 (2001).

16 <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (emphasis added); see also, *e.g.*, GUIDE TO JUDICIARY POLICY, *Ethics and Judicial Conduct*, volume 2, at 55-1 (June 2009), <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf> ("To start, a 'judge should not make public comment on the merits of a matter pending or impending in any court.'" (emphasis added)).

17 37 F.3d 466 (9th Cir. 1994).

18 37 F.3d at 466 (emphasis added).

19 37 F.3d at 467.

20 Letter from Lamar Smith et al. to the Hon. Senator Jeff Sessions, June 24, 2010.

21 *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) disqualified a judge (and former U.S. Attorney) because of actions that an assistant U.S. Attorney took while the judge was the U.S. Attorney. The U.S. Attorney was not personally involved in the investigation. Nonetheless, the court disqualified the judge: "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

22 Carter G. Phillips, a former assistant to the Solicitor General, has said that she should interpret the statute broadly, and she should therefore disqualify herself from any case in which she participated in "conversations—regardless of whether she ultimately signed the office's filing." See Seth Stern, *Kagan's Criteria for Recusals Not Wide Enough*, *Say Legal Scholars*, CQ TODAY, 2010 WLNR 10665560 (May 18, 2010).

23 For example, if she gave advice or was involved in lower court litigation in California involving the Defense of Marriage Act, she would have to disqualify herself on that litigation. It does not matter if her involvement was in support of DOMA or against it. If she was involved in that case, she cannot sit on it if it comes before the U.S. Supreme Court. See, *e.g.*, Posting of Ed Whelan to National Review Online Bench Memos, <http://www.nationalreview.com/bench-memos/49585/sg-kagan-breaks-her-vows/ed-whelan> (Aug. 18, 2009) ("Consistent with convention, SG Kagan's name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it.")

I do not know if General Kagan was involved with this California case, but she can tell us. If she gave any advice regarding the Government's brief, she would have to disqualify herself in that litigation.

24 See 34 A.L.R. Fed. 2d 589 (Originally published in 2009).

25 *E.g.*, *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) (discussed above); see also *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980) (per curiam) (holding that a magistrate judge was automatically disqualified to hear a motion for reduction of the sentence because the magistrate judge was the Assistant United States attorney who had represented the government in earlier proceedings on the defendant's motion for reduction of sentence).

26 The court in *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), disqualified a judge because actions were taken by an Assistant U.S. Attorney when the judge was U.S. Attorney. The U.S. Attorney was not personally involved in the investigation. Nonetheless, the court disqualified the judge and former U.S. Attorney: "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

27 David Ingram, *Should Retired Justices Be Called Back to Supreme Court?*, NAT'L L.J., June 17, 2010, <http://www.law.com/jsp/article.jsp?id=12024627>

Should_Retired_Justices_Be_Called_Back_to_Supreme_Court.

28 Ronald D. Rotunda, *The Point of No Return: Kagan's Recusals Are No Excuse for Retiree Curtain Calls*, WASH. TIMES, Oct. 11, 2010, at B3.

29 Paul Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 14 (1967); see also JEFFREY SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2009).

