



Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2020-06 (December 14, 2020)

Disqualification; Rule of Necessity; Rule 2.11

Issue: Must a Judicial Official, whose term of office expires within the next several weeks and who may be re-nominated by the Governor within that time period, disqualify himself or herself in a case brought against the Governor challenging as unconstitutional specific acts taken by the Governor in issuing executive orders.

Facts: The Judicial Official, an appellate jurist, sat on a case in which the Governor is a named defendant. The matter involved a constitutional challenge to the Governor's authority to issue certain executive orders. The question raised by the Judicial Official is whether he or she may participate in deliberations regarding and in the vote on the opinion of the appellate tribunal given the fact that the Judicial Official's term of office will expire within a few weeks after the matter was heard and because it is the Governor who must re-nominate the Judicial Official to another term.

Discussion: Rule 2.11(a) states that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" Although this Committee has not addressed the precise issue at hand, it has considered whether a Judicial Official should disqualify himself or herself in a case involving a party that previously had testified against the Judicial Official's nomination. In JE 2010-09, the Committee concluded that "the fact that a party to a case before a judge has testified before the legislature to oppose a judge's reappointment does not automatically mean that the judge will harbor actual bias or that his/her impartiality might reasonably be questioned. Instead, the Judicial Official should consider the issue of sua sponte recusal in light of all the facts and circumstances of the case and the party's actions."

Conclusion: Similarly, in the present case, the Committee concludes that mere proximity in time to a Judicial Official's re-nomination by the governor, without more, does not require automatic disqualification from a case challenging actions taken by the Governor in his official capacity. Under Connecticut law, *all* Judicial Officials in the Superior, Appellate and Supreme Courts are nominated and re-nominated by the

Governor. Automatic disqualification in cases involving the Governor's official acts would require frequent recusal and arbitrary determinations regarding the proximity in time of a particular case to the expiration of a Judicial Official's term of appointment. Moreover, because judicial nominations are made by the Governor on a rolling basis, this could have the result of disqualifying multiple judges and justices at all levels of litigation and review, thereby implicating the rule of necessity. See comment 3 to Rule 2.11.

The Committee's conclusion is buttressed by the fact that the case in question does not concern the personal civil or criminal liability of the governor. To reiterate, the issue before the Judicial Official is limited to actions taken by the Governor in his official capacity. This militates against a determination that automatic recusal is required. Cf. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 916, 124 S. Ct. 1391, 158 L.Ed.2d 225 (2004) (memorandum) (Scalia, J.) ("while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer"); see also *In re Third Party Subpoena to Fusion GPS*, 292 F. Supp. 3d 307, 314 (D. D.C. 2018).

Accordingly, the Committee concludes that automatic recusal is not required. A Judicial Official must determine if any specific situations requiring disqualification apply. See Rule 2.11.

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