Ctr for Judicial Accountability

From: Ctr for Judicial Accountability [cja@judgewatch.org]
Sent: Monday, August 06, 2007 12:14 PM
To: 'ref@attglobal.net'
Subject: Belated Thanks & Response, Etc.

Dear Richard,

I thank you for your July 9th e-mail and apologize for the long delay in responding. Unfortunately, on the very day of your e-mail, I was confronted with a difficult and painful situation, yet on-going, in addition to other deadlines and commitments requiring my attention.

I am only now returning to the draft of my cert petition in the "disruption of Congress" case, due on August 17th. I believe that I may be able to eke out another two months, which I greatly need for soliciting *amicus curiae* briefs, interrupted by the past month's distractions.

I have no doubt but that an *amicus* brief from you could make an enormous contribution - and hope that such additional time will enable me to outline what I have in mind. In any event, I would appreciate if you would give me the benefit of your expertise with respect to the latest draft of my cert petition, posted on CJA's website, www.judgewatch.org - accessible *via* "Latest News" and "'Disruption of Congress'-The Appeal"

Specifically, with respect to my petition's first question:

> "Is it a constitutional violation, prima facie disqualifying, and misconduct *per se* for a court to conceal and wilfully fail to adjudicate a motion for its disqualification, disclosure, and transfer - and does it have jurisdiction to proceed further in the matter?"

I have now added a sentence to my "Statement of The Case" (at p. 2) that the Supreme Court has "never spoken on the subject". Am I correct - or are there responsive Supreme Court decisions to which I should be referring?

My very short argument pertaining to my first question is at page 33. Do you agree with my presentation - including my citation to §22.1 of your book Judicial Disqualification: Recusal and Disqualification of Judges (1996)? Can you make suggestions for improving it, including by caselaw and treatise citations?

Also, my petition's second question now specifically includes citation to *Liteky v. United States*, 510 U.S. 540 (1994), in asking whether the D.C. Court of Appeals met its standard for disqualification for pervasive actual bias. Do you know of any case, in the 13 years since *Liteky*, where its "impossibility of fair judgment" standard for judicial disqualification for pervasive actual bias was found to have been met?

I am leaving tomorrow morning for a journalism conference in Washington, D.C. - and won't be returning until Thursday. I would be most grateful if you might be able to respond by then.

With regards - and continued prayers for your wife's recovery from her recent hospitalization-

Elena

-----Original Message-----
From: ref@attglobal.net [mailto:ref@attglobal.net]
Sent: Monday, July 09, 2007 3:23 AM
To: cja@judgewatch.org
Subject: Your Email

Hi Elena --

Sorry for the delayed response -- I haven't been in the office much since my wife's operation.

This passage is in the first chapter of my book:

"Published case law on judicial disqualification may be bountiful, but any attempt to draw a definitive conclusion from these precedents about the prospects for success in securing the disqualification of a particular judge would be perilous at best. This is so because, while judges frequently take themselves off of cases - and while motions to disqualify judges who do not voluntarily recuse are sometimes granted - a judge who recuses rarely issues an opinion explaining her reasons; and, even when such an opinion is issued, it is often unpublished. In contrast, judges who decline to recuse often write lengthy opinions explaining why. As a result, far from accurately portraying the full spectrum of judicial disqualification decisions, the published opinions on this subject tend to reflect 'an accumulating mound' of reasons for denying disqualification."

I cannot revise my treatise to take into consideration unpublished case law, however, as you suggest; because the book was written to be used by lawyers in making disqualification motions and by judges in deciding them, and unpublished opinions (let alone case files) are typically not citable as precedent. As a result, anecodtal information about what went on 'behind the scenes' of a disqualification decision is pretty much useless for these purposes, and would be misplaced in my book. Law review articles would probably be a much better place for the type of scholarship you have in mind.

As for your case, I did read some of the materials I found on your website, but hadn't located the disqualification motions until I received your email. I have now read one of those motions. My initial response is that, while the federal judicial disqualification statute calls for disqualification for even an appearance of impropriety, reality is very different from what is written in the statute.

In fact, the initial federal disqualification statute was intended to be peremptory (like California's, and those of many other states). It was, in other words, intended to allow litigants to remove a judge on the basis of even a suspicion of impropriety -- without any showing of bias at all. But the U.S. Supreme Court read into the federal statute various 'checks'. The net result is that federal judges are pretty much free to decide for themselves whether they are biased, and appellate judges rarely overturn a lower court judge's decision saying he is not. This isn't fair, of course, but Congress has had many opportunities to correct the Supreme Court's interpretation of its will, and has never chosen to do so.

At this point I do not have the time to read all of the unpublished orders, opinions and other documents pertaining to disqualification in your case. Also, I do not see what I could say in an amicus brief that would be helpful to you in regards to your Cert. Petition, but I do wish you the best of luck.

Richard