

Introduction

[Law](#), [Court](#)



Introduction The American legal system is structured in such a way as to permit the individual or entity being prosecuted to receive as fair and impartial a trial as possible. Legal counsel is provided in defense of the individual being prosecuted whether he or she are able to afford it or not, courtroom rules are structured to ensure that the proceedings are fairly administered, and, ideally, an impartial judge plays the role of a wise referee who both interprets the rules and ensures that they are followed. While an impartial judge is ideal, it must be acknowledged that judges are imperfect human beings who are prone to be influenced by politics, lobbyists, and current events. That being said, the ideology of impartiality is not always a realistic concept. In a perfect world, judges who felt that they could not rule on a case without exhibiting personal bias or prejudice would recuse themselves from ruling. This, however, is not a perfect world, and sometimes, biased judges are the price that must be paid in a world with imperfect people. In the American legal system where the defendant is considered innocent until proven guilty, it is absolutely imperative that the judge ensures the courtroom proceedings are carried out in as objective a manner as possible and according to the Constitution. A judge's impartiality not only guarantees that there isn't a miscarriage of justice, it also creates a balance between the two litigating forces: the prosecution and the defense. This helps to ensure that, ideally, a victory in the courtroom occurs when truth prevails, not necessarily when a lawyer achieves his desired outcome. Using newspaper and academic journal articles, this paper will identify the specific regulations that govern the circumstances in which a judge should feel compelled to recuse himself from a given court case. It will also explore

the proper methods that should be employed by attorneys who wish to compel a judge to disqualify him or herself by filing a motion to recuse. Finally, this document will review the controversial politics of electing judges in the state of Nevada and how that process adversely affects the impartiality and neutrality of the individuals who gain office. When should a judge recuse him or herself? According to the Code of Conduct For United States Judges, “ A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned...” (“ Guide to Judiciary, ” 2009). An example of impartiality could be something as simple as having a personal bias or prejudice against one of the parties being tried. Another example would be if the judge were somehow related to one of the parties involved in a given case. One of the inherent problems with determining judicial prejudice is that the rules governing what constitutes bias are fairly vague, and therefore it is sometimes a complicated endeavor to prove that bias exists. When it comes to determining unfairness in a courtroom, an obvious question must be addressed: who is responsible to judge the judges? Or, in other words, who is responsible to determine if a judge is too biased to rule without prejudice on a case? According to The Valparaiso Law Review, “ In the majority of states, the decision of whether to grant or deny a motion to recuse is within the sound discretion of the challenged judge” (Abramson, 1994). So to answer the question, the judge is responsible for judging himself. This concept is fundamentally problematic and inherently flawed, because if a judge is truly biased but wishes to rule on a case anyway, who is to stop him? Understanding that there is not a lot of judicial oversight, the question is not simply whether or not a judge is

prejudicial, but also whether or not he or she is ethical enough to admit it. A small town judge who refuses to recuse himself from a case in which he has a personal relationship with the defendant would not only be highly unethical, but the result would also likely be a miscarriage of justice. The idea that a judge would be capable of moderating him or herself assumes the judge is a person of integrity. This becomes somewhat problematic because when it comes to asking a judge to recuse himself or herself, it is precisely the judge's integrity that is being called into question. In the landmark Proposition 8 court case, the citizens of the state of California adopted an amendment to their constitution that banned same-sex couples from having the right to marry each other. Controversy arose when the amendment was appealed to the California Supreme Court after it was revealed that one of the judges who voted to strike down the amendment, Judge Vaughn Walker, was a closeted homosexual who had been engaged in a relationship with a man for over ten years. According to a news article, "lawyers for the sponsors of the voter approved ban [of same-sex marriage]... [asked] the chief federal judge in San Francisco to vacate the decision issued by [Judge Walker] that declared Proposition 8 an unconstitutional violation of gay Californians' civil rights. They [maintained] that [he] should have recused himself or disclosed his relationship status before trial because he and his partner stood to personally benefit from Walker's verdict" (Press, 2011). Should Judge Walker have recused himself? One argument, as indicated in the news article, is that since he would have personally benefitted from the outcome of the ruling, he should have. It stands to reason that the perception of a judge benefitting either socially or

economically from a court ruling raises ethical questions about whether or not he or she could rule with impartiality on a given case. It could be argued that Judge Walker should have avoided even the perception of personal bias. This controversy is unique in that Judge Walker stood only to gain socially from the ruling's verdict. Had circumstances been different and he had benefitted financially from the outcome of the case, one cannot help but wonder if Judge Walker would not have felt more inclined to excuse himself from the proceedings. In the court of public opinion, social martyrs have a tendency to be much more sympathetic. On the other hand, requiring a man or woman to disclose his or her sexual orientation prior to ruling on a given case sets a dangerous precedent. While the slippery slope argument is old and tired, it's certainly applicable in this situation. Once a judge is required to disclose a few parts of his personal life, what's to stop the legal system from requiring other aspects of his life from being revealed and then scrutinized? Some speculative examples of this could be requiring judges to disclose the sexual orientation of close family members and friends or requiring the disclosure of all non-profit organizations to which they donate. Furthermore, had Judge Walker recused himself, all of the judges who remained would have been heterosexuals. Would it have been less biased to have only permitted a panel of heterosexual judges to rule on the constitutionality of homosexual marriage? In the end, the California Supreme Court chose not to invalidate Judge Walker's decision. In the court's official ruling, Chief Judge James Ware acknowledged that "the presumption that 'all people in same-sex relationships think alike' is an unreasonable presumption, and one which has no place in legal reasoning. The

presumption that Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered him incapable of making an impartial decision, is as warrantless as the presumption that a female judge is incapable of being impartial in a case in which women seek legal relief. On the contrary: it is reasonable to presume that a female judge or a judge in a same-sex relationship is capable of rising above any personal predisposition and deciding such a case on the merits. The motion fails to cite any evidence that Judge Walker would be incapable of being impartial, but to presume that Judge Walker was incapable of being impartial, without concrete evidence to support that presumption, is inconsistent with what is required under a reasonableness standard" (" Order denying defendant-," 2011). Another example of a controversial court case occurred in Ann Arbor, Michigan earlier this year. Judge Tim Connors was accused of having a conflict of interest for not recusing himself from a hearing in which the attorneys who appeared before him in court had donated to his judicial campaign. Maria Miller, a spokesman for the county prosecutor, filed a motion to have Judge Connors recused from the case. She said, " In this case, the lead plaintiff's attorneys have made significant campaign contributions to Judge Connors' current campaign...We are requesting his recusal because the contributions suggest the appearance of impropriety" (Stanton, 2012). The same question must be asked: should Judge Connors recuse himself? His bias seems much less noble than Judge Walker's given that Judge Walker only stood to gain socially, whereas Judge Connor's prejudice is knee-deep in " filthy lucre. " But nobility should not be a determining factor when considering prejudice. Noble bias is still bias. The vague nature of the regulations outlined in The Code Of

Conduct For United States Judges is not satisfactory when it comes to identifying specific instances in which a judicial official should feel compelled to excuse him or herself from a case. True to some of the founding principles of the United States government, when it comes to determining whether or not a given judge is capable of impartiality, sometimes one must simply exercise faith in the judge's character and hope that he or she is ethical enough to withdraw from hearing a case if bias exists. A lot of faith is placed in judges to personally identify whether or not they are able to set aside their personal opinions in order to interpret the law. If Judge Walker felt that he was capable of interpreting the law without being prejudicial, then as a judge it was his prerogative to fulfill his duty and let his voice be heard. Likewise if Judge Connors felt that the campaign contributions that were made to him by the lead plaintiff's attorneys were irrelevant, then he should also be allowed to proceed. It is important to acknowledge that when the American legal system expects a judge to be unbiased and non-prejudicial that they do not expect him or her to be superhuman. When gauging prejudice, the judge's political affiliations or sexual proclivities (provided that they are legal) should not be put on trial. The question that must be asked is simple: can the judge in question rule on a given case with impartiality? If the judge feels that he can, then he should not feel compelled to excuse himself. There are ways to compel judges to recuse themselves in cases where legal counsel disagrees with the court about their perceived impartiality. While these motions are not common (Pileggi, 2008), they do ensure that the American legal system maintains procedural checks and balances. These motions also help to eliminate the perception of injustice. Motions To Recuse

There are times when a judge feels capable of ruling on a case without prejudice but legal counsel still believes that they are biased. In these cases, the lawyers who question the judge's impartiality may file a " Motion To Recuse" (Abramson, 1994). Once a judge has received such a motion, he will " hear the motion informally and [decide] whether to step aside. If the judge refuses, the party may file an affidavit seeking a change of judge. Upon the filing of the affidavit, the administrative judge [or in other words a third party judge] will rule on the motion" (Abramson, 1994). The attorneys who represent George Zimmerman, the Sanford Florida native who allegedly murdered Trayvon Martin, filed such a motion earlier this year. The motion said that Kenneth Lester, the judge assigned to the case, " made gratuitous, disparaging remarks about Mr. Zimmerman's character, advocated for Mr. Zimmerman to be prosecuted for additional crimes; [offered] a personal opinion about the evidence for said prosecution; and continues to hold over Mr. Zimmerman's head the threat of future contempt proceedings" (Smith, 2012). The motion further stated, " O'Mara asserted that the judge and court ' departed from its role as an impartial, objective minister of justice' and should therefore be removed from the case" (Smith, 2012). When the request that the judge recuse himself was first filed with the court, it was initially denied by Judge Lester who said that the motion was " legally insufficient" (Lee, 2012). This is a perfect example of the catch 22 that attorneys encounter when challenging a judge. In order to replace a judge, an attorney's first move is to convince the judge that he is biased. Regrettably, Judge Lester, like many other judges, did not agree with Zimmerman's legal counsel and refused to disqualify himself. Fortunately for

Mr. Zimmerman, in lieu of the evidence provided by his attorneys in their motion to recuse, a three-judge panel ordered Judge Lester to remove himself from ruling on the case (Hightower, 2012). It is fortunate for Mr. Zimmerman, because had his legal team failed to secure the disqualification of the judge, then Judge Lester would have continued to be responsible for exercising judgment over the case, and had he not been biased before, he certainly would have had a bad taste in his mouth for Zimmerman's attorneys after he had been challenged. That is the risk attorneys take when attempting to get a judge disqualified. If they manage to convince him or her to step down, then they chose a good battle to fight. If he or she manages to continue ruling on the case after the motion has been denied, it is more than possible that the challenged judge may hold a grudge against the attorneys who attempted to have him removed. Therefore, if an attorney wishes to file a motion against a judge, he or she better be very confident that their motion will be granted. Addressing the issue of the inherent risks involved in filing a motion to recuse, Richard Flamm stated, * “ where a judicial disqualification motion has been made and denied, the moving party's fate is left to a judge whom that party or his attorney has not only alleged may not be able to render a fair and impartial decision, but who may have become biased--subconsciously or otherwise--by the fact of the filing of the judicial disqualification motion itself. In fact, even a well-grounded disqualification motion may be a risky proposition, because the moving party runs the risk of alienating the challenged judge, thereby exacerbating any perceived bias" (Flamm). As indicated, motions to recuse are filed against judges whom attorneys believe are too biased to impartially rule on a case. In the case of

George Zimmerman, a motion was filed because his attorneys believed that the judge had preconceived notions about their client. Attorneys may also feel compelled to ask judges to withdraw if they feel that the judge has political or financial ties to opposing counsel. It is for this reason that the practice of electing judges in the state of Nevada can become controversial and cause many attorneys to question a judge's impartiality in a given case. The politics of electing judges in Nevada Inherent in a democracy is the people's right to vote for the governmental officials by whom they wish to be represented. Ideally, elections ensure that governmental leadership is determined by popular vote rather than by passing the office down from generation to generation. Unfortunately today, as it has always been, politicians must have sufficient funds and endorsements in order to mount a successful campaign for elected office. In order to secure funds, politicians frequently make promises to lobbyists and special interest groups who in turn donate money to the candidate's respective campaign. The practice of making promises to lobbyists in order to gain elected office essentially makes the elected official a slave to the wills of those lobbyists and special interest groups who helped fund the judge's campaigns. While a system that embraces a popular vote works relatively well when electing politicians, it has always been controversial to utilize that same system when selecting judges. The controversy stems both from how lobbyists adversely affect a judge's impartiality, and the people's lack of knowledge about the judges who are running for office. The difference between judges and politicians is that judges are required to perform their duties without bias while politicians are not. That is one of the fundamental problems with judges accepting

campaign contributions: it can compromise a judge's ability to remain impartial. Likewise, endorsements from union leadership or special interest groups like religious congregations can also impact a judge's ability to rule on cases without bias. Any state that embraces a system where judges run for office and are therefore liable to accept campaign contributions or endorsements puts the judge's ability to remain impartial in jeopardy. A judge's neutrality can be compromised when he or she feels compelled to rule in favor of an individual or a special interest group simply because of an endorsement or because they donated money to his or her campaign. It is important to reemphasize here, that if a judge's integrity becomes compromised, then justice cannot be served and the entire court system becomes an institution of corruption. After studying the voting patterns of Nevada's high courts for over 14 years, a law professor at Tulane University named Vernon Palmer concluded that many of the judges who were studied were significantly influenced by the campaign contributions that they had received: " The study, based on a statistical analysis of how each justice voted on cases involving their campaign donors...[shows that] there is an unusually high correlation between campaign contributions and decisions in favor of contributors" (Finch, 2008). In other words, the study demonstrated that in some cases, a desired ruling could almost be legally purchased through campaign donations. Regarding the topic of judicial bias stemming from campaign contributions, Al Marquis, a Las Vegas real estate and commercial lawyer said, " If you wanted to design a system that would tempt everyone to be corrupt, you would design the system [that] we have right now. " When asked specifically whether or not he believed that the outcomes

of some of the cases that have been ruled on in Las Vegas have been influenced by campaign donations to judges he said, “ I have no doubt about that” (Schwartz, 2010). In addition to concerns regarding judicial bias, there are other controversies that stem from the practice of electing judicial officials. In 2010, there were candidates running for over 30 district and family court judgeships in Clark County, Nevada (Schwartz, 2010). One of the inherent problems with electing people to fill all of those vacancies is that voters often don’t know anything about the candidates for whom they are voting. Bill Raggio, a partner at the law firm Jones Vargas, commented to the Las Vegas Sun that he is often approached to proffer his opinion about for which judicial candidates common people should cast their votes. He conceded that he rarely knows any of the judges himself, despite the fact that he is “ enmeshed...in the legal and political community” (Schwartz, 2010). If an attorney who has professional contact with sitting judges and many of those who are seeking to obtain newly elected office is unable to identify who would be the best judicial candidate for a given vacancy, what chance does a common person who may work at an auto parts store or waits tables, have of selecting a qualified candidate? A compelling case can be made for proponents of a system in which the governor or state legislature would appoint judges as opposed to having judicial officials get elected by the people. There are, however, many people in the state of Nevada who disagree with the notion that an appointment system would be superior to one in which judges were elected by popular vote. In fact, according to a poll conducted by the Las Vegas Sun, 54 percent of registered voters opposed the idea of moving away from Nevada’s system of electing judges, and

another 19 percent were undecided (Schwartz, 2010). Speaking about people who desire to retain their right to elect judges, David Damore, a professor of political science at the University of Nevada Las Vegas, suggested, “ people just don’t trust government. They’re not necessarily making informed choices. But the idea of somehow losing that option, they don’t like” (Schwartz, 2010). It is interesting to note that when a measure was presented to the people of Nevada to move to a judicial appointment system, over 432, 000 people voted on the measure, which is almost 70, 000 more people than vote in a typical judicial race (Coolican, 2012). These numbers seem to indicate that the electorate likes the idea of voting for judges more than they actually like voting for them. It stands to reason that in a democratic society people may not want to relinquish the perceived freedom that they enjoy of being able to elect the judges of their choosing. Unfortunately, many of the individuals who have been elected in the last few years are not the most qualified to hold the position. It is likely that in lieu of knowing a judge’s record, many people are voting for a particular judge for arbitrary reasons like their gender, ethnicity or attractive campaign propoganda instead of making a selection based on a candidate’s experience or qualifications. In truth, placing the responsibility of electing judicial officials into the hands of people who do not research the candidates doesn’t make the citizens of Nevada more free; it cheapens the system altogether. An example of an unqualified judge being elected is the disgraced former Clark County judge Elizabeth Halverson who was elected in 2006 and subsequently suspended in 2007. According to an article written by Mary Manning of the Las Vegas Sun, the Nevada Commission on Judicial Discipline

“ found her guilty on counts of sleeping during hearings, making improper contact with jurors, mistreating her staff, improperly hiring two bodyguards, and making improper and misleading statements to the press. The commission said there was sufficient evidence to show Halverson slept during portions of two criminal and one civil trial” (Manning, 2008). The point here is not to imply that all judges who are elected by popular vote are somehow incompetent, rather to illustrate the fundamental problem with the system of putting this responsibility into the hands of the electorate. By asking a community who is largely unfamiliar with the individuals running for office to select judges, the state of Nevada puts at risk the integrity of its judicial system. Conclusion The mere fact that the American legal system allows attorneys to file motions to compel judges to recuse themselves is evidence that the system is not only interested in eliminating prejudice, but it is also genuinely concerned with the administration of “ justice for all, ” even if the occasional judge is not. Convincing a judge to excuse himself or herself from a case is a risky and complicated endeavor. An attorney who feels confident enough in his or her argument to file a motion to recuse must be absolutely sure they will obtain their desired objective; otherwise they stand to potentially offend the judge and cause him or her to become prejudicial. Furthermore, the practice of electing judges in the state of Nevada is a flawed ideology and it should be done away with. It is a system that in some ways encourages judicial prejudice and cheapens the state’s legal system. Nevada would be better off if its citizens allowed the governor to appoint judges under the careful oversight of the Nevada state legislature. An appointment system would help to ensure that qualified and experienced

individuals were appointed to the bench and costly embarrassing mistakes such as Judge Halverson aren't replicated in the future. Works Cited (2009). Guide to judiciary policy (vol. 2). Retrieved from website: <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> Abramson, L. (1994). Deciding recusal motions: Who judges the judges?. *Valparaiso University Law Review*, 28(2), 543-561. Retrieved from <http://scholar.valpo.edu/vulr/vol28/iss2/3> Finch, S. (2008, February 01). Money talks, says study of justices. Retrieved from http://www.tulanelink.com/tulanelink/electorappoint_08a.htm Flamm, R. (n. d.). Introduction to judicial disqualification. Retrieved from <http://www.cce-mcle.com/tests/ss6005a.htm> Hightower, K. (2012, August 29). George zimmerman judge, kenneth lester, ordered by court to disqualify himself . The Huffington post. Retrieved from http://www.huffingtonpost.com/2012/08/29/george-zimmerman-judge-lester_n_1841293.html Lee, T. (2012, August 01). Judge in george zimmerman case refuses to step down . The Huffington Post. Retrieved from http://www.huffingtonpost.com/2012/08/01/judge-george-zimmerman-case_n_1729103.html?utm_hp_ref=black-voices Manning, M. (2008, November 17). Judge elizabeth halverson permanently removed from bench. *Las Vegas Sun*. Retrieved from <http://www.lasvegassun.com/news/2008/nov/17/judge-elizabeth-halverson-permanently-removed-benc/> Pileggi, F. (2011, December). Delaware judge grants recusal motion on eve of trial. Retrieved from <http://www.insofcourt.org/content/default.aspx?id=6508> Press, A. (2011, June 13). Lawyers target gay marriage ruling by california judge. Retrieved from <http://www.foxnews.com>

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