FROM TRUMP'S RACE CHARGE TO SAN FRANCISCO'S MOST BITTER COURT DISQUALIFICATION BATTLE EVER: THE ETHICS OF FEDERAL DISQUALIFICATION MOTIONS

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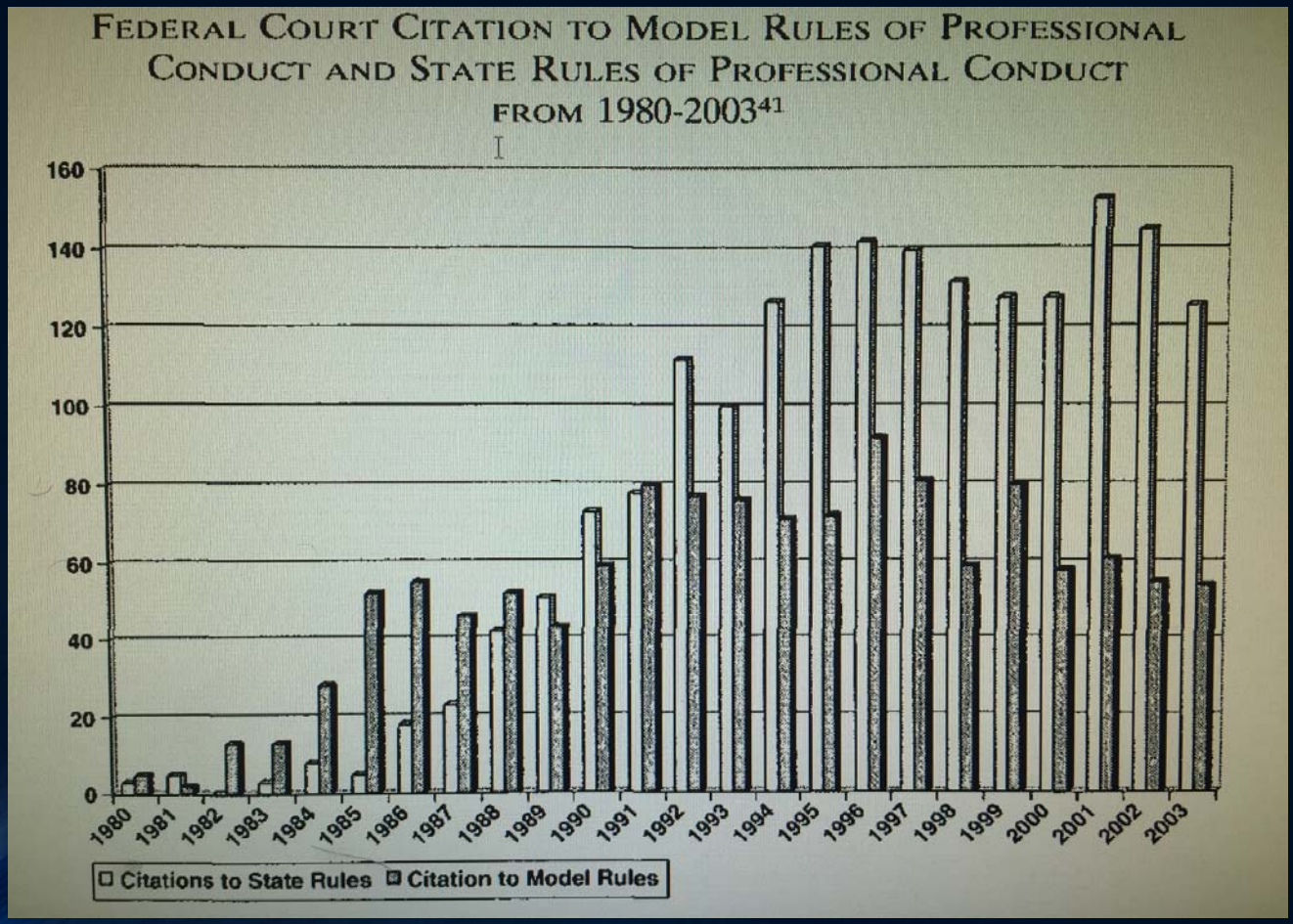
Pot Pourri of Governing Ethics Rules and Standards

- 28 U.S.C. §§ 144 & 455
- Cal. Rule Prof. Conduct 3-200, 5-120, 5-200 & Code of Conduct for U.S. Judges
- Major rule is built around this question: When would a reasonable person challenge the judge's impartiality?
- Attorney conduct (ethics) is not subject to one set of national standards. Patchwork of regimes.
  - State bar rules, ABA Model Rules of Prof. Responsibility, ABA Model Code of Professional Responsibility, Local Rules, Federal Court "inherent power," Individual Standing Orders
  - Contra: federal courts have very coherent set of national standards for other areas of substantive law: Fed.R.Evid., Fed.R.Civ.P., Fed.R.Crim.P.

Cacophony of Noise on Rules



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The Issues

- Dilemma for Practitioner: If you find yourself in a possible DQ situation, what standard may you be judged by for asserting DQ?
  - Out of control lawyer vs. zealous advocate line?
- Dilemma for Judge: Who judges the judge on a DQ motion?
- Dilemma for all: When would a reasonable observer fairly consider the judge's impartiality to be in question?

28 U.S.C. § 455

- DQ where "impartiality might reasonably be questioned"
- Major rule that distills: DQ for the appearance of partiality as viewed from the perspective of a reasonable (non-judge), thoughtful person.
  - Public perception policy
  - Outward facts that could be construed as bias avoid need to do subjective heart and mind inquiry
- Bias/Prejudice must stem for extra-judicial source (unless exceptional record evidence of bias from case)
- Close questions err on side of DQ
- Ethical dilemmas for practitioner:
  - Sufficient cause to levy the charge?
  - Blow-back? Balancing client interests and ethical obligations to client.

28 U.S.C. § 144

- Affidavit that judge "has a personal bias or prejudice either against [the affiant] or in favor of any adverse party."
- Same objective standard as 455.
- Rationale for extra-judicial source doctrine:

  "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task."

  Liteky v. United States, 510 U.S> 540, 550-51 (1994)

Cal. Rules of Prof. Responsibility

- 5-120 prohibits "extrajudicial statement that … will have a substantial likelihood of materially prejudicing an adjudicative proceeding."
- 5-200: "Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."
- 3-200 prohibits asserting a position "without probable cause and for the purpose of harassing or maliciously injuring any person."

ABA Model Code of Prof. Responsibility

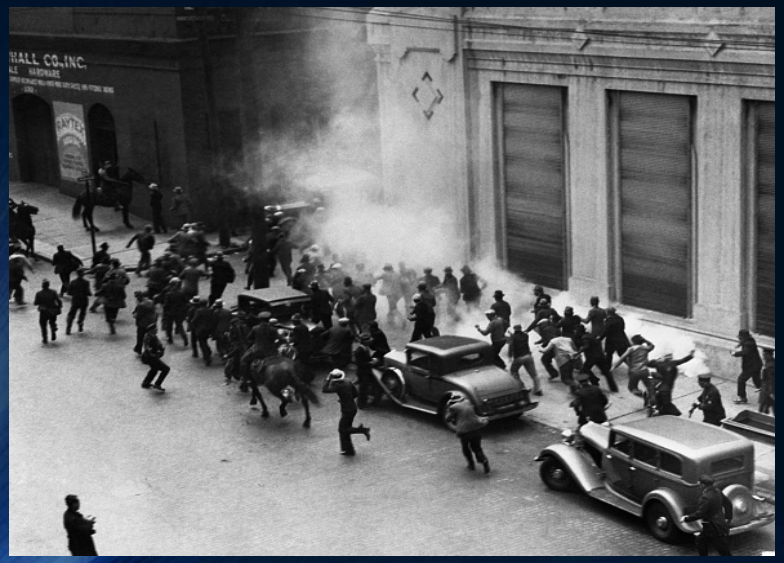
- A lawyer "shall not … [e]ngage in conduct that is prejudicial to the administration of justice." Disciplinary Rule 1–102(A)(5)
- "[i]n appearing as a lawyer before a tribunal, a lawyer shall not … [e]ngage in undignified or discourteous conduct which is degrading to a tribunal." Disciplinary Rule 7–106(C)(6)

Code of Conduct of United States Judges, Canon 2A

- "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"
- "avoid impropriety and the appearance of impropriety in all activities."

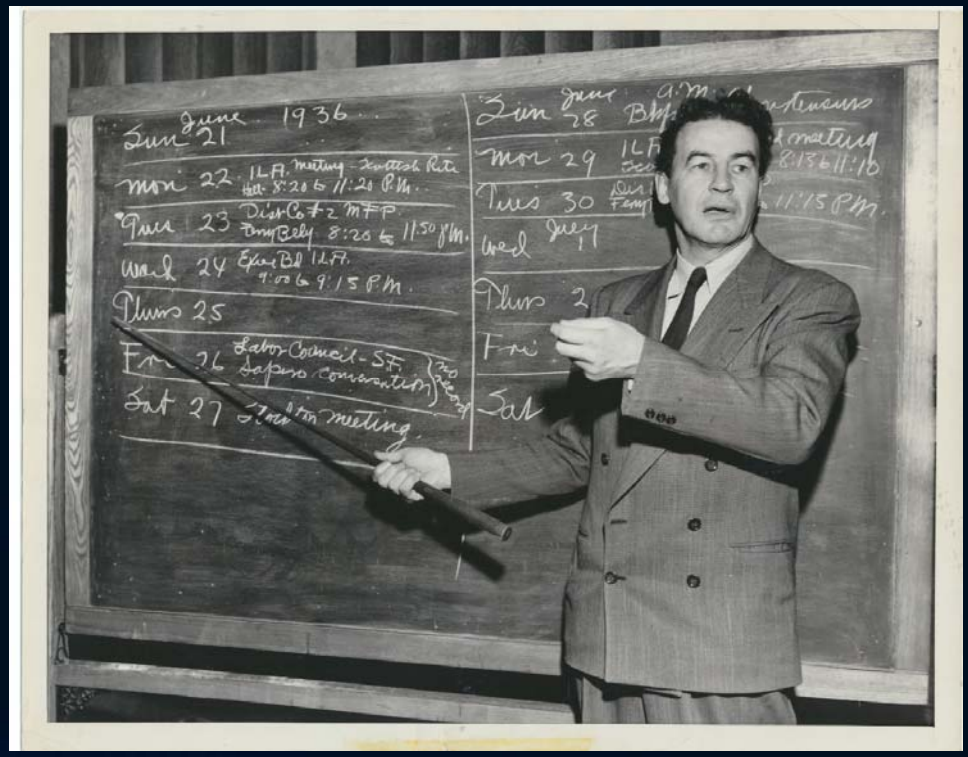
Explosions in San Francisco: The Harry Bridges Deportation Saga & Ethics of Disqualification

San Francisco 1934. Great angst over Great Depression and social and economic changes. Labor felt aggrieved. Explosive social setting. That time's "ism" was communism.



The Judge and the Lawyers

- Judge Harris and Vince Hallinan.
- Prior relationship
- Lawyer triggered DQ motion
  - 1st ethics question: Was it proper to so charge?
  - 2d ethics question: What should judge have done?



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Question 1: Was it proper to charge?

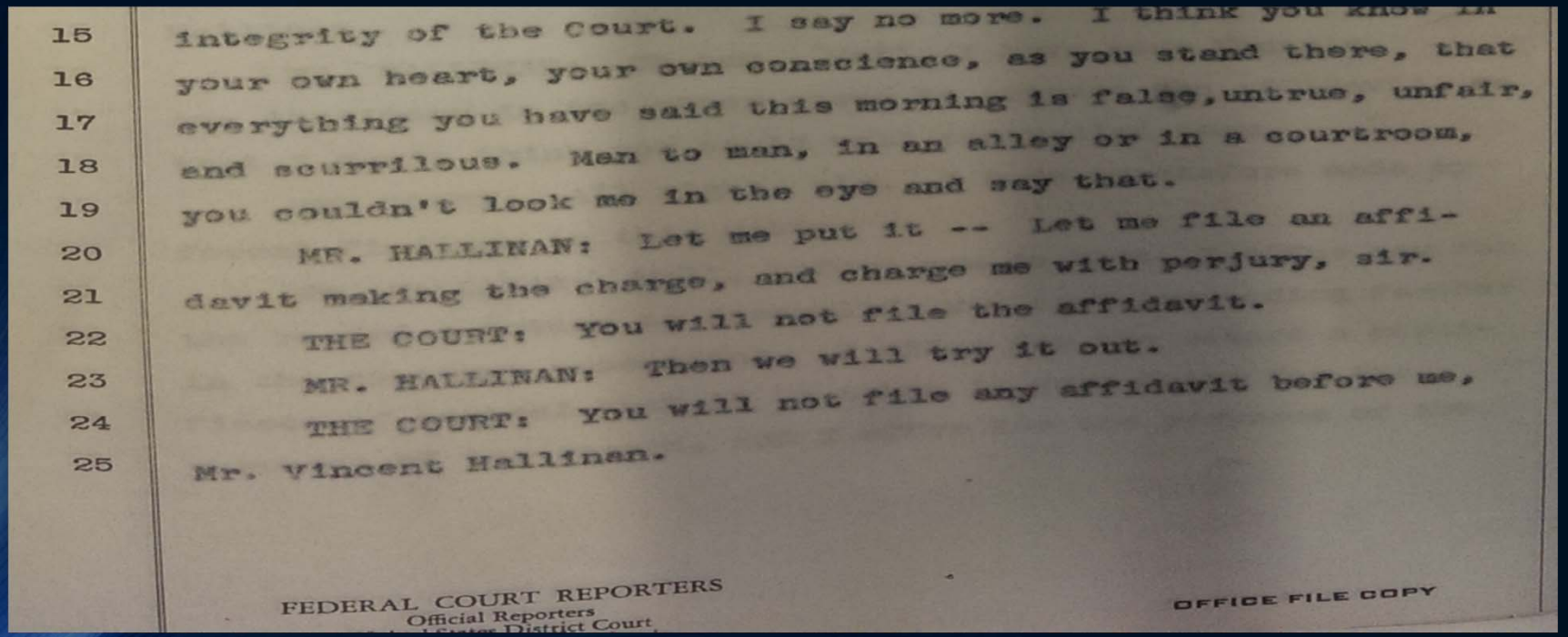
- Facts of a bias offered.
- Could a reasonable observer think Judge was biased based on those facts?
  - Yes but no slam dunk
  - Facts were concrete, not speculative

When HON. GEORGE B. HARRIS stated that he was about to find MR. HALLINAN in contempt of the Court, MR. HALLINAN arose and charged the Court with acting towards him upon the premise of a personal bitterness or hatred. MR. HALLINAN stated that HON. GEORGE B. HARRIS was and is a personal friend of one EUGENE AUREGUY, a conceded enemy of HALLINAN, and he stated that HON. GEORGE B. HARRIS had taken AUREGUY's part in a controversy occurring in the past between AUREQUY and HALLINAN and had urged HALLINAN in the privacy of his chambers as a (then) San Francisco Municipal Judge, to transfer $10,000 to EUGENE AUREGUY. He stated that HON. GEORGE B. HARRIS,

Question 2: What should judge have done?

- Facts of bias offered were 2-fold: Extra-record and in-record. Each trigger different analyses
  - Extra-record facts
    - Aureguy story.
  - In-record facts
    - A lawyer's belief that his case is being unfairly limited is not enough alone to show bias. Lawyer caught in angst of times and high emotion of most famous case of the day. But being hamstrung and then tying that to the judge's alleged prior comment is probably not an ethics violation under Model Rules or California Rules.
    - Obligation to client: line between zealous representation and damaging case because you infuriate judge.

Question 2: What did judge do?



integrity of the Court. I say no more. I think you know in your own heart, your own conscience, as you stand there, that everything you have said this morning is false, untrue, unfair, and scurrilous. Man to man, in an alley or in a courtroom, you couldn't look me in the eye and say that.

MR. HALLINAN: Let me put it -- Let me file an affidavit making the charge, and charge me with perjury, sir.

THE COURT: You will not file the affidavit.

MR. HALLINAN: Then we will try it out.

THE COURT: You will not file any affidavit before me, Mr. Vincent Hallinan.

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MR. HALLINAN: Well, I will file it with the clerk upstairs, your Honor. I am entitled to my rights in this court, too, and I am entitled to not be tried by a personal enemy on a contempt proceeding.

THE COURT: It will be stricken from the files.

Denied

to be weighed in juxtaposition. I suppose I am rather peculiar sort of a fellow. I can't harbor malice. I can't harbor the subject matter that Mr. Hallinan poured into this court today. All his statements, all those things, are untrue. He knew it. If Mr. Gladstein were available, I assume there would be no problem. He has represented this man in other matters, two in number.

Question 2 (cont.): What did judge *then* do?

- Sentenced Hallinan to 6 months for contempt of court.
  - No prior notice and hearing, just came out on bench and did it.
- Jury convicted.

THE COURT: The verdicts and each of them may stand recorded.

Ladies and gentlemen of the jury, I desire to say a few words to you. Not only has this case been the longest criminal trial in the history of these courts, but in addition it has been the most bitterly contested; and the length of the contest has been reflected in your deliberations and in the fervor and devotion that you have attached to your duties. In terms of discharging your obligations as jurors, I desire you and each of you to know, as well as your diligent foreman, Mr. Glenn Christensen, that you have evidenced an intelligent appreciation of the facts in the light of the legal principles applicable. You have finally found the golden truth shimmering in the fiery crucibles of this trial. Your deliberations have been marked by

Question 2 (cont.): What should lawyer have done?

- Did the lawyer go too far and trip his ethical obligations to client, or did the lawyer do exactly what he had to do for his theory of the case?
- Very hard questions in areas of law that are set to a angst backdrop–terrorism today– or areas of law that are very rich in policy for juries–statutory damages awards.

Post-Script to Ethics Dilemma

- Ninth Circuit affirmed conviction, but even then noted Judge Harris had been improper in some respects.
- Supreme Court reversed this conviction. Again!
- Hallinan served his sentence.

Ethics DQ Questions in Federal Court Today Are Subject to Same Standards Still

- 455 motions: when to file and not file? How not to trip ethics questions.
- Common Scenarios
  - (1) Judge's prior relationship with parties
  - (2) Judge's prior relationship with a witness
  - (3) Judge's prior relationship with lawyer
  - (4) Judge's public commentary on issues
  - (5) Lawyer behavior that engenders judicial animus

Scenario 1: Judge's prior relationship with parties or experiential connections

- Prior relationship may allow a judge to be DQ'd, but rarely compel it. Acquaintances alone not enough. If relationship too friendly/antagonistic, then DQ.
- Shared belief systems not enough.
  - *Case Study – Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002)
    - Judge same religion as defendants
    - Held: Judge having the same belief system as "associational bias" too tenuous to justify DQ
    - Ethics for counsel? Too far or ok?
- What about similar shaping experiences? [sexual abuse example, 246 F.2d 1092 (8th Cir. 2001)]
- Familial connections to witnesses/parties trigger DQ.
  - *Case Study – United States v. Toohey*, 448 F.3d 542 (2d Cir. 2006):
    - Sex harassment suit.
    - Judge about defendant: "he is an honorable man and I know he would never intentionally discriminate against anybody."
    - Held: met the objective test and DQ required.
    - Ethics for counsel? Too far or ok? Judge?

Scenario 2: Judge's prior relationship with witness

- Acquaintance or familiarity with a witness does not require DQ.
  - *Case Study – Fletcher v. Conoco Pipe Line*, 323 F3d 661 (8th Cir. 2003)*:*
    - Judge had been friend of fact-witness (lawyer) for 36 years.
    - Judge was client of witness law firm in current, unrelated matter
    - Held: did not overcome presumption of impartiality and no need to DQ.
    - *But see United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989) (Judge knew defense witness and judge expressed some concerns on record; DQ should have followed *then*)

Scenario 3: Judge's prior relationship with attorney

- Acquaintance or familiarity with a lawyer does not require DQ in general, but it depends upon level of intimacy. Close friends can be lawyers and not require DQ, but situationally can also require DQ if too much enmeshment.
  - *Case Study – United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985)
    - Judge was close friend of federal prosecutor.
    - Joint family vacation planned for after the trial that prosecutor was in.
    - Held: that level of friendship "unusual" and objective test required DQ.

Scenario 4: Judge's commentary on public issues

- Unusual level of judicial public commentary can require DQ, but balanced public statements will not require DQ.
- *Case study - United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993)
- Judge appeared on TV to address abortion protests and publicly said the protests were illegal. Judge then had the case. Refused to disqualify upon motion
- Held: DQ required.
- Ethics prism for Judge?

> "Together, these messages unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator."

- *But see United States v. Pitera*, 5 F.3d 624 (2d Cir. 1993) (Judge gave lecture to DEA/prosecutors on steps to take to increase prospects of convictions in narco cases, which lecture critiqued prosecutors also, and also spoke on other programs to criminal defense lawyers; Held: no DQ)

Scenario 5: Lawyer Behavior

- General Rule: A party cannot force disqualification by attacking the judge and then claiming that these attacks much have caused the judge to be biased.
- Strategic behavior to trigger DQ will not, and itself trips ethics lines.
- Flip-side: Complimentary public statements by lawyers about judges do not require recusal.

The Issue of Race and the Ethics of DQ Motions on Race-Charges

- General Rule: Charging race as a basis for recusal requires powerful evidence, and making a charge lightly is an ethics boomerang.
- *Case Study - MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) & 138 F.3d 33 (2d Cir. 1998).
  - Pltf lawyers involved in another political case related to Asian campaign finance in Clinton administration.
  - In *CIT,* Asserted Judge Chin could be biased because a President Clinton appointee and Judge Chin had been active in Asian-American legal initiatives, which initiatives they saw as politically adverse to to them in their other case.
    - Held: no basis for DQ.
    - Ethics Query?
      - Result: ethics violation under Model Rules

    "it is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background."

Race continued

- Judicial commentary on race in decisional process, whether sarcastic or not, triggers recusal requirements.
- *Case Study – In re Chevron USA, Inc.*, 121 F.3d 163, 166-67 (5th Cir. 1994)
- Mass tort claim by predominantly black neighborhoods against Chevron.
- African-American Judge made sarcastic comments about the race of experts being "caucasian" and rejected expert study; plaintiff and judge claimed it was sarcastic.
- Held:
  - "We perforce agree with Chevron that the challenged statements and comments are unfortunate, grossly inappropriate, and deserving of close and careful scrutiny and most serious consideration…it is totally unacceptable for a federal judge-irrespective of the judge's color-to make racially insensitive statements or even casual comments of same during the course of judicial proceedings. Such are not to be tolerated in any litigation and most decidedly are verboten in litigation in which racial or ethnic considerations are relevant to an issue before the court. When they occur, the risk of creating a public perception that the judge has a bias or prejudice which might affect the outcome crosses the proscribed threshold. This is especially true in a racially-charged case such as the instant one. Accordingly, here a reasonable person might indeed harbor doubts about the trial judge's impartiality and recusal would be appropriate under the terms of § 455(a)."
- Ethics Prism?

Race continued

- *Case Study – United States v. Franco-Guillen*, 196 Fed.App'x 716 (10th Cir. 2006)
- Guilty plea by Hispanic defendant; then moves to change plea.
- Judge: "I will not put up with this from these Hispanics or anybody else, any other defendants…I've got another case involving a Hispanic defendant who came in here and told me that he understood what was going on and that everything was fine and now I've got a 2255 from him saying he can't speak English."
- Held: DQ required.
- Ethics Prism? Canon 2A.
  - "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"
  - "avoid impropriety and the appearance of impropriety in all activities."

TRUMP

- Not a lawyer, the litigant.
- Note his lawyers said nothing.
  - Why?
- And Judge handled it by saying nothing also.
  - Why?

Ethics of Judging DQ Questions: Who Judges the Judge?

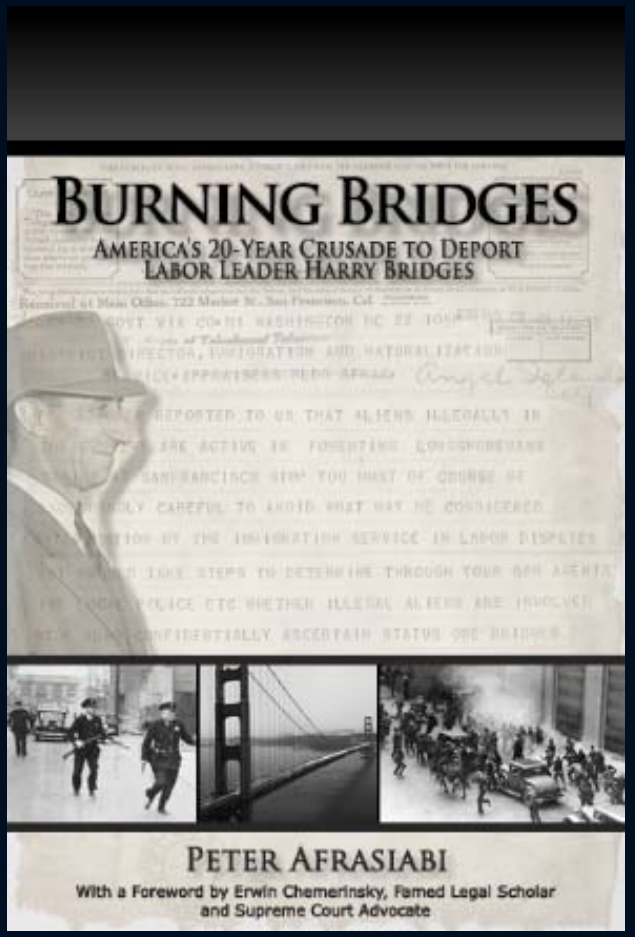
- Judicial Impartiality Standard from ABA's Model Code
- Premise of Law from Blackstone: "The law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."
- States differ on who decides: judge charged or another judge? Most states require it go to another judge.
- Federal standard: another judge.
- Twin polestars of over-arching policies must be kept in mind on both sides of the bench:

  (1) Public confidence requires judge are not just neutral but always perceived to be so,

  (2) System cannot be subjected to abusive attacks as a means of exploiting the impartiality requirement.

Conclusions

- Check your jurisdiction carefully given the absence of uniform standard
- Be very careful charging recusal in federal court
  - Difficult standard
  - Client's perception of damage to case
- If proceeding, couple Sections 455 and 144 together
- Must have very concrete facts so that you do not trip Professional Responsibility rules related to professional integrity in court statements.
- For Harry Bridges he then went through a 4th trial to deport him in federal court in 1955, having then spent almost 20 years in serial deportation proceedings.
  - He did not use Hallinan for that trial.



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