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Where External Reality Collides with Trial:

Judicial Disqualification Lessons from the Harry Bridges Cold War Trials

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The larger ecosystem that envelops a trial is often rancorous and emotional. From terrorism to police-shooting trials, the participants all have a heightened social and political sense of the case and where it stands in the broader climate. Considering this larger context is important today with the ongoing social-activist protests

and anti-Trump movements, all of which have funneled into extensive litigation. For trial participants, though, how the emotions tied to those movements are transported into the courtroom is critical to consider.

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This article addresses judicial disqualification and some ethical implications for lawyers and judges by examining one aspect of the trial record of the longest civil deportation battle in American history—the 20-year saga of four serial deportation trials brought against labor leader Harry Bridges alleging he was a Communist Party member. Modern disqualification examples involving race are addressed as a contemporary bookend.

— Governing Rules —

California law offers a free disqualification challenge to a judge regardless of any actual or perceived bias. (Code Civ. Proc., § 170.6.) The absence of even a good faith belief that the judge is biased is legally irrelevant in most circumstances. (*School Dist. of Okaloosa County v. Sup. Ct.* (City of Orange) (1997) 58 Cal.App.4th 1126, 1136.) But this tool must be used at the case's outset in direct calendar courts. (Code Civ. Proc., § 170.6, subd. (a)(2).)

California also offers a cause-based challenge, albeit less frequently employed. (Code Civ. Proc., § 170.1, subd. (a)(1)-(9).) Cause-based challenges invoke root ethics and disqualification questions. The standards governing cause-based challenges mirror federal standards under 28 United States Code sections 455 and 144, both of which incorporate the same basic objective test: Is there a basis upon which a reasonable person may conclude a judge's impartiality might be questioned? Section 455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

These rules stem from the principle that public confidence in the judicial system is critical. It is not enough that judges be impartial in fact, they must be perceived by the public to be impartial, always. The pivotal question is whether a reasonable member of the public, aware of all the facts, would fairly entertain doubts as to a judge's impartiality. (See, e.g., *Flier v. Superior Court* (1994) 23 Cal.App.4th 165.)

Ethics rules for lawyers that fold into this inquiry include rules 5-120, 5-200, and 3-200 of California's Rules of Professional Conduct. Rule 5-120 concerns trial publicity and prohibits a lawyer participating in a case from making an extrajudicial statement that "will

have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 5-200 requires that a lawyer presenting

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a case "not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." Rule 3-200 forbids a lawyer from asserting a position "without probable cause and for the purpose of harassing or maliciously injuring any person." Each of these patrols a lawyer's ability to levy charges against a judge.

But practitioners are not bound solely by state rules. Federal judicial decisions from the 1980s involving lawyer behavior more often cited the ABA Model rules than state rules. By the 1990s, this shifted, but still more federal decisions in the 2000s cited the ABA rules than in the early 1980s. (McMorrow, The *F(U)tility of Rules: Regulating Attorney Conduct in Federal Court Practice* (2004) 58 S.M.U. L.Rev. 3, 4-13.) This distills to a critical proposition: living right at the line of a state rule may not suffice for all purposes.

A final ethics rule governs judges. Canon 3B of the California Code of Judicial Ethics mandates that a judge "shall perform judicial duties without bias or prejudice" and Canon 2A requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Federal canons are similar.

The Harry Bridges Trial, — 1949-1950 — The First Two Trials.

Harry Bridges arrived in the United States in 1920 as a teenage sailor from Australia. By the early 1930s, Bridges, then a longshoreman, began speaking publicly about the need for a union, and his fellow workers listened to him. He led the Great Strike of 1934, from which a real union was born, with Bridges at its helm.

Immediately, Bridges was tarred as a Communist Party member, and these outcries triggered a deportation proceeding, under then-existing law. Long on drama, Bridges prevailed, but a new proceeding began, filled with more political and legal

intrigue. Bridges lost, but in 1945, the Supreme Court took the case and—by one vote—saved him. The lasting, powerful

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words belonged to Justice Murphy, who wrote in 1945: "This record in this case will stand forever as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution." (*Bridges v. Wixon* (1945) 326 U.S. 135, 157 (conc. opn. of Murphy, J).)

Harry Bridges then swore in as a citizen, making the then-required oath that he was not a member of the Communist Party. Two friends swore as his witnesses.

— The Third Trial —

The government then instituted a federal criminal perjury proceeding to prosecute Bridges and his witnesses. Judge Harris was assigned to the case, which was tried in 1949-1950 during the height of the Red Scare.

Bridges's defense lawyer, Vince Hallinan, mounted a two-pronged attack against Judge Harris. The first focused on extrajudicial facts of bias, and the second on intra-record allegations of bias. Each aspect triggers its own analysis under disqualification and ethics standards.

On the first ground, the extrajudicial facts alleged were: some years earlier, one Eugene had sued Hallinan and, Hallinan alleged, Judge Harris—at the time a state judge not assigned to the case but a friend of Eugene—brought Hallinan into his chambers and pressured him to settle; Hallinan refused; at trial, Judge Harris was a witness for Eugene; Hallinan prevailed at trial. (*United States v. Bridges* (Nov. 28, 1949) No. 32117-H, Bridges Affidavit in Support of Motion to Disqualify at pp. 11-12.)

On the second ground, here were the record facts: to defend the conspiracy charge, Hallinan tried to explain in his opening

statement the history of a counter-conspiracy by private interests working with certain officials to paint Bridges as a communist; Judge Harris found such a claim fantastical and denied Hallinan this theory; Hallinan ignored the ruling and pressed the issue, drawing sustained objections and adverse rulings; at the same time, Judge Harris refused to allow Hallinan to tell the jury that the government witnesses would be proven liars; after the government finished direct examination of its first witness, Hallinan's cross focused again on the witness's role as part of a coordinated government effort to knowingly paint Bridges a communist despite the prior two favorable adjudications; Judge Harris then adjudged the conspiracy claim to be absurd, to which Hallinan responded that the question belonged only to the jury; government lawyers then pushed for contempt, to which Hallinan retorted that the charge was an improper one to levy in front of the jury; Judge Harris said, "The statement made by counsel may well be within the realm of his province to make. I shall not instruct the jury to disregard it. … [Y]our persistent conduct … may well eventuate in the situation that counsel refers to … ." The next morning, before the jury was empaneled, Judge Harris found Hallinan in contempt, and disbarred and jailed him for six months. (*United States v. Bridges*, No. 32117-H, Trial Transcript at pp. 738-740 (Nov. 21, 1949), & pp. 491-574 (Nov. 17, 1949).)

Hallinan's conduct and charges raise two ethics questions, one for him and one for Judge Harris. Hallinan's charge of internal-case bias was not extrajudicial and not a basis to justify his disqualification. His refusal to heed the judge's orders, despite the judge's seeming improper curtailment of his defense theory or his cross-examination of witnesses, caused Hallinan to trip the ethics wires, as his conduct crossed the line of zealous advocacy into improper defiance.

In contrast, the Hallinan-Eugene-Harris charge against the judge was based on extrajudicial facts and gave rise to fair questions about the judge's impartiality. Yet, Judge Harris refused to disqualify himself when confronted with the allegations, instead musing on the record, "I suppose I am a rather peculiar sort of fellow. I can't harbor malice. I can't harbor the subject matter that Mr. Hallinan poured into this court today." (*United States v. Bridges*, No. 32117-H, Trial Transcript at p. 868 (Nov. 22, 1949).) At the same time, Judge Harris ordered Hallinan disbarred, imprisoned, and removed from the trial. Once the resulting pandemonium in the courtroom settled, Judge Harris stayed Hallinan's sentence, but the rancor remained throughout the four-month trial with many ongoing, remarkable battles between Hallinan and Judge Harris.

The jury convicted. The Supreme Court again reversed. (*Harry Bridges v. United States* (1953) 346 U.S. 209.) Judge Harris escaped reprimand. But Hallinan served six months in prison.

When a Race-Based — Disqualification Stick — Becomes a Boomerang

A more recent example of a charged environment is seen in *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.* (2d Cir. 1998) 138 F.3d 33. The trial judge was Judge Chin and the plaintiff's lawyers had recently been involved in campaign finance litigation in a different case charging the Clinton Adminis-

tration and some Asian Americans with finance misdeeds. But *CIT* had nothing to do with campaign finance. The lawyers' asserted basis for disqualifying Judge Chin was rooted in his race: he was Asian American, was appointed by President Clinton, and had been involved in Asian American bar organizations. Thus, they surmised in court filings, he was potentially biased. (*CIT, supra*, 138 F.3d at pp. 35-37.) But the stick they threw quickly became a boomerang.

Judge Chin found the race charge improper, removed the complaining lawyers as counsel, ordered them to never appear before him again, and further ordered them to show his decision to every other judge in that court whenever the lawyers appeared there. The Second Circuit unhesitatingly affirmed: "A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious …"; "[A]ppointment by a particular administration and membership in a particular racial or ethnic group are in combination not grounds for questioning a judge's impartiality. Zero plus zero is zero." *(CIT, supra*, 138 F.3d at pp. 37-38.)

The lesson of *CIT* applies equally to judges. A good example is *In re Chevron USA, Inc.* (5th Cir. 1994) 121 F.3d 163, 166-167, involving tort claims by persons from predominantly Black neighborhoods. The African-American judge made some seemingly sarcastic comments about the race of the author of some reports being "White" and rejected the offered studies, as well as other race-related quips. (*Id.* at p. 166, fn. 12.) The Fifth Circuit resoundingly rejected the judge's behavior: "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"; "[I]t 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." (*Id.* at p. 166.)

These cases show how race-based musings by judges or lawyers, whether springing from the emotion or passion of a particular case, the larger issues perceived to be at stake, or even just careless or thoughtless behavior, can easily trip an ethics rule.

— Conclusion —

The lasting scars from the Harry Bridges trial bear witness to three rules for lawyers and judges confronting disqualification. First, a lawyer is not permitted to create animus by flouting court orders, and then, when the judge is irate, use that to justify an assertion of bias. Second, reciprocally, a judge must not get wrapped up in the heady issues of the day or the frustrations borne from cases, diverting focus from the critical polestar of avoiding even the appearance of bias. Third, the *CIT/Chevron* examples remind all to avoid clouding professional responsibility obligations by importing wrongly into the courtroom the broader political/social implications that might surround a case.

Peter Afrasiabi is a partner at One LLP, and this article is based on his book, Burning Bridges: America's 20-Year Crusade to Deport Labor Leader Harry Bridges (Thirlmere Books 2017) with a Foreword by Dean Erwin Chemerinsky, www.BurningBridges Book.com. Peter can be reached at pafrasiabi@onellp.com.