NAACP Recusals

Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 4, 1984

MEMORANDUM TO THE CONFERENCE

Attached is a memorandum concerning my proposed action in cases involving the NAACP and the NAACP Legal Defense Fund. I earnestly seek your advice as to the propriety of this proposed action.

Thanks.

T.M.

This correspondence among the Justices is from box 1405, folder 14 of the Papers of Harry A. Blackmun, which are held in the Manuscript Division of the Library of Congress.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 4, 1984

MEMORANDUM

Since my appointment to the federal bench in 1961, I have routinely disqualified myself from all cases in which the NAACP has participated as a party or as an intervenor. Now, 40-odd years after I severed my ties with that organization, I believe that continued adherence to this self-imposed blanket rule is no longer necessary.[1] Accordingly, for the reasons set out below, I plan in the future not to recuse myself in cases in which the NAACP is a party or an intervenor, unless the circumstances of an individual case persuade me, as with all cases, to do otherwise.

My initial decision to disqualify myself in NAACP cases was a result of the personal and professional affiliation with the organization that I had developed before coming on to the federal bench. For at least a time after leaving the organization, I deemed it proper not to participate in any NAACP matters before the Court, both to quell any appearance of impropriety and to assure, prophylactically, that I did not decide cases involving issues that were in the office while I was there. The distancing effect of time convinces me that that rationale no longer is applicable, and that the basis for my blanket disqualification rule has therefore evaporated.

[1]From the mid-1940s, the NAACP had to operate separately from the NAACP Legal Defense Fund because of rulings by the Internal Revenue Service.

For more than 20 years, I have been wholly removed from the NAACP, the NAACP Legal Defense Fund and all other like organizations. In that time, I have become uninvolved in the internal workings of the organizations. I have not kept track of their priorities, their hiring practices, their personnel, their case load, their policy choices, or their trial strategies. I have, of course, not retained my membership or received any form of remuneration. Time therefore has erased the ties to the organizations that initially led me to adopt a broad disqualification policy. It is clear to me now that my participation henceforth would be proper as a general matter, under any ethical standard, and would be in keeping with the statutory rules and ethical canons on judicial disqualification.

I begin by considering issues raised by the special nature of the NAACP, which at once plays the role both of public policy advocate and counsel. In almost every instance in which NAACP cases now arrive in this Court, the association participates in order to further a certain conception of public policy in which its members, along with many others, have an interest.

There is of course nothing improper about participating in a case because of a sympathy with the public policy goals that one side advocates. The congruity between my views and those of the NAACP on matters of law and policy has never been the cause of my disqualification in NAACP matters, nor should it have been. Nor would it have been improper to participate because I held and announced particular views when I was affiliated with the NAACP. I agree with the analysis of this question offered by JUSTICE

REHNQUIST in Laird v. Tatum, 409 U.S. 824 (1972), and accepted by many commentators, that the mere fact that sitting judges made known, prior to their appointments, their views on what the law is or ought to be, does not and should not preclude them from deciding cases that raise those issues. That a litigant is aware that a judge has expressed a view contrary to that which the litigant would like the court to accept does not warrant disqualification, and never has.

Nor should my former affiliation with the organization preclude all participation today. When the organization's role is that of advocate, my relationship to the organization is analogous to a judge's relationship to the judge's prior law firm. There is no dispute that a judge generally may participate in a case in which counsel is a law firm with which the judge was affiliated, as long as the matter at hand was not in the office while the judge was at the firm. See Code of Judicial Conduct for United States Judges, Canon 3C(1)(b); Frank, Disqualification of Judges, 56 Yale L.J. 605, 630-631 (1947). This is of course especially true after a substantial passage of time. Indeed many of my predecessors have participated in such cases much sooner than will result from my decision to begin sitting in cases involving the NAACP. It is not precedent alone that supports this view; the rule also makes sense. If a judge has neither acted as a lawyer in a given controversy, nor practiced with a lawyer who served, during their association, as counsel in that controversy, there has been no opportunity to prejudge the facts of the case at hand. I have no doubt that I am capable of

judging each case in which the NAACP participates on the basis of its own facts.

Nor, surely, should the mere fact of a past affiliation forever bar a judge from hearing a case. Perhaps the leading commentator in this area, John P. Frank, has pointed out the absence of a convincing reason for a judge to follow a blanket rule of disqualification when former law partners argue before the judge. He argues that the basis for such disqualification can only be a belief "that the previous association creates an intimacy which causes the arguments of counsel to have excessive weight with the judge." Frank, Disqualification of Judges, 56 Yale L. J. 605, 631 (1947). Yet, he points out, it is almost impossible to draw any rational distinction between the relationship of a judge with a former partner and with a former faculty colleague, government associate, law clerk or old friend, ibid., and none of these prior relationships is, or necessarily should be, perceived either as reasonably creating an appearance of impropriety or requiring routine disqualification. Since there is no reasonable appearance of impropriety when such former associates appear before a court, there should not be one when former colleagues in law practice appear before it. Given the role the NAACP plays in the cases I have described, I find no logical distinction between former law partners and my former organizational affiliation. And after 40 years, I am fully satisfied that the intimacy of which Professor Frank speaks is no longer present.

Additionally, both the Code of Judicial Conduct and advisory

opinions to the Code make clear that judges and justices are free to hear argument, where former law firms are counsel, as long as the matter was not in the office when the judge was there, and as long as the judge no longer receives remuneration from the law firm he has left. Otherwise, the opinions speak in terms of a matter of months before it would be proper to hear the cases. My separation easily suffices to meet that standard. See Code of Judicial Conduct for United States Judges, Canon 3C(1); Advisory Committee on Judicial Activities, Advisory Opinion Nos. 56 and 62.

Finally, since my appointment, federal law has placed Supreme Court Justices within the scope of 28 U.S.C. § 455. The statute, enacted in 1974, contains a general, objective prohibition on participation in cases where impartiality might reasonably be questioned. 28 U.S.C. § 455(a). It then enumerates several specific grounds for disqualification, one of which, subsection (b)(1) of § 455, requires a judge to disqualify himself when "he has a personal bias or prejudice concerning a party." This latter provision bars <u>personal</u> bias or prejudice. As the foregoing makes clear, my participation in cases in which the NAACP is an intervenor or a party is not in all cases contrary to these principles. Under these rules it is well-accepted that neither personal bias nor prejudice is necessarily implicated when a judge or justice hears argument by a former law partner, or about a legal issue on which he has declared beliefs. Most significantly, the more than 40 years that have passed since I was associated with the NAACP should remove any perceived or

actual impropriety that might have attended my participation in cases involving the NAACP immediately after my appointment. And of course, in those instances where I believe my prior affiliation might create a reasonable appearance of impropriety, or otherwise warrant disqualification, I will not participate.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 5, 1984

Dear Thurgood:

I agree with your analysis on the NAACP matter.

I do not view this the same with a Justice's former partners, which may or may not call for recusal after 30 or more years.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 5, 1984

Dear Thurgood,

I fully agree with your proposed policy respecting participation in cases in which the NAACP and NAACP Legal Defense Fund are involved.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 5, 1984

Dear Thurgood,

I have no doubt about the soundness of your judgment about not disqualifying yourself in NAACP cases.

Sincerely yours,

Byron

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 5, 1984

Dear Thurgood:

I certainly feel that your analysis of action with respect to the NAACP and the NAACP Legal Defense Fund is an appropriate one.

Sincerely,

Harry

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 5, 1984

Dear Thurgood:

I approve of your proposal with respect to participation in cases in which the NAACP and the NAACP Legal Defense Fund are involved.

Sincerely,

Lewis

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 9, 1984

Dear Thurgood,

I certainly agree with your decision respecting participation in cases in which the NAACP and NAACP Legal Defense Fund are involved.

Sincerely,

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 5, 1984

Dear Thurgood:

Not only do I agree with the analysis in your memorandum, but I also agree that it was proper for Bill Rehnquist to participate in Laird v. Tatum. I think he received some undeserved flack for taking part in that case and I suppose the same may happen to you, but I am delighted that you have made the decision that you have because I think it is entirely appropriate for you to participate in NAACP cases.

Respectfully,

John

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 4, 1984

Dear Thurgood,

I agree completely with your proposed policy concerning your future participation in cases in which the NAACP and the NAACP Legal Defense Fund are involved. The time has long since passed which would suggest a blanket policy of disqualification.

Sincerely,

Sandra