



Spring 3-1-1995

## NOT HOLDING THE BALANCE NICE, CLEAR AND TRUE: THE RIGHT TO AN IMPARTIAL JUDGE

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### Recommended Citation

JOHN M. DeIPRETE, *NOT HOLDING THE BALANCE NICE, CLEAR AND TRUE: THE RIGHT TO AN IMPARTIAL JUDGE*, 7 Cap. Def. Dig. 47 (1995).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol7/iss2/18>

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In clear contrast stand the facts of *Weeks*. Not only did the same officer fail to read *Weeks* of his *Miranda* rights, but the second interrogation was centered on the very crime that had been the subject of the first interrogation. Although the Court found otherwise, these facts on their face appear to violate both the fourth and fifth prongs of the *Mosley* test. Yet once again we see not only an unwillingness by the Supreme Court of Virginia to disturb the findings of the trial courts but also a broad reading of the *Mosley* rule in order to preserve the integrity of the admission.

## V. PLEADING GUILTY AND DEFENSE STRATEGIES

Motions to suppress confessions must, of course, be made and litigated with all the skill at defense counsel's command. Although the

Supreme Court of Virginia has yet to find an inadmissible confession in a modern capital case, suppression motions may occasionally succeed at the trial court level and go unreported in appellate decisions. Nevertheless, defense strategy should be formulated with knowledge that, in a capital case, chances of success on suppression motions are slim to none. This makes it particularly important that a plea of guilty not be entered in a capital case absent an assurance that the sentence will not be death.<sup>69</sup> In the event of a death sentence, such a decision to plead guilty drops a number of potentially life-saving eggs from the appellate basket.<sup>70</sup> As has been demonstrated in this article, if the only egg left is review of the admission of a confession, then the basket in Virginia is virtually empty.

## NOT HOLDING THE BALANCE NICE, CLEAR AND TRUE: THE RIGHT TO AN IMPARTIAL JUDGE

BY: JOHN M. DeIPRETE

### I. INTRODUCTION

The vast majority of trial judges in the Commonwealth of Virginia are competent individuals who impartially and diligently perform the duties of their judicial office.<sup>1</sup> However, as is true of any large group of professionals, one will always encounter some who fail to uphold the standards of their profession. It is those few that this article intends to address.

The duty to remain impartial is perhaps the most important responsibility of the trial judge. This not only requires that the judge be impartial in fact, but that he or she appears unbiased.<sup>2</sup> Perhaps because of the inherently inflammatory nature of many capital murder trials, this responsibility is sometimes abdicated. Prosecutorial favoritism, which can range from subtle remarks to outright harassment of defense witnesses, is one manifestation of the problem. For the defense attorney, combating such bias is not only difficult but perilous, as most judges do not appreciate the suggestion that they might be anything less than neutral. This article provides suggestions for the defense attorney faced with a biased judge and is intended to serve as an overview of the relevant state and federal authority addressing the issue of judicial bias and disqualification.

Part II will examine the federal constitutional right to an impartial judge, Part III the constitutional and ethical standards for recusal in Virginia, Part IV the administrative remedy available in Virginia through the Judicial Inquiry and Review Commission, and Part V the federal statutory guidelines governing recusal. Finally, Part VI will discuss the various strategies and options available to defense counsel faced with a biased judge.

<sup>1</sup> For example, circuit court judges in small, rural Buckingham County, expressing doubts about the ability of the defendant to receive a fair trial before the sitting judges, voluntarily requested the Supreme Court of Virginia appoint an outside trial judge to preside over the penalty phase of a capital murder trial. The judges stated that they were "so situated in respect to this case as in their opinion to render it improper that they should preside . . ." *Commonwealth v. Tate*, CR-744 (Cir. Ct. of Buckingham County Jan. 27, 1995).

<sup>2</sup> Nonverbal behavior can pose a serious threat to judicial impartial-

### II. DUE PROCESS AND THE RIGHT TO AN IMPARTIAL JUDGE

A fair trial is a basic requirement of due process, guaranteed by both the Sixth and the Fourteenth Amendments to the United States Constitution. A fair trial requires that a neutral and detached judge preside over the proceedings.<sup>3</sup> Just as the defendant's right to a jury trial encompasses the right to an impartial jury, a defendant has a constitutional right to an impartial judge. As Justice Black explained:

Fairness . . . requires an absence of actual bias in the trial of cases. [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome.<sup>4</sup>

This standard found its origins in *Tumey v. Ohio*,<sup>5</sup> where a unanimous Court held that due process of law is violated when the liberty or property of a defendant is subject "to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."<sup>6</sup> In *Tumey* the judge was compensated by fines generated from convictions. Even though the evidence clearly showed that the defendant was guilty, this was held not to preclude his complaint that he was denied due process.<sup>7</sup>

In *Ward v. Village of Monroeville*<sup>8</sup> the Court reaffirmed *Tumey*, stating that

ity. See Note, *Judges NonVerbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 Va. L. Rev. 1266 (1975).

<sup>3</sup> In *Chapman v. California*, 386 U.S. 18, 24 (1967), the right to an impartial judge was one of three rights designated as so basic to a fair trial that its infringement could never be treated as harmless error.

<sup>4</sup> *In Re Murchison*, 349 U.S. 133, 136 (1955).

<sup>5</sup> 273 U.S. 510 (1926).

<sup>6</sup> *Id.* at 523.

<sup>7</sup> *Id.* at 535.

[Every procedure] which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him **not to hold the balance nice, clear and true** between the state and the accused [denies . . . due process of law.]<sup>9</sup>

Here the petitioner was forced to stand trial for traffic offenses before a mayor who was responsible for village finances. The mayor's court, however, provided a substantial portion of the village funds through fines, forfeitures costs and fees.<sup>10</sup> The Court held that this situation denied Ward a trial before a disinterested and impartial judicial officer as guaranteed by the due process clause.<sup>11</sup>

Impartiality may also be lacking and due process violated where the judge is personally embroiled in the matter, as in a contempt proceeding. In *Mayberry v. Pennsylvania*,<sup>12</sup> a criminal defendant repeatedly insulted the trial judge during the trial and at the conclusion of the trial was pronounced guilty of eleven contempt charges and sentenced to eleven to twenty-two years.<sup>13</sup> The United States Supreme Court vacated the judgment of contempt, noting that as the separate outbursts occurred, the judge "could with propriety, have instantly acted, holding [the defendant] in contempt, or excluding him from the courtroom."<sup>14</sup> However, when the judge waits until the end of the trial, due process requires that "another judge, not bearing the sting of these slanderous remarks, and having the impersonal authority of the law,"<sup>15</sup> sit in judgment of the defendant's conduct.

Similarly, in *Taylor v. Hayes*<sup>16</sup> the Court held that another judge should have been substituted in order to dispose of contempt charges against defense counsel where the record showed that "marked personal feelings were present on both sides"<sup>17</sup> and that marks of "unseemly conduct [had] left personal stings."<sup>18</sup> Finally, in *Johnson v. Mississippi*<sup>19</sup> the Court stated that a contempt proceeding held at the end of a trial should have been conducted by another judge because the trial judge "immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that."<sup>20</sup>

Counsel should note, however, that involvement in prior proceedings with a defendant, without more, does not rise to the level of a due process violation unless there is direct bias present. As the Supreme Court explained in *Withrow v. Larkin*:<sup>21</sup>

<sup>8</sup> 409 U.S. 57, 60 (1972).

<sup>9</sup> *Id.* at 60, quoting *Tumey* at 532. (emphasis added).

<sup>10</sup> *Id.* at 57.

<sup>11</sup> *Id.* at 60.

<sup>12</sup> 400 U.S. 455 (1971).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 463.

<sup>15</sup> *Id.* at 466.

<sup>16</sup> 418 U.S. 488 (1974).

<sup>17</sup> *Id.* at 503.

<sup>18</sup> *Id.*

<sup>19</sup> 403 U.S. 212 (1971).

<sup>20</sup> *Id.* at 215.

<sup>21</sup> 421 U.S. 35 (1975).

<sup>22</sup> *Id.* at 56.

<sup>23</sup> 409 U.S. 95 (1972).

<sup>24</sup> *Id.* at 96.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 98.

<sup>27</sup> *Id.*

<sup>28</sup> See *Anderson v. Warden*, 696 F.2d 296 (4th Cir. 1982) (holding that in a state prosecution for felony murder, the trial judge's conduct in openly and successfully pressing the defendant's two key alibi witnesses

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence.<sup>22</sup>

An important expansion of the due process theme came with *Webb v. Texas*,<sup>23</sup> a case that addressed prejudicial judicial conduct towards defense witnesses and how such conduct might deprive a defendant of due process. Here the Court was faced with a trial judge who gratuitously singled out the sole defense witness for a lengthy admonition on the dangers of perjury. Instead of advising the witness of his right to refuse to testify and of the necessity to tell the truth, the judge implied that he expected the witness, who had a prior criminal record and was serving a prison sentence, to lie on the stand.<sup>24</sup> The trial court then went on to assure the witness that if he lied he would be prosecuted and probably convicted for perjury, and that any sentence for that conviction would be added to his present sentence, thus impairing his chances for parole.<sup>25</sup>

The Court held that in this case, such threatening remarks effectively drove the witness off the stand and deprived the defendant of due process.<sup>26</sup> Failure to object by the defendant was not considered a waiver of the defendant's rights.<sup>27</sup> Unlike the previous due process cases, *Webb* did not require that the judge have a direct, substantial pecuniary interest in the matter before him. Nor did it require that the judge have a personal interest in the outcome of the case. Instead, the due process violation was based on the fact that the defendant was denied the right to offer the testimony of his sole witness.

While *Webb* on its facts is subject to narrow interpretation because the witness driven from the stand was the defendant's sole witness, a broader principle involving prejudicial conduct by a judge in front of the jury can be extracted from the case. In *Webb* the jury had been temporarily excused and did not view the judge's admonishment of the defense witness. If the jury witnesses such an outburst by the judge, defense counsel should argue that such harassment discloses the bias of the judge, invades the province of the jury, and prejudices the accused.<sup>28</sup>

to change their testimony interfered with the defendant's Sixth Amendment right to call witnesses in his behalf and to effective assistance of counsel and his Fourteenth Amendment right to a fair trial); and *United States v. Cassiagnol*, 420 F.2d 868, 879 (4th Cir. 1970) (exhaustive questioning of defendant and repeated interruption of defense counsel during trial and summation held to be reversible as it deprived defendant a fair trial; it is incumbent on the judge to conduct himself impartially, as constant or persistent interruption of defense counsel may have the effect of contaminating the jury's verdict by indicating the judge's evaluation of the weight of the evidence and the merits of the defense).

<sup>29</sup> 478 U.S. 570 (1986). See also *Concrete Pipe v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993). In *Concrete Pipe* the Court was faced with the question of whether the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) denied the employer due process. The MPPAA requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the plan. The MPPAA also requires that withdrawal liability be assessed by the plan sponsor, and any determination made by the sponsor is presumed correct. In holding that the MPPAA did not violate the due process clause and deny *Concrete Pipe* an impartial adjudicator, the Court, citing *Ward* and *Tumey*, reaffirmed its belief that due process requires a neutral and detached magistrate and observed that :

More recently, the due process rationale was reaffirmed in *Rose v. Clark*.<sup>29</sup> In *Rose* the Court's main concern was to reaffirm the "harmless error" doctrine, first enunciated in *Chapman v. California*.<sup>30</sup> In doing so the Court reaffirmed its belief that the "harmless error" doctrine does not apply to certain constitutional errors that necessarily render a trial fundamentally unfair. The Court cited four examples of errors that could never be harmless.<sup>31</sup> Reasoning that adjudication by a biased judge can never be harmless as it aborts the basic trial process, the Court made clear that the state "must provide a trial before an impartial judge. Without [this] basic protection[], a criminal trial cannot reliably serve its function . . . and no criminal punishment may be regarded as fundamentally fair."<sup>32</sup>

### III. VIRGINIA'S RECUSAL STANDARD

#### A. The Due Process Standard in Virginia

Virginia has not adopted an expansive view of the federal constitutional standard. Apparently the Supreme Court of Virginia has not addressed the issue. However, in *Welsh v. Commonwealth*<sup>33</sup> the Court of Appeals of Virginia stated that "as a constitutional matter, due process considerations mandate recusal only where the judge has 'a direct, personal, substantial, pecuniary interest' in the outcome of a case."<sup>34</sup> The court went on to acknowledge that in some cases bias may be so pervasive as to offend due process, but "only in the most extreme of cases would disqualification on this basis be constitutionally required."<sup>35</sup> The court then stated that "matters of kinship, personal bias, state policy [and] remoteness of interest, would seem generally to be matters of legislative discretion."<sup>36</sup>

The decision in *Welsh* places a heavy burden on defense counsel to make a showing of pervasive bias. More importantly however, *Welsh* acknowledged that due process grounds for recusal exist if bias, whatever its form or source, prejudiced the outcome of the case.

#### B. Canons of Judicial Conduct for the State of Virginia<sup>37</sup>

The Canons of Judicial Conduct for the State of Virginia are the ethical guidelines used by both the Judicial Inquiry and Review Commission<sup>38</sup> and the Supreme Court of Virginia to regulate judicial conduct. The Canons of Judicial Conduct are similar to the Canons of the Virginia Code of Professional Responsibility in that they are precatory rather than

mandatory, using "should" instead of "shall." The permissive nature of the Canons of the Virginia Code of Professional Responsibility is explained in the Preamble: "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers . . . The Disciplinary Rules, unlike the Canons . . . are mandatory in character . . ." <sup>39</sup> As adopted in Virginia, the Canons of Judicial Conduct have no such clarifying statement,<sup>40</sup> but it is not difficult to conclude that the Canons are intended to be aspirational in character, rather than mandatory.

In November 1989, the American Bar Association, responding to criticism of the 1972 Model Code of Judicial Conduct, released the final draft of a new code of judicial conduct. This draft, known as the Model Code of Judicial Conduct (1990), contained a Preamble which made clear the intention to impose mandatory, binding obligations upon judges, "the violation of which can result in disciplinary action."<sup>41</sup> The language of Canons 1-9 was also made obligatory, as "should" was changed to "shall." Virginia has not adopted these revisions.

Most relevant to the issue of judicial bias is Canon 3, which states that "A Judge Should Perform the Duties of His Office Impartially and Diligently."<sup>42</sup> Canon 3(A)(1) states that "a judge should be faithful to the law . . . He should be unswayed by partisan interests, public clamor, or fear of criticism."<sup>43</sup>

Canon 3 also addresses the issue of disqualification. Canon 3(C)(a) states, "A judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>44</sup> In interpreting Canon 3 the Court of Appeals of Virginia apparently ignored the above-quoted standard and instead stated that "[i]n Virginia, whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'" <sup>45</sup> The determination of this matter is left to the reasonable discretion of the trial court.<sup>46</sup> Clearly this standard is more onerous for defense counsel than the one set out in Canon 3(C)(a).

The *Welsh* court proceeded to state that the fact that a trial judge harbors political views, religious persuasion or values that are in direct opposition to those of the defendant does not, standing alone, constitute a basis for recusal.<sup>47</sup> "Even when circumstances create an appearance of bias, unless the conduct of the judge is shown to have affected the outcome of the case, the conviction will not be reversed, even though the judge may have infringed an ethical duty imposed by the Canons of Judicial Conduct."<sup>48</sup>

[J]ustice . . . must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

*Id.* at 2277.

<sup>30</sup> 386 U.S. 18 (1967).

<sup>31</sup> 478 U.S. at 576-77.

<sup>32</sup> *Id.* at 577-78.

<sup>33</sup> 14 Va. App. 300, 416 S.E.2d 451 (1992).

<sup>34</sup> 14 Va. App. 300, 314, 416 S.E.2d 451, 459 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)) (emphasis added).

<sup>35</sup> 416 S.E.2d at 459 (citing *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986))).

<sup>36</sup> 416 S.E.2d at 459 (citing *Aetna Life Ins. Co.*, 475 U.S. at 820 (quoting *Tumey*, 273 U.S. at 523)).

<sup>37</sup> The Canons of Judicial Conduct for the State of Virginia became effective on July 1, 1973, and are based on the Model Code of Judicial Conduct (1972), which has been adopted in whole or in part by forty-

seven states, the District of Columbia and the Federal Judicial Conference.

<sup>38</sup> See Part IV *infra*.

<sup>39</sup> Virginia Code of Professional Responsibility, Preamble, Rules of S. Ct. of Va., Pt. 6, § II (emphasis added).

<sup>40</sup> The Model Code of Judicial Conduct (1972) contains a Preface that states that "[t]he canons and text establish mandatory standards unless otherwise indicated." Virginia did not adopt this Preface.

<sup>41</sup> Preamble, Model Code of Judicial Conduct (1990).

<sup>42</sup> Va. Sup. Ct. R., Pt. 6, § III, Canon 3.

<sup>43</sup> Canon 3(A)(1) (emphasis added).

<sup>44</sup> Rules of the Supreme Court of Virginia, Pt. 6, § III, Canon 3C(a) (emphasis added).

<sup>45</sup> *Welsh* at 459, quoting *Justus v. Commonwealth*, 222 Va. 667, 673, 283 S.E.2d 905, 908 (1981).

<sup>46</sup> *Terrell v. Commonwealth*, 12 Va. App. 285, 403 S.E.2d 387 (1991).

<sup>47</sup> *Welsh* at 461.

<sup>48</sup> *Id.* (emphasis added).

The *Welsh* standard can best be explained as an attempt to limit the rule announced by the Supreme Court of Virginia in *Stamper v. Commonwealth*.<sup>49</sup> In *Stamper*, the court stated that a judge, in exercising his or her reasonable discretion in determining whether he or she possesses such bias or prejudice as would deny a party a fair trial, must not only consider the true state of his impartiality, but also the public's perception of his or her fairness, so that public confidence in the integrity of the judicial system is maintained.<sup>50</sup> This standard effectively tracks the "might reasonably be questioned" language of Canon 3(C)(a).

In attempting to disqualify a judge, defense counsel should focus on the language of Canon 3(C)(a) requiring a judge to recuse himself when his impartiality might reasonably be questioned. The *Stamper* court's focus on public perception of the judge's fairness and public confidence in the integrity of the judicial system should also be stressed. Finally, counsel should attempt to make a showing that the conduct of the judge affected the outcome of the case, thereby requiring recusal and reversal under both the *Welsh* and federal due process standards.

A related line of Virginia cases address specific prejudicial conduct by the judge in view of the jury, such that the defendant is denied a fair and impartial trial. Generally a judge in a trial of a case before a jury should abstain from expressing by word, deed or otherwise, his personal views upon the weight or quality of the evidence. Expressions of opinion, remarks, or comments upon the evidence which have a tendency to indicate judicial bias, especially in criminal cases, are regarded as invading the province of the jury and are prejudicial to the accused.<sup>51</sup>

When such bias has taken the form of aggressive interrogation of the defendant it has been held to be reversible error.<sup>52</sup> Given that juries in criminal cases give great weight to the words and conduct of the trial judge, any disclosure of bias by the judge invades the province of the jury and prejudices the accused.<sup>53</sup> Similarly, remarks of the court upon overruling an objection of the defendant that were calculated to leave the jury under the impression that the court shared the views of the Commonwealth's attorney have been held to be reversible error.<sup>54</sup>

In order to make a compelling showing of prejudicial judicial conduct under *Webb* and its Virginia progeny, counsel must obviously make a record. This may entail voir dire of the judge upon a recusal or mistrial motion and certainly includes getting rulings and comments on the record, including in their entirety exchanges in chambers.

#### IV. JUDICIAL INQUIRY AND REVIEW COMMISSION

Article VI, Section 10 of the Constitution of Virginia created the Judicial Inquiry and Review Commission (Commission) in 1971.<sup>55</sup> Section 10 directs the General Assembly to create a commission consist-

ing of members of the judiciary, the bar, and the public "vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge."<sup>56</sup> Enacted pursuant to Article VI, Section 10, Virginia Code sections 2.1-37.1 to -37.18 outline the powers and duties of the Commission, which are essentially those described in Article VI, Section 10.<sup>57</sup>

A party who wishes to file a complaint of judicial misconduct with the Commission should do so in a letter explaining the alleged breach of ethics. The Commission is then required to investigate these charges,<sup>58</sup> the main purpose being the determination of whether the judge violated the Canons of Judicial Conduct. At this point, the judge may or may not be notified of the investigation, and the investigation may or may not include a formal hearing or informal conference.<sup>59</sup>

After an investigation has been concluded the Commission may either dismiss the charges, call the judge in for an "informal conference", or notify the judge that his presence is required at a formal hearing.<sup>60</sup> An "informal conference" is a meeting between the judge and the Commission (one or more of its members) to discuss alleged improper conduct. The purpose of this meeting is to discuss informally the allegations of misconduct and possible solutions, and the judge may be represented by counsel. If the matter is not resolved at the informal conference, the Commission may give the judge notice of a formal proceeding. It should be noted, however, that granting an informal conference is entirely in the discretion of the Commission,<sup>61</sup> and it may proceed directly to a formal hearing without first holding an informal conference.

The purpose of the formal hearing is to determine whether a judge has violated the Canons of Judicial Conduct and, if so, to determine what sanctions should be imposed.<sup>62</sup> If the Commission finds the charges well founded and of sufficient gravity to constitute the basis for retirement, censure or removal, it will then file a complaint against the judge with the Supreme Court of Virginia,<sup>63</sup> which has the power to retire, censure, or remove a judge.<sup>64</sup>

The Commission may find that the charges, while well-founded, are not of sufficient gravity to constitute the basis for retirement, censure or removal. In this case the Commission may summon the judge and advise him of its findings. The charges will then be removed from the Commission's docket but may still be considered with any future charges against the judge.<sup>65</sup> In the alternative, the Commission may place the judge on a period of supervisory probation, the violation of which will be grounds for a new charge for failure to cooperate with the Commission.<sup>66</sup> It should also be noted that the Commission can take any of the foregoing steps after an informal conference with the judge, provided the judge consents to such actions.<sup>67</sup>

<sup>49</sup> 228 Va. 707, 324 S.E. 2d 682 (1985).

<sup>50</sup> 228 Va. at 714, 324 S.E.2d at 686 (emphasis added).

<sup>51</sup> *Spear v. Commonwealth*, 213 Va. 599, 194 S.E.2d 751 (1973).

<sup>52</sup> *Goode v. Commonwealth*, 217 Va. 863, 234 S.E.2d 239 (1977).

<sup>53</sup> *Id.*

<sup>54</sup> *McLane v. Commonwealth*, 202 Va. 197, 116 S.E.2d 274 (1960).

<sup>55</sup> Article VI, § 10, Constitution of Virginia reads: "Disabled and unfit judges. The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge."

<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> See Va. Code Ann. § 2.1-37.4 (1990): "The Commission is hereby vested with the power, and it shall be its duty, to investigate charges arising . . . which would be the basis for retirement, censure or removal of a judge under § 10 of Article VI of the Constitution . . ."

<sup>58</sup> Va. Code Ann. § 2.1-37.4 (1990).

<sup>59</sup> Rule 2(H), Rules of the Judicial Inquiry and Review Commission.

<sup>60</sup> Rules of the Judicial Inquiry and Review Commission.

<sup>61</sup> Also significant is the fact that informal conferences are not governed by the Rules of the Commission.

<sup>62</sup> Rule 2(D). At this point in the process, counsel for the Commission presents the case against the judge, who is represented by his own counsel.

<sup>63</sup> Rule 14(A)(2). See also Va. Code Ann. § 2.1-37.4 (1990); Article VI, § 10, Constitution of Virginia. Since its inception in 1971, the Commission has seen fit to take such action before the Supreme Court of Virginia on only six cases. Five cases resulted in censure, and one in removal.

<sup>64</sup> Constitution of Virginia, Article VI, § 10.

<sup>65</sup> Rule 14(A)(4).

<sup>66</sup> *Id.*

<sup>67</sup> Rule 14(B).

## V. 28 U.S.C. SECTION 455

With the recent passage of the Violent Crime Control and Law Enforcement Act of 1994,<sup>68</sup> an increase in federal capital trials is imminent.<sup>69</sup> Recusal at the federal level is governed by 28 U.S.C. § 455,<sup>70</sup> requiring disqualification of biased or prejudiced judges.<sup>71</sup> Section 455 applies to any "justice, judge, or magistrate of the United States."<sup>72</sup> The standard for disqualification, set out in section 455(a), requires that the judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned. In addition to this broad objective standard, section 455 specifies five situations where a judge must disqualify himself. The first situation, mentioned in subsection (b)(1), involves personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts. The other four situations deal with conflicts of interest arising from previous involvement with the case in private practice,<sup>73</sup> previous involvement with the case through governmental employment, financial or other substantial interest in the outcome of the case,<sup>74</sup> and familial relationship to any party, lawyer or witness to the proceeding.<sup>75</sup>

Section 455 was most recently interpreted in *Liteky v. United States*,<sup>76</sup> where the petitioners were charged with wilful destruction of federal property.<sup>77</sup> The indictment alleged that they had committed acts of vandalism at Fort Benning, Georgia, apparently in protest of United States government involvement in El Salvador.<sup>78</sup> Before their trial in federal district court the petitioners had moved to disqualify the district

<sup>68</sup> Pub. L. No. 103-322, Title VI, 108 Stat. 1796, 1995 (to be codified as amended in scattered sections of 8, 18 and 21 U.S.C.).

<sup>69</sup> See Morgan, *The "New and Improved" Federal Death Penalty: A Brief Guide*, Capital Defense Digest, this issue.

<sup>70</sup> 28 U.S.C. § 144 (1988), which will not be discussed in this article, allows a party in a district court proceeding to file an affidavit stating that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party. If the affidavit is timely and sufficient another judge will be assigned to hear the case.

<sup>71</sup> 28 U.S.C. § 455 (1988) reads in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

<sup>72</sup> 28 U.S.C. § 455 (a) (1988).

<sup>73</sup> 28 U.S.C. § 455 (b)(2) (1988).

<sup>74</sup> 28 U.S.C. § 455 (b)(3) (1988).

<sup>75</sup> 28 U.S.C. § 455 (b)(5) (1988).

<sup>76</sup> 114 S. Ct. 1147 (1994). See also *U.S. v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984) (objective standard designed to foster actual impartiality and appearance of impartiality. The question is whether or not judge abused his discretion; bias must be personal, not judicial; denial of recusal is not an abuse of discretion if complaint is merely based on judge's rulings in instant case or related cases, or attitude derived from his experience on the bench.).

<sup>77</sup> 114 S. Ct. at 1147.

<sup>78</sup> *Id.* at 1151.

<sup>79</sup> *Id.* at 1150.

judge pursuant to 28 U.S.C. § 455(a).<sup>79</sup> Their motion relied on events that had occurred during and immediately after an earlier trial involving a similar offense before the same district judge.<sup>80</sup>

The petitioners claimed that recusal was required in the present case because the judge had displayed impatience and animosity toward them and their beliefs.<sup>81</sup> The district judge denied their disqualification motion, stating that matters arising from judicial proceedings were not a proper basis for recusal.<sup>82</sup> The defendants were subsequently convicted of the offense charged. They appealed, claiming that the district judge violated 28 U.S.C. § 455(a) in refusing to recuse himself.<sup>83</sup> The Eleventh Circuit affirmed the conviction, agreeing with the district court that "matters arising out of the course of judicial proceedings are not a proper basis for recusal."<sup>84</sup> The United States Supreme Court granted certiorari<sup>85</sup> to settle the question of whether required recusal under 28 U.S.C. § 455(a) is subject to the limitation that has come to be known as the "extrajudicial source" doctrine.<sup>86</sup>

The Court, in an opinion by Justice Scalia, answered this question in the affirmative, holding that recusal under section 455(a) is subject to the "extrajudicial source" doctrine.<sup>87</sup> The Court also held that an "extrajudicial source" is not a necessary condition for recusal,<sup>88</sup> nor is it a sufficient condition for "bias or prejudice" recusal.<sup>89</sup>

In explaining his opinion, Justice Scalia asserted that the absence of the word "personal" in section 455(a) does not preclude the application of the "extrajudicial source" doctrine,<sup>90</sup> since the textual basis for the doctrine is the pejorative connotation of the words "bias or prejudice",

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1151. The alleged hostility toward the co-defendants included warnings that the trial's purpose was to try a criminal case, not to conduct a political forum; limiting defense counsel's cross-examination; questioning witnesses; admonishing witnesses as to the responsiveness and materiality of their answers; cautioning defense counsel to confine his questions to material issues; admonishing a co-defendant that closing argument was not a time to make a political speech; handing down what the co-defendants believed were excessive sentences; and most importantly, interrupting the closing argument of one of the co-defendants to tell him to restrict his statement to discussion of evidence already presented.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 973 F.2d 910 (1992).

<sup>85</sup> 113 S. Ct. 2412 (1993).

<sup>86</sup> 114 S. Ct. 1150. The "extrajudicial source" doctrine was first enunciated by Justice Douglas in *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), where it was stated that "[t]he alleged bias and prejudice to be disqualifying [under § 144] must stem from an extrajudicial source." "Extrajudicial source" was meant to describe a source outside the judicial proceeding at hand, which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge.

<sup>87</sup> 114 S. Ct. at 1150.

<sup>88</sup> An extrajudicial source is not the only basis for establishing disqualifying bias or prejudice. A favorable or unfavorable predisposition can also be characterized as bias or prejudice, even though it springs from the facts adduced or the events occurring at trial, if it is so extreme as to display the trial judges's clear inability to render fair judgment. This theory has come to be called the "pervasive bias" exception to the extrajudicial source doctrine.

<sup>89</sup> *Id.* at 1157.

<sup>90</sup> *Id.* at 1155. It is generally accepted that the extrajudicial source doctrine applies to § 144 and § 455(b)(1), given that both use the phrase "personal bias or prejudice."

which indicates a judicial predisposition that is wrongful or inappropriate.<sup>91</sup> Similarly, because section 455(a) speaks of "partiality", a term that only refers to such favoritism that is wrongful or inappropriate, its requirement of recusal whenever a question of a judge's impartiality exists does not preclude the doctrine's application.<sup>92</sup>

## VI. PRACTICAL ADVICE

Conditions of potential bias or misconduct before or during a trial should be addressed by a motion for mistrial or motion for recusal, sometimes called a motion for disqualification.<sup>93</sup> Errors or conditions discovered after trial may be raised on appeal. In either case, appellate courts will require a record of the proceedings in order to gauge whether the judge had an opportunity to correct any errors in response to counsel's timely objection. Another option is for counsel to voir dire the motion to recuse. Such a step will not endear counsel to the trial judge, but by this point the relationship between counsel and the court will probably have deteriorated enough to permit such a choice to be made without further harm to the client's cause.

Making the record entails getting rulings and comments on the record, including exchanges in chambers in their entirety. In a capital case, nothing should be "off the record."

Motions to disqualify state and local judges should use arguments based on both the Due Process clause of the Fourteenth Amendment and the Code of Judicial Conduct, Canon 3(C). As previously discussed, the Canons are essentially similar to 28 U.S.C. § 455. Therefore, it is possible to argue by analogy and cite federal precedents decided under section 455

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1156.

<sup>93</sup> Va. Code Ann. § 19.2-153 (1990) states:

When the judge of a circuit court in which a prosecution is pending is connected with the accused or party injured, or is so situated in respect to the case as in his opinion to render it improper that he should preside at the trial, or if he has rejected

that parallel the relevant Canons. Motion for mistrial can also be made at this point, using both the Canons and federal law to bolster the argument.

As a last resort, any serious judicial misconduct which violates the Canons of Judicial Conduct should be reported to the Judicial Inquiry and Review Commission. While such a complaint may not require reversal, it sends a message to other judges that such behavior will not be accepted passively.

When faced with disqualifying a federal judge, counsel can argue that due process requirements supplement the federal statutory claim under 28 U.S.C. § 455.

## VII. CONCLUSION

The United States Supreme Court did not limit the due process right to an impartial judge to pecuniary situations that mirrored those present in *Ward* and *Tumey*. Rather, the Court expanded the due process rationale in *Mayberry*, *Taylor* and *Johnson* to include situations where the judge became personally embroiled in the matter before him. Further expansion came with *Webb*, where prejudicial conduct towards a defense witness was held to deny the defendant his due process right to an impartial judge.

While not adopting an expansive view of this federal constitutional standard, in *Welsh* the Virginia Court of Appeals did acknowledge that in some cases bias, regardless of its form or source, may be so pervasive as to offend due process. Counsel can then make challenges on both federal and state grounds.

a plea bargain agreement submitted by both parties and the parties do not agree that he may hear the case, he shall enter the fact of record and the clerk of the court shall at once certify this fact to the Chief Justice of the Supreme Court and thereupon another judge shall be appointed . . . .

See also Bacigal, *Virginia Criminal Procedure* (2d ed.), § 16-1.

# THE "NEW AND IMPROVED" FEDERAL DEATH PENALTY: A BRIEF GUIDE

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## I. INTRODUCTION

With the recent passage of the Federal Death Penalty Act of 1994,<sup>1</sup> Congress dramatically increased the number of federal crimes for which the Government may seek imposition of capital punishment. The substantive component of the Death Penalty Act both created new federal offenses punishable by death and "revived" existing ones that had been declared unconstitutional or appeared questionable in the wake of *Furman v. Georgia*.<sup>2</sup> This revival was made possible by the procedural

component of the Act, which provides a uniform method of sentencing for all federal capital offenses that is closely-modeled after the provisions of the so-called "Federal Drug Kingpin Statute."<sup>3</sup>

The above developments suggest at least the theoretical possibility that the number of federal capital cases requiring appointed or retained defense counsel in the Commonwealth will increase in the near future.<sup>4</sup> Accordingly, the following analysis of the current state of federal death penalty law should prove helpful.

provisions of this earlier statute is assumed here. For a more in-depth discussion, see O'Grady, *What Every Virginia Capital Defense Attorney Should Know About the Federal Drug Kingpin Statute*, Capital Defense Digest, Vol. 6., No. 1, p. 40 (1993).

<sup>4</sup> The actual impact of the statute on Virginia capital defense practice may be minimal, as discussed *infra* in Part V-B.

<sup>1</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title VI, 108 Stat. 1796, 1994 (to be codified as amended in scattered sections of 8, 18, and 21 U.S.C.) (hereinafter "Federal Death Penalty Act.")

<sup>2</sup> 408 U.S. 238 (1972) (holding death penalty as applied in all jurisdictions unconstitutional).

<sup>3</sup> See 21 U.S.C. § 848 (1988). A working familiarity with the