FILED UNDER SEAL
Letter to the Honorable Sue E. Myerscough
January 12, 2017

Appendix A

Appendix A

MEMORANDUM OF LAW IN SUPPORT OF MR. SCHOCK'S LETTER TO JUDGE MYERSCOUGH SUGGESTING RECUSAL

The applicable case law supports Mr. Schock's suggestion that Judge Myerscough recuse herself in this case. The factual basis for this suggestion is set forth in the letter to which this memorandum is attached.

"It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (alteration omitted). This concept of fairness extends to the appearance of impartiality: "the appearance of justice is important in our system and the due process clause sometimes requires a judge to recuse himself without a showing of actual bias, where a sufficient motive to be biased exists." *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371 (7th Cir. 1994). The federal recusal statute, 28 U.S.C. § 455(a), addresses this concern and provides that it is a judge's duty to "disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." The purpose of that statute "is to 'promote public confidence in the integrity of the judicial process.'" *United States v. Herrera-Valdez*, 826 F.3d 912, 917 (7th Cir. 2016) (quoting *Durhan v. Neopolitan*, 875 F.2d 91, 97 (7th Cir. 1989)). As the Seventh Circuit has observed, "compliance with [section 455(a)] is essential to the perceived legitimacy of the judicial process." *United States v. Boyd*, 208 F.3d 638, 648 (7th Cir. 2000) *vac'd on other grounds by Boyd v. United States*, 531 U.S. 1135 (2001).

Recusal is required where there is a concern "that a judge's impartiality *might* be questioned by a reasonable, well-informed observer." *Herrera-Valdez*, 826 F.3d at 917. To determine whether she is disqualified, a judge should ask "whether an objective, disinterested observer fully informed of the reasons that recusal was sought would entertain a significant doubt that justice would be done in the case." *Id.* "Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry." *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990). As an objective inquiry, whether recusal is warranted under § 455(a) does not depend on whether the judge is actually biased. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 (1988) ("Scienter is not an element of a violation of § 455(a)."). Indeed, whether a judge should recuse herself "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety." *Herrera-Valdez*, 826 F.3d at 917 (quoting *Durhan*, 875 F.2d at 97). All that is required is that "the public might reasonably believe that he or she knew." *Liljeberg*, 486 U.S. at 860 (citations omitted).

To determine whether recusal is appropriate in light of § 455(a)'s broad standard, a judge should "refer to the prohibitions outlined in § 455(b) because 'affiliations that pose risks similar to those identified in § 455(b) may call for disqualification under § 455(a).'" *Herrera-Valdez*, 826 F.3d at 917-18 (quoting *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998)). In particular,

§ 455(b)(1) provides that a judge shall recuse herself "[w]here [she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Thus, where there are circumstances giving rise to the appearance that a judge has a personal bias or prejudice concerning a party, the statute requires that the judge recuse herself from the proceedings. *See Hatcher*, 150 F.3d at 637-38. Additionally, § 455(b)(5)(iii) provides that a judge shall recuse herself where her "spouse, or a person within the third degree of relationship to either of them, or the spouse of such person . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." As the Supreme Court has held, "[r]ecusal is required *whenever* there exists a genuine question concerning a judge's impartiality." *Liteky v. United States*, 510 U.S. 540, 552 (1994).

Whether recusal is required under § 455(a) "is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances rather than by comparison to similar situations considered in prior jurisprudence." *United States v. Anderson*, 160 F.3d 231, 233 (5th Cir. 1998). That said, there are several analogous cases that provide guidance for the Court's determination of whether these circumstances require recusal.

First, a judge should not view each ground for recusal that is brought to their attention in isolation. Instead, a judge should assess whether, taken together, the circumstances could lead a reasonable observer to question the judge's impartiality. Even where one circumstance would be insufficient for recusal, standing alone, those circumstances taken together may be sufficient to disqualify a judge. *See Hatchcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (9th Cir. 1995) (holding that judge's recusal was required even where no one factor was sufficient "to merit recusal in isolation"). With this principle in mind, analogous cases demonstrate that a reasonable observer, having knowledge of all the facts, could reasonably question Judge Myerscough's impartiality.

I. A REASONABLE OBSERVER COULD QUESTION JUDGE MYERSCOUGH'S IMPARTIALITY BASED ON MR. SCHOCK'S INTERVENTION IN HER CONFIRMATION PROCEEDINGS

The evidence that Mr. Schock intervened in Judge Myerscough's confirmation proceedings to ensure that she would not be chief judge of the Central District of Illinois merits recusal. A reasonable observer who was aware of the fact that Mr. Schock denied Judge Myerscough a significant position could reasonably question her impartiality in a case where Mr. Schock is a criminal defendant in her court. Thus, § 455(a) mandates recusal.

The Fifth Circuit's decision in *United States v. Anderson* is particularly on point. The defendant in that case argued that the judge's recusal was warranted because the defendant's attorney had personally testified against the presiding judge before a special investigatory committee. *Anderson*, 160 F.3d at 232. The Fifth Circuit held that such a substantive action against a presiding judge could cause a reasonable observer to fear that the judge might retaliate against not only the attorney but the party they represent. *Id.* at 233. In light of the direct and adverse steps the attorney took against the presiding judge, the Fifth Circuit observed that it was

"difficult under these circumstances to argue that a reasonable person would not harbor any doubt about [the presiding judge's] impartiality." *Id.* at 233-34.[1]

The circumstances presented here weigh more heavily in favor of recusal than in *Anderson*. First, unlike in *Anderson*, Mr. Schock, not his attorneys, took action that could objectively be viewed as against the interests of the presiding judge in this case. Second, instead of merely offering testimony against the presiding judge, which might or might not have affected the outcome, Mr. Schock was in the position of decisionmaker. As a sitting member of Congress, Mr. Schock was able to exercise the prerogatives of his office to influence Judge Myerscough's ultimate position. The evidence disclosed by the government indicates that he did so to Judge Myerscough's detriment.

A reasonable observer, having knowledge of these facts, could reasonably harbor a doubt as to Judge Myerscough's impartiality. Judge Myerscough was denied a leadership position in her district because of Mr. Schock.[2] It is not necessary that Judge Myerscough knew of Mr. Schock's actions, *see Liljeberg*, 486 U.S. at 859, though the government has now disclosed them. Indeed, there is reason to believe that these events have already affected this case. The government repeatedly noted in its opposition to Mr. Schock's motion for an intradistrict transfer of venue that Chief Judge Shadid, the beneficiary of Mr. Schock's intervention, has referred the case away from his chambers. Gov't's Resp. to Def.'s Mot. for Intra-District Transfer to Peoria Division at 3, 11 n.4, 14 Dkt. 12. Indeed, the underlying assumption of the government's opposition was that Chief Judge Shadid would not be available to hear this case in Peoria. *Id.* We are not aware of why Chief Judge Shadid recused himself from this case, but an ethics expert has opined that Chief Judge Shadid would be required to recuse himself because he was the beneficiary of then-Congressman Schock's efforts to ensure that Chief Judge Shadid became chief judge. And just as Chief Judge Shadid must be recused because a reasonable observer could question his impartiality, so must Judge Myerscough be recused. Mr. Schock's intervention affected Judge Myerscough by preventing her from becoming chief judge; thus a reasonable observer could also question her impartiality if she were to preside over a matter involving Mr. Schock. *See* Opinion of Professor Ronald Rotunda.

Judge Myerscough's continued participation in the case threatens to implicate due process concerns, in addition to § 455(a). In a recent case, the Supreme Court held that a judge was required to recuse himself in a matter where a prolific donor to his election campaign was an officer for one of the parties. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009). Although the campaign contributions were not bribes or otherwise criminal, and the judge repeatedly stated that he could be impartial in the case, the Supreme Court noted that the potential that the judge "would nevertheless feel a debt of gratitude" to the donor created "a serious risk of actual bias" that required disqualification. *Id.* at 882, 884. Similarly, a reasonable observer could question whether Judge Myerscough bears a debt of ingratitude to Mr. Schock, which could cause

[1] After the motion to recuse was filed, the movant's position was bolstered by an order issued by the Fifth Circuit Judicial Counsel directing the presiding judge not to participate in cases involving attorneys who had testified against him. *Anderson*, 160 F.3d at 234.

[2] *See* Deskbook for Chief Judges of U.S. District Courts 4 (4th ed. 2014) ("The chief district judge is uniquely situated to lead the district court in determining the administrative policies and actions the court should initiate, continue, or discontinue.").

the observer to question Judge Myerscough's impartiality. As in *Anderson*, the circumstances here weigh more strongly in favor of recusal. Mr. Schock is the party in this case, and he used his position to directly affect Judge Myerscough's interests in the confirmation process.

The circumstances before the Court contrast sharply with cases where attorneys have sought to recuse judges based on their alleged opposition to that judge's confirmation.[3] For example, the court in *United States v. Evans* rejected an attorney's attempt to disqualify the presiding judge based on no more than a letter the attorney submitted to the committee considering the judge's nomination. 262 F. Supp. 2d 1292, 1294 (D. Utah 2003). In deciding that the circumstances did not warrant his recusal, the presiding judge reasoned that (1) any potential bias would be against the attorney, not his client; and (2) if all that an attorney needed to do to disqualify a judge was to submit a letter opposing their nomination, attorneys would be able to "shop" for their judges. *Id.* at 1294-96. As noted, the appearance of impartiality in these circumstances would be targeted at Mr. Schock, not his attorneys. Further, these circumstances are unique. The government's evidence suggests that a Member of Congress effectively used his office to alter the outcome of a judge's confirmation proceedings.[4] Thus, recusal here would present no risk of "judge shopping" in the future.

II. JUDGE MYERSCOUGH'S INTEREST IN THE CONGRESSIONAL SEAT WON BY MR. SCHOCK AND HER FAMILIAL TIES TO MCGUIREWOODS COULD LEAD A REASONABLE OBSERVER TO QUESTION HER PARTIALITY

Judge Myerscough's decision not to run for the 18th Congressional District of Illinois, a seat also sought after by Mr. Schock, even though she had taken substantial steps towards launching a candidacy, could cause a reasonable observer to question her impartiality. Judge Myerscough's true reasons for not seeking the Democratic nomination are irrelevant under § 455(a), which mandates an objective inquiry. *See Liteky*, 510 U.S. at 548 (holding that § 455(a) violations are "to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance."). Together with Mr. Schock's intervention in Judge Myerscough's confirmation proceedings, a reasonable observer could conclude that Mr. Schock has now twice frustrated Judge Myerscough's career ambitions. First, as a candidate, *see Tower Grp., Inc. v. Doral Enters. Joint Ventures*, 760 So. 2d 256, 256-57 (Fl. Dist. Ct. App. 2000) (ordering that judge recuse herself where her former election opponent was an attorney in the case), and second as a Member of Congress for the seat Judge Myerscough herself once contemplated.

Additionally, the impending marriage of Judge Myerscough's daughter to a McGuireWoods attorney could also raise the appearance of impartiality. Once the wedding takes place, Judge Myerscough could face disqualification under § 455(b)(5), which mandates that a judge recuse themselves whenever a family member could be substantially affected by the outcome of the proceedings over which the judge presides. Indeed, the Seventh Circuit has recognized that "the belief may arise in the public's mind" that a close relation's firm "and its clients will receive

[3] *See United States v. Helmsley*, 760 F. Supp. 338, 342-43 (S.D.N.Y. 1991) (drawing "a sharp distinction between alleged hostility between judge and party and alleged hostility between judge and attorney.").

[4] *Cf. Helmsley*, 760 F. Supp. at 343 (noting that recusal was not warranted in part because "[t]he outcome of the nomination was unaffected.").

favored treatment, even if [the relation] does not personally appear in the case." *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (per curiam). Similarly, an advisory opinion issued by the Committee on Codes of Conduct of the United States Judicial Conference cautions that "although recusal may not be prescribed by a relative who is an associate or non-equity partner, other circumstances may arise that in combination with the relative's status at the firm could raise a question about the judge's impartiality and thereby warrant recusal." Advisory Opinion No. 58, Disqualification When Relative is Employed by a Participating Law Firm.

Although Mr. Schock is not aware of any work that Judge Myerscough's future son-in-law has done on this case, and he is not an equity partner in the firm, this familial connection could still give rise to a question as to the appearance of impartiality under § 455(a). A reasonable observer could question Judge Myerscough's impartiality when presiding over a case involving her future son-in-law's law firm, including the appearance that Judge Myerscough would be less receptive to the merits of Mr. Schock's arguments so as to "balance out" the fact that he is represented by a firm to which Judge Myerscough has a familial connection.

Both of these additional circumstances, even if insufficient standing alone, should be weighed together with Mr. Schock's intervention in Judge Myerscough's nomination proceedings. *See Hatchcock*, 53 F.3d at 41. Although the Court's decision is a serious one, the question to be addressed is not complicated. As between a judge encumbered by the circumstances disclosed in the letter, and a judge who was not so encumbered, a reasonable observer would conclude every time that the latter presiding over this case would more readily comport with the appearance of impartiality and due process.