App. No. 03-7

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL A. NEWDOW,
Petitioner
v.

THE UNITED STATES OF AMERICA, ET AL.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

SUGGESTION FOR RECUSAL OF JUSTICE SCALIA

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Petitioner Michael A. Newdow respectfully suggests that Justice Scalia recuse himself from the consideration of this case.

BACKGROUND

Fifty years after its debut in 1892, the Pledge of Allegiance was codified by the Congress of the United States. Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172). At that time, the Pledge contained no religious verbiage, and thus raised no religion clause concerns. However, in 1954, Section 172 was amended so that the words, "under God," were subsequently included. Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).[1] Since then, many American citizens – atheistic and theistic alike – have been offended by the apparent Establishment Clause violation.

On March 8, 2000, Petitioner herein ("Newdow") filed suit in the United States District Court for the Eastern District of California, challenging the constitutionality of the Pledge and seeking to have the words, "under God," removed. Although the District Court ruled against him on a Fed. R. Civ. P. Rule 12(b)(6) Motion to Dismiss, the Ninth Circuit Court of Appeals reversed that decision. Newdow v. United States Cong., 292 F.3d 597 (9th Cir. Cal. 2002*), amended, reh'g denied, reh'g en banc denied* 321 F.3d 772 (9th Cir. 2003). In a two to one opinion, the panel majority wrote:

> To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and--since 1954--monotheism.

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[1] In 1998, Title 36 was revised (Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998)), and Section 172 removed. Accordingly, the Pledge is now found at 4 U.S.C. § 4.

Newdow v. United States Cong., 328 F.3d 466, 487 (9th Cir. 2003). Thus, focusing on Newdow's standing as a parent with a child in the public schools, the Court determined that "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." Id., at 490. Petitions for certiorari are pending before this Court. Apps. No. 02-1574, 02-1624 and 03-7.

A firestorm of controversy arose when the opinion was first released. This reaction was clearly the result of the religious aspects of this case, and the value theistic Americans place upon the worship of God. The associated passions – though understandable – are the very reason we have an Establishment Clause, and, perhaps in this arena more than any other, it is essential that the judiciary present a neutral front. To be sure, the individual judges and justices may be assumed to hold fervid religious beliefs. However, those beliefs – whatever form they take – cannot give the appearance of a bias which might interfere with impartial legal analysis. Because some of his statements and activities have called that impartiality into question, recusal by Justice Scalia is indicated.

LEGAL STANDARD

28 U.S.C. § 455 (a) states, "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." For the reasons that follow, Newdow believes that the impartiality of Justice Scalia indisputably "might reasonably be questioned" in the case at bar.

JUSTICE SCALIA'S STATEMENTS AND ACTIVITIES

According to reliable news accounts (Exhibit A), Justice Scalia was "the main speaker at an event for Religious Freedom Day" held on January 12, 2003. There, Justice Scalia apparently indicated that the Ninth Circuit decision in the instant case was based on a flawed reading of the Establishment Clause. Yet it is highly unlikely that the Justice had ever read any of the briefs in the case, and – although his knowledge base is prodigious – it is doubtful that Justice Scalia has been fully apprised of all the facts related to Congress's Act of 1954. Under such circumstances – where he prematurely indicated that a lower court's decision was wrong in a case he would likely hear – one might certainly reasonably question his impartiality.

The fact that he chose to give these remarks at an event in which the Knights of Columbus played a sponsoring role (Exhibit B) is especially noteworthy. The Knights of Columbus is the organization that "led the effort to officially include the words 'under God' in the Pledge of Allegiance to the American flag."[2] In fact, since Justice Scalia made his comments, the Knights of Columbus has submitted an *amicus* brief in the hope of overturning the Ninth Circuit's decision. Exhibit C. In that document, it is claimed that "American concepts of freedom flow from an authority higher than the State."[3] That idea is, of course, found nowhere in the text of the Constitution. Yet it is a foundational concept of the brief which, of necessity, turns atheists such as Newdow into "outsiders, not full members of the political community."[4] Certainly Justice Scalia was aware of the Knights' hosting of the Religious

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[2] Accessed on August 18, 2003 at the organization's official web site, http://www.kofc.org/knights/history/history.cfm.
[3] Brief *Amicus Curiae* of the Knights of Columbus, at 1.
[4] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Freedom Day activities, and it is likely that he is also cognizant of the role that organization played in effecting the change in the Pledge. That he deliberately chose to allude to the Ninth Circuit's ruling in such a venue gives further cause to reasonably question his impartiality in this litigation.

LEGAL ANALYSIS

It should first be noted that Justice Scalia's voluntary, disapproving statements about the lower court's ruling – in a case obviously destined to come before him – is at odds with the Code of Conduct for United States Judges. Canon 3(A)(6) of that Code states (in pertinent part) that "A judge should avoid public comment on the merits of a pending or impending action." Justice Scalia's comments on January 12, 2003 unequivocally violated that Canon.[5]

Under current case law, the totality of these circumstances supports recusal. Liteky v. United States, 510 U.S. 540 (1994) – authored by Justice Scalia, himself – reviewed the meaning of 28 U.S.C. § 455, especially in view of the "massive changes"[6] made in 1974. It was specifically noted that, "what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [i]s required whenever 'impartiality might reasonably be questioned.'"[7] Moreover, subsection (a) "covers all aspects of partiality"[8]

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[5] It should be pointed out that Canon 3(C)(1) mirrors 28 USCS § 455 (a) in stating that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."
[6] 510 U.S., at 546.
[7] 510 U.S., at 548.
[8] 510 U.S., at 553.

Justice Kennedy's concurrence also made the point that recusal is mandatory here:

> [T]he central inquiry under § 455(a) is the appearance of partiality, not its place of origin;[9]
>
> Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case;[10] and
>
> Section 455(a) … addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion.[11]

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) – another Supreme Court case that considered 28 U.S.C. § 455 in depth – similarly emphasized that "a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."[12]

Along these lines, the lower courts have determined that:

> [T]he judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue. … The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question.

United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993).

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[9] 510 U.S., at 563 (Kennedy, J., concurring).
[10] 510 U.S., at 564 (Kennedy, J., concurring).
[11] 510 U.S., at 567 (Kennedy, J., concurring).
[12] Liljeberg, 486 U.S. at 850.

It should be emphasized that it is not only the statements Justice Scalia has made that are of concern. His conscious decision to appear as the "featured speaker" at an event sponsored by the Knights of Columbus – the religious organization that initiated the drive to place "under God" into the Pledge – and to use that forum to decry the Ninth Circuit's ruling is of enormous moment. In fact, it was "the judge's expressive conduct in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him"[13] that resulted in the Tenth Circuit's determination that the District Judge in Cooley should have recused himself.

The foregoing in no way suggests that a judge or justice, even in an extrajudicial setting, is prohibited from enunciating his views on legal matters. On the contrary, "expressions of opinion on legal issues are not disqualifying" (Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 825 F.2d 946, 950 (6th Cir. 1987) (note 1), and "[a] judge's views on legal issues may not serve as the basis for motions to disqualify." (United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980)). However, Justice Scalia's challenged actions go far beyond such an enunciation. In January 2003, he indicated that he has already applied his Establishment Clause analysis to the case at bar and reached his conclusion before ever reading the briefs or hearing the arguments. That is what provides the grounds for recusal.

The Court has noted the importance of "ensur[ing] that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts." Bender v. Williamsport Area School Dist., 475 U.S. 534, 542 (1986). Here, a justice has indicated that

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[13] Cooley, 1 F.3d at 995.

he is prepared to rule in a given manner absent such deliberations, precisely the situation for which 28 U.S.C. § 455 (a) was promulgated. If "[t]he test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), then it would seem that the following would lead to exactly that doubt:

- The constitutionality of the words, "under God," in the Pledge of Allegiance is at issue;
- A justice – fully aware that the case would soon likely appear before him – accepted a speaking invitation sponsored by the organization that "led the effort to officially include the words 'under God' in the Pledge of Allegiance;"
- At that venue, the justice indicated – before the first petition ever reached his court – that the case was wrongly decided in the court below.

"[T]he appearance of partiality is as dangerous as the fact of it." Conforte, 624 F.2d at 881. Because "a judge is under an affirmative, self-enforcing obligation to recuse himself *sua sponte* whenever the proper grounds exist." United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989), Justice Scalia should recuse himself from deliberations in this litigation.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that Justice Scalia recuse himself from any consideration of the instant litigation.

Under penalty of perjury, I affirm that the foregoing Motion is made in the good faith belief that the facts are true, that the arguments are appropriate, and that recusal by Justice Scalia will best serve the interests of justice and the integrity of the judiciary.

September 5, 2003 Respectfully submitted,

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Michael Newdow, Petitioner

EXHIBIT A
NEWS ACCOUNTS OF JUSTICE SCALIA'S APPEARANCE

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EXHIBIT B
JANUARY 12, 2003 RELIGIOUS FREEDOM DAY PROGRAM

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EXHIBIT C
BRIEF *AMICUS CURIAE* OF KNIGHTS OF COLUMBUS

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 5th day of September, 2003, he sent by first-class mail, postage pre-paid, a copy of the foregoing Suggestion for Recusal of Justice Scalia to each of the following:

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