September 30, 2020

TO: Colloquy Downeast Election ethics seminar
FROM: Peter Sly, Maine Bar # 1507.
MEMO: Dueling duties in the Supreme Court: A Justice's "Duty to Decide" and the "Appearance of Impropriety."

In the Supreme Court, a Justice's decision to "recuse" herself because of conflict of interest can have substantive effect. In a close case, recusal by one of the majority Justices can result in an evenly divided court; when the vote is 4-4, the lower court decision stands. Parties and *Amicii* that expect to lose a 5-4 case may argue for recusal by one or more of the 5-vote expected majority. Each justice decides for herself how to proceed. Published opinions or statements about Supreme Court recusal are rare. Supreme Court Justices are bound by general canons of judicial ethics, but the Court itself has no governing code of ethics or process for recusal. [1]

In 2010, I spoke on conflict of interest issues to an annual "Dividing the Waters" conference of the National Judicial College. I described an ethical conundrum facing Justice Sandra Day O'Connor in a 1989 Indian water rights case. She had circulated among the Justices a final 5-4 majority opinion reversing the Wyoming Supreme Court. [2] Her potential "appearance of impropriety" arose only days before the end of the term. Her decision to recuse affected – and still affects – the core principles of Indian water law.

TWO ETHICAL STANDARDS

There were dueling ethical principles at play:

- A judge must recuse herself from any matter where an "appearance of impropriety" suggests a conflict of interest.
- All judges, especially Supreme Court Justices, have a duty to decide the case. There is no process to appoint a temporary substitute Supreme Court Justice. *Bush v Gore* is the most well known example of a "duty to decide" overcoming a suggested "appearance of impropriety. [3]

THE 1989 WATER CASE

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[1] See materials from National Judicial Center. But because of the Supreme Court's role at the apex of our judicial system, those canons do not always apply. The Court has resisted congressional and other calls to develop its own code of ethics.

[2] After his death, Justice Thurgood Marshall's papers were inadvertently leaked when they were transferred to the Library of Congress.

[3] Claims were made that Justices Thomas and Scalia must recuse themselves because of an "appearance of impropriety" based on politically active families.

The standard for quantifying Indian reserved water rights is highly fact-specific, but has become uncertain in the lower courts since 1963. [4] Federal reserved water rights cases can involve thousands of parties, hundreds of lawyers, and often continue for decades. [5] In a 3-2 decision, the Wyoming Supreme Court slightly expanded the amount of water that a tribe could claim. [6] Justice O'Connor's final draft opinion would have reversed the Wyoming Court and articulated a more "sensitive" and stringent standard for quantifying Indian water rights. In late May 1989, it was confidentially circulated among the Justices. [7]

A week later Justice O'Connor learned that her family's ranch in Arizona had just been named as one of thousands of parties in an Arizona Indian water case. [8] This was a "positional" conflict of interest, because the Arizona case was not before the Supreme Court, and involved a completely unconnected drainage, parties and lawyers. The potential "appearance of impropriety" was remote. However, the precedent of her draft opinion could be argued in the Arizona water case to limit the Tribes' claims.

Ten days after that the Court released a one-sentence order noting that Justice O'Connor had recused herself. An equally divided Court affirmed the Wyoming Court's decision. [9]

THE JUDICIAL COLLEGE VOTE

"How would you rule if you were in Justice O'Connor's shoes?" I asked the audience of about 50 federal and state water judges. The show of hands was evenly divided about whether the "duty to decide" should prevail over the "appearance of impropriety."

Peter Sly, September 30, 2020

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[4] The "Practicably Irrigable Acreage" test for Indian reserved water rights claims was set forth in *Arizona v. California*. The Navajo Nation has asserted PIA claims to the entire flow of the Colorado River.

[5] Attorney conflicts of interest always arise in western stream adjudications, because every claim is adverse to every other claim; a Hobbesian "war of all against all." In Idaho's Snake River adjudication, the number of claims and potential claimants is more than 5 times the total number of attorneys in the state.

[6] 753 P. 2d 76 (WY, 1988)

[7] Second Draft Opinion of Justice Sandra Day O'Connor, Wyoming v. United States, No 88-309 (June 12, 1989)

[8] Justice O'Connor's June 22 1989 memo to the court stated that she was a minority stockholder in a family ranching corporation, which was named as a defendant in the Gila River adjudication. There is no hydrologic connection between the Gila River and the Wyoming drainage.

[9] Complex settlements of Indian water rights cases continued regardless of the confusion left by this litigation. See SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL (1988)