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APPELLATE LAW

The Rule of Necessity

By Aaron S. Bayer

As every lawyer knows, judges are expected to disqualify themselves whenever their "impartiality might reasonably be questioned." 28 U.S.C. 455(a). There is, however, an exception to the ordinary recusal requirements, known as "the rule of necessity," which allows judges to hear a case in which virtually all other available judges would have the same disqualifying interest, and the case could not otherwise be heard. In other words, "where all are disqualified, none are disqualified." *Pilla v. Am. Bar Ass'n*, 542 F.2d 56, 59 (8th Cir. 1976). Under the rule of necessity, the U.S. Supreme Court and federal courts of appeal have heard a surprising number of cases in which judges had a personal interest in the outcome.

The 'Rule of Necessity' is rooted in due process

The rule is rooted in the parties' due process right to have their dispute resolved by a judicial tribunal. Judges are understandably uncomfortable invoking the rule of necessity because it provides litigants with a Hobson's choice between an interested tribunal or none at all. But in some circumstances it is unavoidable.

The principle, which originated in England in 1430, was established here in *Evans v. Gore*, 253 U.S. 245, 248 (1920), in which a federal judge challenged the constitutionality of applying the federal income tax to his judicial salary. The Supreme Court concluded that the "only course open to us is to consider and decide the cause," even though the justices, like all other Article III judges, had a direct pecuniary interest in the outcome.

Similarly, in *U.S. v. Will*, 449 U.S. 200 (1980), the Supreme Court applied the rule to hear a challenge to the constitutionality of legislation that repealed salary increases for federal judges, reasoning that "failure to apply the Rule of Necessity" would effectively deny the litigants "their right to a forum." Id. at 217.

Judges have invoked the rule of necessity in other contexts as well, including cases involving threats of violence against federal judges. For example, all the judges on the 11th U.S. Circuit Court of Appeals and the relevant federal district courts in Georgia recused themselves from the criminal trial of the mail bomber who targeted federal judges and killed 11th Circuit Judge Robert Vance. When defense counsel moved to disqualify all federal judges and suggested that the Senate Judiciary Committee appoint an independent judicial officer, the federal judge sitting by designation invoked the rule of necessity and rejected the motion. *U.S. v. Moody*, 762 F. Supp. 1485, 1488-90 (N.D. Ga. 1991).

Judges have also used the rule of necessity to address the problem of the "indiscriminate litigant," the plaintiff who sues long lists of defendants, including members of the judiciary. In *Ignacio v. Judges of the U.S. Court of Appeals for the Ninth Circuit*, 453 F.3d 1160 (9th Cir. 2006), for example, when a pro se plaintiff sued all the judges on the 9th Circuit, the court heard the appeal under the rule of necessity. The court could have asked visiting judges to sit by designation, but it was concerned about giving a litigant "veto power over sitting judges" and improperly forcing a transfer to a different circuit.

Those concerns may have less to do with the rule of necessity and more to do with discouraging litigants from forum shopping and "imped[ing] the administration of justice." Id. at 1164-65. See also *Pilla*, 542 F.2d at 58 (rule of necessity applies where plaintiff sued numerous federal judges and thus "has deliberately chosen to adopt a course of procedure which might disqualify every federal judge in the country").

The rule of necessity applies with special force to the U.S. Supreme Court because it is the court of last resort, and disqualification of justices could lead to an evenly divided court or the loss of the required quorum of six justices. Other than in direct appeals from a district court (which can be remitted to the circuit court for final decision), when the Supreme Court lacks a quorum it must enter an order affirming the judgment below.

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By law, this has the precedential effect of an affirmance by an equally divided court, 28 U.S.C. 2109—i.e., no precedential value at all. See, e.g., *Sloan v. Nixon*, 419 U.S. 958 (1974).

As a result, justices have been extraordinarily reluctant to disqualify themselves, and have relied on the rule of necessity and a corollary doctrine, the "duty to sit," in appeals when it is "fairly debatable" whether disqualification is warranted. *Laird v. Tatum*, 409 U.S. 824, 837-38 (1972).

Justice William H. Rehnquist caused great controversy by refusing to recuse himself in *Laird*, having previously testified for the Justice Department in congressional hearings about the domestic surveillance program that was the subject of that suit. He concluded that he had a duty to sit, rather than risk leaving an important question of law unsettled.

While Congress purported to eliminate the "duty to sit" when it amended 28 U.S.C. 455 in 1974, the concept persists.

Justice Antonin Scalia refused to recuse himself from a case involving Vice President Dick Cheney based on his friendship and hunting trips with the vice president. While resolving doubts in favor of recusal "might be sound advice...[for] a Court of Appeals," it would undermine the Supreme Court's ability to resolve "significant legal issue[s]." Therefore, Scalia concluded, his recusal was neither required nor permitted. *Cheney v. U.S. Dist. Court for the District of Colum.*, 541 U.S. 913, 915-16 (2004).

By contrast, lower federal courts are usually able to avoid the rule of necessity because of the federal court system's remarkable fluidity. The chief justice of the United States is authorized to assign circuit court judges and district court judges temporarily to other circuits (28 U.S.C. 291(a)) and the chief judge of a circuit may assign district court judges to sit temporarily in different district courts or on the court of appeals (28 U.S.C. 292). Even retired U.S. Supreme Court justices may be assigned to temporary service as circuit court judges. 28 U.S.C. 294(a).

In *U.S. v. Nettles*, 476 F.3d 508 (7th Cir. 2007), a panel of 6th Circuit judges sat by designation as the 7th Circuit to hear the appeal of a criminal defendant who attempted to bomb the federal courthouse in Chicago.

The trial was conducted in Chicago by a New York district court judge, after the 7th Circuit ordered the federal judge in Chicago to recuse herself and sua sponte recused the entire 7th Circuit. *U.S. v. Nettles*, 394 F.3d 1001, 1003 (7th Cir. 2005).

Similarly, in a suit against the 4th Circuit's chief judge challenging the procedure for compensating public defenders, Chief Judge James B. Loken of the 8th Circuit sat by designation in Virginia.

However, when the plaintiffs asked Loken to recuse himself as well because of his institutional interest in upholding the compensation system, he invoked the rule of necessity because all federal judges shared the same institutional interest. *Rosenfield v.Wilkins*, 468 F. Supp. 806, 809 (W.D. Va. 2006).

While state court systems cannot draw on a national pool of judges, they too have found ways to minimize reliance on the rule of necessity. In a 1925 Texas case, all the state Supreme Court justices recused themselves because they were members of the plaintiff fraternal society. The governor, who had statutory authority to appoint a special supreme court, appointed a panel of three women to hear the case—a surprising solution given women's status in the legal community at that time. *Johnson v. Darr*, 272 S.W. 1098 (Texas 1925).

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When, however, a governor declines to exercise his power to appoint alternate judges, the court may still invoke the rule of necessity to hear the case. In *Nellius v. Stiftel*, 402 A.2d 359, 360-61 (Del. 1978), for example, the Delaware governor declined to use his constitutional authority to commission temporary judges to hear an appeal in which the entire Delaware Supreme Court was disqualified, preferring instead to seek a legislative solution.

The court temporarily deferred to the governor, but, relying on the rule of necessity, set a date to hear the case itself if the matter was not resolved by that time.

In some states, courts appoint alternate judges

In some states, the court itself has authority to appoint alternate judges. In *Mosk v. Superior Court of Los Angeles*, 601 P.2d 1030 (Calif. 1979), a California Supreme Court justice challenged a subpoena ordering him to testify before a public commission investigating judicial misconduct on the court.

All the Supreme Court justices disqualified themselves, and the chief justice assigned a panel from the Court of Appeal to hear the case. When her assignment of alternate judges was itself challenged, the court held that the chief justice had authority under the rule of necessity to assign judges, despite her own disqualification. Id. at 482.

In an eerily similar case, Connecticut's Supreme Court recently confronted an appeal in which the former chief justice challenged a subpoena ordering him to testify before a legislative committee about his alleged misconduct. All the Supreme Court justices disqualified themselves, and the most senior appellate court judge who was not disqualified assigned appellate court judges to sit as the Supreme Court to hear the appeal. *Sullivan v. McDonald*, 913 A.2d 403 (Conn. 2007).

The rule of necessity offers an imperfect solution to a difficult problem. But the rule persists because, as its name suggests, it is necessary. As Justice John Marshall wrote in *Cohens v. Virginia*, 19 U.S. 264, 404 (1821), "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."