94-521

Judicial Inquiry Commission

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MONTGOMERY, ALABAMA 36104

March 25, 1994

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your inquiry is whether you should disqualify yourself in the case of Hunt v. State, 1930501, which was argued before the Alabama Supreme Court on March 14, 1994.

On March 14, 1994, the appellant in that case, Harold Guy Hunt, the former governor of Alabama, filed a motion to recuse alleging the following:

"1. The Chief Justice has apparently discussed, negotiated, and agreed with the State Attorney General concerning the settlement of a lawsuit affecting the qualifications and composition of the State Appellate Courts based upon an allegation that the state laws creating certain judgeships were not pre-cleared by the United States Department of Justice.

"2. This offer and acceptance is summarized in a press release by the Attorney General, marked as 'Exhibit 1,' attached hereto and specifically incorporated herein by reference.

"3. Rightfully or wrongfully, based upon various statements by people who allegedly are involved, the settlement has become referred to as the 'Hornsby-Evans' agreement. (See editorial of Montgomery Advertiser dated February 10, 1994, marked as 'Exhibit 2,' attached hereto and specifically incorporated herein by reference.

"4. The Hornsby-Evans agreement has been criticized by a member of the Alabama Court of Criminal Appeals as being a 'secret plan' and being the ' . . . rankest form of behind the scenes, smoked filled room deals I believe this state has ever seen.' A copy of that quotation is found in the February 3, 1994 edition of The Birmingham News, a copy of which is marked as 'Exhibit 3,' attached hereto and specifically incorporated herein by reference.

"5. Issues on this appeal include allegations of misconduct and vindictiveness by the State Attorney General and question his motives for prosecuting former Governor Guy Hunt.

"6. The appearance of impropriety might result if the Chief Justice is required to sit, hear and deliberate on a case involving the alleged misconduct of the Attorney General while, at the same time, appearing to be in negotiation and agreement with the Attorney General on such an important and high profile issue as the proper qualification and composition of our appellate courts.

"7. This appearance of impropriety could be avoided if the Chief Justice would recuse himself from all further involvement, participation and deliberations connected with this case."

By letter dated March 15, 1994, you requested an advisory opinion from this Commission. In that request you state:

> "It is evident from the attached motion that the petitioner bases his request for my recusal on an appearance of 'discussions, negotiations, and agreements' with the Attorney General in the case styled White v. State [Ms. CV-94-T-94-N] in the United States District Court for the Middle District. The fact is that, while the Attorney General or his staff have updated me and my staff on the progress of this case, I have never entered into negotiations with the Attorney General or the plaintiffs or their attorneys in this case. Even the alleged appearance of 'discussions, negotiations, and agreements' in the White case has nothing to do with the petitioner's case. Initially, therefore, I am not inclined to recuse.
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> "However, due to the importance of this case and out of an abundance of caution, I believe that an opinion by the Commission would be helpful."

The motion to recuse is based on the command of Canon 2, Alabama Canons of Judicial Ethics that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." Related to this Canon is Canon 3C(l) which provides, in pertinent part, that "[a] judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, ..."

The test for the "reasonable person/appearance of impropriety test," as now articulated in Canon 3C(l) was recently stated by the Alabama Supreme Court in Ex parte Melof, 553 So.2d 554, 557 (Ala. 1989):

> 'Recusal is required . . . when the facts are such that it is reasonable for a party, for members of the public, or for counsel to question the impartiality of a trial judge.' (Citations omitted.) Bryars v. Bryars, 485 So. 2d 1187 (Ala. Civ. App. 1986). However, a mere accusation of bias that is unsupported by substantial fact does not require the disqualification of a judge, Id. at 1189; Ex

> parte Balogun, 516 So. 2d 606, 609 (Ala. 1987); Medical Arts Clinic v. Henry, 484 So. 2d 385 (Ala. 1986); Ross v. Luton, 456 So. 2d 249 (Ala. 1984). The test is whether a "'person of ordinary prudence in the judge's position knowing all of the facts known to the judge find[s] that there is a reasonable basis for questioning the judge's impartiality.'" (emphasis added). In re Sheffield, 465 So. 2d 350, 356 (Ala. 1984), quoting Thode, The Code of Judicial Conduct -- The First Five Years in the Courts, 1977 Utah L.Rev. 395, 402.
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> "The burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice. Otwell v. Bryant, 497 So. 2d 111, 119 (Ala. 1986). Prejudice on the part of a judge is not presumed. Hartman v. Board of Trustees, 436 So. 2d 837 (Ala. 1983); Duncan v, Sherrill, 341 So. 2d 946 (Ala. 1977); Ex parte Rives, 511 So. 2d 514, 517 (Ala. Civ. App. 1986). '[T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.' Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987), quoting Fulton v. Longshore, 156 Ala. 611, 46 So. 989 (1908). Any disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source. Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837 (Ala. 1983); Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979). Thus,
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> > "'[T]he disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a character, calculated to impair seriously his impartiality and sway his judgment, and must be strong enough to overthrow the presumption of his integrity."
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> Ross v. Luton, 456 So.2d at 254, quoting Duncan v. Sherrill, 341 So.2d 946, 947 (Ala. 1977), quoting 48 C.J.S. Judges § 82(b)."

See also Boros v. Baxley, 621 So.2d 240, 243 (Ala. 1993).

Applying these principles, it is the opinion of this Commission that there exists no basis for your disqualification or recusal under the facts set forth.

Hunt v. State involves the appeal of a criminal conviction in state court. Your involvement in that case is in your capacity as a judge applying legal principles to a specific factual situation. White v. State is a federal case involving a challenge to the state's method of electing appellate judges. While not a party, your interest in that case

is as Chief Justice and as the head administrator of the Alabama Judicial System. In the White case, the Attorney General no more represents you than he does any other appellate judge in this State. The issues in one case have nothing to do with the issues in the other. The outcome of one case has nothing to do with the outcome of the other. In summary, the cases are not related and your involvement in one does not require your disqualification in the other.

This advisory opinion has been considered by and is the opinion of the Judicial Inquiry Commission.