97-680

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

November 10, 1997

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question is: "Whether a justice who is recused for any reason from participating in voting upon the merits of any case may, nevertheless, vote upon the appointment of a judge to sit as a special justice in that case?"

Presently pending cases before the Supreme Court of the State of Alabama are certain consolidated cases (collectively referred to as "Case X"), in which you are recused based on two grounds: (1) Case X was an issue in your 1994 campaign for Supreme Court Associate Justice; and (2) one of the attorneys of record in Case X is the partner in the law firm of an attorney who is currently representing your wife in unrelated litigation. The Supreme Court's vote in Case X is tied, with four concurrences and four dissents; you are recused. Because the Supreme Court cannot reach a majority vote in Case X, it is necessary for the Court to appoint a special justice to break the deadlock with a vote of four-to-four as to whom to appoint as a special justice. Specifically, you ask whether your voting for a special justice to sit in Case X is merely a ministerial act that may be performed despite your recusal in voting on the merits of Case X.

We find nothing in the Canons of Judicial Ethics which prohibits you from voting on the appointment of a special justice to sit on the case.

While a judge may decide not to exercise his judicial functions after recusal, he may perform purely ministerial acts. We find United States v. Moody, 977 F. 2d 1420 (11th Cir., 1992) to be persuasive. In Moody, all of the judges of the Eleventh Circuit Court of Appeals had recused themselves from participating in any cases relating to the investigation of the murder of the Honorable Robert Vance who sat on the Eleventh Circuit. Chief Judge Tjoflat designated a judge from the Southern District of Georgia to hear the case. The defendant argued that Chief Judge Tjoflat, by virtue of the Eleventh Circuit's recusal order, lacked the authority to designate a judge in the case. The crux of this issue was whether the act of designating a trial judge is a ministerial act or an exercise of substantive authority. The Eleventh Circuit held that "there is no question that a federal judge may perform ministerial acts even after he has disqualified himself from a particular case." Chief Judge Tjoflat's assignment of a judge was a purely ministerial act, without implication concerning the merits of the case.

As a general rule, a trial judge who has recused himself should take no action in the case except the necessary ministerial acts to have the case transferred to another judge. 13A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, Section 3550 (2nd ed. 1984).

In Ross v. Luton, 456 So. 2nd 249 (Ala. 1984), the circuit judge who presided over the case from the date of its original filing recused himself. Pursuant to Rule 12, Alabama Rules of Judicial Administration, the circuit judge then appointed the district court judge to serve as acting circuit judge over all future matters in the case. In Ex parte Adkins, 687 So. 2nd 155 (Ala. 1996), the Supreme Court held that where a judge's impartiality might reasonably be questioned, it was appropriate for the judge to transfer the case to another judge.

Based on the foregoing, it is the opinion of this Commission that you may vote on the appointment of a judge to sit as a special justice in Case X as such action is purely a ministerial
act.

Very truly yours,

JUDICIAL INQUIRY COMMISSION