

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

STEPHEN M. KELLY, *et al.*,

Defendants

Criminal No. 97-9-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER DENYING  
DEFENDANTS' MOTION TO RECUSE THE PRESIDING JUDGE

Before the Court for action at this time is the oral motion of the *pro se* Defendants herein made on the record at a pretrial conference held in this case on April 28, 1997. The stated bases for the motion are that I should recuse myself as the presiding judge in this matter because: (1) I have "a long-time friendship with [Duane D. 'Buzz' Fitzgerald], the former Chief Executive Officer of BIW [Bath Iron Works]" and (2) I was "nominated" [to my judgeship] by former Senator [William S.] Cohen," who now serves as United States Secretary of Defense. The implicit assertion is that because of these associations, there is the appearance of impropriety if I preside at trial herein. The motion, therefore, arises under 18 United States Code section 455(a), which reads as follows:

**§ 455. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In determining if an appearance of impropriety exists under section 455(a), the applicable standard is whether "a reasonable person, knowing all the circumstances, would question the judges impartiality." In Re Cargill, Inc., 66 F.3d 1256, 1260, n.4 (1st Cir. 1995).

A. Acquaintance With Mr. Fitzgerald

It is undisputed that I have had a professional acquaintance and a casual social friendship with Duane D. Fitzgerald over the years and that Mr. Fitzgerald served for a period of time, unknown to the undersigned as to its duration, as Chief Executive Officer of Bath Iron Works, the shipyard where the events giving rise to this prosecution occurred.<sup>1</sup> I am aware that Mr. Fitzgerald retired from that position over a year ago. I am not aware that he has had any employment relationship with Bath Iron Works since that time.

I find that there is no appearance of impropriety created by my relationship with Mr. Fitzgerald for two reasons. First,

---

<sup>1</sup>Defendants have filed no affidavit setting forth a factual predicate for an appearance of impropriety as provided for in 18 U.S.C. § 144. The filing of such an affidavit would make no difference to my decision herein because the applicable standard for determining whether an appearance of impropriety exists is the same under section 144 as under section 455. United States v. Cornforte, 624 F.2d 869 (9th Cir. 1980), cert. denied, 449 U.S. 1012 (1980).

Mr. Fitzgerald is no longer an officer of Bath Iron Works. Further, I do not have personal knowledge, and the record does not disclose, that he has any existing relationship with Bath Iron Works or any present interest in the outcome of this prosecution.<sup>2</sup>

Therefore, I conclude that a reasonable person, knowing all of the circumstances of the case as reflected by the record, would not question my impartiality as a presiding judge in this case because of my acquaintance with Mr. Fitzgerald, his association with Bath Iron Works, and Bath Iron Works' possible interest in this case.

B. "Nomination" by Senator Cohen

---

<sup>2</sup>It is not clear to me, in fact, that Bath Iron Works has any present pecuniary or tangible interest in the outcome of this prosecution. The prosecution is brought by the Government to attempt to vindicate its interest in the sanctity of the property of the United States Government. So far as the record presently reflects, Bath Iron Works simply happened to be the owner of the premises on which the alleged attack on the property of the United States occurred. The Indictment alleges no violation of any rights or interests of Bath Iron Works in the subject property, the USS THE SULLIVANS, or of the property interests of Bath Iron Works in its real estate and buildings.

It may be, however, that Bath Iron Works, as the owner of the premises on which the Defendants are alleged to have entered prior to boarding the USS THE SULLIVANS, has some remote or obscure interest in the outcome of this prosecution. That interest, if one exists, is far too speculative and insignificant to cause a reasonable person to conclude that, because of it, I would appear to lack impartiality in this case, especially when it becomes relevant only because of my acquaintance with Mr. Fitzgerald, a circumstance I have found insufficient, by itself, to create an appearance of impropriety.

The basis asserted for my recusal -- then-Senator Cohen's role in my appointment nearly fourteen years ago as a federal district judge -- is factually incorrect in a controlling respect. Senator Cohen did not, and did not have the authority to, "nominate" me as a United States district judge. Rather, his role was to make a "recommendation" to President Reagan that I (perhaps along with others, I am not privy to the precise recommendation) be considered by the President for nomination as a district judge. President Reagan then nominated me to the United States Senate for appointment as a district judge, seeking the "advice and consent" of the Senate to my appointment. After its own processes were carried out, the Senate "consented" to the appointment and thereafter, I was appointed to the position of United States District Judge by President Reagan. Thus, while Senator Cohen played a role in initiating the appointment process, he played no controlling or decisive role in my selection as the appointee. Although we are friends and Secretary Cohen played a meaningful role in my appointment as a federal district judge, I conclude that these facts would not lead a reasonable person to question my impartiality in this case.

Further, although the prosecution is aimed at the vindication of the property interests of the Government, in the USS THE SULLIVANS, there is no reason to believe that Secretary Cohen has any personal interest in the outcome of this prosecution. As a representative of the Government and of the

agency of the Government that owns the vessel, he may have an official interest in the security of the property. There is no showing here, however, that he, or his agency, has precipitated or initiated this prosecution. The prosecution has been commenced by the United States Attorney's Office for the District of Maine, an agency of the United States Department of Justice. I am satisfied that any such "official interest" on Secretary Cohen's part is too attenuated and remote in its impact to create an appearance of bias on my part.

I conclude that notwithstanding my relationship with Secretary of Defense Cohen and his interest in the outcome of this prosecution, a reasonable person, knowledgeable of the facts, would not question my impartiality as a presiding judge in this case.

Accordingly, the motion that I recuse is hereby DENIED.

So ORDERED.

---

GENE CARTER  
District Judge

Dated at Portland, Maine this 30th day of April, 1997.