

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Nos. 10-2487, 10-3580

UNITED STATES OF AMERICA,

Appellee,

vs.

SHOLOM RUBASHKIN

Appellant

**Appeal from the United States District Court
In and For the Northern District of Iowa
Hon. Linda R, Reade, Judge**

**AMICUS CURIE BRIEF ON BEHALF OF THE AMERICAN
CIVIL LIBERTIES UNION OF IOWA IN SUPPORT
APPELLANT RUBASHKIN'S REQUEST FOR REVERSAL
AND REMAND**

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Statement of Interest

The American Civil Liberties Union of Iowa (“ACLU of Iowa”) was founded in 1935, the ACLU of Iowa is a non-profit organization that promotes and defends the values reflected in the Bill of Rights through public advocacy and outreach, lobbying, and litigation.

The ACLU of Iowa is dedicated to upholding the United States Constitution – particularly the First, Fourth, Fifth, and Fourteenth Amendments. It also supports and works for the improvement civil rights statues, open records/meetings laws, and statutory privacy protections. The ACLU of Iowa is dedicated to the principles of liberty and equality embodied in the Constitution. Since its inception, it has been committed to ensuring the fairness and integrity of the criminal justice system and to providing meaningful redress for those whose rights are violated. In furtherance of this goal the ACLU of Iowa has been involved in numerous cases before this Court and others interpreting the scope of fairness demanded by our Constitution.

The ACLU of Iowa files this Amicus brief in support of Appellant’s brief to expose the constitutional magnitude of the *ex parte* communications between the District Court and United States Attorney’s Office in this case permitting unreported *ex parte* communications threaten the very core of our adversarial

system of criminal justice and threatens to tilt the balance in all criminal prosecutions towards the side of the government. To avoid this harm, the ACLU of Iowa suggests that the constitutional standard be applied in cases with rare factual circumstances such those that exist in this case so as to avoid further questioning of the fairness of the judicial system.

The ACLU of Iowa in no way endorses the supposed criminal activity alleged to have been committed by Mr. Rubashkin in the numerous superseding indictments. Our interest is solely in the fact that we believe a legitimate issue exists as to whether Mr. Rubashkin was afforded a “fair tribunal” in light of the numerous *ex parte* communications between the presiding judge and the prosecution and that these *ex parte* communications suggest a blurring of the lines drawn by the separation of powers doctrine between the executive and judiciary functions of government.

Issues Presented for Review

- I. Does the Due Process Clause of the United States Constitution Require Recusal where the Presiding Judge Assisted in the Organization, Planning, and Execution of the Criminal Prosecution?

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28 U.S.C. Section 455(a)

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Fed.R.Cr.P. 11(c)(1)(c)

- II. Do *Ex Parte* Communications initiated by the United States Attorney's Office Violate the "Separation of Powers Doctrine" when those Communications Serve to Enlist the Court's into the Executive Function of Organizing, Planning, and Executing a Criminal Prosecution?

Cases

New York v. United States, 504 U.S. 144, 112 S.Ct. 2408 (1992)

United States v. White, 689 A.2d 535 (D.C. 1997)

Morrison v. Olson, 487 U.S. 654, 108 S.Ct. 2597 (1988)

Summary of Argument

As set forth herein, the presiding judge and the United States Attorney's Office for the Northern District of Iowa were involved in a pattern of *ex parte* communications for a period of 7 months before the execution of a raid at the

Agriprocessor's Inc. Meat packing plant in Postville Iowa in May of 2008. Over this seven month period the criminal prosecution of employees and executives at Agriprocessors, Inc. in Postville, Iowa, were organized, planned and eventually executed, all with the explicit participation of both the United States Attorney's Office and the presiding judge in this matter. Included in the overall prosecution were the multiple indictments against the Appellant Shalom Rubashkin.

Clearly *ex parte* communications are disfavored in our system. The most egregious examples of the *ex parte* communications in this case were documented by Immigration and Customs Enforcement in memoranda obtained by the Appellant after his conviction and include reports that Judge Reade, the United States Attorney's Office and law enforcement officials discussed "an overview of charging strategies" prior to indictment. Further compounding flagrancy of Judge Reade's *ex parte* participation in the "charging strategies" are the claims of a lawyer who refused to participate on behalf of defendants in related cases because F.R.Cr.P. 11 plea agreements had been "pre-approved" by Judge Reade before they were ever presented to defendants. An objective view of these violations and the resulting convictions leads one to openly suspect that all of the defendants, including Mr. Rubashkin, who faced criminal prosecution as a result of this joint judicial and executive activity faced an unfair tribunal. Mr. Rubashkin's

conviction should be vacated and he should “get his day in court” with a tribunal that is not an arm of the prosecution. Due Process demands it. The Separation of Powers Doctrine demands it.

Argument

I. Does the Due Process Clause of the United States Constitution Require Recusal when the Presiding Judge Assisted in the Organization, Planning, and Execution of the Criminal Prosecution?

It is axiomatic that “[a] fair trial in a fair tribunal is a basic requirement of due process. *Caperton v. A.T. Massey Coal Co., Inc.* 129 S.Ct. 2252, 2259 (2009). This *amici curiae* urges that in addition to the statutory duty Judge Reade had under 28 U.S.C. § 455(a) to recuse herself in this matter, Judge Reade had a constitutional duty to do so under the Due Process Clause of the 5th Amendment to the United States Constitution. While fair trial in fair tribunal is basic requirement of due process, most matters relating to judicial disqualification do not rise to Constitutional level, there are circumstances in which the probability of actual bias on part of judge is too high to be constitutionally tolerable. *Caperton v. Massey Coal Co.* 129 S.Ct. 2252, 2254 (2009). In *Caperton* the Supreme Court underscored that “what degree or kind of interest is sufficient to disqualify a judge

from sitting ‘cannot be defined with precision.’” *Id.* This case presents such a unique factual scenario. The actions of the presiding judge in this case present an unprecedented collaboration with the prosecution that require a finding that a violation of due process has occurred. If this case is reversed on statutory grounds, as urged by Appellant Rubashkin, this Court need not reach the constitutional inquiry presented by the circumstances of this case. However, if this Court does not reverse on statutory grounds, this matter must be reversed and remanded to the District Court, with a different district court judge presiding, as a matter of due process.

Under the objective standard established by 28 U.S.C. § 455(a) the issue is whether a judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. Whether a judge actually is biased is irrelevant to this issue. Under the objective standard established by this statute the issue is whether a judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. *Scenic Holding, LLC v. New Board of Trustees of Tabernacle Missionary Baptist Church, Inc.*, 506 F.3d 656, 662, (8th Cir. 2007); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003); *U.S. v. Beale*, 574 F.3d 512, 519 (8th Cir. 2009); and *In re Medtronic, Inc. Sprint Fidelis*

Leads Products Liability Litigation, 601 F. Supp. 2d 1120, 1124 (D. Minn. 2009).

Judge Reade acknowledged the above to be the law governing her statutory duty to recuse herself pursuant to 28 U.S.C. § 455(a).

“Section 455(a) provides an objective standard of reasonableness.” *United States v. Martinez*, 466 F.3d 878, 883 (8th Cir. 2006). “The issue is ‘whether the judge’s impartiality might reasonably be questioned by the average person on the street **who knows all the relevant facts** of a case.’” *Id.* (Quoting *Moran v. Clarke*, 296 F.3d 638, 648 (2002) (en banc)). (Docket No. 958, p. 17.) Emphasis added.

Though the presiding judge correctly identified the applicable objective standards for review, it failed to apply them. The presiding judge, instead, chose to justify it continued *ex parte* involvement in the case by justifying only the “facts” as viewed by the Court while never directly addressing statements contained in the memoranda from U.S. Immigration and Customs Enforcement.

The constitutional objective standard for recusal is different. Due Process requires recusal when “the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); cited with approval in *Caperton v. Massey Coal Co.* 129 S.Ct. 2252, 2257 (2009).

The extensive *ex parte* communications and blurred line of distinction

between the judge and the prosecution could effectively lead to the Court being labeled something akin to what the Supreme Court has called a “one-man grand jury.” SEE *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)).

The “facts” as set forth in the ICE memoranda and statements of a defense attorney who was invited to participate in defending those charged as a result of the planned raid, as opposed to the “facts” identified by the presiding judge, are not in accord. Suffice it to say that memoranda documenting the meetings between the presiding judge and the United States Attorney’s Office differ from the recollections of the Court in several meaningful ways. The presiding judge never addressed specific statements contained in the memoranda that would facially contradict the “facts” as determined by the Court. Specifically, the presiding judge did not address or attempt to explain the following:

- (1) “The USAO also stated that they have briefed Chief United States District Court Judge Linda Reade regarding the ongoing investigation *and* their expectation that it is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions...” (Emphasis Added) (Docket 924-4, p. 3).
- (2) “At 1:30 local time [January 28, 2008] a meeting was held with the

Chief District Judge. There were many attendees at the meeting *as requested by the Judge.*” (Emphasis Added) (Docket No. 942-4, p. 4).

- (3) “The parties [including District Court Judge Reade] discussed an *overview of charging strategies*, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, *and other issues related to the CVJ investigation and operation.*” (Emphasis Added) (Docket No. 942-4, p.5).
- (4) “The first Assistant for the Northern District Rich Murphy indicated that he has a meeting this Friday [April 4, 2008] with Chief Judge Reade *who has requested a briefing on how the operation will be conducted.*” (Emphasis Added) (Docket No. 942-4, p. 6).
- (5) “*The Chief Judge has indicated she wants a final game plan in two weeks* [April 4, 2008].” (Emphasis Added) (Docket No. 942-4, p. 7).

Contrary to the presiding judge’s Order, these statements from the ICE memoranda do not “simply confirm all of the court’s prior representations that the undersigned’s pre-enforcement action involvement was logistical in nature.” (Docket No. 958, p. 12). These statements, in fact, could easily lead an “average person on the street” to believe that the Court had been drawn into the prosecution

function. The acts of “requesting many attendees” at meetings, requesting “briefings” and “game plans”, and discussing “charging strategies” are not the acts of someone who is not intimately involved in the organization, planning, and execution of the criminal prosecution.

In its attempt to justify its failure to recuse, the presiding judge referred to there only being “rumor and innuendo” that suggested recusal without identifying what part of the record it was referring to (Docket No. 958, p. 17). The Court did, however, acknowledge that, “an attorney who declined to represent defendants in Waterloo wrote a letter criticizing the court’s involvement.” (Docket No. 958, p. 6). While acknowledging the existence of this letter the Court asserted that “statements and innuendo published in the media or elsewhere simply do not represent the facts.” (Docket No. 958, p. 19).

Of particular importance to the question of recusal was the claim of the “attorney who declined to represent defendants in Waterloo” that the presiding judge “had already ratified” F.R.Cr.P. 11(c)(1)(C) plea agreements prior to the involvement of any defense counsel.” (Docket No. 955-7, pp. 5-6). The presiding judge has never directly addressed this allegation despite corroboration contained in the Declaration of AUSA Richard Murphy confirming that “[t]he Court was advised we expected to propose binding plea agreements...” (Docket No. 948-5, p.

5).

When faced with the opinions from experts in ethical behavior of both judges and attorneys that incorporated specific statements contained in the ICE memoranda and the letter from the attorney “who declined to represent defendants in Waterloo”, Judge Reade declined to credit the opinions because they contained statements averring that Judge Reade had “expressed support” for the criminal arrests and prosecution. (Docket No. 958, p. 11). With a swipe of a pen confined to a footnote, the presiding judge ignored two leading legal ethics experts without ever addressing their concerns. (Docket No. 958, p. 11).

The level of participation by the presiding judge in the organization, planning, and execution of the criminal arrests and prosecutions as demonstrated by the currently uncontradicted portions of the record in this case is far beyond what the Court referred to as “logistical preparations”.

Judge Reade ruled that her impartiality based on the *ex parte* meetings and the *ICE* memorandums could not be questioned because those factors “simply do not represent the facts” as she found them to be. (Docket No. 958, p.19). Judge Reade did not rule that the hypothetical reasonable person, **knowing** of the numerous *ex parte* meetings between herself and USAO and *ICE* and the content of the written memorandums of ICE could not reasonably question her

impartiality. Judge Reade ruled that such factors “simply do not represent the facts” as she found them to be. This *amici curiae* submits that the presiding judge’s dictation of what constitutes the “real facts” does not comport with the standard required by § 455(a) on which a judge determines whether he or she should recuse themselves from a matter and it certainly is not an “objective test” to make certain that “the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable”.

This Amicus concedes that in reality Judge Reade’s ruling may be accurate in that the ICE memorandums and the letter from the defense attorney “do not represent the facts” as to subject matters of the *ex parte* meetings. However, this cannot be known on appeal as the factual basis for such ruling is not a matter of record. On their face the unexplained ICE memorandums permit a permissible inference that questions Judge Reade impartiality in this matter. Accordingly this Amicus respectfully suggests that both the purpose of 28 U.S.C. § 455(a), the promotion of confidence in the judiciary by avoiding the *appearance* of impropriety, and the Fifth Amendment guarantee of due process of law, can best be served by remanding this matter to the District Court with instructions to allow further discovery as to the subject matters of Judge Reade’s *ex parte* meetings with the prosecutors from the USAO and agents from the ICE.

II. Do *Ex Parte* Communications initiated by the United States Attorney's Office Violate the "Separation of Powers Doctrine" when those Communications Serve to Enlist the Court's into the Executive Function of Organizing, Planning, and Executing a Criminal Prosecution?

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article III, § 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article II, § 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

Implicit in the "Separation of Powers Doctrine" is the understanding our founding fathers created three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another. Separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch.

Where the Judicial Branch exceeds its authority relative to the Executive,

therefore, the departure from the constitutional plan cannot be ratified by the “consent” of executive officials. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment. SEE *New York v. United States*, 504 U.S. 144, 181, 112 S.Ct. 2408, 2431 (1992).

Decisions pertaining to criminal prosecutions generally rest in the executive branch and may not be encroached by the judiciary. *In Re Grand Jury Proceedings*, 613 F.2d 501, 505 (5th Cir. 1980). Accordingly, the executive branch has discretionary power to control criminal prosecutions, and “as an incident of the constitutional separation of powers, . . . the courts are not to interfere with the free exercise of” that power. *Id.* The judiciary is normally without authority to question and review the executive branch in the exercise of its discretion whether to prosecute particular cases. *United States v. White*, 689 A.2d 535, 538 (D.C. 1997). So long as the prosecutor has probable cause to believe the accused committed an offense the decision whether or not to prosecute, *and what charge to file* generally rests *entirely* in the prosecutor’s discretion. (Emphasis Added) *Id.*

In this case the prosecutor sought out the presiding judge in helping him to coordinate prosecutions that eventually included the prosecution of the Appellant.

(Docket No. 948-5). In doing so the United States Attorney's Office enlisted the Court in *ex parte* discussions about "charging strategies" and obtaining "pre-approved plea agreements", decisions which the presiding judge had no business reviewing or approving, particularly in an *ex parte* fashion.

Here an objective view of the memoranda and the letter from an attorney who declined representation of related defendants, suggest a judiciary heavily involved in the prosecutorial function. The Court was simply out of its element in participating in the organizing, planning, and executing the criminal prosecutions that included that of the Appellant. The fact that the United States Attorney's Office may have ceded its authority willingly is irrelevant. What matters is the Court was operating in territory that it did not belong.

Justice Scalia has opined that cases involving the separation of powers "will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699, 108 S.Ct. 2597, 2623 (1988).

The Court's express involvement in discussing the "charging strategies" and "pre-approving plea agreements", both in *ex parte* communications, represents no

wolf in sheep's clothing with respect to the blatant usurpation of executive function. This wolf is indeed a wolf and the risks inherent in permitting this type of activity by the judicial branch threaten the fairness of the entire criminal justice system.

CONCLUSION

The Constitution demands a new trial. Tacit permission by this Court of the activities of the presiding judge would invite further clandestine *ex parte* meetings between judges and prosecutors and would blur any line of distinction between the judicial and executive function. For the reasons set forth herein this Court should vacate the Appellant's conviction and grant a new trial before a detached and neutral judge of the district court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

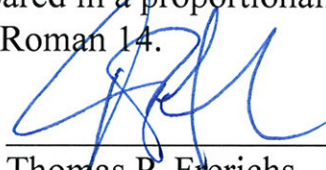
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I hereby certify that on January 10, 2011, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.



Thomas P. Frerichs

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