Recuse Me

By LINDA GREENHOUSE

However the courts eventually resolve the challenge to California’s ban on same-sex marriage, the record of the case will contain an ugly footnote: the last-ditch effort to retrospectively disqualify the federal judge who ruled that the ban is unconstitutional. It turns out that — horrors! — the judge, Vaughn R. Walker, is gay. Perhaps, his critics suggest, Judge Walker secretly intends to marry his partner of 10 years and has thus improperly placed himself in a position to reap personal benefit from his own ruling.

A motion to vacate his judgment was filed last week by opponents of same-sex marriage who are also pursuing an appeal of Judge Walker’s ruling last August on the ban, known as Proposition 8. (The State of California itself has declined to appeal.) Earlier, these same Proposition 8 supporters filed a motion to disqualify one of the appellate judges, Stephen R. Reinhardt. In that motion, they argued that the position of Judge Reinhardt’s wife, Ramona Ripston, as head of the American Civil Liberties Union of Southern California placed in question the judge’s ability to rule impartially because the organization has been a leading advocate for same-sex couples wishing to marry.

Judge Reinhardt denied the request. Judge Walker, having retired from the bench in February, cannot rule on the motion to vacate his ruling, which will be heard next month by another judge.

The effort to force or shame off a case a judge deemed likely to be unsympathetic is becoming the latest weapon in a litigator’s arsenal — litigation by other means. The tactic is not limited to one side of the ideological spectrum. In January, the liberal organization Common Cause asked the Justice Department to investigate whether Justices Antonin Scalia and Clarence Thomas should have recused themselves from participating in last year’s Citizens United campaign finance case “based on their attendance at secretive Koch Industries retreats.” If so, Common Cause asserted, the decision in Citizens United, which opened the door to unlimited corporate spending in federal election campaigns, should be vacated.

The Common Cause argument was thin on its facts, and the Supreme Court denied that either justice had ever participated in any such corporate strategy sessions. Common
Cause did, however, succeed in getting its name into a few headlines, from which it had been absent for some years.

In 2004, the Sierra Club tried to get Justice Scalia to recuse himself from a case seeking to require disclosure of the names of members of Vice President Dick Cheney’s energy policy task force. The recusal motion argued that by joining the vice president on a duck-hunting expedition, Justice Scalia had raised the question of whether he could decide the case impartially.

Justice Scalia declined to remove himself in a 21-page opinion that I found persuasive. This was a case that named Vice President Cheney in his official capacity, Justice Scalia emphasized, meaning that the vice president faced no personal liability. These official-capacity suits are legion, he noted, adding that a “no-friends rule” barring justices from sitting in such cases involving government officials of their acquaintance “would be utterly disabling.”

The most incisive part of his response concerned the Sierra Club’s argument that because many major newspapers had called for Justice Scalia’s recusal and none had argued against it, it was clear that “the American public” had discerned “an appearance of favoritism.” It was thus clear, the motion concluded, that “any objective observer would be compelled to conclude that Justice Scalia’s impartiality has been questioned.” To which Justice Scalia appropriately responded: “The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.”

The standard for judicial recusal is set out in Section 455(a) of Title 28 of the United States Code. It provides that “any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” As Justice Scalia’s response suggests, “reasonably” covers a lot of ground. And that was seven years ago, before the mobilizing potential of the Internet, making it possible to foment public outrage almost instantly over almost anything, was fully realized. In today’s superheated Web-driven world, what’s reasonable and who’s to say?

(To Justice Scalia’s credit, during the same term the Cheney case was pending, he recused himself from a constitutional challenge to the inclusion of the phrase “one nation under God” in the Pledge of Allegiance; before the case reached the Supreme Court, he had mentioned it during an appearance at a Knights of Columbus event and let slip his view that the phrase presented no constitutional problem.)

Back when the duck-hunting controversy was raging, I amused myself by asking friends who insisted that Justice Scalia should remove himself from the case how they would respond to a slightly different situation. Suppose, instead of Justice Scalia going duck hunting with Dick Cheney, it had been Justice Ruth Bader Ginsburg going shopping with Lynn Cheney. Would they move to disqualify Justice Ginsburg? (Note to potential
commenters: Yes, I know my hypothetical scenario is slightly inapposite and politically incorrect, so no need to point that out.)

My point was to challenge ethical sensibilities so conveniently aligned with desired outcomes. Never have I witnessed an effort on the part of anyone to disqualify a presumably friendly judge. If I ever do, I promise to be less skeptical of the entire recusal enterprise.

Which brings me back to the effort to wipe Judge Walker’s opinion in Perry v. Schwarzenegger off the books. There is some irony here. Vaughn Walker is a Republican whose initial nomination by President Ronald Reagan to the Federal District Court in San Francisco was blocked by Democrats who thought he was too conservative. To the extent that he had any public recognition in the legal community, it was for his vigorous representation of the United States Olympic Committee in a 1982 copyright infringement case against a new organization calling itself the Gay Olympics. There could be only one Olympics, Mr. Walker argued persuasively, thus forcing the other group to become the Gay Games.

President George H. W. Bush succeeded in getting him on the district court in 1989. Long rumored to be gay, he discussed his personal life publicly for the first time with a group of reporters last month. He and his partner, a doctor, have been together for 10 years, he said. Reflecting on his career, he observed wryly, “I was the ogre of the gay community when I was nominated, and a hero when I leave.”

The motion filed by the Proposition 8 supporters argues that “the pall cast by the palpable appearance of judicial partiality upon one of the most prominent and widely publicized constitutional cases in this country’s history threatens deep and lasting harm to the public’s confidence in our nation’s judicial system.”

I find this argument puzzling, given the very premise of the war against same-sex marriage being waged by the people and organizations involved in the current effort. Not for Protectmarriage.com and the others is the libertarian view that if you don’t like same-sex marriage, then don’t marry someone of your own sex. No, their premise is that preserving “traditional” marriage as a union of one man and one woman is the urgent business of society as a whole. “Traditional marriage is the foundation of society,” Protectmarriage’s Web site declares.

The “Manhattan Declaration,” a foundational document of the “traditional marriage” movement, goes a step further. It is “the duty of the law to recognize and support for the sake of justice and the common good” that marriage is the “covenantal union of husband and wife,” according to the widely distributed declaration, issued by a group of leading social conservatives in November 2009 as “a call to Christian conscience.” The document adds that “the common good of civil society is damaged when the law itself, in its critical
pedagogical function, becomes a tool for eroding a sound understanding of marriage on which the flourishing of the marriage culture in any society vitally depends.”

The logical inference from this view of judicial duty is that if a gay judge has a stake in the outcome of a case about whether to recognize same-sex marriage, so presumably does a straight judge. Who, confronting stakes as high as the potential collapse of Western civilization, could reasonably be impartial? Who needs the Constitution when ideology and religious doctrine are at hand? I trust that the judges who rule on this latest effort to substitute recusal for legal argument will understand it for the subterfuge that it is.