

1 **A. Background**

2 On March 2, 2005, Plaintiff filed a complaint for battery and negligent medical
3 malpractice against the United States government and a United States Navy surgeon arising from
4 Plaintiff's unsuccessful cataract surgery. Compl., ECF No. 1.

5 On October 18, 2007, the United States filed a motion for summary judgment, which was
6 granted as to the medical malpractice claim, but was denied as to the battery claim. *See* ECF
7 Nos. 74, 75, 84. On October 9, 2008, the United States filed a motion to dismiss the battery claim
8 for lack of subject-matter jurisdiction, arguing that the Federal Tort Claims Act expressly
9 preserves sovereign immunity against battery claims. *See* ECF No. 88. This court agreed and
10 dismissed the battery claim, holding that the Gonzalez Act, 10 U.S.C. § 1089, does not authorize
11 battery claims against the United States when military doctors operate without the patient's
12 consent. *See* ECF No. 110.

13 The dismissal of the battery claim was affirmed by the Court of Appeals for the Ninth
14 Circuit. *Levin v. United States*, 663 F.3d 1059 (9th Cir. 2011). The Supreme Court reversed the
15 judgment of the Court of Appeals and remanded for further proceedings. *Levin v. United States*,
16 133 S. Ct. 1224 (2013).

17 **B. Recusal**

18 “Judicial impartiality is presumed.” *First Interstate Bank of Arizona, N.A. v. Murphy*,
19 *Weir & Butler*, 210 F.3d 983, 987 (9th Cir. 2000). “Because a judge is presumed to be impartial,
20 a party seeking recusal bears the substantial burden of proving otherwise.” *United States v.*
21 *Martinez*, 446 F.3d 878, 883 (8th Cir. 2006).

22 If “the judge before whom the matter is pending has a personal bias or prejudice either
23 against [a party] or in favor of any adverse party, such judge shall proceed no further...” 28
24 U.S.C. § 144. Additionally, a judge “shall disqualify himself in any proceeding in which his

1 impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The Ninth Circuit has held
2 that under both recusal statutes “the substantive standard is ‘whether a reasonable person with
3 knowledge of all the facts would conclude that the judge’s impartiality might reasonably be
4 questioned.’” *Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008) (brackets omitted)
5 (quoting *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997)).

6 In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court recognized that
7 “extrajudicial source” is the common basis for establishing disqualifying bias or prejudice. *Id.* at
8 551. The Court held:

9 First, judicial rulings alone almost never constitute a valid basis for a bias or partiality
10 motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying
11 opinion), they cannot possibly show reliance upon an extrajudicial source; and can only
12 in the rarest circumstances evidence the degree of favoritism or antagonism required (as
13 discussed below) when no extrajudicial source is involved. Almost invariably, they are
14 proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the
15 basis of facts introduced or events occurring in the course of the current proceedings, or
16 of prior proceedings, do not constitute a basis for a bias or partiality motion unless they
17 display a deep-seated favoritism or antagonism that would make fair judgment
18 impossible.

19 *Id.* at 555 (citation omitted).

20 Plaintiff contends that “[a]llowing pervasive errors in the Order’s analysis to slip by
21 could reasonably be seen as an indication that the Chief Judge acted with a predisposition that
22 allowed a decision to be taken without due diligence.” Mot. at 2, ECF No. 128. Plaintiff does not
23 establish that this court’s dismissal of his battery claim either relied upon an extrajudicial source
24 or displayed a deep-seated favoritism or antagonism. Rather, Plaintiff purely relies upon the fact
that the Supreme Court reversed the dismissal of his battery claim.

The court finds that a reasonable person with knowledge of all the facts would not
conclude that the court’s impartiality might reasonably be questioned. This court’s dismissal of
Plaintiff’s battery claim was affirmed by the Court of Appeals for the Ninth Circuit, whose
interpretation of the law is binding precedent for this jurisdiction. Recognizing a split between

1 the Courts of Appeals on whether the Gonzalez Act authorizes battery claims against the United
2 States when military doctors operate without the patient’s consent, the Supreme Court granted
3 certiorari and subsequently reversed the Ninth Circuit’s judgment. The only basis for recusal
4 proffered by Plaintiff is this court’s order dismissing the battery claim. The Supreme Court has
5 held judicial rulings almost never constitute a valid basis for recusal and “only in the rarest
6 circumstances” evince the degree of favoritism or antagonism required for recusal; such rare
7 circumstances are not present in this instance.

8 **C. Conclusion**

9 Based upon the foregoing, the court finds that Plaintiff has not satisfied his substantial
10 burden of rebutting the presumption of impartiality. The undersigned recognizes her duty to sit in
11 all cases that come before the court when there is no legitimate reason for recusal. This is such a
12 case. Accordingly, the court shall not recuse itself.

13 **SO ORDERED.**



15 /s/ Frances M. Tydingco-Gatewood
16 Chief Judge
17 Dated: May 14, 2014

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