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DON'T SHOOT THE CANONS: MAINTAINING THE APPEARANCE OF PROPRIETY STANDARD

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Judges, especially appellate judges who usually bask in anonymity, are very much in the news these days. The topic du jour is recusal. No court or judge enjoys a safe harbor from publicity in this arena. Whether it is the United States Supreme Court,[1] the federal district bench,[2] a state supreme court,[3] or a county court,[4] public scrutiny is rigorous. In most cases, the issue is not an actual conflict of interest or a claim of actual bias, but rather the appearance of potential bias in hearing a case where a judge's impartiality is perceived to be in doubt. It is an examination of this circumstance, which is generally cast as "the appearance of impropriety," that prompts this essay. In my view, the appearance standard fosters public confidence in the judiciary and augments judicial independence.

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1. *See e.g.* Gina Holland, *Scalia, Cheney Trip Stirs Protests; Critics See Conflict of Interest in Case*, Chi. Trib. 14 (Jan. 31, 2004); David G. Savage & Richard Serrano, *Ginsburg Stands by Involvement with Group*, L.A. Times A14 (Mar. 14, 2004).

2. Jennifer 8. Lee, *Judge Who Ruled on Forests Is Faulted for Energy Holdings*, 152 N.Y. Times A11 (Aug. 6, 2003).

3. David Ammons, *State Supreme Court Judge Disqualified From Case*, Columbian (Vancouver, Wash.) 2 (May 15, 2003) (describing the decision of a state supreme court justice to recuse after visiting a sex-offender center while considering an appeal from its residents).

4. Cathy Sorbo, *Judicial Stress Lands on Hapless Litigants*, Seattle Post-Intelligencer B5 (Feb. 12, 2005) (judge sanctioned for wearing "Wanna Piece of Me?" T-shirt).

I. EVOLUTION OF THE CANONS OF JUDICIAL ETHICS

Although the notion of formal canons of ethics for judges in the United States is a phenomenon of the early twentieth century, the concept of impartiality derives from ancient law. Under the Roman Code of Justinian, a party who deemed the judge "under suspicion" was permitted "to recuse him before issue joined, so that the cause go to another."[5] The principle of invoking recusal for "suspicion" of bias was carried through in disqualification statutes in civil law countries.[6] In the common law system, however, the buck literally stopped where the judge had a direct financial interest, as that was the only basis for disqualification.[7] In the United States, since 1792 recusal has been required where judges have a financial interest in a case or where they previously served as an attorney.[8]

The first formal judicial ethics code in the United States came about through an American Bar Association project: the Committee on Judicial Ethics, headed by Chief Justice Taft. The Canons were adopted in 1924,[9] ironically in response to the conflict presented by Judge Kenesaw Mountain Landis serving both as a federal judge and as the Commissioner of Baseball while attempting to clean up the Chicago Black Sox baseball betting scandal.[10] The original thirty-four canons were broad and wide ranging and included the principle that remains in the code today—a judge should avoid both impropriety and *the appearance of* impropriety.[11] With respect to disqualification, the standard was a subjective one—whether a judge should

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5. Harrington Putnam, *Recusation*, 9 Cornell L.Q. 1, 3 n. 10 (1923) (quoting Corpus Juris Civilis, Codex, lib. 3, tit. a, no. 16, both in the original Latin and in translation).

6. Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.2.1 (Little, Brown 1996) (citing Putnam, *supra* n. 5, at 3 n. 10).

7. John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947).

8. *See* Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 (cited in *Liteky v. U.S.*, 510 U.S. 540, 544 (1994)).

9. The Canons of Judicial Ethics (1924) were adopted by the House of Delegates of the American Bar Association in 1924. *See Annotated Model Code of Judicial Conduct* 3 (Art Garwin, ed., ABA Ctr. for Prof. Responsibility 2004) [hereinafter *Model Code*].

10. For a description of Landis's role, see John P. MacKenzie, *The Appearance of Justice* 180-82 (Charles Scribner's Sons 1974).

11. This requirement was embodied in the original Canon 4: "A judge's official conduct should be free from impropriety *and the appearance of impropriety*." MacKenzie, *supra* n. 10, at 190 (emphasis in original).

withdraw in a particular case was in the eyes of the beholder, the judge.

The first major overhaul of the Canons came in 1972.[12] The admonition to avoid actual impropriety as well as the appearance of impropriety remained in the Canons, but the disqualification provision was radically revamped. The standard changed from a subjective to an objective one, that is whether a judge's "impartiality might reasonably be questioned." Despite another round of revisions in 1990, the appearance and disqualification language remained the same. The key change in 1990 was to replace "should" with "shall" to reflect the mandatory nature of the standards.[13]

Today the appearance concept is imbedded in two separate canons. Canon 2 reads, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[14] Canon 3E(1) on disqualification provides that "[a] judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[15]

Canon 3E(1) goes on to list separate instances in which disqualification is required because of (a) personal bias/prejudice or personal knowledge; (b) prior service as a lawyer in the matter; (c) economic interest; and (d) close personal relationship of relatives or parties to a proceeding.[16] For federal judges, virtually the same restrictions are contained in a federal statute.[17]

In the face of a string of court decisions involving judges and political speech and a renewed effort to scrutinize judicial

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12. For an enlightening discussion of the considerations that went into adopting the 1972 changes, see generally E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (ABA 1973).

13. *See generally Model Code*, *supra* n. 9, at 29.

14. *Id.* (Canon 2).

15. *Id.* at 184 (Canon 3E(1)).

16. *Id.* For a discussion of the provisions of Canon 3E(1) and related case law, see generally Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* (2d ed. Am. Judicature Socy. 1992). For a discussion of the relationship between Canons 2 and 3, see *U.S. v. Microsoft Corp.*, 253 F.3d 34, 113 (D.C. Cir. 2001) ("The District Judge's repeated violations of Canons 3A(6) and 3A(4) also violated Canon 2"); *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. Jud. Council 1995) ("The allegations of extra-judicial comments cause the Council substantial concern under both Canon 3A(6) and Canon 2 of the Judicial Code of Conduct.").

17. 28 U.S.C. § 455 (available at http://uscode.house.gov).

ethics, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct is presently undertaking a comprehensive review of the Canons. The Commission is examining the disqualification standards in light of the increased attention and sensitivity about recusal.

II. DEVELOPMENT OF THE APPEARANCE OF IMPROPRIETY STANDARD

Although the first formal judicial code adopted by the ABA did not advise judges to recuse based on an appearance of impropriety, three years after the adoption of the original Canons, the Supreme Court held that the Due Process Clause requires that judges recuse where there is an appearance of a conflict of interest. In 1927, the Court reviewed a defendant's conviction for possession of alcohol in violation of Prohibition because, amazingly, he was tried by an official who was reimbursed only for convictions and not for acquittals.[18] After acknowledging that the most virtuous judges would not allow the prospect of fees to influence their decisionmaking, the Court invalidated the conviction on the grounds that

> [e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.[19]

In developing the appearance standard, the Supreme Court has suggested that it accomplishes two notable ends. First, the prophylactic measure of requiring recusal based on the objective appearance of partiality avoids instances of actual partiality. Proving the partiality of a judge poses the obvious difficulty of having to offer evidence of the judge's state of mind, an unattainable burden in all but the most extraordinary cases. The standard also ensures that, according to the now oft-quoted words, "justice must satisfy the appearance of justice."[20] The Court reasoned that the standard "may sometimes bar trial by

18. *Tumey v. Ohio*, 273 U.S. 510 (1927).

19. *Id.* at 532.

20. *Offutt v. U.S.*, 348 U.S. 11, 14 (1954).

judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[21] The Court concluded that eliminating the appearance of impropriety has its own independent value, engendering public confidence in the judiciary.

The standard achieves its ends, in part, because courts have little difficulty applying it. For example, the Supreme Court found the standard violated where a judge served as the complaining witness and prosecutor as well as the judge;[22] where a mayor, sitting as a judge, convicted the petitioner of traffic offenses for tickets that represented about half of village revenues;[23] and where a state supreme court justice had filed two actions that hinged on the outcome of law he was making in his capacity as a justice.[24]

That the appearance standard should prove manageable in a practical sense is unsurprising, as it is, at bottom, a reasonableness standard.[25] The commentary to Canon 2 states that the test for appearance of impropriety hinges on the impression that conduct would make on "reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose."[26] Judges apply reasonableness standards all the time. For instance, a reasonableness standard controls whether the government has violated the Fourth Amendment's prohibition against unreasonable searches and seizures and, in the case of qualified immunity, the inquiry depends in part on determining whether a reasonable officer would have known of the constitutional right at issue.[27] Thus, the consideration whether a particular judicial act would undermine the appearance of propriety is the application of a routine judicial task. Of course, the ease of reciting the

21. *In re Murchison*, 349 U.S. 133, 136 (1955).

22. *Id.* at 134-36.

23. *Ward v. Village of Monroeville*, 409 U.S. 57, 57 (1972).

24. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 817-18 (1986).

25. For example, the Ninth Circuit explicitly invoked the reasonableness language in a case involving a challenge to a judge's bias. *Cmmw. of Northern Mariana Islands v. Kaipat*, 94 F.3d 574, 575 (9th Cir. 1996) ("Kaipat has not shown a violation of his federal constitutional rights since the judge had no pecuniary interest in the fine and held no other position that could reasonably warrant a fear of partisan influence on his judgment.").

26. *Model Code*, *supra* n. 9, at Canon 2, cmt.

27. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001).

appearance standard and the related reasonableness standard does not mean that courts always apply the standard consistently or that application escapes judicial disagreements.[28] This range of views does not, however, render the standard unworkable but rather underscores the fact-specific nature of the inquiry.

III. A BROADSIDE AGAINST THE CANONS AND THE APPEARANCE OF IMPROPRIETY

Although I strongly favor maintaining the appearance of impropriety as a judicial benchmark, in fairness it bears noting that the standard has its detractors. As far back as the 1972 revisions, "a significant minority of commentators have criticized the vagueness of the . . . Code's provisions."[29] Indeed, the subject is again on the table as the Commission considers additional revisions to the Canons.[30] The standard is attacked as overbroad, imprecise, and difficult to apply. Not surprisingly, this litany sounds like a textbook constitutional challenge to a statute.[31]

More pointed criticism is leveled at the idea of invoking the "reasonable person" as a guide to judicial ethics:

> [A]n appearance test shifts attention away from what objections are valid to what objections might appear valid to a reasonable observer who has not wrestled with the problem. The reasonable person may be a better guide for driving a car than the thinking judge, but not for deciding whether it is unjust for a judge to hear a case. The

28. For an interesting discussion of the appearance standard from a fractured en banc appellate panel, see *Del Vecchio v. Ill. Dept. of Corrections*, 31 F.3d 1363 (7th Cir. 1994) (addressing whether it violates the appearance standard for a judge to preside over the trial of a defendant where the judge had participated in the defendant's prosecution for murder fourteen years earlier). For an example of an acknowledged circuit split on the term's meaning, see *Alpha Epsilon Tau Ch. Hous. Assn. v. City of Berkeley*, 114 F.3d 840, 847 n. 10 (9th Cir. 1997) (discussing whether the standard was violated where a rent board both adjudicates disputes and is funded by registration fees).

29. Lisa L. Milord, *The Development of the ABA Judicial Code* 13 (ABA Ctr. for Prof. Responsibility 1992).

30. Leonard Post, *ABA's Judicial Conduct Proposals Draw Fire*, Natl. L.J. 1 (Feb. 24, 2005) (available at http://www.law.com/jsp/article.jsp?id=1109128219258) (accessed April 21, 2005; copy on file with Journal of Appellate Practice and Process).

31. *Id.*

> appearance test invites judges to rest on appearances, instead of looking deeper.[32]

This same theme was voiced at the recent Hofstra University School of Law conference on legal ethics, "Judging Judges' Ethics." My colleague, Judge Kozinski, wrote that "the modern approach, with its focus on *appearance* of impropriety, overlooks the most frequent and important ethical issues judges face."[33] (Parenthetically, it bears noting that the current Canons do not *focus* on the appearance issue but rather address both actual impropriety and the appearance of impropriety, with the former getting the much larger play within the Canons.)

Cataloging pressures that judges face every day—from giving short shrift to cases to signing on to work done by law clerks to stretching the law to reach a result—Judge Kozinski concludes that

> the standard promotes the wrong idea—that in order to keep judges from acting unethically, ethical rules must prevent judges from *appearing* to act unethically. . . . [T]he more rules you have, the more hoops judges have to jump through to avoid the appearance of impropriety, the more likely they are to feel that the hoop-jumping is the alpha and omega of their ethical responsibilities, and the less likely they are to give careful thought to the job's real ethical pitfalls.[34]

IV. THE CASE FOR KEEPING THE APPEARANCE OF IMPROPRIETY STANDARD

In my view, the various commentators who criticize the appearance standard, including Judge Kozinski, whose reasoning is usually trenchantly on target, have misfired in their broadside against the Canons. For example, Judge Kozinski suggests that hidden and lurking ethical issues are sufficiently grave to make the Canons tangential as guidelines. His approach, in essence, is as follows: Because a law clerk might

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32. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 278 (1987).

33. Alex Kozinski, *The* Real *Issues of Judicial Ethics*, 32 Hofstra L. Rev. 1095, 1096 (2004) (emphasis in original).

34. *Id.* at 1105 (emphasis in original).

draft the opinion in your case, you shouldn't worry if the judge's sister is the lawyer for the other side. This view—that appearances don't matter—misses the utility of the rule as a safeguard against actual impropriety, as well as the importance of public perception. The argument also stems from the false premise that concern with the appearance of impropriety will overshadow actual improprieties. The two principles are not mutually exclusive. Likewise, the commentators who say the notion of "appearance" is too vague to have any meaning are focused too narrowly. My response: Don't shoot the Canons!

The guiding principles of the Canons—integrity, impartiality, and avoidance of the appearance of impropriety—serve as daily reminders of the public trust placed in judges. The Canons also sensitize judges to the public's expectations of the judiciary. The Canons are not just for the benefit of judges, but for the judged and the public at large.[35]

Of course, actual ethical behavior is important but so is the appearance of ethical behavior. To understand why, consider the judicial practice of donning black robes. Being tried by a judge sporting a "Hang 'em high," or "Save the Whales" shirt is unthinkable, not because the T-shirts necessarily reflect an actual bias, but because of the appearance of such a bias. By reining in those practices most likely to undercut confidence in the judiciary, the Canons serve a valuable purpose. They inspire trust in a branch of government that derives its authority primarily from such trust.

Last year a Washington State judge was censured for writing "NTG" on hundreds of defendants' judgments and sentencing documents, knowing that NTG was widely believed

35. The provisions of Canon 3E also help the public understand the judiciary's responsibilities. Until recently, justices in California's appellate courts were not bound by the recusal provisions of the Canons. As the California Supreme Court stated when adopting the provisions for appellate justices,

> [t]he new provisions spell out in greater detail for the benefit of the courts and the public the consideration a justice of the Supreme Court or the Courts of Appeal should take into account in determining whether he or she should recuse or disqualify himself or herself from deciding or hearing a matter.

Ignazio J. Ruvolo, *California's Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will it be Reversible Error not to Self-Recuse?* 25 Thomas Jefferson L. Rev. 529, 540 (2003).

to stand for "Nail This Guy."[36] The judge maintained that NTG stood for "Note This Guy," meaning that the case should be closely scrutinized. Notwithstanding the judge's explanation that he did not really intend to "nail" anyone, he was reprimanded for the reason that

> Respondent created the appearance he was biased or prejudiced against those individuals he intended to "nail." Public confidence in the integrity and impartiality of the judiciary is undermined when a judge's conduct creates the perception that a case has been prejudged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists. Persons who believed Respondent wrote "Nail This Guy" in code on some defendants' judgments could reasonably conclude that those defendants received, or would receive, disparate or unfair treatment from the court.[37]

Confidence in the judiciary's integrity also is the foundation of judicial independence. Indeed, decisionmaking by a respected neutral is the essential function of a court. All of the foundations of judging—such as respect for the text of the law and precedent—reinforce the message of impartiality. The appearance standard similarly undergirds judicial independence.

The Supreme Court has been cognizant of the practical reality that

> people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of [the federal recusal statute] is to promote confidence in the judiciary by avoiding even the appearance of impropriety wherever possible.[38]

As Justice Kennedy wrote:

> Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect . . . . This we

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36. Am. Judicature Socy., *Creating Appearance of Bias*, 26 Jud. Conduct Rptr. 4 (Summer 2004) (summarizing facts recited in Order of Reprimand entered against judge).

37. *In re Burns*, CJC No. 4118-F-111, at 3-4 (Wash. St. Commn. on Jud. Conduct June 18, 2004) (available at http://www.cjc.state.wa.us) (accessed June 9, 2005; copy on file with Journal of Appellate Practice and Process).

38. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988) (footnote omitted).

> cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.[39]

Much conduct that is unbecoming a judge is not necessarily illegal. If this conduct is to be regulated, then a judicial code of conduct is essential. Consider Canon 2A, which reads that a "judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[40] Were this provision eliminated, then there would be no way to discipline a judge for testimony that is misleading but a shade short of perjury. Nor would there be a reprimand remedy for a judge who, stopped under suspicion for DUI but later acquitted, leveraged his position through use of judicial identification and vilified the police during the stop.

That the Canons embrace aspirational or hortatory principles is not a basis for a wholesale revision of the time-tested code. To those who say the appearance standard is too vague for meaningful application in the disciplinary process, it is important to underscore that the Canons are not only about discipline. Instead, the Canons provide a broad framework for a judge's conduct on and off the bench. Lest this view seem like Miss Manners or Pollyanna in the wilderness, one need only to search the case law on judicial ethics to confirm that the appearance standard not only has teeth, but that it is enforceable.[41] And one need only to scan the news to recognize the public's concern about appearance issues. In the same way that physicians aspire to do no harm under the spirit rather than the letter of the Hippocratic Oath, aspiring to avoid the appearance of impropriety imposes no significant burden on the judiciary.

In addition to promoting public confidence, the appearance standard is a practical solution to the difficult situation that

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39. *Liteky*, 510 U.S. at 564 (Kennedy, Blackmun, Stevens, & Souter, JJ., concurring).

40. *Model Code*, *supra* n. 9, at 29.

41. Post, *supra* n. 30 (quoting Robert H. Tembeckjian, administrator and counsel of the New York State Commission on Judicial Conduct: "Appearance of impropriety is significant and enforceable. There is a misunderstanding of what it is and how it is applied. [The Canons] are not entrapment rules, but ethical guidelines that promote impartiality so that the integrity of our system is beyond debate.").

arises when a litigant suspects actual bias or impropriety and accuses the judge of impropriety. Imagine the treacherous situation were litigants forced in every instance to offer evidence of actual impropriety. Refocusing the debate on the appearance of impropriety relieves pressure on all concerned and serves as a useful conflict avoidance principle. By transforming a potentially intensely personal dispute into an objective discussion over how a reasonable person might view the situation, a litigant can give voice to concerns without going nuclear by accusing the judge of being unethical.

Giving life to the appearance of propriety principle does not mean that judges must conduct their lives as cloistered monks. Nor does it mean that judges should be scared of their shadows, smell a rat under every rock, and recuse willy-nilly in every case where there is a speculative whiff of impropriety. The appearance standard is based on the reasonable person standard, a standard judges themselves invoke in countless cases. Implicit in the Canons and in society's trust in the judiciary is the expectation that judges will exercise judgment and common sense in invoking the standard.

Admittedly, the recusal standards are at once too specific and too broad. Hardly anyone would suggest that owning a single share of corporate stock would result in an actual or apparent bias in a case involving that company. On this point, the federal system opts for bright-line simplicity over reasonableness: Recusal is required where a judge owns but one share of stock.[42] In contrast, the ABA Model Code adopts a de minimis interest standard.[43]

As the stock example illustrates, the recusal provisions articulate a handful of bright-line appearance standards (such as stock ownership and close familial relationships) but leave the bulk of decisions to judicial judgment. Alexander Hamilton aptly observed that as judges we have "neither force nor will, but merely judgment."[44] In some cases, we know it when we see

42. 28 U.S.C. § 455(b)(4) (available at http://uscode.house.gov); Judicial Conf. of the U.S., *Code of Conduct for U.S. Judges* 3C(1)(c) (Admin. Off. of the U.S. Cts. 1992) (indicating that disqualification is required when "the judge . . . has a financial interest in the subject matter in controversy").

43. *Model Code*, *supra* n. 9, at 237 (Canon 3E(1)(d)).

44. Alexander Hamilton, *The Federalist No. 78* at 520 (Heritage Press 1945).

it—whether by intuition, the smell test, the "give me pause" response, or the gasp reflex. Thus, the appearance standard serves an important role as an active buffer zone between actual bias and the articulated categories in the Canons.

It must also be recognized that the circumstances calling for recusal are not fixed in stone and may vary with the situation. Traditionally, the duty of a judge to avoid the appearance of impropriety existed in tension with the duty of judges to hear the cases brought to them, known as the duty to sit. Today, barring exceptional circumstances, the duty to sit is not much discussed, and has generally been replaced by a duty not to sit where the appearance of impropriety would result.[45] Although this standard generally works well in the intermediate courts of appeal the principle may not scale well to courts of final resort, where replacement justices are not available and where each justice contributes greatly to the court's equilibrium.

The Supreme Court has emphasized on more than one occasion that, with only nine justices on the Court, recusal must be used sparingly and should not be a club to disqualify judges from legitimately sitting on cases. For instance, Justice Ginsburg recently commented that

> on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. Some think that a recusal in the Supreme Court is equivalent to a vote against the petitioner. When cases divide evenly, we affirm the decision below automatically. Because there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves.[46]

Justice Scalia, who has had his own share of controversy surrounding recusal, goes one step further, suggesting that, unlike the political branches, the Supreme Court is not in a

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45. *See* Abramson, *supra* n. 16, at vii.

46. Ruth Bader Ginsburg, *An Open Discussion with Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1039 (2004); *see also Laird v. Tatum*, 409 U.S. 824, 837-38 (1972) (Memo. of Rehnquist, J.) ("There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. . . . [U]ndesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified.").

position to "survive the constant baseless allegations of impropriety" and "[t]he people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor."[47]

The argument that judges historically have engaged in conduct that might not pass the appearance test bears little on the modern application of the appearance standard. Indeed, this argument only serves to highlight that the objective reasonableness foundation of the appearance standard is not simply a vacuous and vague aspiration. Few today would condone one of the justices of the Supreme Court corresponding with the White House and asking the President to "drop . . . a line" to another justice regarding a pending decision, as was done in the Dred Scott case.[48] Nor would judges today look favorably upon their colleagues advising a sitting president on an ongoing war.[49] And predictably, judges and the public would be aghast at the lobbying efforts of Chief Justice Taft, ironically the same justice who headed the ABA's effort to draft the initial canons of ethics. In an effort to secure the reform of the Supreme Court's jurisdiction, Chief Justice Taft "once put his official limousine and chauffeur at the disposal of a key congressman with the unsubtle reminder that the most important legislation he sought . . . ought to be pushed along more rapidly."[50] The adage that "times have changed" could hardly be more apropos.

In certain instances, the Canons recognize that disclosure of any basis for disqualification, other than personal bias or prejudice concerning a party, will permit a remittal of disqualification.[51] This procedure permits notice to the parties

47. *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913, 928 (2004) (Memo. of Scalia, J.).

48. MacKenzie, *supra* n. 10, at 10 (describing correspondence from Justice Catron to President Buchanan).

49. *Id.* at 19 (describing Justice Fortas's role advising President Johnson on the Vietnam War).

50. *Id.* at 16.

51. The federal statutory restriction on remittal is stricter than the Model Code. The statute lists a number of instances in which recusal is required, and remittal is not permitted in any of those instances. 28 U.S.C. § 455(e) (available at http://www.uscode.house.gov). *See Model Code*, *supra* n. 9, at 251.

and waiver of the ground for disqualification. The process, derisively termed the "velvet black jack" by an early commentator,[52] is more practically invoked in the trial court than in the court of appeals. The canon requires the disclosure to be on the record and the consultation of the lawyers to be outside the presence of the judge. At least in the federal appellate process, the lack of direct contact with the parties before argument, the time lag required to effectuate the notice and waiver process, and the short time-frame between assignment of the panel and oral argument are factors that weigh against a judge invoking the process. The result is that remittal is usually not a realistic option and the appellate judge is faced with only two options: recusal or hearing the case because no conflict or impropriety exists.

The principle of maintaining the appearance of propriety is a longstanding mainstay of judicial ethics. Although it is not "wart free" and admittedly suffers from imprecision, it is not trivial to public confidence in the judiciary—just witness the public outcry in recent cases involving stock ownership, unsolicited gifts, and free trips. The solution to this dilemma is not simply to trust the judges and operate with fewer rules. Indeed, our system functions in large part on public trust and credibility. But that trust should not be blind, and imposing accountability through rules of judicial ethics that include avoiding the appearance of impropriety is a small price to pay for the honor and responsibility of serving as a judge.

52. John P. Frank, *Commentary on Disqualification of Judges*, 1972 Utah L. Rev. 377, 387 ("Waiver has a way of becoming a velvet black jack. It is acceptable when the lawyers do not regularly appear before the same judges. . . . In the conventional hometown courthouse situation, however, waiver is simply a device for bludgeoning counsel who will have to appear before the judge again and again.").