RONALD D. ROTUNDA
GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR OF LAW
Phone: (703) 993-8041
Fax: (703) 993-8124
Email: rrotunda@gmu.edu

GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Dr.
Arlington, VA 22201-4426
http://mason.gmu.edu/~rrotunda/

22 August 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: PROPRIETY OF JUDGE ROBERTS' FAILURE TO RECUSE HIMSELF *SUA SPONTE*

Dear Chairman Specter:

Introduction

You have asked me about the propriety of Judge John Roberts' failure to recuse himself in the case of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Judge Roberts was a member of the three-judge panel that decided this case, although he wrote no opinion.[1] Judge Randolph, speaking for the court, wrote the opinion, holding that the President's designation of a military commission to try an enemy combatant alleged to have fought for al-Qaeda does not violate the separation of powers doctrine; the Geneva Convention of 1949 does not give an enemy combatant any right to enforce its provisions in a federal court; and even if the Geneva Convention were enforceable in court, no rights of any enemy combatant are violated when a military commission tries the combatant.

Last month, Professor Stephen Gillers, who teaches legal ethics at New York University, opined that he "saw no problem" with the fact that President Bush met with Judge Roberts about the vacancy in the U.S. Supreme Court on July 15, "the same day the D.C. court ruled 3-0 in Bush's favor in Hamdan." However, "Gillers told Newsday yesterday [August 17] he changed his mind after Roberts disclosed the White House interviews in his Senate questionnaire Aug. 2."[2] The significant difference, Gillers said, is that Roberts said that Attorney General Alberto

---

[1] Judge Williams, the third member, filed a concurring opinion.

[2] Tom Brune, *Roberts Meeting "Illegal": Legal Ethicists Say White House Interview Jeopardized Judge's Impartiality in a Case on Military Tribunals*, NEWSDAY, Aug. 18, 2005,
(continued...)

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Gonzales spoke to him on April 1, six days before oral arguments in the *Hamdan* case, instead of a few days after.

Professor Gillers and two other professors now argue[3] that Judge Roberts violated a federal statute ethics rules because he should have disqualified himself from participating in the *Hamdan* case when it turned out that the Attorney General met with him on April 1, six days before oral argument. This change in dates, the argument goes, created the "appearance of impropriety." The conversation that the Attorney General had with Judge Roberts about a possible upcoming vacancy, is a conversation that the Attorney General had with other people too, because we know that the President interviewed other candidates and did not make his final decision as to whom to appoint until shortly before (a day or two before) he announced the nomination on July 19th. The vacancy did not even occur until July 1st.

Oddly enough, this change in dates that Professor Gillers claimed caused him to change his mind occurred only because counsel for Hamdan, on March 1, asked for a delay in the oral argument.[4] But for that delay, which they requested and the court granted on March 2, the interview with the Attorney General would have occurred about a month *after* oral argument instead of six days *before* oral argument.

This change in the dates, Professor Gillers and others now argue, created "an appearance of impropriety" that required Judge Roberts to recuse himself, *sua sponte* (*i.e.*, on his own motion, because no party has asked for his recusal). You have asked me to evaluate this issue.

"Impartiality Might Reasonably Be Questioned"

Before turning to the specific facts of this case, we should first look at 28 U.S.C. § 455. Subsection (b) lists a host of specific situations that require the recusal of a federal judge. No one, including Professor Gillers, et al., suggests that Judge Roberts has violated any provision of

---

[2] (...continued)
http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story .

> "*The White House broke the law* when it interviewed D.C. Circuit Judge John G. Roberts last spring for the Supreme Court as he heard a challenge to the president's military tribunals, three legal ethicists said yesterday." *Id.* (emphasis added).

[3] Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs with the Judge out of Court*, SLATE (Online Magazine) (posted Wednesday, Aug. 17, 2005), http://slate.msn.com/id/2124603/?nav=tap3 .

[4] Order, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Mar. 2, 2005); Motion to Postpone Oral Argument, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. filed Mar. 1, 2005). Professor Luban is a faculty colleague of one of Hamdan's lawyers, Neal K. Katyal, who was the lawyer who requested the delay in oral argument.

§455(b). Instead, the concern relates to §455(a), which is a catch-all provision that provides:

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

In addition to the language found in the federal statute, Professor Gillers also uses another test, *even more vague*, the "requirement of an *appearance* of impartiality."[5] One must be very cautious in relying on vague standards such as "appearance of impropriety," because they easily lend themselves to ad hoc and ex post facto analysis. Any allegation that a judge violated the ethics rules is a very serious matter, for it attacks his integrity and bona fides.

The statutory test, "impartiality might *reasonably* be questioned," is the law and we must follow it, but we also must not read the language overly broadly, for the ABA, the commentators, and the cases advise otherwise.

For example, consider the ABA MODEL RULES OF PROFESSIONAL CONDUCT. This model law governs lawyers (not judges), but its cautions are still relevant. The ethics rules, in the past, used the "appearance of impropriety" standard (which Gillers adopts), but no longer. The ABA has called it "question-begging,"[6] and rejected it in 1983. Even before that date, the ABA warned, if the "appearance of impropriety" language had been made a disciplinary rule, "it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, or even *ad hominem* basis."[7] Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, referred to the old "appearance of impropriety" standard as "garbage."[8] The Second Circuit generally advised, over a quarter of a century ago:

> "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and the precise application of precedent." *Fund of Funds,*

---

[5] http://slate.msn.com/id/2124603/?nav=tap3 (emphasis added).

[6] ABA MODEL RULES, RULE 1.9, Comment 5 (pre-2002 version), *reprinted in* MORGAN & ROTUNDA, 2005 SELECTED NATIONAL STANDARDS ON PROFESSIONAL RESPONSIBILITY 193 (Foundation Press 2005). The 2002 revisions to the ABA Model Rules eliminated this language as no longer necessary.

[7] ABA FORMAL OPINION 342 (1975), *discussed in* RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 2 (West Pub. Co., Black Letter Series, 7th ed. 2004).

[8] ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, 13 CURRENT REPORTS 31-32 (Feb. 19, 1997).

Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977).[9]

The Restatement of the Law Governing Lawyers, Third (A.L.I. 2000), has also cautioned us not to read too much into vague phrases like "appearance of impropriety":

> "[T]he breadth [of vague, 'catch-all' provisions] provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that *subjective and idiosyncratic considerations* could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the 'appearance of impropriety' principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). *Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.*" §5, Comment C (emphasis added; internal citation omitted).

While Professor Gillers and his colleagues embrace the "appearance of impropriety" standard, 28 U.S.C. § 455(a) does not. Instead, it requires the judge to disqualify himself in any proceeding where his "impartiality might *reasonably* be questioned." Hence, I will analyze that the factual scenario in light of that standard.

When we apply that standard, it is appropriate to bear in mind that it must be used with care. The statute asks us to look at the perspective of a "reasonable" observer. We should not prohibit

---

[9] Quoting *United States v. Standard Oil Co.*, 136 F.Supp. 345, 367 (S.D.N.Y.1955), and citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975). This case is no judicial orphan. *See also, e.g.*, *In re Powell*, 533 N.E.2d 831 (Ill.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), holding that the canon on avoiding even the appearance of impropriety is not an independent basis to impose discipline on a lawyer. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir.1977) (court refuses to disqualify under "appearance of impropriety" standard that existed in the legal ethics rules as the time because the "appearance of impropriety" is an "eye of the beholder" standard that gives us no way to determine what "a member of the public, or of the bar" would consider improper); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir.1976) ("It does not follow ... that an attorney's conduct must be governed by [appearance of impropriety] standards which can be imputed only to the most cynical members of the public."); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246-47 (2d Cir.1979) ("appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases"); *Sherrod v. Berry*, 589 F.Supp. 433 (N.D.Ill.1984) (no disqualification based on mere appearance of impropriety).

conduct "that might appear improper to an uninformed observer or even an interested party."[10]

In short, the ABA, various commentators, the courts, and the American Law Institute have all advised us not to read language like the "appearance of impropriety" too broadly. We sometimes think, loosely, that ethics is good and that therefore more is better than less. But "more" is not better if the "more" exacts higher costs, measured in terms of vague rules that imposes unnecessary disqualifications. That levies costs on the judicial system and the litigants, which we all must consider when determining whether "impartiality might *reasonably* be questioned." Hence, we must consider the issue from the perspective of a reasonable, objective lawyer fully informed of the facts.

The Chronology Regarding Judge Roberts's Eventual Nomination

Let us summarize the major events that led to Professor Gillers changing his mind so that he now accuses Judge Roberts of engaging in unethical conduct.

❑	12/1/2004	The D.C. Circuit announces the panel that will hear the *Hamdan* appeal. Judge Roberts is part of that panel.
❑	12/11/2004	*National Journal* lists Judge Roberts as the first of a short list of 10 for a vacancy, "based on conversations with former White House officials and others." (This example from the press is just one of many and it is used for illustrative purposes only.)
❑	3/8/2005	The original date scheduled for oral argument in

---

[10] RESTATEMENT OF THE LAW GOVERNING LAWYERS, THIRD, § 121, Comment *c(iv)*. The Restatement is speaking about lawyers' ethical violations but the principle applies to § 455(a) because that statute focuses on what is "reasonable" to the judge; its perspective is a person trained in the law, not a layperson who cynically assumes the worst.

See also, Baker v. City of Detroit, 458 F.Supp. 374, 376 (D. Mich.1978)(Keith, Circuit Judge, sitting by designation):

> "Section 455 was designed to substitute the *objective reasonable factual basis* or reasonable person test in determining disqualification for the subjective test employed prior to the 1974 amendment of Section 455. The issue committed to *sound judicial discretion*, therefore, is whether a reasonable person would infer, from all the circumstances, that the judge's impartiality is subject to question." (emphasis added)(internal citation omitted)).

Simonson v. General Motors Corp., 425 F.Supp. 574 (E.D.Pa.1976), noting that there is an obligation *not to recuse* without valid reasons because of the burden that recusals place on colleagues.

		Hamdan.
❑	4/1/2005	Roberts meets with Attorney General Gonzales.
❑	4/7/2005	Argument in *Hamdan*. Under usual D.C. Circuit practice, each of the judges would cast his initial votes at the conference that day, following oral argument, but any judge is free to change his vote until after the draft opinion circulates and is finally approved.
❑	5/3/2005	Roberts meets with the Vice President and White House officials.
❑	5/23/2005	Roberts meets with the White House counsel and her deputy.
❑	7/1/2005	Justice O'Connor announces her retirement, which creates the first vacancy in the U.S. Supreme Court since President Clinton appointed Justice Breyer in 1994.
❑	7/8/2005	Roberts speaks, by phone from England, with the deputy White House counsel.
❑	7/15/2005	The D.C. Circuit releases the *Hamdan* opinion. Under usual D.C. Circuit practice, the opinion would have been approved by the panel members and circulated to the full D.C. Circuit days or weeks before.
❑	7/15/2005	Roberts interviews with the President.
❑	7/19/2005	The President offers Roberts the job and announces the nomination.

The Proposed Gillers Rule That Would Disqualify Judge Roberts

The reason why ethics codes include "catch-all" provisions is "to cover a wide array" of offensive conduct and to prevent attempted technical manipulation of a rule stated more narrowly."[11] If this conduct — although unforeseen by the drafters of 28 U.S.C. § 455(a) — really is a technical manipulation of a rule, or if the conduct is so offensive that a specific rule should prohibit it, it should not be difficult to draft that rule. In other words, if the statutory standard of "*impartiality might reasonably be questioned*" really required Judge Roberts' recusal in the circumstances of this case, we should be able to draft a workable rule to cover this type of conduct.

Professor Gillers, et al. argue that Roberts violated the federal statute, § 455(a), in not recusing himself, *sua sponte*. For convenience, let us call this rule the proposed Gillers Rule. How would that rule read? Recall that Professor Gillers, et al., argue that Judge Roberts should have

---

[11] RESTATEMENT, THIRD, § 5, Comment *c*.

withdrawn from further participation in the case because he had a conversation with the Attorney General to talk about a possible opening on the U.S. Supreme Court that would occur at some point in the future, and this meeting (as well as others) occurred shortly before the date of the delayed oral argument in *Hamdan*. The Government was a party to the case and, as Gillers says, that case was "hotly contested."[12]

Hence, the hypothetical Gillers Rule would require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court to recuse himself from cases where the Government represents one side and that case is, in Gillers' words, "hotly contested."

However, all litigation is "hotly contested," by definition. Parties do not involve themselves in time-consuming and expensive litigation, appeal the case, and then contest the case "mildly," or "half-heartedly." No case is ever "coldly contested." Just as a light switch is either on or off, the parties contest a case either hotly or not at all.

Hence our hypothetical Gillers Rule would provide that a judge who learns that he is being considered for an appointment to the U.S. Supreme Court must recuse himself from cases where the Government represents one side. If that were the rule, it would apply to a host of cases for each federal judge who is being considered for a position to the U.S. Supreme Court — a position that did not yet exist because Justice O'Connor did not announce her retirement until July 1, 2005.

Recall that the news widely reported that *ten* candidates, including Roberts, were being considered for a possible seat on the Court in early December, 2004. So, the Gillers Rule would have to provide that when a judge is being considered for an appointment to the U.S. Supreme Court, even though there is yet no opening, he or she must recuse himself or herself in every case where the Government is on one side. The Government might be the "United States," as in a typical criminal case, or an agency, like the Department of the Treasury, or Department of Energy, or the NLRB, or the FCC, etc.

It is not unusual for a case to be *sub judice* (under consideration, before the judge) for six months to a year. Each judge being considered will be exposed to scores of cases or more where the Government is a party. Consider, for example, when President Clinton considered Judge

---

[12] Gillers admits that it is not enough that the Government is a party. This case, Gillers tells, is special:

> "Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that 'there is reason to believe that [Hamdan] was ... involved in terrorism.'" http://slate.msn.com/id/2124603/?nav=tap3

Stephen Breyer but then nominated Judge Ruth Bader Ginsburg to the U.S. Supreme Court. Justice Byron White announced his resignation in March, 1993. President Clinton announced his nomination of Judge Ginsburg almost three months later, on June 14, 1993. During this short time period, when there was an actual vacancy on the Court and not merely speculation about a future vacancy, she participated in nearly 50 civil cases involving the U.S. Government or one of its agencies — including the Department of Defense or Department of the Army — and more than 25 additional criminal cases where the United States was a party. As far as we can tell from the records, in none of them did she recuse herself because the media reported that she was being considered for elevation to the U.S. Supreme Court.

The President, at that time, also interviewed Judge Breyer of the First Circuit. The President did not choose Judge Breyer until the following year. During that entire period of time — well over a year — Judge Breyer did not recuse himself from any case involving the U.S. Government even though he had had conversations with the Administration about his possible elevation to the U.S. Supreme Court.[13] In no case during a period over a year did he recuse himself after he was interviewed for the Supreme Court. In none did he recuse himself because the President told him that he was being considered for the Supreme Court. In none did he recuse himself because the President had nominated him to the Supreme Court. In none did any litigant move to disqualify him because he was being considered for the Supreme Court.

The news reports said that at least ten judges, including Judge Roberts, were on the short list in December of 2004. When Roberts had a conversation with the Attorney General in early April of 2005 (before there was any opening on the Court), it is common knowledge that he was not the only judge being considered for possible elevation to the Supreme Court. Even the day before (and the morning of) the final announcement on July 19, news reports told us who they thought the nominee would be, and the various names that were published were hardly limited to Roberts. The Gillers Rule would have to apply to all of these judges and require them to *sua sponte* recuse themselves from cases where the United States or one of its agencies or officials was a party.

This proposed Gillers Rule on disqualification would have to apply to ten or more judges during the time period before there is actually any opening on the Supreme Court but when the White House and Department of Justice are likely to be considering prospective candidates; this new Gillers Rule would also have to apply to the three or four final candidates for the time period just before the President makes his final choice. People on the longer list may not know that they are missing from the short list, so a half dozen candidates may think they are in the final four. If the average number of cases per judge is 40, then (for the time period when the President is considering about 10 candidates), we have 400 cases where judges will have to recuse themselves, even if oral argument has already occurred. Even if we limit the Gillers Rule to the final four, we are still

---

[13] A new opening on the Court was certainly expected. Justice Blackmun had announced in June, 1992: "I am 83 years old. I cannot remain on this Court forever." *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992)(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting).

talking about 160 cases. Of course, my assumption that the average number of cases is 40 is on the low side.

Whether the number is 40 or 70 or more, under the Gillers Rule, even if the case had been *sub judice* for six to 10 months, the judge must withdraw and the parties may have to reargue their case before a new panel. Both parties, after all, are entitled to a three-judge panel, but one or more of these judges would be required to recuse themselves under the proposed Gillers Rule.

I have been assuming that the issue involved appointment to the U.S. Supreme Court, but that need not be the case. It might involve the appointment of a Supreme Court Justice to another position. For example, there came a time when Justice Arthur Goldberg became U.N. Ambassador Goldberg. Oddly enough, he did not withdraw from Supreme Court cases involving the U.S. Government during the time period when he was being considered for the position until the time the President narrowed his choice and then finally made that choice public.

The Gillers Rule would also have to apply when the judge moves from the federal trial court to the Court of Appeals. Or the judge might move from the state courts to the federal district court or U.S. Court of Appeals. Or, a lower court federal judge might leave the bench and accept a federal position outside the judicial branch. Judges have left the bench to become Director of the FBI, or to become head of another agency, like the Department of Education. The Secretary of the Department of Homeland Security was a federal judge this time last year. These are the cases we know about, where the Government actually offered the position to a particular federal judge. There have to be other cases where the President or his designee talked with a federal judge about a possible position that would eventually occur in the future but did not eventually make an official offer. The Gillers Rule would apply to all of these cases.

I can find no evidence that any of these prospective judicial nominees (Supreme Court to UN Ambassador; federal judge to Cabinet Secretary; state court judge or federal trial judge to federal appellate judge) recused themselves in the cases I have described. If we consider all judges who have had *discussions* with an administration official about a position that is not even available yet (recall that Judge Roberts's first discussion with an administration official occurred *before* there was any Supreme Court opening), even more people will be covered by the Gillers Rule.

The President and the Attorney General are not the only people who interview potential judicial nominees. U.S. Senators interview candidates for possible judgeships. In some states there are "Judicial Selection Panels" who interview candidates for federal judgeships, particularly federal district judgeships. Some states have created Judicial Selection Panels to recommend qualified candidates for openings on the state courts.

Members of these panels include laypeople and lawyers, and both of these groups, especially lawyers, have cases in state or federal court. If the Gillers Rule becomes the law, so that the persons whom these panels interview must recuse themselves from any case, then the number of judges who must recuse themselves increases tremendously. The reason for that is because the lawyers on these judicial selection panels have cases before state and federal judges all the time, and these lawyers

will be interviewing state and federal judges who are interested in being nominated to the federal bench.

One might argue that the proposed Gillers Rule is so important and the appearance of impropriety is so significant that it does not matter that many judges will have to recuse themselves because it is the right thing to do. However, if a judge must recuse himself, that gives a great deal of power to officials in the Administration and the members of the Judicial Selection Panels. Roberts did not meet the President until late in the process, on July 15, just four days before he was offered the position. He met with the Attorney General on April 1. Under the proposed hypothetical Gillers Rule, the President, or the Attorney General, or any of their agents, could require Roberts or any other judge to recuse himself from a decision simply by discussing with the prospective nominee a possible position on the Supreme Court, or at the United Nations, or at the FBI, Homeland Security, etc.

The proposed Gillers Rule, if it became the law, would give Administration officials tremendous power to manipulate who is on the panel of a case by forcing the recusal of one or more of the judges simply by considering them for a position that is not yet open but will open eventually. Our hypothetical Gillers Rule, which is promoted as protecting the litigants opposing the government, is really a rule that undercuts litigants' rights by giving Government officials a power to force recusal at very low cost to itself.

The power that this new Gillers Rule would bestow may not be limited to government officials. Any person on the Judicial Selection Panels might have a similar power. A panel member can invite a state judge or federal trial judge to be interviewed for a position on the federal district court or federal court of appeals. When the interviewee learns that a member of the panel has a case before him or is appearing before him, he will have to recuse himself. Members of the panel can become creative and launder their invitations, so that Panel Member #1, with no case before the prospective nominee, will invite the prospective nominee, who will learn, at the interview, that he has a case before Panel Member #2. The people who engage in such conduct are unscrupulous, but we know that lawyers already manipulate the rules to affect the judges who hear their cases,[14] and they are not always caught.

---

[14] *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055–56 (11th Cir.1996), which discusses the district court's suspicion "that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned." *See also, Grievance Administrator v. Fried*, 456 Mich. 234, 570 N.W.2d 262 (Mich.1997). Two judges in a county had close relatives who practiced there. If a client wanted his case to be reassigned from one judge to the other, local lawyers advised the clients to hire the relevant relative as co-counsel to force the recusal of the judge. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. The Supreme Court held a lawyer is subject to discipline if that lawyer participates as co-counsel in a suit for the *sole* purpose of recusing a judge because of the lawyer's familial relationship with that judge.

The Case Law

Over the last several years, there have to be hundreds of times where judges would have had to recuse themselves from cases where the Government was a party because the judge had had a conversation with an administration official about a new position. As mentioned above, Judge Breyer's discussions that led to his elevation to the U.S. Supreme Court had to implicate a year's worth cases. We should expect to find a lot of case law on the subject. Instead we find a paucity of cases, literally less than a handful. Gillers discusses some of them. They all make careful distinctions. Let us turn to them now.

The case that seems most on point is one that Gillers, et al. does not cite. It is *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich.1978). The judge refused to recuse himself from a reverse discrimination case against defendants, including Mayor Young of Detroit. The plaintiffs, who sought disqualification under 28 U.S.C. § 455(a), complained of bias because Mayor Young was chairing the judicial selection committee that forwarded the judge's name to President Carter for elevation to the Court of Appeals.[15] This case was before the judge when he was a trial judge and while Mayor Young was urging President Carter to appoint him to a higher court; he kept this case, even after he was elevated to the Sixth Circuit.[16] Under the proposed Gillers Rule for recusal, this judge would be violating the federal statute. The court, however, denied the disqualification motion.

---

[15] The judge explained:

> "The pertinent allegations of plaintiffs' motion to disqualify are as follows: that Mayor Young and I are friends, that *Mayor Young served as a member of the selection committee which submitted my name*, along with four other nominees, to the President as candidates for appointment to the United States Court of Appeals for the Sixth Circuit, and that Mayor Young was one of several dignitaries who, in his official capacity as Mayor of the City of Detroit, made welcoming remarks to guests and judges of the Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan at my swearing-in ceremony to the Sixth Circuit. From these facts, plaintiffs allege that extra-judicial contact between myself and Mayor Young during the pendency of this litigation is likely and thus creates an appearance of impropriety." 458 F. Supp. at 375-76 (emphasis added).

[16] *See* http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm.

The date of the Judge's commission was October 21, 1977. The case was filed at some point prior to February of 1977, when the plaintiffs filed an amended complaint, a point the judge makes in another of his series of opinions on this case. *Baker v. City of Detroit*, 483 F.Supp. 919, 922 (D. Mich. 1979), *affirmed sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *on rehearing, Bratton v. City of Detroit*, 712 F.2d 222 (6th Cir. 1983), *cert. denied, Bratton v. City of Detroit*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

The Gillers article starts by relying on an opinion by Justice Stevens, *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), where the Court (5 to 4) upheld a lower court decision disqualifying the trial judge in a bench trial. Gillers uses that case to establish what he calls the "appearance of impropriety" standard. The facts, however, simply do not relate to the present situation.[17]

The second case Gillers cites is *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). He describes that case in language that parallels language I use to describe the case in one of my books. He says that the Seventh Circuit —

> "ordered the recusal of a federal judge who, planning to leave the bench, had hired a 'headhunter' to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive."[18]

---

[17] After a bench trial about who owned a hospital corporation, the loser learned that the trial judge was a trustee of Loyola University. During the time the case was pending, the ultimate winner, Liljeberg, was negotiating with Loyola to buy some land for a hospital and prevailing in the litigation was central to Liljeberg's ability to buy Loyola's land. The judge had ruled for Liljeberg, which thereby benefitted Loyola. Health Services thus moved to vacate the judgment, alleging that the trial judge should have disqualified himself. At a hearing to determine what the trial judge knew, he testified that he knew about the land dealings before the case was filed, but that he had forgotten all about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then, the judge did not recuse himself or tell the parties what he knew.

The Court of Appeals reversed the judgement in favor of Liljeberg in the underlying case and the Supreme Court affirmed. While the trial judge could not have disqualified himself over something about which he was unaware, he was "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary."

[18] "*Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir.1985), involved a judge who had become eligible to take senior status. He contacted a 'headhunter' who agreed to contact Chicago firms to see if any would want the judge to become affiliated with them. Inadvertently, and contrary to the judge's instructions, the headhunter contacted firms representing both the plaintiff and defendant in a pending antitrust case. Neither expressed an interest in hiring the judge, although the plaintiff's firm left the matter a bit more open than did the other. The judge did not go to work for either firm. Defendants sought a writ of mandamus to disqualify the judge. The Court of Appeals was careful to stress that there was no intentional impropriety committed in the case, but it ordered the judge recused to avoid any 'appearance of partiality' in the matter before him." THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY

(continued...)

The *Pepsico* case, on its facts, is simply different from the facts involving Judge Roberts. While the judge in *Pepsico* did not know that the headhunter had contacted the two law firms, the law firms believed that the headhunter was acting on the judge's behalf. From their perspective, the judge before whom they trying a case was asking each of them for a job. The two firms were asked to bid to see who gave the judge the best job offer — how big should the partnership draw be; how extensive should the fringe benefits be? Negotiating for an adjustable salary with the two private parties appearing before you is different than accepting, or agreeing to be considered for, a Supreme Court appointment. There is no negotiation for that job; the salary is fixed. Moreover, the Seventh Circuit was concerned that the judge *initiated* (through the headhunter) the contacts:

> "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case *in the role of a suppliant for employment*." 764 F.2d at 461.[19]

Judge Roberts did not apply for a job; he did not negotiate the terms of employment; he did not initiate a meeting; he was no suppliant; he simply accepted the invitation of the Attorney General to meet to discuss a possible Supreme Court vacancy. Recall that Gillers had no problem with the Attorney General meeting with Judge Roberts after the oral argument; one fails to see why the situation is 180 degrees different because the meeting occurred before oral argument.[20]

One can, of course, argue that the case should be read more broadly, and Gillers does that. But he should have noted that the case on which he relies instructs us to the contrary: "Our holding is narrow," the court warned, because "[w]e deal with an unusual case," and the court was unwilling to make any pronouncements that applied to other factual scenarios. 764 F.2d at 461.

The third case, which cites *Pepsico*, is one on which Gillers places special emphasis, *Scott v. United States*, 559 A.2d 745 (D.C. 1989). Here is the way that Gillers, et al. summarize this case:

> "In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of

---

[18] (...continued)
273 (Foundation Press, 8th ed. 2003).

[19] Other cases make this same point: the judge sought a job from each of the law firms appearing before him. As Judge José A. Cabranes said in *McCann v. Communications Design Corp.* 775 F.Supp. 1535, 1544 (D. Conn. 1991) (in the course of refusing to read that case broadly and refusing to motion to disqualify): "Pepsico, as plaintiff himself points out, involved the direct approach of a 'headhunter' seeking to find employment for the judge to the law firms appearing before him."

[20] Tom Brune, *Roberts Meeting "Illegal:" Legal Ethicists Say White House Interview Jeopardized Judge's Impartiality in a Case on Military Tribunals*, NEWSDAY, Aug. 18, 2005, http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story .

> Justice while the local U.S. attorney's office—which is part of the department—was prosecuting an intent-to-kill case before him. Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on [*Pepsico*], as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not 'claim that his trial was unfair or that the [the judge] was actually biased against him.' The court was 'persuaded that an objective observer might have difficulty understanding that [the judge] did not ... realize ... that others might question his impartiality.'"[21]

One might consider *Scott* to be based on different facts, because the judge there was taking a position in the Department of Justice. The judge was not moving from a position as judge to another position as judge; instead, he was joining the prosecutors and becoming a lawyer in the "Executive Office for United States Attorneys." He would, in fact, be supervising some of the Government lawyers who were appearing before him.

There is another problem with Gillers' reliance on the *Scott* case: there is an important discrepancy between his characterization of that case and what it says:

> "By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself from Scott's case. These facts present 'precisely the kind of appearance of impropriety' that Canon 3(C)(1) is designed to prevent." *Scott v. United States*, 559 A.2d 745, 755 (D.C.1989) (emphasis added).

Scott does not support Gillers' argument; it *undermines* it. And it also undermines the proposed Gillers Rule. What *Scott* says, at most, is that Judge Roberts had no obligation to withdraw from a case where the Government is a party *before he was offered and decided to accept the position*. That date could not be before the vacancy existed; in fact, it could not be before July 15, when he meets the President for the first time. By that time, the *Hamdan* case had already been decided.

Conclusion

Past practice of other judges who have accepted or considered appointment for other offices, including past practice of Judge Roberts' predecessors on the D.C. Circuit, demonstrates that he did not violate 28 U.S.C. § 455(a). If we were to interpret this statute broadly, contrary to the advice of the American Bar Association, the American Law Institute, and the case law — if we were, in effect, to change the historical practice and adopt the Gillers Rule — we would create a new set of

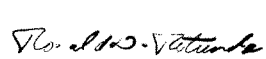
---

[21] http://slate.msn.com/id/2124603/?nav=tap3 .

problems. In particular, we would be giving members of the Administration the power to manipulate who sits on panels simply by considering one or more judges for other positions.

Instead, in my opinion, we should follow the advice of *Scott v. United States*, 559 A.2d 745 (D.C. 1989), the case on which Gillers purports to rely. *Scott* says, at most, that a recusal obligation arose only after the judge "*had decided to accept the position* in the Executive Office for United States Attorneys." In Judge Roberts' situation, by the time he was offered another judicial position, the *Hamdan* case had been decided.

Sincerely,



Ronald D. Rotunda