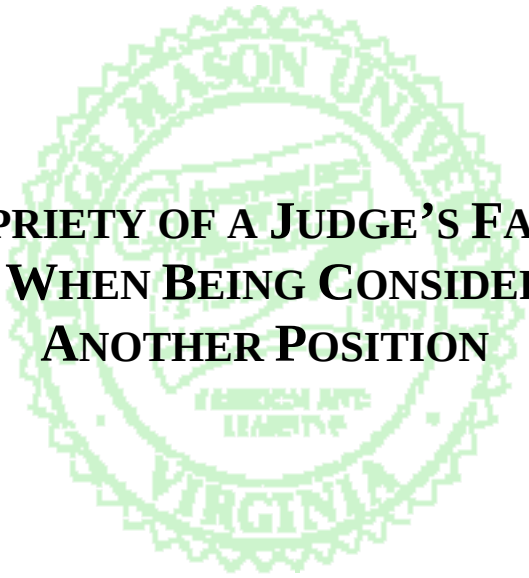
GEORGE MASON UNIVERSITY
SCHOOL OF LAW



THE PROPRIETY OF A JUDGE'S FAILURE TO RECUSE WHEN BEING CONSIDERED FOR ANOTHER POSITION

Ronald D. Rotunda

06-42

Georgetown Journal of Legal Ethics, Vol. 19, No. 4, Fall 2006, pp. 1187-1212

GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

This paper can be downloaded without charge from the Social Science Research Network at http://ssrn.com/abstract_id=925767

19 Geo. J. Legal Ethics 1187
(Cite as: Rotunda, Georgetown J. Legal Ethics 1187)

Georgetown Journal of Legal Ethics
Fall, 2006

Article

***1187** THE PROPRIETY OF A JUDGE'S FAILURE TO RECUSE WHEN BEING CONSIDERED FOR ANOTHER POSITION

Ronald D. Rotunda [FNa1]

Copyright © 2006 by Georgetown Journal of Legal Ethics; Ronald D. Rotunda

I. INTRODUCTION

Some commentators have argued that Judge John Roberts, recently confirmed as Chief Justice of the United States Supreme Court, violated a federal statute [FN1] because of his failure to recuse himself in the case of Hamdan v. Rumsfeld, [FN2] which a panel of the D.C. Circuit including Roberts recently decided. Several Senators raised the issue of Judge Roberts' failure to recuse himself during the course of his confirmation hearings, [FN3] but the Judge did not comment on it because the case was still pending. [FN4] Hamdan's lawyers never raised the recusal issue, [FN5] but interveners in the D.C. Circuit case did. By the time that case was no longer pending in the D.C. Circuit (because the court, per curiam, had denied relief), [FN6] ***1188** the confirmation hearings had concluded, and the Senate had confirmed Roberts as Chief Justice.

Judge Roberts was a member of the three-judge panel that decided Hamdan v. Rumsfeld, although he wrote no opinion. [FN7] Judge Randolph, speaking for the court, held 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. [FN8] He went on to hold that the Geneva Convention of 1949 does not give an enemy combatant any right to enforce its provisions in a federal court, and that--even if the Geneva Convention were enforceable in court--no rights of any enemy combatant are violated when a military commission tries the combatant. [FN9]

A few commentators have argued that Judge Roberts violated the federal statute because Attorney General Alberto Gonzales spoke to Roberts about becoming a member of the Supreme Court on April 1, six days before oral argument in the Hamdan case, instead of after oral argument. [FN10] No Supreme Court vacancy occurred until July 1. Senator Arlen Specter, Chair of the Judiciary Committee, asked me

to evaluate this issue, and this article is derived from my report. [FN11]

II. THE FACTUAL BACKGROUND IN A NUTSHELL

The conversation that Attorney General Alberto Gonzales had with Judge Roberts about a possible upcoming vacancy on the Supreme Court was a conversation that Gonzales and other members of the Administration also had ***1189** with other people. We now know that the President interviewed other candidates and did not make his final decision as to whom to appoint until a day or two before he announced the nomination on July 19. The actual vacancy did not even occur until July 1, when Justice O'Connor announced her retirement. Chief Justice Rehnquist died shortly thereafter, at which point President Bush changed his nomination of Judge Roberts from Associate Justice to Chief Justice. [FN12]

Oddly enough, the order in which the events unfolded occurred only because of a fortuity: on March 1, counsel for Hamdan asked for a delay in the oral argument. [FN13] But for that delay, which 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.

The issue is whether the timing of events created by this change in the dates created "an appearance of impropriety" that required Judge Roberts to recuse himself sua sponte. Hamdan's lawyers decided not to file any motion for recusal when the timeline became public, but in late August 2005, lawyers representing other detainees raised the issue by moving to intervene, in the hope of disqualifying Judge Roberts, thereby vacating the panel's decision in Hamdan, and securing a different result before another panel. [FN14] The other judges on the Hamdan panel--Judges Randolph and Williams--denied their motion; Roberts did not participate in that decision. [FN15]

***1190** Here is a summary of the major events that led to the accusation that Judge Roberts engaged in unethical conduct and violated a federal statute.

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 and other news stories list Judge Roberts as the first of a short list of 10 for a vacancy on the Supreme Court, based on "conversations with former White House officials and others." [FN16]

3/8/2005 Oral argument in Hamdan is originally scheduled for this date.

4/1/2005 Roberts meets with Attorney General Gonzales.

4/7/2005 Oral argument in Hamdan is held. Pursuant to D.C. Circuit practice, each of the judges cast his initial vote at the conference that day following oral argument, with the understanding that any judge is free to change his vote until after the draft opinion circulates and the judges approve it.

5/3/2005 Roberts meets with Vice President Cheney and White House officials.

5/23/2005 Roberts meets with White House Counsel Harriet Miers 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. Consistent with the usual D.C. Circuit practice, the panel members approved the opinion and circulated it to the full D.C. Circuit days or weeks before.

7/15/2005 Roberts interviews with President Bush.

7/19/2005 President Bush offers Roberts the Associate Justice position and announces the nomination.

III. "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED"

The issue of judicial recusal based upon other job offers can be divided, like ancient Gaul, into three parts, only one of which applies to Judge Roberts' situation. First, the U.S. Government may offer a federal judge a different federal ***1191** judgeship position. Judge Roberts faced that situation. Second, the U.S. Government may offer a federal judge a different kind of position in the Federal Government. This position may be in the Department of Justice (so, the judge would, in a sense, be joining the prosecutors, such as when Justice Thurgood Marshall left the Second Circuit to become Solicitor General), or it may be another position in the Executive Branch (such as when Justice Goldberg became U.N. Ambassador).

The offer in the first and second categories could also come from a state official. The governor, for example, may offer a position in the state judiciary or state executive branch to a state or federal judge. For example, a state governor (where the governor has the power to appoint) may offer a federal or state lower court judge a position on the state supreme court. The governor could also offer a state or federal judge a position in the state government, such as state attorney general (in those states where that position is appointed). Or, the governor may offer a state or federal judge a position on the ticket, such as running for lieutenant governor.

The third category when the issue of judicial recusal arises based on a job offer is the case where a private law firm offers a sitting judge a position. It is this scenario alone that the American Bar Association's Model Code of Judicial Conduct ("Model Judicial Code") expressly contemplates (and it relegates the discussion only to the Commentary). [FN17]

None of the Canons in the Model Judicial Code specifically governs judges considering other employment, and nothing in the Model Judicial Code addresses the case in which the other employment is also in the government. Thus, a judge in Judge Roberts position (or a judge being offered an appointed position in the executive branch) is left to rely on the general provision that a judge must disqualify

himself or herself if the judge's "impartiality might reasonably be questioned." [FN18] Similar language exists in the federal statute, which critics of Judge Roberts argue he violated. [FN19]

While subsection (b) of 28 U.S.C. § 455 lists a host of specific situations that require the recusal of a federal judge, [FN20] no one suggests that Judge Roberts has ***1192** violated any provision of § 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." [FN21]

Despite the express language in the statute, which adopts the "impartiality might reasonably be questioned" standard, commentators, and even some courts, often refer to another test--the "appearance of impropriety" standard. [FN22] We must be very cautious about letting the statutory standard morph into the vague "appearance of impropriety" standard as this can easily lead 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 majority of cases advise otherwise.

For example, consider the American Bar Association's move away from the "appearance of impropriety" standard in the Model Rules of Professional ***1193** Conduct. While the Model Rules govern lawyers, not judges, its cautions are still relevant. The Model Code of Professional Responsibility, which used to govern lawyer conduct, included the "appearance of impropriety" standard. [FN23] The ABA ultimately concluded that the standard was "question-begging," [FN24] and therefore rejected it in 1983 when it adopted the Model Rules. Even before that date, the ABA warned, if the "appearance of impropriety" language were 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, ad hoc or even ad hominem basis." [FN25] Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original Model Rules, referred to the old "appearance of impropriety" standard as "garbage." [FN26]

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 precise application of precedent." [FN27] The Restatement (Third) of the Law Governing Lawyers has also cautioned us not to read too much into vague phrases like "appearance of impropriety":

> [T]he breadth [of vague, 'catch-all' provisions] creates the risk that a charge using only such language would fail to give fair warning of the nature of the ***1194** 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. [FN28]

While Canon 3E(a) does not use the "appearance of impropriety" standard, Canon 2--"A judge shall

avoid impropriety and the appearance of impropriety in all of the judge's activities"--does. [FN29] The federal statute, however, does not adopt that language. Instead, it requires the judge to disqualify himself in any proceeding where his "impartiality might reasonably be questioned." [FN30] Hence, we must analyze the factual scenario in light of the statutory standard as written. While that test is, frankly, also a bit vague, at least it emphasizes that one must evaluate the situation from the standard of a reasonable, objective person who is knowledgeable of the facts, not "an uninformed observer or even an interested party." [FN31]

When we apply that standard, it is appropriate to bear in mind that we must use it with care. The statute asks us to look at the perspective of a "reasonable" observer. We should not prohibit conduct "that might appear improper to an uninformed observer or even an interested party." [FN32] The test is objective: "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." [FN33]

The person has to know all the facts. For example, Judge John Roberts can properly hear a case involving John Roberts (a CBS reporter), because the two people are not related, even though an unknowledgeable observer might think they were the same person.

***1195** We sometimes think, loosely, that ethics is good and therefore more is better. But "more" is not better if "more" exacts higher costs, measured in terms of vague rules that impose unnecessary disqualifications. Overly-broad ethics rules impose costs on the judicial system and litigants, [FN34] which we must consider when determining whether "impartiality might reasonably be questioned." Judicial disqualification at any level causes docketing and scheduling problems. When disqualification occurs after decision and the litigants must redo the case, one side (the movant) happily assumes that burden, but the other side does not.

Some judges act as if they will disqualify themselves simply if a litigant makes a motion. That serves to give the less-ethically challenged litigants (those willing to move for insubstantial reasons) a competitive advantage over those who are more self-restrained. Those who are more willing to accuse a judge of unethical conduct create for themselves a right of preemptory challenge of judges, a right that the rest of us do not have. It rewards ill-founded attacks and imposes the burden of extra work on fellow judges. A judge who is too quick to disqualify himself finds that his colleagues work harder while he is more likely to reach the first tee of the golf course before eleven o'clock in the morning. [FN35]

The federal statute and the ABA Model Judicial Code have specific rules that require disqualification for bias and for interest. There "is no need to throw into the scales, as an additional standard over and above those addressed to disqualification, a desire to 'avoid the appearance of impropriety.'" [FN36] In other words, because of a concern over the appearance of impropriety, we create disqualification rules, such as the rule requiring a judge to recuse herself if she owns equity shares in the litigants before her, [FN37] but "appearance of impropriety" is not a rule; it is merely a reason why we have created certain rules.

Of course, if there is a good reason for disqualification, the judge must do that, but judges should not jump to disqualify themselves just to show that they are "more ethical" than other judges. As Chief Justice Rehnquist once noted, some people consider "judicial disqualification for interest or bias as a

matter of personal honor, such that the more ready a judge is to disqualify himself, the higher shall be his standing on the list compiled by that descendant of Abou Ben Adhem who specializes in judges." [FN38]

For these reasons, we must be careful not to read "appearance of impropriety" ***1196** into the federal recusal statute, which does not adopt it. [FN39] Hence, we must consider the issue of whether Judge Roberts should have recused himself, from the perspective of a reasonable, objective lawyer fully informed of the facts. [FN40]

IV. THE PROPOSED JOBS RECUSAL RULE THAT WOULD HAVE REQUIRED JUDGE ROBERTS TO RECUSE HIMSELF

The reason why ethics codes include catch-all provisions--like "impartiality might reasonably be questioned"--is "to cover a wide array of offensive" conduct and "to prevent attempted technical manipulation of a rule stated more narrowly." [FN41] If the conduct in question--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 (if only we had thought of the problem earlier), it should not be difficult to draft a specific 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 that covers this type of conduct to be included in § 455(b). For convenience, let us label this proposed rule requiring recusal under these circumstances the "Jobs Recusal Rule."

How would the proposed Jobs Recusal Rule read? Recall that the argument is that Judge Roberts should have withdrawn from further participation in the case because he had a conversation with the Attorney General about a possible opening on the U.S. Supreme Court. That opening would eventually occur at some point in the future, and this meeting about the future vacancy occurred shortly before the date of the delayed oral argument in Hamdan. Other meetings occurred after the oral argument. The Government was a party to the case and, as some commentators argued, that case was "hotly contested." [FN42] The Supreme Court opening had not yet occurred, but we could be certain that a Supreme Court ***1197** opening would eventually occur because the Justices will all leave the bench by retirement or death. Hence, the hypothetical Jobs Recusal Rule would require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court or any other government position to recuse himself from cases where the Government represents one side and that case is "hotly contested."

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

We are also told that the Administration was particularly interested in this case. Last year, we were told the same thing about a case against Vice President Cheney. [FN43] We were also told the same thing about cases dealing with the Pledge of Allegiance, [FN44] the Ten Commandments, [FN45] any criminal case creating new procedural rights, and so on. All cases in which the Administration is involved are likely to be of particular interest to the Government; otherwise, the Government would

have settled the case or not bothered to pursue an appeal.

We should be wary of any proposed rule that applies to only one case because the case is "unique" because it is "hotly contested" and of particular interest to the Administration. Creating, after the fact, a rule that applies to only one case is simply a way of engaging in ad hoc, ex post facto, ad hominem attacks. This form of attack is so old and shopworn that we identify it using names in Latin, a language long dead. The advantage (and unfairness) of creating unique rules is that we no longer have to worry about precedent because we apply the rule to only one case.

Hence, our hypothetical Jobs Recusal Rule would have to be broader and provide that a judge who learns that the Executive Branch is considering him or her for an appointment to the U.S. Supreme Court must recuse himself or herself 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. Recall that the news widely reported that ***1198** the Administration was considering ten candidates, including Roberts, for a possible seat on the Court in early December 2004. So, the Jobs Recusal Rule would have to provide that when the Executive Branch is considering a judge 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, Department of Energy, the National Labor Relations Board, or the Federal Communications Commission, or an individual like the Commissioner of Internal Revenue, or the Secretary of State.

It is not unusual for a case to be sub judice (i.e., under submission and pending for the court to decide at a later time) for six months to a year. Each judge who may be elevated will be exposed to scores of cases or more where the Government is a party. Consider, for example, when President Clinton nominated Judge Ruth Bader Ginsburg to the U.S. Supreme Court to fill Justice Byron White's seat when he 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), Judge Ginsburg 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 even though the media reported that the President had nominated her to the U.S. Supreme Court. [FN46]

The President, at that time, also interviewed Judge Breyer for the job. However, the President did not nominate Judge Breyer until the following year when Justice Blackmun retired from the Court. During that entire period, Judge Breyer did not recuse himself from any case involving the U.S. Government even though he had conversations with the Administration about his possible elevation to the U.S. Supreme Court. [FN47] In no case during that period lasting 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 ***1199** 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. [FN48]

The news reports said that at least ten judges, including Judge Roberts, were on the short list in December of 2004. [FN49] When Roberts had a conversation with the Attorney General in early April of 2005 (before there was any opening on the Court), he was not the only judge being considered or interviewed for possible elevation to the Supreme Court. [FN50] 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 Jobs Recusal Rule would have to apply to all these judges being considered for the position and require them to sua sponte recuse themselves from cases where the United States or one of its agencies or officials is a party.

This proposed Jobs Recusal Rule on disqualification would apply to ten or more judges before there is actually any opening on the Supreme Court once the White House and Department of Justice simply anticipate an opening and begin considering prospective candidates. This new Jobs Recusal Rule would also continue to apply to the three or four final candidates for the period just before the President makes his final choice.

The short list will always be longer than it first appears, because some people on the longer list will 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 involving the Government is 40 per judge, 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 Jobs Recusal Rule to the final four, we are still talking about 160 to 240 cases. My assumption (that the average number of cases involving the Government is 40) is probably on the low side. Whether the number is 40, 70, or more, under the Jobs Recusal Rule, even if the case had been sub judice for six to ten months, the judge must withdraw and the parties will have to reargue their case before a new panel.

I have so far been assuming that the Jobs Recusal Rule was triggered by consideration of a judge for appointment to the U.S. Supreme Court, but that need not be the case. The recusal might result from the appointment of a Supreme Court Justice to another position. The President may elevate an Associate Justice to Chief Justice. The appointment need not be limited to an Article III court. There came a time when Justice Arthur Goldberg became U.N. Ambassador ***1200** Goldberg. He did not withdraw from Supreme Court cases involving the U.S. Government while he was being considered for that position.

The Jobs Recusal Rule would also have to apply when the judge is elevated from a federal trial court to a Court of Appeals, or when a judge moves from a state court to an Article III court. 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, [FN51] or to become head of another agency, like the Department of Education. [FN52] The present Secretary of the Department of Homeland Security, Michael Chertoff, was a federal judge until he accepted his current position.

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 but did not make an official offer. There also will likely be cases where the judge considered the offer but, eventually, decided not to take it, and there was no public announcement to that effect. The Jobs Recusal Rule would apply to all of these cases as well. Yet there is no case law indicating that any of these prospective nominees recused themselves in these situations.

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 all of the participants (especially the lawyers) have cases in state or federal court. If the Jobs Recusal Rule becomes the law, so that the persons interviewed by these panels must recuse themselves, then the number of judges who must recuse themselves increases tremendously.

The use of Judicial Selection Panels means, first, there is the likelihood that the panel members will be interviewing many more people for a job, which means more people who will have to recuse themselves. Second, people who sit on the panels can be viewed as the future employer in the sense of deciding whether an interviewee will get the job; therefore, the judge would have to recuse himself in any case in which they are involved under the Jobs Recusal Rule. That, in turn, also expands the number of cases in which the judge must recuse.

One might argue that the proposed Jobs Recusal 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 recusal is the right thing to do. However, if a judge must recuse himself, that gives a great deal of power to ***1201** 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 the President offered him the position. He met with the Attorney General on April 1. Under the proposed Jobs Recusal 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, Department of Homeland Security, or any other government agency.

The proposed Jobs Recusal 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 Jobs Recusal Rule, which is initially promoted as protecting the litigants opposing the Government, may ultimately be a rule that undercuts litigants' rights by giving Government officials a power to force recusal at a very low cost to themselves.

The power that this new Jobs Recusal Rule would bestow may not be limited to government officials. Any person sitting on a Judicial Selection Panel 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 pending before him in which Panel Member #2 is involved, a situation that now would require him to recuse himself. 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, and, sadly, they are not always caught. [FN53] Whenever

we create rules, we can expect that there will be those who use them to game the system.

***1202** V. THE CASE LAW

Over the last several years, there would have been many times where judges would have had to recuse themselves from cases where the Government was a party because the judge had a conversation with an administration official about a different government appointed position. Thus, we would expect to find a great deal of case law on the subject. Instead, we find a paucity of cases, literally less than a handful, in which the courts all make careful distinctions and none adopts the proposed Jobs Recusal Rule.

A. JUDGES ELEVATED TO ANOTHER JUDICIAL POSITION

There are few decided cases where a litigant objects because the President may appoint a judge to a different judicial office, even though this fact pattern happens with some frequency.

In Mistretta v. United States, [FN54] the petitioner challenged the President's power to appoint judges to the Federal Sentencing Commission, an entity within the judicial branch, on the grounds that it interferes with judges' independence. A federal trial judge appointed to the Sentencing Commission would also receive a higher salary, and the litigants argued that the possibility of a higher salary interfered with the judges' Article III independence. [FN55] The Supreme Court, in Mistretta, was dismissive of the argument that this was a problem. The Court noted it has "never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another," and that the "mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary." [FN56]

The case most factually on point with Roberts' situation is Baker v. City of Detroit. [FN57] In Baker, Judge Keith refused to recuse himself from a reverse discrimination suit where one of the defendants was Mayor Young of Detroit. [FN58] The plaintiffs, who sought disqualification under 28 U.S.C. § 455(a), complained of bias because (1) the judge and Mayor were personal friends and (2) Mayor Young was chairing the judicial selection committee that forwarded the judge's ***1203** name to President Carter for elevation to the Court of Appeals for the Sixth Circuit. [FN59] The trial 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. [FN60]

This case initially came before the judge when he was a trial judge and while Mayor Young was urging President Carter to appoint Judge Keith to a higher court. The judge kept this case, even after he was elevated to the Sixth Circuit. [FN61] The judge, however, denied the disqualification motion. [FN62] The case was 'hotly contested' and very important to the Mayor. Thus, under the proposed Jobs Recusal Rule, the judge would have violated the federal statute, but no court came to that conclusion.

Laxalt v. McClatchy [FN63] is an analogous case. The district court held that the federal statute did not require a United States Magistrate to recuse herself in a case where Senator Paul Laxalt was the plaintiff, even though the Magistrate Judge had asked the Senator in the past to recommend her for a federal judgeship (over which appointment he had considerable influence), and she did not deny the possibility of doing so again. [FN64] Not only was the Senator the plaintiff, but members of his staff would be deposed and might be called as witnesses during the trial. [FN65] The District Court refused to disqualify and broadly concluded:

***1204** This holding is not dependent on whether Magistrate Atkins plans again to apply for a judgeship in the future, does not plan ever to apply again, or doesn't know in her own mind whether she might seek a future judicial opening. The facts could not create any reasonable doubt in a reasonable person as to her impartiality. [FN66]

The few cases on this issue consistently come to the same conclusion, that a recusal rule in these circumstances is both unnecessary and unworkable.

B. JUDGES WHO MOVE FROM FEDERAL JUDGESHIPS TO THE EXECUTIVE BRANCH

There is very little case law discussing judges who move from judgeships to positions within the Executive Branch. We know of many historical examples, some mentioned earlier. Recall that Justice Goldberg became U.N. Ambassador; Judge Thurgood Marshall became Solicitor General (before becoming Justice Marshall); Justice Jackson became War Crimes Prosecutor; Judge Chertoff became Secretary of the Department of Homeland Security; and Judge Shirley Hufstedler became Secretary of the Department of Education.

The Supreme Court is certainly aware of the issue, and in Mistretta v. United States, [FN67] discussed earlier, it rejected the argument that the President can influence federal judges by blandishing or offering other federal positions:

We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to ... tempt judges away from the bench with Executive Branch positions. The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago. [FN68]

But because Mistretta did not deal with a judge accepting a position outside of the judicial branch, its comments were dicta. There is very little case law with a holding on this specific issue.

In United States v. Ellsberg and Russo, [FN69] an unreported trial court decision, the trial judge refused to recuse himself because he had discussed with the President ***1205** and his aide the possibility of becoming F.B.I. Director while presiding over a criminal trial of interest to the President. The judge later dismissed the criminal prosecution for prosecution improprieties and so the issue was never tested on appeal. [FN70]

Scott v. United States [FN71] is an appellate decision that arose in the Washington D.C. court system, not the Article III courts, and therefore did not involve the federal recusal statute but the Model Code of

Judicial Conduct. In Scott, the judge who was presiding over a criminal trial that the local U.S. Attorney's office was prosecuting was deciding whether to accept the position of Assistant Director for the Debt Collection Staff with the title of "senior litigation counsel" in the Department of Justice. [FN72]

The judge in Scott, unlike the judges in Baker or Laxalt, was not taking a different position in the judiciary; he was joining one of the parties. By taking a position in the Department of Justice, 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. He eventually advised the Chief Judge of the Superior Court and the District of Columbia Commission on Judicial Disabilities and Tenure that he would leave the bench to accept that position.

The D.C. Court of Appeals in Scott held that a judge who has decided to accept employment in the prosecutor's executive office in the department prosecuting the case must recuse himself. [FN73] The court treated the situation of a judge joining the prosecutors as akin to the judge negotiating for private employment with a law firm. The fact that the court repeatedly cited Pepsico, Inc. v. McMillen, [FN74] and treated it the same as the case where the judge was planning to leave the bench for private practice is evidence of that. Pepsico, discussed below, involved a judge who accepted an offer to join a private law firm.

The Scott court does not speak of the historical precedent where judges did not recuse themselves due to potential movement within the judicial branch--such as the situations where an Associate Justice became Chief Justice, or a judge became a Justice, presumably because the court did not find those situations analogous. Scott made no effort to distinguish cases like Laxalt, apparently because the court thought them inapplicable. As Judge Schwelb noted in concurrence: "The precedents strongly suggest ... that recusal would not be required in the case of a judge under consideration for a new appointment." [FN75]

***1206** Scott does not even mention Mistretta, which had come down only four months earlier and included broad dictum dismissing the argument that judges would be tempted by offers of positions in the Executive Branch. Scott only states that a judge negotiating for a position with the prosecutors, at least in a criminal case, must disclose the new position and recuse himself. [FN76]

Moreover, the Scott court held that a defendant cannot waive this disqualification. Scott was interpreting the ABA Model Code of Judicial Conduct, not the federal statute. That distinction was important, the court said, because--unlike a case decided under the federal statute--under the Model Judicial Code the defendant cannot waive the right to force the judge to recuse himself, because the "appearances of partiality" is something that "can never be waived by the litigants regardless of the immateriality of the Canon violation." [FN77] Yes, the court relies on that inherently vague shibboleth, "appearance of partiality."

One can read this case broadly for the proposition that a judge must disqualify himself if he is negotiating with the Department of Justice for any position there. Yet, the opinion focuses on so many special aspects of the facts that to read the holding that broadly may be unfair to the court.

First, the court repeatedly emphasized that the Department of Justice had "conceded" at the second oral argument that the judge "violated the Canon in presiding at Scott's trial and in imposing sentence during his employment negotiations." [FN78] The Government also conceded that the trial judge should have recused himself at trial. The court acted as if it were bound by these concessions.

The concurring opinion also relied heavily on that point: "I find this to be a very close and troubling case in which only the prosecutor's critical concessions have put Scott over the top." [FN79] Later, Judge Schwelb again punctuates this crucial concession:

> We are thus faced with a criminal appeal in which the government has admitted trial court error, and in which all members of the court agree that reversal is required if such error in fact occurred. Although, for the reasons described in this opinion, I have serious reservations as to whether an impartial observer fully informed of the facts would perceive any appearance of impropriety, it is difficult to vote to sustain a conviction where the prosecutor now says that the appearance of justice was flawed. Under the adversary system, judges may ignore or reject concessions of this kind, but they should pause and reflect carefully before they do so. [FN80]

***1207** One does not know why the Government, in effect, agreed with defendant-Scott, but the agreement was crucial. The court found it "significant that the United States has not suggested there would be special hardship in retrying Scott." [FN81]

Second, the Scott majority was impressed that the trial judge, in a criminal case, was making "factual determinations involving credibility," [FN82] and was not merely deciding the law. The court thus suggests that its decision simply does not apply to a judge who decides the law and not the facts.

Finally, the Scott court relies on a time line that is unusual. At some points, the court appears to be concerned about the judge's mere fact of negotiation with the prosecutors while presiding over the criminal trial. While discussing Pepsico, the court said, "we hold that Judge Murphy violated Canon 3(C)(1) when he presided at Scott's trial while he was actively seeking employment with the Executive Office for United States Attorneys." [FN83] Quoting Pepsico, the court said, "a fully informed person might reasonably question whether the judge 'could decide the case with the requisite aloofness and disinterest when he [was seeking] employment [in the prosecutor's executive office in the department prosecuting] the case.'" [FN84]

Yet, there are parts of the decision where the court finds that the dividing line is when the judge decides he will take the offer. Although the judge was "formally offered the job on or about February 6, 1985," [FN85] the opening existed and the judge had already decided, in December, that he would accept the position if offered. That later date seems important for the court: "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." [FN86] In December, the trial was still in progress. That was the judge's fatal error.

The best one can say about Scott is that the opinion is confusing. Normally, the narrowest ground--the language quoted above--is the holding and the rest is dictum. Judges can always label their dictum as holding, but that incantation does not make it so. Yet, even if one reads Scott broadly, the court's failure

to reject, criticize, or distinguish Laxalt emphasizes that the Scott court thought its rule applied only to judges who join the prosecutors, not to those who remain in the judiciary. Indeed, the court did not even mention Mistretta v. United States, where the Supreme Court summarily rejected the claim that the power of the President ***1208** "to elevate federal judges from one level to another" simply "does not, of itself, corrupt the integrity of the Judiciary." [FN87]

Perhaps most telling, the D.C. Court itself does not read Scott broadly. In the later case of Anderson v. United States, the court held that recusal is unnecessary based on the claim that the judge was a potential candidate for a federal prosecutor position, when there was no showing that the judge had actually sought that position. [FN88]

C. JUDGES NEGOTIATING WITH PRIVATE LAW FIRMS

A Comment to the ABA Model Judicial Code, in elaborating on when a judge's impartiality "might reasonably be questioned," says that the judge should disqualify herself if she is "negotiating for employment with a law firm." [FN89] That is the only example the Comment gives. If the drafters thought that possible employment with the Executive Branch of the Government, or possible elevation to a different judgeship, should be treated the same as negotiating for employment with a law firm, that would have been a good place to mention it. By giving that example and referring to "negotiating," the drafters of the Model Judicial Code suggest that they did not intend to require judges to recuse when being considered for another position within the judiciary.

The United States Judicial Conference's Committee on Codes of Conduct issues ethics opinions to guide federal judges. Surprisingly, there is no ethics opinion discussing whether Article III judges must recuse themselves if they are being considered for elevation to a higher court, although one would think that the Committee is aware of the issue. Like the Comment to the ABA Model Judicial Code, what the Committee has considered is the case of a judge who is considering leaving the bench and exploring future employment possibilities with private law firms. The Committee ruled that the judge, in seeking employment by a private law firm, must do so "on a private, dignified, basis." [FN90] Moreover, the judge must "recuse from all cases handled by any such law firm during any such negotiations, and for a reasonable period after the negotiations ***1209** terminate (the exact length of time depending upon the nature of the discussions, the reasons for termination, etc.)." [FN91]

The leading case involving a judge leaving the bench to join a private law firm is Pepsico, Inc. v. McMillen. [FN92] In that case, the trial judge 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. [FN93] Inadvertently, and contrary to the judge's instructions, the headhunter contacted the firms representing both the plaintiff and defendant in an antitrust case pending before the judge. [FN94] Neither expressed an interest in hiring the judge, although the plaintiff's firm may have left the matter a bit more open than did the other. [FN95] The judge did not go to work for either firm. [FN96] The defendants sought a writ of mandamus to disqualify the judge. [FN97] The Seventh Circuit was careful to stress that there was no intentional impropriety committed in the case, but nevertheless ordered the judge recused to avoid any "appearance of partiality" in the matter before him. [FN98]

The Pepsico case is intriguing. The judge in Pepsico did not know that the headhunter had contacted the two law firms. However, the law firms believed that the headhunter was acting on the judge's behalf.

From their perspective, the judge before whom they were trying a case was asking each of them for a job. In essence, the two firms were asked to bid to see who gave the judge the best job offer--how big a draw should the partnership extend to the judge, will the partnership guarantee a minimum bonus, what was the extent of the fringe benefit package, will the judge's name be added to the partnership name, will the partnership be a full equity participation, and so forth.

Moreover, the Seventh Circuit was concerned that the judge initiated (through the headhunter) the contacts: "The dignity and independence of the judiciary are ***1210** diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment." [FN99] On the other hand, when the law firm sought recusal and there was a hearing, it seemed that the judge was innocent of acting as a suppliant because he had specifically instructed the headhunter not to contact either firm. Yet that fact did not affect the result. The Seventh Circuit created what might be considered a strict liability disqualification rule: even if the judge acted without fault, he must disqualify himself. The court repeated that the judge "is accused of, and has committed, no impropriety. The exploration of employment possibilities with firms appearing in a case about to be tried before him was accidental." [FN100] Nonetheless, the court ordered disqualification.

The court tried to cabin its holding. The court did not address the factual situation where a judge may be considered for another appointment in the judiciary: "Our holding is narrow," the court warned, because "[w]e deal with an unusual case," and so the court was unwilling to make any pronouncements that applied to other factual scenarios. [FN101] The Seventh Circuit did not purport to cover even all cases of employment with private law firms: "We do not explore the outer bounds of propriety in a resigning judge's negotiating with law firms for future employment." [FN102]

Pepsico, the court explained, is about a judge negotiating with private law firms for future employment. That factual situation is simply different from the facts involved when a judge leaves one judicial position for another judicial position. Negotiating for an adjustable salary with the two private parties appearing before you is quite different from accepting, or agreeing to be considered for, a Supreme Court appointment or any federal judgeship. There is no negotiation involved; the salary and terms of employment are fixed. No one argues about who gets the corner office, what is the pension plan, or whether one's draw will decrease if the new partner is an insufficient rain-maker.

One can, of course, argue that Pepsico should be read more broadly to apply to judges considering any alternate employment, even within the judiciary. However, the decision instructs us to the contrary, arguing that its holding is "narrow," and it was not even considering all situations of a judge resigning the judgeship and negotiating with law firms for future private employment. [FN103]

***1211** VI. CONCLUSION

Past historical practice of other judges who have accepted or considered appointment for other judicial offices, as well as cases like Laxalt, Baker v. City of Detroit, and Mistretta come to the same conclusion: judges who do not recuse themselves from cases involving the Federal Government do not violate 28 U.S.C. § 455(a) even though they are considered for elevation to a higher judgeship or later accept such an appointment.

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 Jobs Recusal Rule--we would create a new set of 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.

A new Jobs Recusal Rule would also call into question a long line of historical precedents. Throughout our history, the President has elevated lower court judges to a higher bench, or elevated Associate Justices to Chief Justice; [FN104] appointed justices to other posts, either permanently, [FN105] or for a limited time; [FN106] and selected lower court judges to fill other positions in the Executive Branch. [FN107] Judge Roberts, like his predecessors before him, followed the historical and legal precedent when he did not recuse himself from all cases involving the Federal Government simply because he was being considered for a Supreme Court appointment.

The situation is different when a federal judge decides to leave the bench and negotiate with a private law firm for future employment. The historical practice and the case law come to a different conclusion because judges should not be negotiating for the size of their partnership draw with a firm while the lawyers of the same firm are simultaneously arguing a case before that judge. The judge, in that case, must disqualify herself if she is "negotiating for employment with a law firm." [FN108]

Finally, we have the situation where the judge is negotiating with the Government for a position in the Executive Branch of the Government. If that position is not part of the prosecuting lawyers (e.g., U.N Ambassador, Cabinet Secretary, or FBI Director), the judge treats the offer the same as an offer to a higher judicial position. There is no recusal. If, however, the judge is considering an offer to join the prosecutors, the Scott case (relying on the ABA Model Judicial Code rather than federal statutes) advises that when the judge has ***1212** "decided to accept the position in the Executive Office for United States Attorneys, [then] the judge ha[s] a duty to recuse himself" to avoid "'precisely the kind of appearance of impropriety' that Canon 3(C)(1) is designed to prevent." [FN109] But recusal based on the claim that the judge is a potential candidate for a federal prosecutor position is unnecessary if there is no showing that the judge had actually sought that position. [FN110]

[FNa1]. University Professor and GMU Foundation Professor of Law, George Mason University School of Law. I gratefully acknowledge the generous support of the Law & Economics Center of George Mason University School of Law.

[FN1]. 28 U.S.C. § 455(a) (2000) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

[FN2]. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (2005).

[FN3]. Senator Feingold stated:

Mr. Chairman, so the record would be complete, I would like to submit the article from Slate magazine by Professors Gillers, Luban and Lubet and a letter sent to you responding to Professor Rotunda's criticism of their position, and I also want to submit an article by these three law professors that was published in the Los Angeles Times on this topic.

Confirmation Hearing on the Nomination of Judge John G. Roberts, Jr. to Be Chief Justice of the United

States Before the Committee on the Judiciary, 109th Cong. 364 (2005). "Sen. Patrick Leahy of Vermont, the Judiciary Committee's ranking Democrat, said that he considered the recusal question 'significant' and that he had discussed it with the nominee." Jess Bravin, Lawyers for Saudi Prisoner Ask Court To Throw out Roberts Ruling, WALL ST. J., Aug. 30, 2005, at A4; see also Steve France, Supreme Court: Roberts Lack of Recusal in Terror Case Draws Fire from Sens. Schumer, Feingold, 165 BNA DAILY REPORT FOR EXECUTIVES, Aug. 26, 2005, at A-27.

[FN4]. Judge Roberts explained: "I don't want to discuss anything about what's at issue in the case. The case is still pending and pending before the Supreme Court." Confirmation Hearing on the Nomination of Judge John G. Roberts, Jr. to Be Chief Justice of the United States Before the Committee on the Judiciary, 109th Cong. 363 (2005). See generally Ronald D. Rotunda, Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions--A Case Study of the Microsoft Litigation, 2001 U. ILL. L. REV. 611 (2001).

[FN5]. Indeed, after the Supreme Court accepted certiorari and Chief Justice Roberts recused himself because he had been a member of the D.C. Circuit panel, Hamdan's lawyers unsuccessfully urged Roberts not to recuse himself and participate in the Supreme Court decision. Gina Holland, Supreme Court Steps into Dispute over Military Trials, AP ALERT - BUS., Nov. 7, 2005.

[FN6]. The D.C. Circuit, in a per curiam opinion, denied the motion of Rami Bin Saad al-Oteibi for leave to intervene and the lodged motion to recuse on October 11, 2005. Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. Oct. 11, 2005) (Randolph, J. and Williams, C.J.). The opinion was conclusory and gave no reasons. See infra note 15.

[FN7]. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (2005). Judge Randolph wrote the opinion for the court, which Roberts joined. Chief Judge Williams, the third member of the panel, filed a concurring opinion.

[FN8]. Id. at 37-38.

[FN9]. Id. at 40-41.

[FN10]. Stephen Gillers, David J. Luban & Steven Lubet, Improper Advances: Talking Dream Jobs with the Judge out of Court, SLATE, Aug. 17, 2005, http:// slate.com/id/2124603/?nav=tap3. All three teach legal ethics at their respective law schools. Initially, one of these commentators, Stephen Gillers, 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," but on August 17, Gillers said "he changed his mind after Roberts disclosed the White House interviews in his Senate questionnaire Aug. 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, at A34, available at 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).

[FN11]. Letter from Ronald D. Rotunda, to Hon. Arlen Specter, Chairman of the Senate Committee on the Judiciary (Aug. 22, 2005), available at http://committeeforjustice.org/contents/roberts/rotundaletter1.pdf ("Propriety of Judge Roberts' Failure to Recuse Himself Sua Sponte"). Senator Specter made this letter part of the official record of the Senate Confirmation Hearings. 2005 CQ Transcriptions Verbatim Transcript, Senate Judiciary Committee (Sept. 14, 2005), available at 2005 WL 2237049.

[FN12]. For a discussion of the events surrounding the consideration of Supreme Court nominees, see for example Jan Crawford Greenburg, Bush Aides Ready To Act on Top Court; Outside Advisers Join Strategy Session, CHI. TRIB., June 29, 2005, at 11; Robert Novak, Gonzales for Top Court Rankles Right; It Has Sent Conservatives into Spasms of Fear and Loathing, CHI. SUN-TIMES, June 27, 2005, at 41; Jan Crawford Greenburg, Supreme Battle Likely over Justices, CHI. TRIB., Jan. 20, 2005, at C1; Joan Biskupic, Court Intrigue Is Just Looking for an Opening, USA TODAY, Mar. 1, 2005, at 15A; Peter Baker, Bush Expected To Push for a Conservative, WASH. POST, May 25, 2005, at A12; Ken Foskett, President Poised To Reshape Lineup of Justices, ATLANTA J.-CONST., Nov. 4, 2004, at 3B; Michael McGough, Election Likely To Alter Make-Up of Top Court, PITTSBURGH POST-GAZETTE, Aug. 9, 2004, at A1.

[FN13]. Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. Mar. 2, 2005) (order 880947); Motion to Postpone Oral Argument, Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. Mar. 1, 2005). Professor Luban is a faculty colleague of one of Hamdan's lawyers, Professor Neal K. Katyal, the lawyer who requested the delay in oral argument for completely valid reasons having nothing to do with the topic of this article. Professors Luban and Katyal were acting completely independently of each other. I was not one of the lawyers on the Hamdan case, but I was working at the Department of Defense on other matters until May 2005, while I was on leave from the law school. The issues that were litigated in Hamdan also had nothing to do with 28 U.S.C. § 455(a) (2000).

[FN14]. Motion of Rami Bin Saad Al-Oteibi for Recusal of Judge Roberts, No. 04-5393 (D.C. Cir. 2005), available at http://www.law.georgetown.edu/faculty/nkk/documents/Hamdanmotionforrecusalorder_ v4.DOC.

[FN15]. The D.C. Circuit panel (Randolph, J. & Williams, C.J.) denied the motion in a brief per curiam order on Oct. 11, 2005. Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. Oct. 11, 2005). "Lawyers for a Saudi prisoner [on August 26, 2005] asked the federal appeals court here to throw out a ruling denying Geneva Conventions protection to Guantanamo Bay detainees because Judge John Roberts voted on the case while privately pursuing a Supreme Court nomination with the White House." Bravin, supra note 3. Al-Oteibi's lawyers wanted to join the Hamdan case for the purpose of moving to ask that Judge Roberts be recused from the case. "Lawyers for one of those prisoners, Rami Bin Saad al-Oteibi of Saudi Arabia, filed their motion under seal on Friday." Id. Later, a "court security officer cleared it for public release [on August 29, 2005]. The motion seeks to intervene in the Hamdan case and asks for a new hearing before a panel without Judge Roberts." Id.

[FN16]. Stuart Taylor, Jr., Who Might Get the Nod?, NAT'L J., Dec. 10, 2004, available at http://nationaljournal.com/members/news/2004/12/1210nj2.htm; see also Tony Mauro, D.C. Judge Could Be the Next U.S. Justice, 116 FULTON COUNTY DAILY REP. 1 (Feb. 23, 2005); Tony Mauro,

Is John Roberts the Next Justice? The Two Most Important Attributes for the D.C. Circuit Judge: A Giant Intellect and a Tiny Paper Trail, LEGAL TIMES, Feb. 21, 2005, at 1; Who Might Be Nominated?, TIME MAG., NOV. 22, 2004, at 58; Gina Holland, Rehnquist Retirement More Likely with Bush Re-Election, PT. WORTH STAR TELEGRAM, Nov. 5, 2004, at A22.

[FN17]. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) commentary (2004) [hereinafter MODEL JUDICIAL CODE].

[FN18]. Model Judicial Code Canon 3E(1).

[FN19]. 28 U.S.C. § 455(a) (2000) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (emphasis added)).

[FN20]. Id. § 455(b).

[A judge] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Id.

[FN21]. Id. § 455(a) (emphasis added).

[FN22]. Gillers, Luban & Lubet, supra note 10 (emphasis added). Their article starts by relying on the Supreme Court's opinion in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), where the Court, in a 5-4 decision by Justice Stevens, upheld a lower court decision disqualifying the trial judge in a bench trial. Id. at 872. The article uses that case to establish what they call the "appearance of impropriety" standard. See Gillers, Luban & Lubet, supra note 10.

The facts of Liljeberg, however, concern financial matters and simply do not relate to the present situation. After a bench trial about who owned a hospital corporation, the loser learned that the trial

judge was a trustee of Loyola University. Liljeberg, 486 U.S. at 855-56. 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. Id. at 851-57. The judge had ruled for Liljeberg, which thereby benefitted Loyola. Id. at 850. Health Services thus moved to vacate the judgment, alleging that the trial judge should have disqualified himself. Id. at 850-51. 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. Id. at 851. 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. Id. at 851, 869. Even then, the judge did not recuse himself or tell the parties what he knew. Id. at 851.

[FN23]. MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101 (1983).

[FN24]. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5 (2001). The 2002 revisions to the ABA Model Rules eliminated this language as no longer necessary. See MODEL RULES OF PROF'L CONDUCT R. 1.9 (2004) [hereinafter MODEL RULES]. See Am. Bar Ass'n, Ethics 2000 Reporter's Explanation Memo R. 1.9 cmts. 4-5 (2002), available at http://www.abanet.org/cpr/e2k-rule19rem.html ("These Comments have been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended." (emphasis added)).

[FN25]. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342, at n.17 (1975) (emphasis added), discussed in RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 2 (7th ed. 2004).

[FN26]. Pros and Cons of Restatement Are Debated at D.C. Conference, ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT CURRENT REPORTS, Feb. 19, 1997, at 31-32.

[FN27]. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977) (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)).

In not adhering to the appearance of impropriety standard, this case is no judicial orphan. See, e.g., In re Powell, 533 N.E.2d 831 (Ill. 1988) (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 at 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 Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) ("[A]ppearance 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).

[FN28]. Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000) (emphasis added) (citation omitted).

[FN29]. Model Judicial Code Canon 2.

[FN30]. 28 U.S.C. § 455(a) (2000).

[FN31]. Restatement (Third) of the Law Governing Lawyers § 121 cmt. c(iv) (2000). 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. Id.

[FN32]. Baker v. City of Detroit, 458 F. Supp. 374, 376 (E.D. Mich. 1978) (Keith, J., 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.

Id. (emphasis added) (citation omitted).

[FN33]. United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983).

[FN34]. Simonson v. Gen. 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); see also Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979) (judge has an obligation not to recuse himself when no probative evidence reasonably gives rise to doubt as to his impartiality; in this sense, there is a "duty to sit" unless there is a duty to disqualify).

[FN35]. William H. Rehnquist, Sense and Nonsense About Judicial Ethics, 28 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 696, 713 (1973).

[FN36]. Id. at 712.

[FN37]. See 28 U.S.C. § § 455(b), (d)(4) (2000).

[FN38]. Rehnquist, supra note 35, at 712.

[FN39]. The ABA Model Code of Judicial Conduct adopts an "appearance of impropriety" standard as the title of Canon 2: "A Judge Shall Avoid the Appearance of Impropriety In All of the Judge's Activities." Model Judicial Code Canon 2. The specific rules under that Canon do not repeat that language, although it is mentioned in the commentary. See, e.g., Model Judicial Code Canon 2A & commentary. The federal statute does not adopt this "appearance of impropriety" language.

[FN40]. See supra note 31.

[FN41]. Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000).

[FN42]. Professors Gillers, Luban, and Lubet argue that it is not enough that the Government is a party. This case, they argue, 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."

Gillers, Luban & Lubet, supra note 10.

[FN43]. Cheney v. U.S. District Court for D.C., 541 U.S. 913 (2004) (Scalia, J., memorandum denying motion for disqualification).

[FN44]. E.g., Richard B. Cheney, Vice-President, Remarks at a Fund-Raiser for Congressman Ric Keller (Mar. 24, 2005), available at 2006 WLNR 4909795; Hearing On Religious Expression Before the S. Subcom. on the Constitution, Civil Rights and Property Rights, 108th Cong. (2004), available at 6/8/04 EMEDIAPT (Westlaw). The United States filed a brief in this case as respondents supporting the petitioner. The Court ultimately rejected the Ninth Circuit ruling. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 3 (2004).

[FN45]. E.g., Gail Gibson, Injudiciously Divided the Fight over Judicial Nominees Spotlights the Importance of the Circuit Courts of Appeals, Which Much More Often Than Not Have the Final Say in High-Profile Cases, BALT. SUN., May 29, 2005, at 1C, available at 2005 WLNR 8597469. The United States filed amicus briefs in the two Ten Commandants cases supporting the right of the state to display. McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 125 S.Ct. 2722, 2727 (2005); Van Orden v. Perry, 125 S.Ct. 2854, 2857 (2005).

[FN46]. These conclusions are drawn from the author's own research on Westlaw of cases decided by then-Judge Ginsburg between March and June of 1993.

[FN47]. 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). Justice Stephen G. Breyer took his judicial oath of office on August 3, 1994. DENIS STEVEN RUTKUS, CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE, at CRS-1 (2005).

President Clinton nominated Judge Ruth Bader Ginsburg in 1993, two months after the retirement announcement of Justice Byron R. White. He nominated Stephen G. Breyer more quickly "in 1994[,] five weeks after the retirement announcement of Harry A. Blackmun." Id. at CRS-14 n.40.

[FN48]. These conclusions are drawn from the author's own research on Westlaw of cases decided by then-Judge Breyer between March 19, 1993 and July 29, 1994.

[FN49]. See supra note 16 and accompanying text.

[FN50]. See supra note 16 and accompanying text.

[FN51]. Both Judge William Sessions and Judge Louis Freeh left the federal bench to become Director of the FBI.

[FN52]. Lyndon Johnson appointed Shirley Hufstedler to the Ninth Circuit in 1968; Jimmy Carter appointed her as Secretary of the Department of Education in 1981.

[FN53]. See e.g., Robinson v. Boeing Co., 79 F.3d 1053, 1055-56 (11th Cir. 1996) (discussing 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"); McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1265 (5th Cir. 1983) (holding that "a lawyer may not enter a case for the primary purpose of forcing the presiding judge's recusal"). If a litigant is familiar with a judge, the litigant should not be able to "veto the allotment and obtain a new judge by the simple expedient of finding one of the judge's relatives who is willing to act as counsel, [for then] it would become possible for any party to disrupt preparation for, or, indeed, the trial itself." Id. at 1264; see also Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997). In Fried, two judges in a county had close relatives who practiced there. See Fried, 570 N.W.2d at 263. 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. See id. at 263-64. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. Id. at 263. The Michigan 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. Id. at 266, 268.

[FN54]. Mistretta v. United States, 488 U.S. 361 (1989).

[FN55]. "[S]ince Commission members receive a salary equal to that of a court of appeals judge, 28 U.S.C. § 992(c), district court judges appointed to the Commission receive an increase in salary." Id. at 411 n.32. The Court did not decide whether a district judge removed from the Commission must continue to receive the higher salary. Id.

[FN56]. Id. at 409-10. While the Supreme Court later reversed the practical result of Mistretta when it declared the Sentencing Guidelines unconstitutional on a different legal theory in United States v. Booker, 543 U.S. 220 (2005), it did not reverse the opinion itself. Justice Stevens, speaking for the Court, said: "[o]ur holding today does not call into question any aspect of our decision in Mistretta." Booker, 543 U.S. at 242.

[FN57]. 458 F. Supp. 374 (D. Mich. 1978).

[FN58]. Id.

[FN59]. Id. at 375-76.

[FN60]. Id. (emphasis added).

[FN61]. See U.S. Court of Appeals for the Sixth Circuit, Court of Appeals-- Judges, http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_ judges.htm (last visited May 30, 2006). The date of Judge Keith'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 (E.D. Mich. 1979), aff'd 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).

[FN62]. Baker, 458 F. Supp. at 374 (The Sixth Circuit affirmed on appeal, but the lawyers did not argue the recusal issue.).

[FN63]. 602 F. Supp. 214 (D. Nev. 1985).

[FN64]. Id. at 215-16.

[FN65]. Id. at 216.

[FN66]. Id. at 218; see In re United States, 666 F.2d 690, 696 (1st Cir. 1981) (holding there was no basis for the district judge's recusal simply because that judge had a close relationship with the former governor; that defendant, a former state senator, was chairman of the legislative committee that investigated the governor and was reportedly helpful; and that the judge had been involved to some extent in that investigation); see also Schultz v. Newsweek, Inc., 668 F.2d 911, 919-20 (6th Cir. 1982) (holding that the trial judge nominated (and eventually confirmed) for a federal appellate judgeship was not required to recuse herself although the publisher of the defendant, The Detroit News, had strongly supported her elevation to the appellate court).

[FN67]. Mistretta v. United States, 488 U.S. 361 (1989).

[FN68]. Id. at 409-10.

[FN69]. United States v. Ellsberg and Russo, No 9373-WMB (D. Cal. May 11, 1973).

[FN70]. See Other Notable Deaths, BALT. SUN, Jan. 23, 2006, at 5B (obituary of William Matthew Byrne Jr., 75, the federal judge who presided over the 1970s Pentagon Papers trial of Daniel Ellsberg).

[FN71]. 559 A.2d 745 (D.C. 1989).

[FN72]. Id. at 747.

[FN73]. Id. at 750, 755.

[FN74]. Id. passim. For a discussion of the Pepsico case, see infra text accompanying notes 92-103.

[FN75]. Id. at 765 (Schwelb, J., concurring).

[FN76]. Id. at 750 (majority opinion) ("Nevertheless, presented with the facts before us, the court concludes that there is a violation of Canon 3(C)(1) when the trial judge who is presiding at the prosecution by the United States Department of Justice through the United States Attorney's Office is actively negotiating for employment with the Department's Executive Office for United States Attorneys.").

[FN77]. Id. at 751 (emphasis added).

[FN78]. Id. at 750.

[FN79]. Id. at 761 (Schwelb, J., concurring).

[FN80]. Id. at 768.

[FN81]. Id. at 755 (majority opinion).

[FN82]. Id.

[FN83]. Id. at 750 (emphasis added).

[FN84]. Id. (emphasis added).

[FN85]. Id. at 747.

[FN86]. Id. at 755 (emphasis added). The Canon in question provided: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ...." Id. at 758.

[FN87]. Mistretta v. United States, 488 U.S. 361, 409-10 (1989).

[FN88]. Anderson v. United States, 754 A.2d 920, 924 (D.C. Ct. App. 2000) ("Nowhere in the article does it say that Judge Walton had either applied for, or was seeking, the position [in the Department of Justice]."). Unlike Scott, "[h]ere, there is not even a hint that Judge Walton had sought, applied for, or negotiated with anyone for the position." Id.

[FN89]. Model Judicial Code Canon 3E commentary; see Leslie W. Abramson, Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned," 14 Geo. J. Legal Ethics 55, 60-61 (2000).

[FN90]. Judicial Conference of the United States, Committee on Code of Conduct for United States Judges, Compendium of Selected Opinions § 2.5 (2003). CBI Holding Co., Inc. v. Ernst & Young LLP, 424 F.3d 265 (2d Cir. 2005), reflects the ruling in this ethics opinion. Judge Winters decided not to recuse himself simply because he had had discussions "of a very general matter" with a member of one of the law firms representing a party in this matter five years earlier. Id.

[FN91]. Id.; cf. MODEL RULES R. 1.12. Model Rule 1.12 governs, according to its title, "Former

Judge, Arbitrator, Mediator or Other Third-Party Neutral." MODEL RULES R. 1.12 (emphasis added). The Rule, however, covers not only former judges but also present part-time judges, arbitrators, and similar adjudicatory officials. MODEL RULES R. 1.12 cmt. 1. Rule 1.12 and the Model Judicial Code "correspond in meaning" with respect to part-time judges. This Rule roughly parallels Comment 1 to Canon 3E of the ABA Model Judicial Code. See Model Judicial Code Canon 3(E). Like Comment 1 to Canon 3E, Rule 1.12(b) refers to "negotiating" for employment. The first sentence of Rule 1.12(b) provides: "A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral." Model Rules R. 1.12(b).

[FN92]. 764 F.2d 458 (7th Cir. 1985).

[FN93]. Id. at 459.

[FN94]. Id. at 459-60.

[FN95]. Id. at 460.

[FN96]. See id. (explaining that Judge McMillen decided to sign on with the law firm he worked for prior to becoming a judge).

[FN97]. Id. at 459.

[FN98]. This case is discussed in THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 273 (8th ed. 2003).

[FN99]. Pepsico, 764 F.2d at 461 (emphasis added). Other cases make this same point: the judge sought a job from each of the law firms appearing before him. As Judge 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 a 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."

[FN100]. Pepsico, 764 F.2d at 461.

[FN101]. Id.; see also McCann, 775 F. Supp. at 1543-44 (distinguishing Pepsico: "I find that a reasonable person, knowing and understanding all of the relevant facts, would not conclude that my impartiality might reasonably be questioned").

[FN102]. Pepsico, 764 F.2d at 461.

[FN103]. Id.

[FN104]. For example, Justice Rehnquist became Chief Justice Rehnquist.

[FN105]. Justice Goldberg, for example, became U.N. Ambassador.

[FN106]. Justice Jackson left the Court to become War Crimes Prosecutor.

[FN107]. Judge Thurgood Marshall became Solicitor General and Judge Griffin Bell became Attorney General.

[FN108]. Model Judicial Code Canon 3E commentary.

[FN109]. Scott v. United States, 559 A.2d 745, 755 (D.C. 1989) (emphasis added). The Canon in question provided: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ...." Id. at 758.

[FN110]. Anderson v. United States, 754 A.2d 920, 924 (D.C. Ct. App. 2000) ("Nowhere in the article does it say that Judge Walton had either applied for, or was seeking, the position [in the Department of Justice]."). Unlike Scott, "[h]ere, there is not even a hint that Judge Walton had sought, applied for, or negotiated with anyone for the position." Id.

END OF DOCUMENT