PROFESSIONAL RESPONSIBILITY

LETTERS TO SENATOR ARLEN SPECTER, CHAIRMAN, U.S. SENATE JUDICIARY COMMITTEE

BY RONALD D. ROTUNDA*, THOMAS D. MORGAN* AND STEPHEN GILLERS, DAVID LUBAN & STEVEN LUBET*

In Slate magazine, August 17, 2005, Professors Stephen Gillers, David Luban, and Steven Lubet published an article entitled "Improper Advances: Talking Dream Jobs With the Judge Out of Court." The article argued that Judge John Roberts violated a federal statute by failing to recuse himself from Hamdan v. Rumsfeld *when he began interviewing for a Supreme Court seat while the case was pending. Judge Roberts met with Attorney-General Alberto Gonzales on April 1, six days before the oral argument in* Hamdan. *He met twice in May with top White House officials, and had several subsequent interviews before* Hamdan *was decided on July 15. At the time of the first interviews, Justice Sandra Day O'Connor had not yet announced her retirement, but Chief Justice Rehnquist's illness made it possible that a seat would open on the Court. The purpose of the statute, which requires recusal when a judge's "impartiality might reasonably be questioned," is the important one of maintaining public confidence in the courts – and prior cases have held that judges must recuse when they interview with litigants or lawyers in their cases for future jobs. Gillers, Luban, and Lubet acknowledge that "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." But* Hamdan *was "the polar opposite of routine": President Bush was a defendant, and the case—concerning the legality of military commissions and the applicability of the Geneva Conventions to suspected Al Qaeda members— was extremely important to the Administration. Judge Roberts cast a decisive vote on a crucial Geneva Conventions issue. Gillers, Luban, and Lubet called on him to recuse himself retroactively from* Hamdan.

In August, 2005, Senator Arlen Specter, Chairman, U.S. Senate Judiciary Committee, asked Professors Ronald D. Rotunda and Thomas D. Morgan to write opinion letters concerning Judge John J. Roberts' role in the case of Hamdan v. Rumsfeld. *Those letters are reprinted below, followed by a response from Professors Gillers, Luban and Lubet.*

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 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 §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, 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 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 impose 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 *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 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 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 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.

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.

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]

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 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 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

---

* Ronald D. Rotunda is the *George Mason University Foundation Professor of Law* at George Mason University School of Law, where he teaches Legal Ethics and Constitutional Law. He returned to teaching in early June of 2005, after being on leave for a year as Special Counsel to the General Counsel of the Department of Defense. He is the author (with Professor Thomas Morgan) of the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 8th ed. 2003) and is the author of a leading course book on constitutional law, *Modern Constitutional Law* (West Publishing Co., 7th ed. 2003). He is also the author (with Professor John Dzienkowski) of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-West Group, St. Paul, Minnesota, 2nd ed., 2002) (jointly published by the ABA and West Group, a division of Thompson Publishing). He is also the author of several other books and more than 200 articles in various law reviews, journals, newspapers, and books in this country and in Europe. These books and reviews have been cited more than 1000 times by state and federal courts at every level, from trial courts to the U.S. Supreme Court. In 2000, a lengthy study that the University of Chicago Press published, which sought to determine the influence, productivity, and reputations of law professors over the last several decades, listed Professor Rotunda as the 17th highest in the nation. The 2002-2003 New Educational Quality Ranking of U.S. Law Schools (EQR) ranks Professor Rotunda as the eleventh most cited of all law faculty in the United States.

Footnotes

[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, *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).

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

[4] Order, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. 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.

[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).

[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).

[10] Restatement of the Law Governing Lawyers, Third, § 121, Comment *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. *See also* Baker v. City of Detroit, 458 F.Supp. 374, 376 (D. Mich.1978)(Keith, C. 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." (emphasis added)(internal citation omitted)).

See also, 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.

[11] Restatement, Third, § 5, Comment *c.*(2000).

[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.'" *Available at* http://slate.msn.com/id/2124603/?nav=tap3.

[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).

[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.

[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).

[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 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, *at* http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story.

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

THOMAS D. MORGAN
Oppenheim Professor of Antitrust & Trade Regulation Law
George Washington University Law School
tmorgan@law.gwu.edu

2000 H Street, N.W.
Washington, D.C. 20052

Phone (202) 994-9020
FAX (202) 994-9811

August 18, 2005

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

Dear Mr. Chairman:

A recent story in the Washington Post suggested that it might have been improper for Judge John Roberts to participate on the D.C. Circuit panel that decided the recent case of *Hamdan v. Rumsfeld*. The *Post* story relied heavily on a short article written by three professors, Stephen Gillers, David Luban and Steven Lubet, and published on the internet in *slate.com*.

I write to provide perspective on the issues raised by these articles and to make clear that Judge Roberts' participation on the panel was proper. To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

There are several points on which all observers would agree. First, 28 U.S.C. § 455 requires Judge Roberts or any other federal judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The key term, of course, is "reasonably." Anyone could assert that a given judge was not impartial. Indeed, a litigant might be expected to do so whenever he or she preferred to have someone else hear their case. Thus, the statute does not allow litigants (or reporters or professors) to draw a personal conclusion about the judge's impartiality; the conclusion must be "reasonable" to a hypothetical outside observer.

Second, saying as some cases do, that judges must avoid even "the appearance of impropriety" adds nothing to the analysis. Unless the "appearance" is required to be found reasonable by the same hypothetical outside observer, the system would become one of peremptory challenges of judges. That is not the system we have, nor would it be one that guarantees the judicial authority and independence on which justice ultimately depends.

Third, there is no dispute that judges may not hear cases in which they would receive a personal financial benefit if they were to decide for one party over another. The first case cited (albeit not by name) by Professors Gillers, Luban & Lubet was Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). It simply decided that a judge had a personal interest conflict and could not decide a case that would financially benefit a university on whose Board of Trustees the judge sat. In short, the case says nothing relevant to Judge Roberts' conduct.

Fourth, a judge may not hear a case argued by a private firm or government office with which the judge is negotiating for employment. The reason again is obvious. That was the fact situation in the remaining two cases cited by Professors Gillers, Luban & Lubet in their *slate.com* article. The cases break no new ground and provide no new insights relevant to this discussion.

Critics of Judge Roberts suggest, however, that his "interviews" with the Attorney General and with members of the White House staff were analogous to private job interviews. That is simply not the case. A judge's promotion within the federal system has not been—and should not be—seen as analogous to exploration of job prospects outside of the judiciary.

Except for the Chief Justice, every federal judge is at least in principle a potential candidate for promotion to a higher status in the judiciary. One might argue that no district judge should ever be promoted to a court of appeals, and no court of appeals judge should be elevated to the Supreme Court, but long ago, we recognized that such an approach would deny the nation's highest courts the talents of some of our most experienced and able judges. One need only imagine the chaos it would cause if we were to say that no federal judge could hear a case involving the federal government because he or she might be tempted to try to please the people thinking about the judge's next role in the federal judiciary. Nothing in § 455 requires us to say that it would be "reasonable" to assume such temptation. We properly assume that judges decide cases on their merits and see their reputation for so doing as their basis for promotion, if any.

To be fair to the critics, they argue that a judge's situation might be different once actual "interviews" begin for the new position. The problem with that, of course, is that interviews are only a step beyond reading the judge's decisions in a file, interviewing observers of the judge's work, and the like. That kind of thing goes on all the time, including in the media. Further, all accounts suggest that several judges were being "interviewed" and that for most of the period of the interviews, there was not even a Supreme Court opening to fill. Assuming, as even Professors Gillers, Luban & Lubet do, that no improper pressure or discussion took place in the interviews themselves, it is hard to see that physically meeting with White House staff transforms what is inevitable and proper in the judicial selection process into something more suspect.

Again, even Professors Gillers, Luban & Lubet ultimately concede that Judge Roberts should not have had to withdraw from all cases brought by the government as the logic of their criticism would seem to suggest. They argue instead that the *Hamdan* was special. It was "important" to the Administration and therefore required special caution.

I respectfully suggest that an "importance" standard for disqualification could not provide sufficient guidance for the administration of the federal courts. Every case is important, at least to the parties. Furthermore, while some cases have greater media interest than others, and some are watched more closely by one interest group or another, every case before the D.C. Circuit that involves the federal government is there because high level Justice Department officials have concluded that the appeal is worth filing or resisting.

Saying that some cases are important and others are not ultimately reveals more about the speaker's priorities than it does about the intrinsic significance of the case. Indeed, earlier this year, the Supreme Court decided *United*

States v. Booker and *United States v. Fanfan* involving the Sentencing Guidelines. Few decisions have had more impact on the operation of federal courts in recent years, yet it was widely reported that Professor Gillers opined to Justice Breyer—correctly in my view—that he need not recuse himself even though his own work product as a former member of the Sentencing Commission arguably was indirectly at issue. Importance of the case was not the controlling issue for Professor Gillers then, and it is simply not a standard now that can clearly guide a judge as to which cases require disqualification and which do not.

Indeed, the critics of Judge Roberts' remaining a part of the *Hamdan* panel overlook the fact that judges of the D.C. Circuit are assigned to the cases that they hear on a random basis. That randomness is part of the integrity of the court's process and it guarantees that no panel can be "stacked" with judges favorable to one litigant or another. Weakening the standard for a reasonable appearance of impropriety, and making recusal turn on which litigants can place news stories accusing judges with of a lack of ethics would adversely affect the just outcomes of cases more than almost any other thing that might come out of the hearings on Judge Roberts' confirmation.

In short, in my opinion, no reasonable observer can "reasonably question" the propriety of Judge Roberts' conduct in hearing the *Hamdan* case. He clearly did not violate 28 U.S.C. § 455. Indeed, he did what we should hope judges will do; he did his job. He participated in the decision of a case randomly assigned to him. We should honor him, not criticize him, for doing so.

Respectfully,

Thomas D. Morgan
George Washington University Law School

* Thomas D. Morgan is the *Oppenheim Professor of Antitrust & Trade Regulation Law* at George Washington University Law School. Professor Morgan teaches antitrust law and professional responsibility. An author of articles and widely-used casebooks in both subjects, he also writes about administrative law, economic regulation, and legal education. A lecturer and consultant to law firms on questions of professional ethics and lawyer malpractice, Professor Morgan was selected by the American Law Institute as one of three professors to prepare its new Restatement of the Law Governing Lawyers, and by the American Bar Association as one of three professors to draft revisions to its Model Rules of Professional Conduct.

Stephen Gillers
New York University
School of Law

David Luban
Georgetown University
Law Center; Stanford Law School

Steven Lubet
Northwestern
University School of Law

September 6, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

We are writing in response to letters sent to you by Professors Thomas Morgan and Ronald Rotunda. In these letters, the professors disagree with our view (offered in a Slate magazine article) that Judge John Roberts should have recused himself in *Hamdan v. Rumsfeld*. We have great respect for Professors Morgan and Rotunda and recognize their eminence and expertise in legal ethics. But after carefully studying their arguments, we conclude that they fail to deal accurately with the precedents we cited in our Slate article. In addition, other authorities, which space constraints did not allow us to discuss in Slate, further support the conclusion we reached there. We have seen no authority that contradicts that conclusion.

We believe that the Senate should have a complete and accurate understanding of these issues, and for that reason we explain why the contrary views of Professors Morgan and Rotunda are wrong. In short, Judge Roberts should have recused himself in *Hamdan* without being asked to do so; failing which, he should have given Mr. Hamdan's lawyers the opportunity formally to seek his recusal if so advised or to waive their right to do so. We are *not* commenting on Judge Roberts's fitness to be Chief Justice of the Supreme Court. As we said in Slate, we do not doubt Judge Roberts's integrity.[1] Nor do we question his judicial temperament or legal abilities.

Our concern may be stated quite simply. Judge Roberts was interviewing for a Supreme Court seat with top White House officials, including Attorney General Alberto Gonzales, during the pendency of a case in which President Bush is a defendant. The Attorney General's Department is representing him and the other government defendants. Judge Roberts did not disclose these interviews until after *Hamdan* was decided and he had been nominated to the Court. This unusual state of affairs means that his impartiality in *Hamdan* might reasonably be questioned. When a judge's impartiality might reasonably be questioned, federal law requires the judge to recuse himself—even if *in fact* the judge is completely impartial. As the Supreme Court and lower federal courts have repeatedly said, this law, 28 U.S.C. § 455(a), serves the important purpose of maintaining public confidence in the fairness of our courts. As we will show, case law and judicial ethics opinions uniformly support our analysis.

Professors Morgan and Rotunda offer three main objections to our reasoning. First, they object that a rule requiring judges being considered for promotion to recuse themselves from important cases involving the government would disqualify far too many judges in far too many cases. Second, they disagree that legal authority supports our position. Third, they believe that we have substituted a vague charge of "appearance of impropriety" for the actual standard in the law. As we now explain, none of their objections correctly represents what the law requires.

Section 455(a) reads: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This broadly-worded standard does not spell out when a judge's impartiality might reasonably be questioned. Like all "reasonableness" standards in the law, it requires a fact-specific, case by case inquiry. This is the law Congress passed long ago. It applies to all federal judges. It has been construed in hundreds of cases in light of the facts of those cases, sometimes resulting in recusal. Those cases give content to the congressional standard.

Instead of addressing this statute directly, Professor Rotunda recharacterizes its test. He finds fault with something he labels the "Gillers Rule," which he describes this way: "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, and that case is, in Gillers' words, 'hotly contested'" (Rotunda letter, p. 7). But nothing resembling this rule, or any other proposed rule, appears in our article. For good reason: the task is not to concoct rules but to apply Section 455(a) as Congress wrote it.

It is, after all, the standard that Congress adopted and the President signed into law. Rather than reading some hypothetical "rule" into the standard, we far prefer the traditional, fact-specific approach of the common law. This has been the approach of the federal courts. Our conclusion, drawing on cases interpreting this standard, discussed below, was that Judge Roberts's impartiality might reasonably be questioned because of specific and highly unusual facts:

(1) Judge Roberts's first interviewer was Attorney General Gonzales, who had personally drafted a widely-publicized memo to the President advising him of the inapplicability of the Geneva Conventions to suspected Al Qaeda members.[2] As it happens, the inapplicability of the Geneva Conventions to suspected Al Qaeda members is one of the issues *Hamdan* decided—with Judge Roberts casting a deciding vote for the position that Mr. Gonzales recommended to the President. Judge Roberts met with Mr. Gonzales just six days before the oral argument in *Hamdan*. When he heard the arguments, therefore, Judge Roberts had just been reminded that a possible Supreme Court appointment might hinge on Mr. Gonzales's assessment of him. The likelihood of a vacancy on the Court was widely regarded as great at that time because of the late Chief Justice Rehnquist's ultimately fatal illness. We reiterate that we are not accusing Judge Roberts of bias. Our point is only that, in the words of the law, "his impartiality might reasonably be questioned."

(2) As Attorney General, Mr. Gonzales heads the Department of Justice, and it was Department of Justice lawyers who defended the *Hamdan* case. This places Judge Roberts in the posture of discussing a possible Supreme Court appointment with the head lawyer of the "firm" (the Department of Justice) litigating a case before him—a head lawyer who previously gave his legal opinion to the president on a central issue in the case.

(3) Contrary to Professors Morgan and Rotunda, *Hamdan* was not merely a case that was "'important' to the Administration" or "hotly contested" (Morgan letter, p. 2; Rotunda letter, p. 7). President Bush was a named defendant in *Hamdan*. Nor was the President a named defendant only as a formality. President Bush created the military commissions at issue in *Hamdan* by executive order. On February 7, 2002 he personally declared in writing that the Geneva Conventions do not apply to alleged Al Qaeda members. And President Bush declared in writing that there is reason to believe that Mr. Hamdan is an Al Qaeda member engaged in terrorism, who therefore qualifies for trial before a military tribunal. In other words, the President is a defendant in the case because of official actions that he himself took—not because of mere formalities.

(4) Although President Bush did not interview Judge Roberts for the Supreme Court vacancy until some hours after the *Hamdan* decision came down, the numerous interviews prior to the decision were with the President's top aides and advisors, including Vice President Cheney, Chief of Staff Andrew H. Card, Jr., Vice President Cheney's Chief of Staff I. Lewis Libby, White House Counsel Harriet Miers, and Deputy Chief of Staff Karl Rove.

Taken together, these facts show that Judge Roberts was interviewing with top aides of a defendant in a case before his court, including the chief lawyer responsible for defending that case, when the defendant had the sole power to nominate him to the Supreme Court. Furthermore, in this situation both the defendant and the lawyer have a real involvement in the issues of the case, not merely a nominal involvement; and the defendant is focused on the appointment to a greater extent than other judicial appointments. Even if every White House official who interviewed Judge Roberts carefully avoided the topics in the *Hamdan* case, with no hint of an improper suggestion to the judge about how the case should come out, the pressure on the judge not to disappoint or frustrate the President and his advisors is inherent in the situation itself. Any reasonable person would question whether a judge, even with the best will in the world, can impartially consider arguments that, if accepted, would frustrate and disappoint the person who holds the judge's promotion to the Supreme Court in his hands. The law requires recusal because the public does not expect judges to have superhuman abilities to ignore their own aspirations.

Contrary to Professor Rotunda, recusal is the result uniformly endorsed by the legal authorities. In our article, we described two leading cases in which judges were forced to recuse themselves because they had discussed possible future employment with the parties or lawyers while cases were pending. These decisions (which we did not identify by name in the article) are *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) and *Scott v. United States*, 559 A.2d 745 (D.C. 1989). In the first, Judge Richard A. Posner held that a judge who wished to leave the bench and return to private practice was forced to recuse himself from a case after his headhunter, contrary to the judge's instructions, contacted law firms litigating the case. In the second, a criminal conviction was thrown out because during the trial the judge was discussing a job with the Department of Justice, which was prosecuting the case. The Department of Justice conceded that these negotiations violated judicial ethics rules. According to Professor Morgan, these cases "break no new ground and provide no new insights relevant to this discussion." (Morgan letter, p. 2.) However, that is precisely the point: far from breaking new ground, these cases squarely represent the state of the law.

Professor Rotunda points to language in *Scott* that 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. . .." *Scott*, 559 A.2d at 755 (Professor Rotunda's emphasis). Professor Rotunda believes that this means the judge had no duty to recuse himself until he had decided to accept the job—and, by analogy, Judge Roberts had no duty to recuse himself until he had been offered, and decided to accept, the Supreme Court nomination. However, this is a badly mistaken reading of *Scott*, which explicitly says that the violation of the recusal standard occurred "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." *Scott*, 559 A.2d at 750. Indeed, the court's holding in *Scott* reiterates this conclusion: "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." *Scott*, 559 A.2d at 750 (our emphasis).[3]

Additional authorities reach the same conclusions. In *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262-63 (5th Cir. 1990), the Fifth Circuit Court of Appeals found that a judge should have retroactively recused himself and vacated two rulings when he thereafter accepted a job with a law firm representing one party in the case—even though he had no knowledge of the job prospect when he issued the rulings. A second panel reconsidering the case reached the identical conclusion. *In re Continental Airlines Corp.*, 981 F.2d 1450, 1462 (5th Cir. 1993). And Advisory Opinion 84 of the U.S. Judicial Conference's Committee on Codes of Conduct (1990; reviewed 1998) states that whenever a judge discusses future employment with a law firm, "no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." The Opinion adds: "The principles discussed would apply by analogy to other potential employers."[4]

Professor Morgan responds that "[a] judge's promotion within the federal system has not been—and should not be—seen as analogous to exploration of job prospects outside of the judiciary" (Morgan letter, p. 2). But the Committee on Codes of Conduct disagrees. The Committee's Advisory Opinion 97 (1999) discusses the reappointment of magistrate judges. Magistrates are reviewed for reappointment by a selection panel. The Committee writes:

> An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1) the magistrate judge is required to recuse in such a case.

Clearly, a circuit judge being considered for a Supreme Court appointment is equally "aware that his or her past service as a judge is being carefully reviewed and scrutinized." And so, by the reasoning of this opinion, the circuit judge is required to recuse in any case involving an attorney or party who is directly involved in the process of selecting the Supreme Court nominee. The Committee reached the same result in an informal Advisory Opinion issued in 1992. It concerns a judge on the U.S. Military Court of Appeals, nearing the end of her 15-year-term, who sought recommendation by the Department of Defense for reappointment. The Committee on Codes of Conduct found that the judge was required to recuse herself from a high-profile case in which the Defense Department was a party.[5] If mere reappointment to the judiciary raises reasonable questions about impartiality, promotion to the Supreme Court obviously does as well.

Against the unanimous weight of these opinions and decisions, Professor Rotunda cites "[t]he case that seems most on point" in his view, *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich. 1978), in which a judge declined to recuse himself from a case. However, *Baker* concerns an entirely different issue: personal friendship between a judge and a litigant. In the words of the judge in *Baker*, "The crux of plaintiffs' claim is that this Court. . .should recuse itself from presiding at the trial of this case because of the friendship between myself and Coleman A. Young, Mayor of the City of Detroit and a nominal party to this action." 458 F.Supp. at 375. One basis of the friendship (not the only one he mentions) is that Mayor Young had been a member of a panel that recommended Judge Keith for promotion to circuit judge. But at the time of the recusal ruling, that recommendation had already been made, and indeed Judge Keith had already been appointed Circuit Judge. Thus, in the relevant time period, Mayor Young no longer had any role to play in Judge Keith's promotion. *Baker* therefore has nothing at all to do with the question of whether a judge must recuse himself when a litigant is in a position to appoint him to a job he very much wants.

Finally, we wish to comment briefly on Professors Morgan and Rotunda's objection to the "appearance of impropriety" standard, which they believe adds nothing, is too vague and misstates Section 455(a). We find this criticism puzzling, because our article never used the phrase "appearance of impropriety," except once in a direct quote from a Supreme Court

opinion. We did use the phrase "appearance of impartiality," which is far less vague than the all-purpose word "impropriety," and which has appeared in scores of federal court cases discussing Section 455(a). Section 455(a) speaks of proceedings in which a judge's "impartiality might reasonably be questioned"—in other words, proceedings that might *appear* to a reasonable person to violate impartiality, whether or not they actually do. As one distinguished court writes, "we join our sister circuits in concluding that an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under section 455." *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981). With all due respect, Professors Morgan and Rotunda are engaged in semantic quibbling over the word "appearance." Nothing in our reasoning depends on the phraseology. Our conclusions depend only on Section 455(a), the facts of the case, and the authorities we cite. Professor Rotunda argues at great length that the ABA and other rule-writers have rejected "appearance of impropriety" standards. But Professor Rotunda's scholarly demonstration is entirely beside the point, because it pertains only to rules governing practicing lawyers, not judges. Canon 2 of the ABA's Code of Judicial Conduct, like the Code of Conduct for United States Judges, continues to state that "A judge shall avoid impropriety *and the appearance of impropriety* in all of the judge's activities" (emphasis added).

In conclusion, we find that Professors Morgan and Rotunda have not adequately conveyed the remarkable consensus among distinguished authorities that a judge being interviewed for a desirable job must recuse himself from cases involving the interviewers, whether they are parties or lawyers (or, as specified in Canon 3D of the Code of Conduct for United States Judges, obtain written permission to remain in the case from all parties, after disclosure on the record of the basis for disqualification). Nor have they focused on the specific facts that place Judge Roberts's situation, from April through mid-July, squarely within the ambit of the federal law requiring him to disqualify himself. We hope this letter is of use to you and your Committee.

Yours very truly,

Stephen Gillers
Emily Kempin Professor of Law
New York University School of Law

David Luban
Frederick Haas Professor of Law and
Philosophy
Georgetown University Law Center
(currently Leah Kaplan
Distinguished Visiting Professor of Human Rights,
Stanford Law School)

Steven Lubet
Professor of Law and Director of the
Program on Advocacy and Professionalism
Northwestern University School of Law

cc: Senator Patrick Leahy

* Stephen Gillers is the *Emily Kempin Professor of Law* at New York University School of Law. David Luban is the *Frederick Haas Professor of Law and Philosophy* at Georgetown University Law Center (currently *Leah Kaplan Distinguished Visiting Professor of Human Rights*, Stanford Law School). Steven Lubet is Professor of Law and Director of the Program on Advocacy and Professionalism at Northwestern University School of Law.

Footnotes

[1] Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs With the Judge Out of Court*, Slate.com (August 17, 2005), *available at* http://www.slate.com/id/2124603/. (We wrote: "We believe he [Judge Roberts] is a man of integrity who voted as he thought the law required." We also wrote: "We do not cite these events to raise questions about Roberts' fitness for the Supreme Court.").

[2] Memorandum from Alberto Gonzales, to the President (Draft) (Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban) (January 25, 2002).

[3] Canon 3(C)(1) is the recusal rule in the ABA's Code of Judicial Conduct, which the court notes is substantially similar to Section 455(a). *Scott*, 559 A.2d at 749, note 8. It was subsequently adopted in the official Code of Conduct for United States Judges. *See* http://www.uscourts.gov/guide/vol2/ch1.html#3.

[4] The Committee's Advisory Opinions are available at http://www.uscourts.gov/guide/advisoryopinions.htm.

[5] The opinion is published in 5 Military Justice Gazette (January 1993), in Military Justice Gazette: The First Ten Years 1-2 (National Institute of Military Justice 2001).