

The Impartiality Paradox

Melissa E. Loewenstem[†]

The constitutional principles that bind our free society instruct that the American people must “hold the judgeship in the highest esteem, that they regard it as the symbol of impartial, fair, and equal justice under law.”¹ Accordingly, in contrast with the political branches, the Supreme Court’s decisions “are legitimate only when [the Court] seeks to dissociate itself from individual or group interests, and to judge by disinterested and more objective standards.”² As Justice Frankfurter said, “justice must satisfy the appearance of justice.”³

Almost instinctively, once a President appoints a judge to sit on the Supreme Court,⁴ the public earmarks the Justice as an incarnation of impartiality, neutrality, and trustworthiness. Not surprisingly then, Presidents have looked to the Court for appointments to high profile and important committees of national concern.⁵ It is among members of the judiciary that a President can find individuals certain to obtain the immediate respect of the American people, and often the world community. It is a judge’s neutrality, fair-mindedness, and integrity that once again label him a person of impartiality and fairness, a person who seeks justice, and a President’s first choice to serve the nation. The characteristics that led to a judge’s initial appointment under our adversary system, and which lend themselves to appearances of propriety and justice in our courts, often carry over into extrajudicial activities as well. As Ralph K. Winter, Jr., then a professor at the Yale Law School, stated:

[t]he appointment of a Justice of the Supreme Court to head a governmental commission or inquiry usually occurs because of the existence of a highly controversial issue which calls for some kind of official or authoritative resolution. . . . And the use of Supreme Court Justices, experience shows, is generally prompted by a presi-

[†] Yale Law School, J.D. expected 2003.

1. JOEL B. GROSSMAN, *LAWYERS AND JUDGES* 1 (1965) (internal citation omitted).

2. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 108-09 (1976).

3. Jerold H. Israel, *Cornerstones of the Judicial Process*, KAN. J.L. & PUB. POL’Y, Spring 1993, at 5, 20 (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)).

4. This Note will focus exclusively on the activities of Supreme Court Justices for the purposes of organization and expediency.

5. Robert B. McKay aggregates a selective yet substantial record of Supreme Court Justices’ non-judicial activities beginning with Chief Justice John Jay and continuing through Chief Justice Warren Burger. His work demonstrates the commonality and degree to which most Presidents rely upon and look to the Court for political participation separate from the bench. Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 *LAW & CONTEMP. PROBS.* 9, 27-36 (1970).

dential desire to trade on the prestige of the Court in laying the matter to rest.⁶

But there has been opposition to appointing Supreme Court Justices to extrajudicial roles since the framing of the Constitution.⁷ This opposition argues that preserving the neutrality and passivity of a Justice is necessary to uphold the legitimacy of our adversary system.⁸ These same arguments are, interestingly enough, relied upon by the President when he appoints a Justice to such a role. It is upon this paradox—that a President's rationale for the extrajudicial appointments of Supreme Court Justices and an opponent's rationale for contesting such appointments are based on the same idea, that "justice must satisfy the appearance of justice"—that this Note will focus.

Part I will define and highlight the characteristics of the adversary system employed by Anglo-American courts today. Once the reader understands a judge's role in adversary theory as a neutral and passive fact-finder, and nothing else, it becomes obvious why the public, and most importantly, the President considers a Supreme Court Justice the embodiment of impartiality, fairness, and justice. Part II will provide historical examples of Presidents who, motivated by this perception, appointed Justices to extrajudicial positions. Part III will discuss several different modes and examples of opposition to Supreme Court Justices' participation in these activities. Opposition is often based on the need to preserve the neutrality, impartiality, passivity, and ultimately the air of

6. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 91st Cong. 327 (1969) (statement of Ralph K. Winter, Jr.) [hereinafter *Hearings*]. His statement implies that a President is often concerned with creating a neutral and impartial arena to conduct such commissions in order to convince the public that justice is being served. The "executive interest in appointing judges is the desire to add prestige to presidential commissions." Wendy E. Ackerman, Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. REV. 993, 1019 (1986).

7. To facilitate discussion, it is necessary to distinguish, as McKay does, between quasi-judicial and extrajudicial activities. McKay, *supra* note 5, at 20. Quasi-judicial activities include "those activities of judges that are not part of their assigned duties, but are related to the judicial function" such as lecturing, teaching and writing, as well as law reform advocacy. *Id.* In comparison, extrajudicial activities include the practice of law, business and charitable activities, partisan politics, public service, and personal and social relationships. *Id.* at 22-26. The latter category is the focus of this Note.

8. It is necessary to also distinguish between two often confused concepts when analyzing opposition to extrajudicial appointments of Supreme Court Justices. *In re President's Comm'n on Organized Crime*, 783 F.2d 370, 379 (3d Cir. 1986). There is the constitutional separation of powers principle that, under some circumstances, judges may violate "by voluntarily undertaking nonjudicial activity which intrudes substantially in the domain of another branch or so weakens their ability to function as Article III judges that the courts are substantially hindered in the proper performance of their duties." *Id.*; see, e.g., *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851) (finding that the duty assigned to an Article III court by Congress to receive and adjust claims against the United States arising under the Treaty of 1819 with Spain was not the exercise of judicial power under Article III and therefore violated the principle of separation of powers); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (holding that the 1792 statute authorizing circuit courts to pass on the right of individuals to be placed on the pension list of Revolutionary War veterans to violate separation of powers because the power was not judicial in nature). The latter concept must not be confused with the line of opposition focused on ethical considerations and accepted notions of propriety in judicial conduct. *In re President's Comm'n*, 783 F.2d at 379. These ethical considerations are also of the highest importance even though "their violation will not necessarily implicate constitutional prohibitions." *Id.* at 378. It is this concept that remains the concentration of this Note.

The Impartiality Paradox

justice that surrounds the Court and legitimizes the judiciary and its decisions. There is concern that placing Justices in extrajudicial roles might destroy their necessary neutrality and appearance of justice. Part IV will discuss the implications of this paradox and the subsequent effect on executive decisions to appoint a Justice to serve in such extrajudicial capacities and judicial decisions to accept. Part V will conclude.

I. THE ADVERSARY SYSTEM AND THE RESULTANT JUDICIAL CHARACTER

To satisfy the principle that justice must appear just, American courts have long employed “a system of procedure that depends upon a neutral and passive fact finder.”⁹ The central precept of this adversary process is that “out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.”¹⁰ Adversary theory

suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society at large that the judicial system is trustworthy. When a decision maker becomes an active questioner or otherwise participates in a case, he is likely to be perceived as partisan rather than neutral.¹¹

In other words, this adversary method of dispute resolution, with judicial neutrality and passivity at its core, ensures the essential appearance of fairness.¹²

As laid out in the Constitution, the President nominates the individuals who compose the judicial bodies that are players in the adversary model of judicial review.¹³ “Although the question of the *methodology* to be employed for judicial appointments was subjected to intensive floor debate at the Constitutional Convention . . . *criteria* for such appointments were neither debated nor did

9. Stephen A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983). Landsman, in STEPHEN A. LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 19-20 (1984), provides a brief discussion of the development of judicial neutrality and passivity in the adversary system from its beginnings in early eighteenth century England to the struggle for judicial neutrality played out in the United States in the early 1800s.

10. Landsman, *supra* note 9, at 714.

11. LANDSMAN, *supra* note 9, at 3.

12. In addition to judicial neutrality and passivity, the adversary system is also characterized by party control of the investigation and presentation of evidence and argument. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1988-89). The adversary system is generally cast in comparison to the judicial system of continental Europe, the inquisitorial system. Inquisitorial adjudication takes a very different approach to justice than the adversarial system: “[T]he judge is primarily responsible for supervising the gathering of evidence necessary to resolve the issue . . . the decisionmaker is not, therefore, merely a receptor for information at a neatly packaged trial, but is, instead, an active participant.” *Id.* at 313.

13. U.S. CONST. art. II, § 2, cl. 2 states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”

they appear to loom as a matter of either significance or puzzlement.”¹⁴ Although the Constitution sets forth no criteria, it is clear from history and experience that specific decision-based reasons or motivations for presidential nominations exist. Henry J. Abraham suggests four continually occurring motivations: “[F]irst, objective merit; second, personal friendship; third, balancing ‘representation’ or ‘representativeness’ on the Court; and fourth, ‘real’ political and ideological compatibility.”¹⁵

The President, in accord with the Constitution, presumably motivated by some of these rationales, and dedicated to the adversary tradition, pursues a candidate who embodies the characteristics that make for a neutral and passive judge. There is no single characteristic or quality of an individual, however, which assures neutrality and passivity. Many American Justices, unlike jurists of continental Europe who are most often trained specifically for the bench, have no judicial background.¹⁶ Accordingly, Presidents must look to a candidate’s individual character to gauge the presence of “good judge” qualities such as neutrality and passivity. Sheldon Goldman identifies qualities, characteristics, or traits that are associated with the ideal type of “good judge,” most notably:

1. *Neutrality as to the Parties in Litigation.* Nothing ill becomes a judge more than a reputation for being biased or playing favorites among disputants.

2. *Fair-mindedness.* A sensitivity to the requirements of procedural due process as a means to a fair trial is the hallmark of a fair-minded judge.

...

[3.] *Personal Integrity.* A judge must have high moral standards and be able to withstand political and economic pressures and carry out the law to the best of his or her ability.

...

[4.] *Ability to Handle Judicial Power Sensibly.* Of course, this quality is defined differently by those who differ as to what is the “sensible” or the “common sense” use of judicial power. For example, some believe that a good judge is one who exercises judicial power in support of civil rights and civil liberties, and with a particular sensitivity to racial and sexual discrimination and the rights of the underdogs of society. Others believe that a good judge will exercise judicial power modestly, with great sensitivity to the limited capacity of judges to solve society’s problems, and make deference to the policymaking prerogatives of the democratic branches of government.¹⁷

14. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 17-18 (1999). The few delegates who did vocalize the issue did so by assuming that merit, as opposed to favoritism, should govern. *Id.* at 18.

15. *Id.* at 2. See also GROSSMAN, *supra* note 1, at 7-24 (discussing the political motivation that continually pervades the nominations behind Supreme Court Justices).

16. ABRAHAM, *supra* note 14, at 44.

17. Sheldon Goldman, *Judicial Selection and the Qualities that Make a “Good” Judge*, 462 ANNALS AM. ACAD. POL. SOC. SCI. 112, 113-14 (1982) (emphasis added). Other qualities that Goldman lists include:

[1]. *Being Well Versed in the Law.* Obviously a person who has had poor legal training, little

The Impartiality Paradox

These “qualities” arguably hint at a passive and neutral judge—that is, a judge who will sit comfortably in the seat of impartiality designated by our judicial system. In order to maintain an “appearance of justice,” so crucial to society’s belief in the validity of equal justice under law, a President’s ideal appointee will possess such qualities that contribute to neutrality and passivity. And once the Justice is appointed to the Supreme Court, the nation and the world at large will view him or her as possessing such characteristics.

II. EXAMPLES OF EXTRAJUDICIAL APPOINTMENTS

A. *The Constitutional Period: Chief Justice John Jay*

“A dearth of capable men in the early public life of the Nation gave rise to the frequent use of judges in nonjudicial activities”¹⁸ The numerous extrajudicial activities of Chief Justice John Jay strongly support this observation. Jay advised President Washington and Secretary Hamilton on various matters, and Washington appointed Jay to the diplomatic mission assigned to settle the continuing British-American dispute.¹⁹

As further indication of this common reliance on judicial participation in such activities in early American government, Congress and the President also approved use of the Justices, most notably the Chief Justice, in certain *ex officio* capacities.²⁰ The President assigned the Chief Justice to a commission empowered to inspect the operation of the United States Mint and appointed the

or no experience as a practicing lawyer, and who is ignorant of the law or does not have the ability and desire to master it cannot dispense justice under law.

[2.] *Ability to Think and Write Logically and Lucidly.* Fuzzy thinking and poor craftsmanship are highly undesirable, not only for judges who write opinions but also for judges who must make rulings from the bench or instruct juries.

...

[3.] *Good Physical and Mental Health.* It is difficult to believe that someone could function effectively as a judge with an alcohol or drug dependency, with severe personality disorders, or with a serious physical condition that impairs one’s ability to function normally at the intellectual level or that requires medication that might affect one’s judgment.

[4.] *Judicial Temperament.* Effective trial conduct requires a judge to be even-tempered even under the tensions and pressure-cooker atmosphere of, for example, a prolonged criminal trial, and to be courteous to lawyers, litigants, witnesses, and courtroom personnel. At the appellate court level, judicial temperament might well include the ability and willingness to be a full member of the “team” by doing one’s share of opinion-writing and working with colleagues to produce the most authoritative and clear decision as expeditiously as possible.

Id. at 114 (emphasis added).

18. Honorable Jane A. Restani & Ira Bloom, *The Quick Solution to Complex Problems: The Article III Judge*, 18 *FORDHAM INT’L L.J.* 1668, 1670 (1995) (internal citation omitted).

19. McKay, *supra* note 5, at 27.

20. Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *SUP. CT. REV.* 123, 139 (1973). Similar types of *ex officio* memberships still exist today. For example, under 20 U.S.C. § 41, the Chief Justice along with the President, the Vice President, and the heads of executive departments “are constituted an establishment by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men, and by that name shall be known and have perpetual succession with the powers, limitations, and restrictions hereinafter contained, and no other.” 20 U.S.C. § 41 (1994). Accordingly, to this day the Chief Justice of the United States Supreme Court serves as a mem-

powered to inspect the operation of the United States Mint and appointed the Chief Justice, along with other cabinet members, to the Sinking Fund Commission, which had the task of reducing and refunding the Revolutionary War debt.²¹ “The quality of currency and debt repayment were both hot political issues in the founding period.”²² Accordingly, people felt it was “extremely important that the public have confidence in the administrators of the [Sinking] [F]und Hamilton and Congress saw the Chief Justice as an individual who would enhance the operation of the Sinking Fund Commission and increase public trust in it.”²³ Given the public’s trust and seemingly absolute confidence in the judiciary because of its neutral and impartial character, any involvement of the Chief Justice would create public confidence in such government operations.²⁴

The frequency with which the early Presidents looked to Jay and his contemporary Justices²⁵ implies that some of the men who had helped write and ratify the Constitution believed it was ethically proper and constitutionally permissible for Supreme Court Justices to concurrently hold executive posts.²⁶ The debates at the 1787 Constitutional Convention suggest that many of the framers not only expected judges to make off-the-court contributions to the government, but also viewed such incidents of service favorably.²⁷ Russell Wheeler has noted that based on the debates, “it is obvious that more than a few of the prominent delegates felt it quite proper to require some type of extrajudicial service by the nation’s highest jurists.”²⁸ The delegates clearly thought

ber on the board of the Smithsonian Institute. The Chief Justice is also a trustee of the National Gallery of Art pursuant to 20 U.S.C. § 72(a).

21. Wheeler, *supra* note 20, at 140. See also Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1133 (1994).

22. Calabresi & Larsen, *supra* note 21, at 1131.

23. Wheeler, *supra* note 20, at 141.

24. *Id.* at 140.

25. The most well-known examples, in addition to John Jay, are John Marshall’s simultaneous service as Secretary of State and Oliver Ellsworth’s simultaneous service as Special Ambassador to France. Calabresi & Larsen, *supra* note 21, at 1131. Marshall’s simultaneous service is not a perfect demonstration of extrajudicial appointments since President Adams appointed Marshall as Secretary of State *before* appointing him to the Court. However, Jefferson, who became President after Adams, asked Marshall to remain as Secretary of State even though Marshall had begun his service on the Court. Although this short overlap seems quite tenuous as an example of extrajudicial appointments, Calabresi states that its importance lies in its well-known existence: “Marshall’s dual role is most famous since, during his tenure of Secretary of State, he himself signed and sealed, but failed to deliver, the commission appointing William Marbury as Justice of the Peace for the District of Columbia. This infamous commission would later become the subject of his landmark opinion in *Marbury v. Madison*.” *Id.* at 1131 n.423 (internal citation omitted).

26. *Id.* at 1132.

27. Wheeler, *supra* note 20, at 126.

28. *Id.* at 127. Wheeler discusses two of what he considers the “[m]ost notable of the proposals for obligatory extrajudicial service”: Madison’s plan for a council of legislative revision and a proposal that would have compelled judges to provide advisory opinions to other governmental entities. *Id.* These plans, according to Wheeler, reflect a “conviction that those who held the judicial office had skills of statesmanship which they were obliged to put extrajudicially to the nation’s service.” *Id.*

The Impartiality Paradox

that a Justice's character leaks an implicit perfume of impartiality that would imbue the extrajudicial commissions and activities with the same smell of justice.

Many of the Framers focused on these advantages that derive from assigning the judges to extrajudicial service. Madison, for example, made a proposal for a "Council of Revision," to be comprised of the President "and a convenient number of the National Judiciary . . . with authority to examine every act of the National Legislature before it shall operate. . . ."²⁹ He then spoke of the perceived advantages of such judicial participation: "[M]uch good . . . [would] proceed from the perspicuity, the conciseness, and the systematic character . . . [which] the Code of laws . . . [would] receive from the Judiciary talents."³⁰

B. *Justice Owen Roberts: Chairman of the Pearl Harbor Investigation*

Justice Owen Roberts has been described as a "man capable of error but incapable of persisting in it—a powerful, effective, eloquent advocate; a firm and honest judge and upright citizen of the nation and the world. . . ."³¹ He was hailed for his "independent spirit" and for standing "aloof from total surrender to either the 'liberal' or the 'conservative' position"³² while a member of the Court from 1930-1945. The Senate's confirmation of Justice Roberts on June 2, 1930, without any negative votes, assured the public that President Herbert Hoover's nominee embodied justice and neutrality.³³ Justice Roberts approached his position on the Court with avid impartiality—so much so that "[b]y the end of 1931 he . . . could be characterized only as [an] 'unreliable member[] of the so-called liberal majority.'"³⁴ Roberts's appearance as a non-partisan Republican on the Roosevelt Court caused the President to look to him for extrajudicial service.³⁵

Shortly after the news of a Japanese attack on Pearl Harbor reached Wash-

29. 1 THE RECORDS OF THE FEDERAL CONVENTION 21 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS].

30. *Id.* at 139.

31. John J. McCloy, *Owen J. Roberts' Extra Curiam Activities*, 104 U. PA. L. REV. 350, 353 (1955).

32. David Burner, *Owen J. Roberts*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, at 1117, 1128 (Leon Friedman & Fred L. Israel eds. 1997) [hereinafter THE JUSTICES].

33. *See id.* at 1120.

34. *Id.* at 1121 (citation omitted from the original text).

35. *Id.* at 1127. Roberts engaged in several extrajudicial activities throughout his tenure on the Supreme Court. The most well known is his appointment as chairman of the Commission that conducted the investigation of the Japanese attack on Pearl Harbor. In addition, he served on the Mixed Claims Commission of the United States and Germany that dealt with the Black Tom cases, see Owen J. Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1, 2 (1949), and, "[i]n 1943[,] Roberts headed the Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe, which cataloged and traced the art objects stolen or destroyed by the Germans." Burner, *supra* note 32, at 1128.

ington on December 7, 1941, “the name of Owen J. Roberts loomed up as the man best fitted to direct the investigation of the disaster at the great naval base on Oahu.”³⁶ President Roosevelt sought to appoint a commission to “ascertain and report the facts relating to the attack” for the stated purpose of providing “bases for *sound decisions* whether any derelictions of duty or errors of judgment on the part of the United States Army or Navy personnel contributed to such successes as were achieved by the enemy. . . .”³⁷ Arguably, as a result of Roosevelt’s desire for “sound decisions” on the matter, he agreed favorably with the suggestion of Secretary of War Stimson that Justice Roberts serve as the chairman of the Commission.³⁸ Certainly this selection was the natural consequence of a pressing national necessity and Roberts’s already prominent career and character as a fearless, independent and thorough fact-finder.³⁹ Roberts’s profile as a man of independence and neutrality was probably most apparent to Roosevelt and his associates from Justice Roberts’s previous extrajudicial activity as umpire of the Mixed Claims Commission of the United States and Germany that dealt mostly with the so-called Black Tom cases.⁴⁰

John McCloy has described Roberts’s important service on the Mixed Claims Commission, noting that he

deliberately set aside several decisions which had been handed down during the course of those cases. . . . When new evidence had been adduced in those cases which seriously reflected upon certain facts at the foundation of the earlier decisions, Justice Roberts unhesitatingly swept aside the old decisions, in effect acknowledging error, and he entered judgment accordingly. He took this step, which was perhaps unprecedented in international arbitration, even though the consequences were most awkward for both of the governments involved.⁴¹

C. *Justice Robert Jackson: Chief Prosecutor for the United States at Nuremberg*

“To confess error was for him a show of strength, not of weakness. No man who ever sat on the Supreme Court, it seems to me, mirrored the man in him in his judicial work more completely than did Justice Jackson,” wrote Justice Felix Frankfurter.⁴² These endearing words portray both the intelligence and honor with which Justice Robert Jackson sat on the Court and the respect the world held for him. He was described as having “a calm which no crisis could disturb, and standards of honorable conduct which were both rigorous and un-

36. McCloy, *supra* note 31, at 351-52.

37. Exec. Order No. 8983, 3 C.F.R. 1046 (1941) (emphasis added).

38. McCloy, *supra* note 31, at 352.

39. *Id.* at 351.

40. *See id.* at 353; *see also* United States *ex rel.* Lehigh Valley R.R. v. Germany, 27 AM. J. INT’L L. 339 (1933).

41. McCloy, *supra* note 31, at 353.

42. Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955).

The Impartiality Paradox

shakeable.”⁴³

Jackson, a self-educated man from a rural background, was admitted to the Bar at the age of twenty-one with little formal study.⁴⁴ In 1934, after twenty years in his own law practice in Jamestown, New York, Jackson left “for his spectacular national career.”⁴⁵ From the time Jackson became General Counsel of the Bureau of Internal Revenue in February, 1934 until his unanimous confirmation to the Supreme Court on July 7, 1941, he established his abilities and intelligence in numerous legal positions throughout Washington.⁴⁶ By the time he reached the Court, Jackson had successfully held the titles of General Counsel of the Bureau of Internal Revenue, Assistant Attorney General in charge of the Tax Division, Assistant Attorney General in charge of the Antitrust Division, and Solicitor General.⁴⁷

But it was more than Jackson’s professional experience and career in Washington that influenced Presidents Roosevelt and Truman to follow Jackson’s suggestions on the subject of legal recourse against Nazi aggressors upon Germany’s surrender to the Allies. It was Jackson’s pronounced belief in justice, apparent both in his position regarding fair prosecution of the Nazis as well as in his judicial work on the Supreme Court, that led to his extrajudicial appointment as chief prosecutor for the United States at the Nuremberg Trials. According to Jackson, a judge is a man who does not “let the personalities on either side interfere with his deciding the case on the facts and the law.”⁴⁸ “He had the habit of truth-seeking and faithfully served justice.”⁴⁹ Jackson believed in the necessity of impartiality and neutrality on the bench, and he entertained the conviction that the power entrusted to the Supreme Court is “saved from misuse only by a self-searching disinterestedness almost beyond the lot of men.”⁵⁰

His assumption of human fallibility, arguably so essential to maintaining fairness and neutrality as a judge, runs throughout his work. In his dissent in *Massachusetts v. United States*, the Justice wrote:

[I]f I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it. . . . [E]xcept for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously

43. Warner W. Gardner, *Government Attorney, in Robert H. Jackson*, 55 COLUM. L. REV. 438, 439 (1955).

44. Gardner, *supra* note 43, at 439. Jackson was born on a farm near the village of Spring Creek, Pennsylvania, on February 13, 1892. He had little post-secondary education and only one year of formal legal training.

45. Felix Frankfurter, *Foreward to Robert H. Jackson: 1892-1954*, 55 COLUM. L. REV. 435, 436 (1955).

46. See Gardner, *supra* note 43, at 440-44.

47. *Id.*

48. Philip B. Kurland, *Robert H. Jackson*, in 4 THE JUSTICES, *supra* note 32, at 1282, 1303 (quoting Robert Jackson).

49. Frankfurter, *supra* note 42, at 939.

50. *Id.* at 938.

wrong today because I was unconsciously wrong yesterday.⁵¹

Roosevelt died suddenly on April 12, 1945, and Vice President Harry S. Truman succeeded him. The day after the President's death, Justice Jackson addressed the American Society of International Law in Washington. He pronounced support for Stimson's proposal and advocated not only the necessity of Nazi leader prosecution, but also the importance of fairness.⁵² Roosevelt had "steadily and insistently favored a speedy but fair trial for these men," but, Jackson said, he remained "fearful that if they were punished without public proof of their crimes and opportunity to defend themselves there would remain a doubt of their guilt that might raise a myth of martyrdom."⁵³ Understandably concerned with the public's reaction to America's endorsement of a trial rather than immediate execution, Truman needed someone to represent America and remind its people of the standards of justice central to American law. Upon hearing Jackson's support in Washington, Truman asked Jackson to become America's advocate at the Nuremberg trials.⁵⁴ Jackson's words and presence brought the neutrality, impartiality and trust he exemplified on the bench to the eyes and hearts of Americans and the rest of the world, who eventually came to support the need for a trial in Europe.⁵⁵ Churchill even acknowledged that

51. Charles Fairman, *Associate Justice of the Supreme Court, in Robert H. Jackson: 1892-1954*, 55 COLUM. L. REV. 435, 445 (1955) (quoting *Massachusetts v. United States*, 333 U.S. 611, 639 (1948) (Jackson, J., dissenting)).

52. Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2423 (2000) (book review). Jackson supported Stimson's proposal and the necessity for a fair trial—at least by Anglo-American standards of justice under law—in his address to the American Society of International Law. He stated:

It seems to me that much hinges on acceptance of the concept of the Court as an independent body above obligation to any nation or interest. I do not see how we, or any nation of like philosophy, could submit controversies to a court otherwise conceived, and certainly we could not concede any measure of compulsory jurisdiction to it. Nor do I see how any reputable professional man of the Anglo-American tradition could lend his name to a tribunal not of that character. . . . We must not use the forms of judicial proceeding to carry out or rationalize previously settled political or military policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people. . . . The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.

EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 316-17 (1958).

53. Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL* xxxiv (1999).

54. GERHART, *supra* note 52, at 317.

55. Jackson constantly professed the need for a fair trial, and through his eloquent words, he convinced the world. He stated:

To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride.

Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 303 (1994) (quoting ROBERT JACKSON, *THE NUREMBERG CASE* 8 (1971)).

The only course, in my view, was for the victors to behave as civilized victors and take the re-

The Impartiality Paradox

“[n]ow that the trials are over, I think the President was right and I was wrong.”⁵⁶

D. *Chief Justice Earl Warren: Chairman of Commission to Investigate the Assassination of President John Fitzgerald Kennedy (The Warren Commission)*

Justice William J. Brennan coined the term “Superchief” to describe his colleague, Chief Justice Earl Warren based on Warren’s performance as the leader of the Court.⁵⁷ Warren had learned from previous public service in his native state of California⁵⁸ “‘to lead, to manage, to set a tone, and to get results.’ As such, he brought more authority to the position of Chief Justice than had been seen for years.”⁵⁹ He had a reputation before his appointment to the Court as “a solid, well-meaning, and rather nonpartisan public servant.”⁶⁰ President Eisenhower picked Warren to replace former Chief Justice Vinson because of Warren’s “integrity, honesty, middle-of-the-road philosophy.”⁶¹ It was hoped that Warren could resolve conflicts among the Justices “during a time of tremendous social and political controversy.”⁶² Warren conquered this feat in his first five years on the Court.⁶³

Warren was never considered a learned legal scholar, but he also never pretended to be one.⁶⁴ To him, the “right result took precedence over doctrinal clarity and consistency.”⁶⁵ Professor Martin Shapiro has labeled Warren’s jurisprudence a “jurisprudence of values.”⁶⁶

sponsibilities implicit in demanding and accepting capitulation of the whole German state and population. Unless history was to lay the war guilt and the guilt for organized programs of atrocities upon the whole German people, some process must identify those individuals who were in fact responsible and make an authentic record of their deeds.

Jackson, *supra* note 53, at xxxiv.

56. Jackson, *supra* note 54, at xxxiv.

57. *Earl Warren*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 501, 502 (Melvin I. Urofsky ed., 1994).

58. From 1920 until he took his seat on the Court, Earl Warren served continually in public office in his home state of California. Without interruptions, he served as a deputy in the Alameda County district attorney’s office, as a district attorney for thirteen years, as California Attorney General for four years, and as governor serving three terms. A few days after Warren announced that he would not run for a fourth term as governor, the Chief Justice of the United States, Fred. M. Vinson died. President Eisenhower subsequently picked Governor Warren to succeed him. See Anthony Lewis, *Earl Warren*, in 4 *THE JUSTICES*, *supra* note 32, at 1373, 1380-81.

59. Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 *TULSA L.J.* 477, 480 (1997) (quoting G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 152 (1982)).

60. *Earl Warren*, *supra* note 57, at 502.

61. Lewis, *supra* note 58, at 1381 (quoting President Eisenhower).

62. *Earl Warren*, *supra* note 57, at 502-03.

63. *Id.* at 503.

64. Schwartz, *supra* note 59, at 479. Warren once told an audience, “I wish that I could speak to you in the words of a scholar, but it has not fallen to my lot to be a scholar in life.” *Id.*

65. *Earl Warren*, *supra* note 57, at 507.

66. *Id.*

To Warren, justice meant seeing that the right side, the good side, prevailed in the particular case. As Anthony Lewis wrote in a biographical sketch, Warren “really did believe, to use Justice [John] Harlan’s phrase, that he sat as a judge to do good where good was needed.”⁶⁷ Most often his sympathy lay with the individual victim of governmental restraints; but interestingly, he also voted to sustain government action when he saw the need for social control of some evil, such as gambling or obscenity, despite charges of inconsistency. Notwithstanding Warren’s political background, “he recognized that a judge should not seek popular favor; he never hesitated in the face of opposition from Congress or the organized bar or public opinion.”⁶⁸ All this made Warren more than just a judge in the public’s eyes. “[T]o the public in the United States and much of the world he became a symbol. . . . Warren represented to them the hope of America. . . . for the majority, he was a reminder of what seemed lost American virtues: openness, optimism, idealism without ideology.”⁶⁹

Accordingly, while America grieved over the assassination of President John F. Kennedy in November of 1963 and rumors and theories combined to provide wild explanations, the newly sworn in President Lyndon B. Johnson saw Warren as the “personification of justice and fairness in this country.”⁷⁰ The mixed emotions of shock and anger at President Kennedy’s assassination, and the horror of the televised killing of his accused assassin, created an overwhelmingly popular thirst to know what had happened and why.⁷¹ The public was unsatisfied by the lack of tangible facts and the public conceived of and believed rumors and theories that presupposed conspiracies of various kinds. The world began to believe almost anything.⁷² Therefore, “out of the nation’s suspicions, out of the nation’s need for facts, the Warren Commission was born.”⁷³

President Johnson faced a nation imbued with rumors and suspicions of governmental and international conspiracies that needed to be repressed. He understood all too well the need to create an inquisitorial body charged with discovering the truth. President Johnson knew that any investigative body charged with unraveling the Kennedy assassination could not be an agency of the Executive branch.⁷⁴ “The commission had to be composed of men who

67. Lewis, *supra* note 58, at 1379.

68. *Id.* at 1376.

69. *Id.* A minority in America saw Warren in quite the opposite light and as a convenient symbol of hate. These individuals composed the group opposed to the Court’s decision in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), which held that school segregation is unconstitutional under the Fourteenth Amendment. *Id.*

70. LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-1969*, at 26 (1971).

71. Robert F. Cushman, *Why the Warren Commission?*, 40 N.Y.U.L. REV. 477, 477 (1965).

72. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 355 (1977).

73. JOHNSON, *supra* note 70, at 26.

74. *Id.*

The Impartiality Paradox

were known to be beyond pressure and above suspicion. . . . The commission had to be bipartisan and . . . [it] needed a Republican chairman whose judicial ability and fairness were unquestioned.”⁷⁵

Johnson never considered any candidate other than Chief Justice Warren. It is a President’s duty to bring the nation through such tragedy and “Warren’s personal integrity was a key element in assuring that all the facts would be unearthed and that the conclusions would be credible.”⁷⁶ Thus, just one week after the Kennedy assassination, Deputy Attorney General Nicholas Katzenbach and Solicitor General Archibald Cox informed Warren of Johnson’s decision to establish a bipartisan commission to investigate the affair, and asked Warren if he would serve as chairman.⁷⁷ Although Warren thought the idea of such a commission was wise, he vigorously opposed serving on it due to his belief in the impropriety of Justices taking on extrajudicial appointments.⁷⁸

Johnson ultimately convinced Warren to head the commission through an appeal to the Chief Justice’s patriotism and to the severity and urgency of the matter.⁷⁹ Johnson recalls his conversation with Warren:

In World War I he had put a rifle to his shoulder and offered to give his life, if necessary, to save his country. I said I didn’t care who brought me a message about how opposed he was to this assignment. When the country is confronted with threatening divisions and suspicions and its foundation is being rocked, and the President of the United States says that you are the only man who can handle the matter, you won’t say “no,” will you?⁸⁰

Once again, a President only needed to look to the highest court in the nation. Johnson knew that the only way to convince the nation and the world that the investigation would be conducted fairly, comprehensively, and objectively, and would produce an ultimately just conclusion, would be to appoint as chairman an individual who embodied justice and fairness. The Chief Justice was the obvious choice. He had already established such a reputation in the eyes of the world and especially in the hearts of the nation. Warren unquestionably “lent authority, dignity and stature to the Commission.”⁸¹

75. *Id.*

76. *Id.* at 26-27.

77. WARREN, *supra* note 72, at 355-56.

78. *Id.* at 356. For further discussion of Warren’s original position concerning the impropriety of Supreme Court Justices taking on such extrajudicial appointments, see *infra* Section III.B. Warren expressed his disapproval of such practices by prior Justices and their detrimental effects on the Court itself and the Court’s authority. *Id.*

79. See JOHNSON, *supra* note 70, at 27; see also WARREN, *supra* note 72, at 357 (retelling the conversation that he had with President Johnson at the White House when Johnson convinced him to chair the commission due to the emergency and necessity of the situation and because his country needed him to be there for her).

80. JOHNSON, *supra* note 70, at 27.

81. Cushman, *supra* note 71, at 502.

III. OPPOSITION TO EXTRAJUDICIAL APPOINTMENTS

A. *Historical Opposition*

The early historical examples set forth above “might lead one to conclude that extra-judicial service has the sanction of history.”⁸² But these extrajudicial activities were not always accepted as within the limits of the Constitution or endorsed by the Justices themselves. From the outset, in fact, Americans have debated the prudence of such extrajudicial activities of Supreme Court Justices.⁸³

Chief Justice Jay felt that “judges should avoid any extra-judicial activity which would threaten their ability to judge impartially. It was, Jay asserted . . . neither ‘illegal [n]or unconstitutional, however it may be inexpedient, to employ [judges] for other purposes, provided the latter purposes be consistent and compatible with the ‘judges’ basic function.’”⁸⁴ Jay’s opposition existed only to the extent that such extrajudicial activities would interfere with a judge’s neutrality and impartiality in America’s adversarial system. His opinion is obvious in correspondence with Thomas Jefferson, Secretary of State at the time. In a letter dated July 18, 1793, Jefferson asked Chief Justice Jay for an expansion of the Court’s advisory relationship to the President:

The President . . . would be much relieved if he found himself free to refer questions . . . to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.⁸⁵

In a letter dated August 8, 1793, the Justices declined to accept an advisory role to Washington. Although not specifically commented upon in the Justices’ letter, there is ample evidence that the Justices were wary of intruding upon and destroying the neutrality and impartiality of the Court.⁸⁶ As Wheeler has commented, “the Justices thought that they would retain a bias toward an opinion once publicly stated . . . [They] simply did not trust themselves, or later judges following their precedent, to be able to change their opinion so easily.”⁸⁷ Jay

82. Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 466 (1997).

83. *See id.*

84. Wheeler, *supra* note 20, at 131 (quoting from a letter reprinted in 2 GRIFFIN J. MCREE, *THE LIFE AND CORRESPONDENCE OF JAMES IREDELL* 292, 294 (1857)).

85. Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices, (July 18, 1793) reprinted in PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65 (3d ed. 1988).

One of the reasons Jefferson gave for seeking advice on such important matters from the highest court was that the Court’s authority would “insure the respect of all parties.” *Id.* Again, there is the conviction that the Justices were perceived as neutral and fair and thus commanded the respect and trust of people. Accordingly, men like Jefferson and Washington looked to them to instill such a societal conviction regarding other activities.

86. *See* Wheeler, *supra* note 20, at 153.

87. *Id.*

The Impartiality Paradox

had warned in a 1790 letter to Washington that “judges were reluctant to ‘relinquish sentiments publicly’ . . . [s]uch reluctances ‘not infrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.’”⁸⁸

The Justices were not only aware of their own vulnerabilities but were also conscious of the public’s subsequent perception of such bias. It was apparent to these early Justices that, in the words of Justice O’Connor, “[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception.”⁸⁹ Wheeler concludes that “the 1793 incident was more than a refusal to give advice. It was a part of a broader attempt by the early Supreme Court to deemphasize the obligatory extrajudicial service concept, so widely held in the early period.”⁹⁰

From the standpoint of an originalist, the 1787 Federal Convention debates concerning the Tenure and Compensation Clause of Article III arguably provide additional proof of the delegates’ foresight.⁹¹ They understood that the judiciary’s power lay solely in its integrity and legitimacy—characteristics a Court can maintain only through an appearance of neutrality and impartiality. Without speaking directly to the impropriety of Justices accepting extrajudicial roles, the debates focused on the necessity of judicial independence from the other branches of government in order for the judiciary to properly function.⁹² The sentiment of the delegates’ convictions does, however, speak to impartiality in addition to independence, for only a judiciary that can decide issues without fear of removal from office or decrease in salary can be viewed universally as not only independent but also impartial.

The Federalist Papers unambiguously allude to this sentiment. In Federalist No. 78, Alexander Hamilton supported his defense of the Tenure Clause of Article III by asserting its ability to help maintain the public’s necessary perception of the judiciary as the “citadel of . . . the public security”⁹³—implying that the people “must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.”⁹⁴ It follows that

88. *Id.* (quoting from a letter by Jay reprinted in 2 MCREE, *supra* note 84, at 293).

89. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

90. Wheeler, *supra* note 20, at 158.

91. Article III provides that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

92. See 2 RECORDS, *supra* note 29, at 37-49 (rev. ed. 1937) (discussing the Compensation Clause as a means to secure the judiciary’s independence); *id.* at 428-30 (rejecting a proposal to subject judges to removal by the Executive because it would weaken judicial independence). For a discussion of delegates’ consideration of judicial independence, see Krotoszynski, *supra* note 82, at 457-59.

93. THE FEDERALIST NO. 78, at 497 (Alexander Hamilton) (Robert Scigliano ed., 2000); see generally Krotoszynski, *supra* note 82, at 459-61 (pointing to three Federalist Papers that demonstrate the Framers’ intent to safeguard the independence and impartiality of the federal judiciary).

94. THE FEDERALIST NO. 78, *supra* note 94, at 496.

“the general liberty of the people can never be endangered from that quarter.”⁹⁵ According to Hamilton, this requires independence and impartiality, characteristics logically supported through permanency in office.⁹⁶ Such permanence further suggests that the appearance of impartiality is necessary to sustain the judiciary as a source of public security.

Similarly in Federalist No. 79, Hamilton emphasized an independent and impartial judiciary supported through the Compensation Clause. “Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support.”⁹⁷ Hamilton evoked the commonality of the realization that “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”⁹⁸ According to Hamilton, this provision, together with the provision regarding tenure, “affords a better prospect” of the Justices’ independence.⁹⁹ Arguably, Hamilton refers to a phenomenon of dependency obvious to him, and one that he believed to be unequivocal to the public as well given its characterization as “human nature.” Therefore, Hamilton strove to justify both the Tenure and Compensation Clauses as means of providing an impartial appearance to the public, for together, they “afford a better prospect.”¹⁰⁰

This historical evidence portrays the delegates as individuals who endeavored to create a government and a constitution that imbued the judiciary with the utmost appearance of impartiality and independence. The delegates intended these two clauses to provide the public with a more definitive and defensible vision of impartiality. These historical figures did not directly speak to extrajudicial activities of Supreme Court Justices as weakening the judiciary’s legitimizing appearance of impartiality. However, the delegates analogously opposed framing the Constitution in a way that might similarly deteriorate the crucial appearance of impartiality whether through the limited duration of appointments or through unstable salaries.

B. *Supreme Court Justices’ Opposition*

“The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch,” wrote Justice Blackmun in *Mistretta v. United States*.¹⁰¹ Recognizing such ethical concerns, members of

95. *Id.* at 497.

96. *Id.*

97. Krotoszynski, *supra* note 82, at 460-61 (quoting THE FEDERALIST NO. 79, at 504 (Alexander Hamilton) (Robert Scigliano ed., 2000)).

98. THE FEDERALIST NO. 79, *supra* note 97, at 504.

99. *Id.* at 505.

100. *See id.*

101. *Mistretta v. United States*, 488 U.S. 361, 404 (1989). In *Mistretta*, the Court noted that “the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch.” *Id.* at 407. Although the Court ultimately concluded

The Impartiality Paradox

the Court are unequivocally aware that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.”¹⁰²

Former Chief Justice Harlan Stone was probably the most outspoken Justice in his opposition to such extrajudicial service. Finding it his own responsibility as Chief Justice to preserve the judiciary’s integrity and impartiality, Justice Stone tried to set a standard by declining numerous appointments to commissions and by consistently opposing “prying justices from their posts for special duty under the direction of the President or of Congress.”¹⁰³ In 1942, for example, Franklin D. Roosevelt asked Chief Justice Stone to head an investigatory commission into the rubber industry:

A rancorous quarrel had developed in the administration’s handling of the nation’s rubber supply. . . . [T]he President sought to take these perplexing questions out of politics by naming an investigating commission so thoroughly respectable that few would dare dispute its findings. As he envisaged it, the recommendations of a beloved elder statesman could restore peace among his feuding aides, placate Congress and the citizenry.¹⁰⁴

Accordingly, Roosevelt looked to Chief Justice Stone. In response to Roosevelt’s letter requesting his services, Stone wrote:

Apart from the generally recognized consideration that it is highly undesirable for a judge to engage actively in public or private undertakings other than the performance of his judicial functions, there are special considerations which I think must be regarded as controlling here. . . . A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. . . . He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably *impairs his value as a judge and the appropriate influence of his office.*¹⁰⁵

The Chief Justice reiterated his opposition through his refusal to accept yet another proffered position, chairmanship of the United States Ballot Commission.¹⁰⁶ Stone regarded such a position as “incompatible with obligations which

that the judge’s participation did not threaten the impartiality of the Judicial Branch, the opinion is relevant, for purposes of this Note, in that members of the Court expressed a clear awareness and were vocal about the need for restraint from participation in activities that will threaten the ethical considerations of impartiality.

102. *Id.* at 407.

103. Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The View of Chief Justice Stone*, 67 HARV. L. REV. 193, 201 (1953).

104. *Id.* The quarrel between the farm bloc congressmen and the powerful oil industry focused on conflicting methods of making rubber synthetically. *Id.*

105. *Id.* at 203-04 (emphasis added). In support of his decision to decline Roosevelt’s request, Stone cites the historical examples of extrajudicial activities of Supreme Court Justices and regards such participation of Jay and Ellsworth negatively.

We must not forget that it is the judgment of history that two of my predecessors, Jay and Ellsworth, failed in the obligations of their office and impaired their legitimate influence by participation in executive action in the negotiation of treaties. . . . [I]t is not by mere chance that every Chief Justice since has confined his activities strictly to the performance of his judicial duties.

Id. at 204.

106. Ackerman, *supra* note 6, at 998 n.25. The Commission was created to handle the problem of

I assumed with the office of Chief Justice, and as likely to impair my usefulness in that office. . . . [I]t might have political implications and political consequences which should be wholly disassociated from the duties of the judicial office."¹⁰⁷ Chief Justice Stone declined a variety of other positions¹⁰⁸ and expressed his deep disturbance at Justice Jackson's participation in the Nuremberg Trials—a disturbance based in his fear that such activities by members of the Court would damage its reputation and influence.¹⁰⁹ In his view, the judicial role required neutrality. Chief Justice Stone believed that the way to maintain an appearance of neutrality and ultimately the legitimacy of the judicial branch was to avoid such extrajudicial postings as a "prophylactic safeguard."¹¹⁰

Justice Owen J. Roberts regretted his own service on two commissions, stating afterwards that "I do not think it was good for my position as a Justice, nor do I think it was a good thing for the Court."¹¹¹ Accusations of Justice Roberts's bias and unfairness while on the German-American Mixed Claims Commission and while on the investigation into Pearl Harbor fueled such doubts.¹¹² The investigation into the Pearl Harbor disaster was so controversial that Congress actually investigated Justice Roberts's investigation.¹¹³

Roberts referred to these experiences as "unfortunate" and "unpleasant" due to the reputation they afforded his character and the partiality with which they tainted the Court as a result.¹¹⁴ His newly-found opposition after service on these commissions went so far as to lead him to support a proposal that "the Chief Justice or any associate justice or any judge of any other court of the United States shall not, *during his term in office*, hold any other governmental or public office or position."¹¹⁵

Although Chief Justice Earl Warren ultimately agreed to head the commission charged with investigating the assassination of President Kennedy, he did so only after his initial refusal and with serious misgivings regarding acceptance of such a position.¹¹⁶ In his autobiography, Warren rationalized his reser-

soldiers voting during the war. *Id.*

107. *Id.* (citing Letter from Chief Justice Harlan F. Stone to Senator Arthur H. Vandenberg, 89 CONG. REC. 9791 (1943)).

108. In addition to those mentioned, Stone declined to act as head of the Atomic Energy Commission, to serve on the panel of judges of the Hague arbitrations, and to head a committee on traffic safety. Mason, *supra* note 103, at 208, 209, 214.

109. *See id.* at 214-15.

110. Krotoszynski, *supra* note 82, at 468.

111. Roberts, *supra* note 35, at 2.

112. *See Ackerman, supra* note 6, at 998 n.25.

113. *Id.*

114. *See Roberts, supra* note 35, at 2.

115. *Id.* Roberts stated that he felt "very strongly that that would be a great protection to the Court." *Id.* Obviously, Roberts was referring to the damage he felt that his participation on such commissions caused the Court.

116. Calabresi & Larsen, *supra* note 21, at 1137 (noting Warren's initial eloquent and persuasive speech defending his refusal); Krotoszynski, *supra* note 82, at 464-65 (same).

The Impartiality Paradox

vations this way:

First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy docket; and, third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases. I then told them that, historically, the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth, had not contributed to the welfare of the Court, that the service of five Justices on the Hayes-Tilden Commission had demeaned it, that the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and that the action of Justice Robert Jackson in leaving the Court for a year to become chief prosecutor at [Nuremburg] after World War II had resulted in divisiveness and internal bitterness on the Court.¹¹⁷

Despite Chief Justice Warren's eventual acceptance of the appointment, his prudential and ethical objections based on the negative historical results of such actions are critical and noteworthy in opposing extrajudicial appointments of Supreme Court Justices.¹¹⁸

The Senate Judiciary Subcommittee on Separation of Powers convened in 1969 to hear testimonies, including those from retired Supreme Court Justices, regarding extrajudicial activities of judges.¹¹⁹ Former Justice Arthur J. Gold-

117. WARREN, *supra* note 72, at 356.

118. See, e.g., *In re President's Comm'n on Organized Crime*, 783 F.2d 370, 377-78 (3d Cir. 1986) (citing Warren's comments as an example of individual opposition to judicial participation in extrajudicial bodies); *Mistretta*, 488 U.S. at 401 n.26 (reflecting on Warren's "lament on the subject" of extrajudicial service as an example of judicial reservation or regret regarding such service); *Krotoszynski*, *supra* note 82, at 464-65 (referring to Warren as an example of the continued and historical controversy regarding extrajudicial appointments and stating that "Chief Justice Warren's acceptance of the appointment, however, did not allay or assuage his constitutional and prudential concerns about undertaking this extrajudicial assignment"); *Ackerman*, *supra* note 6, at 999 n.25 (quoting Warren for an example of judicial criticism regarding participation by federal judges in such activities).

119. The Subcommittee met for the stated purpose of addressing the problem of "nonjudicial activities of federal judges" and discussing "S. 1097 and S. 2109, bills which are representative of possible legislative approaches to the problem." *Hearings*, *supra* note 6, at 1. The testimonies are replete with references to judicial independence and canons of ethics as sources of concern in addition to the doctrine of separation of powers. *In re President's Comm'n*, 783 F.2d at 379.

The Committee heard from academics, Senators and members of the legal community in addition to retired Supreme Court Justices. Hon. Sam J. Ervin, Jr., chairman of the Subcommittee and U.S. Senator from North Carolina, said in the opening statements of the second series of hearings on September 30, 1969, that witnesses from the first series of hearings reached no consensus

about the desirability of legislation at all. Some questioned the authority of Congress in imposing strictures on the judiciary, but felt that in prohibiting the Executive from appointing judges to special assignments, the Congress would be on sure ground. Others contended that the canons of ethics already in force are sufficient. Still others believed the question should be left to the individual judges themselves, not even to their colleagues.

Hearings, *supra* note 6, at 157. There is a similar resolve at the end of the second series of hearings. See *id.* These legislative efforts were never reported out of the Senate Committee on the Judiciary. Solomon Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 CONN. B.J. 391, 395 n.15 (1975). The court in *In re President's Commission* found that "most of the witnesses and correspondents disapproved of judges undertaking such assignments as the Warren and Pearl Harbor Commissions as well as the Nuremberg trials. There was strong support for judges participating in such areas as judicial administration, rule-making, and similar matters closely related to the courts." 783 F.2d at 379. Further,

[t]he 1969 hearings [were] not the first time that extrajudicial service by federal judges has en-

berg testified in support of specific ground rules that should be adopted by federal judges themselves as opposed to the legislature mandating appropriate non-judicial conduct.¹²⁰ Goldberg asserted that “we are a country which depends, rightly, upon the consent of the governed, the perpetuation of the judicial system and preservation of the rule of law requires public confidence both in the independence and in the integrity of the judiciary.”¹²¹ Accordingly, Goldberg noted that “now the present is the time for judges to refrain from engaging in activities which, however proper in an abstract sense, have a potential to create doubt and confusion in the present public mind.”¹²² “[J]udges ought to be guided by the principle that judicial duties come first and that nothing should be done or said which would even appear to compromise the independence and integrity of the individual judge, or of the courts as institutions.”¹²³

As the above discussion demonstrates, Supreme Court Justices are both aware of and vocal regarding their opposition to such extrajudicial activities in order to preserve appearances of impartiality and neutrality essential to maintain the judiciary’s legitimacy.¹²⁴

C. *Canons of Judicial Ethics*

The American Bar Association provided additional criticism and opposition to Supreme Court Justices’ participation in such activities when, in 1972 and

countered congressional criticism. In 1947, the Senate Judiciary committee concluded that, “The practice of using federal judges for nonjudicial activities is undesirable. The practice holds great danger of working a diminution of the prestige of the judiciary. It is a deterrent (sic) to the proper functioning of the judicial branch of the government.”

Id. at 379-80 (quoting NOMINATIONS OF HONORABLE MARVIN JONES AND HONORABLE JOHN CASKEY COLLOT, S. Rep. No. 80-7 (1947)).

120. *Hearings, supra* note 6, at 159. Justice Goldberg felt that “it is helpful for our judges to know what is deemed appropriate conduct . . . to avoid the appearance of impropriety, it helps both the public and the judge to know the guidelines.” *Id.*

121. *Id.* at 158.

122. *Id.* at 159.

123. *Id.* at 165.

124. For purposes of this Note, the discussion is limited to comments of opposition by Supreme Court Justices. However, this is not meant to discount the numerous other federal judges that voiced their opposition to such extrajudicial activities.

At the 1969 Hearings, for example, the Senate Subcommittee heard testimony from Hon. David T. Lewis, judge for the U.S. Court of Appeals for the Tenth Circuit and from Hon. Simon H. Rifkind, former judge for the U.S. District Court for the Southern District of New York. *Hearings, supra* note 6, at 45-58, 76-84.

Judge Skelly Wright, a former judge for the U.S. District Court of the District of Columbia, observes that “public confidence in the judiciary is indispensable to the operation of the law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity.” Restani & Bloom, *supra* note 18, at 1674-75.

Judge Irving R. Kaufman, former Chief Judge of the U.S. Court of Appeals for the Second Circuit, wrote an article that generally “explains and defends an independent federal judiciary. . . . According to Judge Kaufman, ‘the essence of judicial independence . . . is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality.’” Krotoszynski, *supra* note 82, at 470 (discussing and quoting Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980)).

The Impartiality Paradox

again in 1990, it adopted several provisions restricting the extrajudicial activities of judges. Scholars have suggested that these rules, embedded in the Model Code of Judicial Conduct, “might be read to require federal judges to decline service”¹²⁵ in such extrajudicial activities and commissions.

Canon 4 states: “A judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.”¹²⁶ Subsection C(2) of Canon 4 reads:

A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.¹²⁷

The commentary to Canon 4C(2) offers the following significant observations:

The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.¹²⁸

The 1994 Code of Conduct for Judges and Judicial Employees took a similar position on the propriety of extrajudicial positions. It instructs that a “judge should not, in any event, accept such an appointment if the judge’s governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality or independence of the judiciary.”¹²⁹ Commentary to the Code of Conduct suggests that this canon was meant to ensure that extrajudicial service does not “interfere with the performance of the judge’s judicial responsibilities or tend to undermine public confidence in the judiciary.”¹³⁰

D. Contemporary Academic Opposition

Much of the academic opposition has already been touched upon throughout this Note. The following section, however, highlights the academic literature’s unfailing stress on notions of impartiality and impropriety that a Justice’s extrajudicial service is thought to threaten.¹³¹

125. Restani & Bloom, *supra* note 18, at 1676.

126. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990).

127. *Id.* at Canon 4C(2).

128. *Id.* at Canon 4C(2), cmt.

129. 2 GUIDE TO JUDICIAL POLICIES AND PROCEDURES, CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES Canon 5G (Oct. 1994).

130. *Id.* at Canon 5G, cmt.

131. The academic articles cited are only a few among others that allude to the necessary preservation of the appearance of justice as the logic behind opposition to extrajudicial activities. See, e.g., John J. Parker, *The Judicial Office in the United States*, 23 N.Y.U. L.Q. REV. 225, 236 (1948); *Hearings, supra* note 6 (including the testimony and written statements of numerous academics).

Although analyses of the separation of powers doctrine form the basis of much academic opposition to extrajudicial activities of Supreme Court Justices, one can remove language focused on ethical considerations and accepted notions of propriety in judicial conduct. For example, an article by Steven Calabresi and Joan Larsen on the doctrine of separation of powers appeals to the necessary appearance of impartiality that can easily be stripped from the Court:

While one can understand and sympathize with a President's yearning to draw on the prestige of the federal courts to solve tough crises, the entanglement of judges in controversial undertakings, no matter how important, must, in the end, cause harm to the federal judiciary by stripping it of the appearance of impartial detachment that sustains judicial legitimacy and effectiveness.¹³³

Solomin Slonim briefly mentions the issues of judicial ethics, propriety, and conflict of interest that may arise upon judicial acceptance of private and informal contacts between the judiciary and the executive.¹³⁴ Similarly, Ronald J. Krotoszynski makes continual and consistent reference to an independent, nonpartisan, and neutral judiciary as essential to the legitimacy of the federal courts. "The judicial role required neutrality with respect to both the particular subject matter at hand and the particular litigant before the court. Executive branch postings potentially compromised a judge in both respects . . ." ¹³⁵ According to Krotoszynski, history dictates a "clear rule, with only occasional exceptions" that there must be a "careful separation of the judicial function from the political branches, in order to protect the independence and neutrality—and hence the legitimacy—of both Article III decisionmakers and their decisions."¹³⁶

Several articles focus on the ethical factors and impropriety in such extrajudicial activities of Supreme Court Justices, independent of a separation of powers analysis. Robert McKay, for example, warns of the public perception of impropriety and the practical and ethical hazards associated with judicial involvement in extrajudicial functions.¹³⁷ According to McKay, the hazards to guard against are:

133. Calabresi & Larsen, *supra* note 21, at 1144. It follows that while Warren's service lent authority, dignity and stature to the Commission, one can only speculate as to the amount of authority, dignity, and stature he would have stripped from the Court had he demonstrated incompetence in his executive role. . . . [T]he mere fact that a Chief Justice of the Supreme Court was so intimately associated with an investigation that has engendered such lingering controversy and speculation can only have had the collateral effect of diminishing the public's confidence in the Court.

Id. Further, according to the authors, "[m]uch the same could be said of Justice Jackson's involvement in the prosecution of the Nuremberg Trials." *Id.*

134. Slonin, *supra* note 119, at 395.

135. Krotoszynski, *supra* note 82, at 468.

136. *Id.*

137. McKay, *supra* note 5, at 9.

The Impartiality Paradox

(1) participation in outside activities so extensive that the time and energy available for the primary obligation are measurably impaired; (2) participation in out-of-court activities that may lead to actual bias or the appearance of prejudgment of issues likely to come before the court; and (3) actions that impair the dignity and esteem in which the court should be held.¹³⁸

Expanding upon the third hazard, McKay regards judicial acceptance of appointments to commissions, boards and other public service positions as diminishing the “prestige” of the Court.¹³⁹ “Whenever issues that are highly visible and sensitive are entrusted to a public commission for resolution or recommendation, the results are unlikely to satisfy all the critics, perhaps none. Participation . . . lend[s] credence to the all-too-common charge that the courts are part of the political process.”¹⁴⁰ Jackson’s participation in the Nuremberg Trials resulted in a year-and-a-half absence from Washington and “was an embarrassment to the Court[,]” for it interfered with Jackson’s performance of his official duties.¹⁴¹ McKay calls for a return not only to the reality, but also to the appearance of impartial service to the cause of justice.

Wendy Ackerman similarly demonstrates a regard for ethical considerations of propriety, impartiality, and neutrality upon acceptance of judicial service on presidential commissions. “Judicial service on presidential commissions may threaten judicial impartiality because it could bias a judge in favor of viewpoints that he or his colleagues promoted as members of a commission. This concern is particularly grave since impartiality constitutes the essence of the judicial function.”¹⁴² Ackerman acknowledges that “not only must a judge in fact be independent and impartial in resolving disputes, but the public must also *perceive* this to be the case A court’s effectiveness in applying the law to the parties depends on its public image as a fair and neutral arbiter of disputes”¹⁴³ Accordingly, Ackerman opposes judicial participation on presidential commissions because it “can easily tarnish the appearance of impartiality. If a judge is viewed as having a personal interest in governmental action that makes prejudgment likely, or as being under the wing of the executive branch, public confidence in the judiciary will diminish.”¹⁴⁴

IV. THE PARADOX’S MEANING

Recognition of this paradox perhaps places an additional burden on both the executive and the judiciary to incorporate its effects into any decision to appoint a Justice to an extrajudicial activity and into any acceptance of such an

138. *Id.* at 12.

139. *Id.* at 25.

140. *Id.*

141. *Id.*

142. Ackerman, *supra* note 6, at 1011-12.

143. *Id.* at 1017.

144. *Id.* at 1018.

appointment. This Note does not attempt to dispute the clear advantages and often seeming necessity of appointing a neutral and impartial figure such as a Supreme Court Justice serving in such extrajudicial capacities. It does, however, point to the extraordinary similarity between the obvious advantages and the more obscure disadvantages, perhaps allowing the disadvantages to appear as obvious as the advantages.

A Justice's unique situation requires more than literal neutrality and impartiality. It requires the Justice to maintain a crucial appearance of impartiality. More often a Justice's participation in extrajudicial activities risks the deterioration of this appearance as opposed to any literal wear on a Justice's impartiality. Maintenance of this appearance forms the basis of the prudential and the ethical opposition to such appointments and ironically parallels the President's understandable desire to appoint the Justice. Recognition of this ironic parallel should impose on the executive and the judiciary a better understanding and appreciation for the disadvantages of a Justice's service in such capacities.

Although this paradox should help elucidate the opposition, it is not intended to encourage an absolute sanction to extrajudicial activities. A Justice, upon understanding this paradox, should proceed with caution, and as Justice Goldberg stated, "nothing should be done or said which would even appear to compromise the independence and integrity of the individual judge, or of the courts as institutions."¹⁴⁵ A Justice's experience and propensity for making logical decisions should allow her to understand that a reputation for impartiality cannot be borrowed by the political branches without cost and to decline those appointments where the executive asks the Justice to lend her character. It is not necessary for the legislature to enact an absolute sanction, for the burden should rest with the Justices who, with the benefit of hindsight regarding previous Justices' activities and their own experiences, should be able to distinguish the extrajudicial activities that tend to create the appearance of partiality.

Similarly, although recognition of the paradox should restrict a President from automatically turning to the Court for such appointments, it should not absolutely preclude such actions. A President, too, should proceed with caution and perhaps turn to other well-respected and seemingly impartial figures in society who could provide a similar air of neutrality and trustworthiness without fear of weakening the appearance of impartiality so sacred to this country's judicial branch and adversarial theory of justice.

V. CONCLUSION

A Justice sits on the Supreme Court with an air of dignity, accomplishment, intelligence, and merit instilled in the opportunity to occupy that position. A Justice's acceptance of this position almost automatically imbues her with an

145. *Hearings, supra* note 6, at 165.

The Impartiality Paradox

absolute character of impartiality, neutrality, fairness, and justice. It is America's dedication to the adversary system that imposes this historically stereotyped character on a Justice. Yet the adversary model also dictates that a Justice must preserve this character and never leak partiality or bias. For with the collapse of a Justice's neutrality and impartiality, her legitimacy and that of the Court is destroyed.

The paradox that is the subject of this Note rests solely upon this imbued character of impartiality. Presidents have consistently looked to Justices of the Supreme Court to serve extrajudicial roles because of these characteristics and the public's subsequent perception. Yet many oppose such extrajudicial service precisely because of these characteristics and the necessity that Justices in our adversarial system both literally and figuratively maintain this impartial and neutral character in the eyes of the public. This paradox may provide scholarship with a better understanding of why Presidents continually look to the bench and why there will always be opposition. I invite both opponents and proponents to realize that the reasoning behind their respective opinions is also the strength behind the other's rationale. It is a realization that should instruct the opposition to perhaps reevaluate their opinions and Presidents to reevaluate their prospective appointments in light of the paradox.

