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Chief Justice Roberts is Correct: Justices are Different From Other Judges¹

James J. Sample

On perhaps no point of modern legal discourse can such a broad consensus as to fact, if not meaning, be forged than this: when in the hot seat, Chief Justice John Roberts turns to baseball. During his confirmation hearing before the United States Senate, Roberts famously stated: “Umpires don’t make the rules; they apply them They make sure everybody plays by the rules . . . And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”²

Chief Justice Roberts’s invocation of the judge-as-umpire metaphor was far from the first such invocation,³ but the prodigious manner in which he deployed it rendered it a calling card for the swiftly-confirmed Chief Justice. Further, its penetration into the confirmation hearing lexicon is so profound that it has played a significant role in framing the hearings and political discourse surrounding the confirmations of now-Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor. Some, however, have noted that the image of just calling “balls and strikes” but “not to pitch or bat” does not always map easily onto the Roberts Court’s jurisprudence. Notwithstanding such quibbles, given the enduring effectiveness of the metaphor, perhaps it should hardly come as a surprise that Chief Justice Roberts goes back to baseball in the effort—which this article finds deeply meritorious—to quell a portion of the vitriol and controversy over Supreme Court disqualification practices.

Beneath the title “2011 Year-End Report on the Federal Judiciary,” Chief Justice Roberts wastes no verbiage—spending just three words—before invoking the national pastime. Connecting baseball to judicial ethics, Chief Justice Roberts points to the infamous “Black Sox Scandal” and the question, circa 1919-1922, of whether federal district judge Kenesaw Mountain Landis could ethically “remain on the bench while serving as Baseball Commissioner.”⁴ Chief Justice Roberts notes that “Judge Landis resolved his situation by resigning his judicial commission in 1922 to focus all his efforts on the national pastime.”⁵ It is at this point that the Chief Justice reveals the purpose of this historical detour—in a 2011 year-end report—saying: “Some observers have recently questioned whether the Judicial Conference’s Code of Conduct for United States Judges should apply to the Supreme Court. I would like to use my annual report this year to address that issue, as well as some other related issues that have recently drawn public attention.”⁶

Court observers, and particularly members of the Supreme Court Bar familiar with the Court’s relatively unfettered power to manage ministerial internal Court affairs may

find the Chief Justice’s next sentences a tad disingenuous. Roberts asserts that “[t]he space constraints of the annual report prevent me from setting out a detailed dissertation on judicial ethics. And my judicial responsibilities preclude me from commenting on any ongoing debates about particular issues.”⁷ In terms of the ostensible space constraints, it is worth noting, as just one randomly-selected comparison, that even including the Appendix, the word count of Roberts’s 2011 year-end report is only slightly more than *half* that of Chief Justice William Rehnquist’s report in 2000.⁸ Similarly, only the most rigid of formalists could take seriously Roberts’s assertion that, via the report, he was not “commenting on any ongoing debates about particular issues. . . .”⁹ While the Chief Justice’s report does not mention Justices Thomas and Kagan by name, the references are so thinly-veiled as to leave little doubt as to their functional specificity. Adam Liptak’s coverage of the report in *The New York Times*, for example, put it this way: “The chief justice’s comments . . . amounted to a vigorous defense of Justices Clarence Thomas and Elena Kagan, who are facing calls to disqualify themselves from hearing the health care case, which will be argued over three days in late March.”¹⁰

As to the gravamen of the matter, Chief Justice Roberts’s “vigorous defense” is both timely and insightful. In my view, it is also quite correct. To adapt F. Scott Fitzgerald’s meme,¹¹ when it comes to recusal, the justices of the United States Supreme Court are simply different from other jurists. Acknowledging and/or asserting consequences of those differences is far from an uncontroversial endeavor. Indeed, to further the analogy via the dismissive, even flippant rejoinder to Fitzgerald’s meme—that, when it comes to recusal, the only difference between the justices of the Supreme Court and other jurists is that they are justices of the Supreme Court—is one that has substantial support.

Some of the support for this “fungible” justices-are-just-judges perspective is populist, partisan, and opportunistic. On the other hand, some of the support for it is deeply principled and intellectual—grounded in the gravity of genuine conflicts of interest in the nation’s high court. Yet therein lies the conundrum and the reason the conundrum deserves focused attention. In an increasingly caustic legal and political environment, separating the shrill cries from the serious concerns requires a nuanced consideration of historical context. While, sadly, such historical context is often found wanting in legal analyses, it is virtually always wanting—or worse, twisted—in media, including sound-bite and talk journalism, blogs, and social media that, while disseminating news, double as powerful ideological echo chambers in which heat, rather than light, is the coin of the realm.

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In researching a forthcoming paper aimed at offering that relatively comprehensive historical context through which today's discussions might be made more substantive, I realized that the attempt itself quickly yields a powerful lesson in perspective. Even if one chooses *not* to include the easy, bright line disqualification scenarios—stock ownership in a company litigating before the high court for example¹²—and instead trains attention on the kind of factually-intensive gray areas of real-world human interaction that, in today's statutory disqualification terminology fall—if anywhere—into Section 455's catch-all provision in which a judge must disqualify himself or herself whenever their impartiality “might reasonably be questioned,” one realizes that recusal controversies have often involved giants of the Supreme Court.

Further, just as with health care's current prominence as a national issue, instances of arguable conflict form a part of the tapestry of many of the Court's landmark cases involving—as with health care today—circumstances of extraordinary national import. Anecdotal, conflicts from the serious to the specious include sequences ranging from John Marshall, in *Marbury*, adjudicating the validity of judicial commissions he had himself signed as Secretary of State—one of which was for none other than his brother James;¹³ to the Steel Seizure case and multiple justices with arguable conflicts;¹⁴ to Thurgood Marshall's long arc, culminating in his decision, only after decades of remove, to sit on cases involving the NAACP;¹⁵ to Justice Scalia and perhaps the best-known duck-hunting trip of all time;¹⁶ to Justice O'Connor's election night outburst preceding *Bush v. Gore*;¹⁷ to profound matters of issue identification involving Justices Ginsburg and Breyer in matters of gender equality and criminal sentencing respectively;¹⁸ and finally, on the one hand, to Justice Thomas's failure to disclose hundreds of thousands of dollars in undisclosed income related to Virginia Thomas's work, some of which involved opposition to the health care legislation,¹⁹ and on the other, to Justice Kagan's ill-advised e-mails including the memorable “I hear they have the votes, Larry!”²⁰

Absent long-term, and arguably far-fetched transformational changes in Supreme Court practices along the lines suggested by Senate Judiciary Chair Patrick Leahy, that are aimed at reducing the consequences of Supreme Court disqualifications by taking advantage of the Court's “deep bench” of retired Article III Supreme Court justices,²¹ the factors pertaining to the finality of a justice's—as opposed to a judge's—disqualification will always hold true. Thus, the finality factors, certainly cannot, standing alone, be determinative in every case. When those factors are combined with a close examination of the circumstances specific to Justice Thomas's situation, I conclude that Justice Thomas's participation in reviewing the health care law, as with Justice Kagan's, is not only warranted under the rule of law, but optimal for the perceived legitimacy of the Court's decision—whatever that decision may be.

In the recusal-esque spirit of full disclosure, this article is authored by an academic and citizen who hopes to see the health care overhaul upheld, but who believes, apart from any

such considerations, that neither Justice Thomas's nor Justice Kagan's disqualification from the case is/was required. Relative to the Court's historical norms, Justice Kagan's decision as to her participation, in light of factual context involving her directly (as opposed to only derivatively as with Justice Thomas's spouse) actually presents a closer call than Justice Thomas's decision as to his own. Each justice, however, would serve the Court and the current and future civic discourse on disqualification by issuing reasoned, transparent analyses of their decisions with regard to their own participation.

The high profile of the health care law, and the nature of the heat—rather than light that so marks the partisan opportunism and rhetoric surrounding each justice's participation—presents an important and teachable moment. To that end, Chief Justice Roberts's focus on disqualification in his year-end report is a positive step. The Chief Justice's defense of the Court's disqualification practices boils down to the assertion that when it comes to disqualification, the Supreme Court is constitutionally and pragmatically different. Clearly, if taken too far; if invoked as talisman, that reasoning could easily cause more problems than it solves for the rule of law.

The Chief Justice's argument is neither emotionally nor intellectually satisfying. It is my view, however, that in an imperfect world, and viewed through the lens of historical context, it is nonetheless also entirely correct. ■

Endnotes

1. An extended law review version of this article, entitled “Supreme Court Recusal from Marbury to the Modern Day” is forthcoming in the Fall 2012 issue of the Georgetown Journal of Legal Ethics.

2. Zuzanna Kobrzynski, *Balls and Strikes*, SLATE (Sept. 13, 2005), <http://www.slate.com/id/2126289>.

3. An interesting recent essay finds that the “analogy was originally intended for trial judges, and was expressly advanced as a model to be rejected.” Aaron S.J. Zelinsky, *The Justice As Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 114 (2010).

4. See generally Chief Justice Roberts, *2011 Year-End Report on the Federal Judiciary*, 1 (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

5. *Id.*

6. *Id.*

7. *Id.*

8. Compare *id.* (totaling a word count of 2,989) with Chief Justice Rehnquist, *2000 Year-End Report on the Federal Judiciary* (Jan. 1, 2001), <http://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx> (totaling a word count of 5,734).

9. Chief Justice Roberts, *supra* note 4, at 3.

10. See Adam Liptak, *Chief Justice Defends Peers' Hearing Case on Health Law*, N.Y. TIMES, Jan. 1, 2012, at A1, available at <http://www.nytimes.com/2012/01/01/us/chief-justice-backs-peers-decision-to-hear-health-law-case.html>.

11. Fitzgerald famously wrote: “Let me tell you about the very rich. They are different from you and me.” A decade after Fitzgerald's turn of phrase, Ernest Hemingway, over lunch with literary critic Mary Colum, floated a trial balloon based on Fitzgerald's line, saying, “I am getting to know the rich.” Colum tartly replied, “The only difference

between the rich and other people is that the rich have more money.” Letter to the Editor, *The Rich Are Different*, N.Y. TIMES (Nov. 13, 1988), available at <http://www.nytimes.com/1988/11/13/books/l-the-rich-are-different-907188.html>.

12. 28 U.S.C. § 455 (d)(4) (2012).

13. Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 264 n.22 (2003).

14. DAVID G. McCULLOUGH, TRUMAN 1071 (1992); see also Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB.POL’Y 531, 538, n.16 (2001).

15. Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, and replies from Chief Justice Warren Burger and Justices William Brennan, Byron White, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O’Connor, all Oct. 5, 1984, in Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, box 1405, folder 14.

16. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 914 (2004) (Scalia, J., mem.).

17. Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 377 (2003).

18. Linda Greenhouse, *Legacy of a Term*, N.Y. TIMES, July 3, 1996, at

A1; Ronald J. Krotoszynski Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 433, 434 (1997).

19. Eric Lichtblau, *Thomas Cites Failure to Disclose Wife’s Job*, N.Y. TIMES, Jan. 25, 2011, at A16.

20. Jake Tapper, *Then-Solicitor General Kagan on Health Care Bill Wrote ‘I Hear They Have The Votes!! Simply Amazing’*, ABC NEWS BLOGS (Nov. 16, 2011, 11:32 AM), <http://abcnews.go.com/blogs/politics/2011/11/then-solicitor-general-kagan-on-health-care-bill-wrote-i-hear-they-have-the-votes-simply-amazing/>.

21. Senator Leahy’s proposed legislation would have allowed a retired justice to replace a current justice who has recused herself. Leahy hopes this would encourage justices to recuse themselves with less hesitation when there is even “an appearance of partiality.” Robert Barnes, *A Deep Bench of Substitute Justices Goes Unused*, WASH. POST, Aug. 9, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/08/AR2010080802629.html?hpid=topnews>. Retired justices have remained active in the judiciary. For example, since Justice O’Connor’s retirement from the Supreme Court in 2006, she has filled in on and decided cases with every federal appellate court in the nation, except for the one on which she was appointed in 1981.

Letter to the Editor

January 19, 2012

Dear Art,

The following is in response to James Altman’s article on Model Rule 4.4(b). In a case in the Eastern District of N.Y., *Gutman v. Klein*, the court ordered the defendant to turn over his laptop so that it could be copied by the plaintiff’s lawyer and an expert. When the lawyer and the expert arrived at the appointed time, there was a two-hour delay. When they finally got the laptop, they found that it was hot to the touch and was missing a screw from the hard-drive plate, which made them suspicious.

As a result, the court ordered its own expert to examine the laptop. The court’s expert found that numerous files had been deleted and were unrecoverable, and also that there were numerous modifications in documents that were on the laptop. Accordingly, the judge entered a default judgment against the defendant for spoliation of evidence and ordered that attorney’s fees be given by the defendant to the plaintiff for the time involved. The judge explained, “It is impossible to know what [plaintiffs] would have found if [defendants] and [their] counsel had complied with their discovery obligations.”

Assume a similar situation, but that the spoliation or withholding of discovery is revealed because the defendant misdirected a fax to the plaintiff. As a practical matter, that case is indistinguishable from *Gutman v. Klein*. Nevertheless, Mr. Altman agrees with ethics opinions that would exclude the evidence of spoliation discovered through reading the errant fax.

The reasoning of those opinions is striking. There is almost no discussion whatsoever about the recipient’s fiduciary obligation to his or her own client. Nor is there discussion about the lawyer’s obligation of loyalty to her client, which the model rules say is an essential element in the lawyer’s relationship to the client. Moreover, there is little if any discussion of the importance of truth in the administration of justice.

Mr. Altman similarly ignores or scants these issues. Nor does he recognize that the lawyer who misdirects the facts is his client’s agent. Yet in habeas corpus cases, the Supreme Court has relied on the agency relationship in holding prisoners on death row responsible for their lawyer’s defaults in failing to file pleadings on time, a doctrine that has resulted in executions of the clients. Instead, Mr. Altman focuses on confidentiality, despite the fact that any obligation of confidentiality is that of the sending lawyer, not the recipient.

I suspect that a principal reason for requiring receiving lawyers to put the interests of their adversaries above the interests of their own clients, is to protect fellow lawyers from malpractice actions. In any event, there are opinions that say just that. In my view, that should not trump the lawyer’s fiduciary relationship to the client, the lawyer’s duty of loyalty, the lawyer’s status as the client’s agent, the fact that the confidentiality at issue is not that of the receiving lawyer but of her adversary, and the trial as a search for truth.

Best regards,
Monroe Freedman
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When Character and Fitness Disclosures Collide

(Continued from page 1)


amendment explaining the nondisclosed information and the reason for the nondisclosure. Currently, four of the five ABA accredited law schools in Georgia are using a Declaration of Disclosure or other document with similar language. (See sidebar for the Declaration of Disclosure used by Georgia State University College of Law.) Other schools in other states make similar requirements. However, the Georgia Board appears to be the only board of law examiners currently organizing a statewide effort. The benefit of statewide uniformity is obvious. The overwhelming majority of Georgia graduates seeking admission to the bar are subject to the same set of rules before applying to the Georgia Board. Prior to receiving the juris doctorate degree, students must sign a declaration affirming the information provided on their original law school applications, or request permission to amend. This results in a majority of Georgia graduates arriving at the Georgia Board in the same boat so to speak. While there is not necessarily uniformity in terms of how each of the participating Georgia law schools will respond to a request to amend the original application, at least there is uniformity in that the majority of students were asked to amend or swear to their original answers prior to receiving their degrees.

The steps the Georgia Board is encouraging Georgia law schools to take are important for two reasons. First, the law school will not be placed in the situation of having to decide how to address a fraudulent application after a student has graduated, though it still may be placed in a situation where it must decide whether to revoke admission of a current student based upon a fraudulent application, or administer some other form of sanction for nondisclosure. The Thomas M. Cooley Law School was required to make such a decision in *In re Application of Otterman*.³ In that case, the applicant failed to disclose his past legal problems on his application, including several alcohol-related offenses. Several months after enrolling, the applicant voluntarily admitted that he failed to disclose his convictions and offenses. In response, the school suspended the applicant for one year and placed him on permanent probation. The applicant was readmitted after the one year suspension, and later completed his studies.

Second, requiring students to submit the sworn document alleviates the quandary for the board of law examiners because it reduces the instances where an applicant has fully disclosed on the character and fitness application but not on the law school application, at least as amended. To the extent the applicant signs the declaration stating he or she has fully disclosed all issues on the law school application when they have not done so, the applicant has made the character and fitness issue more serious but also much more clear to the board of law examiners. An applicant who submits a less than truthful law school application and then again fails to disclose the information on the declaration has built a compelling record that demonstrates he or she has a candor issue. At that point, the applicant has moved the character and fitness

application out of a gray area of how he or she may behave with a law license, and provided evidence that may be used to reach the conclusion that he or she is willing to lie when it counts. This is precisely the information boards consider when deciding how the applicant's past acts may predict his or her future behavior should the law license be approved.

While the Georgia approach assists with the disclosure dilemma for in-state graduates seeking admission to the Georgia bar, it does not address inconsistent disclosures when dealing with out-of-state graduates requesting a license. Recent graduates seeking to be admitted to a bar of a state other than where they graduated is commonplace, as is attorneys seeking to either add bar licenses to their resumes or relocate. In this latter instance, attorneys with years of practice under their belts find themselves in the same situation as a new graduate seeking a bar license – the information disclosed on their law school applications is relevant, and what they may have stated or omitted years ago will be subject to scrutiny. In other words, regardless of whether an applicant filled out a law school application yesterday or a decade ago, the statements, omissions and descriptions contained on those pages are still relevant, and instead of being sent to a shredder the application likely will be part of your permanent character and fitness file.

It is likely that other boards of law examiners will move in the direction of Georgia, and encourage the law schools in their states to require similar declarations from students prior to graduation. However, it is too early to determine whether the Georgia approach will gain enough momentum to become a national trend. The states that adopt the declaration requirement will still have to address the dilemma of inconsistent character and fitness applications, but hopefully less frequently. While this will not eliminate the problem, it certainly will reduce it, and for a board of law examiners that can only be considered a positive and much needed development. 

Endnotes

1. Patricia Sexton is a Shareholder with Polsinelli Shughart's Kansas City, Missouri office. She is the current Vice-President of the Missouri Board of Law Examiners ("MBLE"). The content of this article does not represent the views of the Supreme Court of Missouri or the MBL.

2. The Florida Board of Bar Examiners ("Florida Board") found that the failure to disclose information on university and law school applications is a basis for denying admission to the bar when considered collectively with other misconduct. In *Florida Board of Bar Examiners re R.L.W.*, 793 So.2d 918 (Fla. 2001), the Florida Board recommended that the applicant's request for admission be denied and he be disqualified from reapplying for admission for a period of five years because, in part, he failed to disclose the following: 1) the educational institutions he attended; 2) certain debts; 3) the fact he had been married; 4) that he had been a party to litigation during his divorce; and 5) that he had previously been charged with a traffic ticket. *Id.* at 920-21. In reaching its recommendation to disqualify the

applicant, the Florida Board determined that the numerous failures to disclose were "collectively disqualifying." *Id.* at 923. The Florida Board further determined that there was a great deal of "circumstantial evidence" contradicting the assertion that the applicant's failure to disclose was an "oversight" or "due to inadvertence." *Id.* at 924. The Florida Supreme Court approved the Florida Board's recommendation. *Id.* at 927-28. Denying an application for admission based, in part, on failing to disclose information on a law school application is

not a novel theme when considered collectively with other character and fitness issues. Florida Board of Bar Examiners re M.A.R., 755 So.2d 89 (Fla. 2000) (misrepresenting facts on law school application when considered with other factors basis for denial of admission); Florida Board of Bar Examiners re P.K.B., 753 So.2d 1285 (Fla. 2000) (failing to disclose certain criminal charges on law school application considered in denying applicant admission).

3. 835 N.E.2d 370 (Ohio 2005).



Declaration of Disclosure for 2011-2012

Your College of Law application includes the following questions:

21. Have you ever been expelled, suspended, or placed on probation or discipline, academic or otherwise, by any school, university, college, trade or professional organization for any reason?
22. Are you aware of any circumstances in your background that might prohibit you from being admitted to the practice of law?
23. Excluding **PARKING** violations, have you ever been detained, arrested, formally accused, cited or prosecuted for the violation of **any law**? **IMPORTANT NOTE:** You must disclose each instance even if the charges have been dismissed or you were acquitted or allowed to plead *nolo contendere* or adjudication was withheld or a conviction was reversed, set aside or vacated or the record sealed or expunged and regardless of whether you have been told you need not disclose any such instance. Such instances do not necessarily disqualify you from admission to the law school. All circumstances are carefully considered by the College of Law Admissions Committee.

At the end of your application, you confirmed and agreed with the following statement.

I certify that the information provided herein is true, to the best of my knowledge, and I understand that any omission or misrepresentation may result in the invalidation of this application, revocation of a favorable admission decision, discipline under the College of Law Honor Code, report to the Law School Admission Council Misconduct and Irregularities Subcommittee, report to the appropriate bar authorities or any other action appropriate under the circumstances. I further certify that the personal statement submitted herewith is my own original work. I also agree to obtain copies of the College of Law Bulletin and/or Student Handbook, as well as the Honor Code, and to abide by the rules and policies therein. I understand that receipt of a law degree does not entitle one to be admitted to the bar, and it is incumbent upon all applicant to review the fitness requirements and other local rules governing admission to the practice of law. Georgia's rules may be found at: <http://www.gabaradmissions.org>.

Complete Part A or B, not both, on the reverse side. Return the completed form no later than 8/15/11. You may turn it in at the Professionalism Orientation session, deliver it to UL 417 or scan and email it to Bernitta Harris (bharris@gsu.edu). A copy of this document will be placed in your permanent file.

Complete Part A or B below, not both, and return it no later than 8/15/11. You may turn it in at the Professionalism Orientation session, deliver it to UL 417 or scan and email it to Bernitta Harris (bharris@gsu.edu). A copy of this document will be put in your permanent file.

Part A

The responses I have provided to all questions on my application (and any previously submitted amendments thereto) for admission to the College of Law are accurate and complete.

Name (print): _____

Signature: _____

Date: _____

Part B

I request permission to amend my application (and any previously submitted amendments thereto), as stated below. I understand that the College of Law will review this request and decide what action(s) to take in response hereto. The College of Law's actions may include acceptance of the amendment with no consequences, the filing of an Honor Code charge, revocation of my admission or any other action deemed appropriate under the circumstances. I understand that the factors the College of Law takes into account in deciding what actions to take include, but are not limited to, the submission date of this request, the date and seriousness of any matter(s) reported herein, post-occurrence behavior and any intent to deceive the College of Law. The College of Law has made no representations or promises to me as to what actions it would take in my individual case.

I understand that when I apply for certification of fitness to sit for the bar exam, Georgia's Office of Bar Admissions will be given access to my application and this and any other amendments thereto, and will compare my submissions to them and the College of Law.

Name (print): _____

Signature: _____

Date: _____