ATITUDINI

National Security and Judicial Ethics: The Exception to the Rule of Keeping Judicial Conduct Judicial and the Politicization of the Judiciary

***Joshua Kastenberg*[10]**
University of New Mexico

Abstract:

This article is divided into three sections, and it incorporates original research from the personal correspondences of several judges and justices. This article includes unpublished correspondences from various judicial collections at the Library of Congress, the Bentley Historical Library at the University of Michigan, the Washington and Lee School of Law's special collections, the Richard Nixon and Ronald Reagan Presidential Libraries, the National Library of Australia in Canberra, and Canada's National Archives in Ottawa.

The first section analyzes the current framework governing judicial disqualification based on the separation of powers doctrine as well as the right to an impartial judiciary, beginning with a discussion of Mistretta v. United States, a non-national security decision. This section also provides examples of how judicial selection based on pre-judicial service in the national security arena may affect judicial neutrality and enable a willingness of judges to become involved in extra-judicial activity.

[10] Professional e-mail: joshua.kastenberg @law.unm.edu. Prior to joining the UNM Law School faculty, Professor Joshua Kastenberg had a 20-year career as a lawyer and judge in the U.S. Air Force. He served as an advisor to the Department of Defense on cyber security and cyber warfare matters, twice deployed to Iraq and oversaw the military's compliance with international law. Professor Kastenberg served as a prosecutor and defense counsel in over 200 trials and as a judge in over 200 trials. He has been cited by the Washington Post and appeared on Fox News, and written over a dozen law review articles as well as four books. Prior to joining the faculty he taught graduate and undergraduate level courses in national security law and systems as well as legal history. Professor Kastenberg's interests are in the field of criminal law and procedure, evidence, legal history, and judicial ethics.

The second section contains examples of both judicial service on extra-judicial matters as well as judicial aid to the executive branch. Lastly, this section provides a comparative framework on how the Supreme Court of Canada and the High Court of Australia, in light of their national security experiences during the Cold War, have fashioned rule-sets that serve as barriers to extra-judicial activities. Section III concludes with an argument for greater openness in the judiciary, so that historians need not be the first to assess the propriety of a judge serving over a particular cause of action.

Rezumat:

Acest articol este împărțit în trei secțiuni și încorporează cercetări originale din corespondențele personale ale mai multor judecători. Textul include corespondențe nepublicate din diverse colecții judiciare de la Biblioteca Congresului, Biblioteca Istorică Bentley a Universității din Michigan, colecțiile speciale ale Washington and Lee School of Law, bibliotecile prezidențiale Richard Nixon și Ronald Reagan, Biblioteca Națională a Australiei din Canberra și Arhivele Naționale ale Canadei din Ottawa.

Prima secțiune analizează cadrul actual care reglementează recuzarea judiciară bazată pe doctrina separării puterilor, precum și dreptul la o instanță imparțială, începând cu o discuție despre cauza Mistretta împotriva Statelor Unite*, o decizie de securitate non-națională. Această secțiune oferă, de asemenea, exemple despre modul în care selecția judiciară bazată pe serviciul pre-judiciar în arena securității naționale poate afecta neutralitatea judiciară și permite voinței judecătorilor de a se implica în activități extrajudiciare.*

A doua secțiune conține exemple atât de servicii judiciare pe probleme extrajudiciare, cât și de asistență judiciară pentru puterea executivă.

În sfârșit, a treia secțiune oferă un cadru comparativ cu privire la modul în care Supreme Court din Canada și High Court din Australia, în lumina experiențelor lor de securitate națională din timpul Războiului Rece, au creat seturi de reguli care servesc drept bariere în calea activităților extrajudiciare. Secțiunea a III-a se încheie cu un argument pentru o mai mare deschidere în justiție, astfel încât istoricii să nu fie primii care evaluează caracterul adecvat al serviciului unui judecător care servește o anumită cauză.

Keywords: *national security; judicial ethics; executive branch; judicial branch; federal judicial positions*

It is generally assumed that the right to an impartial and independent judiciary means that in federal courts, trial and appellate litigants can be assured that the nation's Article III judges will not favor one side, but rather, will neutrally apply the law to a cause before them.[11] One of the fundamental means for making this assumption a reality is for the federal judiciary to adhere to the Constitution's separation of powers principle.[12] This

[11] See, e.g., Tumey v. Ohio, 273 U.S. 514 (1927); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941). Clearly, in following Tumey, the right extends to state judiciaries as well. Tumey, 273 U.S. 514; see, e.g., Caperton v. A. T. Massey Coal Co., 556 U.S. 872 (2009).

[12] See, e.g., Muskrat v. United States, 219 U.S. 348 (1911). The Court, in Muskrat, quoting Chief Justice 'Taney: The Supreme Court . . . does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other. Id. at 355 (citing Gordon v. United States, 117 U.S. 697, 699–700 (1865)).

principle, as originally conceived, was partly designed to prevent the executive branch from becoming a tyranny.[13] Another means is for federal judges to self-regulate against extra-judicial conduct that aids, or appears to aid, a party. If one aspect of politicizing the judiciary may be defined as elite interest groups "capturing the judiciary," than in the field of national security, the elite interest group would be the executive branch's assertion of national security needs.[14] In spite of safeguards, in the arena of national security, the Constitution's demand for an impartial judiciary has, at least in appearance, occasionally proven illusory because of both the conduct of prominent judges and presidential considerations used in judicial selection. This article reviews the historic extra-judicial conduct of judges, national security considerations in the judicial nomination process, and how the judiciary has enabled a national security recusal exception. Put another way, this article analyzes how past judicial participation in national security policies and legislation has contributed to the possibility of undermining judicial impartiality and independence, thereby politicizing the judiciary and undermining its credibility.

The term "exception," in this essay, connotes the ability of judges to engage in extra-judicial conduct favoring the executive branch, without recusal in national security-related causes of action.[15] Extrajudicial conduct includes not only formal involvement in executive branch programs, but also making speeches favoring governmental security policies and providing advice to the executive branch.[16] For instance, immediately prior to the United States declaration of war on the Imperial German Government in 1917, Justice Louis Brandeis advised General Enoch Crowder on the drafting of the United States' first national conscription program and then did not recuse himself from the constitutional challenge to conscription.[17] Almost nine decades later, when Justice Antonin Scalia spoke at the University of Freiburg in Switzerland, he responded to a question regarding the status of detained combatants held at Guantanamo, saying, "I had a son on that battlefield (...) and I'm not about to give this man who was captured in a war a full jury trial. I mean it's crazy."[18] When asked to recuse

[13] Buckley v. Valeo, 424 U.S. 6 (1976). In its decision, the Court recognized: The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively. Id. at 121.

[14] For a definition of the influence of "elites," see generally NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 11–27 (2005).

[15] See, e.g., Peter Alan Bell, Note, Extrajudicial Activity of Supreme Court Justices, 22 STAN. L. REV. 587, 598–99 (1970) (noting that judicial independence may be endangered by extra-judicial conduct because of the need for the appearance of impartiality).

[16] On defining extra-judicial conduct, see Jeffrey M. Shaman, Judges and Non-Judicial Functions in the United States, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 512, 528–30 (H.P. Lee ed., 2011); Alpheus Thomas Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 HARV. L. REV. 193, 194–98 (1953); Bell, supra note 5, at 590–98.

[17] See, e.g., MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 498 (2012); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 53 (1982); JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I at 81, 144 (2017).

[18] See Letter from David H. Remes, Counsel for Amici, to Hon. William K. Suter, Clerk, United States Supreme Court (Mar. 27, 2006), https://www.scotusblog.com/archives/HamdanRecusalLetter.pdf.

himself from Hamdan v. Rumsfeld,[19] an appeal potentially implicated by his statements, the justice declined.[20] Scalia's decision to sit on the appeal evidences the exception's continued life.

In between Brandeis and Scalia, on April 8, 1952, President Harry S. Truman announced that Secretary of Commerce Charles Sawyer would seize privately owned steel mills in an effort to avert a labor strike.[21] The importance of the action directly arose from a significant national security challenge. The steel produced in the mills was turned into military hardware–such as tanks, naval vessels, and shells–necessary to support the nation's war efforts on the Korean peninsula.[22] In announcing his decision, Truman knew a similar seizure had occurred during World War II, and that Justice Robert Jackson, while earlier serving as Attorney General, had advised President Franklin Roosevelt that such property seizures were constitutional in wartime.[23] Moreover, Truman understood that as a general practice, in times of armed conflict, the federal judiciary often deferred to the actions of the executive branch.[24] Truman had another source of confidence for his actions; he had long been friends with Chief Justice Fredrick Vinson who Truman had nominated to the Court. Vinson was a trusted advisor and he privately assured Truman that the seizure would survive the Court's review of the corporation's challenge.[25] The President and Chief Justice alike were surprised that the Court, in Youngstown Sheet & Tube v. Sawyer, determined, in a multi-faceted decision, that the seizure was, in fact, unconstitutional.[26] Vinson's actions in this case may have stemmed–as Chief Justice William Hubbs Rehnquist later posited–from his long service in the government, and this disposed Vinson "toward a "practical rather than a theoretical approach[.]"[27] But, missing from Rehnquist's analysis was whether Vinson's actions in advising Truman would have undermined the efficacy of the federal judiciary if the public were to have learned of it at the time.

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[19] 548 U.S. 557 (2006).

[20] Remes, supra note 8.

[21] For a background on Truman's rationale and decision, see MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 1–16 (1977); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 141–43 (1973).

[22] See, e.g., PAUL G. PIERPAOLI, JR., TRUMAN AND KOREA: THE POLITICAL CULTURE OF THE EARLY COLD WAR 169–71 (1999); DAVID MCCULLOUGH, TRUMAN 1069–71 (1992).

[23] See, e.g., MARCUS, supra note 11, at 155–56.

[24] Id. In 1940, Robert Jackson, while serving as Attorney General, advised Roosevelt that the government had the authority to seize the nation's aviation industries in order to achieve labor peace, although in that instance, the fear of communist led strikes were at the forefront of his advice. One of the World War II seizures, involving the Montgomery Ward Corporation, reached the Court through by the time it did, the appeal was moot. Following the example set in 1940, in World War II, the War Department took control of over sixty industrial plants. Id. at 39–57. The case stemming from this is United States v. Montgomery Ward & Co., 150 F.2d 370 (7th Cir. 1945).

[25] See, e.g., JAMES E. ST. CLAIR & LINDA C. GUIGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 217 (2002); John P. Frank, Conflict of Interest and Supreme Court Justices, 18 AM. J. COMP. L. 744, 748 (1970). It should also be noted that Truman later insisted his nomination of Vinson to the Court arose after consulting former Chief Justice Charles Evans Hughes and retired Justice Owen Roberts. See Letter from Harry S. Truman, President of the United States, to Merlo Pusey, Assoc. Editor, Wash. Post (May 6, 1950) (on file with the National Archives and Records Service); Letter from Harry S. Truman, President of the United States, to Joe Short (Dec. 19, 1951) (on file with the National Archives and Records Service).

[26] 343 U.S. 579, 588–89 (1952).

[27] WILLIAM H. REHNQUIST, THE SUPREME COURT: REVISED AND UPDATED 172 (1987).

vignettes of judicial conduct, but also to make the point that because national security actions are often cloaked in secrecy, the discovery of a judge's extra-judicial conduct might only occur after the judge has died and a historic repository becomes open for research. For example, this article includes unpublished correspondences from various judicial collections at the Library of Congress, the Bentley Historical Library at the University of Michigan, the Washington and Lee School of Law's special collections, the Richard Nixon and Ronald Reagan Presidential Libraries, the National Library of Australia in Canberra, and Canada's National Archives in Ottawa.

Secondarily, as a symposium article, it is necessarily brief and cannot utilize more than a small number of historic instances that a lengthier article or book treatise would otherwise permit. The first section analyzes the current framework governing judicial disqualification based on the separation of powers doctrine as well as the right to an impartial judiciary, beginning with a discussion of Mistretta v. United States, a non-national security decision.[28] This section also provides examples of how judicial selection based on pre-judicial service in the national security arena may affect judicial neutrality and enable a willingness of judges to become involved in extrajudicial activity.

The second section contains examples of both judicial service on extra-judicial matters as well as judicial aid to the executive branch. Lastly, this section provides a comparative framework on how the Supreme Court of Canada and the High Court of Australia, in light of their national security experiences during the Cold War, have

The historic record, as discovered in various archives across the United States, evidences that judges have tolerated a weaker standard for applying the traditional rules safeguarding the right to an impartial and independent federal judge in national security matters.

fashioned rule-sets that serve as barriers to extra-judicial activities. Canada's and Australia's judicial branches have, in fact, taken comprehensive steps outside of the national security arena to ensure that that the judicial branch remains independent of their respective elected branches, and it appears that these measures will apply equally to national security appeals. Section III concludes with an argument for greater openness in the judiciary, so that historians need not be the first to assess the propriety of a judge serving over a particular cause of action.

Finally, before analyzing the intersection between national security and judicial ethics, it is necessary to define "national security," at least for the purposes of this article. In part, this is because in recent years, agencies charged with either militarily guarding the nation or doing so through a combination of intelligence and diplomacy have provided an expansive definition, which includes climate change, obesity, access to medicine, and the quality–or lack thereof–of public education.[29] While, from a strategic perspective, this expansive definition may be sound, it becomes too broad for the purpose of this article. Instead, this article utilizes an older, if not more traditional definition of national security, such as the one coined by noted

[28] Id.

[29] See JEREMI SURI & BENJAMIN VALENTINO, SUSTAINABLE SECURITY: RETHINKING AMERICAN NATIONAL SECURITY STRATEGY 1–15 (2016).

journalist Walter Lippmann in 1943. Lippmann penned that national security is ensuring "[a] nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by war."[30] Of course, national security has, and does, include internal security as it applies to the government's efforts to combat internal terrorism, espionage, and treason.[31]

I. Disqualification and the Mistretta Rule

In 1911, the Court, in Muskrat v. United States[32] observed that the federal government was intentionally "divided into three distinct and independent branches" and each branch has a duty "to abstain from, and to oppose, encroachments on either."[33] The appeal arose as a matter of Indian-treaty and land allocation legislation that placed into the courts an advisory role outside of the Constitution's "cases and controversies," jurisdictional statement.[34] In addition to the Court's abstention statement, the justices also noted that in 1793, when Secretary of State Thomas Jefferson asked the Court for an advisory opinion on a question of foreign policy, the justices demurred from doing so because it would be a constitutionally improper extra-judicial activity.[35]

In 1989 the Court in Mistretta v. United States decided that federal judicial service on the United States Sentencing Commission–a legislatively created body to establish criminal sentencing guidelines–did not violate the separation of powers doctrine.[36] Mistretta arose from a challenge to mandatory sentencing guidelines based on the fact that the guidelines were enacted by the legislative branch, but created as a result of presidentially appointed federal judges serving on the commission and with the commission "located" in the judicial branch.[37] Much of Mistretta focused on Congressional authority to generally delegate its law-making functions to other agencies, which had occurred with increasing frequency since the beginning of the twentieth century, and how this delegation may encroach on the separation of powers doctrine without violating the Constitution.[38] Yet, the decision incorporated a national security justification to reach its conclusion.

Although Mistretta was not a national security decision, in examining the role of the judiciary in extra-judicial commissions and investigations, the Court, in an opinion authored by Justice Harry Blackmun, reached into the nation's legal history–including matters that could be argued as national security issues–to conclude that not all extra-judicial conduct violated the separation of powers doctrine.[39] Blackmun's examples included Chief Justice John Jay contemporaneously serving as Ambassador to England, Justice Oliver Ellsworth serving as Ambassador to France, Justice Owen Roberts serving on the Pearl Harbor investigation, Justice Robert Jackson

[30] JOSEPH J. ROMM, DEFINING NATIONAL SECURITY: THE NONMILITARY ASPECTS 7 (1993).

[31] See, e.g., id. at 1–8.

[32] 219 U.S. 346 (1911).

[33] Id. at 352.

[34] See, e.g., The Federal Courts May Not Render Declaratory Judgments, 6 N.Y. L. REV. 235, 235 (1928).

[35] Muskrat, 219 U.S. at 354.

[36] 488 U.S. 361, 393, 397 (1989). Mistretta's main argument was that Congress had unconstitutionally delegated its law-making authority to an extra-legislative process which included the input of federal judges. Id. at 371. His secondary argument was that the service of federal judges on the sentencing commission weakened the judiciary to a less than co-equal branch of government. Id. at 380.

[37] Id. at 380–81.

[38] Id. at 379–80.

[39] Id. at 396–402.

serving as a prosecutor in the Nuremburg Tribunals, and Chief Justice Earl Warren leading an investigation into the assassination of President John F. Kennedy.[40] Because the appointments of Jay and Ellsworth occurred during the life of the Constitution's framers, Blackmun concluded that the framers had blessed the concept of extra-judicial activity as a matter of necessity.[41] Indeed, Blackmun's use of Justice Felix Frankfurter's observation in his Youngstown Sheet & Tube concurrence, that judges had long-participated in extra-judicial activity, albeit with reservation and occasional regret, provided evidence of the necessity of such extra-judicial conduct.[42] In the justices' Mistretta conference discussions, there was an absence of written concern on the issue of national security and judicial ethics. Justice John Paul Stevens was concerned with offending retired Chief Justice Burger because Blackmun's original draft noted that Burger had served on the Constitution's bicentennial commission.[43] Justice Anthony Kennedy fretted about issuing an opinion which might lead critics of the Court to believe that the majority had accepted its role as "an imperial judiciary."[44]

Seven justices in the majority accepted Blackmun's historic recitation, and Scalia, in his dissent, did not criticize Blackmun's historic analysis. However, Blackmun's analysis is wholly incomplete and devoid of a full range of judicial conduct which demonstrates the potential for harm. Additionally, Blackmun's use of Frankfurter's statement is problematic, if, for no other reason than Frankfurter's excessive extrajudicial activities.[45] Frankfurter had been a long-trusted advisor to President Franklin Delano Roosevelt on matters ranging from economic recovery to national defense.[46] In 1940, Frankfurter approached Loring Christie, the Solicitor General of Canada, with a proposal for the United States to assume the defense of Canada if Great Britain were to fall to Nazi Germany.[47] The plan, once signed by Roosevelt and Prime Minister William Lyon Mackenzie King of Canada, became known as the Ogdensburg Agreement.[48] Certainly the defeat of Nazi Germany and the survival of western democracy was the paramount national security consideration in the

[40] Id. at 398–400.

[41] Id. at 400–01 ("While these extrajudicial activities spawned spirited discussion and frequent criticism, and although some of the judges who undertook these duties sometimes did so with reservation and may have looked back on their service with regret, `traditional ways of conducting government... give meaning' to the Constitution." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

[42] Id.

[43] Letter from John Paul Stevens to Harry A. Blackmun (Dec. 21, 1988), in HARRY A. BLACKMUN PAPERS, box 1408 (on file with author). In response to Stevens' concern, Blackmun erased any mention of Burger's work on the commission. See, e.g., Letter from John Paul Stevens to Harry A. Blackmun (Dec. 20, 1988), in HARRY A. BLACKMUN PAPERS, box 1408 (on file with author); Letter from Harry A. Blackmun to John Paul Stevens (Dec. 19, 1988), in HARRY A. BLACKMUN PAPERS, box 1408 (on file with author).

[44] Letter from Anthony M. Kennedy to Harry A. Blackmun (Dec. 19, 1988), in HARRY A. BLACKMUN PAPERS, box 1405 (on file with author).

[45] See, e.g., PETER G. RENSTROM, THE STONE COURT: JUSTICES, RULINGS, AND LEGACY 59 (2001).

[46] MICHAEL JANEWAY, THE FALL OF THE HOUSE OF ROOSEVELT: BROKERS OF IDEAS AND POWER FROM FDR TO LBJ 3, 6, 16 (2004).

[47] GALEN ROGER PERRAS, FRANKLIN ROOSEVELT AND THE ORIGINS OF THE CANADIANAMERICAN SECURITY ALLIANCE, 1933–1945: NECESSARY, BUT NOT NECESSARY ENOUGH 75(1998).

[48] JOHN HERD THOMPSON & STEPHEN J. RANDALL, CANADA AND THE UNITED STATES: AMBIVALENT ALLIES 143 (Lester D. Langley ed., 4th ed. 2008).

years 1939–1945. But Frankfurter, having authored the text of the Ogdensburg Agreement, did not recuse himself from appeals important to Canada and the United States. For instance, he participated in Bob-Lo Excursion Co. v. Michigan in which the court upheld a state anti-discrimination statute against a Canadian corporation's maritime challenge.[49] More importantly, he did not recuse himself from participating in a decision enabling a Canadian maritime company to sue the United States for the United States Navy's negligent damage to vessels.[50]

Frankfurter's participation in the Ogdensburg Agreement portended his other efforts to be an instrumental participant in United States defense policy. In the aftermath of World War II, he worked with Sir John Latham, the Chief Justice of the High Court of Australia, in shaping a defense plan for both countries against the possibility of a resurgent Japan as well as against Soviet expansion in the Pacific.[51] In 1961, Frankfurter counseled Sir Robert Menzies, the long-serving prime minister of Australia, on the need for him to serve as a mentor to the recently elected President John F. Kennedy.[52] As in the case of appeals concerning Canada, Frankfurter did not recuse himself from appeals concerning Australia, though in one significant matter involving Australia's internal security, Frankfurter sided with that country.[53] In 1945, he dissented from the Court voiding a decision to deport Harry Bridges, the president of a powerful longshoreman's union, back to Australia on the basis that Bridges concealed his communist affiliation prior to becoming a United States citizen.[54] Had Bridges been deported to Australia, the Australian government would have to concern itself with how to corral a powerful labor union leader accused of fomenting communism.[55]

A. Judicial Recusal Rules in the Modern Era

In 1911, Congress legislated a statute requiring judicial disqualification when the judge's impartiality might be reasonably questioned.[56] There were two aspects to the 1911 disqualification statute that provide a framework for this article. The first required a judge to be disqualified when he or she was directly connected with a party to a suit.[57] The second was that a judge had a duty to inform the parties of a possible need for disqualification.[58] Following this law on non-national security matters, the federal courts of appeals have a mixed record regarding whether service on a government-sponsored investigation or

[49] 333 U.S. 28 (1948).

[50] Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945).

[51] Letter from Robert Menzies to Felix Frankfurter (July 1, 1951), in PAPERS OF SIR ROBERT MENZIES, box 12 (on file with author).

[52] Letter from Felix Frankfurter to Robert Menzies (Feb. 11, 1961), in PAPERS OF SIR ROBERT MENZIES, box 12 (on file with author). In actuality, Frankfurter's association with the High Court began in the 1920s when, as a Harvard Law Professor he discussed the United States' involvement in supplying the allies with war material with Justice Henry Higgins of the High Court in 1916. See Letter from Henry Bournes Higgins to Felix Frankfurter (Dec. 1918), microformed on FELIX FRANKFURTER PAPERS, box 66, reel 40 (on file with author).

[53] See infra note 45 and accompanying text.

[54] Bridges v. Wixon, 326 U.S. 135, 166–68 (1945) (Frankfurter, J., dissenting). It could be argued, however, that Frankfurter argued contrary to the interests of Australia in trying to uphold the return of a suspected communist to the country of his birth. See, e.g.,

HARVEY KLEHR, THE COMMUNIST EXPERIENCE IN AMERICA: A POLITICAL AND SOCIAL HISTORY 119–20 (2010).

[55] See BRUCE NELSON, WORKERS ON THE WATERFRONT: SEAMEN, LONGSHOREMEN, AND UNIONISM IN THE 1930S at 66–68 (1988).

[56] 28 U.S.C. £ 455 (2000).

[57] 28 U.S.C. ££ 455(a)–(d) (2000).

[58] 28 U.S.C. ££ 455(e)–(f) (2000).

commission later requires recusal. For instance, in United States v. Payne, the Court of Appeals for the Ninth Circuit concluded that a judge who served on a commission investigating the effects of child pornography on child welfare and safety was not required to disqualify himself since his service ended prior to the trial.[59] Rules governing judicial ethics have also been developed by the federal judiciary to prevent the erosion of public confidence in the judiciary.[60] In 1955, in In re Murchison, the Court recognized that there are reasons to disqualify judges if questions regarding the apparent impartiality of the judge are significant enough to weaken public confidence in the fairness of a proceeding.[61] In other words, as the Court noted in Liljeberg v. Health Services, "justice must satisfy the appearance of justice."[62]

In spite of these rules, in at least one instance, a justice decided not to disqualify himself on the basis of having worked on a national security project. As an Assistant Attorney General in the Nixon Administration, William Rehnquist participated in the expansion of a federal-military surveillance program over persons involved in protesting the Vietnam Conflict and other social inequities.[63] However, when the program came under challenge before the Court, in Laird v. Tatum, Rehnquist not only disavowed substantively participating in the program, he cited to instances which favored his retention on the challenge.[64] When President Ronald Reagan nominated Rehnquist to replace Burger, it became apparent that his participation in the decision was a questionable departure from judicial ethics norms, though not to the point of the Senate voting against confirmation.[65]

B. Judicial Nominations

There is little surprise in the appointment of judges who, in their previous careers, had considerable governmental service or had assisted a president in a national security or foreign policy related matter. Exceptional service in governmental operations, after all, distinguishes lawyers for higher governmental positions. Nonetheless, there are instances in which attorneys have been nominated to judicial positions because of their past work in the national security arena and then incautiously determined that there was no reason to recuse. While Rehnquist provides one example, Justice Abe Fortas provides a far more egregious example of incautious behavior.

On July 28, 1965, President Lyndon Johnson announced that he would order 50,000 soldiers to be shipped to South Vietnam, thereby escalating the conflict from an air war and training mission to an actual ground war.[66] That same day, Johnson nominated Fortas to the Court; notably, there is a relationship between these two events.[67] Before his tenure on the bench, Fortas had served as a personal counsel and political advisor dating to Johnson's contested primary

[59] 944 F.2d 1458, 1477 (9th Cir. 1991).

[60] See, e.g., Guide to Judiciary Policy, Ch. 2: Code of Conduct for United States Judges, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_ effective_march_12_2019.pdf (last updated Mar. 12, 2019).

[61] 349 U.S. 133 (1955); Bell, supra note 5, at 615–16.

[62] 486 U.S. 847, 864 (1988) (quoting In re Murchison, 349 U.S. at 136).

[63] See DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 192–93 (2016).

[64] 409 U.S. 824 (1972).

[65] See, e.g., SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 191–200 (1989).

[66] BRUCE ALLEN MURPHY, FORTAS: THE RISE & RUIN OF A SUPREME COURT JUSTICE 177 (1988).

race in 1948 against Texas governor Coke Stevenson and then later worked as Johnson's liaison to Juan Bosch–a deposed Dominican leader–in trying to prevent a Marxist takeover of the Dominican Republic.[68] Fortas continued to advise Johnson after he swore his judicial oath on August 11, 1965, including on federal efforts to quell domestic upheaval and in formulating Vietnam policy.[69] Fortas never recused himself from a myriad of decisions involving selective service, the legality of presidential authority to send conscripted forces to an undeclared war, or the limits of free speech involving war protests.[70]

President Nixon nominated Lewis F. Powell to the Supreme Court for several reasons, including the fact that as a Virginian, Powell satisfied Nixon's quest to appoint a conservative southern jurist to the Court.[71] In addition to appeasing his political base in the southern states as well as northern conservatives, Nixon understood that Powell had strong national security credentials.[72] Powell was not only a World War II veteran, who served as Special Assistant to the Attorney General of the United States on selective service matters during the Truman Administration, but also, under President Dwight Eisenhower, he was a member of the Joint Civilian Defense Orientation Conference.[73] In the year prior to his nomination, Powell–upon Nixon's request–served as an advisor to Secretary of Defense Melvin Laird on restoring morale and discipline to the military as well as preparing the military for its post-Vietnam roles.[74] Powell's service to Laird as a member of the "Blue-Ribbon Commission" included an intensive study on preparing the military to engage in "political warfare."[75] In 1978, Powell described his contributions to the Commission as part of an effort to keep "the United States [military from] becoming a secondrate power."[76]

In December 1979, the Soviet Union sent a large military force into Afghanistan, drawing intense criticism from President James Earl Carter as well as the United States' NATO allies and the government of the People's Republic of China.[77] During the Nixon administration, the military shifted from a conscripted force to an all-volunteer force and the quality of the military was thought to be wanting.[78] One of the Carter administrations' responses was to reinstitute a part of the former conscription program, though only so far as to require draft registration.[79]

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[67] Id. at 177–78.

[68] See, e.g., RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 93 (2011).

[69] See generally MURPHY, supra note 56, at 177–79.

[70] Id.

[71] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (Fordham Univ. Press 2001) (1994).

[72] Id. Powell had impressive credentials, including, having served as the American Bar Association President and on President Lyndon Johnson's Crime Commission. Id.

[73] Joint Defense Orientation Conference, Report of the Comptroller General of the United States, June 29, 1971 (1971). The Conference was formed "to inform business, professional, and religious leaders on national defense matters in the hopes that, in turn, they would impart this information to their communities to stimulate support and interest in DoD activities." Id. at 2.

[74] See, e.g., Letter from Lewis F. Powell, Assoc. Justice, U.S Supreme Court, to Nixon (June 26, 1970) (on file with author).

[75] Id.

[76] Letter from Lewis F. Powell, Assoc. Justice, U.S Supreme Court, to J. Kilpatrick (Nov 29, 1978) (on file with author).

[77] JULIAN ZELIZER, GOVERNING AMERICA: THE REVIVAL OF POLITICAL HISTORY 346 (2012).

[78] See, e.g., JOSHUA E. KASTENBERG, SHAPING US MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY 169–71 (2014); see also BETH BAILEY, AMERICA'S ARMY: MAKING THE ALL-VOLUNTEER FORCE 126–29 (2009).

[79] BAILEY, supra note 68, at 127–29.; see also JAMES B. JACOBS, SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS 95 (1986).

Several appellants opposed the draft registration law because it exempted women and eventually a challenge to the new law came to the Court in a case captioned Rostker v. Goldberg.[80] Powell, in joining the majority, upheld the draft law, and he embraced Congress' as well as the military's position that because combat positions were fitted for only males and there were no specific combat roles for women, he urged that the male-only registration withstood any level of scrutiny.[81] Powell wrote to Rehnquist, who wrote the majority opinion, "Congress would have been irresponsible to have included women in the registration/draft law. We already have an army that probably cannot fight."[82] While there is nothing to suggest that Powell acted unethically, had he indicated that he worked on rebuilding the volunteer military a decade before this decision, he could have established a minimum denominator for judicial transparency in the national security arena.

While modern presidential administrations have nominated individuals to the federal judiciary for a variety of reasons, including their views on federalism, federal civil rights enforcement and prevailing social norms, and beliefs such as abortion rights, President Ronald Reagan provides another model helpful to understanding how a judge's conception of national security may alter the judge's treatment of the duty of impartiality into a malleable standard. Not unlike Roosevelt, Reagan selected judges who shared his vision of the government's national security strategy.[83] The defeat of communism, and not simply the collapse of the Soviet Union, was a key Reagan strategy throughout his two terms.[84] Two appointments highlight the underlying national security considerations Reagan placed in his nominees: Laurence Silberman and Robert Bork.

Silberman had a long career in public service and business. In 1981, he sought a position on the Foreign Intelligence Advisory Board.[85] "Its purpose, in the past, has been to provide an independent but supportive advisory role to the President concerning all foreign intelligence activities from the view[]point of effectiveness, consistency with foreign policy aims and legality[,]"[86] Silberman penned to White House Counsel, H. Monroe Brown.[87] "As a former Deputy Attorney General and Ambassador to Yugoslavia, I have a good deal of background in the area and should very much like to be of service in such a periodic advisory role."[88] White House attorneys stressed Silberman's ambassadorship to communist Yugoslavia as well as his work in the Nixon and Ford administrations.[89] Certainly, there were other attributes that made Silberman appealing to the Reagan administration

[80] 453 U.S. 57 (1981).

[81] See Letter from Rehnquist to Lewis F. Powell, Assoc. Justice, U.S Supreme Court (May 11, 1981) (on file with author).

[82] Letter from Lewis F. Powell, Assoc. Justice, U.S Supreme Court to Rehnquist (May 7, 1981) (on file with author).

[83] See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 345 (1997).

[84] EDWARD A. LYNCH, THE COLD WAR'S LAST BATTLEFIELD: REAGAN, THE SOVIETS AND CENTRAL AMERICA 1–22 (2011).

[85] Letter from Laurence H. Silberman to H. Monroe Brown (Feb 6, 1981) (Ronald Reagan Library – White House Organization Files) (on file with author).

[86] Id.

[87] Id.

[88] Id.

[89] Letter from Christopher Hicks, Associate Director, Presidential Pers., to Silberman, Exec. Vice President, Crocker Nat'l Corp. (Mar. 2, 1983) (on file with author); Letter from Silberman, Exec. Vice President, Crocker Nat'l Corp., to Lyn Nofziger, Presidential Assistant, Political Affairs (Sept. 16, 1981) (on file with author).

and its conservative supporters, and he was an eminently qualified nominee. Silberman stressed that he was anti-busing, anti-affirmative action, and anti-judicial imperialism.[90] After being confirmed to the appellate court, he generally sided with the government's stated national security policies, even in matters of discrimination. For instance, he authored a decision upholding the Federal Bureau of Investigation's policy of excluding gay and lesbian persons from employment in the agency on the basis of an alleged national security consideration.[91] On the other hand, he chastised his fellow judges who only partially upheld a government employee drug testing program for relying on the doctrine of judicial restraint when it had the effect of insulating other drug-enforcement employees from having to undergo testing in his Harmon v. Thornburgh concurrence.[92] As part of the "war on drugs," Harmon clearly falls into the ambit of national security.[93]

There were many reasons Reagan nominated Robert Bork to the Court, and national security is overshadowed by the failed confirmation process including Bork's stance on abortion, affirmative action, civil rights, and his role in the Justice Department during Watergate.[94] Yet, one of the areas that was considered a reason for Reagan's nomination of Bork to the highest court was his rejection of congressional standing as it applied to national security programs, as well as his view that in the late 1970s, Congress had usurped too much of the executive branch's national security authority.[95] "[H]is separate opinions in two CIA FOIA cases, Sims and McGehee, suggest a feeling that application of FOIA to intelligence agencies represents an attempt by Congress to interfere dangerously with the conduct of the executive in the vital field of national security[,]"[96] the White House report on Bork read. "Sims was particularly troubling, since it involved an attempt to obtain through FOIA names of individuals who had cooperated with the CIA's MKULTRA project and who therefore were intelligence sources."[97] Additionally, the report stressed that Bork believed a President had the constitutional authority to prevent "dangerous aliens" from entering the country without the denied

[90] Letter from Silberman, Exec. Vice President, Crocker Nat'l Corp., to Lyn Nofziger, Presidential Assistant, Political Affairs (Sept. 16, 1981) (on file with author).

[91] Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987). The last paragraph of the decision is instruction on Silberman's deference to the government's arguments linking national security and homosexuality. He noted: Perhaps more important, FBI agents perform counterintelligence duties that involve highly classified matters relating to national security. It is not irrational for the Bureau to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even "open" homosexuals, to the risk of possible blackmail to protect their partners, if not themselves. Id. at 104. It should be noted, however, that the linkage between homosexuality and national security was hardly novel by the time of Padula. In 1953, President Dwight Eisenhower issued Exec. Order No. 10450, 18 Fed. Reg. 2489, which, among other aspects, prohibited homosexual persons from obtaining access to national security positions in the government or private industry. In 1956, the Court upheld the procedures enumerated for dismissal in the Executive Order. Cole v. Young, 351 U.S. 536, 555–56 (1956).

[92] 878 F.2d 484, 496 (1989) (Silberman, J., concurring).

[93] See, e.g., R , supra note 20 at 9–14; EVA BERTRAM, ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 112–17 (1996).

[94] See, e.g., NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 9–40 (1998).

[95] Report on Bork, in PATRICIA BRYAN PAPERS, box 10 (on file with author).

[96] Id. (citation omitted).

[97] Id. The Report further noted: Bork's dissent in Sims, which was somewhat constrained by his court's holding in an earlier case, was largely adopted by the Supreme Court when it reversed the original Sims decision. Id.

aliens having recourse to the courts.[98] In addition to these points, on June 29, 1978, Bork testified to the House Judiciary Committee that he opposed the Foreign Intelligence Surveillance Act as both "a thoroughly bad idea, and almost certainly unconstitutional."[99] Clearly then, Reagan believed that one of Bork's attributes was his support for presidential determinations of national security.

II. Judicial activities, advice, and encouragement: Taft, stone, and burger

In 1889, Justice Stephen A. Field corresponded with General Nelson A. Miles, a decorated veteran of the Civil War and Indian Wars, who would shortly become the Commanding General of the Army, on the topic of protecting federal judges.[100] Field had been the target of an assassination attempt and ordered a federal judge to release a United States Marshal who had killed the would-be assassin.[101] He noted to Miles that it might become necessary to require military protection of judges in certain instances. "Without it," Field penned, "there can be no administration of justice upon which the security of persons and property, and the peace of society largely depend."[102] Within a decade, Miles sought Field's advice on the use of the Army in suppressing a major railroad strike that threatened to cripple the nation's economy.[103] One of the convicted strike leaders, Eugene Debs, appealed to the Supreme Court, but Field did not find it necessary to recuse himself from the appeal.[104]

Field was by no means an aberration in advising a government security program. In early 1918, the Court upheld the constitutionality of the national military conscription program.[105] During World War I, Arthur J. Tuttle, a United States District Court judge for the Eastern District of Michigan, worked with the Army to reduce the number of court petitions from applicants denied conscientious objection status. He reviewed hundreds of applications before advising the draft boards on

[98] Id. Finally, Bork's Abzourek dissent argued in favor of a broad executive power to exclude dangerous aliens from the country. Id.

[99] Statement of Bork, in ROBERT BORK PAPERS – Library of Congress, I:20 (June 29, 1978) (on file with author); Statement of Robert Bork to the Senate Select Committee on Intelligence with Reference to the National Intelligence Act of 1978, in ROBERT BORK PAPERS – Library of Congress, I:20 (June 21, 1978) (on file with author).

[100] Letter from Justice Field, Associate Justice, U.S. Supreme Court, to Nelson A. Miles, Commanding General, United States Army, in NELSON-CAMERON FAMILY PAPERS – Library of Congress (Oct. 18, 1889) (on file with author). It should be noted that the term "Commanding General of the Army," predates the modern term "Chief of Staff of the United States Army." For a background on the reason for the military reforms underlying the change, see RONALD J. BARR, THE PROGRESSIVE ARMY: US ARMY COMMAND AND ADMINISTRATION, 1870–1914 at 49–122 (1998).

[101] For a background on Field's role in the attempted assassination, see HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 88 (1990).

[102] Letter from Justice Field, Associate Justice, U.S. Supreme Court, to Nelson A. Miles, Commanding General, United States Army, in NELSON-CAMERON FAMILY PAPERS – Library of Congress (Oct. 18, 1889) (on file with author). Letter from Justice Field, Associate Justice, U.S. Supreme Court, to Nelson A. Miles, Commanding General, United States Army, in NELSON-CAMERON FAMILY PAPERS – Library of Congress (Oct. 18, 1889) (on file with author).

[103] JOSHUA E. KASTENBERG & ERIC MERRIAM, IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE – 1940–1954 at 16–17 (2016).

[104] See In re Debs , 158 U.S. 564 (1895). In this decision, labor leader Eugene Debs challenged a federal judge's injunction against his labor union striking against the Pullman Corporation and his subsequent contempt conviction. Id.

[105] See Arver v. United States, 245 U.S. 366 (1918); CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN 21–55 (2008).

granting conscientious objector status.[106] For denied applicants, he was able to issue quick rulings sustaining the government's position because he had already given advice, if not passed judgment, on their status.[107] Tuttle also presided over the trial of Maurice Sugar, a Socialist Party leader and opponent of the United States participation in the war.[108] There is no indication in the historic record that Tuttle informed Sugar, or the public, of his draft-board activities.[109]

After World War II, extra-judicial activity continued in the national security arena. For instance, President Harry S. Truman appointed Alexander Holtzoff to the United States District Court for the District of Columbia on September 28, 1945.[110] Holtzoff, a 1911 Columbia University Law School graduate and World War I veteran, also had a distinguished career in the Justice Department prior to his judicial service.[111] Shortly after being appointed to the bench, Holtzoff was named to a committee, along with Judge Morris Ames Soper from the Court of Appeals for the Fourth Circuit, which studied courts-martial during World War II and the need for reform.[112] Their work resulted in the enactment of the Modern Uniform Code of Military Justice (UCMJ) in 1950. The UCMJ establishes military trial procedures and contains statutes prohibiting a wide array of criminal conduct.[113]

Having helped craft a modern code of criminal law for the military, clearly a national security matter as noted from the very words of the code's preamble, Holtzoff did not recuse himself from challenges to the code itself.[114] In United States ex rel Toth v. Quarles, the Court determined that the military could not recall a veteran non-retiree to active duty for the purpose of a court-martial, because military jurisdiction only covered active duty service-members and former service-members on retirement status in receipt of pay.[115] However, in one of the

[106] See, e.g., Letter from C. Lininger to Arthur J. Tuttle, in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (Mar. 24, 1918) (on file with author); Letter from Henry E. Bodman to Arthur J. Tuttle, in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (Mar. 18, 1918) (on file with author); Letter from Arthur J. Tuttle to George J. Cummins, Local Bd. for Clare Cty., in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (Apr.22, 1918) (on file with author).

[107] Letter from C. Lininger to Arthur J. Tuttle, in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (Mar. 24, 1918) (on file with author); Letter from Arthur J. Tuttle to H.O.H. Heistant, Adj. Gen., in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (May 22, 1918) (on file with author); Letter from Arthur J. Tuttle to George E. Nelson, in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (May 22, 1918) (on file with author); Letter from Arthur J. Tuttle to Roy R. Davis, Local Bd. Div. 3, in Arthur J. Tuttle collection with the University of Michigan Bentley Historical Library (Nov. 25, 1918) (on file with author).

[108] See United States v. Sugar, 243 F. 423 (E.D. Mich. 1917); CHRISTOPHER H. JOHNSON, MAURICE SUGAR: LAW, LABOR, AND THE LEFT IN DETROIT 1912–1950 at 23–39 (1988).

[109] See, e.g., JOHNSON, supra note 98, at 72–73.

[110] MARCUS, supra note 11, at 103.

[111] See, e.g., Matthew F. McGuire, Judge Alexander Holtzoff – A Vignette, 39 D.C. B.J. 17, 17–18 (1973).

[112] KASTENBERG & MERRIAM, supra note 93, at 140.

[113] See THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 355–56 (John Whiteclay Chambers II et al. eds., 1999).

[114] See JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2019). The preamble reads, in pertinent part, [t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Id. at I-1.

[115] 350 U.S. 11 (1955). Toth had served in the United States Air Force and been stationed in the Republic of Korea. Id. However, by the time the Air

two district court decisions underlying the Court's opinion, Holtzoff merely ordered the Air Force to return Toth to the United States but implied the military maintained jurisdiction over him.[116] In a second decision, following the government's motion for reconsideration, Holtzoff upheld his initial ruling and hinted that the jurisdictional question would be resolved in the military's favor.[117] In 1958, Holtzoff upheld the military's assertion of its court-martial jurisdiction over a civilian contractor working for the military overseas.[118] Holtzoff, in essence, sat in judgement of the very law he helped to create, and this could hardly be assumed to have resulted in an impartial review, even if his ruling was correctly decided.

One might wonder why Holtzoff felt free to serve on a lawmaking committee and then issue rulings on challenges to the laws he helped craft. In addition to Field's discussions with Miles, Brandeis' advice to the government on the nation's draft laws, a review of the conduct of Chief Justice Taft and the Supreme Court under Chief Justice Stone provides insight into the perceived acceptability of an exception. There is a difference between the two chief justices. Taft engaged in political activities, and he did not, as the section below describes, oppose judicial contributions to the national defense and foreign policy. Stone, on the other hand, deplored extra-judicial conduct, but did try to stop his peers from doing so.

A. Taft and the National Security Exception

Of all of the twentieth century justices, it might have been the most difficult for Chief Justice William Howard Taft to contain his activities to the judicial branch. Taft not only came from a distinguished Ohio family where his father had been attorney general, secretary of war, as well as minister to both Russia and the Habsburg Empire, but he also served as solicitor general under President Benjamin Harrison, governor general of the Philippines, secretary of war under President Theodore Roosevelt, and the nation's twenty-seventh president.[119] After becoming chief justice, he tried to influence the 1924 Republican nomination to go to Calvin Coolidge by urging Charles Evans Hughes not to enter the race.[120] In 1928, Taft advised the Ohio's Republican leadership to back Herbert Hoover against other potential Republican candidates.[121]

Force discovered his role in a murder, he had served his enlisted term and returned to civilian life. Id. at 13. The Air Force arrested him and transported him back to Korea for trial. Id. For a background on the Toth decision, see Joshua E. Kastenberg, Cause and Effect: The Origins and Impact of William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker, 26 T.M. COOLEY L. REV. 163, 222–23 (2009). At the time of the decision, there were over twenty-two million Americans who could have been subject to the broad range of military jurisdiction if the Court had upheld the government's actions. Id.

[116] Toth v. Talbott, 113 F. Supp. 330, 331 (D.D.C. 1953), rev'd, 215 F.2d 22 (D.C. Cir. 1954), rev'd sub nom., U.S. ex rel. Toth v. Quarles, 350 U.S. 11 (1955). Although Toth challenged the military's assertion of jurisdiction over him, Holtzoff merely ruled that the arrest and transport of Toth overseas without a judicial hearing exceeded the military's authority. Id.

[117] Toth v. Talbott, 114 F. Supp. 468 (D.D.C. 1953).

[118] United States ex rel . Guaglairdo v. McElroy, 158 F. Supp. 171, 179 (D.D.C. 1958), rev'd, 361 U.S. 281 (1960).

[119] See, e.g., JONATHAN LURIE, WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE 1–20 (2012).

[120] Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to George Dewey (Sept. 8, 1923) (on file with author) ("My own impression is that Coolidge is the one upon whom more people can agree for re-nomination than anyone else. I talked with Hughes on the night of the funeral, and suggested that I noted there was a great many people in the country who would like to see him run for the presidency.").

[121] Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Charles Curtis, U.S. Senator and 1928 Republican vice-presidential nominee, in Library of Congress (July 3, 1928) (on file with author). Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Moses Strauss, Editor, Cincinnati Times-Starr, in Library of Congress (July 3, 1928) (on file with author).

In addition to his political activities, Taft also showed an acceptance of judicial involvement in national security matters.

On October 27, 1917, Walter I. Smith, a judge on the Court of Appeals for the Eighth Circuit and an Iowa resident, informed Taft–then teaching law at Yale University–that he crafted a proposed law to directly tax communities that failed to purchase their share of Liberty Loans.[122] Smith claimed that since the nation had resorted to a draft, "it seems unjust that whole German sympathizing townships refuse to contribute anything to carry on the war while others are straining every nerve to buy all the Liberty bonds they can."[123] Smith's drafting of legislation might have appeared unseemly for a federal judge to undertake, since the drafting of bills is an inherent function of the legislative branch, and judges who engage in this sort of extra-judicial conduct may later be reasonably questioned on their impartiality to oversee the trials of persons charged with failing to comply with the Selective Draft Law, violating the Espionage Act, or even in civil disputes between citizens and the War and Naval Departments. Yet, in his letter, Smith did not merely vent his disgust with Iowa's ethnic German population. During the time the Court deliberated on the Selective Draft Act's constitutionality, he also forwarded to Justice Willis Van Devanter an analysis of the nation's militia laws he and former attorney general George Wickersham had authored.[124] Neither Taft nor Van Devanter left a record indicating their displeasure with Smith's actions.

In contrast to Taft's deference for extra-judicial activity in national security matters, he opposed extra-judicial activity in law enforcement. In 1929 President Hoover initiated a commission, the National Commission on Law Observance and Enforcement, to investigate crime and police conduct in the United States.[125] Colloquially known as the Wickersham Commission after its leader, former Attorney General George Wickersham, the investigation included future justices Frankfurter and Douglas.[126] Hoover, however, tried to lobby Taft to appoint Justice Harlan Stone prior to appointing Wickersham.[127] Taft resisted the appointment, describing to his son:

I have been going through, as you perhaps know, a major trial with Hoover, in which he has attempted to take from our Court, his favorite Stone. I opposed it and made some other suggestions which did not suit him as he hammered at me through Stimson and through the Attorney General.[128]

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[122] Letter from Walter I. Smith, Fed. Judge, U.S. Court of Appeals for the Eighth Circuit, to William H. Taft, Professor at Yale Law School (Oct. 27, 1917) (on file with author).

[123] Id.

[124] Id.; Letter from William Van Devanter, Associate Justice, U.S. Supreme Court, to Walter I. Smith, Fed. Judge, U.S. Court of Appeals for the Eighth Circuit (Jan. 8, 1917) (on file with author).

[125] Arthur E. Sutherland, Jr., One Man in His Time, 78 HARV. L. REV. 7, 21 (1964).

[126] See, e.g., BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM 544 (2017); Robert W. Gordon, Professors and Policymakers: Yale Law School Faculty in the New Deal and After, in HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIEL LECTURES 110 (2004).

[127] Letter from Herbert Hoover, U.S. President, to William H. Taft, Chief Justice, U.S. Supreme Court (Apr. 7, 1929) (on file with author) (writing "I have received your message indicating that it was your purpose to review the question of Justice Stone's undertaking the chairmanship of the Law Enforcement Commission. I can scarcely express my anxiety that you will be able to acquiesce in that suggestion. I realize the extra burden it imposes on the Court . . . .").

[128] Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Robert Taft, son of William H. Taft (Apr. 7, 1929) (on file with author); Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Herbert Hoover, U.S. President (Apr. 8, 1929) (on file with author).

Taft simply did not want Stone serving as an investigator over the causes of crime and then having to decide appeals which could have been implicated by his extra-judicial service.[129]

Although Taft was reticent to have his fellow justices become involved in the non-national security extra-judicial functions of the government, he was not above giving advice to legislators and the President in regard to military affairs. He encouraged President Warren G. Harding to enter into an international maritime arms limitations treaty known as the Washington Naval Treaty.[130] In the aftermath of World War I, the leaders of the United States, Great Britain, France, Italy, and Japan agreed that one of the contributing factors to the global conflict had been an unprecedented arms production race to ensure the expansion of colonial empires and dominance of the high seas, and therefore limitations on battleships and other naval tonnage would ensure international peace.[131] Taft had long been supportive of international peace efforts, including working with billionaire Andrew Carnegie and endorsing the League of Nations.[132] When Taft was confirmed as Chief Justice, Judge George E. Martin of the Court of Customs Appeals penned "the cause of constitutional government in this country is advanced, and our influence upon other nations is promoted by the appointment[,]"[133] evidencing that at least one judge believed Taft would work to advance the nation's foreign policies.[134] In this instance, Taft's encouragement to Harding to seek peace through arms reductions while ensuring United States naval dominance was clearly an action of advising a president on a national security matter.

B. Stone: Opposition to Extra-judicial Conduct but Resistance to his Example

As Chief Justice, Harlan Stone was displeased with his fellow justices who engaged in extra-judicial activity in support of the war effort. He wrote to Professor Charles Fairman that he had "great difficulty" in reconciling Justice Robert Jackson's service on the

[129] See Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Herbert Hoover, U.S. President (Apr. 8, 1929) (on file with author); see also Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Robert Taft, son of William H. Taft (Apr. 7, 1929) (on file with author).

[130] See generally Letter from William H. Taft, Chief Justice, U.S. Supreme Court, to Horace Taft, brother of William H. Taft (Nov. 29, 1921) (on file with author) (writing "I saw Harding yesterday. He is very serious about the Conference and tells me that things are working well and that they are going to get something real out of it. He complained that Borah and others were, as he said, "crabbing" the situation. I told him I would send him a little memorandum I had of what Lincoln said about complaints of an Administration in order to cheer him up at times . . . . As Root told me that he thought the thing as going to be a success, Harding's assurance is a confirmation.").

[131] RICHARD W. FANNING, PEACE AND DISARMAMENT: NAVAL RIVALRY & ARMS CONTROL 1922-1933 at 1–18 (1995) (noting that the American delegation worked to ensure continued United States naval superiority over other nations, particularly in regard to the Pacific Ocean, except for Great Britain).

[132] See Frank, supra note 15, at 744; JOSEPH FRAZIER WALL, ANDREW CARNEGIE 977–78 (1970); LEWIS L. GOULD, CHIEF EXECUTIVE TO CHIEF JUSTICE: TAFT BETWIXT THE WHITE HOUSE AND SUPREME COURT 41 (2014). Taft's reputation for supporting international peace negotiations led to Tomas Masyryk, the first president of Czechoslovakia and President Eleftherios Kyriakou Venizelos, the president of Greece, asking him to campaign for the League of Nations. See, e.g., Letter from William H. Taft to Thomas Mazaryk, President of Czechoslovakia (Sept. 23, 1919) (on file with author); Letter from William H. Taft to Eleftherios Kyriakou Venizelos, President of Greece (Sept. 23, 1919) (on file with author).

[133] Letter from George E. Martin, Judge, U.S. Court of Customs Appeals, to William Howard Taft, Chief Justice, U.S. Supreme Court, in WILLIAM HOWARD TAFT PAPERS, Reel 228, Library of Congress (July 1, 1921) (on file with author).

Nuremburg War Crimes Tribunal.[135] The war crimes trials of Nazi and Japanese officials created an international precedent to limit warfare to combatants and deter crimes against humanity, and in this sense, there was a national security component to the war crimes trials.[136] But, Stone had worked in the national security arena himself and understood the implications to the independent judiciary. In the year after Hitler came to power, Stone–as evidenced below–tried to intercede on behalf of men who had been convicted under the 1917 Selective Service Act for defying orders to report to military service. He had a personal connection to a number of men who were denied conscientious objector status and convicted for refusal to join the Army in World War I. In 1918, as dean of Columbia University's law school, Stone agreed to serve on an administrative panel reviewing the World War I criminal convictions of conscientious objectors.[137] Julian Mack, a judge on the Court of Appeals for the Seventh Circuit (and later Second Circuit), served alongside Stone on a number of conscientious objection appeals.[138] Like Judge Walter Smith and Arthur Tuttle, Mack did not recuse himself from conscription cases.[139]

After being appointed to the Court by President Coolidge, dozens of applicants who had been denied relief from the wartime board began to petition Stone, and in several instances, Stone appealed to President Franklin Roosevelt to grant pardons. On November 28, 1934, Stone wrote to Roosevelt that, regarding Mr. Brent Allinson, he was "convinced of his sincerity and that his conduct was attributable to a conscientious objection to war[.]"[140] To another applicant who

[134] See id.

[135] Letter from Harlan F. Stone, Chief Justice, U.S. Supreme Court, to Charles Fairman, in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (Mar. 13, 1946) (on file with author). It should be noted, however, that Jackson recused himself from serving on the appeals of persons charged with war crimes in Hirota v. MacArthur, 338 U.S. 197 (1948).

[136] See, e.g., KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 1–17 (2011).

[137] Laura M. Weinrib, Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties , 65 EMORY L.J. 1051, 1097–98 (2016); see Letter from James M. Good, Sec'y of War, U.S., to Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (May 30, 1929) (on file with author); letter from James M. Good, Sec'y of War, U.S., to Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (May 2, 1929) (on file with author).

[138] See, e.g., Alpheus Thomas Mason, Harlan Fiske Stone: In Defense of Individual Freedom, 1918-20, 51 COLUM. L. REV. 147, 147–48 (1951); Dennis J. Hutchinson, The Black-Jackson Feud, 1988 SUP. CT. REV. 203, 204–05 (1988). Although the judicial ethics rules did not expressly prohibit a judge from having a friend appear as counsel in a pending case, it is worthy to note that in 1945 Justice Robert Jackson excoriated Justice Hugo Black over a similar issue. See Letter from Stone, Chief Justice, U.S. Supreme Court, to Kellen, The New School for Social Research, in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (Feb. 25, 1944) (on file with author) ("I shall always look back at my association with Judge Mack as a most agreeable experience. We became fast friends and saw each other on occasion in later years . . . before his death. After the war, I occasionally appeared before him when he was sitting as a judge in New York City."). See, e.g., KASTENBERG & MERRIAM, supra note 93, at 86–87. The decision, while it arose from a union-labor dispute, had national security implications in that a labor strike in the coal or steel industry in the early Cold War, could lead to the Soviet Union's leaders believing the United States would be unable to supply its military with munitions. Id.

[139] See, e.g., Snitkin v. United States, 265 F. 489 (7th Cir. 1920) (reversing a conviction and not siding with the government).

[140] Letter from Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, to Franklin D. Roosevelt, President, U.S., in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (Nov. 28, 1934) (on file with author). But see Letter from Franklin D. Roosevelt, President, U.S., to Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, in HARLAN FISK STONE PAPERS, Box 45, Library of Congress (Dec. 24, 1934) (on file with author). Roosevelt had a different view of Allinson after Allinson refused to pledge an oath of allegiance to the United States.

Stone rebuffed, he wrote that while he respected the "extreme position" of conscientious objectors they "should accept the consequences without complaint[.]"[141] Perhaps, presaging how he would vote in the World War II appeals of conscientious objectors to the Court, Stone ended his letter with:

Organized society is as much a reality as ice and snow in the arctic. It must function by majorities, it contemplates that minorities who are against all war or a particular war may vote or speak against it, but it cannot admit of the right of minorities to resist it.[142]

Justice Owen Roberts served on two significant national security extra-judicial investigations contemporaneous with his judicial service. In 1932, President Herbert Hoover appointed Roberts to serve as an umpire over German monies held by the United States Treasury Department under a World War I settlement agreement with Germany.[143] Two years earlier, Hoover had nominated Roberts to the Court.[144] In 1916, a German act of sabotage against a munitions storage unit in New Jersey resulted in the deaths of four United States citizens, injuries to hundreds more, and property damage in excess of millions of dollars.[145] In 1930, the Lehigh Valley Railroad sued a joint German-American commission over the award of monies to other plaintiffs.[146] As an umpire, Roberts determined that because the commission was entitled to determine its own jurisdiction, and that the German government had presented false evidence to the commission, he ordered the investigation into German sabotage reopened.[147] In 1939, after the German representative to the commission withdrew from the investigation under protest, Roberts ordered the commission to reassess its award in favor of the railroad company.[148] In turn, the Court upheld Roberts' authority against a challenge from two companies that contested the award to the railroad.[149]

Shortly after the Japanese surprise attack on the Pearl Harbor naval base and other United States military installations in the Pacific, President Roosevelt appointed Roberts to lead an investigation into the military's preparedness for an enemy attack.[150] Roosevelt believed that Roberts–having been appointed by a Republican president–would provide public confidence to the investigation's findings.[151] The Pearl Harbor investi-

[141] Letter from Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, to Fred Breihl (Mar. 4, 1936) (on file in Harlan Fisk Stone Papers, Box 45, Library of Congress).

[142] Id.; see Letter from Fred Breihl, to Harlan F. Stone, Assoc. Justice, Supreme Court of the U.S. (March 20, 1936) (on file in Harlan Fisk Stone Papers, Box 45, Library of Congress) ("Modern wars and imperialism spring from the capitalist system. Someday the working class will abolish that system . . . .").

[143] Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470, 480–81 (1941); John J. McCloy, Owen J. Roberts' Extra Curiam Activities , 104 U. PA. L. REV. 350, 350–51 (1955).

[144] Erwin N. Griswold, Owen J. Roberts as a Judge, 104 U. PA. L. REV. 332, 333, 348 n.43 (1955).

[145] HENRY LANDAU, THE ENEMY WITHIN: THE INSIDE STORY OF GERMAN SABOTAGE IN AMERICA 80 (1938); see McCloy, supra note 133. According to McCloy, who represented the Lehigh Valley Railroad, Hoover selected Roberts because of Roberts' service to the government in investigating corruption in the leasing of oil fields in what became known as the "Teapot Dome Scandal." Id.

[146] Z. & F. Assets Realization Corp., 311 U.S. at 482–83.

[147] Id. at 483–84

[148] Id.

[149] Id. at 489.

[150] See McCloy, supra note 133, at 352; ALAN SCHOM, THE EAGLE AND THE RISING SUN: THE JAPANESE-AMERICAN WAR, 1941–1943 at 148–49 (2004); GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA 79–80 (2009).

[151] Lance Cole, Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbour, Warren Commission, and 9/11 Commission Investigations), 41 MCGEORGE L. REV 1, 9–10 (2009).

gation concluded that the Japanese attack was a surprise, although the Army and Navy command in Hawaii were culpable in failing to adequately prepare for a surprise attack.[152] While no appeals from the December 7 surprise attack came to the Court, there was the possibility, however remote, that one of the dismissed military commanders would have appealed.

On March 20, 1945, Roosevelt sent General William Donovan, the commander of the Office of Strategic Services–the predecessor of the Central Intelligence Agency–to see if Justice William O. Douglas could advise the administration on the asylum rights of political refugees in non-belligerent countries.[153] Roosevelt worried that Switzerland, Sweden, Ireland, Portugal, the Vatican, Turkey, and Argentina would offer asylum to Nazi war criminals, such that had enabled Kaiser Wilhelm II to escape prosecution in the Netherlands after World War I.[154] Douglas' memoirs are silent on this request, and what remains in his personal papers is a cryptic note to Donovan that he did not consider non-belligerent governments as possessing the right to offer asylum to persons charged with an international tribunal. Cognizant of Stone's anger with Murphy, Roberts, and Jackson, Douglas did not formally offer any assistance to Donovan.[155]

Although Douglas declined to personally participate in extrajudicial committee work during the war, judges on the Court of Appeals for the Ninth Circuit and its district court judges–which he oversaw as his assigned circuit–were involved in various wartime committees and planning, with his approval. For instance, he approved of Judge William Denman's extensive work not only in planning port and factory defenses on the west coast against a Japanese attack, but also Denman's repeated advice to James Forrestal and John J. McCloy, two men in the Roosevelt administration instrumental in the national defense.[156] Denman, in his statements to McCloy and Forrestal, referred to Governor Earl Warren as "a tragically pathetic commander-in-chief" and sought greater federal military control over the state police.[157] There is no record Douglas disapproved of Denman's conduct.

C. Warren Burger and the Encouragement of Nixon

The Vietnam Conflict resulted in the twentieth century's greatest period of domestic upheaval.[158] While, from 1964 through 1969, much of the dissension against the war focused on President Lyndon Johnson's wartime policies, including a national conscription program which favored exemptions for wealthy and largely Caucasian males, by 1970 public dissension turned to Nixon's expansion of the war into Cambodia.[159] On April 30, 1970, Nixon informed the nation that the

[152] Id. at 13.

[153] Memorandum from Gen. William Donovan to J. William O. Douglas (Mar. 20, 1945), in WILLIAM O. DOUGLAS PAPERS, (Library of Congress) (on file with author).

[154] Id.

[155] Id.

[156] Letter from J. William Denman to J. William O. Douglas (June 17, 1947), in WILLIAM O. DOUGLAS PAPERS, (Library of Congress) (on file with author).

[157] Commonwealth Club Plan, Memorandum from J. William Denman to J. William O. Douglas, in WILLIAM O. DOUGLAS PAPERS, (Library of Congress) (on file with author).

[158] See, e.g., JEFFREY W. KNOPF, DOMESTIC SOCIETY AND INTERNATIONAL COOPERATION: THE IMPACT OF PROTEST ON US ARMS CONTROL POLICY 167–69 (1998); RODERICK A. FERGUSON, WE DEMAND: THE UNIVERSITY AND STUDENT PROTESTS 12–17 (2017).

[159] See, e.g., JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 31–32 (1993); GLENN L. STARKS & F. ERIK BROOKS, THURGOOD MARSHALL: A BIOGRAPHY 93–95 (2012).

United States military forces, with the Army of the Republic of South Vietnam, had entered into Cambodian territory for the purpose of eliminating "a major Communist staging and communications area," and ensuring the success of Vietnamization.[160]

Almost immediately after Nixon's television address, Chief Justice Warren Burger wrote Nixon in support of the military operation. "Very properly, the White House lines and all Western Union lines are blocked with loyal Americans who wish to express their support for your courageous decision,"[161] Burger exclaimed. "Whatever comes, there is no substitute for courage in a time of crisis and you have shown that tonight."[162] Burger's note to Nixon was not without some parallel. On November 13, 1928, Stone wrote President Calvin Coolidge a note lauding the president's speech on disarmament and the settlement of France's wartime debt to the United States.[163] However, Stone's letter did not occur during an ongoing unpopular military conflict that resulted in dozens of legal appeals through the circuit courts.

On April 30, 1970, Burger did more than write Nixon a letter; he personally brought the letter to the White House and favourably compared the President's resolve against the press to the actions of George Washington and Abraham Lincoln.[164] That there was a substantial likelihood that the Supreme Court would decide appeals on the legality of the incursion, as well as the First Amendment assertions of the news media and war protesters, seemed not to matter to Burger. For instance, when, in 1974, the Court reversed a conviction of a defendant charged with the "improper use" of the United States flag after the defendant displayed the flag with a peace symbol following the Cambodian invasion, Burger dissented on the basis that the Court expanded its constitutional role.[165]

Burger was by no means alone in supporting Nixon's decision to send forces into Cambodia. On May 11, 1970, Roger Robb, a judge on the Court of Appeals for the District of Columbia, penned to Deputy Attorney General Richard Kleindienst not only a historical justification for the Cambodian operation but also the basis for an administration official's potential public speech.[166] "As a student of the Civil War I have been impressed by several parallels between events of the spring and summer of 1864 and what is happening now[,]"[167] Robb wrote. "This look at history strengthens my confidence that Mr. Nixon's courageous and decisive actions in Vietnam and Cambodia will be vindicated

[160] Robert B. Semple Jr., Nixon Sends Combat Forces to Cambodia to Drive Communists from Staging Zone, N.Y. TIMES: ARCHIVES (May 1, 1970), https://www.nytimes.com/1970/05/01/archives/nixon-sends-combat-forces-to-cambodia-not-an-invasion-president.html.

[161] Letter from Warren Berger, Chief Justice, U.S. Supreme Court, to Richard Nixon, President, U.S. (Apr. 30, 1970), in PERSONAL NAME FILES (Richard Nixon Library) (on file with author).

[162] Id.

[163] Letter from J. Harlan Fiske Stone to Calvin Coolidge, President, U.S. (Nov. 13, 1928), in HARLAN FISKE STONE PAPERS (Library of Congress) (on file with author).

[164] Letter from Warren Burger, Chief Justice, U.S. Supreme Court, to Richard Nixon, President, U.S. (May 10, 1971) (on file with author); Letter from Richard Nixon, President, U.S., to Warren Burger, Chief Justice, U.S. Supreme Court (May 12, 1971) (on file with author).

[165] Spence v. Washington, 418 U.S. 405, 416 (1974) (Burger, J., dissenting). Burger penned: If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each State and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected. Id.

[166] Roger Robb, Judge, U.S. Court of Appeals, to Richard Kleindienst, Deputy Att'y General, Dep't of Justice (May 11, 1970) (on file with author).

[167] Id.

by results."[168] In Priest v. Secretary of the Navy, Robb voted to uphold the court-martial conviction of a sailor who 'colorfully' criticized Nixon's Vietnam and Cambodia policies without noting his support to Nixon.[169]

Burger was also not the only post-Fortas justice to provide national security advice to a national leader. On March 13, 1977, future president George H.W. Bush presented the commencement speech to the University of Houston summer graduates.[170] In it, he criticized President Carter's human rights policies in foreign affairs as interfering with the domestic affairs of allied nations and aiding communist insurgent movements in Latin American and African nations.[171] Moreover, Bush accused Carter of creating a "double standard," which excused neutral totalitarian governments, or those allied with the Soviet Union and China.[172] Shortly after reading the speech, Powell sent a congratulatory letter to Bush, criticizing Carter's foreign and military policies: "Communism and neo-Communism have steadily gained ground (...) since the end of World War II[,]" Powell claimed, "[e]vents in East Africa at this time demonstrate (...) that we no longer have the will to challenge even if we have the means."[173] Two months later, Powell wrote to General George Brown that Carter's national security and military policies had "endangered if not foreclosed" the ability of the United States to come to the aid of the free world.[174] In 1979, Powell warned Senator William Cohen–a future secretary of defense–that based on his past service on the Blue Ribbon Defense Panel, if the United States signed a new Strategic Arms Limitations Treat (SALT II), the United States would decline further as a world power and communism become more influential.[175]

D. The Canadian and Australian Experience and Answer

The problems of extra-judicial activities are not confined to the United States, and indeed, two of the constitutionally based legal systems with substantial similarities to the United States have witnessed appellate judges appointed to commissions related to the national security of their respective countries. In 1942, the Governor General of Canada appointed Chief Justice Lyman Duff of the Supreme Court of Canada to lead an investigation into the defeat of Canadian forces against the Japanese in Hong Kong.[176] Shortly after the United States joined with the United Kingdom and Soviet Union in World War II, the Canadian Government–then a part of the

[168] Id. Robb finished his letter by writing: Of course Mr. Lincoln did not have critics urging that General Grant refrain from crossing the Rapidan, or that General Sherman remain in Chattanooga to avoid the risk of escalation; but in many ways the troubles of 1864 resembled the ones we have today. I predict that the historical parallel will continue, with success in Cambodia and Vietnam bringing us fair skies 'if our people at home will be but true to themselves.' Id.

[169] 570 F.2d 1013, 1019 (D.C. Cir. 1977).

[170] George H. W. Bush, Commencement Address at University of Houston (Aug. 13, 1977) (on file with author).

[171] Id.

[172] Id.

[173] Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to George H. W. Bush (Mar. 4, 1978) (on file with author).

[174] Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to George S. Brown, Gen., U.S. Air Force (June 27, 1978) (on file with author).

[175] Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William S. Cohen, Senator, U.S. Senate (Mar. 5, 1979) (on file with author).

[176] LYMAN P. DUFF, REPORT ON THE CANADIAN EXPEDITIONARY FORCE TO THE CROWN COLONY OF HONG KONG 2 (1942); A.R. Menzies, Canadian Views of United States Policy Towards Japan, 1945–1952, in WAR AND DIPLOMACY ACROSS THE PACIFIC, 1919-1952 at 159-60 (A. Hamish Ion & Barry D. Hunt eds., 1988).

British Empire–permitted American military forces and U.S. citizens involved in defense construction projects to be stationed in Canada.[177] Chief Justice Thibadeau Rinfret and Justice Ivan Rand of the Canadian Supreme Court headed a commission to establish limitations on Canada's criminal and civil jurisdiction over U.S. citizens and soldiers involved in the protection of Canada.[178] In 1945, in Canada, the Governor General, on the advice of Prime Minister William Lyon McKenzie King, appointed Supreme Court Justice Roy Lindsay Kellock to lead an investigation into a mass riot of Canadian naval personnel in Halifax, Nova Scotia.[179] The following year, in a similar process, Kellock, along with Supreme Court Justice Robert Taschereau, investigated a far graver national security matter: Soviet espionage in Canada and the United States.[180] Known as the Kellock-Taschereau Investigation, the justices approved of secretive questioning and the temporary imprisonment of suspects without access to the courts, which resulted in over ten convictions, including a member of the Canadian Parliament.[181]

In 1954, another Soviet government official defected to the west and promised information on Soviet espionage activities involving the host government's officials, this time in Australia. Known as the Petrov Affair, Prime Minister Menzies appointed three judges from three of the Australian states' highest courts to investigate how far the Soviet Union and the Australian Communist Party had penetrated into the government.[182] Initially, Menzies sought Chief Justice Sir Owen Dixon of the High Court to head the investigation but Dixon, perhaps realizing the problems inherent in Kellock's and Taschereau's

[177] DUFF, supra note 166; Menzies, supra note 166.

[178] IVAN RAND, IN THE MATTER OF A REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS, in National Archives of Canada (1943) (on file with author) (Can.) (During World War II, the Canadian provincial governments were concerned that the thousands of Americans employed building the Alaska Highway were shielded from Canadian criminal and civil jurisdiction, but Rinfret concluded that as long as the United States prosecuted the criminal conduct of it military personnel and repaid Canadian citizens for damages, the exemption from jurisdiction comported with international law).

[179] R. L. KELLOCK, REPORT ON THE HALIFAX DISORDERS, MAY 7-8, 1945 (1945) (Can.). On May 7, a victory celebration in Halifax evolved into a riot when thousands of Canadian sailors were permitted to leave their ships and protested the high price of alcohol and the lack of accommodations by setting fire to buildings, tram cars, and looting stores. For information on the riot, see Marc Millner, Rear Admiral Leonard Warren Murray: Canada's Most Important Operational Commander, in THE ADMIRALS: CANADA'S SENIOR NAVAL LEADERSHIP IN THE TWENTIETH CENTURY 118–19 (Michael Whitby et al. eds., 2006).

[180] ROBERT TASCHEREAU & R. L. KELLOCK, THE REPORT OF THE ROYAL COMMISSION 7 (1946) (Can.). In 1945, Igor Gouzenko, a Soviet Union citizen, assigned as a cypher clerk in the Soviet Embassy in Ottawa and provided Canadian and British intelligence with information that the Soviet Union had obtained information on nuclear weapons projects from scientists working on the Manhattan Project and that there were Soviet Agents in the Canadian government. AMY KNIGHT, HOW THE COLD WAR BEGAN: THE IGOR GOUZENKO AFFAIR AND THE HUNT FOR SOVIET SPIES 30–34 (2005). The Federal Bureau of Investigation (FBI) also participated in questioning Gouzenko and learned of communist activities in the United States. Id. at 39. The Canadian member of Parliament, Fred Rose was convicted of espionage and sentenced to six years in prison. See DAVID LEVY, STALIN'S MAN IN CANADA: FRED ROSE AND SOVIET ESPIONAGE 150 (2011). To date, he is the highest-ranking Canadian government official to be convicted of a crime. See id. at 151.

[181] J. PATRICK BOYER, A PASSION FOR JUSTICE: HOW 'VINEGAR JIM' MCRUER BECAME CANADA'S GREATEST LAW REFORMER 190–93 (2008).

[182] ROBERT MANNE, THE PETROV AFFAIR: POLITICS AND ESPIONAGE 114–16 (1987).

appointments in Canada, demurred and advised Menzies to select judges who were not a part of the nation's court of last resort.[183] Still, the fact that three judges, Justice William Owen of the Supreme Court of New South Wales, Justice George Coutts Ligertwood of the South Australian Supreme Court, and Justice Roslyn Philp of the Queensland Supreme Court, were appointed by Menzies underscored that the judges had departed from their judicial duties and were subject to the prime minister.[184] In 1950, with his party in the majority in the Australian Parliament, Menzies tried to outlaw the Communist party of Australia, but by 1955 his party had lost popularity.[185] The Petrov Affair was partly responsible for Menzies and his Conservative Party defeating a Labour Party challenge, led by his opponent Herbert V. Evatt, in late 1955.[186]

Although one could argue that because the Supreme Court of Canada and the High Court of Australia were not, until 1949, courts of final review, aggrieved appellants could always appeal to the Judicial Committee of the Privy Council.[187] However, given the few appeals that the Judicial Committee took from either of the two Dominions, it was unlikely that any of the persons denied financial redress from the Halifax Riot, or from the conduct of United States military personnel in Canada, or the persons imprisoned or convicted as a result of the Kellock-Taschereau Investigation would find a receptive Privy Council, or for that matter, would any aggrieved person challenging the use of judges in Australia's Petrov Inquiry.

Since 1957, the High Court has determined that extra-judicial activities in matters not directly related to the judicial branch undermine judicial independence.[188] The decision, titled Kirby ex Parte Boilermakers, arose from a communist-oriented labor union's challenge to the government's appointment of judges to arbitration courts, when the arbitration decisions ordering unions to return to work would be appealed to the judicial branch.[189] The High Court concluded that Australia's judges could not be vested with any legislative or administrative power without violating the independence of the judicial branch.[190] In 1996, the High Court of Australia once more determined that extra-judicial activities at the behest of the government compromised judicial independence to the point of incompatibility for judicial service in a decision unrelated to national security.[191] In 1982, Canada

[183] Id. at 114.

[184] Id.

[185] DAVID LOWE, MENZIES AND THE 'GREAT WORLD STRUGGLE': AUSTRALIA'S COLD WAR, 1948–1954 at 65 (1999).

[186] Id. at 123–24.

[187] NICHOLAS ARONEY ET AL., THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA: HISTORY, PRINCIPLE, AND INTERPRETATION 31 (2015).

[188] R v. Kirby (1956) 94 CLR 254 (Austl.).

[189] Fiona Wheeler, The Boilermakers' Case, in AUSTRALIAN CONSTITUTIONAL LANDMARKS 160, 164–66 (H.P. Lee & George Winterton eds., 2003).

[190] Kirby, 94 CLR at 298.

[191] Wilson v. Minister for Aboriginal Affairs and Torres Strait Islander Affairs (1996) 189 CLR 1 (Austl.) (arising from a challenge to the appointment of Justice Jane Matthews from the Federal Court of Australia–a court which determines civil cases and appeals arising from challenges to statutes and whose decisions are appealable to the High Court of Australia–to prepare a report as to whether the construction of a bridge violated the Aboriginal and Torres Strait Islander Heritage Protection Act 1984). In Wilson, the High Court held: "no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power." Id. at 17. It would appear, from the language of this decision, that the use of judges, such as had occurred in the Petrov Inquiry, would no longer be permissible.

adopted the Charter of Rights and Freedoms, but while the Charter has not expressly prohibited the use of judges on inquiries, it is clear through its language that the use of judges to perform executive or legislative functions is impermissible.[192]

One of the many noteworthy aspects of the Canadian and Australian extra-judicial experiences is how some of the United States justices signaled their approval. In 1947, Justice Rand penned Frankfurter his approval of the Kellock-Taschareau investigation.[193] In December 1955, Douglas wrote to Menzies his congratulations on the Petrov investigation as well as Menzies' defeat of Evatt in the Australian elections.[194] "A news account says that while Labor washed its linen in public, you merely tossed in handfuls of detergent,"[195] Douglas wrote. "But your detergent practically ate up his linen, didn't it?"[196] Frankfurter parroted Douglas' congratulations in a letter to Menzies in early 1956, to which Menzies expressed his thanks.[197]

III. Conclusion

While it is reasonable for a presidential administration to nominate attorneys with considerable government service to federal judicial positions, once on the bench, there should be greater transparency in extra-judicial conduct and greater use of disqualification than the historic model presents. As noted in the introduction, this symposium article is more limited in space than a book or even a full-length article. Yet, it hopefully meaningfully adds a new dimension to a discussion on whether there should be a new rule-set on judicial activity and speech regarding disqualification. Certainly, as a constitutional branch of the federal government, the judiciary has a compelling interest in the survival of the nation's democratic government. But this compelling interest should not undermine one of the most fundamental of rights and expectations of the judiciary–that it be both impartial and independent. The historic record, as discovered in various archives across the United States, evidences that judges have tolerated a weaker standard for applying the traditional rules safeguarding the right to an impartial and independent federal judge in national security matters. A commitment to transparency–more than that practiced by past judges–would assist in depoliticizing the judiciary.

Nota redacției: Articolul a fost publicat inițial în *The Elon Law Journal, Vol. 12, No. 2, 2020*, Revista Forumul Judecătorilor primind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.

[192] See, e.g., Patrick Monahan & Byron Shaw, The Impact of Extra-Judicial Service on the Canadian Judiciary: The Need for Reform, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 428, 428–51 (H.P. Lee ed., 2011).

[193] Letter from Ivan Rand to Felix Frankfurter (Dec. 21, 1947) (on file with author).

[194] Letter from William O. Douglas to Robert Menzies (Dec. 20, 1955) (on file with author).

[195] Id.

[196] Id.

[197] Letter from Robert Menzies to Felix Frankfurter (Jan. 18, 1956) (on file with author).