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Book Review- The Appearance of Justice, Serving Justice

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BOOK REVIEWS

THE APPEARANCE OF JUSTICE. By John P. MacKenzie. New York: Charles Scribner's Sons. 1974. Pp. 241. $8.95.

*Reviewed by William K. Slate, II**

". . . [T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' "[1] This theme resounds throughout the book born of that phrase. The ethical conduct of judges, primarily those of the federal judiciary, is examined by the author from a posture which is basically non-political. In so doing, the author scrutinizes judicial conduct in detail, from the denial of the position of Chief Justice to then Associate Justice Abe Fortas, to the questionable propriety of Justice Rehnquist sitting in *Branzburg v. Hayes* and *Laird v. Tatum*,[2] because of his alleged pre-judgments. The lobbying efforts of certain Justices and Chief Justices on behalf of legislation pending before Congress are examined in light of professional as well as personal ethics. Similarly, the fitness of extra-judicial involvement by judges in a variety of roles is considered: when they serve as advisors to Presidents, as a chief prosecutor of the Nuremberg trials, and as the chairman of a commission investigating the assassination of a President. MacKenzie discusses the inner workings of two institutions as they pertain to judicial ethics: the Judicial Conference of the United States and the American Bar Association. The former is the administrative clearinghouse and policymaking body of the federal court system. The Chief Justice is the Conference chairman. The Conference members include the chief judges of the eleven circuits, eleven district court judges elected by the judges of their respective circuits, and the chief judges of the United States Court of Claims and the United States Court of Customs and Patent Appeals. Among the Conference's concerns is the subject of ethics. The American Bar Association's Special Committee on Standards of Judicial Conduct is lightly scorched for its failure, in the author's view, to provide sufficiently strict canons of judicial ethics.

From the outset, MacKenzie acknowledges that corrupt judges are rare fellows and that the majority of American federal judges are honest, able, and desirous of discharging the duties of their office justly. It is also con-

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1. *In re* Murchison, 349 U.S. 133, 136 (1955), *citing* Offutt v. United States, 348 U.S. 11, 14 (1948).

2. Branzburg v. Hayes, 408 U.S. 665 (1972); Laird v. Tatum, 408 U.S. 1 (1972).

ceded that ethical and behavioral considerations are not the whole of judging. However, in describing the courtroom conduct of Judges Harold R. Medina and Julius J. Hoffman, in two trials noted for their uproariousness,[3] the author makes a case that conduct is inextricably a paramount part of the whole of judging.

A practice familiar to every attorney is attacked in a chapter entitled *The Velvet Blackjack.*[4] The title describes a situation where a judge has an interest in a case which he has been assigned to hear. One hypothetical case offered is where there is an insubstantial ownership of stock by the judge in one of the companies which is a party to the proceeding. The judge makes his interest known and inquires of counsel as to their objection to his continuing to sit. In paraphrasing John P. Frank, the author maintains that the velvet blackjack of subtle coercion has now been wielded—the inference being that if counsel objects and requests the judge to recuse himself, a vengeful judge may, in future cases, see that counsel many times over regret their objection.

The author, in assessing both the appearance and the reality of judicial integrity, distills into his book over a decade of experience[5] as a court reporter for *The Washington Post.* In chapters unconnected but for the ethical thread, the book combines, often with historical references, an outsider's independence with knowledge gleaned from inside exposure.

One such successfully developed historical case establishes that ethical standards have indeed changed. Therefore, in light of today's standards, some past judges' conduct may be termed scandalous: note that of the first Chief Justice, John Jay, in negotiating a treaty with Great Britain while holding judicial office, or that of John Marshall in judging the legality of commissions he had signed as a cabinet official, while rendering his opinion in *Marbury v. Madison.*[6] In a situation of more recent vintage, Justice Blackmun has concluded that his conduct, while a circuit judge, of sitting in four cases involving corporations in which he held stock, would not meet the requisites of the stricter standard required today. At his Senate confirmation hearings, Blackmun described the practice of his circuit that allowed a judge to sit in cases of so-called "insubstantial stock holdings" if the jurists disclosed their interests to each other.

3. United States v. Sacher, 9 F.R.D. 394 (S.D.N.Y. 1949); United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

4. J. MacKenzie, The Appearance of Justice 95 (1974).

5. In 1969 MacKenzie won the American Bar Association's Gavel Award for Supreme Court coverage the previous year.

6. 1 U.S. (1 Cranch) 368 (1803).

Although MacKenzie endeavors to be fair in judging the conduct of others, he is shackled at times by a subjectivity that results in an overextensive treatment of less serious incidents. Such inordinate treatment, indeed the greater part of a chapter,[7] is devoted to the refusal by Justice William H. Rehnquist to disqualify himself in the case of *Laird v. Tatum.*[8] The *Tatum* case raised the question of whether antiwar groups and pacifists could sue the government over the Army's program of surveillance, intelligence gathering, infiltration, and dissemination of information to other federal agencies. It was suggested on petition for rehearing before the Supreme Court, and reiterated by the author, that Justice Rehnquist should have disqualified himself "because of his role as principal administration defender and witness at extensive hearings on military surveillance held before [Senator Sam] Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon program, however unwise or regrettable, did not violate anyone's constitutional rights."[9] Rehnquist even went on to say that the *Tatum* lawsuit was not justiciable. MacKenzie explains that these were the very issues when the case reached the Supreme Court. For his refusal to recuse himself from sitting on the *Tatum* case, the author indicts the Justice for "one of the most serious ethical lapses in the Court's history."[10] MacKenzie, however, discounts too hastily and with insufficient consideration Mr. Justice Rehnquist's opinion in the *Tatum* case, in which he discussed the statute which governs the propriety of his sitting, 28 U.S.C. § 455. Rehnquist concluded that because "he never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in the Supreme Court in the government's conduct of the case of *Laird v. Tatum*[11] . . . ," and since he had neither been counsel nor a material witness, the governing statute which would demand disqualification was not applicable. The Justice added that it would be not merely unusual, but extraordinary, if a Justice came to the Supreme Court without having expressed opinions on constitutional issues in his prior legal career. "Proof," he said, "that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[12] MacKenzie continues his attack by taking exception to Justice Rehnquist's rather summary dismissal of the American Bar

7. J. MACKENZIE, *supra* note 4, at 207.
8. 408 U.S. 1 (1972).
9. J. MACKENZIE, *supra* note 4, at 213.
10. *Id.* at 209.
11. 409 U.S. 824, 828 (1972).
12. J. MACKENZIE, *supra* note 4, at 220.

Association's Code of Judicial Conduct, which admonishes in Canon Two that a judge should avoid even the appearance of impropriety in his activities. In fact, the discretion as to whether or not to sit is entrusted to the judiciary; Rehnquist acknowledged his duty under the statute and then published his reasons for his course of action.

In the area of so-called judge lobbying in behalf of legislation on Capitol Hill, the judiciary is taken to task for a number of instances in which they purportedly overstepped the boundaries of their branch of government. Yet Congress often needs and seeks the expertise of judges in matters ranging from judicial administration and prison reform to habeas corpus rights. "Social policy" is the term MacKenzie gives to areas deemed improper for judicial lobbying. Identification of such areas, however, is clearly a matter of judgment in most cases. It is noteworthy that though the judiciary is cautioned to "stick to judging," the author recommends that Congress enact legislation regulating judicial ethics. Admittedly Congress has the authority to establish and abolish the lower federal courts.[13] Notwithstanding, the setting of ethical standards for a coordinate branch of government may provide room for the view that the legislature is improperly intruding into the judiciary.

Is there a crisis of public confidence in the judiciary in America? Unfortunately, this book was printed before the Supreme Court ruled on the President's tapes in August of 1974.[14] Thus, a significant addendum would appear to be in order. There are over 500 federal judges in the United States. Both ethical precepts and the appearance of justice, ably examined by MacKenzie, are arguably violated by only a minuscule sample of judicial conduct. Generalizations, vis à vis the entire profession, do not logically follow. Likewise, the author's more extreme remedies, such as requiring judges and Justices to report their debts, appear unwarranted at this time. Finally, the author, by a combination of recommendations, would restrict off the bench activities and public speaking by judges. A semi-monastic existence, however, is not required to achieve justice, nor even the appearance of justice.

13. U. S. CONST. art. I, § 8; art. III, § 1.
14. United States v. Nixon, 418 U.S. ___, 94 S. Ct. 3090 (1974).

SERVING JUSTICE. By J. Harvie Wilkinson, III. New York: Charter House. 1974. Pp. 207. $7.95.

*Reviewed by W. Gibson Harris**

Jay Wilkinson is perhaps the outstanding Virginian of his age group. It is difficult to imagine how any young man desiring to become part of the main stream of American legal life could have better spent his formative years. He was a Phi Beta Kappa and a Magna Cum Laude graduate of Yale University, where he majored in history and made an in-depth study of the politics of his native state. In 1968, while attending the University of Virginia Law School, he received national acclaim for the publication of his book entitled, *Harry Byrd and the Changing Face of Virginia Politics*. At law school he was on the Law Review and was elected to the Order of the Coif. In 1970 he was a Republican candidate for Congress from Virginia's Third Congressional District and was appointed by then Governor Holton as the youngest member of the Board of Visitors of the University of Virginia. He is now serving at the University of Virginia as Assistant Professor of Constitutional Law.

Following law school graduation Mr. Wilkinson sought the position of law clerk to a Justice of the Supreme Court of the United States. After interviewing Justices White and Stewart, he received an appointment from the then new member of the Court from his own city of Richmond, Justice Lewis F. Powell, Jr.

Serving Justice is the story of Mr. Wilkinson's years as law clerk to Justice Powell. The book is, by any standard, well written. A portion is in the form of an historical autobiography and gives the highlights of events in the Supreme Court during its 1971 and 1972 terms. But the book is much more than merely a chronicle or summary of such events, for the author reveals his personal feelings and professional thinking on the many subjects inevitably involved in his work and that of the Court. As Professor John P. Frank points out in his *Foreword*, Mr. Wilkinson "brought to his year in the Court diligence, perceptiveness and principle," personal qualities which shine throughout the volume. One of the merits of the book is that it approaches the subject with respect and sensitivity, but without sensationalism, and yet conveys in an intimate way the flavor of the Court as it works from day to day.

The first part of the book is largely autobiographical, dealing with Mr. Wilkinson's own experiences as a clerk. He does not hold these out as

*Partner, McGuire, Woods and Battle, Richmond, Virginia; A.B., Princeton University, 1939; LL.B., University of Virginia, 1942.

necessarily typical of every clerk, but obviously there is much of general application. Every Justice has a somewhat different concept of the proper role of the clerks and the way in which he can obtain from them maximum assistance. By relating the experiences and opinions of clerks for other Justices, Mr. Wilkinson explores these differing concepts and views. This portion will thus be interesting to everyone who wonders exactly what law clerks do and where their influences stop. Mr. Wilkinson believes that with most Justices, and certainly with Justice Powell, there is no truth to the suspicion occasionally voiced that the clerks determine the course of the Court's decisions. And yet, we see plainly that law clerks have indeed contributed greatly to the intellectual quality of the Court's efforts and that the clerks are one of the Court's unique and indispensable assets. These early chapters will enlighten law students considering applying for similar positions and would appear instructive for all judges as to the use of their law clerks.

The second section of the book concerns Justice Powell himself, as both a man and a Justice. As with valets, historically law clerks have not always ended their service with the highest regard for the man with whom they have been in close association. We might expect the reverse here, where the Justice had been a family friend and mentor of his youthful aide for many years prior to their professional relationship, and indeed we do find this clerk to have the highest regard for his Justice. On the evidence presented in these pages, as well as in the decisions already written by Justice Powell and the positions taken by him on the Court, this judgment would seem objectively justified and supported by the record.

The chapter on *The Justice* blends a warm personal insight with a thoughtful judicial portrait of Justice Powell. Powell is seen as possessing a model judicial temperament—a combination of balance, broad life experience and personal equanimity. He is presented as a human being who has risen above the petty and vindictive emotions that consume so many in public life and as having arrived at a mature vision of life in which human dignity and responsibility, as twin virtues, are paramount. Mr. Wilkinson thinks that one of Mr. Justice Powell's finest characteristics is his compassion and his feeling for people as individuals. Perhaps the most impressive evidence cited in the book on this is the testimony given in favor of his confirmation to the Court by a black woman who had worked with him in establishing the OEO Legal Services Program, that "Lewis Powell is, above all humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends idealized or fixed positions."

A second basic characteristic of the Justice, as seen by his clerk, is his independence. To those who knew Mr. Powell before his elevation to the

Court, this quality was well known, and it has been a source of satisfaction and almost amusement to them to observe the nation become aware of this quality as it has read his opinions and seen that the Justice's positions are not foreordained by bias of region, background, or economic circumstance. Mr. Wilkinson's pages cite chapter and verse, showing in how many cases Justice Powell has already come to be perhaps the decisive element in determining the Court's position in vital areas of the law. Certainly he has not blindly cast votes with the other members of the Court who happen to have been appointed by the same President.

Practicing lawyers will be particularly interested in the transition that was involved in passing from a highly professional but non-specialized practice in one of the outstanding law firms of the country, to a seat on the Supreme Court. In the case of Justice Powell, this was a transition he did not seek and one that he has said on many occasions he really did not wish. The transition here, however, seems to have been made with the Justice's usual good humor but only with a tremendous increase in his personal work hours. The book brings out vividly the far lesser amount of assistance that is available to a Supreme Court Justice than to a top partner in almost any sizable American law firm. As in the case of Chief Justice Burger, Mr. Justice Powell has spoken publicly on the need for additional assistance of all kinds for each member of the Court, and bar associations across the nation are lending their active support to have Congress supply it.

Mr. Wilkinson does not in so many words term his mentor one of the great Justices of the Court, but the facts marshalled in the volume, as well as the record of Mr. Justice Powell's own writings and positions, point clearly in that direction. Such a conclusion will come as no surprise to those who worked closely with Mr. Powell before his elevation to the Court, for as President Nixon said in announcing the appointment: "Everything that Lewis F. Powell has undertaken he has accomplished with distinction and honor."

The last portion of the book passes from a consideration of a single Justice to a study of the Court as a whole. For the layman it describes the place of this institution in the American political scene as well as in American life, and for the professional it gives keen insights into the reasoning and positions of the individual members of the present Court.

Mr. Wilkinson, on the basis of his personal observations as well as his studies in constitutional law, is a firm and deep supporter of the Supreme Court, both as our court of final resort and as the most fascinating branch of the American government. He feels strongly that it must remain a court and not a political forum. This, he writes, can and will be done through

the tradition that encourages the nine Justices to retain their independence and thereby preserve the institution's continuity. He understands that the nature of any important Supreme Court decision is enormously complex and, at the same time, "enormously vulnerable to oversimplification." He shows us that, even amidst radical changes of personnel, the Court remains sensitive to the continuous and evolutionary character of the law. He points out that the changes that have been brought about by this Court have been far from the wholesale repeal of the work of the Warren Court that had been expected in many quarters, and says that as yet no significant Warren Court holdings in the field of criminal law have been directly overruled. With perhaps a sly intendment, he adds that this would appear "a major feat" since that Court itself overturned many other pre-existing decisions.

The final pages of the book were composed, as Mr. Wilkinson describes it, in "the autumn of Watergate." He deplores that then unravelling scandal, but even against that background he felt relieved to know that the Supreme Court would carry on with an inner sense of integrity and a commitment to the public trust. How wise he was! Since then we have read the unanimous opinion of the Court that even the President of the United States is not above the rule of the law.