Baseball, Kenesaw Mountain Landis, and the Judicial Strike Zone - Home Run or Foul on the Play?

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We love both the game and the flimflam because they are both so...American. Baseball has been blessed in equal measure by Lincoln and by Barnum. 1

- Tom Thorn

Introduction

Babe Ruth, Lou Gehrig, Micky Mantle, and Shoeless Joe Jackson—There are many well-known baseball legends, but perhaps less well-known is the story of Kenesaw Mountain Landis, a judge turned baseball commissioner who inspired not only baseball fans, but also the American Bar Association’s first Judicial Canon of Ethics. The parallel stories of baseball’s greatest scandal, the judge appointed to be the first baseball commissioner, and the development of the judicial canons, provide context for the current controversial judicial prohibition—the appearance of impropriety.

So, let’s first travel back to the 1919 World Series “Black Sox” scandal. Eight White Sox players were indicted and charged with fixing the 1919 World Series—a series played against the Cincinnati Reds. America’s popular past time had been sullied; baseball team owners sought a solution to restore baseball’s reputation integrity and honor.

What could be more honorable than hiring a baseball commissioner? Especially if the first Commissioner happened to be the Honorable Kenesaw Mountain Landis, a Chicago Federal District Court Judge who had proven to be a huge baseball fan, especially aligned with the Chicago Cubs. 2

2 Shayna M. Sigman, “The Jurisprudence of Judge Kenesaw Mountain Landis,” 15 Marquette Sports Law Review, 277, 283 (2005) (citing J.G. Taylor Spink, Judge Landis and Twenty-Five Years of Baseball 73-77 (1947)) Landis, a National League fan, “was especially a fan of the Chicago Cubs in an era when he could witness the triumph of his heroes (e.g., Mordecai Brown, Tinker-Evers-Chance) at West Side Park.”
In fact, in 1915, Judge Landis had presided over a baseball antitrust case filed by an upstart Federal League against the National League and American League, known as Organized Baseball (which later became Major League Baseball). Landis apparently delayed ruling for “an entire baseball season and beyond” until after his encouragement, the parties reached a settlement.\(^3\)

Baseball owners took notice of both Judge Landis’s enthusiasm for the sport and his handling of the case.\(^4\) Thus, in 1920, while simultaneously serving as a federal district court judge, Kenesaw Mountain Landis accepted the owners’ invitation to become the first baseball commissioner—a position that he held until his death in 1944. And the rest, as they say, is history...Not only an interesting story about baseball's early woes, but also about baseball's impact on the judicial canons of ethics. Say, what? Let's explore the connection.

**Baseball History & The Black Sox Scandal**

Baseball scholars and historians disagree about where and when baseball began. Some historians reference the mention of the game in a 1744 English children’s book. Others rely on Albert Goodwell Spalding’s 1908 commission’s conclusion that Abner Doubleday invented baseball in 1839 in Cooperstown, New York—the current location of the Baseball Hall of Fame. Critics of the 1908 proclamation immediately challenged the results and the controversy continued.

While a fascinating slice of baseball history, a detailed exploration of baseball’sorigination is beyond the scope of this article. However, there is little doubt that American baseball evolved in American cities during the nineteenth century. Moreover, at least one baseball historian, Tom Thorn, credits the early success of baseball to its appeal to gamblers.

“I don’t think you could have had the rise of baseball without gambling,” says Thorn. “It was not worthy of press coverage. What made baseball seem important was when gamblers figured out a way to spur interest in it. ... You would not have had a box score. You would not have had an assessment of individual skills. You would not have had one player of skill moving to another club if there were not gambling in it.”\(^5\)

Eventually gambling directly influenced the players and the game. The first gambling scandal occurred in 1865, resulting in three players being banned from the game.\(^6\) Fast forward to 1919, when the Black Sox scandal links baseball to the judicial canons and results in the judicial strike zone otherwise known as the appearance of impropriety.

\(^3\) Ibid.
\(^4\) Ibid.
\(^6\) Ibid.
The fallout from the Black Sox scandal was reported in the *New York Times* in the September 1920 headline: “Eight White Sox Players are Indicted on Charge of Fixing 1919 World Series; Cicotte Got $10,000 and Jackson $5,000.” These eight players were charged with conspiracy to fix the outcome of the 1919 World Series played between the White Sox and the Cincinnati Reds. Despite initial confessions (that were later recanted) all the players were ultimately acquitted.

Judge Kenesaw Mountain Landis enters the scene amid the Black Sox scandal, when the baseball owners, in their effort to “clean up” baseball, offer Judge Landis the opportunity to become the first baseball commissioner. He accepts and the owners are thrilled to have a judge begin to restore the game’s reputation.

As we shall see, the ripple effect of Judge Landis’s two-year stint as both a federal district court judge and the baseball commissioner probably could not have been anticipated, especially as it relates to the creation of the judicial canons and the appearance of impropriety. But let’s not get ahead of the story. A brief exploration of Kenesaw Mountain Landis’s extraordinary life journey further sets the stage for the drama that results in the establishment of the judicial canons.

**Kenesaw Mountain Landis**

**Early Life**

When Mary Landis birthed her sixth child and fourth son on November 20, 1866, her husband Dr. Abraham Landis, a Civil War veteran, wanted to name the child Abraham. Apparently, Mary detested the name, and their son was not named for several months during which their entire community joined the debate. Ultimately, Dr. Landis suggested Kenesaw Mountain Landis and his wife agreed. Kennesaw Mountain was intertwined with Dr. Landis’s identity as his leg was badly mangled by a (spent) cannonball bounding into his surgical headquarters at the Battle of Kennesaw Mountain.

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10 *Ibid*.

11 *Ibid*. Note also that both spellings of Kenesaw were accepted in the nineteenth and early twentieth centuries although Kennesaw is the current standard spelling for the mountain but not the man.
Kenesaw Mountain Landis was born near Cincinnati, in Millville, Ohio into a highly engaged, dynamic family in which his four older brothers became journalists and politicians. The family moved to Logansport, Indiana in 1875 where Kenesaw spent the remainder of his youth. Young Kenesaw was described as having a certain “something”—an outgoing personality and perhaps a type of charisma and lordly aura that caused his family to nickname him “Squire.” The nickname stuck and proved to be apropos. Kenesaw later observed, “I do remember that when I was a youngster, I had an ambition to become the head of something. I mean the man who was responsible to nothing except his own conscience.”

**School and Early Employment**

Despite his youthful ambition, Kenesaw's journey to achieve his positions as judge and commissioner did not follow a traditional route, at least by contemporary standards. In fact, after struggling with algebra, a frustrated Kenesaw dropped out of high school—a decision of which his father did not become aware for another six months. Kenesaw took a position as a clerk at the local grocery store and, despite his father’s best efforts, Kenesaw remained unpersuaded to return to school. He tried his hand at various menial jobs and eventually went to work for his brother at the Logansport Journal where he was exposed to the new process of shorthand court reporting while covering proceedings at the local court house. Kenesaw learned the new technique and soon became the official circuit court reporter in Lake County, Indiana—a position that he held from 1883-1886.

Described as both hyperkinetic and of small stature (at 5'6 and no more than 130 pounds), Kenesaw nonetheless was also known as a local athlete with terrific dexterity. He played first base for the local semi-pro team and competed in early bicycle racing.

**Politics and Becoming a Lawyer**

In 1886, Kenesaw became involved in another type of race; he supported a friend who won the election for Indiana secretary of state and Kenesaw received a prominent position in the department. While working as the assistant to the secretary of state, Kenesaw secured admission to the Indiana State Bar on July 13, 1889. Indiana law did not require an examination and Kenesaw eventually left his position at the secretary of state’s office to read law with a firm in Marion, Indiana.

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12 Ibid., 4-7.
13 Ibid., 7.
14 Ibid., 8.
16 Ibid., 9.
17 Ibid.
18 Ibid., 10.
19 Ibid.
20 Ibid.
21 Ibid., 11.
Eventually, Kenesaw concluded that being a self-taught lawyer limited his path to success. He enrolled in Cincinnati’s YMCA Law School—neither a high school nor a college degree was required. After being black balled from the school’s fraternity-dominated life by the more polished, college graduate students, Kenesaw organized other outcasts and captured the school elections. Kenesaw completed law school at Union Law School in Chicago (now part of Northwestern).

Although not at the top of his class, he graduated in 1891, gained admission to the Illinois Bar, and became an assistant on the Union faculty. He practiced law and developed a reputation as a reformer. In fact, he joined Clarence C. Darrow and William Bross Lloyd to form the nonpartisan Chicago Civic Centre Club with the goal of reforming local government.

Young Kenesaw Landis’s political experience would not be limited to local Chicago politics as he was asked by old family friend and mentor, Judge Walter Gresham, to accompany Gresham to Washington, D.C. Gresham became the Secretary of State for President Grover Cleveland, and a twenty-six-year-old Landis became Gresham’s personal secretary. The two were inseparable and when Gresham became ill, Landis often attended cabinet meetings in his stead.

Landis astutely handled both the press and the politicians while maintaining an impressive schedule. He established a national reputation while obtaining a real time political education as he had entered the state department with no knowledge of foreign affairs. He made his presence known, an acquired taste for some, because similar to his law school behavior, he overtly demonstrated his lack of patience for elitist attitudes. When Gresham died in office, President Cleveland offered Landis an ambassador post, but Landis decided to return to Chicago to the practice of law.

**Returning to Chicago and Becoming a Judge**

Landis returned to Chicago not only to build a successful law practice, but also to secure his relationship with Winifred Reed. They had been introduced when she was visiting her sister in

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22 Ibid., 12.
23 Ibid.
24 Ibid., 14-17.
25 Ibid., 25.
26 Ibid., 19-20, 24.
27 Ibid., 17.
28 Ibid., 20.
29 Ibid., 27, 29.
D.C., and smitten, Landis began commuting back to Illinois to be with her until he finally returned to Chicago. Landis and Ms. Reed were married in 1895 and eventually had three children.30

Landis became a well-established corporate attorney but also remained involved in politics. He continued to hone his public speaking talent and to display his contempt for elitist titles and attitudes. He often referred to the Chicago federal judiciary by their common names without their judicial titles.31

In 1905, President Theodore Roosevelt appointed Landis to the Federal District Court in Illinois. Landis’s political connections and reputation landed him the appointment and the assignment to a courtroom in the new federal building in Chicago.32 The two-story mahogany, brass, and marble courtroom that contained murals of King John conceding the Magna Carta and Moses with the Ten Commandments, set the stage for Judge Landis’s fifteen-year dynamic judicial career.

**Reputation and Experience as a Judge**

Judge Landis’s appointment in the Northern District of Illinois placed him at the epicenter of the Midwest, which was a major railway center. The early 1900’s, characterized as the Progressive Era, evidenced early attempts to enforce the Sherman Antitrust Act as railroad monopolies upset the executive and legislative branches of government as well as the public.33 Thus, the first half of Judge’s Landis’ stint on the bench often involved antitrust cases dealing with railroad rebates and corruption. In fact, in a famous case involving John D. Rockefeller, the *New York Times* reported:

Judge Kenesaw M. Landis of the United States District Court today fined the Standard Oil Company $29,240,000, the extreme limit of the penalty fixed for the acceptance of illegal rebates. In the announcement he closes, so far as his court is concerned, what is regarded as the most important case against a trust in the history of the United States.34

After the Standard Oil case, Judge Landis achieved “most talked of person in America” status.35

Later in his judgeship, Judge Landis presided over the high-profile Sedition Act cases, which involved World War I era government prosecutions of alleged socialists.36 The Sedition Act cases also garnered national attention and provided a platform for Judge Landis’s propensity to engage in courtroom theatrics.37

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33 Sigman, “Jurisprudence of Landis,” 282 (citations omitted).
Generally, the press, the bar, and the academic world popularized his opinions even if he was ultimately reversed.\textsuperscript{38} Interestingly, Judge Landis armed himself not only with relevant jurisprudence, but also with knowledge of popular sentiment sometimes leading him to rule based on what he believed was the correct decision in the current societal context.\textsuperscript{39}

**The Federal League Case**

Perhaps the foreshadowing of Judge Landis’s ultimate career as the first baseball commissioner may be found in his handling of the 1915 antitrust lawsuit filed by baseball’s fledgling Federal League against the National League and American League. (These two leagues agreed to merge into Organized Baseball, known today as Major League Baseball.)

Judge Landis, an enthusiastic Chicago Cubs fan, encouraged the parties to settle the case. As mentioned above, it appears that he intentionally delayed ruling on the case beyond an entire baseball season. Eventually, the parties agreed to a settlement, so he never had to render an opinion in the case.\textsuperscript{40} Both his devotion to baseball and the handling of the Federal League case caught the attention of baseball owners who would soon be confronted with the Black Sox scandal and the need to “clean up” America’s favorite pastime. \textsuperscript{41}

**First Baseball Commissioner (1920-1944)**

On November 12, 1920, baseball’s team owners asked Judge Landis to become baseball’s first commissioner. Judge Landis was not only a baseball fan, but also the fact that he was a high-profile federal judge lent credibility to the position. Landis accepted the position and served initially as both a federal judge and the baseball commissioner.\textsuperscript{42} His charge was “to restore public faith in the professional baseball league”\textsuperscript{43} by employing any methods necessary “to bring to book anyone connected with baseball in any capacity, from ‘magnate’ to bat boy, who is suspected of conduct or associations detrimental to the best interests of the sport.”\textsuperscript{44}

It is important to note that Judge Landis, who was accustomed to having his decisions appealed, insisted on having the final word before he accepted the position as commissioner. He indicated that he “wouldn’t take this job for all the gold in the world unless I knew my hands were free.”\textsuperscript{45} His decisions were not to be challenged in a court of law; the baseball team owners agreed

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\textsuperscript{38} Sigman, “Jurisprudence of Landis,” 278 (citations omitted).
\textsuperscript{39} Sigman, “Jurisprudence of Landis,” 279.
\textsuperscript{40} Sigman, “Jurisprudence of Landis,” 283 (citations omitted).
\textsuperscript{41} Sigman, “Jurisprudence of Landis,” 283 (citations omitted).
\textsuperscript{43} Ibid.
\textsuperscript{45} Andrew Green, “The Judge Who Became Commissioner: Kenesaw Mountain Landis, the Judiciary & Baseball,” Judging in the American Legal System (May 7, 2009), 22 (citing Baseball: A Film by Ken Burns: Inning 3 – The Faith of Fifty Million People (PBS television broadcast Sept. 20, 1994) (referring to Landis as a “Federal judge with a
to assign the commissioner broad powers and abide by his decisions.\footnote{Sigman, “Jurisprudence of Landis,” 283 (citations omitted).}

Of course, Commissioner Landis’s most famous act remains his decision to impose a lifetime ban on eight members of the Chicago White Sox for their alleged role in the 1919 World Series scandal.\footnote{Sigman, “Jurisprudence of Landis,” 284 (citations omitted).} The lifetime ban was imposed despite their acquittal by a jury.

Thus, Commissioner Landis imposed an appearance of impropriety standard in baseball before that standard applied to judges and prior to the existence of the judicial canons. He explained, “Regardless of the verdict of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever again play professional baseball.”\footnote{Sigman, “Jurisprudence of Landis,” 278 (citations omitted).}


The Ironic “First” Judicial Appearance of Impropriety

Although the baseball owners embraced Judge Landis’s willingness to serve simultaneously as Commissioner Landis, Congress and the judiciary were not similarly inclined. The belief was that Commissioner Landis’s high-profile baseball position damaged judicial integrity.\footnote{“Code of Judicial Conduct: History of the Code,” J Rank (accessed Feb. 2020), https://law.jrank.org/pages/5327/Code-Judicial-Conduct-History-Code.html.} Moreover, the Commissioner position came with a substantial salary thereby flaming the fuel of displeasure and the belief that Commissioner Landis would neglect his judicial duties.\footnote{Green, “Judiciary & Baseball,” 21-2 (citing John P. Mackenzie, The Appearance of Justice, 180 (1974), 181 (Landis’ actual salary was $42,500, as he deducted his judicial salary from that which the baseball owners were willing to pay); Spink, Twenty-Five Years of Baseball, 72).} (Judicial salaries at that time were $7500.00 per year and the Commissioner’s annual salary began at $50,000.00.\footnote{Green, “Judiciary & Baseball,” 22.})

seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as arbitrator or commissioner."54 Nonetheless, Congressman Benjamin F. Welty, a lame-duck representative from Ohio, sought to impeach the Judge.55 “This was a rare and extreme measure, as only six federal judges had been impeached at that point in American history, four of whom were convicted and removed from the bench.”56

The Impeachment Investigation, ABA Censure, and The Canons

Congressman Welty’s Accusations

Congressman Welty based his motion to impeach Judge Landis on an alleged conflict of interest.57 Judge Landis was charged with “neglecting his official duties for another gainful occupation not connected therewith.”58 Welty asserted that Judge Landis must be neglecting his duties since the obligations of his full-time judicial position would not allow for a second job.59

Welty further complained that Judge Landis had become the “chief arbiter of a trust [which had been declared] illegal [yet at the baseball owners'] request remained on the Federal bench”60 thereby further evidencing a conflict of interest. (Both the Court of Appeals and the US Supreme Court would eventually rule against the trust allegations.)

The House Judiciary Committee held a hearing after which it declined to further investigate. However, the Committee did leave the issue pending for the next Congress. The Committee recognized that if Welty’s accusations could be proven then Judge Landis’s conduct would be “inconsistent with the full and adequate performance of the duty of . . . Landis as a United States District Judge, and that said act would constitute a serious impropriety on the part of said judge.”61 Ultimately, Judge Landis was never impeached.

ABA Censure

The ABA also disapproved of Judge Landis’s dual roles. However, a federal judge could only

54 McKoski, “Judicial Discipline,” 1923 (citations omitted).
56 Green, “Judiciary & Baseball,” 22 (citing Conduct of Landis Hearings, 19 (statement of Benjamin F. Welty)).
58 Green, “Judiciary & Baseball,” 23 (citing Conduct of Landis Hearings, 4-5 (statement of Benjamin F. Welty)).
59 Green, “Judiciary & Baseball,” 23 (citing Conduct of Landis Hearings, 18 (statement of Benjamin F. Welty)).
60 Green, “Judiciary & Baseball,” 23 (citing Conduct of Landis Hearings, 18 (statement of Benjamin F. Welty)).
be removed through impeachment proceedings and the US Attorney General had opined that no law prevented a judge from supplementing their salary with a baseball commissioner position. Thus, the ABA had little meaningful recourse in 1921.

Therefore, the ABA employed its only power, which was to censure Judge Landis. The ABA issued a censure that stated that Judge Landis’s conduct “meets with our unqualified condemnation, as conduct unworthy of the office of Judge, derogatory to the dignity of the bench, and undermining public confidence in the independence of the judiciary.” Because the censure of Judge Landis could not be based on the violation of any law, it was based on an appearance of impropriety.

Judge Landis asserted that he had not committed any impropriety and explained, “The public supports baseball, and the public is entitled in return to the best efforts of the players. If . . . I . . . leave the game as clean as it is today, I shall feel proud of my record and will feel that it offers ample refutation of the charge that it is undignified for a member of the judiciary actively to be associated with professional baseball.”

Interestingly, although the roles of judge and commissioner are distinct, it has been said that Kenesaw Mountain Landis approached the judiciary and professional baseball in like manner.

[T]he scholarly divorce of Landis in the district court and Landis on the diamond is an artificial one. In both contexts, Landis: (a) relied on a common set of principles in reaching his decisions; (b) used opinion writing or public pronouncement to rationalize and legitimize results by making them seem inevitable and morally right; and (c) carefully employed the press, guarding some material as private while sharing other information... A pragmatist on the bench and in baseball, Landis comfortably borrowed from the legal principles and procedures of the federal court when it suited his purposes in governing in the non-legal setting of Organized Baseball, while shedding formalistic constraints dictated by either the law itself or the presence of higher authority.66

Nevertheless, after confronting the critics for a little more than a year, Judge Landis resigned from the bench in early 1922. Judge Landis’s dual roles and his resignation served as a catalyst for the ABA’s creation of the first official judicial canons of ethics.68

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The First Canons of Judicial Ethics

As evidenced by Judge Landis's story, in 1922, there was not a cohesive code of conduct to provide ethical guidance to judges. Although judges could be removed via impeachment, address or recall, the removal process was both cumbersome and politically charged.\textsuperscript{69} Thus, Judge Landis's conduct became a motivating factor in the ABA's 1922 establishment of its Commission on Judicial Ethics.\textsuperscript{70} Chaired by recently confirmed Chief Justice William Taft,\textsuperscript{71} the Commission drafted Thirty-four Canons of Judicial Ethics that were approved in 1924 as guidelines for the states.\textsuperscript{72}

The 1924 Canons admonished judges to avoid the appearance of impropriety in all professional and personal activities. Some of the literature attributes the repeated references to avoiding even a suspicion of improper conduct, to the outrage over Judge Landis's conduct. Some criticized the Canons as lacking in specific guidance and pointed to the preamble as evidence that the Canons were essentially an ABA “wish list” of judicial conduct.\textsuperscript{73}

The Preamble stated that the ABA, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their offices. . . the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.\textsuperscript{74}

Between 1924 and 1972 the Canons were cited by thirty-nine courts in determining whether a judge's conduct had been unethical with one federal court deeming the Canons to be an “admonition” of how judges should act.\textsuperscript{75} Perhaps Illinois Supreme Court Justice Robert Shaw's observation that the Canons did no more than caution judges to “abstain from all appearance of evil” best captured the general perspective on the original Judicial Canons.\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{70} Cohn & Lievense, \textit{Judiciary and ABA Model Code}, 273.
  \item \textsuperscript{71} Cohn & Lievense, \textit{Judiciary and ABA Model Code}, 273.
  \item \textsuperscript{72} A.B.A., \textit{About the Commission} (accessed Apr. 2020), \url{https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background/}.
  \item \textsuperscript{74} A.B.A. Reports, 1924:762.
  \item \textsuperscript{75} Cohn & Lievense, \textit{Judiciary and ABA Model Code}, 274 (citing Kinnear, 1969; Brooks Bros, 1945, 17).
  \item \textsuperscript{76} McKoski, “Judicial Discipline,” 1926 (citing In re Harriss, 4 N.E.2d 387, 388 (Ill. 1936)).
\end{itemize}
Interestingly, the application of the “appearance of evil” to the analysis of judicial conduct predates the 1924 Canons as early court cases cited Saint Paul’s appeal to the Thessalonians to “[a]bstain from the appearance of evil.” The courts, referencing Saint Paul’s plea, held that ‘[t]o keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided’ by jurors, lawyers, litigants, witnesses, and judges. Thus, the secularizing of evil by deeming it impropriety provides a logical explanation for the focus of the 1924 Canons.

The Judicial Canons and Impropriety Revisited: The 1972 Model Code

The 1924 Canons remained the normative standards until another federal judge’s receipt of extrajudicial income created a controversy in 1969 that motivated a revision of the Canons. Supreme Court Justice Abe Fortas’s conduct garnered 1969 headlines.

Justice Fortas had an agreement with the Wolfson Family Foundation to assist in planning its charitable, educational, and civil rights activities. In exchange for his assistance Justice Fortas received a $20,000.00 fee. When the fee was remitted, the Securities and Exchange Commission was investigating Louis Wolfson, the Foundation’s Director. When Wolfson was ultimately indicted for selling unregistered stock, Justice Fortas cancelled the agreement and returned the $20,000.00 consulting fee.

Similar to Judge Landis, Justice Fortas had not violated any law; however, both the media and the ABA focused on the appearance of impropriety or wrongdoing. In fact, Time magazine

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77 McKoski, “Judicial Discipline,” 1920-21 (citing In re Harriss, 4 N.E.2d 387, 388 (Ill. 1936) (“The 1924 Canons] were all succinctly summed up by St. Paul centuries ago when he advised the Thessalonians to abstain from all appearance of evil;); Eastham v. Holt, 27 S.E. 883, 894 (W. Va. 1897); see also State ex rel. Attorney Gen. v. Lazarus, 1 So. 361, 376 (La. 1887) (“All those who minister in the temple of justice . . . should be above reproach and suspicion. None should serve at its altar whose conduct is at variance with his obligations.”)).

78 McKoski, “Judicial Discipline,” 1926 (citation omitted).


81 McKoski, “Judicial Discipline,” 1927 (citation omitted).

dismissed the question of whether Fortas violated the law, asserting that it “misse[d] the point” because Fortas's actions gave rise to “a question about the appearance of virtue on the court.”

Life magazine published a story in which it reproduced Canon 4, which contained the mandates that a judge be free from the appearance of impropriety and that a judge's everyday life be conducted in a manner “beyond reproach.” Life magazine also quoted Canon 24's admonishment that a judge shall not incur pecuniary obligations which “appear to interfere with his devotion to the expeditious and proper administration of his official functions.”

The ABA Committee on Professional Ethics issued an informal opinion that censured Justice Fortas finding his conduct to be “clearly contrary to the Canons of Judicial Ethics.” The opinion referenced eight of the 1924 Canons; however, the “one most forcefully cited was Canon Four’s command that a judge's official conduct should be free from impropriety and the appearance of impropriety.”

Justice Fortas ultimately followed in Judge Landis's footsteps and resigned from the US Supreme Court on May 16, 1969. Also in similar vein, the Fortas scandal motivated the ABA to establish a committee to review and revise the 1924 Canons.

Retiring California Chief Justice Roger Traynor chaired the committee whose charge was to evaluate and strengthen the Canons. The Traynor Committee replaced thirty-six Canons with seven Canons to maintain the substance and eliminate much of the Confirmation of Supreme Court Justices,” 72 Judicature 338, 340 (1989) (“Fortas had broken no law . . . .”); “The Fortas Affair,” Time, May 16, 1969, 20 (“Although Fortas had not broken any law, he had clearly been guilty of a gross indiscretion.”).

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86 McKoski, “Judicial Discipline,” 1927-28 (citing 4 The Justices of the United States Supreme Court: Their Lives and Major Opinions 1463 (Leon Friedman & Fred L. Israel eds., 1997); see also Glen Elsasser, “Fortas Violated Judicial Ethics, ABA Rules,” Chicago Tribune, May 21, 1969, 28 (describing the informal opinion issued by the ABA Committee on Professional Ethics finding that Fortas violated the 1924 Canons)).

87 McKoski, “Judicial Discipline,” 1928 (citing 4 The Justices of the United States Supreme Court: Their Lives and Major Opinions 1463-64 (Leon Friedman & Fred L. Israel eds., 1997)).


the aspirational language in the 1924 Canons.”

In the aftermath of the Fortas scandal the Traynor Committee focused on the importance of judicial appearances, moving some of Canon 4's text to the title of Canon 2 in what would become the 1972 Model Code of Judicial Ethics. The title of Canon 2 read: “A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His Activities.” The appearance of impropriety, no longer simply aspirational, had become a mandatory standard of judicial conduct. Moreover, as Judge Ralph McKoski explains:

...[T]he 1972 Code’s major contribution to the developing world of judicial ethics was to graft the appearance of impropriety standard onto the rules governing judicial disqualification...Henceforth, disqualification would be required any time a judge's participation in a matter created an ‘appearance’ of partiality.

From Seven Canons to Five: The 1990 Model Code

Although not driven by a judicial controversy, the ABA once again decided to revise the Judicial Canons in 1990. Based upon a study commenced in 1988, the 1990 Model Code combined all the rules relating to off-the-bench conduct while adding a preamble and terminology section.

The appearance of impropriety standard remained intact “to caution judges to avoid certain prospective conduct even if the conduct only appears suspect, and to proscribe any act that is harmful even if it is not specifically prohibited in the Code.” The 1990 Code replaced “should” with “shall” in Canon 2 to emphasize the mandatory nature of the rule. Expanded commentary added the reminder that avoiding the appearance of impropriety applied to both a judge's professional and personal conduct.

The 1990 Code's commentary further explained: “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to

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91 McKoski, “Judicial Discipline,” 1928 (citing CODE OF JUDICIAL CONDUCT Canon 2 (1972) (The Code of Judicial Conduct was adopted by the ABA House of Delegates on August 16, 1972.)).
92 McKoski, “Judicial Discipline,” 1928 (citing CODE OF JUDICIAL CONDUCT Canon 2 (1972)).
97 McKoski, “Judicial Discipline,” 1931 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.”)).
98 McKoski, “Judicial Discipline,” 1931 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2, cmt. (1990)).
carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” In other words, judges were informed that they must consider not only the impact of their conduct, but also the public’s perception of their conduct. Imposing a standard on judges which some considered to be vague or ill-defined was justified as necessary to both maintain the public’s confidence in the judiciary and the public’s perception of the entire justice system.

The 2007 Model Code & The Debate Over the Appearance of Impropriety

The ABA Commission on the Twenty-first Century recommended a review of the 1990 Model Code of Judicial Ethics and specifically targeted the role of judicial appearances and the evaluation of the fairness of the vague standard of the appearance of impropriety as a rule of discipline. After three and one-half years of debate during which the appearance of impropriety was moved to Canon 1 and initially appeared to be relegated to an aspirational guideline, it was eventually reinstated as a rule of discipline.

Thus, more than a century after Judge Landis flamed the fire of the appearance of impropriety, it continues to be the standard by which judges may be held accountable. Although the standard remains subject to constitutional debate based upon due process concerns, it continues to be applied to judicial conduct. Some examples include discipline imposed on judges for personal or professional relationships with a party in a case, stock ownership, granting favors to those who appear before them, accepting sport tickets from a lawyer who appears...

101 Maher, Appearances, 9 (citing Model Code of Judicial Conduct, Commentary to Canon 2 (1990); see also In re Interest of McFall, 617 A.2d 707 (Pa. 1992) (“[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements.”); In re Dean, 717 A.2d 176 (Conn. 1998) (the appearance of impropriety standard “is as important to developing public confidence in the judiciary as avoiding impropriety itself.”)).
104 See McKoski, “Judicial Discipline,” 1934-1935 (citations omitted). “[T]he demotion of the appearance standard from an enforceable rule to a guiding principle created a small firestorm... In the face of united criticism the Joint Commission relented and supported an amendment introduced on the floor of the ABA House of Delegates incorporating the appearance of impropriety prohibition into disciplinary Rule 1.2... Thus, disciplinary Rule 1.2 of the Model Code of Judicial Conduct adopted by the ABA in February 2007 provides: ‘A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.’”
105 A deep dive into the constitutional debate over the allegations of vagueness and resulting due process concerns while intellectually compelling and ongoing is beyond the scope of this article.
106 Maher, Appearances, 10 (citing People for the Ethical Treatment of Animals v. Bobby Bersosini, Ltd., 894 P.2d 337 (Nev. 1995) (judge served on the board of a local animal shelter that had connections to a party in litigation before the judge)).
107 Maher, Appearances, 10 (citing Huffman v. Arkansas Judicial Discipline and Disability Comm’n, 42 S.W.3d 386 (Ark. 2001)).
108 Maher, Appearances, 10 (citing Matter of Barrett, 593 A.2d 529 (Del. Jud. 1991) (judge conducted gratuitous title searches for police officers who appeared before her)).
before them,\textsuperscript{109} and posting social media comments on cases or current events.\textsuperscript{110}

Conclusion

The winding and interconnected tale of baseball and the judicial canons reveals that the connections, coincidences, and repercussions of various historical events and moments in time are often both unpredictable and long lasting. The upset over a judge becoming the first baseball commissioner and the ironies of the application of the appearance of impropriety to both baseball players and the judiciary remain significant.

Perhaps the poignant postscript to this story resides in the 2020 decision to remove Kenesaw Mountain Landis’s name from baseball’s MVP plaques due to his lack of support for the integration of baseball.\textsuperscript{111} The appearance of impropriety or actual impropriety then, now, or always? No doubt, time will continue to judge both the federal district court judge and the first baseball commissioner known as Kenesaw Mountain Landis. The analysis may evolve but Kenesaw Mountain Landis’s status as the first baseball commissioner and his impact on both the game and the judicial canons cannot be denied.

	extit{Baseball has the largest library of law and love and custom and ritual, and therefore, in a nation that fundamentally believes it is a nation under law, baseball is America’s most privileged version of the level field.}

- A. Bartlet Giamatti\textsuperscript{112}

\textsuperscript{109} Maher, Appearances, 10 (citing Disciplinary Counsel v. Lisotto, 761 N.E.2d 1037 (Ohio 2002)).


\textsuperscript{111} Matt Kelly, “Landis’ Name to be Removed from MVP Trophies,” MLB.com (October 2, 2020) \url{https://www.mlb.com/news/kenesaw-mountain-landis-name-removed-mvp-trophies}

\textsuperscript{112} \url{https://www.inspiringquotes.us/quotes/rd01_Oae97tQH}

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