COMMENTARY

Don't Gag the Judges

By Thomas Penfield Jackson

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The Supreme Court has recently confirmed the constitutional right of elective judges to speak forthrightly to the electors about legal issues they may be obliged to decide, in *Republican Party of Minnesota v. White (2002)*. So now is the time for the federal judiciary to re-examine its own attitude toward public speaking by federal judges. Our life tenure is all the more reason for us to be able to communicate informally on occasion with a public that must live with our decisions, yet can never vote us out of office.

One convention of federal judicial life to which I have never been fully reconciled is the notion that judges shouldn't ever comment publicly about their cases-period. As the branch of government that prides itself on being the principal guardian of the right of free speech for all, the federal judiciary can still be remarkably intolerant when it comes to its own.

CANON OF SILENCE

The Canon of the Code of Judicial Conduct on the subject of unofficial public statements by federal judges generally provides merely that a judge should "avoid public comment on the merits of a pending or impending action." The canon then expressly admits of exceptions for explanations of the legal process and for purposes of legal education. I have considered the canon to be simply a rule of prudence, i.e., don't say anything for public consumption, on or off the bench, that might sound prematurely judgmental or cast doubt upon the essential fairness of the proceedings.

Although some judges will on occasion speak "off the record to members of the press, many judges -- perhaps most -- believe that the canon imposes a virtual code of *omerta* forbidding any public commentary while a case remains unfinished in any respect, quite possibly forever. They regard the canon as a commandment to withdraw from all public discourse about the case, even if their thoughtful and timely observations might be a significant contribution to public understanding of it. The ostensible reason is that anything said informally, but publicly, about a case must perforce detract from the court's "appearance of impartiality." Whether what the judge might say is legally and factually accurate is essentially irrelevant.

So interpreted, the canon represents a variant of that dubious maxim of leadership: Never apologize; never explain. It also suggests that the judiciary is more concerned with appearances than with actuality.

Ironically, the unwritten corollary to the same rule countenances almost anything a judge chooses to say about a case when spoken from the bench or in a written opinion, even if what he says does little to promote the appearance of a neutral and detached

jurist. No one ever talks back, and there are no follow-up questions.

The distinction between sanctioned "judicial" speech and proscribed "extrajudicial" speech is unrealistic. It conflates the concept of unofficial commentary and personal prejudice, which do not always equate, and draws the line between the permissible and the impermissible on the basis of whether the judge speaks ***ex cathedra*** or simply as a knowledgeable participant in the adjudicative process.

A judge's silence, on or off the bench, does not guarantee his impartiality. Any "appearance of impartiality" conveyed by a judge's silence may be an illusion. It may also reflect ignorance or indifference. The only genuine determinant of judicial impartiality is the integrity of the judge himself, not appearances, and a reputation for candor is a better gauge of integrity than a reputation for silence.

MOST SECRETIVE BRANCH

The judiciary is in many ways the most secretive of the three branches of the federal government. It is not subject to the Freedom of Information Act or any other so-called "sunshine" statute. Judicial disciplinary proceedings are conducted in private. Although the judicial system professes to display its decisional processes "on the public record," its most important decisions are made behind closed doors, whether by judges or juries. Law clerks and supporting staff are sworn to secrecy. There are remarkably few "leaks," and no whistleblowers. **A** veteran journalist once told me that "we know more about how the CIA operates than we do about you."

That secrecy has consequences. In his remarks to the D.C. Chapter of the Fellows of the American Bar Foundation last spring, my colleague Judge Paul Friedman expressed alarm at the increasing intensity of public attacks upon judges and their decisions, and the loss of public confidence in the judiciary as an impartial and nonpolitical branch of government. Because it would be "unseemly" for judges to respond, however, as well as contrary to the Code of Judicial Conduct, Judge Friedman called upon the bar to assume the responsibility to defend them.

I cannot agree. Judges are responsible for their decisions, not the bar. And so judges should expect to bear a large part of the responsibility for dispelling the caustic effects of any criticism they provoke. One way of doing so would be to become more communicative.

The Supreme Court may be an exception, but if there ever was an era in which lower court judges could rely upon the majesty of the office and the aura of omniscience to inspire confidence in their decisions, that age is long past. People expect other public officials to earn their respect in part by displaying a willingness to answer good-faith questions about actions taken and decisions reached. Judges should be no exception.

I know of no good reason why a judge who has made a decision, in a case of obvious interest and concern to many people, should not at least be willing, if not expected, to respond to legitimate inquiries about it from responsible interlocutors, whether they are lawyers, academics, students, journalists, historians, or the local garden club.

I am certainly not advocating that judges should issue press releases or hold regular press conferences, or even be readily available for public comment. There are, of course,

eminently good reasons for judges to be circumspect as a rule. Judges should generally not offer post hoc defenses of decisions they have made if they truly believe they have sufficiently explained them on the official record. The record may, indeed, "speak for itself." For another thing, a garrulous judge is likely to be seen as self-promotional. For yet another, there are those in the media all too willing to exploit judicial loquacity to their own ends, which may be anything but the public's interest in understanding a controversial case.

MORE-SENSIBLE RULES

Moreover, judges should never speak publicly in or out of court until the timing is appropriate. In jury cases judges should obviously not speak out when, or in such a fashion, as may unduly influence a jury in its work. In nonjury cases, a judge's premature expression of an opinion on the merits may signify a mind closed before all of the evidence is in. Appellate judges should not disclose their thinking about a pending appeal until the collegial process of writing majority and minority opinions is completed.

And I add another proscription: as a rule, judges should not speak ill of other judges personally, whether on or off the bench. Personal attacks on judges by other judges also undermine respect for and confidence in the judiciary.

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