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BEYOND *REPUBLICAN PARTY V. WHITE*:
A PLEA FOR A RULE OF REASON FOR
EXTRAJUDICIAL SPEECH

*Thomas Penfield Jackson**

I.

I do not intend to offer a scholarly discussion of *Republican Party v. White*¹ as Professor Hazard has done.² My mission here today is to try to convince what I suspect is a skeptical audience that the judiciary—in particular, the federal judiciary—does itself a disservice by imposing a blanket rule of silence on its judges with respect to issues and cases before them. We should encourage a greater judicial willingness to communicate informally with the public when appropriate, and always, of course, in an appropriate manner.

It is common wisdom among federal judges that we are sworn to ethical silence about our cases other than as we speak officially, orally or in writing. We are not allowed to comment to the press. We are expected to decline to answer case-specific questions before public audiences. We must not elaborate informally on our rulings even for clarity's sake, or ruminate on possible consequences from our decisions. We cannot point out what we have *not* decided, or why. I have learned to my personal discomfiture that we are subject to a virtual code of *omerta*, and to breach it is an unpardonable sin.

Let me preface the observations to follow by reminding you that I speak from the perspective of a federal district judge. There are certain circumstances pertaining to the work of a trial judge that are absent in a court of appeals, and it is my experience as the former that informs what I have to say.

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1. 535 U.S. 923 (2002).

2. See Geoffrey C. Hazard, Jr., "Announcement" *By Federal Judicial Nominees*, 32 HOFSTRA L. REV. 1281 (2004).

First, we are the court of first resort. We preside over and render decisions in important or notorious cases in the certain knowledge that our work will be examined critically by a court of appeals. That, in a way, is reassuring: If we blunder badly, it will most surely be corrected on appeal. Circuit judges, on the other hand, know that the likelihood that their decisions will ever be scrutinized by the Supreme Court is virtually nil.

Second, trial judges sit alone. We do not have the intellectual reinforcement that comes from testing our convictions with peers, or, conversely, the obligation to insure that the integrity of the collegial deliberation process is respected.

Third, in protracted cases our exposure to public scrutiny may extend over weeks and months. We are observed daily, for hours at a time, and begin to develop a public persona created entirely from our perception by the media, who tend to read portentous significance into every word, gesture, or facial expression. In contrast, appellate judges are rarely seen in public in regard to a single case for more than an hour at a time.

II.

The operative commandment for federal judges is Canon 3A(6) of the Code of Judicial Conduct. Canon 3A(6) states that a judge “should avoid public comment on the merits of a pending or impending action.” It then expressly admits of exceptions for explanations of the legal process and for purposes of “legal education.”³

As a cautionary precept of prudence, the Canon is undoubtedly wise counsel: It tells us not to say anything for public consumption, on or off the bench, that might sound prematurely judgmental or cast doubt on the essential fairness of the proceedings.

As an enforceable rule of ethical conduct, however, I submit Canon 3A(6) is unconstitutional. It is clearly not narrowly tailored to address the only legitimate purpose claimed for it, namely, to preserve public confidence in the integrity of the judicial process. Even the stated objective of the Canon is itself somewhat dubious as a compelling governmental interest: The objective is cosmetic, not substantive. The objective is to preserve an *appearance* of impartiality⁴ on the part of the

3. CODE OF CONDUCT FOR U.S. JUDGES (1999).

4. “A judge should perform the duties of the office impartially and diligently.” CODE OF CONDUCT FOR U.S. JUDGES Canon 3.

judge. It does nothing to enhance the actuality of impartiality. A judge who keeps his mouth shut can fairly seethe with bias or prejudice. No one will ever know, or at least be able to prove it.

Finally, as one federal district judge in New York has already held with respect to a state analog to the Canon, it is also unconstitutionally vague.⁵ Where does the “legal process” leave off and “the merits” begin? Why doesn’t it apply to questionable “public comment” from the bench as well as off? Does it apply to any “pending case,” or only those pending before the judge who speaks? How long does a case remain “pending”? “Pending” before whom? Until all possibility of further appeal is exhausted? Is the exception for “legal education” only for law students, or to educate the public at large about the law?

III.

Professor Hazard seems to have been startled by the Supreme Court’s decision in *Republican Party of Minnesota v. White*. Personally I have expected something like it for several years. Professor Hazard is clearly right, however, in perceiving it as a sea change in the law of extrajudicial speech.⁶ And I agree with him that its effect will not be limited to judicial election campaigns, or even to elected judges as opposed to appointed judges. Neither dichotomy represents a natural or rational constitutional fault line for separating the permissible from the impermissible in what judges may say publicly, on or off the bench. I expect that judges, including federal judges with life tenure, will be subject to the same rule as are all other public servants: What they may say with constitutional (and ethical) impunity will depend upon whether any restrictions imposed are narrowly tailored to serve a compelling governmental interest.

Of one thing I am convinced, however: the Canon, as presently interpreted, actually disserves the interest of the federal judiciary in one respect, namely, in preserving its reputation for candor and openness. Federal judges, respected as they generally have been, are also seen by many as aloof, secretive, and unaccountable in their work to anyone. That certainly is how we are perceived on Capitol Hill, as the following points illustrate:

5. See *Spargo v. N.Y. State Comm’n on Jud. Conduct*, 244 F. Supp. 2d 72, 91-92, *vacated by* 351 F.3d 65, 68 (2d Cir. 2003) (holding that the district court lacked jurisdiction).

6. See Hazard, *supra* note 2, at 1281-82.

- Mandatory minimum sentences and the U. S. Sentencing Guidelines are both a direct result and incontrovertible evidence of Congress's distrust of federal judges, requiring them to be sensitive to— if not governed by—public opinion.

- While not discounting the importance of party politics in the matter, a principal reason given by congressional opponents of certain judicial appointments for their opposition is the refusal of the nominees to answer questions about their views on controversial legal issues they may confront.

- Senators have offered an amendment to the judicial pay bill currently before Congress that permits federal courts to allow their proceedings to be televised.⁷ One senator has proposed a requirement that federal judges “stand for retention” before the Senate every 12 years,⁸ which would require a constitutional amendment.

- Congressmen Lamar Smith and Steve Chabot have recently formed the “House Working Group on Judicial Accountability,”⁹ whose goal it is to make sure we understand that “the notion that judges are above it all, that the judiciary is sacred and should be left alone . . . [is] wrong.”¹⁰

Lest you think sentiment on Capitol Hill is driven by interbranch jealousy and does not reflect public opinion at large, let me remind you that, notwithstanding the potential for corruption in judicial elections, public opinion polls reportedly continue to show a majority of the country to favor elective over appointive state judicial systems.¹¹

We should acknowledge that federal judicial branch is, as a practical matter, the most secretive branch of the federal government. It is not subject to the Freedom of Information Act,¹² or any other so-called

7. S. 1023, 108th Cong. § 3(b) (2003) (reported as amended by Senator Hatch on June 18, 2003).

8. See Press Release, Senator E. Benjamin Nelson, Nelson Discusses Judicial Appointments (June 13, 2003), at <http://bennelson.senate.gov/2003/releases/judicial%20appointments.htm>.

9. See Press Release, Congressman Lamar Smith, Smith & Cabot Form Judicial Accountability Group (July 23, 2003), at <http://lamar-smith.house.gov/news.asp?FormMode=Detail&ID=278>.

10. Todd J. Gilman, *GOP Group Plans to Turn Up Scrutiny on Federal Judges*, DALLAS MORNING NEWS, July 27, 2003 (quoting Representative Lamar Smith).

11. See HARRIS INTERACTIVE, INC., ABA, A STUDY ABOUT JUDICIAL IMPARTIALITY 4 (2002), available at News Release, A.B.A., Poll: Confidence in Judiciary Eroded by Judges' Need to Raise Campaign Money (August 12, 2002), http://www.abanet.org/media/aug02/apnews_confrevise8-8.html.

12. 5 U.S.C. § 552 (2004).

“sunshine” statute. All of its important decisions are made behind closed doors, whether by judges or juries. It vehemently opposes all cameras in the courtroom and television coverage of its proceedings. It continues to be portrayed pictorially in the media by quaint, hastily drawn courtroom “sketches” reminiscent of Daumier. Our written decisions, no matter how debatable, are the last word on a case unless and until the next higher court takes it up. No follow-up questions are entertained.

A veteran journalist once told me “we know more about how the CIA operates than we do about you.”

IV.

Let me state emphatically that I am not advocating that judges hold regular press conferences or issue press releases, or make regular appearances on talk shows. As a general proposition judges should keep their own counsel for a variety of reasons. As Sir Francis Bacon once said, “An overspeaking judge is no well-tuned cymbal.”¹³ Even though they may become celebrities of sorts, judges shouldn’t behave like them. They also shouldn’t waste time answering foolish questions over and over again.

What I *am* advocating is employing a little common sense to a general rule of reticence for judges. We are, after all, public servants as much as are members of the political branches. The fact that we don’t *have* to justify ourselves to an electorate shouldn’t mean that we must always sanctimoniously refuse to do so. I believe we have a responsibility to let the public see us as something other than imperious authority figures in black robes. Loss of insularity does not necessarily result in loss of dignity.

The effort expended in scolding or disciplining judges for speaking in public would be better spent teaching them *how* to speak to the public—on or off the bench—without doing damage to the judicial image. That instruction would, of course, include an admonition not to say anything that might prejudice prospective jurors or intrude upon jury deliberations. In non-jury cases, a judge should not intimate any predisposition on the part of the court before the record is complete and the case decided. Appellate judges should never speak until collegial deliberation is finished and all opinions issued.

13. FRANCIS BACON, THE ESSAYS OR COUNSELS, CIVIL AND MORAL, OF FRANCIS LD. VERULAM VISCOUNT ST. ALBANS 212 (Peter Pauper Press (n.d.)).

It is also my conviction that one judge should never be personally critical of another judge in public, orally or in print.

All of those proscriptions should apply, by the way, whether the speaking judge is on or off the bench. And, of course, whatsoever is said should always be couched in appropriately discreet language.

V.

Highly publicized cases inevitably generate a lot of public interest. That interest often extends to a genuine curiosity about the judge who presided over or decided the case, and with respect to subjects not directly related to the outcome of the case. Like it or not, the judge becomes a public figure—one with considerable power to affect the course of events and the lives of many people.

Some years ago, having endured several high-profile trials and the attendant publicity, I wrote an article about the adversary nature of the fair-trial/free-press debate.¹⁴ I described the relationship between the media and a newsworthy case as roughly equivalent to the relationship between an infectious disease and a healthy organism. I offered some lessons learned from my experiences to date to keep the judicial immune system intact. The gist of those lessons was for a judge to force himself to ignore the publicity and insulate himself from any contact with the press altogether.

Unfortunately that formula will not always work.

In a truly celebrated case, awash with publicity day after day, augmented with daily “public relations” pronouncements from the parties, the ideal image of an “appearance of judicial impartiality”—the remote, impassive judge—begins to disintegrate, and then to reassemble itself in the shape of the Wizard of Oz. Unspoken questions begin to loom in the public mind: Who is that pompous anonymity behind the curtain, and why was he entrusted with deciding such an important matter?

Like most judges who have had such cases, I receive requests for interviews from the press, and invitations from educational institutions, lawyers’ associations, and community service organizations to speak to them. Virtually all of them I ignore or reject. I have turned down offers to appear on “60 Minutes” and “Nightline,” and I refuse to speak to journalists whom I know to have a point of view or a sensational agenda.

14. See Thomas Penfield Jackson, *A Judicial Cynic's View of Why This Topic Is Always Presented as Fair Trial Versus Free Press*, 45 FED. LAW. 28 (1998).

If, however, I trust the journalist—and some *are* trustworthy—and the journalist’s interest in knowing something about the case is genuine and not merely a search for a quote, I will occasionally respond. When I do, I try earnestly to be sure not to say anything likely to undermine the public’s faith in the fairness of the outcome, or at least the fairness of the process leading to it.

Sometimes an “off the record” or “for background” response is sufficient, but often it is not. Moreover, having been the subject of “anonymous source” articles myself, I am generally distrustful of people who refuse to be quoted by name. Except in true “whistleblower” situations, one who declines to be identified with the information he imparts is unlikely to be motivated by purely honorable intentions.

VI.

Why do we persist in insisting that judges remain mute when some informed communication from them might truly contribute to public understanding and acceptance of controversial decisions?

My answer is that, at bottom, it is mostly a matter of self-preservation. Canon 3A(6) is our Fifth Amendment. It is routinely invoked as a convenient excuse for judges to refuse to respond to even the most innocuous and well-intentioned queries about cases that may be of profound concern to many people for multiple good reasons.

We are grown accustomed to our ethically sanctioned right to remain silent, and are comfortable with it. Even those of us who were trial lawyers have become rusty in the art of parrying the spontaneous question. We learn to choose our words carefully when writing our opinions in solitude, but are clumsy in extemporaneous exchanges with skilled interlocutors. We cherish our privilege to refuse to answer any questions at all: It is far easier than trying to discern which questions can be answered and which cannot, and, more difficult still, how to respond intelligently to those that cannot without really answering, or diverting the discourse to less dangerous ground.

In short, we take sanctuary in the rule of silence. Each of us stands in terror of being quoted as saying the wrong thing at the wrong time, just as we remain fearful of being captured on camera in an uncomplimentary light.

VII.

Whether or not the Supreme Court's opinion in *Republican Party v. White* was the catalyst, there have been signs of late that the federal judiciary may be relenting somewhat in its rigid interpretation of Canon 3A(6) and its attitude of privileged isolation from the world of public discourse.

For example, in July 2003, two Supreme Court justices made an unprecedented appearance on a Sunday morning TV talk show and answered questions about the Court with remarkable candor.¹⁵ It was, I am told, truly beneficial to the image of the Court. Where the justices were criticized as less than convincing was in their adamant insistence that television continue to be banned from all federal judicial proceedings.

In August 2003, Justice Anthony Kennedy gave an equally unprecedented speech to the American Bar Association denouncing federal mandatory minimum sentences as unjustly harsh and unwise.¹⁶ Although Supreme Court Justices are not bound by Canon 3A(6), in speaking as he did, let me emphasize, Justice Kennedy thus spoke "publicly" about the "merits" of an issue that will be "pending" before the Supreme Court in many contexts for years to come.

Still another example: In the summer of 2003, a round-table colloquium was convened of three prominent journalists, with decades of experience covering the federal courts.¹⁷ It was moderated by a fourth journalist with similar credentials. The unanimous consensus was that judges should be less reluctant to talk to the press. One journalist urged a "recognition on both sides that [we] share [a] mutual interest [in] trying to get accurate information [out] about what the federal courts are doing."¹⁸ Another said, "We all hope to serve the public . . . trying to make sure that important matters are brought to the public's attention."¹⁹

15. Justices Stephen Breyer and Sandra Day O'Connor appeared on "This Week" with George Stephanopoulos. See *This Week* (ABC News television broadcast, July 6, 2003).

16. See Justice Anthony Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

17. See *Journalists and the Courts: What Reporters Really Think About the Courts and Judges*, 35 THIRD BRANCH 7, (Newsletter of the Fed. Cts.) July 2003 available at <http://www.uscourts.gov/ttb/july03ttb/Journalists.index.html> (providing excerpts of a discussion between three participating journalists, Carl Stern, Stephen Wermiel, and Ron Ostrow, moderated by Dick Carelli).

18. *Id.* (quoting Stephen Wermiel).

19. *Id.* (quoting Carl Stern).

The fact of the colloquium is not surprising. What *is* surprising is that it was convened under the auspices of the Administrative Office of the U.S. Courts (“A.O.”), and the moderator was the former Associated Press reporter for the Supreme Court, who is now with the A.O.’s Office of Public Affairs. An account of the colloquium’s proceedings was published in the A.O.’s newsletter to the federal judiciary, *The Third Branch*.

Such developments I find to be encouraging, and if the trend continues, they may enhance rather than detract from a favorable image of the federal judiciary in the eyes of Congress and the public.
