



# Federal Judges *and* Public Attention

*The second in a series of  
imagined conversations  
about federal courts*

BY D. BROCK HORNBY

## [THE CAST OF CHARACTERS]

*Federal courts law professor* LANG FELL  
*Federal circuit judge* COAR DAPPEL  
*Federal district judge* NIELSEN PRIUS  
*Federal bankruptcy judge* CHIP TERLEVEN  
*Federal magistrate judge* MADGE STRAIT  
*Federal trial lawyer* TALAGUD STOREY  
*Federal practitioner* LINDA GATE  
*Transactional lawyer* WARD SMITH  
*General counsel* MANNY G. RISK  
*Special guests on this occasion,*  
*Journalist* TRAN SPERASY, *and Ward Smith's*  
*law firm's newest associate,* BELLA BILOWR

## [THE SCENE]

*This is the second conversation among friends who once were law school classmates and now are well along in their legal careers. It occurs at the end of the work day in a spacious conference room at the law offices of Ward Smith, a transactional lawyer who does not appear in court. Smith's associate has seated all but Smith around Smith's elegant conference table. Smith enters the room and opens the conversation.*

### WARD SMITH

Welcome, everybody. Today's topic is federal judges and public attention. To lead our discussion, I have invited Tran Sperasy, a professional journalist whom we all met at law school when she was enrolled in the law program for journalists. Tran now specializes in writing about courts and the law. She's with us this afternoon not as a journalist, but as an old friend. I've explained to her our rule: candor, no holds barred, and no offense taken. Tran has agreed that she will not use anything we say except for deep background without any attribution that could identify us. At our last session, Manny G. Risk suggested we needed some younger voices in our conversations, so I've also invited my firm's newest associate, Bella Bilowr, to join us. Go ahead, Tran. ▶

**A NOTE FROM THE AUTHOR:** The words are mine, but the ideas expressed are not. I have gathered them from the legal literature and from conversations with judges, lawyers, and academics over the years. My current law clerks, Sara Murphy and Paul Switter, have provided useful comments.

**TRAN SPERASY**

Classmates, it's good to see you again after so many years. I have fond memories of our time together in law school. But I know you have busy schedules, so I will get right to the point. Nielsen, as a federal trial judge, why won't you talk to reporters like me?

**NIELSEN PRIUS**

I speak only through my decisions.

**SPERASY**

Some of your colleagues talk to me.

**PRIUS**

Much as I like you, Tran, I think that's a bad idea. My authority as a federal judge is limited to deciding cases and controversies. Everything I have to say about the issues that come before me I should say in open court or in writing directed to the lawyers and the parties. Everyone — including you, Tran — is welcome to attend court, read my decisions, and talk or write about them as they choose, but I don't have any business speaking outside my constitutional and statutory role. I'm aware that on certain issues of real public interest I have a broader audience than the parties before me, and then I choose my words accordingly. I'm sure the judge who sentenced the airline shoe-bomber Richard Reid some years ago had that in mind, and the judge's quotable comments quickly went viral. But he did it in open court as part of his sentencing address to the defendant. That's how a trial judge should speak to the media — indirectly.

**SPERASY**

No offense, Nielsen, but your written opinions are usually dry, often opaque, and sometimes unreadable on account of legalese. And realistically, we in the media can't sit in a courtroom waiting and hoping for you to say something newsworthy in real time. We often find out when it's too late to attend. If more of you trial judges would speak to us journalists, we could do a better job explaining to the American public in plain English what federal judges are doing, what they think and what they're really like. You'd be doing the federal courts a service. We could show the public that you federal judges are actually regular human beings struggling to do an often difficult job.

**MADGE STRAIT**

I used to feel like Nielsen, but I've benefitted from attending sessions the Judicial Branch Committee and the First Amendment Center have organized that bring together federal judges, journalism professors, and journalists. Now I have a more nuanced attitude. I believe we judges can contribute to better public understanding of the federal courts' role in a democratic republic

by recognizing the legitimate role the media play in this process. We still must follow ethical rules in what we say about cases we're working on, but we can talk about courts institutionally and about issues of justice, and give information about legal terminology or court processes to generate more accurate and insightful coverage.

I think we have an obligation to make federal judges and the law they apply more accessible and understandable to the public.

**SPERASY**

Madge, would you be willing to alert us journalists to controversial cases coming before you? Would you allow the administrative people in your clerk's office or the national Administrative Office to educate us about the cases?

**STRAIT**

I don't see any problem with alerting the media to cases of public interest. I'm also agreeable to court administrative personnel explaining court processes, but I wouldn't want them to speak about the substance of a case or decision, because they could easily be perceived as speaking for the judge. There also are ethical rules that bar court employees from talking publicly about pending cases.

**CHIP TERLEVEN**

I agree with Madge. On several occasions I've explained legal terminology and bankruptcy procedures to journalists, and I let the bankruptcy court clerk alert the media to court proceedings of interest.

**PRIUS**

Why should judges do that? Our role is to decide cases. High school teachers and political science professors can teach the institutional judicial role. Lawyers already draw attention to controversial cases. When the court does so, it implies that judges give certain kinds of cases special attention. Lawyers can answer journalists' questions about what legal terminology means if it's not obvious from the judge's opinion. Citizens expect something different from their judges, and generally they don't expect judges to engage in the public debate or become media sources. Coverage of the courts now is more prominent than at any time in history. We have intelligent commentators like Marcia Coyle, Lyle Denniston, Tom Goldstein, Jan Greenberg, Linda Greenhouse, Adam Liptak, Tony Mauro, Nina Totenberg, and others covering the Supreme Court in various media, including blogs. There's also decent coverage of federal circuit decisions in some parts of the country. The one place where coverage is regularly lacking is at the federal trial level in cities outside major metropolitan areas, where newsgathering economics has reduced the presence of journalists in

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federal court. But even in those circumstances, professional blogs often pick up significant decisions, comment on them, and make them available to anyone who's interested. Not to mention the fact that all published opinions are freely available on court websites, and every document associated with a case is available over the internet, for a fee, through the electronic filing system known as PACER. I don't see the reason for us judges to stick our necks out.

#### STRAIT

Nielsen, we can't count on high school teachers to provide adequate civics education on federal courts given all the other subjects they must cover, and we all know that political science professors focus on ideology and data, ignoring the day-to-day challenges that federal judges and courts confront. Lord knows, federal courts need public support — whether it be at a time of budgetary requests, or when difficult or controversial decisions provoke an outcry. I think we judges have to step up to the plate to explain the role of the Third Branch to the public.

#### LANG FELL

Nielsen, you referred to citizen expectations. I'm not sure anyone knows what citizens expect of federal judges. Even if we did know, popular expectations are not necessarily the standard that should govern federal judges' behavior.

#### SPERASY

And Nielsen, you say anyone is welcome to watch and hear you in the courtroom. Why don't you allow cameras in your courtroom to make that offer practical so that we and the public can observe you doing your job? Some state courts and some federal circuit courts allow video coverage. Why not you federal trial courts?

#### PRIUS

If it were up to me, I probably would allow cameras in federal trial courtrooms, subject to some restrictions. State courts that allow the practice have survived. But the United States Judicial Conference has forbidden cameras in civil cases, and the federal rules prohibit cameras in criminal cases, and there's nothing I as a federal trial judge can do.

#### SPERASY

Let me come at this from a different direction and engage the circuit judge among us. Coar, political scientists tell us that you circuit judges are basically politicians in robes, implementing your political or policy preferences in your opinions and decisions. But we see you in action only during abbreviated oral arguments and in your formal opinions. Why should you hide from greater scrutiny in this important policy-setting role you have? Surely the public deserves to know what your preferences are in order to understand and critique your decisions that often have such significant impact. At least you appellate judges ought to speak to us journalists.

#### COAR DAPPEL

We're *not* just politicians in robes, Tran. We don't go looking for policies to implement. We decide only the controversies parties

bring to us after the trial court has decided the case and one side or the other is unhappy. Appellate judges don't even decide the facts of a case; we make decisions based upon what the law says. Sometimes the law is ambiguous — that's one of the primary reasons the parties don't reach resolution of their dispute without a decision from us appellate judges — but even when the law is ambiguous, we must nevertheless make a decision. When we do, we follow generally accepted principles for resolving the ambiguity. We're very aware of our institutional role as the Third Branch, and we know our decisions must demonstrate a distinctive approach that is judicial rather than political. We strive for continuity and stability in the law. Our decisions are not at all like casting a vote for a piece of legislation we like, or voting against one we don't like.

#### SPERASY

Oh come on, Coar. I can attend a chapter meeting of the Federalist Society or the American Constitution Society at Lang Fell's law school and hear one of your colleagues or even a Supreme Court justice hold forth on the merits of particular constitutional doctrines or on his or her policy preferences with respect to various social issues. When I do, I learn that your "generally accepted principles" are hardly undebatable, and that some of your colleagues actively encourage change in the law when they speak extrajudicially. I can even hear Supreme Court justices criticize Supreme Court decisions.

#### DAPPEL

You have me there, Tran. My personal view is that speeches like those are ill-advised. Judges and justices who speak outside of court should not talk about matters or issues they have dealt with or are likely to deal with in their judicial business. We should do that in our decisions or not at all.

#### TERLEVEN

As a bankruptcy judge, I try to avoid speaking about my views on bankruptcy policy because sometimes bankruptcy judges have to deal with very high-profile disputes, as in a municipal bankruptcy or a reorganization involving distribution of limited assets to injured people where there has been a disaster.

#### SPERASY

But judges and justices who disclose their views in public are being honest and transparent, and they're educating the public — in their law school appearances or a broader public forum — about what leads to their decisions, and sometimes their second thoughts or misgivings about a previous decision. They should be applauded for doing so and for engaging the public debate. Let's face it, what you judges call "law," the rest of us call important public policy decisions on issues like campaign finance, abortion, gay marriage, and affirmative action, all of which deserve full airing. We journalists and the public see how Supreme Court justices and federal appellate judges are nominated and confirmed, and all the politics involved in that process. And we see how some toe the party line pretty consistently after they are appointed. Federal judges want ▶

to behave like the Wizard of Oz, when what we journalists seek is transparency so that the public can understand better the basis for judges' decisions and opinions.

**FELL**

Tran, political views do seem to make a difference in a small percentage of cases. But the empirical data I've seen suggest that in the largest category of cases, political preference and political affiliation don't drive the outcomes. Federal trial judges in particular are not at all like Supreme Court justices in the kinds of decisions they make or in the choices open to them. Circuit judges are closer, but still they deal mostly with mundane and politically uncontroversial issues and apply the rule of law impartially. Keep in mind that the Supreme Court typically hears fewer than 80 cases per year. Although those cases often involve matters of great importance, most disputes are handled by trial and appellate courts.

**MANNY G. RISK**

I know political scientists and journalists like to treat the federal judiciary as engaged in just another form of political or interest-group decision making, but, if you talk to American business executives who do business here and abroad, largely they will tell you they're more confident of the rule of law in the United States than they are elsewhere. So I think there's merit to what Lang says.

**TERLEVEN**

Political and interest-group issues play no role in bankruptcy court.

**SPERASY**

Really, Chip? As you just observed, Chapter 11 cases can have a huge impact on state and local economies and generate substantial interest-group pressure, and sometimes you deal with religious organizations. You must be aware of the significance — the political and economic impact of what you do — and I doubt you're immune to those concerns. But let me shift the focus of the conversation once again. Bella Bilowr, I bet you Tweet a lot, correct?

**BELLA BILOWR**

Well, yes.

**SPERASY**

In fact, it's probably one of the major ways you follow what's going on in the world, correct?

**BILOWR**

I guess so.

**SPERASY**

So do you think Tweeting has a role for judges?

**BILOWR**

Well, I certainly would follow Justices Kagan and Sotomayor if they were on Twitter.

**SPERASY**

Twitter has become a very accessible form of communication, and Tweeting judges could generate a much broader exposure for the federal judiciary and educate the public. There's already a Texas Supreme Court justice who has been recognized for his Tweeting prowess. [*Editor's Note:* The judge alluded to here is Texas Supreme Court Justice Don Willett, a Duke Law Master's of Judicial Studies graduate and a member of *Judicature's* editorial board.] Let's face it, the public does not read judges' opinions, but they might read judges' Tweets. Certainly we journalists would. And by the way, if federal judges actually used social media, they might have a better understanding of its role in modern culture, and it might improve the quality of decision making on everything from jury empanelment to First Amendment issues to intellectual property.

**DAPPEL**

I do worry about judges Tweeting. It's too fast and impulsive.

**SPERASY**

Wait a minute, Coar. We pay federal judges to exercise sound judgment. We expect trial judges in particular to make split-second rulings on evidentiary matters that can affect someone's liberty interests. Why should we think they are unable to exercise the same judgment in diligently self-censoring their Tweets or any other online presence they may have?

**DAPPEL**

Well, France had a scandal over judges Tweeting inappropriate comments about a witness and other judges during a trial a few years ago. There has been at least one case in this country where a party has called for disqualification of a federal judge on account of something the judge Tweeted about a case. But more importantly, why should federal judges Tweet, have followers on Twitter, or be followers? That's just not our role.

**SPERASY**

Coar, polls show that most Americans can't even name a Supreme Court justice, unlike their knowledge of television judges like Judge Judy or the judges on competitions like "The Voice." Surely we should encourage all steps — and Tweeting is one — that lead to more public recognition of the identities of our judges and justices and what they do.

**PRIUS**

I disagree. That's just succumbing to the personality cult of "Entertainment Tonight." Why should the public know the names of individual justices or judges? That's not what counts. What matters is whether the public respects the institution of the judiciary, and it's an impersonal institution, not designed to focus on individual personal characteristics.

**BILOWR**

Your honor, may I ask a question?

PRIUS

Of course.

BILOWR

You seem to have a firm view on this topic. I wonder whether all other federal district court judges feel similarly.

PRIUS

Unfortunately, no. With over a thousand federal court judges, both district and appellate, there are bound to be differences of opinion about the judge’s role in the public arena.

BILOWR

Is that because the Code of Conduct is ambiguous?

PRIUS

Yes, Bella, many phrases in the code, such as avoiding the “appearance of impropriety,” call upon us to make personal judgment calls. Aside from being held accountable to our respective circuits’ judicial councils and, ultimately, the Committee on Judicial Conduct and Disability, which usually act only in blatant cases, it’s up to the individual judge to behave appropriately.

SPERASY

Whatever *that* means. Basically, Nielsen, you’re saying that each individual judge and justice gets to interpret the rules that govern his or her conduct. Moreover, there is no enforcement mechanism when it comes to Supreme Court justices, and the Code of Conduct doesn’t even expressly apply to them. But I digress. Let me explore another contemporary communication vehicle. I’ve learned to accept that federal judges are afraid of journalists and worry we will make them look foolish. So maybe judges should publish blogs, and give the bar, media, and public a chance to see, in the judges’ own words, more broadly what federal judges think and do, without the interposition of journalists. My colleagues and I love reading judges’ blogs, and they often give us new insights into what is going on in the interplay among various levels of the judiciary.

TALAGUD STOREY, LINDA GATE, AND BILOWR

(*in unison*)

I always read judges’ blogs!

STOREY

I also read blogs *about* judges. Sometimes I can get useful insights into the preferences and attitudes of a judge before whom I am appearing for the first time.

BILOWR

My law professors frequently discussed what they learned about judges from both kinds of blogs — those *by* and *about* judges.

STRAIT

I’ve actually been thinking of starting my own blog. A handful of judges have done so. It would give me an opportunity to develop some of the things I see or do on the bench or to elaborate on institutional issues I confront that don’t make it into my written opinions. I’d like to discuss the role of judicial officers at the trial court level and show the lawyers and the public the human side of judges, without the robe and the courtroom atmospherics, and thus contribute to judicial transparency. It’s time to let the country know we’re not infallible.

PRIUS

Judges who fear someone may think we’re infallible have been listening too much to their law clerks. The public knows very well that we’re human, Madge. Judges’ failures appear regularly in the media when a judge speaks inappropriately in court, behaves arrogantly in public, abuses a spouse, accepts a bribe — the list is endless. And if reality weren’t enough to demonstrate our blemishes, Hollywood and TV stand-ins caricature us. I think blogging is a terrible idea. Plenty of lawyers and law professors write blogs. There’s no need for judges to do so. Not only does blogging carry the risk a judge will talk about an issue that will come before some court in the near future, but the medium of blogging also encourages an irreverence and flippancy unbecoming to a judge; a judge on a blog sheds his or her judicial temperament and inhibitions. I suggest a little cloistering of judges from public

view is healthy. Blogging also has the risk that attends email — comments made and disseminated too quickly, without time for serious reflection or editing, resulting in content that may be tone-deaf or even off-color. Unfortunately, when a judge writes like that, the impact is not limited to that particular judge; the entire federal judiciary is tainted by the ill-considered utterance. If you want to write about the role of trial court judicial officers, Madge, write a law review article where standards of discourse are different.

STRAIT

Nielsen, we’re talking about informing the *public* about the Third Branch. You and I both know that, with the exception of a few judges and academics, no one reads law review articles unless they have to, which generally reduces the population of readers to law clerks and editorial boards. Why is a statement about the ▶

“Why should the public know the names of individual justices or judges? That’s not what counts. What matters is whether the public respects the institution of the judiciary.”

judge’s role in a less-accessible law review article any more legitimate than the same statement on a blog?

**FELL**

Well, I guess we all know where Nielsen stands on blogging and where Madge stands on law reviews. Madge, you mentioned to Tran a few moments ago that you’re willing to talk to the media. If you do talk to them, how will you avoid the temptations of public attention? I’ve seen judges interviewed where the judge appears to revel in the attention, happily owning his or her characterization as gutsy or a troublemaker. One can’t help but wonder what effect that apparent craving for attention has on the judge’s decisions, or what effect it has on the parties’ confidence in the judge.

**STRAIT**

As an ordinary magistrate judge, I don’t think I’m going to be the subject of much public attention, Lang, but I take your point. If a judge begins to enjoy public attention, that judge might reach out for cases or issues in order to stay in the limelight. Like all human beings, judges generally are flattered by attention, and like to talk about themselves and the difficulty of what they do. Experienced journalists who know how to ask questions may tempt a judge to say more than he or she ought. A federal trial judge presiding over a prominent antitrust case several years ago believed he was presiding at the trial of the century. When it came to light later that during the trial — for the sake of history — the judge gave confidential interviews to a news reporter describing his thinking, the effect was to impugn the integrity of the process.

**DAPPEL**

Speaking of public attention, there seems to be a new phenomenon that has developed during our professional lifetimes — Supreme Court justices becoming public celebrities. When we attended law school, we knew about the earlier wave of “Impeach Earl Warren” billboards and we knew that at a younger age Justice White had been a star football player, but I don’t remember individual justices being treated as celebrities until the last 20 to 25 years. Now we see justices being lionized not just at law schools, which is to be expected, but on talk shows and comedy shows, as a visiting disc jockey, at New Year’s Eve galas, on book tours highlighting their most recent books, in operas — I won’t list all the examples. We’re not here to talk about the Supreme Court — that’s above our pay grades — but it does concern me that this growing and almost continuous public exposure — maybe overexposure — of nonjudicial behavior in nonjudicial settings is changing ordinary Americans’ perception and image of judges generally. Fortunately in my view, circuit and trial judges have traditionally not received that kind of attention, but the temptation to seek it seems to be growing.

**TERLEVEN**

Let’s also not overlook the effect state judicial elections have in damaging the image of a judge as withdrawn from the public arena.

**FELL**

Chip, state judicial elections have been with us at least since the Jacksonian era, and, while I don’t personally favor the practice of electing judges, I don’t think you can make the case that judicial elections alone have affected the institution of judging. In fact, elections were instituted in many states to displace corrupt judicial-selection processes. Now, how judicial candidates raise money for election campaigns is another matter, but not part of today’s discussion. And to your point, Coar, I seem to recall that Justice Oliver Wendell Holmes had some celebrity status to the point of giving a brief radio address on his 90th birthday, and let’s not forget that Justice William O. Douglas openly flirted with running for president from the Supreme Court bench.

**DAPPEL**

Holmes may have been an exception on account of his Civil War service and injuries, his lineage, and his age. Don’t even get me started on Douglas’s political ambitions. But back to district and circuit judges. I’ve observed that in some metropolitan areas, a handful of federal judges receive extra media attention to what they say about the law, prosecutorial policies, or the role of judges. The extra attention seems to result from not only their high-profile cases, but also their out-of-court writings, speeches, and, in some cases, interviews. Sometimes the focus seems to be more on their individual views and personalities, rather than on what federal law institutionally requires. Plus we now have circuit judges publicly criticizing Supreme Court justices, not just in judge-like disagreement over an outcome but almost challenging their intellectual integrity. The media love and encourage it, but it’s not what a federal judge is hired to do. I don’t expect archbishops to publicly challenge the pope or army generals to publicly challenge their commander-in-chief. Although the criticisms may have merit, I’m troubled by the source.

“Where is it written that a federal judge gives up his or her First Amendment rights?”

**FELL**

But what more informed critic is there than another judge, Coar? Plus, where is it written that a federal judge gives up his or her First Amendment rights?

**PRIUS**

If a judge wants to engage in the public debate, I suggest he or she should retire from the bench to do so. After all, that’s not unheard of. But until then, federal judges should not become players in the public arena. To the extent they do, they diminish the public’s belief that judges apply the law in an agenda-free manner. That in turn diminishes the public’s trust in the judiciary as a legitimate, independent part of government. This won’t surprise

you, but I'm of the old school view — that becoming a federal judge does mean giving up some of the free-speech rights of ordinary citizens and taking a vow of reserve and withdrawal in our public and private lives. The federal judiciary exists to serve the public, not promote the interests or views of individual judges. In fact, I'll go farther and say that I think that even after retirement judges and justices should be silent about their past decisions and their former colleagues. Let the past work product speak for itself, good or bad. I notice that Presidents generally pipe down at least for a period after they leave office; why not judges and justices?

#### SPERASY

Well, if judges won't Tweet or blog, how about using last-century techniques like op-eds written by experienced judges on the sentencing guidelines, mandatory minimum sentences, or prosecutorial policies for white-collar crime?

#### SMITH

If I were the defendant about to be sentenced, I wouldn't be pleased to read that my judge thinks the guidelines are too lenient. If I were the prosecutor, I wouldn't be pleased to read that my judge disapproves of Justice Department policies.

#### SPERASY

But you miss the point, Ward. Judges already *have* those views. Placing them out in public simply makes them transparent. Then the defendant and the lawyers know in advance what they are up against and can style their presentations to the judge accordingly, rather than labor in the dark.

#### STOREY

As a trial lawyer, I certainly want to know everything about the judge that I can. So I welcome greater transparency. Sometimes my clients and I won't be pleased that a particular judge ends up handling our case, but at least we know then what we're dealing with, and can plan our trial or settlement strategy accordingly.

#### RISK

Is there anything wrong with a judge writing a law review article or a book about her views on a topic? Isn't that a venerated tradition? It's not exactly as if no justice ever wrote a book in the past. William O. Douglas in the 20th century and Joseph Story in the 19th were famous and prolific out-of-court writers.

#### DAPPEL

It certainly is not a problem if the book or article is about something that's not before the court or seeking to justify or criticize a previous decision. The Code of Conduct explicitly allows federal judges to write and lecture about the law and the administration of justice. A book on standards of review, for example, or principles of statutory construction is fine. But when the publication starts to be an out-of-court debate over the country's cultural wars, then I think it is a problem. As Nielsen intimated earlier, that's not the business of judges.

#### SMITH

I'm a transactional lawyer and not involved in this issue of judges having a public identity, but let's not ignore the benefits of federal judges — especially Supreme Court justices — showing young people through their life stories what's possible in this country. Some of our judges and justices have overcome obstacles based upon race, ethnicity, gender, or economic limitations, and their experiences can give hope and ambition to a younger generation. And trial and appellate judges can write about what their job entails, often a mystery to outsiders. Believe me, written judicial opinions will not accomplish that. If books can explain in plain English what the Supreme Court does or other federal judges do, then I think book tour interviews are a small price to pay for that benefit.

#### BILOWR

As a law student, I was greatly influenced by the life stories of Justices O'Connor and Sotomayor, and I fully intend to read *Notorious RBG*.

#### SPERASY

Nielsen, if you are committed to judges speaking only through judicial opinions, then why not write them with a view to their being read by ordinary people, not just lawyers? For example, the late Chief Justice Earl Warren reportedly said he wrote *Brown v. Board of Education* at a length that the opinion could be carried in full in the national newspapers of the time.

#### PRIUS

I've no objection to well-written opinions, Tran, when I have the leisure to write a polished piece of prose without legalese. Given our legal training and the complexity of many federal laws, it's more difficult than you think. But if judges were to eliminate their out-of-court pronouncements and use all that time and energy to make their written decisions more understandable, then I'd be all for it. The topic of opinion-writing, however, deserves a separate conversation by this group.

#### RISK

Coar said earlier that federal judges don't reach out to set policy, but only decide disputes the parties bring them. I wonder. I suggest you take another look at the kinds of opinions some judges are writing these days. I'm not talking about the Supreme Court. I read a lot of lower federal court decisions and I've noticed a number at the trial and circuit court level that seem consciously designed to be noteworthy, to push the envelope so to speak — I mean where the district or circuit judge goes beyond what's necessary to decide that particular case, and expounds more generally on an issue of public concern, and the opinion then becomes a focus of public attention. I've observed it in the context of judicial critiques of everything from prosecutorial policies over white-collar crime, to prosecutorial policies on charging and sentencing, to executive-agency settlement practices, to the pluses and minuses of class-action lawsuits, to the benefits of online research, to the decline of civil trials. Judges get attention for these opinions among their colleagues, ▶



within the academy and even in the general media. It seems to me that the volume of such opinions is growing.

**STRAIT**

Manny, I confess I've written an opinion like that on a couple of occasions. In my case, it had to do with electronic discovery issues, and I believed the Rules Committee needed to take some corrective action.

**PRIUS**

Then why not write the Rules Committee, Madge? There's a process for making comments and criticizing that does not involve "going public."

**STRAIT**

You're correct, Nielsen, but then I'm just one voice of many and, in my experience, often overlooked. I've discovered that when I write an opinion criticizing a rule, and the legal bloggers pick it up, it gets more resonance. I've also noticed that when a district judge writes about prosecutorial policies, both the blogging world and the news media pay attention to what the judge has said, and it provokes a healthy public debate. Same for circuit judges talking about class action issues.

**FELL**

You want to have an impact, Madge. I understand that. You think you've developed an important insight that should not be ignored. We members of the academy have the same desire.

**PRIUS**

But our role as judges is to decide individual cases, not look for attention, not seek an impact, and not promote our own views of law reform. I'm apprehensive that the more judges get that kind of attention, the more they will write in that vein. A succession of such opinions contributes to skepticism about judges' role as neutral arbiters of particular controversies, and suggests that at least some judges have an agenda and a role in the public arena. It doesn't matter whether the critique is liberal or conservative, pro-law enforcement or anti-law enforcement, pro-plaintiff or pro-defendant; the result's the same. No longer are judges seen primarily as agenda-free umpires of the dispute before them.

**FELL**

Nielsen, I can tell you firmly believe judges should be reclusive, but you're overlooking the benefits of judges speaking out. Federal judges have experience and knowledge not shared by the general public, and they can point out injustices in sentencing policy, gaps in prosecutions, and problems in class-action lawsuits, in ways that no one else can. I can think of examples where judges who once were prosecutors have highlighted the effects of prosecutorial decisions on sentencing ranges that other judges might have overlooked. As a democratic republic, we can't afford to silence judges' voices.

**PRIUS**

Where that's the case, federal judges can speak institutionally through the Judicial Conference. The Judicial Conference through its Committee structure authorizes judges to testify in Congress about policies the Conference has adopted in areas where the federal judiciary has special information and knowledge.

**DAPPEL**

There is some merit to what Nielsen says. I've noticed that publicity-seeking judges tend to have an adverse effect on collegial relations. We on the appellate bench begin to view a colleague's opinions as driven at least in part by the desire for public attention rather than simply the need to decide the case according to the law and the facts. As the professional journalists and bloggers give that judge extra attention, I worry my colleagues will begin to compete for that attention. I guess that risk does not apply at the trial court level, but it does concern me as an appellate judge.

**SPERASY**

Linda, you've been awfully quiet. As a litigator in federal court, wouldn't you agree with me that transparency on the bench is in everyone's best interest?

**GATE**

Well, Tran, it might be. But I'm going to play devil's advocate here. I know you journalists swear by transparency, and get juicy stories by "uncovering" something, but what's wrong with one branch of government being reserved, and observing rules that reflect the special way members of that branch make decisions, in distinction from the other branches? Where are today's advocates for Nielsen's proposition that being a federal judge is a calling that carries limitations for public and private behavior? Now we see judges and justices "confessing error" outside of court for opinions they wrote earlier or criticizing their colleagues' opinions. *Citizens United* is a prime example. At least when Chief Justice Marshall wrote later in defense of *McCulloch v. Maryland*, he used a pseudonym. Maybe Nielsen is correct — that judges should speak only in the context of deciding a particular case or controversy. Let's keep the judicial branch unique. Journalists want personality, not just the institution, as their story, but lack of personality is the *strength* of the judiciary. There's value in staying away from personalities and in preserving detachment.

**SPERASY**

But Linda, it's never healthy for a democratic republic when its officials operate under false pretenses. Judges pretend to be neutral oracles who simply apply the law without any predisposition. In fact, judges are human beings with biases and predispositions, many of which they are unaware of. Journalists want to expose judges for who and what they are, to let the public see what they're doing, and why they're doing it, and to stop them from hiding behind their robes. And I say, thank goodness that some judges and justices have criticized *Citizens United*.

FELL

I agree with Tran that the public at all levels needs to see judges for who they are. I'm not sure I agree that it's healthy for a judge or justice to enter the public debate about the merits of a particular decision, even *Citizens United*.

PRIUS

The public is well aware that we federal judges are human, making difficult decisions, but the public expects judges after taking the oath of office to strive to overcome their human weaknesses and behave at a better level — just as the public expects of pastors, priests, rabbis, and imams. If judges accept Tran's gospel, I fear that rather than try to overcome their predispositions, they will glory in applying them and see themselves as legitimately part of the culture wars. Such an outcome would be disastrous for the rule of law and Americans' trust in their government, already at historic lows. I reluctantly accept that celebrity justices are with us to stay, but I sense that development is contributing to a changing vision of the entire federal judiciary's role. I'm distraught that no one is exerting leadership to manage that change and try to ensure it won't do damage.

TERLEVEN

I agree. We expect the federal judiciary to provide decisions that are independent of the political branches and of the popular

outrcry of the moment. Impersonality and detachment are important values in the claim to legitimacy for that role. But the increasingly public personae of individual federal judges and justices have placed the federal judiciary on a road of change where no one knows the destination.

SPERASY

Friends, I give up. I'm beginning to think the Legal Realist movement never happened. And we haven't even touched upon whether federal judges should use social media like Facebook or Tumblr, or what state judges are doing in those social media, especially those who run for elective office. Rejecting and avoiding the methods of how new generations communicate put federal judges at a huge disadvantage in trying to preserve cultural mores and constitutional values. You are as delusional as Canute trying to hold back the tide. Take it from a journalist who has seen her media world completely up-ended: Change will occur despite you.



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