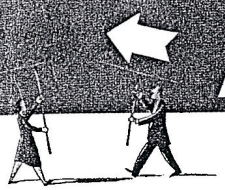


The Appearance of Propriety

The judicial canons have got it wrong. The real ethical issues facing judges are hidden from view.

By Alex Kozinski

THE CANONS OF JUDICIAL ETHICS REMIND me of the old joke about the drunk who's crawling around on all fours under a lamppost one night. A policeman comes along and asks him his business and the drunk explains that he's looking for a lost quarter. The policeman offers to help and pretty soon they're both crawling around looking for the coin. After about a half hour of this, the policeman gets fed up and asks, "Are you sure you lost the quarter around here?" "Oh, no," answers the drunk. "I dropped it over in the alley, but it's too dark to look there."

So, too, it is with the canons of ethics. The canons focus on the tensions and potential conflicts that are most easily detected by an outside observer. For example, pretty much everyone agrees that a judge should not sit in judgment in a case on appeal if he participated in the decision below. Similarly, everyone agrees that a judge should not sit in a case where he participated as a party or a lawyer. Those are just two of the most obvious examples of rules and precedents saying that a judge may not take part in a case where doing so would create the appearance of impropriety.

I'm not a fan of this approach, nor do I believe that it's necessary or inevitable. In the early years of the Republic, the rules of disqualification were based on the common law notion that an integral part of the judge's job was to set aside whatever personal interests and biases he might have and decide cases impartially on the merits. If a judge felt he could not set aside personal bias in a particular case, he would recuse himself. But the primary obligation was to summon his internal fortitude and decide the case without regard for personal considerations. Thus, it was not uncommon for a judge to hear an appeal of his own decision, as Supreme Court justices did when the full court reviewed cases that they had each decided while serving as judges in the lower courts, a practice called riding circuit. Nor was it taboo for a judge to hear cases involving events in which he had participated, as Chief Justice John Marshall did in *Marbury v. Madison*. That landmark case arose because Marshall, acting in his capacity as secretary of state—a job he held at the same time he was chief justice—had failed to deliver William Marbury's commission as a justice of the peace before President Adams's term in office expired. Yet no one thought there was a problem at the time. The modern approach, with its focus on the appearance of impropriety, condemns both of these practices while overlooking the most common and important ethical issues that judges face.

WHAT ARE THESE ISSUES? THE FIRST one I want to examine has to do with work allocation, that is, the amount of time and effort judges spend on cases, particularly small cases. Judicial caseloads have increased tremendously over the last few decades, and they continue to do so. When I graduated from law school in 1975, I clerked for a judge on the Ninth Circuit; at that time each judge disposed on the merits of approximately 210 cases a year. In 2002, the number stood at 492 per active judge, and the Ninth Circuit was far from the busiest court of appeals in the country. That dubious honor went to the Eleventh Circuit, which decided a mind-numbing 843 cases per judge.

Human nature being what it is, there is a strong tendency to devote a disproportionate amount of judicial time to big cases and give short shrift to small ones. There's actually a lot to be said for this. Preparing a precedential opinion requires a significant amount of time because the opinion not only decides the dispute between the parties but also sets the course of the law for innumerable cases to come.

Yet the small cases also have a legitimate claim to a fair share of judicial time and attention. Once in a while, it turns out that what looked like an easy case is actually quite difficult, because of a small fact buried in the record or a footnote of a recent opinion. After more than two decades of judging I have found no way to separate the sheep from the goats, except by taking a close look at each case. But how close a look any judge actually takes is strictly a matter of conscience. It's one of the embedded ethical issues that no one ever talks about.

A closely related issue is the pressure to give away essential pieces of your job. Ninth Circuit judges generally have four law clerks, and the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening"—oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition. After you decide a few dozen such cases on a screening

calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.

A similar temptation exists in the bigger cases. Writing opinions is a difficult, time-consuming, exacting task. It is a reality of current judicial life that few judges draft their own opinions from scratch. Generally, the judge will give instructions about how a case is to be decided and what points the opinion should make, but the initial drafting is almost always left to a clerk. If the judge chooses merely to fiddle a bit with an opinion drafted by his clerk, nobody outside his chambers will know. And we do occasionally get opinions circulated that read like they were written by someone a year out of law school with no adult supervision. The only guarantee one can have that judges are not rubber-stamping their law clerks' work product is each judge's sense of personal responsibility.

Important cases create their own issues. Would anyone today remember John Sirica, Harold Greene, and Thomas Penfield Jackson if they had held, respectively, that President Nixon did not need to turn over the White House tapes, that AT&T did not need to be broken up, and that Microsoft was not a monopoly? I'm not saying that Judges Sirica, Greene, and Jackson made their decisions for improper reasons. I'm saying only that judges are well aware that certain outcomes are far more likely than others to gain them personal fame and prestige. Sirica, who before Watergate led an undistinguished judicial career and was known around the D.C. district courthouse as "Maximum John" for his harsh sentencing practices, became *Time*'s Man of the Year in 1973. That's a lot of temptation right there, yet it is seldom recognized as creating an ethical dilemma.

And how does a judge reconcile his career ambitions with principled application of the law and sensitivity to individual justice? Let's say you're a district judge hoping for promotion. In criminal cases, do you consider that the attorney general, who has considerable say in the appointment and elevation of federal judges, has adopted a policy of keeping track of district judges who sentence defendants below the range suggested by the sentencing guidelines? How do you keep it *out* of your mind? Every magistrate judge is a district judge in waiting, every district judge is a circuit judge in waiting, every circuit judge is an associate justice in waiting, and every associate justice is a chief justice in waiting. Every state judge wants to be re-elected and promoted. The canons of judicial ethics don't begin to address the pervasive temptation to decide cases so as to please those in the political process who have the power to appoint, retain, and promote judges.

Making sure judges don't attend privately financed seminars at swank resorts with golf courses will do nothing to increase judicial responsibility where it counts.

Relationships on the bench also present challenges and temptations. Do you have an ethical obligation to dissent because you think it's the right thing to do, even if you know it won't change anybody's mind and will probably upset your colleagues? Is it okay to swap votes with another judge—say, to vote in favor of going en banc in a case he's interested in, in exchange for having him vote with you in a case you're interested in?

And how about the ethical conundrum presented by the cases where a dispassionate application of the law to the facts leads to a result that the judge doesn't like? I want to put aside the close case where the law is murky enough so the judge might find a principled way to reach a result he considers just. I also want to put aside the controversial case where the morally offended judge applies the law correctly but then makes noise to spark political efforts to change the law. Rather, I pose the more mundane—but far more common—case where the law is fair, no one in particular has an axe to grind, but the judge believes that the result dictated by precedent is unjust.

Most people would say that a judge in that situation must put aside his personal feelings and decide the case in accordance with the law. But most would also agree that the judge faces a conflict of obligations, namely the obligation to apply the law impartially and the obligation to do justice. We generally reconcile these obligations by saying that justice is served when a judge applies the law impartially, regardless of his personal views.

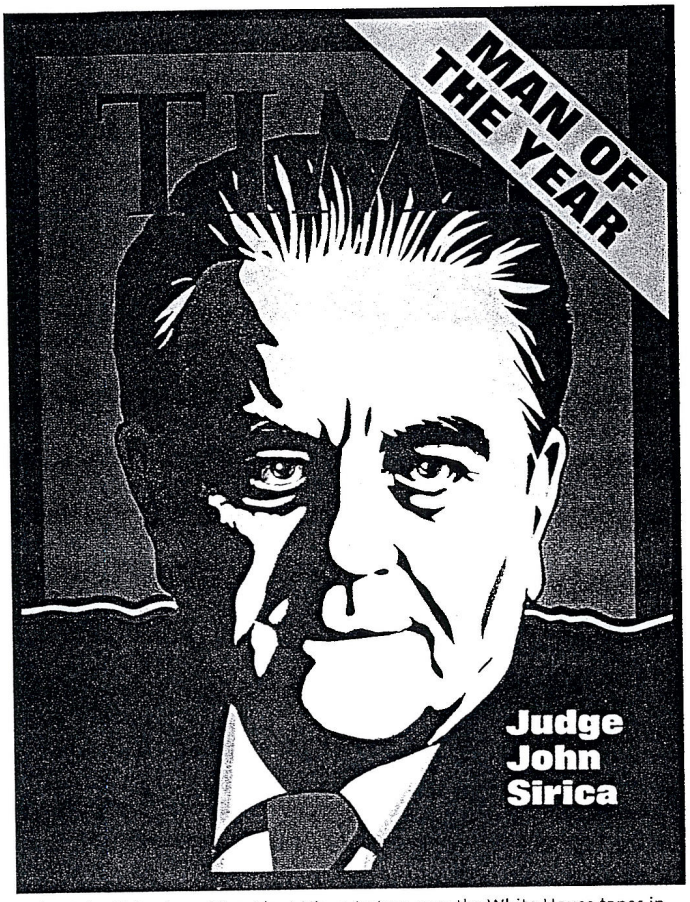
But what if a judge comes across a case where a straightforward application of the law leads not merely to a result he doesn't like, but to what he believes is a shocking injustice? May a judge bend the rule of law to avoid a truly monstrous result? Does he have an ethical obligation to do so?

In theory, it's easy enough to say that a judge may never bend the rules to avoid a particular result, no matter how bad. But consider this example: You are reviewing a criminal appeal where a young man has been convicted of murder and sentenced to life without the possibility of parole. You examine the record and find that the evidence linking the defendant to the crime is quite flimsy. The only solid proof supporting the conviction is the testimony of an inmate who shared a cell with the defendant while he was awaiting trial, and who swears that the defendant confessed to the murder (a confession the defendant denies making). You read the snitch's testimony closely and find it transparently unconvincing.

Applying the rules of appellate review in an objective manner, you would have to affirm the conviction. After all, the jury is the trier of fact, and it was entitled to return a guilty verdict based on the jailhouse confession alone. Yet what if you believe, to a moral certainty,

that the confession is a fabrication and the defendant didn't do it? Must you affirm the conviction and let a young man you believe is innocent spend the next 60 years locked up like an animal in a 7-foot by 10-foot cage?

Or, if you're not moved by this example, consider the case where the defendant is convicted of multiple brutal murders of small children—crimes of which he is doubtless guilty. And let's say you're convinced that, if the defendant is released, he will surely do it again. As it happens, however, this defendant has a slam-dunk argument that the prosecution's entire case against him is the fruit of a technical procedural violation—a search based on an improper warrant, for instance. Do you have a categorical obligation to set the defendant free and thereby condemn more children to death by torture, or may you put justice above the law and find a way to keep the killer behind bars?



Judge John Sirica forced President Nixon to turn over the White House tapes in 1973. Most judges long for this kind of recognition.

ETHICAL QUESTIONS LIKE THESE POP up every day in the course of judging but don't show up anywhere in the canons. How serious are these issues? Let me explain it this way: I file a financial disclosure report every year, giving the world a list of my assets, just so litigating parties can confirm that I did not—God forbid—sit in a case involving a corporation whose stock I hold. I find this requirement a nuisance and a bit dangerous and intrusive, because it makes public information about me and my family that I would prefer to keep private. But the report is required by law and is considered an important safeguard of judicial integrity.

Yet I can't imagine that I could possibly be tempted to change my vote in a case because I own stock in one of the parties. If money mattered to me, I would be in private practice and, in a month or a week—maybe an hour—I would make much more than my one hundred shares of AT&T could conceivably change in value based on my vote in a case. The idea that I would give up my honest judgment in a case for a few dollars is beyond silly—it's ludicrous and insulting. So many of the things contained within the canons, the ones most talked about, make no difference at all in practice.

But the internal pressures I describe above are ones I confront every day. Giving short shrift to small cases, signing off on the work of staff and calling it my own, bending the law to reach a result I like, and the dozens of other ways in which I feel the urge to do something unethical, yet wholly undetectable by anyone other than me—all these temptations I must fight off many times every day.

My problem with the appearance-of-impropriety standard is that it promotes the wrong idea—that in order to keep judges from acting unethically, ethical rules must prevent judges from *appearing* to act unethically. It also seems to suggest the converse: that if judges appear to be acting ethically, they probably are. Nothing could be further from the truth. A judge can appear to act ethically and still betray his responsibility in essential respects and in ways no one will ever know about. Increasing the number of rules and prohibitions—like making sure judges don't attend privately financed seminars at swank resorts with plush golf courses—will do absolutely nothing to increase judicial responsibility where it counts.

I know there's a growing tendency to distrust judges—to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges' private lives—all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself. ■

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