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MAKING THE CASE ONE'S OWN

*John T. Noonan, Jr.**

My title is taken from a phrase of the Roman law used in Justinian's *Digest* 5, 1, 15, 1 to describe a corrupt judge.¹ The judge has accepted a bribe. He has, therefore, made the case his own. The phrase pungently expresses the resulting incapacity of the judge. You cannot judge your own case.

Bribetaking judges have bespotted the English and the American judiciary and appear in the literature that reflects reality: Francis Bacon, chancellor of England under James I;² Martin Manton, chief judge of the Second Circuit Court of Appeals in the 1930s;³ Albert Johnson, district judge for the Middle District of Pennsylvania from 1922 to 1947, whose corrupt services were bought by Hoyt Moore of the Cravath firm in 1936.⁴ Besides such miscreants whose guilt was established, others have existed whose guilt is evident on examination—for example, Portia, the most famous of fictional judges, who once had a law school in Boston named for her,⁵ but who made the case her own when she decided in favor of her fiancé against Shylock.⁶ That Shakespeare was aware of Portia's problem, although he did not dwell on it, is clear from *Measure For Measure*, where Angelo, probably modeled on Bacon, has corruptly sought sex from Isabella; he is then accused by her, and is told by the

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1. See DIG. 5.1.15.1 (Paulus, Ad Edictum 5).

2. See JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEAL, 334-365 (1987).

3. See JOSEPH BORKIN, THE CORRUPT JUDGE 23-93 (1962).

4. See *id.* at 139-86.

5. Portia Law School was founded in 1908 when lawyer Arthur Winfield MacLean agreed to tutor two Boston women to take the bar examination. It was named, at the suggestion of MacLean's wife, after Shakespeare's judge-impersonating heroine. The school grew into the nation's only law school exclusively for women, became coeducational in 1938, and changed its name in 1969 to the New England School of Law. See New England School of Law, The History of NESL at <http://www.nesl.edu/about/history.cfm> (last visited Sept. 2, 2004).

6. See WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1.

duke to be the judge in his own case.⁷ Everyone in the audience sees the wickedness of such a judge.

One cannot close one's eyes to the possibility that crassly corrupt judges exist today. It would be foolish to suppose that the requirement to report income and assets⁸ has eliminated the elementary temptation.⁹ Vigilance is necessary to assure what is the primary asset of any judicial system: freedom from corruption. The unhappily corrupt state of some countries in Africa, Asia, Eastern Europe, Latin America, and the Middle East will not be changed until their judiciaries possess that asset. An honest judiciary is central to honest government. No country can take the honesty for granted. It would be naïve to suppose that lawyers as stuffy and as sly as Hoyt Moore do not exist who would test that honesty.

A gathering of this kind, I am sure, will think this possibility too obvious to need emphasis. I believe that its obviousness should not let it be neglected, but I will go on to focus on three ways more subtle than a case bribe in which a judge may make a case his own.

First, there is the judge who is ruling in a case where the judge's participation is required by law. It may be illustrated by a situation that has arisen more than once in the federal courts: a judge is asked to rule on the constitutionality of an act of Congress reducing the judge's salary contrary to the command of Article III, section 1 that the judges' compensation "shall not be diminished during their continuance in office."¹⁰

Judges have responded in different ways when this situation has arisen. During the Civil War, Congress enacted an income tax that touched all federal officers. Chief Justice Roger Taney wrote Secretary of the Treasury Salmon Chase that he considered the tax to be an unconstitutional diminution of his salary; but as his financial interest was at stake, he would not adjudicate a case challenging a tax.¹¹

7. See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 5, sc. 1.

8. See 5 U.S.C. app. §§ 101, 102 (2004).

9. The effectiveness of the reporting requirement has recently been called into question, and a Government Accountability Office study has revealed that between 1999 and 2002, information was redacted from the financial reports of federal judges 661 times. See Joe Stephens, *U.S. Judges Getting Disclosure Data Deleted*, WASH. POST, Aug. 5, 2004, at A4 (discussing U.S. GOV'T ACCOUNTABILITY OFFICE, *FEDERAL JUDICIARY: ASSESSING AND FORMALLY DOCUMENTING FINANCIAL DISCLOSURE PROCEDURES COULD HELP ENSURE BALANCE BETWEEN JUDGES' SAFETY AND TIMELY PUBLIC ACCESS* (GAO-04-696NI, June 30, 2004)).

10. U.S. CONST. art. III, § 1.

11. See BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY* 508-09 (photo. reprint 1997) (1922).

In more recent times, Congress repealed salary increases for federal judges that would have automatically occurred pursuant to enacted law unless Congress had intervened.¹² The Supreme Court in an opinion by Chief Justice Burger held the repeal unconstitutional.¹³ Only Justice Blackmun recused himself. Chief Justice Burger conceded that the compensation of every federal judge was affected by the decision. He excused their participation by what he called, "The Rule of Necessity," capitalizing the rule and finding his first precedent in 1436 in which the chancellor of Oxford judged a case in which he was a party.¹⁴ The rule was invoked because there was an "absolute duty of judges to hear and decide cases within their jurisdiction."¹⁵ If federal judges did not decide the constitutional question, no forum would exist to decide it.¹⁶

The question is not without difficulty. But I disagree with Chief Justice Burger on two grounds. Where a federal forum is lacking for a federal constitutional issue, a state court may decide it, as Henry Hart used to teach in his famous course on federal courts. Even more basic than the rule of necessity is the rule that self-interest transforms the judge into a partisan. A case before a financially-interested judge is *coram non iudice* as the Supreme Judicial Court of Massachusetts once firmly expressed it;¹⁷ the case is "not before a judge." The judge whose salary is at stake owns the case; he is no longer a judge. It has been a surprise to me that in recent litigation on behalf of the salary of federal judges, no judge or justice followed the example of Justice Blackmun.

A variant of the situation where law puts an interested party into the seat of a decision-maker occur in various administrative tribunals which by law must make decisions that affect their budgets. The administrative officers are not personally affected by their decisions but their agency is. It is now clear that agency officers making decisions that affect the rights of their fellow citizens are bound to be as free from bias as any

12. In four consecutive years, Congress enacted laws designed to prohibit or reduce cost-of-living increases for federal judges that were to be automatically operative: (1) in 1976 Congress enacted the Legislative Branch Appropriation Act, 1977 (90 Stat. 1439); (2) in 1977, Congress passed a statute (91 Stat. 270) nullifying a contemplated 7.1% increase for federal judges in 1978; (3) in 1978 Congress enacted the Legislative Branch Appropriation Act, 1979 (92 Stat. 763) prohibiting the payment of a 5.5% increase; and (4) in 1979 Congress passed the Executive Salary Cost-of-Living Adjustment Act (93 Stat. 565), which reduced a proposed pay increase for federal judges of 12.9% to 5.5%.

13. See *United States v. Will*, 449 U.S. 200, 231 (1980).

14. *Id.* at 214.

15. *Id.* at 215.

16. *Id.* at 217.

17. See *Gay v. Minot*, 57 Mass. (3 Cush.) 352, 354 (1849).

Article III judge. It is also clear that there is such a thing as a de minimis impact of an agency's decision on the agency's budget. The case, however, is different if agency adjudications in one direction or another sustain the agency's budget, and thereby produce a revenue flow making the agency in regard to certain of its programs independent of congressional appropriation. In such a situation, the agency adjudicators act in their own case when they decide. They act because a statute sets them up as the adjudicators. But a statute cannot make them impartial or purge them from an interest that should disqualify them.

Second, there is the identification with a public cause that may raise a question as to whether the judge does not consider the case the judge's own when the cause is believed in by the judge and the case is before the judge's court. I will speak from personal experience. Prior to nomination to the bench, I was active in the pro-life cause and a member of several pro-life groups. In my first year on the bench I was presented with a case brought by a state health department employee who sued the state because she had been disciplined for attending a legislative hearing on abortion in order to demonstrate support for abortion. I did not disqualify myself in *Johnston v. Koppes*,¹⁸ and in fact wrote an opinion upholding the employee's claim.

Nine years later I was presented with a case in which an abortion clinic sued a pro-life group for interfering with its business in violation of federal law. The plaintiffs asked me to recuse myself, citing my prejudicial position on abortion. I declined to do so and wrote a brief explanation of my refusal.¹⁹ My position on the disqualification request was that it sought to impose a religious test on the judiciary contrary to Article VI of the Constitution. In the background was history: American judges, unlike those on the European continent, are not judges from the start and are not promoted in a civil service sort of way. American judges often emerge from the battles of American politics. They have been engaged, sometimes passionately engaged, in partisan causes. It has not been considered that their past passions disable them from judging when an old cause might enkindle the flame in them as judges.

Justice Thurgood Marshall has established the relevant precedent. He was a member of the NAACP and its counsel for many years. He did disqualify himself when that organization was before the Supreme

18. 850 F.2d 596 (9th Cir. 1988).

19. See *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995).

Court.²⁰ He did not disqualify himself when the cause of racial justice was before his court.²¹ Unquestionably he had devoted himself to that cause as a lawyer. But he thought, and I should suppose that the informed public thought, that he could distinguish the cause sufficiently from himself so he could judge a case where it was at issue. The public does not want, I believe, a rule that would prevent judges from acting on subjects where, by virtue of their prior political participation, they are apt to be keenly aware of all the nuances. No doubt the former partisan is not a perfect neuter; no doubt there is a trade-off in which perfect neutrality is diluted in order to obtain a judge with relevant experience. The proof is in the pudding. If a former partisan always rules in favor of the cause that once was his, it may be inferred that he is so prejudiced that he should recuse himself. I do not, however, think it right to presume that the old cause will determine the judge's outcome.

Third, there is the attachment to a position that is aroused by the facts of the case. This bias is normally considered to be nondisqualifying. It comes, it is supposed, from what the judge sees. It is the reaction of any sentiment human being to facts that cry Outrage! or Injustice!

I don't think this kind of bias can so easily be dismissed. What is outrageous or patently unjust to one judge is to another what is required by law or the normal working of an institution. If the judges see the facts so differently, it is evident that not the facts themselves but their own past experiences, their own values and beliefs, their own inner make-up have produced these varied reactions of outrage or acceptance. No bias may be stronger than that bred in the bones. We can and should, I think, still ask, when strong feelings exist as to what the outcome should be, whether the judge has not made the case his own.

The facts of a case lead to the persons in the case. A judge is mistaken, I suggest, to extinguish any empathy with the persons affected by the judgment. It was written admiringly of Chancellor George Wythe that he knew no one in the case before him, they were to him only A and B.²² But litigants are not A and B, perfectly fungible; nor are they to be reduced to "respondent" or "appellant." Litigants are human beings; as human beings, the judge is capable of identifying with them.

20. See I FRIEDMAN & ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 3090 (1969).

21. See, e.g., *Metro Board, Inc. v. FCC*, 497 U.S. 547 (1990).

22. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 30 (2d prtg. 1977) (quoting John Randolph).

Of course that does not mean that the judge should favor a plaintiff or a defendant because she is intelligent or old or pretty or underprivileged. What it does mean is that the judge should understand the consequences for these persons of the judgment that the judge will give. The judge must judge in terms of rules, not persons. But to understand the rules and to choose the relevant rule, that judge needs to know its effect upon the human beings before the judge. It is the consequent empathetic identification that will lead the judge to feel strongly about the rightness or wrongness of a decision.

Let me illustrate again from personal experience. Sitting in Atlanta with the Eleventh Circuit I heard a case of a man who had been made a paraplegic by shots from a police officer.²³ The plaintiff was a thief, a passenger in a stolen truck driven by the co-thief.²⁴ A police car overtook the truck on a main highway into Atlanta about 7:30 a.m. The police ordered the truck to stop and tried to block it, but the truck continued at 70 miles per hour.²⁵ The police then drove alongside the truck, and the officer fired at the driver, hitting the plaintiff instead.²⁶ The district court in Georgia dismissed the plaintiff's case.²⁷

From first hearing the facts in this case I had the conviction that it was wrong to deny the plaintiff a chance to prove his case. The facts that came to seem significant to me were the use of potentially lethal force, the paralyzing of the plaintiff, and the craziness of stopping a speeding truck by shooting the driver at the beginning of the morning commute hour. The law around the country appeared to support my conclusion. Convinced of what the result should be, I was making the case my own in the sense of identifying with the plaintiff's cause. But the case was not my own in any material sense. No interest of mine was defeated when the case first went the other way, except my sense of what was right. I remained on collegial terms with the other two judges on the panel who, for a long time, responded differently. I report this case here to make a point; it is permissible to respond to the facts with controlled passion and; maintaining a decorum and collegial civility, to champion a result the judge has reached after examination of the relevant facts and law.

This kind of bred-in-the-bones reaction should be looked at self-critically and skeptically by the judge. It does not, and need not occur, in

23. *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003).

24. *See id.* at 1326.

25. *See id.*

26. *See id.* at 1327.

27. *See id.*

every case. But in some cases it is right for the judge to conclude that he or she is on the side of justice. He or she is not a bureaucrat applying rules without relation to persons. Not to have a passionate devotion to the right result is to underperform one's judicial function. In this limited and special sense, making the case one's own is what every conscientious judge will do.
