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Abstract

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JOHN SANCHEZ: Good afternoon. Before turning to the panelists for their observations and questions, in addition to questions from the floor, I have one rather short question. This relates to an earlier part of Judge Noonan's presentation. Judge Noonan stated that there was evidence of bias with Supreme Court Justices sitting on their own appeal. Do we have a present-day equivalent of that bias on the Circuit Courts of Appeal, when a panel delivers a decision and then sits on review en banc on the same decision?

JUDGE JOHN NOONAN JR.: Well, in the interest of candor, if not of impartiality, I should reveal that Professor Sanchez and I discussed this last night, so I am not totally unprepared. But understand the practice of a panel of a circuit court: three judges hear a case, decide one way or the other, then the losing party appeals to the whole court en banc. Those three panel members will then sit again—in some circuits, they will always sit, in the Ninth Circuit they will sit if they are chosen by lot, because we do not have the whole court hear the appeal. But in either event, the circuit provides that on the hearing by the full court, the same judges who originally sat on the panel appeal are not disqualified from hearing the appeal to the full court. So it is a very good question. Is this not the same problem? If you look on the appeal to the full court as a new chance for appeal—there is always oral argument and there are often new briefings—it seems something of a sham to allow people who have already judged the case to then sit on the appeal.

Now, it is true that in the old Supreme Court practice, once in a great while a judge changed his mind. It is also true in the circuit; I have seen it happen exactly once, when a judge had decided one way then changed his mind, and went the other way. Actually was great. Everybody admired it, that he was able to change his mind and to write

* The panelists included John Sanchez, Associate Professor of Law, Nova Center for the Study of Law; Michael M. Burns, Professor of Law, Nova Law Center; Janet Munn, Associate Attorney, Steel, Hector, Davis, Miami, Florida, and John Flackett, Professor of Law, Boston College Law School; Judge John Noonan, Jr., Judge, United States Court of Appeals for the Ninth Circuit.

a new opinion reversing himself. But that is extraordinary. You know, the judges come more or less with their minds made up. I said those people, I include myself in that statement. So it is a big problem—one that is not going away. That is the margin analogy that we just did not address.

MICHAEL BURNS: We are fortunate to have Judge Noonan with us today. His work over the years has impressed upon me the importance of viewing lawmaking in its broader context. Unfortunately, the dominant tradition in American legal education has been to utilize the case method in an extremely narrow, legalistic fashion, thereby ignoring the human context in which legal problems arise and are resolved. And so, I urge all of you who have not already done so, especially those of you who are first-year students, to read Judge Noonan's chapter on the Pal-sgraf case in his book, *Persons and Masks of the Law*.¹

Judge Noonan has also encouraged us through his work to contemplate very profound issues of law, morality, and ethics—which all too often we race by quickly in law school—and he has done so with very artful prose. He has written about the qualifications of judges, and particularly about some of our most revered judges and what made them great. He has written about education, intelligence, and character, quoting John Dewey to the effect that all education proceeds by the participation of the individual in the social consciousness of the human race.² Today, Judge Noonan has talked about the inadequacy of the Judiciary Act as a means of safeguarding impartiality.

With these thoughts in mind, I would like to try to draw Judge Noonan a bit further down the path which he has selected for us today—a part of the path which is surely less defined and less well paved, and also very contemporary and highly controversial. I would like to ask Judge Noonan, and all of you who are here today, whether it is appropriate in the judicial nomination and selection process to inquire into the nominees' personal lives, their views on social policy, and their professional choices—all with a very particular concern for the possibility of class bias or, at the very least, class isolation.

To what extent is it appropriate to inquire whether judicial nomi-

1. J.T. NOONAN JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WYTHE AS MAKERS OF THE MASKS* (1976).

2. Noonan, *The John Dewey Memorial Lecture: Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1124 (1987) (quoting Dewey, *My Pedagogic Creed*, reprinted in *TEACHERS MANUALS* 3 (1897)).

nees have been members of elite, fancy "social" clubs which exclude women and minorities? Is it relevant to ask whether nominees have chosen for most of their lives to live in neighborhoods where there has been only token integration, and where they have had little contact with many of the people who will be coming before them? Does it matter whether nominees have been educated in private or public schools or have chosen to send their children to private or public schools?

In other words, what is the degree of the nominee's first-hand exposure to the kinds of living conditions and the kinds of problems facing the parties whose fates he or she will be deciding? As a lawyer, which elements of society has the nominee chosen to serve? Finally, has the nominee made life choices which suggest a sensitivity to these issues, which demonstrate an attempt to bridge the enormous gap between the haves and the have-nots? With respect to judicial impartiality and judicial qualifications, I would ask Judge Noonan whether these questions are appropriate.

SANCHEZ: We will hear the comments first from the panelists, and then Judge Noonan will respond. Now we turn to Janet Munn.

JANET MUNN: I am interested in hearing Judge Noonan's thoughts on the "favor bank." As Judge Noonan talked about it, and as I read his paper, it occurred to me that judges become judges often because they are proficient at working within a favor bank. Judges are generally political beings, particularly within the states where the judiciary is elected. I wonder if it is unrealistic to expect that a person who has become adept at working within the system, upon taking a position on the bench, will suddenly be able to forsake that behavior. If it is unrealistic to expect them to do so, should we talk about the procedural mechanisms needed to ensure that this behavior is controlled? Do we know enough to take care of it in those instances when judges cannot exercise enough self-restraint?

JOHN FLACKETT: I am delighted to be here today, and honored to be on any panel with Judge Noonan. Judge Noonan, although he does not know it, has had a profound effect on my life. As a teacher of Torts, I was enormously influenced by his *Persons and Masks of the Law*,³ which led me to an exciting summer Fellowship in Law and Humanities at Stanford with Professor Lawrence Friedman. I now teach a course in Law and Literature at Boston College Law School, and I

3. See *supra* note 1.

have been associated with a program at Brandeis University which brings together groups of judges, lawyers, and other law enforcement professionals to discuss the relevance of selected literary texts to their working lives.

This leads me to that part of the oath, mentioned in Judge Noonan's address today, whereby a judge "affirms[s] that I will *administer justice* without respect to persons and *do equal right to the poor and to the rich . . .*" (emphasis added).⁴

In my judgment, we do not pay enough attention to the doing of justice in legal education today. Indeed, I often feel law students are encouraged to check the word at the door as they enter law school. It also seems to be increasingly difficult to fashion a legal system which treats the poor on an equal footing with the rich, the judicial oath notwithstanding. In this regard, I am reminded of the remark, allegedly made by an English High Court Judge, that "the law is open to everyone, like the Ritz Hotel."

I would like to share with you some reflections on this theme arising out of discussions of literary texts with judges, lawyers, prison and probation officers, and law students.

E.L. Doctorow remarked to Bill Moyers in a television interview that "literature spreads suffering around." It is very hard not to be moved by the plight of both Billy Budd and Captain Vere in Melville's tragic tale. Melville was said to be obsessed with the problem of doing justice in an imperfect world, and Brecht's "crazy" Judge Adzack in the *Caucasian Chalk Circle* clearly understands that dilemma. Camus' *The Stranger*, Doctorow's *The Book of Daniel*, James Baldwin's *Sonny's Blues*, Susan Glaspell's *Jury of Her Peers*, and many other works of literature highlight the difficulty of judging fairly and impartially the poor, the unpopular, and the weak, especially in times of stress. Shakespeare's Lear, who finally attains compassion and understanding *after* he is alone and powerless on the heath admonishes us: "[T]hrough tattered clothes small vices do appear; robes and furred gowns hide all. Plate sin with gold, and the strong lance of justice hurtless breaks."

Professor Saul Touster of Brandeis University, commenting on judicial seminars in an article, *Parable for Judges*,⁵ noted that the issues which most engaged the participants were "how judgments are made, especially as the judge is necessarily a product of his or her cultural

4. 28 U.S.C. § 453 (1983).

5. Touster, *Parables for Judges*, 16 BOSTON BAR JOURNAL 4 (Nov. 1983).

background and reflects biases; whether gender affects judgments and justice, and how; the problem of inequalities before the law, and the relation between adjudicative and distributive justice (with related questions of the effect of class, race and status on the rendering of judgment)"⁶

The medium of literature enables all of us to talk more openly about our personal values, the hopes and expectations of our professional lives, and our concern for the role of law and lawyers in contemporary society. I would thus urge an expanded role for the humanities in legal education. My own experience tells me that students (of all ages and professional standing) are anxious to grapple with the moral and ethical dilemma of doing justice in an admittedly imperfect world.

NOONAN: Prior to responding to those thoughtful comments, I think the first question really deals with the nomination process, particularly to the Supreme Court of the United States. It is an interesting fact that the first nominee to the Supreme Court to go up personally before a Senate committee was, I believe, Felix Frankfurter in the late thirties. It really is amazing that up until that time, while the Senate committee would scrutinize a nominee, it would do so at quite a distance, at the very most looking at some lawyer representing the nominee. So it may be that we have moved somewhat in the direction of taking a more thorough look at the nominee. I would say that clearly, it is appropriate to scrutinize the person in all relevant aspects.

The one thing I disagree with is the implication that there is some obvious virtue in where one lives or how one has been educated. It has been my observation that often enough the persons who are members of some minority group and are appointed to some high governmental or judicial position not necessarily sympathetic to the claims of their group once appointed. There is a very distinct operation of some kind of psychology that works in that direction, and what results is a very foolish stereotyping. I think the media is partially responsible for making this kind of automatic equation between coming from a particular group or particular background and assuming, therefore, that this person would have certain special qualities of empathy. I reject all that. I think what is important are the individual person's abilities to empathize rather than the stereotypical elements of background. I would hate to see a process in which those elements became dominant, used as a kind of checklist. I do not think that process really would produce the

6. *Id.* at 6.

kind of judges one wants.

The "favor bank" also relates in a way to the nomination process. The observation that people who get nominated or elected as judges had usually shown very good political skills in the "favor bank" is valid. To take a famous example I have been using, John Marshall was a very skilled politician in Virginia before becoming Secretary of State and ultimately Chief Justice. I think it is unquestionably true of a majority of both state and federal judges that they have had substantial immersion in political life and that has encouraged development of skills in reciprocation.

I also have no doubt that to succeed in life in the United States a certain amount of those skills are necessary. What Chief Justice Jay referred to as mutual tenderness, that is the way life is; it makes life civil, and it makes life even enjoyable. The objection is not to mutual tenderness or mutual exchange of civility, but to when that exchange affects the exercise of governmental power.

Now people on a collegial court, such as the Supreme Court or the circuit courts, have to live with each other. They have to get along, in nonconsequential ways by accommodating one another. If they did not, their lives would be unbearable, and the Court would not work. It is important to have those skills of accommodation, as long as they do not involve distortion of the legal results. I do not know if there is any way to guard against this distortion except through the exercise of the personal conscience of the judge. There is a point where the judge would be moving from the accommodation that is necessary to live together as a collegial body, to the improper exchange of favors.

I refer back to my original quotation from the *Massachusetts Declaration of Rights*.⁷ You are entitled to as impartial a judge as the common lot of humanity would admit, and that is not perfection. It is better than the system that prevails on the continent of Europe, where being a judge is a career that a student enters after he graduates from law school. One says he wants to be a judge, a minor judge or a more major judge, and works his way up the ladder. He does not develop the same skills. He develops a much more bureaucratic ability. He is much more insulated from contact with the rough and tumble of political life. On the whole and recognizing that I am biased, we do better in this country in having people come out of the great churning experience of politics. Even if we cannot be perfect, I still think we have a pretty

7. MASS. CONST. pt.1, art. 1-30 (1986).

good system.

Now as to the third major point, I certainly agree that judges do need humanizing. But there is a danger even when the candidates have emerged from this political arena, particularly since in the old days the justices, (i.e. Marshall, Story, William Johnson) stayed on the Court for a very long time. Story and Johnson were appointed at young ages and stayed on. It was not a good procedure to have justices remain that long on the Court. I think they were totally cut off from other experiences and I really feel that they deteriorated the longer they stayed. But that problem is illustrative of the need for constant immersion into some kind of humanizing discipline. I am sure that literature is one of the best ways. Literature, film, and drama are all ways that a judge can enlarge empathy and stay in touch with society.

I might just comment on types of litigants one sees in the federal courts, because we get a great range. We get the biggest litigator—the Government of the United States—in the federal court. It is a rather striking and surprising phenomenon to me, having read so much literature that the conservatives are the defenders of the individual. The judges who most often carry the label as a conservative judge are the ones who are most sympathetic to the claims of the United States against the individual. It is really a remarkable fact which the media never seemed to observe. It is not the liberals who are voting for the government, it is the judges with the most conservative labels.

That is the United States. Now, at the other end of the spectrum is the pro se plaintiff, who is absolutely without a lawyer, who brings a case anyway because he has some sense that his rights have been violated. Sometimes, regrettably, in a small number of cases, the person is crazy, or the person is just irrational. The court is performing some sort of therapy in entertaining them. But whether they are irrational or just not very well, what should be done about this. So I would say that the judges I have seen show great concern for this kind of person totally on their own, persons who, because they do not have a lawyer, ninety percent of the time in the end do not win. They win procedural points but they never, or almost never, seem to make it across the goal line to some actual victory. As we are talking to people who are going to be lawyers, nothing impresses me more than the need for lawyers, when we see these people, who sometimes have meritorious cases, but just cannot seem to get it together to win.

Another class of plaintiff, who happens to be common in our state, is the alien. The alien is desperately in need of a lawyer because of the very complex immigration law. It is about as complex as the Internal

Revenue Code. You cannot expect somebody to get through the Internal Revenue Code without a lawyer. You can see what is expected of an alien without a lawyer. We do not have enough lawyers working for them. The few foundations that provide services do fairly good work but often the alien is handicapped by poor counsel or no counsel. There are certainly a substantial number of judges who again are very conscious of the disadvantaged position of the alien and are aware that the judge has to make up for the deficiency in the legal presentation.

There is also a whole class of litigants who are represented by counsel, where the disadvantages or advantages are not so clear as with the United States or with the pro se plaintiff. Most cases, contrary to the political legal studies people, are decided on the concrete facts of the case. The operation of ideology is pretty small. Few judges operate with conscious ideology, and really, no good judges do. It is partly because of the way cases come—not with ideological labels—such as poor or rich, but with facts. There is a very clear body of law that is or is not to be applied. Therefore, the range of judicial discretion is a good deal more fettered than one thinks when one speculates without looking into the cases. So the bias or the possibility of bias is confined if the judge would just respond to the facts and decide on those facts.

AUDIENCE: It is very difficult for state court judges to be, I do not want to say unbiased, but since you have raised it because if he is in the Nick Navarro⁸ tent he is going to be out in the next election.

NOONAN: I think that this may be easy to say but I have tenure secured by the Constitution. If you are a state judge you had better realize that you may be out. However, you do what you can while you have that period and the change does have the merits that you do not have these tremendously long terms of office that I think were not so desirable in the case of Marshall, Story and Johnson.

AUDIENCE: It is suggested that litigants have a right to a high standard of impartiality in judges deciding their cases. What if Chief Justice Marshall had become intimately familiar with the facts of *McCulloch* through newspaper reports, and was not candid, as you identified, in describing his interest therein? What if Chief Justice Rehnquist, in spite of his intimate involvement with the facts of the case, as a mem-

8. The current sheriff of Broward County, Florida. In the summer of 1989, Sheriff Navarro set up tents to hold prisoners because the jails in Broward County were overflowing.

ber of the executive branch, refused to recuse himself, and perhaps would cast the deciding vote? Would they both insist that they had still met their high standards, that the possibility of bias does not prove a fact of bias, and that in their narrow mind they felt competent to decide it fairly?

NOONAN: My problem is that I think Marshall's opinion is so persuasive. I still am persuaded that he is right. But the law provides that the judge must remove the suspicion, and in that sense Marshall did not live up to the law. That statute that we now have—that any pecuniary interest however small disqualifies the one no judge—has been carried to lengths that seem absurd. To give you an example, one justice was required by statute to hear a class action involving 200,000 purchases of cement;⁹ the judge who had tried the case for four years had to disqualify himself because his wife inherited an amount of that stock that paid her \$28 in dividends. The whole litigation had to begin again. That absurdity has finally forced Congress to make a modification in that kind of situation.

But I think the Congress, the statutes, and Chief Justice Parsons, who I quoted in Massachusetts, have the right idea that people cannot believe that a judge who has a pecuniary interest, however small, can still be objective. Perhaps most people involved in the law would believe Chief Justice Marshall, but it just does not wash with the public. The information came out because somebody said in a political campaign that after all, Marshall owned stock. His supporter, Benjamin Leigh, rushed to his defense and said that the accusation was terrible, but his defense only made the situation worse. It was felt to be a serious blow to the confidence of the decision that Marshall was in that position. I do not personally doubt Marshall's impartiality.

In the case of Chief Justice Rehnquist, I do not know the facts of that case the way I know Marshall's, but it involves a very different kind of interest. It is like the interest of the Supreme Court judge in his opinion as a circuit judge that disqualified him.

AUDIENCE: Judge Noonan, do you feel there is really a need for our separate federal court system and for diversity jurisdiction?

NOONAN: Well, I certainly believe there is a need for a federal court system because it would not be feasible to have fifty states interpreting

9. See, e.g., *In Re Cement and Concrete Antitrust Litigation*, 515 F.Supp 1076 (D.C. Ariz. 1981).

all federal statutes plus the Constitution. I think that would be a solution that nobody, or at least very few people, would want.

The diversity question is a more difficult one. I would say that I went on the court with a prejudice against diversity—I thought it must be a big waste of time. I have now become very fond of diversity. It takes me back to first year law school studies of contracts, property, and torts. Diversity cases are a very good variation from federal statutory questions. They are good for the judges to get them back into a common law mode of interpreting law; the best recipe for preventing the judiciary from becoming a bureaucracy is to have variety. That is a great argument against any specialization, and against getting rid of diversity. As long as we have variety, our minds are stretched in various ways; so diversity is a good thing.

AUDIENCE: Judge Noonan, I would like you to comment on Professor Burns' suggestion that a person could be disqualified from the bench because of where he lives or what he does, based on a theory that such a background might cause discrimination against a person based on economic status or where they live or where they were born. How far should we go as a society in the nominating process to secure impartial justice?

NOONAN: It is clear that neither you nor I can lay down any criteria to be followed because this is a highly political process in which both the executive and the legislative branch take a keen interest. The criteria that they establish are the ones that will be followed. The academic input could be there, but we are not going to dictate it or even go very far in determining what is acceptable. So I hesitate to give you any formula, feeling that it is not going to be very effective. It does seem to me that so many different considerations go into the judgment of who will be an effective judge that I just do not think it is going to be plausible to articulate specific criteria.

AUDIENCE: Judge Noonan, if I heard you correctly, you stated that minorities who are appointed to high positions are often less sympathetic to minority issues. Is that based on your off-the-cuff encounters with minority officials and judges or based on the types of decisions that were made in a series of cases?

NOONAN: It is based more on observations and perhaps should be qualified in that fashion. It seems you have, I think, misunderstood, what I was trying to say. People may be very sensitized to group issues, but they do not serve the particular group from which they have come.

They remain judges who are too set independently, make up their own minds and state the law as they themselves see it.

AUDIENCE: Do you see any tension between the popular fiction of Justice holding a scale blindfolded and your own ideas in your writings that allow you to be more personalized?

NOONAN: Well, it is obviously a very interesting paradox between the classical image of Justice blindfolded and the desire to have judges aware of the human impact of the decision. I cannot do better than to state it is a paradox. Both elements have to be present.

AUDIENCE: Judge Noonan, it seems to me that the action of the higher benches reviewing panel decisions is not at all comparable to a Supreme Court Justice reviewing a circuit court decision. The circuit court is one level, and the Supreme Court is another level; and that is clearly an appeal. And there is something not right about a judge being at both levels and hearing an appeal of his own decision. But in the whole-bench-via-panel situation, the case load has gotten so big and unwieldy that all the judges cannot hear in every case they are broken up into panels. But if it turns out that the case really is important and the whole court agrees, then the whole court ought to hear it. In such a situation, there is no reason why the three members who heard the case first should not be part of the whole court.

NOONAN: In an abstract way, that is a good answer. Judges are rather poor, as the record shows, about disqualifying themselves for bias. Your reasoning would certainly be the first line of defense that would be raised.

Now, if I may be the devil's advocate, I would say that an en banc proceeding is a very special hearing. At that point, the court really is acting like a higher court. It is not as though it was just that these delegates of three on a panel were acting. Most of the time the panel *is* the court, and realistically you do appeal to a higher body. Although, theoretically, it is the same court, realistically it should be treated as a different court. But I see the strength of your point.

Audience Comments and Questions

AUDIENCE: Judge Noonan, I was interested in your observation that it is possible for judges to remain on the bench too long, insulated from ordinary mortals, as in the case of Justice Story and I think Justice Johnson. We have continuing legal education programs for lawyers so

they can remain professionally accomplished. Would it be too radical a suggestion to say that, either through the organized Bar or the judicial conference, there should be some effort to have a judicial education program? You mention film and literature, drama and so on. I do not know who would write the curriculum, but would that idea have any merit?

NOONAN: I am afraid the judges get an overdose of legal education from the lawyers who argue in front of them, instead of from workshops and other things. They are continually bombarded with legal doctrines, so the real thing that they need is to have education. There are other ways—perhaps visits to prisons or visits to immigration centers. But there are certainly many ways which would at least make a small dent in this problem. I am sure what happens with long-term justices is not isolation so much as it is complacency. Judges are in very pleasant situations in a system that more or less works for them, and that is the problem. The longer they are there the more they see the system as satisfying because it satisfies them.