Would-be Court Reformers, Please Face the Elephant in the Court Room

by Lev Tsitrin

Now that the Supreme Court is solidly conservative, we hear calls to make the court more balanced by changing its structure. The schemes are many; some advocate increasing the number of justices; others, limiting their term in office to a set number of years.

Noticeably absent, however, are the calls to change the nature of the judicial decision-making process itself.

Yet it is a measure well worth considering. The centerpiece of decision-making is judges' ability to inject his or her own argument into the decision. This type of argument is called, in Latin, "*sua sponte*" ("of [judge's own] initiative") and it gives judges their ability to decide a case whichever way they

want to. Simple weighing of plaintiff's argument against the defendant's (a procedure symbolized by innumerable images of Lady Justice, or by protestations such as Justice Kavanaugh's, that a judge is an "umpire," or that judges do not pitch or bat, but only call balls and strikes, as Chief Justice Roberts assured us), cannot produce that effect. Nine judges or ninety nine judges cannot make the argument handed to them for adjudication by parties to not be what it is, to weigh more than it weighs, or less. The reason a decision can be split four-to-five is that it is not the parties' argument that judges weigh, but judges' own. "*Sua sponte*" argument turns judges into lawyers representing the parties who argue before them, it allows them to define the very argument the validity of which they are called to adjudicate. It turns them into parties to the case, without making them recuse themselves. In short, it makes judging arbitrary.

Change that arrangement by eliminating the ability to inject "*sua sponte*" argument, and you get a situation where, by the changed nature of judging, there indeed can be no "Trump judges or Obama judges," as Chief Justice Roberts lamely tried to convince us. If a judge merely weighs parties' argument, but cannot first add anything to it, or subtract from it, the courts will be completely transformed, very much like figure skating judging got transformed in the wake of 2002 Olympic judging scandal from a totally subjective, to an entirely objective model. A judge being a Republican or a Democrat, a conservative or a progressive, won't make one bit of a difference to the outcome. Judging will become just another professional activity, just like plumbing or gardening is, a profession where party affiliation and political convictions are simply irrelevant to the quality of the end-product.

And indeed, there is a solid legal reason to abolish "*sua spontism*", for the ability to introduce "*sua sponte*" argument flies in the face of Constitutional guarantee of "due process of the law." No matter how you dice it or slice it, under any

version of “due process” a judge has to be impartial – that is, a judge cannot be a party to the case, and has to recuse himself if he discovers that he is. Yet, since the court argument has no purpose other than to sway the judge to favor it, judge’s action of inventing argument in the case argued before him is a clear-cut act of partiality. It is particularly insidious since it is impossible to be impartial to one’s own argument; the argument supplied by the judge will invariably win. Under “due process of the law” the function of supplying the argument has to be restricted to parties and their lawyers. Judicial function – under “due process of the law” – is strictly limited to evaluating respective strength of the argument provided by the parties, not to provide that argument; a judge cannot be a lawyer. On the same principle, it is imperative under “due process of the law” that parties be able to rebut each other’s argument. It is, however, impossible to rebut the argument while it does not exist, since “*sua sponte*” argument typically makes its first appearance in judge’s ruling, at which point it is simply too late to rebut it. Quite simply, under “due process of the law” the judge has to certify as victorious the party which presented a stronger argument – and not to make stronger the argument of the party the judge wishes to certify as victorious.

The absurdity of “*sua sponism*” is nowhere better illustrated than in the argument deployed by its defenders. When I sued a bunch of judges for fraud after they “*sua sponted*” my case (*Overview Books v. US*), I got this from the DAs defending them: “In *Pierson v. Ray*, the Supreme Court explained: Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher*. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it “is not for the protection or benefit of a malicious or corrupt judge, but for the

benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

This is Orwellian on any number of levels. Firstly, there is sheer bizarreness of US district attorneys defending malice and corruption. But no less important is the obvious fact that *Pierson v. Ray* does the very opposite to what it claims to do: while it claims to be implemented "for the benefit of the public," it's practical effect is to deprive the public of the protection of constitutionally-sanctioned "due process of the law" from arbitrary judging – which most definitely does not benefit the public, and it certainly does protect "a malicious or corrupt judge," – which is not to the public benefit either.

As someone who went to a Soviet school as a child, I remember an exquisitely-rimed fable by a Russian fabulist Ivan Krylov in which an ape, donkey, goat, and bear got fiddles and flutes, and formed a quartet – but no matter how hard they tried, the sound they produced was awful. To fix the problem, they resorted to rearranging their seats – but their music did not improve. Finally, they sought nightingale's advice. "To play, you've got to have an ear for music, and instrument skills" he advised them. "Rearranging seats is not going to help."

This sage advice should be taken to heart by all would-be court reformers. As long as judging is done by "*sua sponte*" argument, no amount of mechanical reshuffling, of introducing

term limits or changing the number of justices is going to change the political nature of judging. If you want judges not to be politicians by other name, you will have to change the nature of judging by removing the elephant in the room – "*sua spontism*" – altogether.

Which, being counter to "due process of the law," is illegal anyway, and has to go for that reason alone.

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