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JUSTICE THROUGH PRAGMATISM AND PROCESS: A TRIBUTE TO JUDGE DENNY CHIN

*Frank H. Wu**

Judge Denny Chin has distinguished himself as a great trial judge. Although his unique status, as the first Asian American named a U.S. District Judge east of the Mississippi,¹ and his unusual personal background, having grown up in a one-room apartment above an adult theatre in New York City,² have attracted considerable attention, his extensive record deserves to be recognized for the balance he has brought to official decision making. Judge Chin has shown himself to be a pragmatist in the truest sense: he considers the consequences of his actions.³ Two themes emerge from his leading decisions: first, Judge Chin has been scrupulous in his treatment of the factual record and binding case law; second, he has emphasized the fairness of procedure.

Prior to his elevation to the Second Circuit, Judge Chin achieved prominence because he presided over the criminal case of Bernard Madoff.⁴

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1. Shiro Kashiwa was appointed to the U.S. Court of Claims in 1972, and, when the court was converted to the Federal Circuit a decade later, he became an Article III judge. Judge Chin is thus the first person of Asian descent appointed to an Article III judgeship east of the Mississippi. See Scott A. Herbst & Atigone G. Peyton, *On the Horizon: A New Federal Circuit*, 19 FED CIR. B.J. 509, 516 (2010); *Asian Americans and Pacific Islander on the Federal Bench*, ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA, <http://www.aaba-bay.com/aaba/showpage.asp?code=apafederaljudges> (last visited Feb. 23, 2011).

2. Denny Chin, *Representation for Immigrants: A Judge's Personal Perspective*, 78 FORDHAM L. REV. 633, 636–37 (2009) (discussing personal background); see also Ashby Jones, *Judge Denny Chin: The Man Who Controls Bernie's Fate*, THE WALL ST. J.: LAW BLOG (June 26, 2009, 5:37 PM), <http://blogs.wsj.com/law/2009/06/26/judge-denny-chin-the-man-who-controls-bernies-fate/>; Nicholas Varchaver et al., *The Man Who Gave Madoff the Max*, CNNMONEY.COM (last updated June 29, 2009, 3:21 PM), http://money.cnn.com/2009/06/25/magazines/fortune/madoff_judge_denny_chin.fortune/index.htm.

3. For discussions of the return to pragmatism in American law, see generally RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); *PRAGMATISM: A CONTEMPORARY READER* (Russell B. Goodman ed., 1995); *PRAGMATISM: A READER* (Louis Menand ed., 1997); ROBERT B. TALISSE, *A PRAGMATIST PHILOSOPHY OF DEMOCRACY* (2008); *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* (Morris Dickstein ed., 1998).

4. *United States v. Madoff*, 316 Fed. App'x. 58, 58 (2d Cir. 2009) (affirming Judge Chin's decision to revoke bail); *United States v. Madoff*, 626 F. Supp. 2d 420, 422 (S.D.N.Y. 2009) (addressing media's request to unseal certain documents, including emails to Court from victims); see Tomoeh Murakami Tse, *Madoff Sentenced to 150 Years; Calling Ponzi Scheme 'Evil', Judge Orders Maximum Term*, WASH. POST, June 30, 2009, at A1.

In 2009, he sentenced the white-collar defendant to 150 years in prison for having perpetrated a massive Ponzi scheme that exemplified the economic crisis of the era.⁵ The case was significant because of the scale of the fraud. But the Madoff matter was only one of many on the judge's docket. Other cases are more important for their legal analysis and precedential effect.

Judge Chin has shown his fidelity to the facts and the law. He has taken care to limit his holdings to the record before him, with copious citations.

In *Morales v. Portuondo*,⁶ a case that was dramatized on television,⁷ he found the reality of innocence more important than an asserted priest-penitent evidentiary privilege. He ordered the release of criminal defendants wrongly convicted of homicide. On a *habeas corpus* petition, he received the testimony of a priest who disclosed that the actual wrongdoer had confessed a dozen years earlier (the actual wrongdoer had then died of unrelated causes).⁸ Significantly, for those who are sticklers about process, Judge Chin did not require exhaustion of state law remedies, because he found that the petitioner had demonstrated the likelihood of a "fundamental miscarriage of justice"—being innocent.⁹ He pointed out that a case of this nature was the proverbial "needle in the haystack."¹⁰ (In a later proceeding, he found that a co-defendant was in the same situation, thus meriting the same treatment.)¹¹

In another case that was widely covered by the press,¹² Judge Chin also followed well-established doctrine implementing the First Amendment.¹³ In *Million Youth March v. Safir*,¹⁴ he held that New York City could not refuse to issue a permit for a rally because the speaker had made offensive statements earlier. Writing only one day after an evidentiary hearing, he opened with a summary of classic free speech philosophy:

The right to free speech, however, applies not only to politically correct statements but also to statements that we may disagree with and that, indeed, we may abhor. At least as frightening as the rhetoric of Mr.

5. Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1; Diana B. Henriques & Jack Healy, *Madoff Jailed After Pleading Guilty to Fraud*, N.Y. TIMES, Mar. 13, 2009, at A1; Diana B. Henriques & Zachery Kouwe, *U.S. Arrests a Top Trader in Vast Fraud*, N.Y. TIMES, Dec. 12, 2008, at A1; Diana B. Henriques & Alex Berenson, *The 17th Floor, Where Wealth Went to Vanish*, N.Y. TIMES, Dec. 15, 2008, at A1.

6. 165 F. Supp. 2d 601, 614–15 (S.D.N.Y. 2001) (granting the writs of *habeas corpus* unconditionally, and barring the prosecution from re-trying petitioners after release).

7. *Law and Order: The Collar* (NBC television broadcast Jan. 9, 2002).

8. *Morales v. Portuondo*, 154 F. Supp. 2d 706, 709–10, 714–15 (S.D.N.Y. 2001).

9. *Id.* at 720–21.

10. *Id.* at 734.

11. *Morales v. Portuondo*, 165 F. Supp. 2d 601, 614–15 (S.D.N.Y. 2001).

12. See, e.g., David Barstow, *City Claims That Hate Speech Justifies Denying Rally Permit*, N.Y. TIMES, Aug. 31, 1999, at B1; David Barstow, *Rebuking Giuliani, U.S. Judge Orders Permit for Rally*, N.Y. TIMES, Sept. 1, 1999, at A1; Jayson Blair, *Organizers Sue, Saying Giuliani Ignored Court Ruling in Refusing a Permit*, N.Y. TIMES, Aug. 28, 1999, at B3; Editorial, *The March and the Constitution*, N.Y. TIMES, Sept. 1, 1999, at A22.

13. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (the *Pentagon Papers* case); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

14. 63 F. Supp. 2d 381 (S.D.N.Y. 1999).

Muhammad is the possibility of a society where freedom of speech is not respected, and where the right to speak publicly can be denied on the basis of administrative whim, personal dislike, or disapproval of anticipated content.¹⁵

Judge Chin added a caveat: “I do not hold that a person’s past conduct or speech can never justify a denial of that person’s application for a permit to speak or assemble.”¹⁶ He observed that the rationale for denying the permit for the speech was articulated only after litigation arose,¹⁷ and he was concerned with whether the city had borne the burden of showing that the speech under consideration constituted “fighting words.”¹⁸ In conclusion, he allowed the government to impose reasonable time, place, and manner restrictions.¹⁹

Judge Chin’s treatment of *Morales* contrasts with that of several other cases. He has been guided by the specific circumstances of each case, rather than preconceived notions about punishment that would be characterized as either liberal or conservative. To the point, Judge Chin has not hesitated to impose considerable sentences in criminal matters in which guilt has been established. After a jury found an Afghan warlord had conspired to import heroin, he sentenced the defendant to life in prison.²⁰ He sentenced two businessmen, one a Korean national, the other a socially-connected Texan, in a fraud scheme arising from the UN Oil-for-Food program in Iraq.²¹ In a Bronx drug distribution case, involving twenty-three defendants and multiple charges arising from a criminal enterprise, he sentenced nineteen defendants who pled guilty to sentences of as much as forty-five years; among them was an attorney for the operation who pled guilty to money laundering.²²

Likewise on the civil side of the docket, he has offered a nuanced understanding of the Constitution, both upholding and striking down provisions of the New York State “Megan’s Law.”²³ He found the law’s registration provisions permissible but the retrospective aspects impermissible as violative of the *Ex Post Facto* clause.²⁴ He accepted the

15. *Id.* at 383.

16. *Id.* at 393.

17. *Id.* at 392.

18. *Id.* at 392–93.

19. *Id.* at 394.

20. See Benjamin Weiser, *Afghan Linked to Taliban Sentenced to Life in Drug Trafficking Case*, N.Y. TIMES, May 1, 2009, at A10.

21. The individuals were Tongsun Park and Oscar Wyatt. See *United States v. Tongsun Park*, 533 F. Supp. 2d 474, 475 (S.D.N.Y. 2008) (reducing Park’s sentence from sixty months’ imprisonment to thirty-seven months, based on his substantial assistance to the government and other factors); *Texas Sentenced in Iraq Oil-For-Food Scam*, CBSNEWS.COM (Nov. 27, 2007), <http://www.cbsnews.com/stories/2007/11/27/business/main3544538.shtml>.

22. *United States v. Clark*, Nos. 06 Civ. 9884, 97 Cr. 817, 2008 WL 2428223 (S.D.N.Y. June 12, 2008) (providing some description of the case). The lawyer, Pat Stiso, was sentenced to seven years. See Benjamin Weiser, *Judge Refuses Leniency Plea, Sentencing Lawyer to 7 Years*, N.Y. TIMES, Apr. 1, 1999, at B3.

23. *Doe v. Pataki*, 919 F. Supp. 691, 691 (S.D.N.Y. 1996).

24. *Id.* at 702.

argument that registration requirements for sex offenders was punitive, and it was a greater punitive measure than would have been imposed at the time the acts were committed. He relied on a multi-factor test, weighing intent and effects;²⁵ his discussion even included a mild critique of the Supreme Court's "somewhat confusing[] reasoning."²⁶

Judge Chin also has been mindful of the determinative role of procedure. Along these lines, he has understood the potentially dispositive effects of evidentiary rulings.

In *United States v. Gomez*,²⁷ Judge Chin took a position that the Second Circuit later adopted, rejecting a contrary outcome taken by another district judge.²⁸ In this criminal matter, Gomez sought to introduce his own testimony that was inconsistent with his prior statements made during proffer sessions.²⁹ Judge Chin ruled that if Gomez did so, then the prior inconsistent statements were admissible, not merely for impeachment purposes, but substantively.³⁰ With scholarly precision, Judge Chin stated that:

[W]here a proffer agreement is entered knowingly and voluntarily and its terms are clear and unambiguous, it is enforceable, at least to the extent that the Government may use the defendant's proffer statements to rebut evidence or arguments offered on his behalf at trial, even where he does not testify.³¹

In *In re Grand Jury Subpoenas dated March 9, 2001*,³² Judge Chin found that lawyers working with tax fugitive Marc Rich to obtain a pardon were acting as lobbyists and not attorneys. As a consequence, he ruled that their communications were protected by neither attorney-client privilege nor work-product doctrine.³³ On a "fact-specific" "inquiry," he found that the individuals who happened to be lawyers were acting primarily as lobbyists, performing a function that did not require a law license, and they were doing so in a non-adversarial context.³⁴

He was sensitive to subtlety, though. He held that the "fugitive disentitlement doctrine"—which authorizes courts to dismiss the appeals of defendants who are fugitives from justice during the pendency of their appeals, as Rich was—did not apply. Although he was a fugitive, Rich did not seek affirmative relief but rather asserted a defensive use of the principle; nonetheless, Judge Chin took into account that Rich was a

25. *Id.* at 700–02.

26. *Id.* at 700 n.5.

27. 210 F. Supp. 2d 465 (S.D.N.Y. 2002).

28. *United States v. Duffy*, 133 F. Supp. 2d 213 (E.D.N.Y. 2001), *declined to adopt* by *United States v. Velez*, 354 F.3d 190, 195 (2d Cir. 2004).

29. *Gomez*, 210 F. Supp. 2d at 472.

30. *Id.* at 474–75.

31. *Id.*

32. 179 F. Supp. 2d 270 (S.D.N.Y. 2001).

33. *Id.* at 286, 290.

34. *Id.* at 288–90.

fugitive in evaluating whether the pardon application was an adversarial proceeding.³⁵

Finally, Judge Chin has fulfilled his responsibilities in a neutral manner. In a civil case, counsel for one of the sides doubted his impartiality on the basis of his being Asian American and having been appointed by Democratic President Bill Clinton. The lawyer asserted that Judge Chin must have been associated with the Asian American Democratic fundraiser John Huang, whose solicitations of campaign contributions for the Clinton re-election in 1996 had been deemed inappropriate, because Chin shared his racial background with Huang.³⁶ This lawyer had led an unrelated effort to discredit Huang.³⁷ Therefore, he reasoned, Judge Chin was likely to be biased against him. Since the lawyer who raised these allegations had no evidence in fact related to Judge Chin, and relied only on his race and political affiliation, Judge Chin refused to recuse himself, and, furthermore, he issued sanctions.³⁸

The Second Circuit affirmed, writing “[z]ero plus zero is zero.”³⁹

Judge Chin’s Asian American background has made him a hero to Asian Americans.⁴⁰ He has been celebrated as a role model, not shying away from the role that prominent members of minority groups often are expected to assume despite their own individual identity.⁴¹ He has been a

35. *Id.* at 285–89.

36. *MacDraw, Inc. v. The CIT Grp. Equip. Fin., Inc.*, 994 F. Supp. 447, 447–48 (S.D.N.Y. 1997); see also Denny Chin, *Access to the Legal Profession for Minorities: Introductory Remarks*, 2 J. INST. FOR STUDY LEGAL ETHICS 49, 52–54 (1999) (discussing *MacDraw*).

37. See *Judicial Watch, Inc. v. U.S. Dep’t. of Commerce*, Civ. A. No. 95-0133 (RCL), 1995 WL 450520 (D.D.C. July 21, 1995); see also Frank H. Wu & Francey Lim Youngberg, *People from China Crossing the River: Asian American Political Empowerment and Foreign Influence*, in ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS (Gordon Chang ed., 2001).

38. *MacDraw, Inc.*, 994 F. Supp. at 460.

39. *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998).

40. See, e.g., *Nominations: Hearing on the Nomination of Denny Chin, to the United States Court of Appeals for the Second Circuit Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of the National Asian Pacific American Bar Association and the Asian American Justice Center); Press Release, Asian American Justice Center, NAPABA and AAJC Applaud Nomination of Judge Denny Chin to Become First Active Asian Pacific American Federal Appellate Court Judge in Over Five Years (Oct. 6, 2009), <http://www.advancingequality.org/en/rel/237/>; AsianWeek Staff Report, *A Tribute to Chinese American Hero: Judge Denny Chin*, ASIANWEEK (May 31, 2010), <http://www.asianweek.com/2010/05/31/a-tribute-to-chinese-american-hero-judge-denny-chin/>; Jocelyn Chui, *Judge Chin Confirmed for Landmark Position*, NW. ASIAN WKLY., Apr. 29, 2010, available at <http://www.nwasianweekly.com/2010/04/judge-chin-confirmed-for-landmark-position/>; Ramey Ko, *Judge Denny Chin Nominated to 2nd Circuit, Would Be Only APA Fed. Appellate Judge*, ASIAN PAC. AMS. FOR PROGRESS (Oct. 6, 2009 1:24 PM), <http://www.apaforprogress.org/judge-denny-chin-nominated-2nd-circuit-would-be-only-apa-fed-appellate-judge>.

41. For several views on the meaning of representation, including by racial minorities, see, e.g., ANNE PHILIPS, *THE POLITICS OF PRESENCE* (1995); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991). For a perspective on symbolic forms of racial diversity on the bench, see Sherrilyn

leader within the National Asian Pacific American Bar Association (NAPABA), for example, developing re-enactments of important historical cases involving Asian Americans.⁴² His work should be celebrated because of its high quality, but his significance to Asian Americans should not be underestimated. After all, Asian Americans have been, at various times, excluded from the nation,⁴³ prohibited from naturalizing,⁴⁴ forbidden to intermarry with whites,⁴⁵ deemed ineligible to testify in court,⁴⁶ forced into segregated schools,⁴⁷ imprisoned due to prejudices about their loyalty,⁴⁸ and subjected to other forms of official discrimination.⁴⁹ Judge Chin has shown that it is possible nonetheless to achieve the highest level of success within the profession, proving that the path of leadership is open to all.⁵⁰

On the basis of his record, comprising some 1600 opinions with only about 40 reversals,⁵¹ Judge Chin has been a terrific success. The trial bench has lost one of its most thoughtful members, even as the appellate bench has gained the same.

It would not be premature to suggest that, if a seat opened on the Supreme Court, Judge Chin should be on the short list.⁵² In fulfilling the judicial function of a democracy, he has proven himself and should serve as an inspiration for people of all backgrounds.

A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

42. Building Our Legacy: The Murder of Vincent Chin at the NAPABA 2008 Convention (Nov. 22, 2008); The Trial of Tokyo Rose: *United States v. Iva Toguri D'Aquino* at NAPABA 2010 Convention (Nov. 19, 2010). (Author's Note: I co-authored the Vincent Chin script with Judge Chin.)

43. See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

44. See, e.g., *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).

45. See, e.g., *Roldan v. L.A. Cty.*, 18 P.2d 706 (Cal. App. 1933); see also Brief for Asian Am. Bar Assoc. of the Greater Bay Area et al. as Amici Curiae Supporting Respondents at 10–26, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at http://www.lambdalegal.org/in-court/legal-docs/in-re-marriage_ca_20080926_amicus-asian-american-bar-association-of-the-greater-bay-area-et-al.html (discussing widespread anti-miscegenation laws that affected Asian Americans).

46. See, e.g., *People v. Hall*, 4 Cal. 399 (1854).

47. See, e.g., *Lum v. Rice*, 275 U.S. 78 (1927).

48. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

49. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

50. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (stating that “the path to leadership [must] be visibly open . . . to individuals of every race and ethnicity” for there to be “legitimacy in the eyes of the citizenry”).

51. LEXISNEXIS, <http://www.lexisnexis.com> (follow “Federal Court Cases, Combined” hyperlink; then using “Terms and Connectors,” add “OpinionBy: Denny Chin;” then follow “Search” hyperlink).

52. Cf. Kenji Yoshino, Op-Ed, *For President Obama . . . Many Gaps To Fill on the Bench: An Asian*, N.Y. TIMES, May 9, 2010, at WK9.