Inquiry into Judge Keating Warranted

By Harvey Silverglate

In an abrupt and unexpected turn of events, Massachusetts Superior Court Judge Francis W. Keating has taken the highly unusual step of disqualifying himself from further participation in the forthcoming rape trials of Willie J. Sanders. Keating, who was to have presided at the trials, withdrew from the case in an apparent reaction to being accused of racist conduct by a black woman lawyer in the case, Geraldine S. Hines of Roxbury.

Sanders, also black, is accused of committing seven rapes in the Allston/Brighton area. His lawyers, Hines and co-counsel Max D. Stern of Boston, have charged in pretrial court proceedings and legal papers that the victims purporting to identify Sanders as the rapist are mistaken, and that they identified Sanders only after undergoing suggestive identification procedures arranged by the police, or after having seen Sanders's picture on television and in the news media, where he was identified as the suspect in the case (see Briefcases, "Mistaken Identity," *The Real Paper*, July 21, 1979).

Hines and Stern have been seeking to have all of the rape cases combined into a single trial. First, Sanders cannot afford multiple trials. More important, the defense wants to demonstrate to the jury the process by which faulty identification procedures, combined with pervasive racism that causes whites to have difficulty distinguish-

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ing one black from another, have resulted in the wrong man being charged in these cases. Sanders's cause has attracted a large and active defense committee, spurred on in part by reports that rapes with the same modus operandi have continued to occur in the same area, including one reported to have taken place while Sanders was still incarcerated shortly after his arrest.

Sanders's pretrial motions, including the motion to have all of the cases tried together, were referred to Judge Keating for a hearing and a decision. The transcript of the oral argument, held on July 18, reflects a judicial impatience with the defense side, while the prosecutor, Assistant District Attorney Sandra Hamlin, was accorded somewhat more courtesy.

For one thing, Keating displayed great annoyance that a number of Sanders's supporters showed up for the hearing, which was held in open court.

When Stern asked the judge if Sanders could join the lawyers at the counsel table to free up one more seat because there was "not enough room" for all of Sanders's relatives in the courtroom, Keating responded with a curt "so what?" Referring to Sanders, Keating said, "I don't want him at counsel table." Shortly thereafter, Prosecutor Hamlin walked into the courtroom late and apologized because "the elevators are slow"; Keating indulged her by noting that "I know they are." This tone, creating a sense of unequal treatment of the defense and prosecution, pervaded the entire hearing.

Keating spent nearly as much time inquiring about the presence of so many Sanders Defense Committee members in the courtroom as he did inquiring about the legal issues. He asked Stern if "this group of spectators" were in the courtroom at Stern's urging. When informed that the spectators were there at Sanders's invitation, the judge accused the defense of trying to create "some sort of rally-round-the-flag atmosphere" in order to try to influence the court. He referred to the attendance of Sanders's supporters as "mob psychology."

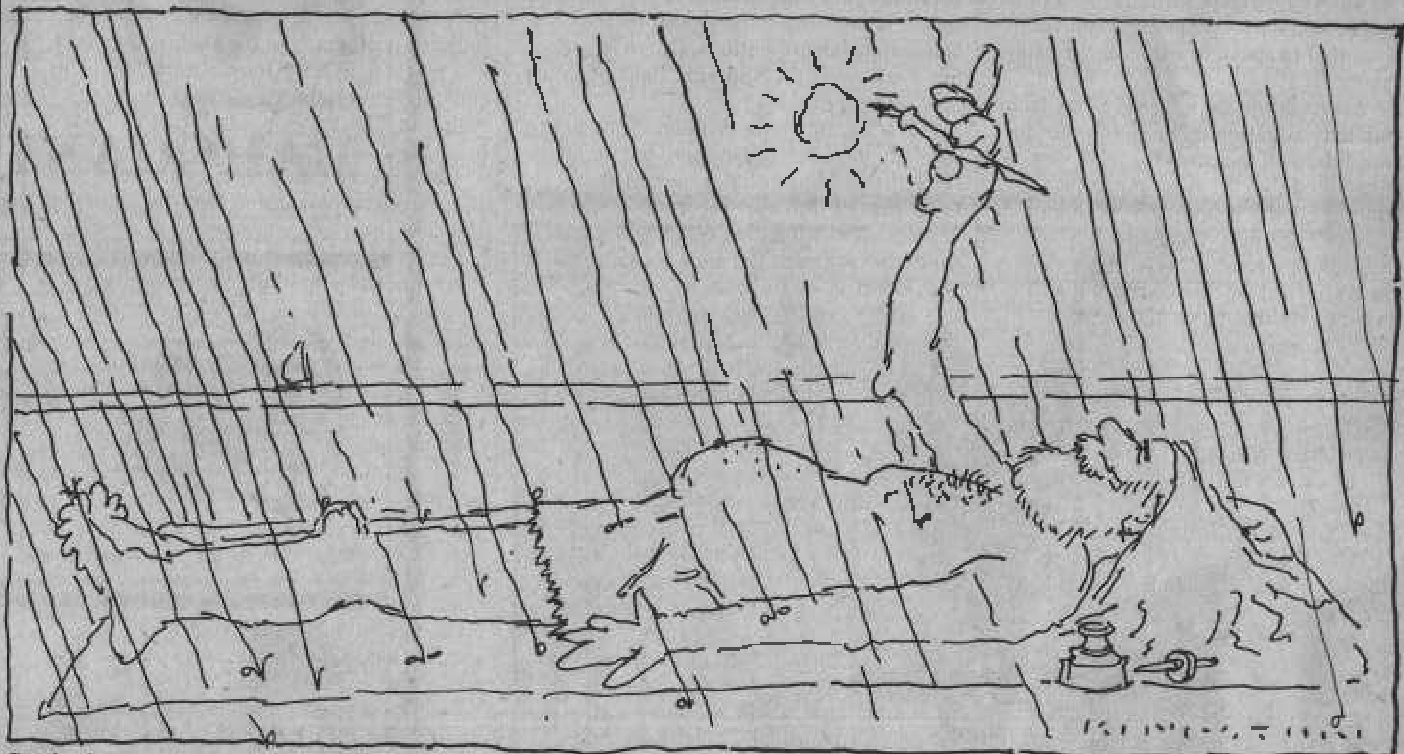
Then, in apparent response to a prosecution claim that the victims were being placed under great pressure due to the public and media interest in the case, Judge Keating forbid Sanders's lawyers from seeking to contact or interview the victims without prior consultation with the district attorney's office and the court. Stern objected to this highly unusual and improper interference with counsel's ability to prepare a defense, but Keating's mind was not to be changed.

A week later, Keating convened an unexpected conference in his chambers, rather than in open court. Stern, Hamlin, and the judge were in the room, with the court stenographer. Keating accused Stern of fomenting publicity by submitting to a television news interview. Stern responded that in the period just prior to and after Sanders's arrest it was the prosecution that spread a lot of misinformation that prejudiced Sanders. Stern argued that now that the government had stirred up unfavorable publicity, it wanted to cut off the flow of information. "The well has been poisoned," noted Stern, "and I don't believe the Commonwealth has a right to keep a poisoned well. . . . I have a right to correct the record."

Keating became angry, threatening to issue a gag order and to report Stern to the bar disciplinary authorities. As the atmosphere heated up, and as it became apparent that the hearing being held had a direct bearing on the case, Stern requested that his co-counsel, Geraldine Hines, come into the room. Keating refused to allow Hines to attend the hearing, stating that this was a matter involving Stern and not Hines. Keating intermittently expressed his anger at, and disagreement with, statements he'd read in Sanders Defense Committee literature, to the effect that the trial was, as Keating put it, "a racist action by the government." Heatedly, he asked Stern if he'd been involved in "the preparation of either of these [Defense Committee] tracts," and finally Stern simply "respectfully declined" to answer further questions on the subject. He again asked that Hines be allowed in, and the judge finally relented, noting, however, that "all I cared about was your [Stern's] interest in this."

When Hines finally entered the room, she addressed Keating and said, "I want to protest being left out." Keating did not offer any apology or explanation for having excluded Sanders's black lawyer while

Kingston's Vacation



having allowed Sanders's white lawyer in the room. He said only: "This was a matter I felt I wanted to speak to Mr. Stern personally about. . . ."

The conversation soon turned away from the publicity situation to Sanders's motion to consolidate all the cases for trial, and Keating noted that "there is no doubt the cases are related," including "the time, the modus operandi, everything else. . . ." Thus, notwithstanding Keating's evident hostility expressed toward defense counsel, it still appeared likely that he would grant Sanders's crucial consolidation motion.

The next day, however, Hines, apparently still smarting from having been excluded from the hearing, wrote a stinging two-page letter to Keating, which he ultimately made part of the public record in the case. The letter, copies of which Hines sent to Trial Court Chief Justice James Lynch, the clerk of the Superior Criminal Court, and the Commission on Judicial Conduct, termed Keating's having barred Hines from the hearing as "so clearly inappropriate and blatantly racist that I am compelled to express to you my outrage. . . ." She rejected Keating's explanation the day before that the matter then at issue involved only Stern. "In my view," wrote Hines, "the only sensible explanation for your action is that you simply could not accept a black lawyer's participation on an equal footing with that of a white lawyer. I dare say that just the thought of subjecting any white attorney to such disrespect would never have even occurred to you. By excluding me, you resurrected the long discredited sentiment expressed in the infamous Dred Scott case that 'a black person has no rights which a white person is bound to respect.' "

After receiving Hines's letter, Keating took only two further actions in the case. First, he released his decision denying Sanders's consolidation motion largely because, he noted, these were separate and unrelated cases, and the joinder might prejudice Sanders! Keating denied the motion notwithstanding his earlier agreement that the cases were indeed related, and notwithstanding the fact that Sanders's two experienced lawyers believed that joinder was the only effective way to meet headon the claimed misidentifications. (Stern is seeking a review by the Supreme Judicial Court of Keating's denial.)

Next, Keating removed himself from the case. He gave no explanation, but he made reference to Hines's letter, and made the letter part of the court record. Nor did he explain how he justified deciding the consolidation motion after he'd decided that he should not sit on the case.

Keating's withdrawal from the case raises the question of whether he should ever have sat on the case in the first place. If his attitude toward the defense case, toward Sanders, and toward Hines had anything to do with his racial views, then how could he have made a dispassionate decision on Sanders's motion to consolidate or on any other matter arising in the case?

It is not now known whether the Judicial Conduct Commission will consider its receipt of a copy of Hines's letter to be a formal complaint against the judge, justifying an investigation into his conduct. However, Hines's letter does come on the heels of another case in which Judge Keating exhibited an unusually hostile attitude toward a black lawyer, former prosecutor, and then United States Magistrate, now private attorney, Willie J. Davis.

Davis has had a long career as a lawyer in criminal cases, on both the prosecution and defense sides. He has had judicial experience as a magistrate. Yet during the recent murder trial of one Herman Jones, conducted before Judge Keating, there arose what a subsequent Appeals Court opinion described as "a series of verbal exchanges . . . between counsel . . . and the judge."

The Appeals Court had occasion to review the transcript of the Jones trial, because Judge Keating, reacting to the open rancor that erupted between himself and defense counsel at the trial, took it upon himself to declare a mistrial toward the end of the trial, thereby aborting the case and requiring that it be retried. The defendant objected, claiming that since the court and not the defendant or his lawyer was responsible for the circumstances that caused the judge to terminate the trial before a verdict was reached, to retry Jones would violate his constitutional right to be free from being placed in "double jeopardy," that is, from being tried twice for the same crime.

The Appeals Court refused to prevent Jones's retrial (a decision that the Supreme Judicial Court has since agreed to review), but in its written opinion the Appeals Court quoted numerous "representative exchanges" that took place between the judge and defense counsel. (Characteristically, not wanting to unduly embarrass the trial judge, the Appeals Court never mentioned Keating's name or identified him as the trial judge.)

For example, when the codefendant's attorney asked Keating for permission to "chat with learned counsel" (referring to Davis), Keating retorted: "I believe you checked with Mr. Davis, if he qualifies to that appellation." The judge also belittled certain questions that Davis wanted the court to ask of potential jurors. At another point, Keating criticized Davis's grammar. When Davis insisted that he was pressing his request that the judge read a certain instruction to the jurors "right down to every comma," Keating responded "Well, if we are going to get into commas, I would like to see you after court, and I will show you where a few are misplaced." Keating even criticized Davis for what Keating claimed was a smile on Davis's face.

Things got so bad between the judge and both Davis and other counsel, that Keating aborted the trial, noting that "things have got out of hand." Interestingly, Keating accepted his "share" of the blame, although the Appeals Court accused defense counsel of contributing "in some measure and in varying degree to the atmosphere and dynamics" that led to the mistrial, and claimed that there was no evidence that Keating "was motivated by any ill will toward either *defendant*." (I wonder whether the court intentionally omitted any reference to possible ill will toward either of the *lawyers*, especially Davis.)

Nevertheless, despite its efforts to place some of the blame with defense counsel, the Appeals Court's decision must be seen as at least an implicit criticism of Keating; after all, a judge is not supposed to spar with and become an adversary of the defendant or his or her lawyer because then he cannot administer equal justice in a neutral and detached manner.

Keating's behavior in the Jones case, as well as in the Sanders case, raises some doubt as to his ability to conduct himself in the manner required of judges. Equally disturbing, however, is the more specific question of whether, as Hines has charged, Keating's actions have been motivated by racist attitudes. If the Commission on Judicial Conduct decides to pursue this one, it promises to be one of the most difficult and controversial judicial disciplinary inquiries ever undertaken. It may also be one of the most important. But based on past performance, unless there is public attention focused on the case, the commission is unlikely to touch this hot potato.

Follow-ups

There's been some action on two matters that have been the subject of recent columns.

In the celebrated Blackfriars case, the Suffolk County District Attorney has sought and obtained a perjury indictment against Robert M. Zachary, twenty-six, of Everett. Zachary was the government's star witness in the recent murder trial of Robert Italiano and William Ierardi, both of whom were acquitted by the jury. Zachary testified at the trial that he'd discussed the Blackfriars murders with Italiano, and the jury heard a tape recording of what Zachary purported to be the incriminating conversation. The jurors, however, concluded that the voice on the tape was someone other than Italiano, and the defendants were acquitted. Apparently, the district attorney's office and the grand jury now agree that Zachary misrepresented the voice on the tape.

One question not yet answered, seemingly not even investigated, is how it hap-

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pened that the trial prosecutor presented to the jury a tape that, it was apparently clear to the jurors and other trial observers, was not what Zachary said it was. The whole fiasco may have been due simply to some inadvertence or sloppy trial preparation, but the public is entitled to an explanation.

Recently, I wrote here that Frederick Lacey, a United States District Judge in New Jersey, had the inside track for appointment to the important and sensitive post of deputy attorney general, the second most powerful position in the United States Department of Justice. I noted how Judge Lacey's temperament and actions on the bench made him unsuitable for such a position.

The *New York Times* of August 3 announced that Lacey "has taken himself out of the running for the job." Then Attorney General Griffin Bell, for the record, expressed his regret at Lacey's decision. However, the *Times* report noted that "Justice Department sources reported that the Carter administration's enthusiasm for the judge cooled recently as it became apparent his nomination might encounter substantial opposition in the Senate."

In fact, my sources in Washington indicate that the administration suggested that Lacey withdraw. Had a confirmation hearing gotten under way, Lacey would have had to respond under oath to questions of judicial misconduct and excesses that he thus far has avoided talking about, protected as he has been by his judicial robes.

Further evidence that Lacey's withdrawal was not quite his own idea comes in the form of reports from lawyers in New Jersey who say that Lacey has been in a rage ever since the flap over his near-nomination developed and became public. ■