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THE QUALITY OF THE JUDGES IS WHAT COUNTS IN THE END*

John J. Gibbons[†]

I am very pleased to be here for several reasons. First, it presents the opportunity to participate in a lecture series memorializing Abraham Pomerantz. I never encountered Mr. Pomerantz in practice but Colins J. Seitz, who was my chief judge for a good part of my tenure on the United States Court of Appeals, knew Abe Pomerantz well, and had an Abe Pomerantz story for every occasion. Judge Seitz was, and is still, a great admirer of this tremendously innovative, powerful lawyer, and frequently held out Abe Pomerantz as a role model for law clerks in our court.

The second reason I am pleased to be here is that it has given me an opportunity to read, in advance of publication, an excellent Article on the subject of specialized courts. I can add very little to what Professor Dreyfuss has said on that subject.

While addressing the role of specialized courts generally, Professor Dreyfuss focuses on the pending legislative proposal in Pennsylvania for a business court that would handle, in the language of the statute, "all cases involving corporations and other associations, mercantile and commercial matters, or the employment of directors and officers of corporations and other associations."¹ The pending bill, as she notes, would staff the proposed court with judges appointed by the governor, with the advice and consent of the senate. These judges would be selected from a list submitted by a nominating commission, with no more than a majority of judges from the same party.²

Professor Dreyfuss postulates that the purpose of the Pennsylvania proposal may be to create a specialized tribunal

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¹ Pa. S.J. Res. 309, 178th Gen. Assemb., Regular Session § 20(a) (1993-94).

² *Id.* § 22; PA. CONST. art IV, § 8.

that would achieve the notable acceptance that the Delaware Chancery Court has achieved.³ She concludes, and I certainly agree, that it is unlikely to achieve this goal.⁴ The difference in size and population between the two states, as well as the other historical and cultural differences that she notes are simply too great to expect that Pennsylvania's proposed court will accomplish for Pennsylvania what Delaware Chancery has done for Delaware's fisc and for the wealth of its bar.

Besides Delaware Chancery, the other specialized courts that command Professor Dreyfuss's attention include: the Federal Circuit, in which patent appeals are concentrated; the Temporary Emergency Court of Appeals, which had limited subject matter jurisdiction over disputes arising under the federal price control legislation; and the Foreign Intelligence Surveillance Court, which had the task of issuing search warrants for foreign intelligence law-enforcement purposes.

Professor Dreyfuss's Article suggests two points that warrant further consideration. First, is that a study of the functioning of specialized courts should take into account more courts than the three federal and one state tribunal that she considers. At the state level, the courts that come most readily to mind are those that in many jurisdictions are referred to as "family courts". A study of the functioning of many of these specialized courts, applying Professor Dreyfuss's criteria of quality of the decisionmaking, efficiency, and due process⁵ would produce disconcerting results. I have not made such a study, but anecdotal evidence from community legal service lawyers and others suggests that many family courts, while efficient in disposing of large numbers of cases, are rather short on quality of decisionmaking, efficiency and due process.

The bankruptcy courts in each federal district also come to mind. These, too, administer a specialized subject matter, although they must also adjudicate a broad range of legal issues, especially in their jurisdiction over Chapter Eleven cases. The bankruptcy courts are the largest and most important group of specialized federal courts in the United

³ Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 2-3 (1995).

⁴ *Id.* at 24.

⁵ *Id.* at 11.

States. In contrast with my anecdotal knowledge about family courts, my first-hand experience reviewing the decisions of bankruptcy courts leads me to conclude that as measured by Professor Dreyfuss's criteria of quality of decisionmaking, efficiency and due process, they are remarkably successful, at least in the Third Circuit.

It is true, of course, that the bankruptcy courts are supervised by appellate tribunals that themselves are courts of general rather than of specialized jurisdiction. As Professor Dreyfuss points out in her Article,⁶ that is also true of Delaware Chancery—its decisions are reviewed by the Supreme Court of that state. But it is true as well of the family courts, about which I, at least, have a good deal less enthusiasm than I have for bankruptcy courts.

That brings me to my second point: a court's success in delivering quality decisionmaking efficiently and with due process has nothing to do with whether the court is or is not specialized. Rather, courts are successful because the judges in those courts are selected and appointed by a process that selects high-quality jurists more often than not. Certainly, that is true of the selection process for bankruptcy judges. Absent such a selection process, courts, specialized or generalist, will not satisfy Professor Dreyfuss's criteria.

As early as 1937, the American Bar Association addressed the problem of judicial selection and tenure, declaring its opposition to the unfortunately common practice of electing judges.⁷ At that time, in contrast with the practice of appointing judges who served during good behavior that prevailed in the Federal system, the direct election of judges was the method pursued in most of the states, including Pennsylvania.⁸

Direct election was not the method pursued by Pennsylvania's southern neighbor, Delaware, or by its eastern neighbor, New Jersey. At least in judicial selection, these two states never succumbed to the Jacksonian revolution.⁹ Indeed,

⁶ *Id.* at 7.

⁷ 62 A.B.A. Rev. 893-897 (1937).

⁸ See MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 6-12 (Arthur T. Vanderbilt ed., 1949) [hereinafter "MINIMUM STANDARDS"].

⁹ Legal historians generally associate the movement toward an elected judiciary with the ideas of popular sovereignty espoused by the Jacksonian

Delaware's Constitution of 1897 not only provided for appointed rather than elected judges, but also specified that a majority of the judges not be from the same political party.¹⁰ In New Jersey, an almost 150-year-old tradition dictates similar bipartisan selection of appointed judges.¹¹ No governor has dared to depart from it. Yet despite the efforts of prominent Pennsylvania lawyers, many of whom were leaders of the American Bar, the movement to remove the unfortunate legacy of Jacksonian democracy from the Pennsylvania judicial system never made any progress. Every effort to change the elected judiciary provisions of the Pennsylvania Constitution from 1937 to date has been ineffective.

In the heyday of the great political bosses, although judges ran for election in Pennsylvania and elsewhere, the actual selection often was made by the dominant political leadership. Occasionally those bosses, who frequently shared interests with the economic movers and shakers in the states, made rather fine selections: a Curtis Bok or a Sam Roberts in Pennsylvania; a Benjamin Cardozo or a Charles Desmond in New York. Because the bosses made the selection, usually judges were not forced to raise money for political action committees to finance seriously contested elections.

The ameliorative role of political bosses, of course, ended not too long after *Baker v. Carr* began the reapportionment revolution in American politics.¹² As the bosses' influence declined, the position of judges in those states with elective judgeship provisions began to depend on the electorate more directly. Those judges were forced to raise money and to spend time campaigning for office.

The effects, especially in Pennsylvania, were unfortunate. The reputation of Pennsylvania's entire judiciary declined—a decline probably warranted by their level of performance. From top to bottom, the Pennsylvania state court system fails to

Democrats in the first half of the nineteenth century.

¹⁰ DEL. CONST., art. IV § 3; see also DEL. CODE ANN. tit. 10 §§ 1303(d), 1702(a); 9221 (1974). One can see where the drafters of the proposed Pennsylvania statute got their idea.

¹¹ See MINIMUM STANDARDS, *supra* note 8, at 9.

¹² 369 U.S. 186 (1961) (holding that malapportionment is a justiciable issue and leading to the one person one vote cases that transformed the American political landscape).

engender confidence. Not long ago we witnessed the disedifying spectacle of a sitting supreme court justice attending fundraising events for an opponent of one of his own judicial colleagues who was running for reelection. Later that justice was impeached and removed from office for improprieties not related to political fundraising. Similarly, at the common pleas level performance falls far short of the standards by which Professor Dreyfuss defines a court's success. The only bright spot that I see in an otherwise dismal Pennsylvania judiciary is the Pennsylvania Commonwealth Court created in the 1968 Constitution Convention. The Commonwealth Court is an elected specialized court having original and appellate jurisdiction over cases in which Pennsylvania's local government units have a significant interest.

Every effort at systemic reform in Pennsylvania with respect to judicial appointments in recent years has been defeated. It comes as no surprise, therefore, that business and corporate representatives would try to achieve some sort of systemic reform: namely, routing cases in which business and corporate interests are parties to some forum other than the existing Pennsylvania state courts. It seems clear that these interests now are willing to settle for a little reform, rather than the system-wide reform that has been the object of the prior unsuccessful efforts to improve the Pennsylvania judiciary. Nor is it the least bit surprising that the proposed legislation would depart from Pennsylvania's Jacksonian tradition of judicial selection by providing both for a nominating commission and for appointment by the governor with the advice and consent of the senate.

That provision is, I think, the most important feature of the Pennsylvania proposal. It carries with it the hope that the proposed court will, at least initially, be staffed by quality jurists. Because the bill yields to political practicalities by providing for a retention election at some point,¹³ however, how long such a reform will last is indeterminable.

If the bill passes, will the judges of Pennsylvania's Chancery Corporations Court achieve for Pennsylvania the benefits that the Delaware Chancery Court confers on that state? Professor Dreyfuss makes a persuasive case against the

¹³ Pa. S.J. Res. 309, § 22(d); PA. CONST. art. 5, § 15(b).

likelihood of such an outcome.¹⁴ It is entirely likely, however, that those jurists will outperform the judges of the Pennsylvania Court of Common Pleas. Indeed, it seems a virtual certainty.

Still, the objection remains that the ordinary people of Pennsylvania desire and deserve generalized courts of as high a quality as the proposed specialized courts devoted to specific parties and issues. Creating a specialized court for those parties and issues may have the undesirable effect of removing powerful interest groups from the battle for systemwide reform of the selection method for the state's courts, and therefore could delay such sorely needed reform.

Perhaps these issues warrant another solution entirely. In the late 1940's, experts on judicial administration like Arthur T. Vanderbilt were urging not only the elimination of elected judgeships, but also the adoption of unitary court systems.¹⁵ The unitary court concept proposed that no court such as the Delaware Chancery Court should exist. In the New Jersey Constitution of 1947, that reform was partially achieved when the old supreme court (a law court), the court of chancery, the prerogative court, and the old circuit courts all were merged into a single superior court.¹⁶ The 1947 Constitution temporarily left county courts, county district courts and juvenile and domestic relations courts in place,¹⁷ but eventually all were abolished by subsequent constitutional amendments.¹⁸ Today, above the municipal court level, and below the level of the New Jersey Supreme Court, all judges simply are appointed to the superior court.

Like Delaware, however, New Jersey had a strong history of equity jurisprudence. It had a chancellor until 1947 and did not lose the advantages of specialization in equity that Professor Dreyfuss notes with respect to Delaware Chancery. Under Vanderbilt's leadership, the constitution divided the superior court into a chancery division, a law division and an

¹⁴ Dreyfuss, *supra* note 3, at 24-31.

¹⁵ See, e.g., American Bar Association, *Report of the Section of Judicial Administration*, reprinted in *MINIMUM STANDARDS*, *supra* note 8, app. a at 24-32.

¹⁶ N.J. CONST. art. 6, § 2.

¹⁷ N.J. CONST. art. 6, §§ 1, 3.

¹⁸ N.J. CONST. art. 6, §§ 1, 3.

appellate division.¹⁹ Eventually the work of the county courts was assigned to the law division, that of the county district courts to a new law division special part, and that of the juvenile and domestic relations court to a new chancery division family part. Assignments to these divisions currently are made by the chief justice, who can and does take into account a judge's special knowledge and skill in specialized areas. Moreover, under Vanderbilt's leadership, the New Jersey Supreme Court resolved the jury trial issue, to which Professor Dreyfuss makes reference.²⁰ In *Steiner v. Stein*,²¹ the court decided not to follow the United States Supreme Court's lead in *Beacon Theatres, Inc. v. Westover*.²² It held, instead, that if any equitable claim in a case arises, a plaintiff does not have a right to a jury trial. Finally, the Court developed a broad "entire controversy" doctrine requiring that all claims against all interested parties be joined in a single action.²³

I mention the New Jersey experience to make the point that most of the advantages said to flow from specialized courts are obtainable without the disadvantages that flow from the multiplication of courts, court administrations, and court facilities. For a state judicial system, a single court divided into divisions according to some degree of subject matter specialization seems a good deal sounder than the path proposed for Pennsylvania in the pending legislation. But that outcome is not likely in Pennsylvania. Indeed, the state's political realities are likely to doom even the modest reform proposed in the pending chancery corporation bill.

¹⁹ N.J. CONST. art. 6, § 3, ¶ 3.

²⁰ Professor Dreyfuss notes, "Pennsylvania's removal of corporate and commercial cases from the purview of the juror is bound to create problems." Dreyfuss, *supra* note 3, at 25. The problems relate to the constitutional right to a jury trial in certain civil actions.

²¹ 66 A. 2d 367 (1949) (chancery division judges must decide all equitable claims and all legal claims once equity jurisdiction is established).

²² 395 U.S. 500 (1959) (if plaintiff seeks both legal and equitable relief it is error to strike a demand for a jury trial).

²³ See William J. Volonte, Note, *The Entire Controversy Doctrine, A Novel Approach to Judicial Efficiency*, 12 SETON HALL L. REV. 260 (1982).

