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Round 2 in the Process To Confirm a Chief Judge

By **David B. Saxe**

The judicial community is now involved in the second iteration of the selection process of a chief judge for the New York State Court of Appeals.

The first part of the process was an unprecedented and confusing analysis of the judicial record of the nominee, Presiding Justice Hector LaSalle of the Appellate Division, Second Department.

The challenge to Justice LaSalle focused on a distillation of a small selection of the hundreds of memorandum decisions in which he had joined.

The use, for this purpose of Appellate Division memorandum decisions, was wrong and was the driving force in derailing his candidacy.

Memorandum decisions are a feature of the four Appellate Divisions in New York, i.e., New York's immediate appellate courts. These memorandum decisions are relatively concise; they merely consist of to-the-point statements of the relevant facts, the applicable law and the result. They are, you might say generally, but not always, lean and mean, and focus on providing an abbreviated analysis. On rare occasions, they arrive with a dissent annexed, usually short and to the point, like the majority position in the memorandum.

Memorandum decisions are not generated in the chambers of individual justices at the Appellate Divisions who sit in panels to decide cases. They are initially the work-product of court attorneys who prepare bench memos to assist the justices in their work; the memorandum decisions are a by-product of the bench memo and are accepted by the justices when there is unanimity on the part of the assigned panel of justices.

The justices often modify these offerings with minor revisions or "tweaks;" they are meant to be voted on, finalized and released when there is agreement among the justices as to the core reasons for the result and there appears to be no further necessity for any expanded writing.

Under New York Law, virtually every kind of New York Supreme Court order and judgment is appealable as of right. Therefore, the reality—which knowledgeable law professors should know—is that the sheer volume of appeals that come to our Appellate Divisions necessitate conclusory memorandum decisions.

In the First Department for example, justices sit once a week and face an ever-growing calendar of 20 or more appeals per sitting. If a detailed and painstaking reasoned decision was required for each appeal, the entire appellate structure would come to a grinding halt. For better or worse, these workmanlike memorandum decisions are the only answer to the crushing case load that Appellate Division justices face. The Court of Appeals, with its restricted jurisdiction, does not shoulder this burden.

> In my view, the objection to LaSalle's appointment was misguided. For this reason, it is my purpose in this article to remind readers, and those who objected to LaSalle's appointment, that a number of former prosecutors have served on the Court of Appeals and, during their tenure, have demonstrated a sturdy and thoughtful approach to the rights of criminal defendants.

To read into these memorandum decisions broad philosophical viewpoints on subject areas such as criminal law issues, abortion rights and labor union rights (as was the case with Justice LaSalle) was as unfair as it was uninformed. They simply do not support conclusions about an individual judge's philosophical bent.

The progressive contingent raised another objection to the confirmation of Justice LaSalle—that he was a former prosecutor and therefore must hold views antithetical to their tenets of social justice.

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A few examples are illustrative. Notably are some of the decisions of former Chief Judge Stanley H. Fuld.

In *People v. Donovan*, 13 NY2d 148 (1963)—well before the U.S. Supreme Court decided *Miranda v. Arizona*, 384 US 436 (1996)—Judge Fuld wrote an opinion for the court holding inadmissible the confession of a suspect whose attorney had requested access to him and been denied. He wrote:

> The worst criminal, the most culpable individual, is as much entitled to the benefit of the rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would lead to erosion of the rule and endanger the rights of even those who are innocent.

In *People v. Rosario*, 9 NY2d 286 (1961), Fuld's opinion for the court expanded the scope of materials that prosecutors are obligated to provide to criminal defendants. He explained that "a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand."

In a dissent in *W. v. Fam. Ct.*, 24 NY2d 196 (1969), *rev'd* sub nom. *In re Winship*, 397 U.S. 358 (1970), Fuld held that the Due Process Clause of the » Page 7

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Fourteenth Amendment to the U.S. Constitution requires that adjudications of juvenile delinquency be founded on proof beyond a reasonable doubt.

He was vindicated by the U.S. Supreme Court in *In re: Winship*, 397 U.S. 358 (1970), which concluded by stating: "We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, 'that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process the case against him must be proved beyond a reasonable doubt."

In *O'Brien v. Skinner*, 31 NY2d 317 (1972), *rev'd*, 414 U.S. 524 (1974), Fuld was again vindicated by the U.S. Supreme Court. In dissent, Fuld held that, "the State Constitution (art. II, §§1, 4, 5) guarantees petitioners—some of whom are now incarcerated in the Monroe County Jail awaiting trial while others are serving sentences on convictions for misdemeanors—the right to vote. Accordingly, I would read section 117-a of the Election Law as the Appellate Division has and affirm its order."

In reversing the majority, the U.S. Supreme Court in *O'Brien v. Skinner*, 414 US 524 (1974), endorsed Judge Fuld's dissenting view that New York's failure to provide pretrial detainees with a means of registering and voting was a denial of equal protection of the laws.

Chief Judge Charles D. Breitel, another former prosecutor, wrote a powerful dissent in *People v. Davis*, 43 NY2d 17 (1977), expressing distaste toward the death penalty. He stated:

> Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the James case itself is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in this infliction. This has been a lifelong view buttressed by over 40 years of experience as prosecutor, counsel to the Governor entailing 81 applications for commutation of capital sentences, Judge, member of the "National Crime Commission, witness before the British Royal Commission on Capital Punishment, and member of the American Law Institute and its Advisory Committee on the Model Penal Code. In all of these roles, when appropriate, I actively resisted viewing capital punishment as a proper or useful sanction for civilian crime.

Former Chief Judge Albert Conway, another former prosecutor wrote with sensitivity of the rights of criminal defendants in *People v. Trowbridge*, 305 NY 471 (1953).

Two former prosecutors, who later became distinguished associate judges of the Court of Appeals—Judge Harold Levine and Judge Albert Rosenblatt—were well-regarded as jurists who respected and indeed advanced the protections afforded criminal defendants.

The following is a precis of a few of Judge Levine's cases in this subject area:

- *People v. Cohen*, 90 NY2d 632 (1997): Writing for a unanimous court, Judge Levine held that the defendant's constitutional right to counsel was violated where the police were personally aware that the defendant was represented by counsel in a prior related crime. He concluded that statements made during an interrogation, without counsel present, should have been suppressed because the police intermingled questions regarding the first crime on which defendant had obtained representation.
- *People v. Banks*, 85 NY2d 558 (1995): Judge Levine, writing for a unanimous court, held that the police search of a vehicle was unconstitutional despite the defendant's consent because the police, who stopped the vehicle for a seatbelt violation, continued the detention of defendant without sufficient cause. Levine explained that the "consent to search was obtained during or immediately after that extended detention and without any intervening circumstances. Thus, under no rational view of the evidence at the suppression hearing can it be concluded that Jones' consent was acquired by means sufficiently distinguishable from the taint of illegal detention."

Indeed as pointed out by Professor Vincent Bonventre of Albany Law School, a leading authority on the New York Court of Appeals: "Under both Chief Judges Stanley Fuld and Charles Breitel, the Court of Appeals went far beyond the United States Supreme Court in protecting the rights of the accused."

It is wrong to pre-judge a former prosecutor who dons the robes to become a judge. Our own Court of Appeals history points out the unfairness of slotting former prosecutors who become judges as having a heavy hand favoring the prosecution. This is not so only with respect to Court of Appeals judges who have, in a past life, served as prosecutors but applies equally to members of our trial judiciary who have served as assistant district attorneys.

One size does not fit all. When evaluating candidates for the position of chief judge, the fact that a resume may indicate prior service as a prosecutor should not be a disqualifying factor. Of course, careful vetting in the confirmation process is appropriate for purpose of uncovering any hidden biases and covert elements of judicial decision-making.

Fairness dictates that what the applicant should be asked about is what reflects core beliefs. The applicant ought to be principally questioned for example, about signed opinions, speeches given, how state constitutional protections operate within the context of our federal system and what processes are involved in statutory construction and interpretation.

But, to dismiss or sideline a candidate because he or she has served as a prosecutor—that is simply knee-jerk. Those in charge of the process at this point can do much better.

One size does not fit all. When evaluating candidates for the position of chief judge, the fact that a resume may indicate prior service as a prosecutor should not be a disqualifying factor.LaSalle's appointment, that a number of former prosecutors have served on the Court of Appeals and, during their tenure, have demonstrated a sturdy and thoughtful approach to the rights of criminal defendants.