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EPILOGUE: THE NEW YORK COURT OF APPEALS—INDEPENDENT AND ACCOUNTABLE

Luke Bierman[*]

At his January 1987 confirmation hearing before the New York State Senate Judiciary Committee, Joseph W. Bellacosa suggested that judges of the New York Court of Appeals should be closely scrutinized to ensure that they satisfied the high judicial standards necessary in a civilized society. He told the Committee:

> We live in a glass house and we should. It should be visible and we have to do things, not only the judges but the non-judicial staff, in such a way that people believe that the substance of what is going on and the perception of it is so good that they can believe that this is a place they can turn to for resolution or surcease of disputes that they otherwise might take to the streets.[1]

After only a few years as an Associate Judge on the Court of Appeals, however, Bellacosa seemed to offer a vastly different perspective on how New York's high court judges should be treated. According to published reports, Bellacosa severely chastised Albany Law School Professor Vincent Bonventre for a study that indicated the Court of Appeals was "retrenching" from its traditional progressive support for civil rights and liberties.[2] Critical accountability seemed no longer appropriate for the Court of Appeals; rather, the New York Court of Appeals was to be left to deliberate in independent solitude, not a glass house.

Bellacosa's apparent change of heart reflects the different principal approaches that contribute to how the judiciary is

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[1] Testimony of Joseph W. Bellacosa, New York Senate Judiciary Committee, January 27, 1987, at 37.

[2] John Caher, *Court Critique Prompts Controversy Over Academic Freedom*, TIMES UNION (Albany), Aug. 18, 1991, at B6; *see* Vincent M. Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1 (1991).

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organized in American governmental systems. Unlike the legislature, which in American practice generally follows a model of bicameral organization, and the executive, which Americans typically structure around a single chief, the judiciary in America comes in all shapes and sizes. It can, consistent with the expectations associated with representative democracy generally, be made accountable to the electorate through direct election and short tenure. By recognizing, as Holmes did, that "law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified"[3] and that judges are policy makers like other governmental officials, we devise judicial systems to ensure that our judges do not go too far and that, if they do, we can throw the robed rascals out.

We also, however, recognize that in a representative democracy the majority can exert its will to the detriment of the less powerful. To afford protection against the power enjoyed by these factions, the judiciary is offered independence, which Hamilton called "essential in a limited Constitution."[4] Only when it is protected from the whims of society's factional elements can the judiciary be counted on to preserve the fundamental values that the majority may seek to undermine in the name of expediency. Thus, we have chosen to select the federal judiciary without popular referendum and with life tenure so as to promote independence in its decision making.[5]

For the first 130 years of its almost 150 year existence, the New York Court of Appeals was accountable directly to the state's citizens. The New York Constitution of 1846 reflected the prevailing tenets of Jacksonian Democracy[6] and was the most democratic constitution New Yorkers have adopted.[7] It also is responsible for establishing the Court of Appeals, which began functioning in 1847 with judges elected directly by the people. The continuing importance of citizen control over and accountability of the judiciary is seen in the voters' overwhelming rejection in 1873 of a proposal to

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[3] Southern Pac. Co. v Jensen, 244 U.S. 205, 222 (1916).

[4] *See* ALEXANDER HAMILTON, THE FEDERALIST PAPERS (Clinton Rossiter ed. 1962).

[5] *See, e.g.,* Chief Justice William H. Rehnquist, Remarks at Washington College of Law Centennial Celebration: The Future of the Federal Courts (April 9, 1996) ("[T]he independence of the federal judiciary is essential to its proper functioning.") (on file with the *Albany Law Review*).

[6] *See, e.g.,* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860,* 45 HISTORIAN 337 (1983).

[7] PETER GALIE, ORDERED LIBERTY 111 (1996).

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abandon popular selection of judges.[8] Indeed, it would be more than a century before the state's citizens were convinced to adopt a different method to select their high court's judges.

This is not to suggest that citizens retained unbridled control over the Court of Appeals. To be sure, through the increasingly prevalent practice of cross endorsement, whereby the political leaders of opposing parties would agree to endorse the same candidate and thereby effectively deprive the citizens of any meaningful choice for Court of Appeals judge, the public's capacity to exercise accountability over the Court of Appeals was diminished.[9] The 1970s, though, saw a resurgence of democratic activity, with a series of hotly contested Court of Appeals elections and some significant successes for candidates without support from the organized political parties.[10] New Yorkers thus retained some measure of direct control over the Court of Appeals, precisely as contemplated by the Constitutional Convention of 1846.

Too much democracy, however, proved an ill pill for the political party leaders who had suffered through these electoral contests and were convinced that "'we're not attracting the right type of individual to the bench.'"[11] During years of deliberations about the most appropriate selection system, there was much attention given to the virtues of the federal system, although it never was made entirely clear what was so virtuous - the absence of elections, executive appointment, Senate confirmation, judicial independence or some combination of these attributes. Nonetheless, it finally came to pass that the state's political and bar leadership agreed on a merit selection plan for the Court of Appeals. In 1977, the citizens amended the Constitution, giving up their 130 year old power to keep the Court of Appeals directly accountable to them. Instead, Court of Appeals judges would be appointed by the governor, subject to State Senate confirmation, from nominations made by a bipar-

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[8] FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932 94-95 (1985).

[9] *See, e.g.*, Carl Swidorski, *Judicial Selection Reform and the New York Court of Appeals: Illusion or Reality?*, 55 N.Y. ST. B.J. 10 (July 1983).

[10] For example, in 1972, Nanette Dembitz, running without Democratic Party support, secured a Democratic nomination by defeating the Party backed candidate in a primary election. In 1973 for Chief Judge and in 1974 for Associate Judge, Jacob Fuchsberg won Democratic nominations despite opposition from Party leaders. He lost the general election in 1973 but won in 1974.

[11] Linda Greenhouse, *State Senate Unit Urges New Way to Select Judges*, N.Y. TIMES, Mar. 23, 1976, at 62.

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tisan commission appointed by the governor, chief judge and legislative leaders.

Although this selection system can be seen to promote the Court of Appeals' independence from any single branch of government,[12] it also can be characterized as a mechanism offering judicial independence in an amount tempered by accountability to the other branches. This selection system is different from the federal model, which promotes judicial independence by imposing few formal constraints on selection so that judges can be true to themselves and the republic.[13] Presidents might have tried to utilize the lack of formalities to appoint judges who would be sympathetic to them in their decision making but the history of the federal judiciary is replete with examples of judges whose independence disappointed and frustrated their selector. New York's high court judges, by contrast, must satisfy initial scrutiny and approval by nominating commissioners who are hand picked by the governor and legislative leaders, as well as the chief judge. This additional step in the Court of Appeals judicial selection process, especially in conjunction with less than life tenure, suggests that there are some restraints on New York's high court judges that are not present in the federal judiciary.

The preceding Comments demonstrate quite ably just how New York's high court judges exhibit independence tempered by accountability. The articles characterize the judges in particularly unique ways. Chief Judge Kaye promotes independent state constitutional adjudication when appropriate to protect adequately the rights and liberties of state citizens. Judge Simons is moved especially by official misconduct. Judge Titone responds strongly, but not dogmatically, to impositions by the state on an individual's civil rights. Judge Bellacosa seems to have little use for per se rules that will dictate distasteful outcomes. Judge Smith is concerned with fundamental fairness as demonstrated by reliable procedural protections. Judge Levine exhibits compassion for the state's children. Judge Ciparick recognizes the personal toll of litigation and seeks to protect the unempowered from that cost. These different emphases that motivate the judges to move in different directions at different times reflect an independence that can come only from the heart.

Yet apart from the independent aspects of the Court of Appeals judges, the Comments also remind us that these jurists are the

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[12] GALIE, supra note 6, at 340.

[13] *See* ALEXANDER HAMILTON, *supra* note 4.

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products of a system that imposes accountability to the political branches. Noteworthy are the backgrounds of these seven Court of Appeals judges. Despite outward diversity in terms of gender (two women), race (one African-American), religion (two Jews) and ethnicity (two Italian-Americans and one Hispanic-American), these are career judges who came of professional age in the judiciary. Judges Simons, Titone, Smith and Levine served for many years in the state judiciary as trial and intermediate appellate judges before coming to the Court of Appeals. Judge Ciparick served a lengthy tenure as a state trial judge before her appointment. Chief Judge Kaye was not a judge before she came initially to the Court of Appeals but she had a decade of judicial experience by the time she became chief judge. Only Judge Bellacosa had no real judicial experience when appointed to the Court of Appeals[14] but he had spent much of his professional career in the judiciary as an advisor and administrator.

Just as "[i]t certainly is not clear . . . that the habits of thought necessary to performing as a judicial underling are those most truly needed on the Supreme Court,"[15] the capacity of career judges to resolve satisfactorily the important public policy issues now dominating the Court of Appeals' primarily discretionary plenary caseload is far from certain. To be sure, the effects of a common professional development as lower court jurists on these judges can be discerned in the preceding Comments. For example, the Comments, in accordance with usual analytical methodology, tend to examine the concurrences and dissents in nonunanimous cases so that an individual judge's personal views, often masked or compromised to attain a unanimous or majority opinion, can be ascertained. The relative infrequency of separate opinions by these judges is striking, with only a handful of concurrences and dissents providing the bases of analysis for even the most disagreeable judges. Indeed, we know that upwards of eighty percent of the court's plenary caseload is decided without concurrence or dissent even though the Court of Appeals is choosing the most important, and potentially divisive, cases.[16] This fact, combined with a

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[14] Although he was appointed a Court of Claims judge, Bellacosa never exercised the judicial authority associated with this position as he also was serving as the court system's chief administrator.

[15] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 220 (2d ed. 1994).

[16] *See generally* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at the New York Court of Appeals*, 12 TOURO L. REV. (forthcoming 1996).

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plenary criminal caseload decision rate in favor of the prosecution of about seventy-five percent,[17] suggests that there are some substantial pressures exerted on the judges to remain in the mainstream and, thus, accountable to those responsible for their tenure on the court - including the governor, the legislative leaders and ultimately the citizens of the state.

It appears, then, that the decision making propensities of these judges hardly ignore prevailing public concerns, such as those recently expressed about crime. When approached from this perspective, the recent criticisms of the Court of Appeals by Governor Pataki and former New York City Police Commissioner Bratton seem so specious. Pataki cannot really mean that the Court of Appeals is "'mindless'" and "'irrational;'"[18] Bratton cannot really mean that the Court of Appeals is "'screwball,'" "'living off in Disneyworld somewhere.'"[19] For the Court of Appeals is not deciding cases that far off the mark where most people are. Most criminal convictions remain intact; civil rights and liberties consistent with an ordered society find recognition.

In accordance with the selection system provided by the state constitution, Pataki will be able to influence the Court of Appeals not simply by appointing new judges[20] but through four appointments to the Commission on Judicial Nomination during his tenure from 1995 to 1999. No doubt, any judges appointed by Pataki to the Court of Appeals will exert an independence tempered by accountability that is inherent in the constitutional design of New York's high court. Critical articles like these Comments not only help us to understand more about our judges but also remind us that we are engaged in promoting an independent and accountable Court of Appeals in New York. With these facts prevailing, Judge Bellacosa's glass house should have just shades, not shrink wrap.

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[17] My data in this regard for the 1994-95 term is comparable to others who have looked at this matter. *See The Governor's Attack on the Judges*, N.Y. TIMES, Feb. 3, 1996, at 22. It also should be noted that each year the Court of Appeals judges decline even to review literally thousands of criminal cases that resulted in a conviction but the defendant is claiming some impropriety.

[18] *See* John Caher, *Rulings Court Conflict with Pataki's Agenda*, TIMES UNION (Albany), Dec. 28, 1995, at A6.

[19] *See* Clyde Haberman, *State Courts Found Guilty by Jury of Peers*, N.Y. TIMES, Mar. 8, 1996, at B1.

[20] Pataki's first opportunity to do just that will occur early in 1997 when Judge Simons' 14 year term will expire. Simons has indicated that he will not seek reappointment. *See* James Dao, *Pataki Gains Pick as Court Loses Judge*, N.Y. TIMES, Apr. 6, 1996, at 28.

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