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Perspectives on Poetry in Judicial Opinions - or - How an Elegiac Squirrel Came to Address the Pennsylvania Supreme Court

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Perspectives on Poetry in Judicial Opinions—or—How an Elegiac Squirrel Came to Address the Pennsylvania Supreme Court

Introduction by Sarah Andrews[*]

As should be quite clear by now to any reader of this tribute to Chief Justice Cappy, the Justices of the Pennsylvania Supreme Court often enjoy a lively and dynamic dialogue between chambers as they worked to draft the text of judicial opinions that will decree the ruling of the Court. In chambers, where a collection of law clerks work to support each Justice as he or she develops these opinions, the debate is often no less lively. Chief Justice Cappy thrived on this debate, gathering his clerks to engage in discussion each time the Court produced a list of opinions ready for his vote.

By this point, the Court would have heard oral arguments, a preliminary vote would have been rendered, and a majority author assigned by the Chief. That draft majority would then be circulated, and each Justice would determine if he or she would vote to join the majority or if a concurring or dissenting opinion would be prepared. At times, the process of researching an opinion and actually putting pen to paper would become an occasion for the Justice and his or her clerks to collaborate with the other members of the Court in a less formal style and to exchange barbs amongst themselves, never intending for these "inside" exchanges to see the light of day.

This is what occurred in the case of *Seeton v. Pennsylvania Game Commission*.[1] In *Seeton*, a taxpayer had filed a complaint in mandamus,[2] demanding that the Court require the Pennsylvania Game Commission to exercise its jurisdiction under the Pennsylvania Game and Wildlife Code with respect to the regulation of

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* Ms. Andrews was privileged to begin her legal career as the last law clerk hired by Chief Justice Cappy before his retirement. She wishes to extend her whole-hearted gratitude for the opportunity to be mentored by the Chief and his most excellent staff.

1. 937 A.2d 1028 (Pa. 2007).

2. *Mandamus* is "a commonlaw mechanism by which a court may compel a government body to perform a mandatory act where the moving party has a clear right, the government body has a corresponding duty, and the moving party demonstrates that no other remedy at law is adequate to secure relief." *Seeton*, 937 A.2d at 1033.

canned boar hunts.[3] The Court had two legal issues to confront. First, the Court had to decide if a taxpayer had standing to make such a demand.[4] Assuming the Court found standing, it would next determine whether there was any reason to overturn the Commission's determination that—because the wild boar in question were held in a state of captivity—the Commission had no jurisdiction to regulate the canned hunts.[5] As the law generally requires great deference to the decisions of agencies like the Commission, this might have seemed like an open-and-shut case.[6]

And it may well have been. The first question Chief Justice Cappy always asked when considering the merits of a case was, "Who has the power?" While interested in the merits of any case, he was always concerned first with defining the scope of power within which the Court could act, and he would rule on that basis even if the result was that he—and the Court—had to declare the decision to be out of their hands.[7] In a case like this one, under normal circumstances, the power was with the agency to administer the statute according to the will of the legislature as embodied in the statutory text.[8] So, at first consideration of *Seeton*, the Court seemed inclined to respect the decision of the Game Commission related to the enforcement of the Game and Wildlife Code, and Chief Justice Cappy saw no reason not to join that opinion.

But the Chief, as I mentioned, did encourage his clerks to engage in healthy debate. And I had a concern. As a law student, I had happened across a delightfully drafted case by the name of

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3. *Seeton*, 937 A.2d at 1030-31.

4. *Id.* at 1032-34.

5. *Id.* at 1035.

6. *Id.* at 1036 (citing *Winslow-Quattlebaum v. Md. Ins. Group*, 752 A.2d 878, 881 (Pa. 2000)).

7. *See Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998) ("In severing void portions of a statute or ordinance, a court is empowered merely to strike existing language; the judiciary is given no authority to draft its own language and insert it into the statute or ordinance"), *rev'd on other grounds*, 529 U.S. 277; *First Citizens Nat. Bank v. Sherwood*, 879 A.2d 178, 182 (Pa. 2005) ("In addressing an issue of statutory construction, this court's power is limited. Where the Legislature has crafted a statute which is clear and is squarely on point, we may not decline to apply it simply because we find that there are better policy options. Nor may we decline to follow an unambiguous statute on the basis that other jurisdictions have charted a different course with regard to the same issue. TO PUT IT BLUNTLY, it is not our role to disregard clear policy choices made by the Legislature merely because we may believe these choices to be poor. If the Legislature chooses to amend the applicable statutes to create a system as envisioned by First Citizens, it may do so. We, however, may not"). *See also* Commonwealth v. Bowden, 838 A.2d 740, 768 (Pa. 2003) (Cappy, C.J., dissenting) (commenting that the majority opinion "ignores the prohibition against judicial legislation").

8. *See* 34 PA. CONS. STAT. §§ 133 *et seq.* & § 322(8).

Commonwealth v. Gosselin,[9] which described the travails of a formerly wild squirrel named Nutkin who had been adopted by a couple in South Carolina and, later, luxuriously accommodated by this same couple in their Pennsylvania home.[10] As it happened, Nutkin's owners ran afoul of a Pennsylvania Game Officer after they complained about poachers on their land.[11] As a result, Nutkin spent some time on the lam, to avoid being confiscated (the Superior Court opinion makes a reference to the threat of squirrel stew but denies any record evidence to support this concern).[12] The trial court entered a judgment against Nutkin's owners, fining them $100 and the costs of prosecution and citing a provision in the Game and Wildlife Code that made it unlawful to possess wildlife taken alive from the wild or held in a state of captivity.[13] For the purposes of appeal, both Nutkin's owners and the Gaming Commission stipulated that Nutkin, a squirrel living in a state of captivity, remained a wild animal, subject to the jurisdiction of the Commission.[14]

And it was this fact that caught my attention. In *Seeton*, the Commission's position that it had no jurisdiction to regulate the canned hunt of boars rested exclusively on its assertion that boars were not wild animals specifically because, no matter their natural propensities, the boars had been captured and placed into captivity.[15] How could the Gaming Commission interpret the Game and Wildlife Code to declare Nutkin a wild animal under their jurisdiction and then later refuse to acknowledge that wild boars placed in captivity were similarly situated?

Chief Justice Cappy was intrigued. He asked me to investigate further, and we would consider drafting a dissenting opinion. Additionally, he was amused by the story of Nutkin, so colorfully laid out in Judge Hudock's opinion in *Gosselin*. He noted that, if we dissented, we would be challenging a majority opinion drafted by Justice J. Michael Eakin, who had been known to enjoy and to draft a colorful opinion or two in his day, including several in

9. 861 A.2d 996 (Pa. Super. Ct. 2004).
10. *Gosselin*, 861 A.2d at 997.
11. *Id.*
12. *Id.* at 998.
13. *Id.* at 998-99.
14. *Id.* at 1000.
15. *Gosselin*, 861 A.2d at 1035.

rhyme.[16] With a twinkle in his eye, the Chief Justice turned to me and asked, "Can you draft a dissent in verse?"

Astounded by my luck, I enthusiastically agreed. Several of my co-clerks, however, wisely reminded the Chief that—no matter how much fun such a response to Justice Eakin might be—the Chief had, in fact, specifically expressed concern over Justice Eakin's use of poetry in judicial opinion writing.[17] Rightly recognizing the importance of consistency, the Chief paused for a moment to weigh the merits of having some internal fun with his colleagues on the Court, and finally turned to me again. "Justice Eakin writes his poems in couplets?" he asked. I affirmed. "Can you our draft our poem in iambic pentameter?"[18]

And thus the dissent below was circulated to the members of the Court. In keeping with his prior position in *Porreco*,[19] this dissent was never published as part of an official opinion, but it did add a spark to the dialogue among the Justices and the clerks of the Court. Although this poem was intended as an inside joke, it was always the hope of Chief Justice Cappy to eventually publish the adventures of Nutkin in an informal venue distanced by time and place from his strongly stated dissent in *Porreco*.[20]

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16. *See* Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597 (2003) (discussing the history of verse in judicial opinions and focusing on Justice Eakin's poetic undertakings).

17. *See Porreco v. Porreco*, 811 A.2d 566, 573 (Pa. 2002) (Cappy, J., concurring) ("It is axiomatic and I firmly believe that every jurist has the right to express him or herself in a manner that the jurist deems appropriate. My concern, however, and the point on which I concur completely with the Chief Justice, lies with the perception that litigants and the public at large might form when an opinion of this Court is reduced to rhyme. I, too, feel strongly that no case with which this court deals is any more or less important than any other; I will endeavor to prevent a contrary impression whenever possible").

18. The Chief was always the competitive sort.

19. The propriety of the use of poetry in judicial opinions came under much discussion in chambers, and Justice Eakin might be gratified to know that Chief Justice Cappy softened somewhat, at least unofficially, in his opinion on the subject, especially after this clerk compiled a list of other well-respected judges who had shown a tendency to wax poetic. This list includes the likes of jurists such as Justice Benjamin N. Cardozo and Judge Learned Hand, among others. *See* R. Perry Sentrel, *Torts in Verse: The Foundational Cases*, 39 GA. L. REV. 1197 (2005).

20. As to Nutkin, I am told that the squirrel was quite pleased with the ultimate result in *Seeton*, where a majority opinion was authored by Justice Max Baer that invalidated the Commission's inconsistent opinion that while squirrels might be wild, boars were not. Nutkin is further most grateful that the august Chief Justice Castille has granted his permission for this proposed dissenting opinion to be published, as it would have otherwise remained a confidential internal court document

Chief Justice Cappy -

For the reasons that follow, I respectfully dissent.

SCENE - The Forest.

Enter NUTKIN[21] *and a throng of Animals.*

ANIMALS:
We will be satisfied; let us be satisfied.

NUTKIN:
Then follow me, and give me audience, friends.
And public reasons shall be rendered
Of Boarius's death.

FIRST ANIMAL:
I will hear Nutkin speak.

NUTKIN climbs unto the stump.

SECOND ANIMAL:
The noble Nutkin is ascended: silence!

NUTKIN:
Be patient 'til the last.
Raccoons, wolves, and ferrets! Hear me for my
cause, and be silent, that you may hear: believe me
for mine wildness, and have respect to mine wildness, that
you may believe: the Commissioner has come to me, and
he hath declared me wild!

I, a squirrel,
did come for the sake of pity
to live, even love,
in a state of captivity.
I did live apart, for a time of long years
with humans dwelling
a place of no fears.

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21. *See Commonwealth v. Gosselin*, 861 A.2d 996 (Pa. Super. Ct. 2004), where the Game Commission stipulated Nutkin, the squirrel, to be a wild animal for the purposes of the game law.

Sweet people, ever changeable
were but constant in care.
For no acorn did I scrounge but that nut
it was there!
Coddled and petted
did I pass my time.
Memories of hunger
they were not mine.
Yet not I, *domitae naturae*,[22] despite my privileged position.
I was but wild, not belov'd child
so spoketh the gaming commission.

FIRST ANIMAL:
You, noble Nutkin?
Descend from your bower?
Back to the wide world would you go?
After so many years of such softness,
what of the wild would you know?

NUTKIN:
Alas, the law of men has long judged
some creatures be wild, some creatures be tame.
And in that distinction
they give jurisdiction
to the commissioners of the game.

FIRST ANIMAL:
But what of Boarius?

SECOND ANIMAL:
Yes, Boarius, Boarius, the boar.
So fierce, so tufted, so hairy;
for wild you'd want no more!

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22. At common law a distinction was drawn between animals *ferae naturae* and animals *domitae naturae* (sometimes also referred to as *mansuetae naturae*). *Ferae naturae* are animals, which by nature are wild or of a wild nature or disposition, as distinguished from *domitae naturae*, which are naturally tame animals. The distinction with attendant differences in legal consequences is found crystallized in the classical writers as early as the Seventeenth Century in SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS, Bk. IV, ch. 6, § 5 (1672), and is carried forward by 2 WILLIAM BLACKSTONE, COMMENTARIES § 391.

NUTKIN:
Oh Boarius, not wild is he, no matter mighty tusks
He hails from afar
it is a bar
and thus men hasten murderous thrusts.

SECOND ANIMAL:
Oh noble Nutkin! How can this be?
For glorious Boarius, who more wild than he?

NUTKIN:
Harken close and listen, I will explain,
For creatures like Boarius, wild is not the name.
Creatures like ferrets, their nature is known
Wild reputation is clear,
far from domesticity thrown.
Wild like me!
Like wolf, like raccoon
Wild they are due to ferocity![23]

FIRST ANIMAL:
But Nutkin, oh Nutkin, how can you deny,
the ferocity of Boarius?
He is fiercer than I.

NUTKIN:
I hear you, dear fellow,
I hear you indeed.
I doubt humans will listen, despite what we plead.
Protection is granted or forfeit at will,
the Commission decides which of us men can kill.
Wild or tame, true nature explains not a wit,
At the mere whim of man, your life is forfeit.[24]

FIRST ANIMAL:
Then Nutkin, do tell us,
how should we know
whether wild or tame,
which way do we go?

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23. *Gallick v. Barto*, 828 F. Supp. 1168, 1172 (M.D. Pa. 1993).
24. *See* 34 PA. CONS. STAT. § 322(8) (granting the game commission discretion to add to or change the classification of any wild animal).

NUTKIN:
The Commission has spoken:
Life in nature is key
to prove to the humans that an animal is free
Because if he is free, he's as wild as the wind.
Once you capture him then,
it's all at an end
A fence or a cage they do tame him.

Unless he's a squirrel.

FIRST ANIMAL:
O piteous spectacle!

THIRD ANIMAL:
O woeful day!

ALL ANIMALS:
Surely, dear Nutkin, there must be a way!

NUTKIN:
Be easy, my friends, to you I exhort
This case will come up to the human's great Court.
There learned humans will tussle and tuff
to decide if the decision of the Commission was gruff.
If the Commission was acting in error or in ill will
The great Court will tell them, I am sure that it will.
The Court will know what is plain on its face,
wild is a state of being
not a state of grace.
The Commission that KNEW when it looked at its rules,
that squirrels were wild
like four-legged trolls
Must be consistent, not judge at a slant
It may have discretion, but it certainly can't
go willy and nilly, its own decisions supplant.
If a squirrel is wild, then it's time to admit,
dear Boarius's nature is far wilder to wit.

ANIMALS:
All hail King Nutkin
his logic so fine
All hail to Nutkin,
so wild and divine!

The animals hear the sound of distant gunfire and scatter.